

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

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)	

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S RESPONSE TO MONTANA
CONSUMER COUNSEL’S RENEWED MOTION TO COMPEL A COMPLETE
RESPONSE TO MCC-010**

Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submit to the Montana Public Service Commission (“Commission”) this Response to the Montana Consumer Counsel’s (“MCC”) renewed motion to compel Liberty’s response to MCC-010. MCC’s motion was filed on June 24, 2015 and served by email on the parties on June 25, 2015. The Commission should not consider MCC’s pending motion because the Commission ordered Liberty to provide responses to MCC-010 on June 29, 2015, and Liberty previously submitted a supplemental response and contemporaneous motion for protective order. *See* PSC Docket No. D2014.12.99, Order No. 7392k, ¶¶ 12-13. Because the Commission already has granted the relief requested in MCC’s current motion to compel and Liberty already has complied with the terms of the Commission’s order, no further action is necessary from the Commission.

In any event, the Commission should disregard MCC’s motion on procedural and/or substantive grounds. MCC’s motion is, in substance, an untimely response to Liberty’s motion for a protective order preventing public disclosure of the confidential trade secrets requested in

MCC-010, which Liberty filed on June 10, 2015. Additionally, MCC's motion failed to establish that there is no "good cause" pursuant to Admin. R. Mont. 38.2.5002(3) for the Commission to impose special provisions in Liberty's requested protective order.

Liberty incorporates by reference the arguments it raised in its June 10, 2015 motion for a protective order. The Commission should impose the special provisions Liberty has requested because the City of Missoula's ("City") contemporaneous condemnation action against Mountain Water presents an extraordinary circumstance justifying the imposition of these heightened protections.

PROCEDURAL AND FACTUAL BACKGROUND

MCC submitted data requests to the Joint Applicants in this docket on April 20, 2015. Data request MCC-010 asked Liberty to provide "the financial model [Liberty] used in evaluating the acquisition of Park Water Company by Liberty Utilities Co." The Commission requested similar information in data request PSC-033(b). Liberty objected to MCC-010 and PSC-033(b) on relevancy grounds. The Commission overruled Liberty's relevancy objection to PSC-033(b) and ordered Liberty to produce its financial model. PSC Docket No. D2014.12.99, Order No. 7392e, ¶¶ 8-9 (June 3, 2015). The Commission further ordered that Liberty "must provide the subject information or file a motion for protective order within ten days of this Order." Order No. 7392e, ¶ 14 (emphasis added).

Liberty has complied with the Commission's instructions in Order No. 7392. Based on the contents of that order, Liberty filed supplemental responses to PSC-033(b), MCC-010, and CITY-031 and filed a motion for an order protecting the confidential information requested in those data requests on June 10, 2015. Pursuant to Admin. R. Mont. 38.2.5002(3), Liberty requested that the Commission impose special provisions in Liberty's requested protective order

to ensure that Liberty's confidential and proprietary financial models could not be used by the City in the valuation stage of its condemnation proceedings against Mountain Water. Liberty's Motion for Protective Order, pp. 9-10. Contemporaneous with its motion for a protective order, Liberty filed supplemental responses to PSC-033(b), MCC-010, and CITY-031 identifying (but not providing) the documents Liberty would provide upon entry of the requested protective order.

The City objected to Liberty's request for special provisions in its requested protective order by filing its response within seven days of Liberty's motion, as expressly required by paragraph 17 of Procedural Order No. 7392. The City acknowledged that Liberty was entitled to a protective order; the City's objections only related to Liberty's request for special provisions in its requested protective order and the use of an enhanced non-disclosure agreement. City's Response to Liberty's Motion for Protective Order, p. 7 ("the City does not oppose Liberty's motion to the extent the PSC issues its standard protective order and NDA"). Conversely, MCC has not directly responded to Liberty's motion for a protective order. At this point in the proceedings, any objection by MCC to Liberty's motion for a protective order is untimely under paragraph 17 of Procedural Order No. 7392.

Because MCC can no longer file a timely response to Liberty's motion for a protective order, MCC has attempted to indirectly respond to Liberty's motion for a protective order under the guise of a second motion to compel responses to MCC-010. MCC's motion is procedurally improper. MCC failed to identify any legal rationale that would allow MCC to respond to Liberty's motion for a protective order by submitting a stand-alone motion to compel. Presumably, MCC chose to file a motion to compel because the Commission allows parties

greater time to brief motions to compel (14 days) than it does all other motions (7 days). *C.f.* Order No. 7392, ¶ 14, ¶ 17.

LEGAL ARGUMENT

I. The Commission Has Granted MCC’s Initial Motion To Compel Responses to MCC-010. Because MCC Has Received The Relief Requested In Its Current Motion, The Commission Should Not Take Further Action.

As noted previously, the Commission should not consider MCC’s pending motion because the Commission already has granted the relief MCC requests in its pending motion. MCC’s pending motion asks the Commission to compel Liberty “to provide full and complete responses to MCC-010.” MCC’s Second Motion, p. 5. In its recent order granting MCC’s motion to compel Liberty’s response to MCC-010, the Commission ordered Liberty to “provide the subject information or file a motion for protective order within ten days of this Order.”¹ *See* Order No. 7392k, ¶¶ 12-13 (emphasis added). Additionally, MCC’s pending motion asks the Commission to provide MCC with “additional time to prepare its testimony in this case.” MCC’s Second Motion, p. 5. The Commission staff recently issued a Notice of Staff Action dated June 29, 2015 which extended MCC’s deadline for submitting testimony by nearly three months to August 11, 2015.

Because MCC already has received the relief requested in its pending motion to compel, MCC’s motion was rendered moot by Commission Order No. 7392k and the Commission’s June 29, 2015 Notice of Staff Action. Mootness is a “threshold issue” that must be determined before addressing the substantive merits of a motion. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. “A dispute is moot when it once existed but because of an event or happening, it has ceased to exist.” *Larson Lumber Co. v. Bilt Rite Const.*

¹ Liberty filed a motion for a protective order to prevent public disclosure of the confidential trade secrets requested in MCC-010 over three weeks ago. MCC did not timely respond to Liberty’s motion for a protective order.

& Landscaping LLC, 2014 MT 61, ¶ 29, 374 Mont. 167, 320 P.3d 471. Although the Commission had not yet extended MCC’s testimony deadline or ordered Liberty to submit responses to MCC-010 when MCC filed its pending motion, the Commission’s subsequent actions granted both of MCC’s requests and mooted MCC’s current motion. A similar issue was presented in *Havre Daily News*, wherein a newspaper filed a lawsuit seeking production of police reports and the City of Havre subsequently provided those police reports. *Havre Daily News, LLC*, ¶¶ 6-7. The Montana Supreme Court agreed with the City of Havre that “the issue pertaining to the release of the Reports was mooted by the Havre Daily News’s receipt of the unredacted report.” *Havre Daily News, LLC*, ¶ 30. The Commission’s recent decisions to compel Liberty to provide responses to MCC-010 and extend MCC’s testimony deadline similarly moots MCC’s pending motion requesting those actions.

II. MCC Should Not Be Allowed To File An Untimely Response To Liberty’s Motion For A Protective Order By Designating Its Response A “Motion to Compel.”

MCC cannot be allowed to avoid procedural deadlines by calling its objections to Liberty’s motion for a protective order something else. Although MCC frames its motion as a motion to compel, in reality MCC is using a mooted motion to compel as a mechanism to untimely object to Liberty’s motion for a protective order. *See* MCC’s Second Motion, p. 3 (acknowledging it filed the motion because “Liberty now claims confidentiality and seeks protection of the information”). MCC failed to file a timely response to Liberty’s pending motion for a protective order. The Commission should not allow MCC to respond to Liberty’s motion for a protective order by filing a stand-alone motion to compel. Instead, the Commission should disregard or deny MCC’s procedurally-deficient response to Liberty’s motion for a protective order. *See* Admin. R. Mont. 38.2.315.

Montana law allows the Commission to “issue a procedural order . . . which sets out the procedures to be followed by the parties.” Admin. R. Mont. 38.2.2702(1). When, as here, a procedural order has been entered “which specifies either procedures or times for the disposition of a case, such as the timing of discovery and data requests,” then the filing deadlines set forth in the “procedural order shall control.” Admin. R. Mont. 38.2.2702(3). Procedural Order No. 7392 generally establishes that responding parties “must file and serve [their] response brief within seven (7) calendar days of service of the motion.” PSC Docket No. D2014.12.99, Order No. 7392, ¶ 17 (Feb. 9, 2015). The only exception to that general rule concerns motions to compel; the Commission allows the parties fourteen calendar days to file a response to those motions. Order No. 7392, ¶ 14.

MCC is bound by the procedural deadline established in paragraph 17 of Procedural Order No. 7392. If MCC wished to respond to Liberty’s pending motion for a protective order, it was required file a response no later than June 17, 2015, just as the City did. *See* Admin. R. Mont. 38.2.313; *see also* Order No. 7392, ¶ 17. If MCC was unable to file its response by June 17, it could have filed a motion for an extension of time pursuant to Admin. R. Mont. 38.2.312. Instead of acting in accordance with Procedural Order No. 7392 and Montana law, MCC now attempts to file its response to Liberty’s motion for a protective order under the guise of a stand-alone motion to compel. The Commission must reject MCC’s untimely and procedurally-deficient filing because it does not comply with commission rules, commission orders, or Montana law. *See* Admin. R. Mont. 38.2.315.

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III. The Commission Should Grant Liberty's Motion For A Protective Order And Impose Special Provisions To Adequately Protect Liberty's Proprietary And Confidential Financial Model.

Even if the Commission considers MCC's untimely arguments in response to Liberty's motion for a protective order, the Commission should grant Liberty's motion for a protective order and impose the special provisions and non-disclosure agreement requested by Liberty. As an initial matter, it is unclear whether MCC generally opposes Liberty's motion for a protective order or whether MCC only objects to the special provisions Liberty has requested be imposed in its protective order. It does not appear that MCC objects to Liberty's enhanced non-disclosure agreement, because MCC did not address that request in its pending motion to compel. In any event, Liberty's motion for a protective order should be granted in its entirety because MCC has failed to establish the legal or factual basis necessary for denying Liberty's motion.

The Commission has legal authority to impose special provisions in a protective order upon application of a party "for good cause" shown. Admin. R. Mont. 38.2.5002(3). The Commission also has legal authority to approve non-disclosure agreements. *See* Admin. R. Mont. 38.2.5014(1) (requiring all interested parties to sign a "commission-approved nondisclosure agreement"). MCC does not dispute those legal conclusions in its response.

Liberty has requested the Commission impose special provisions in its protective order and use an enhanced non-disclosure agreement to ensure that Liberty's confidential and proprietary financial model does not fall into the hands of Liberty's competitors and, more specifically, is not used in the City's ongoing condemnation proceeding against Mountain Water. The Commission previously has recognized the importance of preventing competitors from accessing a private utility's confidential and proprietary information. In Order No. 7392f, the

Commission granted Mountain Water’s motion for a protective order in part because Mountain Water “identified a real and specific competitor in the Town of Apple Valley, which may attempt to condemn Park Water’s water utility operations in the Apple Valley.” PSC Docket No. D2014.12.99, Order 7392f, ¶ 16 (June 5, 2015).

The Commission appropriately realized that if Mountain Water’s competitors had access to Mountain Water’s confidential information, Mountain Water’s economic interests would be damaged. *Id.* The concerns the Commission guarded against in Order No. 7392f are squarely presented in Liberty’s motion for a protective order. If the Commission does not adopt enhanced protections in its protective order and non-disclosure agreement, Liberty’s confidential information could fall into its competitors’ hands and Liberty’s economic interests would be damaged. Thus, Liberty has demonstrated “good cause” for imposing special provisions in its protective order and using an enhanced non-disclosure agreement. *See Admin. R. Mont.* 38.2.5002(3).

MCC does not dispute that Liberty has established the “good cause” necessary to impose special provisions in Liberty’s requested protective order or use Liberty’s enhanced non-disclosure agreement. Instead, MCC argues that the special provisions Liberty has requested will make it more difficult for MCC to work with the information Liberty provides. MCC’s Second Motion, p. 5. In support of that argument, MCC’s counsel raises various concerns that are not grounded in fact or supported by any information from MCC’s expert. For example, MCC suggests that Liberty’s proposed WebEx access to the financial model will make it impossible for its expert “to work with the data and to make alternate runs of models with alternative assumptions and inputs.” MCC’s Second Motion, p. 5. This is simply not true. The only restriction on MCC’s expert’s use of Liberty’s financial model will be the expert’s inability

to save his work to his own computer, which is necessary to maintain Liberty's possession and protection of its proprietary information. On May 26, 2015, counsel for Liberty sent MCC's counsel the following email outlining the access Liberty would provide MCC's expert:

Monica:

We have come up with a way to provide Dr. Wilson access to the financial model on Liberty's system. He would be connected over the internet to a Liberty PC in one of Liberty's offices. The PC would be configured such that it would have access to the internet and the Microsoft Office 2010 suite (including Excel). Dr. Wilson would access the file via WebEx, which would give him keyboard and mouse control in order to work with the file.

Using this setup, the Dr. Wilson would be able to:

- View all cells, including formulas, and modify data and formulas
- Change the file (add rows/columns etc.) but not save the file to the same (original) filename, only to a new filename – this is to protect the integrity of the initial file. The new file could only be saved on the Liberty PC.

Please advise if this is acceptable to the MCC so we can discuss the timing of Dr. Wilson's review and testimony deadline.

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May 26, 2015 Email from Michael W. Green to Monica Tranel.

MCC also erroneously argues that Liberty will “watch every input and data point the MCC uses, and the MCC cannot save its work on an independent system.” MCC's Second Motion, p. 5. MCC's assertions ignore the repeated conversations between counsel and offers of written assurance that Liberty will not monitor Dr. Wilson's use of the model. Moreover, even if Liberty were not willing to offer these assurances, Liberty's ability to monitor access to its model does not impact MCC's expert's use or work. MCC would not be disadvantaged because Liberty is entitled to seek discovery from and cross-examine MCC's expert about how Liberty's

confidential information was used.² As a testifying expert, work product privileges do not apply and Liberty is entitled to full disclosure of any review or modification MCC's expert made to Liberty's confidential financial model. In light of Liberty's valid concerns about the risk of disclosure compelled in another forum or improper use of its model, the concerns MCC raises do not justify requiring conveying possession of Liberty's financial model to a Montana public agency or its expert witnesses.

MCC's unsupported argument that the special provisions Liberty has requested would restrict MCC from using Liberty's confidential financial model distracts from the decision-making process contemplated by Admin. R. Mont. 38.2.5002(3). Imposing special provisions will always be more burdensome than not; the critical analysis is determining whether special provisions are necessary. Pursuant to that administrative rule, the Commission should impose special provisions for "good cause" shown. MCC does not dispute that Liberty has satisfied the "good cause" standard in Admin. R. Mont. 38.2.5002(3). There is good cause for imposing special provisions because heightened protections are necessary to prevent Liberty's competitors from indirectly or directly using Liberty's confidential and proprietary financial information and especially to prevent the City from using Liberty's financial model in the condemnation action the City is waging against Mountain Water. Liberty has proposed a methodology for providing MCC's expert with virtually unfettered access to the financial model, as well as the ability to modify and review data, run his own models, and to save those models in a way that will remain accessible to him, but in Liberty's possession. This proposal strikes an appropriate balance

² At hearing and/or during discovery, Liberty could ask MCC and its expert to describe exactly what the expert did with the model, including any all and alternative assumptions used and/or programmed by the expert, and a detailed description of each and every data input and data point used by the expert in manipulating Liberty's financial model. Both MCC and its expert would have to provide complete, detailed responses to any and all such questions. MCC's suggestion that its expert must be allowed to have *carte blanche* access to the model without any oversight is misguided and contrary to established practice and law. In fact, to the extent MCC's expert intends to modify the model and save modified versions of the model, the expert must preserve any and all such saved formats and produce them to Liberty in this docket.

between protection of Liberty's highly confidential information and the claimed need for MCC to have its witness review and analyze the information.

CONCLUSION

The Commission should disregard or deny MCC's pending motion to compel responses to MCC-010 and grant MCC additional time to submit testimony. MCC's Second Motion, p. 5. After MCC filed its second motion to compel, the Commission granted the relief MCC requested in Order No. 7392k and the Commission's June 29, 2015 notice of staff action. Because MCC has received the relief it requested, its pending motion has been rendered moot and there is nothing further for the Commission to do. *See Havre Daily News, LLC*, ¶ 30.

The Commission also should reject MCC's untimely attempt to respond to Liberty's motion for a protective order under the guise of a motion to compel. *See Admin. R. Mont.* 38.2.315. If MCC wished to respond to Liberty's motion to compel, it was required to do so no later than June 17, 2015, just as the City did.

If the Commission does consider MCC's untimely response to Liberty's motion for a protective order, the Commission should still grant Liberty's motion in its entirety. There is good cause for imposing special provisions in Liberty's requested protective order and using an enhanced non-disclosure agreement in this docket.

For the foregoing reasons, the Commission should disregard or deny MCC's pending motion to compel.

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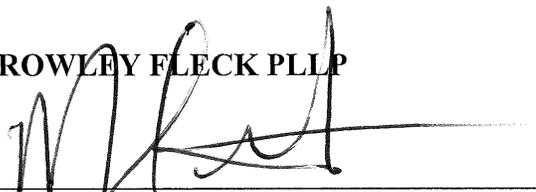
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Submitted this 2nd day of July, 2015.

CROWLEY FLECK PLLP

A handwritten signature in black ink, appearing to read 'Michael Green', is written over a horizontal line.

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**ATTORNEYS FOR LIBERTY UTILITIES CO. AND
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on July 2nd, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S RESPONSE TO MONTANA CONSUMER COUNSEL'S RENEWED MOTION TO COMPEL A COMPLETE RESPONSE TO MCC-010 was served via electronic and U.S. mail on:

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