

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

**THE MONTANA CONSUMER COUNSEL'S
REPLY IN SUPPORT OF
MOTION TO COMPEL
COMPLETE RESPONSE TO MCC-010**

Intervenor Montana Consumer Counsel (MCC) requests an Order compelling Liberty Utility (Liberty) to fully answer and respond to MCC data request 010. Liberty opposes MCC's motion to compel.

A. Introduction

Liberty confuses two entirely separate issues: MCC's motion to compel a response to MCC-010, and Liberty's request for a protective order. A motion for protective order has nothing to do with a motion to compel. The MCC did not object to Liberty's motion for a protective order, which does not equate to a waiver of receipt of Liberty's financial information.

Liberty's refusal to produce its financial information for MCC's independent use and analysis is an unwarranted intrusion into MCC's work product privilege. Liberty's insistence on limiting MCC's ability to access, save

and analyze Liberty's financial data violates MCC's work product privilege. The MCC's motion to compel and further motion to compel has nothing to do with whether Liberty's financial information is protected. Liberty may not oversee and monitor MCC's analysis of Liberty's financial information. Anything less than production of the data to MCC for MCC's use, outside the purview of Liberty, amounts to a failure to reasonably produce the information. Liberty is simply not entitled to observe and retain control over MCC's work product. Liberty's failure to produce its financial information to MCC should be sanctioned.

The Commission should either order Liberty to produce its financial information responsive to MCC-010 for MCC's independent use, or dismiss this case and reject Liberty's Application for its refusal to produce its financial data, as contemplated by paragraph 15 of the procedural order in this docket.

B. Argument

Liberty argues: 1) Liberty complied with the terms of the Commission's order granting MCC's request for relief; 2) the MCC's motion to compel is an untimely response to Liberty's motion for a protective order; and 3) MCC failed to establish "no good cause" under the Commission's administrative rules governing protective orders "to impose special provisions in Liberty's requested protective order." Liberty's arguments should be rejected.

1. Liberty has not produced the information requested in MCC-010

Liberty has not produced the information requested in MCC-010. To the extent that Liberty considered this information confidential, it was obligated under

the Commission's procedural schedule to make a motion for a protective order at the same time it was due to provide its response to MCC-010, which was May 4, 2015.¹ Liberty did not file a request for protection of the information until June 10, 2015, when Liberty also filed a "supplemental response" in which it identified for the first time, *but did not produce*, "An Excel Workbook containing Liberty's financial model" as responsive to MCC's request.

Liberty has yet to produce *any* information responsive to MCC-010, two months after the deadline for responding to MCC's original request. Liberty argues that MCC is not entitled to the Excel workbook to use under MCC control and direction. Liberty has not complied with the Commission's order. Rather, Liberty has indicated in its July 2 supplemental response that it will provide MCC access to Liberty's financial information subject to restrictions that inherently and impermissibly interfere with MCC's work product immunity. Specifically, Liberty asserts (Supplemental Response at 8-9) that it has complied with Commission Order No. 7392k by proposing to MCC that it (Liberty) is willing to allow MCC's expert access to its financial model only under the restrictions that MCC's expert:

. . . 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

¹ The Commission's procedural order provides:
12. If a data request asks for protected information, the responding party must file a motion for a protective order as soon as practicable, **but no later than the deadline to respond to the data request**. (Emphasis added.)

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.

Liberty goes on to argue (Supplemental Response at 9) that its counsel’s “offers of written assurance that Liberty will not monitor Dr. Wilson’s use of the model” are adequate protection of any MCC claim of work product privilege.

Liberty’s perception of a need to “assure” MCC and the Commission that it will “not monitor” MCC’s use of the model demonstrates that, under its proposed “compliance” with the Commission’s directive to produce materials responsive to MCC-010, Liberty would in fact at all times remain able to survey MCC’s work.

This is an unacceptable and unauthorized intrusion into MCC’s work product privilege.

The core purpose of the work product doctrine is to shelter the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case. See *Draggin’ Y Cattle Co. v. Addink*, 2013 MT 310 ¶ 44, citing *Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 116, 861 P.2d 895, 910 (internal citations and quotations omitted). “The reality of our legal system demands that the embraces of the protection also extend to agents of the

attorney." *State v. Miller*, 231 Mont. 497, 513, 757 P.2d 1275, 1285 (1988) (citing *U.S. v. Nobles*, 422 U.S. 225, 238, 95 S. Ct. 2160, 2170, 45 L. Ed. 2d 141 (1975)).

Liberty's argument is essentially a claim that it is entitled to observe, monitor, save and overwrite the ongoing thought process of MCC's expert witness.

Liberty justifies its claim of entitlement to monitor MCC's work product on the argument that it may cross examine MCC's expert witness regarding MCC's use of the material. Cross examination of an expert witness is independent of the work product used between an expert and an attorney in developing a final position. Were this not the case, there would be no work product privilege.

Liberty may not participate in MCC's work product and oversee MCC's review and analysis of Liberty's data. The fact that Liberty may cross examine MCC's expert witness does not negate the work product doctrine. MCC's development of its case is outside the purview of Liberty's control, and Liberty must provide its financial data to allow MCC meaningful use of that data. Liberty's failure to support this argument with legal authority should result in rejection of the argument outright.

In fact, Liberty's claim is inconsistent with legal authority in Montana.² The right to cross examine an expert witness about the underlying data and facts upon which that expert relied is a far cry from being able to step into the thought

² M.R.Evid. 705 provides:

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

process of the expert and the attorney while developing a final opinion and work product. Liberty's claim that it is entitled to observe MCC's use of Liberty's financial data absolutely undermines the work product doctrine.

The degree of intrusion that Liberty's proposed protective order's "special provisions" would represent into the opinion work product of MCC and its expert is both unprecedented and impermissible. The opportunity that Liberty seeks to arrogate to itself to monitor Dr. Wilson's exploration of Liberty's financial model for the acquisition effectively places Liberty in the middle of an ongoing dialogue between MCC and Dr. Wilson concerning "the mental impressions, conclusions, opinions, or legal theories of [MCC's] attorney or other representative concerning the litigation" This is prohibited by M.R.Evid. 26(b)(3)(B). No amount of the circumlocution and distraction attempted in Liberty's supplemental response will change that fact, or mitigate the impermissible nature of the intrusion that its proposed "special conditions" attempt. See e.g., *Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416, 420-421 (N.D. Ill. 2011); *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 664 (S.D. Iowa 2000). Nor will promises not to peek, or "offers of written assurance that Liberty will not monitor Dr. Wilson's use of the model" (Supplemental Response at 9) redress the intrusion. Put another way, affording Liberty and its counsel the opportunity – at will – to insert themselves into either Dr. Wilson's thought processes or, by implication, into dialogue between MCC and its expert concerning theories of the case would preemptively strip the MCC of that "certain degree of privacy, free from unnecessary intrusion

by opposing parties and their counsel”³ that work product immunity is intended to protect. See, e.g., *In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997), *cert. denied sub nom. McGraw v. Better Government Bureau*, 522 U.S. 1047 (1998) (attorney’s “choice and arrangement constitutes opinion work product because Allen’s selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation”).

Liberty makes no argument to the contrary. Rather, Liberty reverts to its untenable procedural argument that MCC is precluded from arguing that production of financial information in response to MCC-010 is required because MCC did not respond to Liberty’s request for protection of that information. MCC is neither obligated to object to Liberty’s claim of confidentiality, nor barred from requesting that this Commission enforce Liberty’s obligation under Order No. 7392k to provide full and complete responses to MCC-010, which to date has not happened.

Liberty also argues that MCC’s request is moot because the Commission granted MCC’s initial motion to compel. Brief p. 4-5. The fact remains; however, that to date Liberty has not provided the requested information. Unless Liberty produces the information in Excel spreadsheet format as requested by MCC, MCC’s motion is not moot. MCC insists on its right to unimpeded review of the financial information it requested months ago, which Liberty agrees is relevant, and which the Commission ordered to be produced, in order to proceed with its

³ *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

analysis of the transaction at issue here. Liberty's continued refusal to produce the information only serves to further delay a decision.

MCC's motion to compel full and complete responses and actual production of information in response to MCC-010 should be granted. MCC should be granted not less than three weeks to analyze the information and prepare its testimony. Liberty's failure to comply with the procedural schedule and ARM 38.2.5007(9) allows the Commission to change the date on which its decision may be issued.

2. MCC's motion to compel is unrelated to Liberty's motion for a protective order.

Liberty argues that MCC filed a motion to compel because there was more time to file that motion than to file a response to Liberty's request for a protective order. Brief p. 3-4. This argument is a red herring. Liberty's request for a protective order is separate and independent from MCC's motion to compel production of Liberty's financial information. MCC has no obligation to intervene, object to or address Liberty's request for a protective order. ARM 38.2.5001 et seq.

Liberty filed its Application in this docket and MCC is entitled to review the financial information supporting that Application in order to provide the Commission with information regarding Liberty's Application. If Liberty requires a Commission decision on its Application, then it must produce the financial

information supporting the Application. MCC should not be required to relinquish its work product privilege in order to receive that information.

Liberty's complaint that MCC's motion to compel is in fact a response to Liberty's request for an order of protection conflates two separate issues.⁴ MCC requests the Commission order Liberty to produce its financial information to MCC for MCC's review and analysis independent of Liberty's control. No other result is warranted if the Commission is to make an informed decision regarding Liberty's Application to purchase Mountain Water.

MCC seeks an order compelling Liberty to produce its financial information in response to MCC-010. Liberty's refusal to comply with the Commission's order granting MCC's initial motion to compel should not be condoned. Immediate production of Liberty's financial information should be ordered, or alternatively, the Commission should dismiss Liberty's Application as allowed by the procedural order:

15. In response to a party's failure to answer a data request, the Commission may: (1) refuse to allow it to support or oppose related claims; (2) prohibit it from introducing related evidence; (3) strike pleadings, testimony, or parts thereof; (4) stay the proceeding until the request is satisfied; or (5) dismiss the proceeding, or parts thereof.

⁴Liberty states that MCC's deadline for filing testimony was extended by "nearly three months." (Brief p. 4). Liberty alone is responsible for the delays created in this docket. It alone chose to ignore the procedural schedule and claim confidentiality without filing a motion for a protective order. See para. 12 of the procedural schedule. Liberty refused to produce information routinely provided to the MCC in transactions of this nature. Commission rules provide the Commission the option of changing the anticipated date of decision in a docket where the provider of information causes delay, as Liberty has done here. ARM 38.2.5007(9).

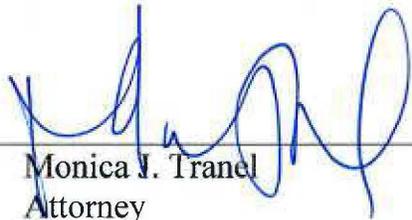
MCC seeks immediate production of Liberty's financial information in the form requested by MCC or alternatively, dismissal of Liberty's Application.

C. Conclusion

Liberty should be compelled to provide full and complete responses to MCC-010. Alternatively, the Commission should dismiss Liberty's Application for its failure to produce its financial information.

DATED this 16th day of July, 2015.

By: _____



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