

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

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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

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**CITY OF MISSOULA’S MOTION TO COMPEL, FOR RECONSIDERATION OF  
ORDER NO. 73921, AND FOR EXTENSION OF DEADLINES**

The City of Missoula (“City”) moves the Montana Public Service Commission (“PSC”) to compel Liberty Utilities Co. (“Liberty”) to produce the materials ordered under Order No. 72931 and to reconsider the “special provisions” granted in Order No. 72931. In clear violation of the PSC’s recent order, Liberty has provided no information to the City, the PSC, or the Montana Consumer Council (“MCC”). Liberty had refused to provide any information until June 10, 2015, and then proposed providing the information in a manner that hinders actual use of the information and violates the work product doctrine. Liberty’s continued refusal to provide the information in a meaningful manner is completely unacceptable and a disservice to the customers it one day hopes to serve.

For the reasons set forth below, the City respectfully requests the PSC order Liberty to provide actual copies of the information determined, by itself, to not be “due

diligence” materials, reconsider the problematic requirements of viewing the remaining information at the Crowley Fleck offices, and extend the deadlines in this docket.

**I. The PSC should order Liberty to produce actual copies of the non-due diligence documents identified as responsive to MCC-010, PSC-033(b), and CITY-031.**

The conclusion of Order No. 72931 was quite clear: “Liberty’s request for special provisions . . . is GRANTED with respect to Liberty’s *due diligence materials* and *financial model*.” Order No. 72931, ¶ 52 (emphasis added). The order clearly creates two classes of documents: (1) due diligence materials and the financial model; and (2) non-due diligence materials. As the next two paragraphs of the order illustrate, those categories are to be treated differently. For the non-due diligence materials, Paragraph 53 ordered Liberty to “*submit* its confidential information within 5 calendar days of the service date of this order.” *Id.*, at ¶ 53 (emphasis added). Then, for the due diligence materials and the financial model, paragraph 54 noted that “Liberty will make its confidential information *subject to special provisions* [special provisions were granted for “due diligence” materials and the financial model] available for inspection.” *Id.*, at ¶ 54. One category was to be “submitted” and the other was to be “inspected.”

When the PSC, MCC and the City served PSC-033(b), MCC-010, and CITY-031 on Liberty, Liberty’s answers specifically noted what was to be considered due diligence and what was not due diligence. Of all the documents identified as responsive, Liberty specifically noted only a few items were actually due diligence material. Principles of legal construction require that when one expressly includes something, it impliedly excludes the alternative. Black’s Law Dictionary (Bryan A. Garner ed., 10th

ed., West 2014) (definition of *expressio unius est exclusio alterius*); *Omimex Canada, Ltd. v. Montana Department of Revenue*, 201 P.3d 3, 6 (Mont. 2008) (expression of one implies exclusion of another).

Only the September 1, 2014 PowerPoint and the Project Orchard Due Diligence Report contained classifications as actually being due diligence materials. Regarding the September 1, 2014 PowerPoint, Liberty clearly stated that “[e]ight pages of that deck are a due diligence appendix.” Liberty’s own statement demonstrates the remainder of the slides are *not* due diligence. The Project Orchard Due Diligence Report, as aptly noted in its title, *is* due diligence. The remaining materials (September 15, 2014 PowerPoint, board minutes, board resolution, and tax returns) had no classification whatsoever as “due diligence” materials.

Liberty claimed in its responses to PSC-033(b), MCC-010, and CITY-031 that two documents contained privileged material: (1) part of the September 1, 2014 PowerPoint; and (2) the Project Orchard Due Diligence Report. Liberty’s claims were not upheld by the PSC in Order No. 7392l. Instead, the PSC correctly ordered Liberty either submit or make available for viewing the respective documents without regard to whether the material was claimed as privilege or not. *See* Order No. 7392l, ¶¶ 52–54. Liberty’s failure to provide the portions they claim are privileged is a violation of Order No. 7392l and they should be ordered to provide the material as the PSC ordered. Therefore, the City respectfully requests that the PSC order Liberty to provide actual copies of the non-due diligence materials identified in their own responses to the data requests.

II. **The City requests the PSC reconsider the special provisions granted to Liberty regarding its due diligence materials.**

Regarding the clearly due diligence documents, Liberty has continued to refuse to make the information the PSC ordered to be produced available in any meaningful manner. The PSC ordered the City, Liberty, and the MCC to make the information available for inspection “at a place and time mutually agreed upon.” Order No. 73921, ¶ 47. Liberty’s counsel made arrangements to have copies of the non-privileged claimed materials available for viewing at the Crowley Fleck offices in Helena and Missoula **with a Crowley Fleck attorney or paralegal present in the room.** See Email from Mike Green, July 31, 2015 (attached as Exhibit A) (emphasis added). Liberty counsel also said the City attorneys and experts would *only* be able to work and view the information and they would “not allow any requesting party to copy Liberty’s confidential information **in any way.**” *Id.* (emphasis added). This is the same position Liberty articulated in its responses to the data requests which prompted the MCC’s Motion to Compel.

The presence of a Crowley Fleck attorney or paralegal while the City or its experts review the information is an unacceptable violation of the work product doctrine. The individual would be able to see what the City focused on, discussed, wrote down (because they maintain they will not allow any copying, which must be taken to mean a review of notes so that no copying is actually done), and generally their preparation. There will also be no opportunity for meaningful discussion of the documents between counsel and experts. The work product doctrine enables

“attorneys to prepare cases without fear that their work product will be used against their clients.” *Am. Zurich Ins. Co. v. Montana Thirteenth Jud. Dist. Ct.*, 280 P.3d 240, 248 (Mont. 2012). Access to information with opposing counsel present in the room is not “reasonably private” and does not provide “meaningful access” in any reasonable sense. Order No. 73921, ¶ 47, 49.

Liberty is the entity seeking approval to purchase Mountain Water. As a product of that review, the PSC, the MCC, the City, and other parties directly involved in the matter, must review Liberty’s financial information and due diligence materials to ensure the acquisition does not put a vital public service at risk of corporate malfeasance and poor governance. Therefore, Liberty’s own documents and preparations are subject to extensive scrutiny and have a lessened expectation of privacy due to the very nature of the regulated utility business. The right to serve the public with a monopoly means the public has a window into the corporation with the monopoly. Liberty seems to want the right to a monopoly, but is unwilling to provide any realistic access to their information. If Liberty’s actions in this docket are any indication, they do not plan to be an open or transparent owner of Mountain Water.

Discovery before the PSC is subject to the Montana Rules of Civil Procedure. Admin R. Mont. 38.2.3301 (“Techniques of prehearing discovery permitted in state civil actions may be employed in commission contested cases, and for this purpose the commission adopts rules 26, 28 through 37.”). Rule 34 is explicit:

A party may serve on any other party a request within the scope of Rule 26(b):

(1) **to produce and permit** the requesting party or its representative to **inspect, copy, test, or sample** the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically-stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium.

Mont. R. Civ. P. 34 (emphasis added). Liberty has identified all the documents in dispute as relevant and the PSC was clear: "**[n]othing in . . . this rule [incorporating the Montana Rules of Civil Procedure] shall be construed to limit the free use of data requests among the parties.**" Admin. R. Mont. 38.2.3301 (emphasis added). The parties are entitled to be able to 1) inspect; 2) copy; 3) test; **or** 4) sample the information determined to be relevant. Yet, Liberty has maintained that no copies shall be made and the PSC's order only allowed an opportunity to "review and work" with the information. Order No. 72931, ¶ 47. This is unworkable and an incorrect understanding of the Montana Rules of Civil Procedure.

Protective orders are allowed for sensitive information, such as the information here. Mont. R. Civ. P. 26(c). When faced with a somewhat similar issue in *Great Falls Tribune v. Montana Public Service Commission*, the Montana Supreme Court told the PSC it could protect trade secrets with "the same or similarly reasonable means" used in the Uniform Trade Secrets Act such as any

*reasonable means*, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the

litigation not to disclose an alleged trade secret without prior court approval.

82 P.3d 876, 887 (Mont. 2003) (emphasis original). That list does not contemplate only viewing the documents, no copies of the relevant documents, no ability to present documents during the hearing, or that an attorney or paralegal from the opposing side would be present. Instead, the options given are a protective order to ensure no disclosure, NDAs, in-camera hearings, and sealing the records. For example, the protective order during the condemnation action was essentially a NDA. Various documents were classified and governed in certain ways by that order. Similarly, the PSC could issue a protective order for all the disputed information with the accompanying NDAs that provides meaningful and complete access by giving the City and the MCC actual copies of the documents, but subjects them to penalties if the information was disclosed.

Without actual copies of the documents and not being allowed to copy on-site, only “review and work” with the documents, the City’s attorneys and experts will have to prepare their analyses, legal case, and testimony in a Crowley Fleck meeting room without access to their own resources in their own offices. A thorough review of Liberty’s financial information is fundamental to analyzing whether Liberty’s acquisition is good or bad. To conduct this analysis under the framework provided by Liberty, the City (and the MCC) will have to fly their experts into Missoula or Helena, pay for the costs associated with their extended stay to conduct the analysis, and then fly them back. This is a financial burden Liberty should be required to pay. If Liberty

cares this much about its financial information and due diligence materials, it should shoulder the burden.

The City's attorneys and experts will also not be able to use the documents as exhibits because they are not allowed to have an actual copy. There will be no functional way for the City to present a case to the PSC. An attorney testifying that a Liberty document said something is inadmissible. Relying on recollections or limited notes that do not constitute a "copy" of something is an incredibly imprecise and unreliable manner of conducting financial and legal analysis not to mention presenting a case at a hearing. This is an unacceptable burden for the parties to bear when the only entity demanding these restrictions is Liberty.

The City and the MCC have both filed all of the appropriate NDAs as required by the PSC. The City and the MCC are subject to lawsuits and potential punitive damages if they use Liberty's information in an improper manner. These protections should be sufficient to ensure information is protected. As demonstrated in the condemnation case, the City, Mountain Water, Carlyle, and the Employees all dealt with confidential information regularly. There is no reason to think that the City or the MCC would willfully go and violate the NDAs they have signed or begin distributing Liberty's information publicly or to its competitors. The City is *not* a "rival buyer" of the Mountain Water system. The City has a Preliminary Order of Condemnation which is a right to purchase the system for a price determined by the valuation commissioners. There is no "secondary trial" where the City must face off against Liberty as a rival purchaser. The City is one of Mountain Water's largest customers and its leadership

represents the entire City of Missoula. There will be no example where the City is bidding against Liberty for Mountain Water. Liberty's conclusion that the City and the MCC will violate the NDA is simply unreasonable and it ultimately it serves to provide unrealistic access to the core information necessary to conduct this inquiry, which is an utter and complete disservice to the consumer. The PSC should reconsider its order requiring the due diligence information to be viewed in-house at the Crowley Fleck offices and order Liberty to provide the information subject to PSC's NDAs to the City and the MCC.

**III. The PSC should extend the procedural deadlines in this docket so Liberty is not rewarded for its delaying tactics and the other parties are not burdened by their lack of access to Liberty information.**

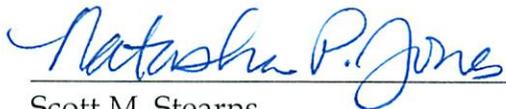
The additional time requirements involved with brining experts to Helena or Missoula as well as the other procedural delays regarding these discovery responses demands an extension of the deadlines in this case. Liberty should have provided this information to the City, the PSC, and the MCC three months ago. Liberty objected to the PSC's data requests on April 21, 2015 and the MCC's and the City's on May 4, 2015. Since then, the City and the MCC have demonstrated that the information is relevant and responsive and the PSC has ordered it be produced. If Liberty had provided the information as requested when requested, all entities involved would have had over three months to examine the information and provide competent and thorough analysis. As noted above, the financial health of Liberty is core to the analysis of whether or not the acquisition is good or bad. Liberty has attempted to deny access to this information in every possible manner. The PSC needs thorough analysis in order to

make an appropriate decision and both the City and the MCC need this information to present their cases to the PSC. The City and the MCC should not have to bear the burden of preparing testimony in a few short days when Liberty is the entity that has refused to be forthcoming and willing to provide meaningful access to the information.

#### **IV. Conclusion**

Therefore, the City respectfully requests the PSC to order Liberty to provide actual copies of the non-due diligence information demanded in Order No. 73921 and to reconsider the requirements for due-diligence information as well. The City also requests an update to the scheduling order that reflects the lost time created by Liberty and does not punish the City, the MCC, and the PSC for the ongoing delay tactics used by Liberty.

Dated this 5<sup>th</sup> day of August 2015.



Scott M. Stearns  
Natasha Prinzing Jones  
BOONE KARLBERG P.C

Jim Nugent  
City of Missoula  
CITY ATTORNEY'S OFFICE

*Attorneys for the City of Missoula*

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 5<sup>th</sup> day of August 2015:

Thorvald A. Nelson Nikolas S. Stoffel Holland & Hart LLP 6380 South Fiddlers Green Circle, Suite 500 Greenwood Village, CO 80111 tnelson@hollandhart.com nsstoffel@hollandhart.com cakennedy@hollandhart.com aclee@hollandhart.com	Michael Green Gregory F. Dorrington CROWLEY FLECK PLLP P.O. Box 797 Helena, MT 59624-0797 mgreen@crowleyfleck.com gdorrington@crowleyfleck.com cuda@crowleyfleck.com jtolan@crowleyfleck.com
Robert Nelson Monica Tranel Montana Consumer Counsel 111 North Last Chance Gulch, Suite 1B P.O. Box. 201703 Helena, MT 59620-1703 robnelson@mt.gov	Christopher Schilling Chief Executive Officer Leigh Jordan Executive Vice President Park Water Company 9750 Washburn Road Downey, CA 90241 cschilling@parkwater.com leighj@parkwater.com
John Kappes President & General Manager Mountain Water Company 1345 West Broadway Missoula, MT 59802-2239 johnk@mtwater.com	Barbara Hall Legal Director The Clark Fork Coalition P.O. Box 7593 Missoula, MT 59801 Barbara@clarkfork.org
Todd Wiley Assistant General Counsel Liberty Utilities 12725 West Indian School Road, Suite D-101 Avondale, Arizona 85392 todd.wiley@libertyutilities.com	Gary Zadick #2 Railroad Square, Suite B P. O. Box 1746 Great Falls, MT 59403 gmz@uazh.com
Kate Whitney Public Service Commission 1701 Prospect Avenue Helena, MT 59620-2601 kwhitney@mt.gov <b>ORIGINAL SENT VIA OVERNIGHT DELIVERY</b>	

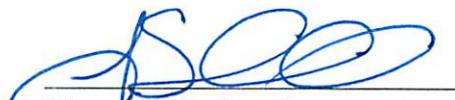
  
Tina Sunderland

EXHIBIT “A”

EXHIBIT “A”

## Randy Tanner

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**From:** Mike Green <mgreen@crowleyfleck.com>  
**Sent:** Friday, July 31, 2015 1:20 PM  
**To:** Randy Tanner  
**Cc:** Scott Stearns; Tina Sunderland; John M. Semmens  
**Subject:** Re: DOCKET NO. D2014.12.99

Randy.

We have offered access under terms we believe comply with the Commission's order. The board presentations, discussions and decisions are all part of Liberty's internal review of the transaction and covered by the Commission's order governing the special protections. It is also consistent with the Commission's own review of the materials. Our offer for access in our office stands, but I am not required or authorized to deliver copies to you.

Mike Green  
CROWLEY FLECK  
[406-457-2021](tel:406-457-2021)  
Sent from my iPhone

On Jul 31, 2015, at 12:21 PM, Randy Tanner <[rtanner@boonekarlberg.com](mailto:rtanner@boonekarlberg.com)> wrote:

Mike,

We do not believe your reading of Order 73921 is correct.

Paragraph 52 of the order states that Liberty's request for special provisions (viewing in-house at Crowley Fleck's office) applies only "with respect to Liberty's due diligence materials and financial model." The next paragraph orders Liberty to submit – not view in person – the remaining confidential information. The order clearly creates two categories of information: due diligence/financial model and non-due diligence materials. Further, the PSC did not grant your motion with respect to claims of attorney/client privilege.

In Liberty's own responses to MCC-010, PSC-033(b), and CITY-031, Liberty freely acknowledges that some of the purported confidential information is "due diligence" and some is not. From the September 1, 2014 PowerPoint deck, your response clearly stated that only "[e]ight pages of that deck are a due diligence appendix." The other slides are not due diligence. The PowerPoint deck from September 15, 2014 is not classified as due diligence. Further, Liberty's tax returns; the minutes from the board meetings on August 14, 2015, September 4, 2015, and September 15, 2015, and the September 15, 2015; and the Liberty board resolution are also not due diligence. Liberty must "submit" all of these non-due diligence materials to the City, the MCC, and the PSC, as required by the PSC's protective order.

Please deliver copies of this information by the end of the day today, as required by the PSC's order. If you do not provide copies of the information – as ordered by the PSC – we will file a motion

to compel. By refusing to provide copies of the documents the PSC ordered Liberty to provide, Liberty is only creating more delay that will require further extensions of the deadlines in this case.

As mentioned in my previous e-mail, we further intend to file a motion for reconsideration, asking the PSC to reconsider its ruling on in-person viewing of the due diligence and financial models.

Randy

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**From:** Mike Green [<mailto:mgreen@crowleyfleck.com>]  
**Sent:** Friday, July 31, 2015 9:57 AM  
**To:** Randy Tanner  
**Cc:** Scott Stearns; Tina Sunderland; John M. Semmens  
**Subject:** RE: DOCKET NO. D2014.12.99

Randy:

Thank you for initiating contact regarding the discovery documents in the pending PSC case. I am hopeful we reach an agreement to provide you and your experts access to Liberty's confidential documents. As an initial matter, Liberty is not obligated to provide the City or its experts access to the information outlined in the second paragraph of your email. In addition, we are not obligated to and will not be delivering to you copies of any of the documents referenced in your email. Rather, we will comply with the Commission's order by making copies of information subject to the order available in the offices of Liberty's counsel.

The information subject to the protective order are those items identified in our supplemental responses to the data requests you referenced. As a result, Liberty is obligated to provide the City's counsel access to copies of the following only:

1. The non-privileged portion of the PowerPoint deck dated September 1, 2014 consisting of 36 total pages, presented to the APUC Board. Eight pages of that deck are a due diligence appendix which was prepared by counsel, is an attorney/client communication and is withheld on privilege grounds.
2. The PowerPoint deck dated September 15, 2015, consisting of eight pages, presented to the APUC Board;
3. The excerpt certified by the corporate secretary and general counsel of Algonquin Power & Utilities, Co. ("APUC") of the APUC minutes from its board meetings on August 14, 2015, September 4, 2014, and September 15, 2014;
4. the Board Resolution of Liberty Utilities approving the Western Water final bid on September 15, 2014; and
5. the U.S. consolidated tax returns for Liberty Utilities for 2012 and 2013.

I have made arrangements for a Crowley Fleck attorney or paralegal to be present at mutually acceptable times starting on Friday, July 31, to provide the three Boone Karlberg attorneys who have signed NDA's access to copies of these materials in a conference room in our Missoula or Helena office. To facilitate your review, one of our attorneys or paralegals will be present and Liberty will arrange to have an appropriate representative available by phone to answer informal questions reviewers might have. Please contact John Semmens at 457-2015 to coordinate times. We will extend the same opportunity for review of these documents to your outside experts upon notification and execution of the required NDA.

As you know, Liberty considers and the Commission determined that these materials are highly sensitive and subject to special protections. As a result, Liberty expects that all individuals entitled to view Liberty's non-privileged, confidential

information will comply with Order No. 73921 and Montana law. Liberty will allow the entitled individuals to “review and work with” Liberty’s non-privileged, confidential information. Order No. 73921, ¶ 47. Liberty will not allow any requesting party to copy Liberty’s confidential information in any way. In anticipation that authorized reviewers may wish to take notes, Liberty will provide pencils, pens and yellow sheets of paper that are marked with a clear indication that the paper contains confidential information for note-taking purposes use. See Admin. R. Mont. 38.2.5022(2).

Please indicate by reply to this email your agreement to this arrangement, and contact John to arrange mutually acceptable times. Please contact me with any comments or questions about our proposed access arrangements.

Michael W. Green  
Crowley Fleck PLLP  
900 N. Last Chance Gulch, Suite 200  
Helena, Montana 59601 USA  
voice 406-457-2021 fax 406-449-5149  
[mgreen@crowleyfleck.com](mailto:mgreen@crowleyfleck.com)

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**From:** Randy Tanner [<mailto:rtanner@boonekarlberg.com>]  
**Sent:** Thursday, July 30, 2015 2:39 PM  
**To:** Mike Green  
**Cc:** Scott Stearns; Tina Sunderland  
**Subject:** RE: DOCKET NO. D2014.12.99

Mike,

Here are NDAs for Scott and me. We'll get NDAs from the experts to you before they review the material.

Thanks,

Randy

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**From:** Randy Tanner  
**Sent:** Thursday, July 30, 2015 8:53 AM  
**To:** 'Mike Green'; Gary Zadick; Scott Stearns; Tranel, Monica; Thor Nelson; '[nsstoffel@hollandhart.com](mailto:nsstoffel@hollandhart.com)'; Greg Dorrington; Nelson, Robert (MCC); '[barbara@clarkfork.org](mailto:barbara@clarkfork.org)'  
**Subject:** RE: DOCKET NO. D2014.12.99

Mike,

I'm e-mailing in regard to Liberty's responses to PSC-033(b), MCC-010, and CITY-031. The City's attorneys and experts will sign and deliver to you the standard non-disclosure agreement, as ordered by the PSC in Order No. 73921. Accordingly, by this Friday, please send us copies of Algonquin's board minutes from the three meetings, Liberty's purchase resolution, the September 1st PowerPoint (except the 8 pages identified as "due diligence"), the September 15th PowerPoint, and Liberty's 2012 and 2013 tax returns.

With respect to Excel workbook, the 8 pages from the Sept. 1st PowerPoint, and the Sept. 1st due diligence report, we will not be able to reach an agreement for in person viewing by Friday. Even if Liberty chartered a flight for our experts to bring them to Montana to view the documents, the timeline would be impossible to meet. Unfortunately, this is a problem that Liberty has created by refusing to provide copies of the relevant documents.

Unless Liberty agrees to provide copies of these documents, we will file a motion to reconsider, asking the PSC to extend the timeframe for in person viewing, extend other deadlines in this matter, and order Liberty to pay the travel costs for the City's experts.

Thanks,

Randy

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