

**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

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IN THE MATTER OF the Joint Application of )  
Liberty Utilities Co., Liberty WWH, Inc., ) REGULATORY DIVISION  
Western Water Holdings, LLC, and Mountain )  
Water Company for Approval of a Sale and ) DOCKET NO. D2014.12.99  
Transfer of Stock )

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**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S MOTION FOR A  
PROTECTIVE ORDER AND BRIEF IN SUPPORT**

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Liberty Utilities Co. ("Liberty Utilities") and Liberty WWH, Inc. ("Liberty WWH") (collectively, "Liberty"), by and through their counsel, hereby submits to the Montana Public Service Commission ("Commission") this Motion for a Protective Order and Brief in Support. Liberty moves the Commission, pursuant to Admin. R. Mont. 38.2.5001, *et seq.*, for protection of confidential trade secrets that disclosure has been requested in PSC-033(b), MCC-010, and CITY-031.

In support of this Motion, Liberty offers the Affidavit of David Pasieka, President of Liberty Utilities (Canada) Corp., which is the parent company for Liberty Utilities. Mr. Pasieka is qualified to testify regarding these issues.

Liberty also moves the Commission to impose special provisions in its protective order as contemplated by Admin. R. Mont. 38.2.5003(3) and to use Liberty's proposed non-disclosure agreement.

## INTRODUCTION

Joint Applicant Liberty Utilities is a Delaware corporation that owns and operates regulated gas, water, sewer and electric utilities in ten states—Arizona, Arkansas, California, Iowa, Illinois, Missouri, Georgia, Massachusetts, New Hampshire and Texas. Pasieka Affidavit, ¶ 1. As part of the proceedings in this docket, the Commission and Intervenor Montana Consumer Counsel (“MCC”), and City of Missoula (“City”) have submitted data requests to Liberty. PSC-033(b) asked Liberty to provide “the financial analysis that was done in conjunction with Algonquin’s/Liberty’s due diligence, including but not limited to projected financial results (e.g., income statements, balance sheets, cash flow).” MCC-010 sought production of “a working copy, including data, supporting spreadsheets and all formulas and links intact, of the financial model used in evaluating the acquisition of Park Water Company by Liberty Utilities Co.” CITY-031(a) asked Liberty to provide board meeting minutes and/or records for Liberty and related corporate entities. CITY-031(b) asked Liberty to provide tax returns for Liberty and related corporate entities.

Liberty originally objected to these requests on various grounds, including that they sought information irrelevant to this matter. On June 3, 2015, the Commission’s examiner overruled Liberty’s objection to PSC-033(b) and granted it ten days to seek a protective order. In compliance with that order, and in recognition of the rationale applied in that order, Liberty has submitted supplemental responses to PSC-033(b) and MCC-010. Based on clarifications by the City’s counsel after Liberty’s original objections, Liberty has also submitted supplemental responses to CITY-031. In each case, the supplemental response indicates Liberty will submit specifically identified information upon grant of a protective order by the Commission. This motion seeks imposition of a protective order and enhanced protections for certain classes of confidential information of Liberty and its affiliates including Algonquin Power & Utilities, Co. (“APUC”) in this docket.

Following a thorough legal and factual examination, Liberty and its legal counsel have determined that the information responsive to the foregoing data requests (“Confidential Information”) is entitled to protection from public disclosure pursuant to Admin. R. Mont. 38.2.5007. Liberty has considered that the Commission is a public agency and that there is a constitutional presumption of access to documents and information in the Commission’s possession. Liberty understands it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval.

Liberty respectfully submits to the Commission that the Confidential Information is entitled to protection because it contains information that qualifies as “trade secret” under the Commission’s administrative rules, or that it is “otherwise legally protectable.” *See* Admin. R. Mont. 38.2.5007(4)(b). Montana law establishes that the Commission “may issue a protective order when necessary to preserve trade secrets . . . or other information that must be protected under law, as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2). As outlined below, Liberty seeks special provisions restricting access to information beyond the protections offered by the Commission’s standard protective order pursuant to Admin. R. Mont. 38.2.5002(3). Therefore, Liberty requests the Commission issue a protective order as set forth below.

### **IDENTIFICATION OF THE CONFIDENTIAL INFORMATION**

Liberty seeks a protective order preventing the disclosure of the following confidential and proprietary information (“Confidential Information”):

- Liberty’s confidential and proprietary due diligence materials and financial model that Liberty relied upon in submitting its bid to merge with and acquire the stock of Western Water Holdings, LLC, except for the written due diligence prepared by counsel, which has been withheld on grounds of attorney-client privilege.
- Excerpts of the minutes from APUC Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014 at which the Western Water bid

process or the proposed sale were discussed, and a copy of the Board resolution of Liberty Utilities Co. approving the acquisition.

- The 2012 and 2013 United States income tax returns for Liberty Utilities.

### **FACTUAL AND LEGAL BASIS FOR PROTECTION**

The Commission should grant Liberty's motion and protect the Confidential Information from public disclosure because it qualifies as "trade secret" under the Commission's administrative rules or is "otherwise legally protectible." The Confidential Information satisfies all of the necessary criteria for a protective order under Montana law. It is: (1) information; (2) secret; (3) subject to efforts reasonable under the circumstances to maintain its secrecy; (4) not readily ascertainable by proper means; and (5) derives independent economic value, or a competitive advantage is derived, from its secrecy. Admin. R. Mont. 38.2.5007(4)(b). The Confidential Information also complies with the definition of "trade secret" found at Montana Code Annotated § 30-14-402(4) ("Trade secret' means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy"). Thus, the Confidential Information is Liberty's "constitutionally protected property rights." *Great Falls Tribune Co. v. Great Falls Pub. Sch., Bd. of Trustees, Cascade Cnty.*, 255 Mont. 125, 130, 841 P.2d 502, 505 (1992).

The Commission already has determined that the type of information requested in PSC-033(b), MCC-010, and CITY-031 should be protected from public disclosure. Under Montana law, "it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure." *Waste Mgmt. Partners of*

*Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997).

The Commission previously has found that confidential financial modeling programs used to bid on public utilities are entitled to protection from public disclosure as trade secrets. *See* PSC Docket No. D2006.6.82, Order No. 6754a, ¶¶ 91-92 (“BBI has made a *prima facie* showing that the Acquisition Model is trade secret”). The Commission also has protected the “outputs” and “inputs” associated with “modeling” similar to that which Liberty seeks to protect. *See* PSC Docket No. D2013.12.85, Order No. 7323d, ¶ 5 (January 24, 2014).

Furthermore, the Commission also has recognized that a protective order is appropriately granted to protect the minutes of a board of directors’ meeting from public disclosure. *See* PSC Docket No. D2006.6.82, Order No. 6754a, ¶ 26 (September 12, 2006) (“generally minutes of board of director meetings will meet the criteria for trade secret”). Finally, the Commission previously has determined that “both federal and state law prohibit disclosure of income tax returns.” *See* PSC Docket No. D2010.6.59, Order No. 7088a (September 2, 2010) (citing Montana Code Annotated § 15-31-511 and 26 USC § 6103). Thus, Liberty’s tax returns are “otherwise legally protectable” under Admin. R. Mont. 38.2.5007(2). *See also* Pasioka Affidavit, ¶ 29.

**1. The Confidential Information qualifies as “information” under the Commission’s rules.**

Under the Commission’s administrative rules, “information” is defined as:

knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request.

Admin. R. Mont. 38.2.5001(3).

The Confidential Information is comprised of knowledge, data and facts communicated in writing. The information responsive to PSC-033(b) and MCC-010 includes confidential information communicated to the APUC Board and a financial modeling program constructed by Liberty to create an economic advantage over competitors as Liberty continues to engage in competitive bidding processes and ultimately to invest in utility companies throughout North America. Pasioka Affidavit, ¶ 6. Liberty's confidential financial model is based on confidential valuations and assumptions, as well as Liberty's unique knowledge and expertise in the public utility sector. *Id.* That confidential financial model is used relating to potential acquisitions of regulated utilities, which is a highly competitive market, making it even more important to treat that financial information as proprietary and confidential. The documents responsive to CITY-031(a) consist of records of the Boards of Directors meetings for Liberty and its related corporate entities. Those minutes reflect discussions held by various boards regarding the confidential and proprietary aspects of corporate governance on a variety of topics, including the proposed acquisition of public utilities. Pasioka Affidavit, ¶ 19. The documents responsive to CITY-031(b) consist of Liberty and related entities' tax returns. Therefore, PSC-033(b), CITY-031(a) and CITY-033(b) all seek "information" from Liberty as that term is defined in Admin. R. Mont. 38.2.5001(3).

**2. The Confidential Information is secret.**

The Commission's administrative rules do not define the term "secret." The ordinary meaning of "secret" is "something that is kept or meant to be kept unknown or unseen by others." OXFORD DICTIONARY OF ENGLISH 1608 (3d ed. 2010). The Uniform Trade Secrets Act defines "trade secret" as

information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from **not being generally known to and not being readily ascertainable by proper means by other persons** who can obtain

economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Mont. Code Ann. § 30-14-402(4) (emphasis added).

Liberty does not share the Confidential Information or disclose it to the public. Pasieka Affidavit, ¶ 9, ¶ 23. Its disclosure is not required by law and is not published or otherwise publicly available. *Id.* Liberty has adopted reasonable measures to maintain the secrecy of its Confidential Information. Pasieka Affidavit, ¶ 10, ¶ 24. As a result, the Confidential Information is not generally known and is not readily ascertainable by other persons. Pasieka Affidavit, ¶ 11, ¶ 25. Therefore, it satisfies the “secrecy” element necessary for a protective order under Admin. R. Mont.

38.2.5007(4)(b)(iii).

**3. The Confidential Information is subject to reasonable efforts under the circumstances to maintain its secrecy.**

Liberty does not share or disclose the Confidential Information. Liberty has enacted policies to protect the secrecy of the Confidential Information. Liberty does not share or disclose its Confidential Information and only those Liberty employees and representatives with a direct need to know are authorized to access the Confidential Information. Pasieka Affidavit, ¶ 9, ¶ 23. Furthermore, Liberty has adopted reasonable security measures to maintain the secrecy of its Confidential Information, as detailed in the Pasieka Affidavit. Pasieka Affidavit, ¶ 10, ¶ 24. For these reasons, Liberty’s Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.

**4. The Confidential Information is not readily ascertainable by proper means.**

Liberty's Confidential Information is not within the public domain. Pasieka Affidavit, ¶ 11, ¶ 25. Only Liberty employees and representatives with a direct need to know are authorized to access it. Pasieka Affidavit, ¶ 9, ¶ 23. Additionally, Liberty has adopted reasonable security measures to ensure that the Confidential Information is not readily ascertainable. Pasieka Affidavit, ¶ 10, ¶ 24. Therefore, Liberty's Confidential Information is not readily ascertainable by proper means, as required by Admin. R. Mont. 38.5.5007(4)(b)(v).

**5. The Confidential Information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.**

The Commission's administrative rules establish that Liberty must derive some economic value or competitive advantage from the Confidential Information's secrecy. *See* Admin. R. Mont. 38.2.5007(4)(b)(vi). Liberty obtains both economic value and a competitive advantage from keeping the Confidential Information secret.

The public utilities sector in Montana and elsewhere is highly competitive and product and service providers to this industry aggressively market their products and services. Through its own innovation, substantial investment in research and development, and by virtue of its long established experience as a world renowned going-concern in the public utilities sector, Liberty has developed the technical and financial expertise contained in its proprietary financial model. Liberty is able to provide quality services and secure business because it possesses this expertise. Pasieka Affidavit, ¶ 12. Even further, Liberty has expended substantial time, resources and expertise over many years to develop that financial model and it is critical to its ongoing value to Liberty and to Liberty's continued success in competing to acquire other public utilities that the model remain proprietary and privileged.

Public disclosure of Liberty's proprietary financial model would provide a clear competitive advantage for Liberty's competitors. Liberty's competitors would obtain the benefit of this proprietary financial model, without making the substantial investments, spending time, or acquiring the knowledge and experience necessary to innovate. Therefore, public disclosure of Liberty's financial model would severely prejudice Liberty's economic and competitive interests. Pasioka Affidavit, ¶¶ 13-15. The Commission historically has protected from public disclosure information that could be used against a party by that party's competitors. *See* PSC Docket No. D2011.1.8, Order No. 7149a, ¶ 30 (June 24, 2011) (protecting information that "could be used by competitors and future acquisition targets to gain an economic advantage through the insights they could gain").

Additionally, public disclosure of Liberty and its related corporate affiliates' board meeting minutes similarly would prejudice Liberty. Liberty derives economic value from its Board of Directors' ability to engage in open discussions regarding the confidential and proprietary aspects of corporate governance on a variety of topics, including the proposed acquisition of public utilities. Pasioka Affidavit, ¶ 26. Liberty protects the secrecy and confidentiality of these meetings because they involve the discussion of sensitive and material, nonpublic financial or other confidential and proprietary information. *Id.* If a competitor were allowed to review the meeting minutes of Liberty or its corporate affiliates' Boards of Directors, that competitor could use that confidential information to Liberty's economic and competitive disadvantage. *Id.*; *see also* PSC Docket No. D2011.1.8, Order No. 7149a, ¶ 30 (June 24, 2011).

**REQUEST FOR IMPOSITION OF SPECIAL PROVISIONS IN PROTECTIVE ORDER  
AND APPROVAL OF NON-DISCLOSURE AGREEMENT**

Because Liberty's economic interests would be so greatly damaged if Liberty's confidential and proprietary financial model were publicly disclosed, Liberty respectfully requests that the Commission include special provisions in its protective order as contemplated by Admin. R. Mont.

38.2.5002(3). Pasieka Affidavit, ¶ 17; *see also* PSC Docket No. D2011.1.8, Order No. 7149a, ¶ 30 (June 24, 2011). Specifically, Liberty requests that its confidential and proprietary financial model only be made available by Liberty for inspection by legal counsel and experts at a place and a time mutually agreed upon by Liberty and all individual parties as contemplated by Admin. R. Mont.

38.2.5023. Liberty has made arrangements to offer additional access to remote-located outside experts by providing dedicated service through a Webex portal to Liberty’s system. This option will allow appropriate outside experts access to a live version of the financial model, while maintaining Liberty’s possession and control over its confidential and highly sensitive information.

The City of Missoula already has initiated a condemnation of the Missoula water system, while it simultaneously acts as an intervenor in these proceedings. Similarly, the Town of Apple Valley has indicated its intent to pursue condemnation of the Apple Valley Ranchos water system. Imposition of these special provisions is necessary to ensure that the City does not use Liberty’s confidential information in the condemnation proceedings or disclose it outside this matter. *See also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17, 98 S. Ct. 2380, 2390 n.17 (1978) (“when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied”). Liberty also respectfully requests the Commission to approve the terms of the proposed non-disclosure agreement attached to this motion as Exhibit 1, as expressly contemplated by Admin. R. Mont. 38.2.5014(1) (requiring all interested parties to sign a “commission-approved nondisclosure agreement”).

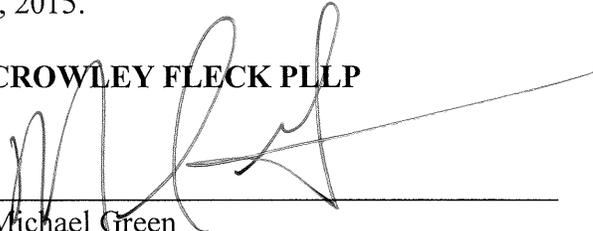
### **CONCLUSION**

Liberty has supported its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that its Confidential Information constitutes property rights which are protected under constitutional due process requirements as well as state and federal law and, thus, has

established its legal and factual entitlement to a protective order under Admin. R. Mont. 38.2.5001, *et seq.* See *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 56, 319 Mont. 38, 82 P.3d 876. For the foregoing reasons, Liberty respectfully requests the Commission grant its motion for protective order, as well as its request for the imposition of special provisions in the Commission's protective order and the use of Liberty's proposed non-disclosure agreement.

Submitted this 10<sup>th</sup> day of June, 2015.

**CROWLEY FLECK PLLP**



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**ATTORNEYS FOR LIBERTY UTILITIES CO.  
AND LIBERTY WWH, INC.**

**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on June 10<sup>th</sup>, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S MOTION FOR A PROTECTIVE ORDER AND BRIEF IN SUPPORT was served via electronic and U.S. mail on:

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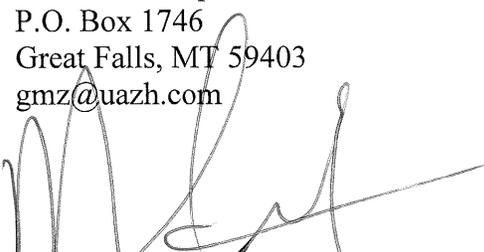
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CROWLEY FLECK PLLC

## NON-DISCLOSURE AND CONFIDENTIALITY AGREEMENT

This Non-Disclosure and Confidentiality Agreement is made effective as of \_\_\_\_\_, 2015 by and between Liberty Utilities Co. ("Provider) and \_\_\_\_\_ ("Requesting Party"). Provider and Requesting Party hereby covenant and agree as follows. Subject to the terms of this agreement, Provider shall provide certain confidential and proprietary information to Requesting Party for the sole purpose of facilitating the Montana Public Service Commission's ("PSC") approval of the Application for Approval of a Sale and Transfer of Stock submitted in PSC Docket No. D2014.12.99. This agreement incorporates by reference the definitions established in Admin. Rule Mont. 38.2.5001.

- 1. Purpose.** In connection with the transaction and approval docket noted above, Provider will provide Requesting Party with certain proprietary and confidential information ("Confidential Information"). As used in this Agreement, "Confidential Information" means all confidential or proprietary information that under all circumstances should reasonably be considered confidential, including, without limitation, data, financial information, reports, analyses, compilations, models, studies, projections, forecasts, records, and other materials (including such information and data which are electronically transmitted or stored) containing or otherwise reflecting information and concerning the transaction, the Parties, and each of their affiliates and subsidiaries, whether disclosed orally, in writing or obtained through site visits, and whether or not marked or identified as "Confidential" or such other similar identification. Confidential Information shall also include, without limitation, any confidential or proprietary materials or information of third parties provided by Provider to Requesting Party or its representatives in connection with Requesting Party's consideration of the transaction. "Derived Information" shall include materials such as communications, analyses, reports, compilations, studies, summaries, interpretations, records, notes, lists, financial statements or other documents prepared by the Requesting Party or others, which contain or otherwise reflect Confidential Information. Provider and Requesting party agree that disclosure of Provider's confidential and proprietary information without express written permission of Provider will cause Provider irreparable harm and that any breach of this agreement by Requesting Party will entitle Provider to injunctive relief and monetary damages, in addition to any other legal and/or equitable remedies available to it, in any court of competent jurisdiction.
- 2. Treatment of Confidential Information.** In consideration of Provider providing Confidential Information to Requesting Party, the Requesting Party agrees that: all Confidential Information will be held and treated by the Requesting Party and its affiliates and subsidiaries and their respective directors, managers, members, partners, trustees, officers, employees, agents, consultants, attorneys, actual or potential lenders, financing sources, potential vendors, and advisors (collectively, "Representatives") in strict confidence. Confidential Information and Derived Information will not, except as hereinafter provided, without the prior written consent of Provider, be disclosed by the Requesting Party or its Representatives, in any manner whatsoever, in whole or in part to any person, company and/or entity and will not be used by the Requesting Party or its Representatives other than in connection with consideration of the transaction referenced in the docket noted above; and without Provider's prior written consent, except as

**EXHIBIT**

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required by law or in accordance with the terms of this Agreement. Moreover, the Requesting Party further agrees (i) to disclose Confidential Information and Derived Information only to the Requesting Party's Representatives who need to know the Confidential Information and Derived Information for purposes of evaluating the transaction and who will be advised by the Requesting Party of this Agreement. Under this Agreement, Requesting Party hereby covenants and agreements, on behalf of itself and its Representatives, that Confidential Information and Derived Information will not be offered, presented or used in any other legal proceedings and that use of Confidential Information and Derived Information will be limited to the regulatory docket noted above. Requesting Party understands and agrees that its receipt and review of Confidential Information is expressly conditioned on that requirement and that Requesting Party will be subject to injunctive relief and monetary damages in the event of any breach of this Agreement.

3. **Permitted Use.** The Requesting Party shall handle, use, treat and utilize Provider's confidential and proprietary information only as follows: (a) hold all confidential and proprietary information received from Provider in strict confidence as required by Admin. R. Mont. 38.2.5017(2); (b) use such Confidential Information only for the purpose of Requesting Party's participation in PSC Docket No. D2014.12.99; (c) not use Provider's confidential and proprietary information in any other court of law, tribunal or other forum; (d) restrict disclosure of Provider's confidential and proprietary information to its employees and/or advisors who: (i) have a strict need to know; and (ii) have served Provider with a signed copy of this Non-Disclosure agreement; (e) not disclose Provider's confidential and proprietary information to any third party; and (f) not use Provider's confidential and proprietary information for Requesting Party's own pecuniary benefit, or to the detriment of Provider. Upon request of Provider, any Confidential Information and Derived Information (including information that may be contained within computer backup systems) will be promptly returned by Requesting Party to Provider.
4. **Ownership.** All of Provider's confidential and proprietary information shall remain the sole property of Provider.
5. **Disclosure Under Court Order Or Subpoena.** Should applicable law or any rule or regulation of any governmental entity of competent jurisdiction require disclosure of Provider's confidential and proprietary information in Requesting Party's possession, custody, or control, the Requesting Party shall: (a) immediately provide Provider with prior written notice of such disclosure; (b) cooperate with the Provider to appropriately protect against or limit the scope of such disclosure; and (c) make such disclosure only to the extent required. To the fullest extent permitted by law, Requesting Party will continue to protect all of Provider's confidential and proprietary information disclosed in response to a written court order, subpoena, regulation or process of law.
6. **Monetary Damages and Equitable Relief.** Requesting Party acknowledges and understands that Provider will suffer monetary loss in the event of any breach of this Agreement or release of Confidential Information. Requesting Party further acknowledges that monetary damages alone may be inadequate to protect against an

actual or threatened breach of this Agreement, and Requesting Party hereby consents to the granting of injunctive relief or specific performance, or both, or other equitable relief as may be appropriate for any actual or threatened breach of this Agreement.

7. **Attestations of Requesting Party.** I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof, as well as the terms of this Non-Disclosure Agreement. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the Provider, Commission, Consumer Counsel, any party and may be further and freely distributed.

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Requesting Party's Typed or Printed Name

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Requesting Party's Signature

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Date of Requesting Party's Signature

Requesting Party's Business Address:

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**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

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IN THE MATTER OF the Joint Application of	)	
Liberty Utilities Co., Liberty WWH, Inc., Western	)	REGULATORY DIVISION
Water Holdings, LLC, and Mountain Water	)	
Company for Approval of a Sale and Transfer of	)	DOCKET NO. D2014.12.99
Stock	)	

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**AFFIDAVIT OF DAVID PASIEKA**

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AFFIDAVIT OF DAVID PASIEKA FILED IN SUPPORT OF LIBERTY UTILITIES CO. AND  
LIBERTY WWH, INC.'S MOTION FOR AN ORDER TO PROTECT: LIBERTY'S  
CONFIDENTIAL AND PROPRIETARY FINANCIAL MODELS FROM PUBLIC DISCLOSURE  
IN RESPONSE TO DATA REQUEST PSC-033(B); LIBERTY'S CONFIDENTIAL BOARD  
MEETING MINUTES FROM PUBLIC DISCLOSURE IN RESPONSE TO DATA REQUEST  
CITY-031(A); AND LIBERTY'S CONFIDENTIAL TAX RETURNS FROM PUBLIC  
DISCLOSURE IN RESPONSE TO DATA REQUEST CITY-031(B)

David Pasieka, being duly sworn, states:

1. I am President of Liberty Utilities (Canada) Corp., which is the parent company for Liberty Utilities Co. ("Liberty Utilities"), a Delaware corporation (collectively "Liberty"). Liberty Utilities is an American corporation that owns and operates regulated gas, water, sewer and electric utilities in ten states—Arizona, Arkansas, California, Iowa, Illinois, Missouri, Georgia, Massachusetts, New Hampshire and Texas. My principal business address is 354 Davis Road, Oakville, ON L6J 2X1.
2. Liberty has considered that the Commission is a public agency and that there is a constitutional presumption of access to documents and information in the Commission's possession. Liberty understands it bears the burden of establishing a *prima facie* showing of confidentiality, factually and legally, and that confidential information is protected only upon Commission approval.

**CONFIDENTIAL AND PROPRIETARY FINANCIAL MODELS**

3. In my role as President, I have personal knowledge regarding the investments Liberty, its affiliates and its parent Algonquin Power & Utilities, Co. ("APUC" and collectively the "Companies") have made in creating the proprietary financial models that management relies on when analyzing the costs and benefits of acquiring public utilities. I am one of the persons responsible for guiding Liberty's responses to the discovery requests in this docket. I also have personal knowledge of the means by which the Companies protects those proprietary financial models.

4. Liberty has been asked to provide information that is confidential, not subject to public disclosure, and is entitled to protection against public disclosure. Specifically, data request PSC-033(b) asked Liberty to provide “the financial analysis that was done in conjunction with Algonquin’s/Liberty’s due diligence, including but not limited to projected financial results (e.g., income statements, balance sheets, cash flow).” Similarly, MCC-010 sought production of a “working copy, including data, supporting spreadsheets and all formulas and links intact, of the financial model used in evaluating the acquisition of Park Water Company by Liberty Utilities Co.”

5. Prior to requesting this protective order, Liberty engaged in a thorough legal and factual examination of the information requested in PSC-033(b) and MCC-010. With the assistance of legal counsel, Liberty has made a good faith determination that the documents requested in PSC-033(b) and MCC-010 are confidential trade secrets entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et. seq.*

6. The Companies have created a financial modeling program to create an economic advantage over competitors as Liberty continues to engage in competitive bidding processes and ultimately to invest in utility companies throughout North America. To build this model, the Companies hired various financial experts, who created the model based on their unique knowledge and experience and by integrating secret valuations and assumptions. The proprietary and confidential financial model also contains confidential information about the Companies’ future projected earnings. Liberty has invested considerable time, expertise and financial resources creating this model over many years. Liberty seeks a protective order preventing the disclosure of this confidential and proprietary information.

7. The Companies’ propriety financial models contain secret information that is subject to efforts reasonable under the circumstances to maintain its secrecy. The propriety financial models are not readily ascertainable by proper means. The Companies derive independent economic value from the secrecy associated with its proprietary financial models because it provides Liberty analytical tools for conducting due diligence that are not available to competitors. Because Liberty has expended substantial time, resources and expertise over many years to develop that financial model, it is critical that the model remain proprietary and privileged. That confidential financial model is used relating to potential acquisitions of regulated utilities, which is a highly competitive market, making it even more important to treat that financial information as proprietary and confidential.

8. Additionally, the model contains confidential forward looking projections about the Companies’ performance, the disclosure of which is regulated by securities regulations in the U.S. and Canada.

9. The Companies do not share or disclose its proprietary financial models or analyses. Only employees and representatives with a direct need to know are authorized to access the proprietary financial models and analyses. No other regulatory agency has requested or been granted access to the Companies’ financial models.

10. The Companies have adopted reasonable measures to maintain the secrecy of its confidential and proprietary financial models and analyses: securing its business offices and facilities, restricting access via individual access cards, locking main building doors, locking file cabinets, password-protecting computer files, and using automated e-mail encryption. Liberty also shreds confidential documents that are no longer in use.

11. The Companies' proprietary financial models are not within the public domain. As a result, the Companies' proprietary financial models are not generally known and are not readily ascertainable by other persons.

12. The competition for the acquisition of public utilities in the U.S. is highly competitive. Through its own innovation, substantial investment in research and development, and by virtue of its long established experience as a world renowned going-concern in the public utilities sector, Liberty has developed the technical and financial expertise contained in the proprietary financial models.

13. If the Companies' proprietary financial model were disclosed to a competitor, the competitor would benefit from review of Liberty's financial model and use that model against Liberty in future acquisitions, depriving Liberty of both its investment cost in the model and its opportunity cost in acquiring additional utilities.

14. Public disclosure of the proprietary financial models would provide a clear competitive advantage and opportunity for Liberty's competitors. Liberty's competitors would obtain the benefit of the proprietary financial models, without making the substantial investments, spending time, or acquiring the knowledge and experience necessary to innovate. As a result, Liberty would be at a severe disadvantage. Disclosure would also allow Liberty's competitors to learn of Liberty's approach to bidding on public utilities in North America. This would provide Liberty's competitors a strategic advantage in future acquisitions.

15. In this case, disclosure may also have an adverse impact on Liberty's interests in the pending condemnation action by the City of Missoula against Mountain Water Company and Carlyle, as well as a potential future action by municipalities in California to condemn other systems currently owned by Western Water or its subsidiaries. Discovery in the Mountain Water condemnation has closed. Further, Liberty was denied intervention as a party in that action, so Liberty does not have a readily available means to object to improper use of its information in that condemnation case. Under these circumstances, disclosure should be further restricted to avoid improper use of the Companies' information in other matters and from providing the City of Missoula an opportunity for additional discovery outside of its condemnation action.

16. Liberty has arranged to provide access to hard copies of responsive documents in its counsel's office, and has worked with the Companies' specialists to develop a means to provide temporary access to a "live" version of the financial model on Liberty's system. These heightened measures allow access to the requested information, but will prevent the Companies' model from becoming subject to a public records request to the Commission or MCC, and controls dissemination to prevent disclosure in other forums. We believe these measures are reasonable and will allow access to the financial model in this docket.

17. Because Liberty's economic interests would be so greatly damaged if the confidential and proprietary financial models were publicly disclosed, Liberty respectfully requests that the Commission include special provisions in its protective order as contemplated by Admin. R. Mont. 38.2.5002(3). Specifically, Liberty requests that its confidential and proprietary financial models be made available by Liberty for inspection by legal counsel and experts at a place and a time mutually agreed upon by Liberty and all individual parties as contemplated by Admin. R. Mont. 38.2.5023. Liberty also respectfully requests the Commission to approve the terms of the proposed non-disclosure agreement submitted by Liberty, as contemplated by Admin. R. Mont. 38.2.5014(1).

### **BOARD MEETING MINUTES**

18. In my role as President, I have personal knowledge regarding Liberty's business records, including Liberty's board records as well as the board meeting minutes of Liberty's corporate parents. Furthermore, I have personal knowledge about the procedures the Companies have imposed to protect their confidential information, including board meeting minutes and resolutions.

19. The Boards of Directors for both Liberty Utilities and APUC hold regular meetings. These board meetings are private, confidential meetings at which attendance by anyone other than the Board members is at the invitation of the Board. The regular board meetings facilitate discussions regarding the confidential and proprietary aspects of corporate governance on a variety of topics, including the proposed acquisition of public utilities. Often, the discussions of the Boards of Directors of both Liberty and APUC are protected by the attorney client privilege. All meetings of the Boards of Directors of both Liberty and APUC are considered to be confidential because of the discussion of sensitive and material, nonpublic financial or other confidential and proprietary information.

20. Liberty has been asked to provide information that is confidential, not subject to public disclosure, and is entitled to protection against public disclosure. Specifically, in response to the City's clarification of the intended scope of its data request CITY-031(a), Liberty has worked with APUC's corporate secretary and general counsel to identify portions of APUC board meeting minutes in which the WWH transaction was discussed. The corporate secretary prepared and certified excerpts of the minutes from APUC Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014 at which the Western Water bid process or the proposed sale were discussed. Additionally, general counsel's office has identified the Board resolution of Liberty Utilities Co. approving the acquisition as responsive to the City's request.

21. Prior to requesting this protective order, Liberty engaged in a thorough legal and factual examination of the information requested in CITY-031(a). With the assistance of legal counsel, Liberty has made a good faith determination that the documents requested in CITY-031(a) are proprietary and confidential trade secrets entitled to protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, *et. seq.* Any questions regarding the legal or factual basis for Liberty's determination should be communicated to legal counsel for Liberty in this proceeding.

22. The Companies' confidential board meeting minutes contain secret information that is subject to efforts reasonable under the circumstances to maintain its secrecy. The confidential board meeting minutes are not readily ascertainable by proper means, and the Companies derive

independent economic value and competitive advantage from the secrecy of the confidential board meeting minutes.

23. The Companies do not share or disclose its confidential board meeting minutes. Only employees and representatives with a direct need to know are authorized to access the confidential board meeting minutes. No other regulatory agency has requested or been granted access to the Companies' confidential board meeting minutes.

24. The Companies have adopted reasonable measures to maintain the secrecy of its confidential board meeting minutes: securing its business offices and facilities, restricting access via individual access cards, locking main building doors, locking file cabinets, password-protecting computer files, and using automated e-mail encryption. Liberty also shreds confidential documents that are no longer in use.

25. The Companies' confidential board meeting minutes are not within the public domain. As a result, the confidential board meeting minutes are not generally known and are not readily ascertainable by other persons.

26. Public disclosure of Liberty's confidential board minutes would prejudice Liberty's economic interests and undermine its competitive advantage. As discussed above, APUC, Liberty and related corporate entities' Boards of Directors meetings routinely involve discussions regarding the confidential and proprietary aspects of corporate governance on a variety of topics, including the proposed acquisition of public utilities. Liberty protects the secrecy and confidentiality of these meetings because they involve the discussion of sensitive and material, nonpublic financial or other confidential and proprietary information. Liberty derives economic value from its Board of Directors being able to engage in confidential and secret discussions. If a competitor were allowed to review the meeting minutes of Liberty or its corporate affiliates' Boards of Directors, that competitor could use that confidential information to Liberty's economic and competitive disadvantage.

## **TAX RETURNS**

27. In my role as President, I have personal knowledge regarding Liberty's business records, including Liberty's confidential tax returns.

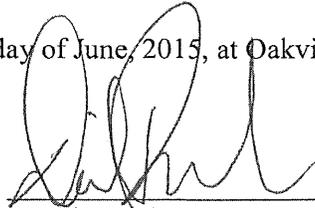
28. Prior to requesting this protective order, Liberty engaged in a thorough legal and factual examination of the tax returns requested in CITY-031(b). With the assistance of legal counsel, Liberty has made a good faith determination that the U.S. tax returns it has offered in its supplemental response to CITY-031(b) are entitled to legal protection against public disclosure pursuant to Admin R. Mont. 38.2.5001, et. seq.

29. I have been informed that tax records are confidential as a matter of state and federal law. See Montana Code Annotated § 15-31-511; see also 26 USC § 6103. I also understand that the Commission previously has determined that "both federal and state law prohibit disclosure of income tax returns." See PSC Docket No. D2010.6.59, Order No. 7088a (September 2, 2010) (citing PSC Docket No. D2008.9.199, Order No. 6954a).

30. Liberty has produced its consolidated tax returns in response to discovery requests before other regulatory bodies on a confidential and proprietary basis.

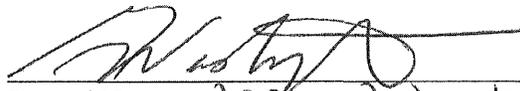
END OF AFFIDAVIT

Executed on the 10<sup>th</sup> day of June, 2015, at Oakville, Ontario, Canada.

  
\_\_\_\_\_  
David Pasieka  
President of Liberty Utilities (Canada) Corp.

SUBSCRIBED and SWORN to before me on the 10th day of June, 2015, by David Pasieka.

[Seal]

  
\_\_\_\_\_  
Printed Name Nicole Washington  
Notary public for Law Society of Upper Canada  
Residing at Ontario, Canada  
My commission expires: n/a