

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

IN THE MATTER OF Joint Application of
Liberty Utilities Co., Liberty WWH, Inc.,
Western Water Holdings, LLC, and
Mountain Water Company for Approval
of a Sale and Transfer of Stock

REGULATORY DIVISION
DOCKET NO. D2014.12.99

**CITY OF MISSOULA’S RESPONSE TO LIBERTY’S
MOTION FOR A PROTECTIVE ORDER
(PSC-033(b), MCC-010, and CITY-031)**

Liberty moves the PSC for an order protecting its supplemental responses to data requests PSC-033(b), MCC-010, and CITY-031. While Liberty filed documents titled “supplemental response,” it did not actually file any supplemental responses. Instead, the documents simply describe the documents Liberty will make available if the parties sign Liberty’s proposed nondisclosure agreement (NDA).

The City does not object to entering an NDA similar to those approved by the PSC in orders 7392f, 7392g, 7392h, and 7392i. The City objects, though, to Liberty’s proposed NDA, which includes “special provisions” and “enhanced protections.” The heavy-handed NDA is overreaching, entirely unnecessary, and chock full of ambiguous legalese. What is more, Liberty’s proposal to simply make hard copies of the documents available for viewing – rather than providing copies to the parties – is unworkable and only adds unnecessary expense for the City.

Liberty proposes to provide viewing-only access to the following information:

- 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);
- the financial model Liberty used to evaluate the proposed sale;
- excerpts of minutes from board meetings where the proposed sale was discussed; and
- tax returns for the years 2012 and 2013.¹

Liberty claims, "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." (Mot. for Protective Or., p. 4.) Even assuming that is true, Liberty fails to show that the PSC has ever required a heavy-handed NDA like the one Liberty proposes. If granting a protective order for this type of information is as routine as Liberty suggests, then one would expect to find that the PSC has routinely adopted NDAs like the one Liberty proposes. But it has not. Liberty does not point to any PSC-approved NDAs like the one it proposes, nor does it explain why the proposed NDA is necessary.

The PSC has well-established rules governing the contents of NDAs. Indeed, while the rules allow the PSC to incorporate special provisions into its protective orders in very limited circumstances, the rules do not permit the PSC to adopt "custom" NDAs, as Liberty proposes. *See* Admin. R. Mont. 38.2.5002(3). Rule 38.2.5012(3) states that, when a protective order has been granted, "[c]ounsel, expert witnesses, and others

¹ Liberty appears willing to provide copies of the tax returns, rather than view-only access.

entitled to access confidential information for parties . . . shall sign and file with the commission” a nondisclosure agreement “certifying in substantial compliance with the following”:

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 that is protected as confidential information. I have reviewed all commission rules 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. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and commission rules 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, or any party and may be further and freely distributed.

Setting aside the fact that Liberty’s proposed NDA is not allowed under the rules in the first place, the proposed NDA goes well beyond what is necessary. The PSC-approved NDA is two paragraphs. It is concise and sufficient. By comparison, Liberty’s proposed NDA is three pages of overreaching and unnecessary legalese.

Among other things, the proposed NDA requires the parties (and presumably the PSC)² to agree – before even viewing the information – that disclosure of the information would cause Liberty “irreparable harm” and would entitle Liberty to “injunctive relief and monetary damages, in addition to any other legal and/or

² Under Rule 38.2.5012(2), the PSC must sign a “commission nondisclosure agreement.” Liberty’s intent with respect to the PSC’s use of the information or adherence to the NDA is not clear: Does Liberty also intend to hold the PSC accountable for money damages and injunctive relief and to require the PSC Commissioner’s to travel to Liberty’s attorney’s offices to view the files?

equitable remedies.” (Proposed NDA, ¶ 1; *see also id.* at ¶¶ 2 and 6.) Liberty then repeatedly threatens the parties (and, again, presumably the PSC) that they will be sued for monetary damages, injunctive relief, or other remedies if any of the information is disclosed. These terms are simply unnecessary.

The PSC-approved NDA is clear enough. The parties and the PSC understand they are not supposed to disclose the information, except as provided in the rules. That is the point of having the NDA in the first place. Neither the parties nor the PSC need to be patronized and repeatedly threatened with monetary damages or injunctive relief to understand that.

Further, while Liberty’s proposed NDA makes clear that Liberty believes the information is double super secret, Liberty utterly fails to explain how the parties or PSC could even use the information in this proceeding. The reason the PSC, the City, and the Montana Consumer Counsel requested the information was so that they may use it in this proceeding. Yet, under Liberty’s proposed NDA, it is not clear that the parties or PSC could do so. Paragraph 3(e), for example, states the “Requesting Party” shall “not disclose Provider’s confidential and proprietary information to any third party.” If Liberty is the first party and the Requesting Party (e.g. the City) is the second party, that means the PSC is a third party. Does Paragraph 3(e) therefore mean that a party cannot reference the information in presenting its case to the PSC? This is just another example of the problem with Liberty’s NDAs – it introduces myriad foreign conditions that are vague and incomplete.

Moreover, even if the NDA allowed the parties and the PSC to use the information in this proceeding – which it apparently does not – there are obvious practical problems with Liberty’s proposal. In its “supplemental responses” – which include a general description of the proposed responses but not the responses themselves – Liberty asserts that nearly all of the requested information must be viewed in person at Crowley Fleck’s law offices (the only exceptions are the 2012 and 2013 tax records). This raises several unanswered questions: (1) to what extent may the parties or experts record the information in their notes? (2) to what extent may they cite to the information in their briefing or testimony? (3) will the original hard copies be available to use as exhibits? (4) will the PSC also be limited to in-person viewing of the hard copies? and (5) why, in the first place, must the documents be viewed only in-person if they are subject to a NDA?

What is more, Liberty’s proposal would create unnecessary expense for the City because it would have to pay for its experts to travel to Montana to view the documents in person.

Liberty’s proposed NDA raises far more questions than it answers. In this instance, simple is better. The PSC-approved NDA language, as stated in Rule 38.2.5012(3), is perfectly sufficient to protect Liberty’s interests.

Finally, there is no need to incorporate “special provisions” or “enhanced protections” in the protective order itself. Under Rule 38.2.5002(3), requests to incorporate special provisions are not to be “routinely granted.” *See In re Northwestern Energy*, Docket No. N2005.6.101, Or. No. 6683a (Oct. 31, 2005) (rejecting proposed

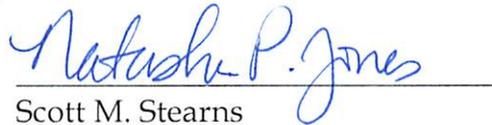
“special provisions”); *In re Northwestern Energy*, Docket Nos. D2003.7.86, D2004.6.96, D2005.6.103, Or. No. 6501d (Oct. 31, 2005) (rejecting proposed “special provisions”). In any case, the request must contain proposed language for the protective order (not the NDA, as Liberty has proposed). And, importantly, Liberty must provide a “sufficient legal basis or factual basis for the requested special terms and conditions” such that the special terms and conditions do not create “legally unreasonable barriers” to the parties’ participation in the proceeding. *Id.*

Here, Liberty fails to articulate why the PSC’s standard protective order and NDA – which has already been issued in four protective orders for this case – is inadequate. It does not identify any extraordinary circumstances that warrant special protections. The only thing Liberty has to say on that matter is that, according to David Pasioka, Liberty would be “so greatly damaged” if the information is publicly disclosed. (Mot. for Protective Or., p. 9.) This conclusory assertion falls far short of what is required to justify special terms or conditions in a protective order, much less a requirement that all documents (except the tax records) must be viewed in person.

The PSC has already approved the standard NDA four times in this case, and it offers adequate protection. It requires the parties to treat the information as confidential, prohibits unlawful use of the information, and allows the parties to use the information in this proceeding only as allowed by the rules. Liberty offers no explanation for why that NDA is inadequate for the information now at issue but is, at the same time, perfectly adequate for the other categories of protected information.

The City does not oppose Liberty's motion to the extent the PSC issues its standard protective order and NDA, but the PSC should deny Liberty's request to adopt the overreaching and unnecessary NDA that Liberty proposes. It should instead approve the same NDA it has approved when granting the other protective orders in this case.

Dated this 15th day of June 2015.



Scott M. Stearns
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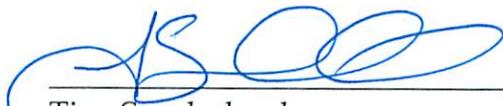
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 15th day of June 2015:

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