

**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 RENEWED MOTION TO DISMISS OR,
IN THE ALTERNATIVE, COMPEL ACCESS AND STAY THE PROCEEDINGS**

This Motion is the seventh motion that either the City or the Montana Consumer Counsel has been forced to file on account of Liberty’s refusal to comply with the Commission’s discovery orders. In its most recent effort at ignoring the Commission’s Orders, Liberty now refuses to provide access to its due diligence materials and financial model because the experts the City designated to view the material are also participating in the condemnation proceeding. Liberty does not get to pick and choose which of the City’s experts can view the material. Its position is wholly unsupported. The City’s experts are well aware of the limitations imposed by the NDAs, as well as the Commission’s express order that “abuse of discovery must not be dealt with leniently.” (Order 7392o, ¶ 31.) The City has repeatedly assured both Liberty and the Commission that it is not using discovery in this case as a subterfuge. The only thing that Liberty’s actions demonstrate is that it has no interest in abiding by the Commission’s orders or exercising any transparency if it (or, more correctly, Algonquin) is allowed to do

business in Montana. The City asks that the Commission dismiss these proceedings or, in the alternative, stay the proceedings, compel Liberty to provide access to the material, and reset all deadlines (including the hearing) once Liberty provides access.

I. Liberty refuses (again) to provide the City access to discovery in violation of the Commission's orders and without any basis in law or fact.

Liberty's August 25th e-mail to the City, in which it cancelled the August 26th viewing of the material, is littered with paranoia and unsubstantiated argument. (See Exhibit A.) Liberty's principal concern is that the City's retention of Dr. Vinso and Mr. Hayward is a "thinly-veiled attempt to gain confidential information for its valuation case [in the condemnation proceeding]." (*Id.*) Liberty's argument utterly ignores the City's position in the condemnation case: The City has moved to exclude all evidence or testimony related to Algonquin and Liberty's proposed purchase of Park Water. (See City's Motion in Limine, attached as Exhibit B at pp. 3-9.) That, of course, includes Algonquin and Liberty's due diligence and financial models. The City has repeatedly argued in the condemnation proceeding that Algonquin and Liberty's valuation is not relevant for a host of reasons. As far as the City is concerned, Algonquin and Liberty's due diligence and financial models have no role in the condemnation proceeding.

Even if the due diligence and financial models were relevant to the condemnation proceeding, the City is not attempting to use discovery in this case in order to benefit its condemnation case. The NDAs and administrative rules expressly prohibit the City from using confidential information obtained solely through these proceedings in other proceedings. *See, e.g.,* Admin. R. Mont. 38.2.5014. The City and its

experts are well aware of their obligations under the NDAs. Liberty is simply making the same argument that the Commission already rejected:

36. The Commission cannot recall a time in which a party practicing before it has failed to adhere to the administrative rules regarding protective orders and non-disclosure agreements. The City and the MCC have practiced before this Commission in the past, and have without exception abided by the rules and expectations of the Commission regarding treatment of confidential information.

37. Liberty has remedies available to it if a party fails to adhere to the rules and non-disclosure agreement. It is unnecessary to implement a custom non-disclosure agreement. Liberty can seek relief pursuant to the Uniform Trade Secrets Act. *See* Mont. Code Ann. § 30-14-401 et seq. Under the Act parties can seek and be awarded exemplary damages and attorneys' fees. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1111 (9th Cir. 2001). Furthermore, in the event of a violation of the Commission's rules and non-disclosure agreement, Liberty can pursue sanctions in front of the Commission and in District Court.

38. The Commission is not persuaded that the use of a custom non-disclosure agreement is appropriate in this instance, therefore Liberty's request for such is denied.

(Order 73921, ¶¶ 35-38.) Liberty claims, "We do not believe it is reasonable to suggest or expect that a witness can partition the information gained in one case from use in another matter." Of course, that "partition[ing]" is the very purpose of an NDA. If Liberty's unfounded fear is true, then any NDA would be meaningless and could never be used.

As long as the City's experts have signed NDAs (which they have), Liberty does not get to pick and choose the City's experts.¹ Nothing in the Administrative Rules or

¹ Showing that no good deed goes unpunished, Liberty chides the City for purportedly not providing the NDAs in a timely manner. In its e-mail to the City, Liberty complains it did not receive the NDAs until the day before the viewing was scheduled to occur. The City provided Liberty the NDAs in advance as a courtesy to Liberty. The City and its experts could have showed up at Crowley Fleck's office the day of the viewing with NDAs in hand if it had chosen to do so. Nothing in the rules or the Commission's

the Commission's orders prevent an expert retained in a parallel proceeding (e.g., the condemnation proceeding) from testifying in the regulatory proceeding. Liberty, of course, fails to provide any support to the contrary. While Algonquin, Liberty, and Mountain Water might have deep enough pockets to hire separate brigades of experts and attorneys to handle the parallel proceedings and regulatory proceedings, the City is not in a position to needlessly waste money. Nothing in the rules or the Commission's orders restrict the experts the City may retain or require the City to hire a separate "regulatory" team of experts, as Liberty claims.

Remarkably, Liberty also claims that Dr. Vinso and Mr. Hayward should not be permitted to view the due diligence and financial model because the value of the water system, the amount Algonquin and Liberty are proposing to pay for the water system, and how Algonquin and Liberty plan to recover their purchase costs are not relevant to this proceeding. Remarkable as that belief might be, it is not surprising—Algonquin and Liberty do not want the Commission or the public to know how they valued the system or how they intend to recover their purchase costs. Dr. Vinso and Mr. Hayward are imminently qualified to offer expert testimony on the value of the water system, and that value—as well as Algonquin and Liberty's recovery of its purchase costs—is central to this proceeding because it directly affects the amount of money the people of

orders prevented it from doing that. Instead, though, the City provided the NDAs in advance. Again, Liberty provides no authority to support its argument that the City should have provided NDAs earlier than it did.

Missoula will be paying for their water in the future.² Algonquin and Liberty's suggestion to the contrary simply shows this transaction is a bad deal for the people of Missoula.

Finally, Liberty argues that Dr. Vinso, Mr. Hayward, and Mr. Bickell should be denied access to the due diligence and financial models because they are "employee experts," which creates an "inherent conflict." Simply saying there is a conflict does not make it so, and Liberty does not attempt to explain what the conflict is or how it is "inherent." Dr. Vinso and Mr. Hayward are not employees of the City of Missoula. The notice provisions of Rule 38.2.5023 and 38.2.5024 therefore do not apply to them. While Mr. Bickell is a City employee, Liberty is apparently not willing to provide him access to the due diligence and financial models regardless of whether he provides advance notice.

The irony of Liberty's unfounded paranoia is that it has decided to fall on its sword over information that is not "particularly sensitive" in the first place. (Order 73920, Commissioner Kavulla, dissenting.) A City representative who viewed the material on August 25, 2015 confirmed this observation. As Commissioner Kavulla wrote in his dissent: "[The information] is essentially the same type of valuation any firm seeking to buy a regulated utility would and should conduct." (*Id.*) What this information does show, though, is that Algonquin is making the decisions in this transaction, not Liberty, and that this transaction will be a costly and bad deal for the

² The City also intends to provide Liberty with a NDA from its expert Craig Close, since the board minutes that Liberty provided speak to the condition of the water system, capital investment, and how that capital investment will contribute to Liberty's purchase-cost recovery.

people of Missoula. Consistent with Commissioner Kavulla's dissent, the City continues to believe that this information does not warrant special protections in the first place (which the Commission had not imposed in the previous decade).

Regardless, Liberty's demands to make the information subject to even further special protections are wholly unsupported by either the facts or the law.

II. Liberty's repeated violations of the Commission's orders warrant dismissal of the proceeding or, at a minimum, a stay of the proceeding and an order compelling production of the material.

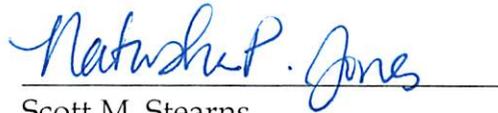
The Commission's procedural order makes clear that if a party fails to produce discovery, the Commission may "dismiss the proceeding" or "stay the proceeding until the request is satisfied." (Order No. 7392, ¶ 15.) Liberty has repeatedly shown that it has no intention of complying with the Commission's orders.

Even in this most recent instance, rather than filing (another) motion for a protective order, Liberty simply told the City by e-mail that it would not comply with the order and copied the Commission to notify it of Liberty's own "order." Liberty continues to waste the parties' and the Commission's time by refusing to comply with the Commission's orders and forcing the City to file these motions.

The City respectfully requests that the Commission enforce Order No. 7392 and either dismiss the proceedings or stay the proceedings until Liberty complies with the orders. If the Commission stays the proceedings, it should reset the deadlines, including the hearing deadline in order to afford the City due process and the opportunity to offer meaningful testimony based on a review of the due diligence and financial models. Even with the Commission's recent order setting the intervenor

testimony deadline for September 4, 2015, the City will not have adequate time to prepare its testimony after all the arrangements are made for in person and remote viewing.

Dated this 26th 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 ^{26th} 5th day of August 2015:

<p>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</p>	<p>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</p>
<p>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</p>	<p>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</p>
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<p>Kate Whitney Public Service Commission 1701 Prospect Avenue Helena, MT 59620-2601 kwhitney@mt.gov lfarkas@mt.gov jkraske@mt.gov ORIGINAL SENT VIA OVERNIGHT DELIVERY</p>	<p style="text-align: center;"> Tina Sunderland</p>

EXHIBIT “A”

EXHIBIT “A”

From: Mike Green [mailto:mgreen@crowleyfleck.com]
Sent: Tuesday, August 25, 2015 9:45 PM
To: Scott Stearns; Randy Tanner
Cc: Tasha Jones; Bill VanCanagan; Tyler Stockton; Todd.Wiley@libertyutilities.com; John M. Semmens; Jeffrey Kuchel; Kraske, Justin; Langston, Jeremiah; Farkas, Laura
Subject: RE: Liberty Document Viewing

Scott and Randy:

The City's decision to put forth its entire condemnation valuation team to review my client's confidential information is inappropriate and unacceptable. Despite my prior informal requests for information regarding your experts and other reviewers, we received most of these NDAs for the first time this afternoon. Based on this newly disclosed information, we are cancelling the review session scheduled for August 26, 2015, in our Missoula office, until we can agree to terms governing reasonable access by the City's regulatory counsel and an outside witness who is not simultaneously testifying in the valuation phase of the condemnation case relating to Mountain Water Company and who has not been retained and/or consulted by the Town of Apple Valley regarding the Town's stated efforts to follow in the City of Missoula's footsteps in acquiring Apple Valley Ranchos Water Company. By putting forward the current stable of witnesses it is very clear that the City's intent is not to evaluate the merits of Liberty's ownership in the context of the MPSC proceeding but to create impressions upon valuers who have no background or credentials to testify in this regulatory proceeding. Dr. Vinso and Mr. Hayward are valuation appraisers and are not experts on any issues relevant to the regulatory approval docket currently pending before the Montana Commission. As a result, Liberty is not willing to allow access to its financial model and board presentations by what appears to be a significant portion of the City's condemnation valuation team.

As you are aware, Dr. Vinso and Mr. Hayward were previously identified as valuation experts for the City in the Mountain Water condemnation trial and Mr. Bickell is an employee of the City of Missoula. In addition, Mr. Hayward has been publicly identified as a valuation consultant for the Town of Apple Valley. Given their existing testifying witness roles for the City and Mr. Hayward's simultaneous work for the Town of Apple Valley, the City's attempt to gain access to Liberty's valuation model for its appraisal experts and valuation trial counsel is nothing more than a thinly-veiled attempt to gain confidential information for its valuation case. The City's attempt to gain access to Liberty's confidential and proprietary model under these circumstances is neither fair nor reasonable, even with the special protections imposed. We do not believe it is reasonable to suggest or expect that a witness can partition the information gained in one case from use in another matter. As a result, access to this information by the City's condemnation valuation experts

does not comply with the spirit of the Commission's protective order or the special provisions it imposed, and access by a City employee does not comply with the letter of the rules.

These same concerns are addressed in the special notice provisions in ARM 38.2.5024 governing access to confidential information by employee experts. In this case, we believe that Dr. Hayward and Mr. Vinso's work for the City in the condemnation case creates an inherent conflict that significantly undermines the effectiveness of the Commission's standard NDA. Mr. Bickell's employment does the same. Under the circumstances, Liberty is not willing to allow access to the due diligence and financial model information to the team of people identified in Ms. Sunderland's email.

Liberty has already provided access to the confidential information to Tyler Stockton from your office today; and should further clarifications to the information provided to Mr. Stockton be required, Liberty is amenable to allowing access to a reasonable number of the *regulatory* attorneys for the City to review the hard copies of the model and designated due diligence materials. Liberty will not agree, however, to the City's attempt to manufacture access to the proprietary and confidential model for the City's appraisal experts, the City's chief accounting officer and its valuation trial counsel.

Given the current issues, please direct all communications regarding this matter to me rather than Jeff Kuchel.

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From: Tina Sunderland [<mailto:tsunderland@boonekarlberg.com>]
Sent: Tuesday, August 25, 2015 1:17 PM
To: Mike Green; Jeffrey Kuchel
Cc: Scott Stearns; Randy Tanner; Tasha Jones; Bill VanCanagan; Tyler Stockton
Subject: RE: Liberty Document Viewing

Mike and Jeff

Attached are the completed 73921 NDA's for the following individuals:

- David Hayward;
- Dale Bickell;
- Randy Tanner;
- Natasha Prinzing Jones;
- Tina Sunderland;
- David Vinso; and

- Tyler Stockton (previously forwarded)

Please let me know if you have any difficulties with the attachments.

Thank you,

Tina

Tina Sunderland

Paralegal

BOONE KARLBERG, PC

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EXHIBIT “B”

EXHIBIT “B”

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Attorneys for Plaintiff

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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

THE CITY OF MISSOULA, a
Montana municipal corporation,
Plaintiff,

v.

MOUNTAIN WATER COMPANY, a
Montana corporation; and
CARLYLE INFRASTRUCTURE
PARTNERS, LP, a Delaware limited
partnership,

Defendants.

and

THE EMPLOYEES OF MOUNTAIN
WATER COMPANY, et al.

Intervenors.

Cause No. DV-14-352

Dept. No. 4

**BRIEF IN SUPPORT OF CITY'S
MOTIONS *IN LIMINE* TO (1)
EXCLUDE ALL POST-SUMMONS
VALUATION EVIDENCE; (2) SET
INCOME-BASED VALUATION
METHODS AS PRIMARY AND
EXCLUDE REPLACEMENT COST
NEW LESS DEPRECIATION AS A
VALID METHOD; AND (3)
EXCLUDE EXCESS WATER RIGHT
VALUATIONS**

Background

Plaintiff City of Missoula submits the following combined brief in support of its Motions *in Limine*.¹ On June 15, 2015, this Court entered a Preliminary Order of Condemnation regarding the assets of Mountain Water Company (“Mountain Water”). The next phase is to value the property being taken by the City of Missoula (“City”). In the course of preparing for the necessity phase, both parties analyzed the value of Mountain Water. Those experts and their accompanying reports have been disclosed to either side, but that evidence was, appropriately, not presented at the necessity trial and is now squarely up for consideration during the valuation trial.

Mountain Water’s experts have valued Mountain Water using Replacement Cost New Less Depreciation (“RCNLD”), income based methods, and comparable sales. For the reasons set forth below, Mountain Water’s expert testimony regarding the following topics should be barred from this case: (1) evidence of sales or values from comparable sales after the summons in this case was filed; (2) valuation evidence using the RCNLD methodology; and (3) valuation of the water rights to the extent

¹ This brief supports three Motions *in Limine*. For convenience of the parties and the Court, the City has combined its briefs supporting these motions into a single brief. Although the combined brief exceeds 20 pages, it is substantially shorter than the 60 pages of briefing the City would be entitled to submit by making the motions separately.

it used incredibly speculative means to ascribe value. Each of these types of evidence falls clearly outside the standards set forth in Montana law and reasonable means of valuation. Mountain Water's use of them is a scheme solely to inflate the value of Mountain Water beyond its actual value and stick the increased cost to the Missoula ratepayers. The City also affirmatively moves to set income based valuation and comparable sale methods as the preferred methods of valuation in this given case. Mountain Water is entitled to just compensation, not just compensation inflated by speculation and improper valuation methods.

STANDARD

"The purpose of a motion in limine is to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial." *Hulse v. State, Dept. of J., Motor Veh. Div.*, 961 P.2d 75, 81 (Mont. 1998). The Court's authority to grant or deny a motion *in limine* is found in its "inherent power . . . to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *City of Helena v. Lewis*, 860 P.2d 698, 700 (Mont. 1993).

ANALYSIS

I. All Post-Summons Evidence must be Disregarded

Post-summons evidence is not allowed by Montana law because it

comes well after the filing of the suit and is speculative and conjectural at best. It is also subject to manipulation and should, therefore, be viewed with heightened distrust. Carlyle placed Park Water up for sale on May 21, 2014, just two weeks after the City filed the amended complaint. Findings of Fact and Conclusions of Law (“FOFCOL”), ¶ 42. Upon knowing a government entity has filed and served an action to condemn a piece of property, the condemnee has an opportunity to manipulate the value of the property. This is simply common sense. As such, post-summons valuation evidence should, at least, be viewed with hefty skepticism and, at best, be disallowed.

A. Federal cases bar evidence of comparable sales not entered into before the condemnation.

“Bona fide sales of comparable properties made within a reasonable time **before** the date of the taking of the property interest may be the best obtainable evidence of market value at the time of taking.” *Montanore Minerals Corporation v. Easements and Rights of Way under*, No: 9:13-cv-00133-DLC (Mont. Dist. 2015) (Commissioner Instruction No. 15) (attached as Exhibit A); 3A Fed. Jury Prac. & Instr. § 154:61 (6th ed., West 2015).

Evidence of comparable sales, including sales of the property in question, are subject to scrutiny if they occur **after** the eminent domain case has been filed and are, appropriately, excluded from evidence. Carlyle

announced that Park Water was for sale on May 21, 2014, just two weeks after the City filed its condemnation action. The merger agreement entered between Carlyle and Algonquin was signed on September 19, 2014, four and a half months after the City filed its suit. The Algonquin sale is clearly post-summons evidence that should be disregarded as such.

B. The Available Post-Summons Valuation Evidence is Speculative and Conjectural

When evaluating whether certain evidence is admissible in condemnation proceedings, “speculative and conjectural possibilities are not to be taken into consideration.” *City of Great Falls v. Temple Baptist Church*, 859 P.2d 1015, 1017 (Mont. 1993).

The merger agreement between Algonquin/Liberty and Carlyle has not closed and is likely months from closing, if at all and, therefore, cannot be considered a comparable sale. It is a speculative, possible sale that *might* occur. Some states, Montana included, review and must approve or deny regulated utility sales.² Therefore, any comparable sale that could be used as evidence must pass through the regulatory approval process before it is considered a final sale.

The merger agreement contains multiple provisions governing whether or not the agreement can actually close and be considered a

² California is another example.

finalized transaction. First, the purchase must achieve regulatory approval from both the Montana Public Service Commission (“PSC”) and the California Public Utility Commission. California has approved the transaction, but the PSC has not. The approval by the PSC, which, although portrayed by Defendants as a near certainty, is not guaranteed. *See Babcock & Brown and Northwestern Joint Application for Approval of Sale of Stock*, Montana Public Service Commission, D2006.6.82 (2006) (application to purchase Northwestern Energy denied). The Babcock & Brown proposal to purchase Northwestern Energy was denied primarily because the acquisition premium far exceeded the possible recovery via consumer rates. In other words, it was a speculative investment by the purchasing company that would likely cause the utility financial ruin and could not be a true fair market value of the system. Algonquin and Liberty face that same hurdle. The PSC, the Montana Consumer Counsel, and the City will analyze Algonquin’s decision to purchase Park Water as soon as the necessary information is provided. However, as of today, Algonquin and Liberty have been unwilling to provide the needed financial information in a usable form so the City can do that analysis.

If the transaction is rejected upon a review of the information from Liberty/Algonquin, it is not a comparable sale, and therefore, completely

irrelevant. The PSC could determine that Algonquin has agreed to pay too much for the utility and there is not enough revenue from the utility to pay back the acquisition premium, which, if true, would place the public utility in grave fiscal danger. In sum, the proposed Algonquin transfer is a speculative sale of Park Water that could never actually be consummated and, therefore, any evidence regarding the sale should be rejected.

C. Montana Law Does Not Allow Post-Summons Valuation Evidence

Evidence indicative of value that comes after the summons has been issued in a condemnation case must be excluded. Montana's eminent domain statutes are clear:

For the purpose of assessing compensation, the right to compensation is considered to have **accrued at the date of the service of the summons**, and the property's current fair market value **as of that date is the measure of compensation** for all property to be actually taken and the basis of depreciation in the current fair market value of property not actually taken but injuriously affected.

Mont. Code Ann. § 70–30–302; *Wohl v. City of Missoula*, 300 P.3d 1119

(Mont. 2013). “The fair market value of the property on [the date of the summons] is the measure of compensation for the property actually taken.

It is only that value which is relevant.” State v. DeTienne, 707 P.2d 534, 536 (Mont. 1985) (internal citations omitted) (emphasis added). In *Wohl*,

the District Court found that the City of Missoula, through inverse condemnation, had condemned the land as of April 2005.³ Trial testimony by the condemnee's witness provided the value of the land as of April 2006. The City's witness provided valuations from the months leading up to the condemnation (March and April 2005). Upon review, the Montana Supreme Court determined the admission of value evidence from a later date to be in error:

In applying a measure of compensation that did not reflect the value of the Landowners' land at the time [of the summons], the District Court based its ruling on an erroneous view of the law and thereby abused its discretion.

Id. The Court concluded that “[t]he District Court **must** apply a measure of compensation that reflects, as closely as possible, the value of the land **at the time** [the summons was served].” *Id.* at 1140 (emphasis added).

Evidence regarding value months after the summons does not accurately convey such information.

The merger agreement between Algonquin/Liberty and Carlyle to purchase Park Water Company (“Park Water”) and the value given to Park Water (and therefore, the implied value to Mountain Water) by that

³ In an inverse condemnation action, the valuation date is the day the property was seized and in a statutory condemnation action, the land is valued on the date the summons is filed. Both dates, depending on the type of action, set the date for valuation and the applicable legal principles regarding that date are the same. *Wohl*, 300 P.3d at 1136.

agreement must be excluded as statutorily not allowed as evidence in this case. The City served its summons on the Defendants on May 6, 2014. The merger agreement for the proposed sale of Park Water was signed on September 19, 2014 and has yet to actually close. The Algonquin agreement assigns a value multiple months following the City's service of the summons in this case. It reflects valuation evidence well past the filing of the summons and, as such, cannot be a reliable indicator. Therefore, any information regarding the proposed sale to Algonquin should not be allowed.

II. Market and Income Based Valuations Should be the Basis For Valuation, Not Replacement Cost New Less Depreciation ("RCNLD").

The Montana Supreme Court has wrestled with the appropriate manner to determine "just compensation" noting, valuing "just compensation is often difficult to measure with any degree of consensus between the condemnor and condemnee" and therefore, "no one formula or method of measurement universally applies to all cases." *State v. Tubbs*, 411 P.2d 739, 742 (Mont. 1966). The "justness" of the compensation is measured by finding the "actual value" at the summons. *Id.* To this end, valuation may be based on "comparable sales, reproduction costs, capitalization of net income, or an interaction of these

determinants.” *Id.* However, [e]ach case must be determined on the basis of its own special circumstances as they are revealed in the testimony.” *Id.* at 743.

Under the facts in this condemnation, there is ample, reliable, and credible financial information regarding Mountain Water due to its status as a regulated, public utility. Therefore, the most reliable method to value Mountain Water is using the revenue based valuation methods. Revenue based valuation methods use the income the property (always a business or a rental property) produces as a means to determine what a willing buyer and willing seller would sell the property for. This is the method used by Carlyle in 2011 and most business acquisitions. There are, however, some comparable sales present and those withstanding appropriate scrutiny should be used as well. Therefore, both income and comparable sale valuation methodologies should be affirmatively determined as the preferable methods for valuation. Further, with such reliable revenue information and some comparable sales, RCNLD is not allowed under Montana law and should be disregarded.

A. Revenue based valuations are the best and most appropriate methodology for valuation in this condemnation.

Where other methods of valuation have conjecture and uncertainty,

“[i]ncome capitalization is an appropriate valuation method Its applicability is determined less by the type of property taken than by a comparison of the relative certainty resulting from the use of the various methods.” *State v. Olsen*, 531 P.2d 1330, 1332 (Mont. 1975) (emphasis added). Where comparable sales are infrequent or unavailable, revenue producing properties should be valued using their revenue. *State v. Bennett*, 513 P.2d 5, 8 (Mont. 1973); *State v. Palin*, 503 P.2d 524 (Mont. 1972) (“We therefore hold that the capitalization of income method of land valuation should be limited to income producing property where at all possible, recognizing that it may be necessary to use the method in cases where no comparable sales evidence is available.”); 4 Nichols on Eminent Domain, 12B.11 (if not “possible to use either the market value formula or the income approach, resort has been had to the . . . original cost of the property or to current cost of reproduction less depreciation.” (emphasis added)).

The United States Supreme Court has recognized this as well. In *Monongahela Navigation Company v. United States*, the U.S. Supreme Court evaluated whether income or cost was the appropriate way to value a lock and dam as a revenue producing entity. 148 U.S. 312, 328 (U.S. 1893). The United States Supreme Court concluded that a lock and dam

on a less trafficked river would make less revenue and therefore be valued less, therefore, “[t]he value . . . is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner.” *Id.*

Income valuation methods must not be used when the income itself is subject to “conjecture and uncertainty.” *Palin*, 503 P.2d at 526 (Mont. 1972) (finding a farmer’s guess on the number of animals that could graze and be fed from the field and therefore the field’s income was conjectural and speculative); *State v. Bare*, 377 P.2d 357, 363 (Mont. 1962) (finding one year of “pure estimates” speculative and not a valid use of the income capitalization approach); *State Hwy. Commn. v. Bennett*, 513 P.2d 5, 8 (Mont. 1973) (finding appraiser’s use of net income from tax returns as a basis for value using the capitalization of income approach was not conjectural and speculative).

Montana condemnation cases involving businesses have regularly used the income capitalization valuation method. In *Department of Highways v. Hy-Grade Auto Court*, the Northgate Texaco station in Gardiner, MT was condemned for a highway. 546 P.2d 1050 (Mont. 1976). The Montana Supreme Court found that the income approach was the appropriate method to determine the valuation because there were not

comparable sales and both parties' appraisers agreed RCNLD was inapplicable for business valuation. *Id.* at 1054. Similarly, in *Bennett*, the Supreme Court ruled that the income capitalization approach was an appropriate means of valuing property with rental cabins and a service station. 51 P.2d at 8. Doubt as to the income method went to the weight of the expert's testimony and calculations based on whether the entity's income tax returns were reliable. *Id.* Finally, in *Olsen*, the Supreme Court found income capitalization evidence for valuation of a grocery store permissible and supported by substantial evidence. 531 P.2d at 1333.

As noted below, though there are some market comparable sales to a sale of Mountain Water, there is not a great many of them. This injects some uncertainty into the use of comparables and makes income approaches to valuation the ideal valuation methodology, especially given Mountain Water's status as a regulated, public utility.

As a private, public utility, Mountain Water is regulated by the PSC and therefore, falls under specific Montana Code provisions regarding its finances. Mont. Code. Ann § 69–3–102. Utilities must keep uniform accounts of all business they conduct, such records must open and available for inspection and auditing by the PSC, and the utility is subject to penalties for not maintaining the records or providing access. Mont. Code

Ann. §§ 69–3–202, 206. Each utility must publicly file an annual report containing extensive financial records. Mont. Code Ann. § 69–3–203. The PSC’s annual report requires the following:

- a simple income statement;
- a comparative balance sheet;
- an accumulated depreciation and amortization schedule;
- a list of contributions in aid of capital;
- details on income taxes, amount of retained earnings;
- the amount of long-term debt;
- a list of water utility plan accounts;
- a list of water operation and maintenance expenses;
- the amount of contractor payments and to whom; and
- the system size and specifications.

See Montana Public Service Commission, *Mountain Water Company 2013 Annual Report Amended* (May 1, 2015) (available at http://psc.mt.gov/docs/AnnualReports/2014AnnualReports/2014_Mountain_Water_Amended_2013.pdf). This data on Mountain Water is available online back to 2003 and presumably even farther in PSC archives. See Montana Public Service Commission, *2003 Regulatory Annual Reports*, <http://psc.mt.gov/Docs/AnnualReports/?year=2003> (accessed Aug. 6, 2015). In the words of Mountain Water’s former owner Sam Wheeler, a utility’s operations and finances are “in a fishbowl.” (Depo. of Henry Hugh Wheeler, Jr. 42:17 (Dec. 18, 2014) (attached as Exhibit B)).

Mountain Water's prior status as a private, regulated utility makes the income based valuation methodologies subject to almost to no "conjecture or speculation." Instead, appraisers, though perhaps disagreeing on application, have over ten years of finances in the public annual reports and extensive records for valuing the company. This amount of information is far more than that found in, for example, *Bennett*, where the Supreme Court found two years of tax returns sufficient information and not subject to speculation for the valuation. As such, the income valuation method should be used as the most reliable method of valuation in this given case.

B. Comparable market sales is an acceptable valuation methodology.

"Current fair market value is the price that would be agreed to by a willing and informed seller and buyer." Mont. Code Ann. § 70–30–313; *St. Hwy. Commn. v. Vaughan*, 470 P.2d 967, 970 (Mont. 1970) (actual value is market value); *K&R Partn. v. City of Whitefish*, 189 P.3d 593, 601 (Mont. 2008) ("The value of the condemned property is the fair market value of the property taken."). This market based definition is the "ultimate criterion" for actual value if there is an actual market for the property. *Tubbs*, 411 P.2d at 742 (emphasis added).

There are, broadly, two types of comparables: 1) prior or post condemnation sales of the actual property being condemned within a

reasonable time; and 2) prior or post sales of properties comparable to the one being condemned within a reasonable time. 4-12 Nichols on Eminent Domain § 12.02. Comparable properties are those “sufficiently similar to the parcel taken with regard to situation, usability, improvements, and other characteristics.” *Id.* There are two methods to draw valuation from sales of comparable properties: 1) capital markets; and 2) mergers and acquisitions. Capital market sales are those companies traded publicly on the stock exchange. Using the stock price and market capitalization on the date of valuation, the value of the company can be determined. If the company is comparable in size, revenue, and industry to the company being valued for condemnation, then the implied value from the stock valuation counts as a comparable sale. Merger and acquisition sales are sales where an entire company is purchased whether it is traded on the stock market or not. Again, if the company is comparable, the cost of the sale is a comparable value.

Therefore, where comparable sale data is available it should be admitted as relevant evidence. However, the proposed Algonquin sale is clearly not comparable and should be excluded as such. First, the sale process began immediately after the City had filed its condemnation suit against Carlyle and the proposed sale was not signed until 136 days after

the suit was filed. Second, as of today, the PSC has yet to approve the sale of Park Water to Algonquin. Proposed sales not yet completed should not be treated as actually representative of value. The merger agreement between Algonquin and Carlyle also has multiple contingencies that could end the proposed transaction. For example, if the agreement has not been consummated by September 19, 2015, pursuant to Section 9 (Termination) of the merger agreement, the parties could walk away from the transaction. Finally, the agreement is subject to PSC review and, as happened to Babcock & Brown in 2006, the PSC could deny the transfer and end the sale. Therefore, where comparables are available, they should be used if appropriate, but the proposed Algonquin transaction should be disregarded as inapplicable.

C. The RCNLD valuation methodology is used in limited circumstances throughout the United States and should be disallowed in this case.

RCNLD as a valuation methodology, in sum, takes whatever is being valued and calculates the cost to build a similar piece of property again, then depreciates that number by the depreciation found in the original property. It is, generally, “subject to criticism” and some courts have established strict requirements for when it can be used. 4-12C Nichols on Eminent Domain § 12C.01. It is used in “exceptional circumstances” where

the market or income approaches are unworkable given the property being valued. 4-12B Nichols on Eminent Domain § 12B.11.

i. The Supreme Court has not addressed whether RCNLD may be used in Montana.

Montana has not addressed whether RCNLD should be used in this instance or not. Only four Montana Supreme Court cases have addressed “reproduction” cost as a possible valuation method and none have addressed RCNLD. Reproduction cost is slightly different from RCNLD, but related. Reproduction cost assumes building an identical structure, replacement cost assumes building a structure similar to the one being condemned. In *Tubbs*, the Supreme Court held that if reproduction cost is used as one measure of value it must include a proper deduction for depreciation. 411 P.2d at 743. In *Schumacher*, reproduction cost could be used as one factor in calculating value. 590 P.2d at 1114. In *Hy-Grade Auto Court*, the Supreme Court upheld a determination that income methods were best when both sides’ appraisers concluded reproduction cost was inapplicable for valuing an income generating property. 546 P.2d at 1054. Finally, in *Olsen*, the Supreme Court upheld use of the income approach when both parties’ appraisers concluded reproduction costs were inapplicable when valuing a grocery store. *Olsen*, 531 P.2d at 1332–1333.

Montana has simply noted that reproduction is an option, but has provided no guidance other than that depreciation must be incorporated. There are two points to be drawn from the scarce Montana case law on this issue. First, the Montana Supreme Court has not disagreed with appraiser conclusions that cost approach valuations are improper for valuing revenue producing properties. This inference is supported by both the Montana case law above regarding the use of income approaches when there are few or no market comparables and the treatise conclusion that cost approaches are used when there are no income or markets as well. See *infra*. Second, generally, treatises on valuation speak of the two as both being “cost approaches” to valuation, which are treated the same and given the same elements for their use. See *supra*. With no specific guidance from the Montana Supreme Court on if, how, or when the RCNLD method should be used, this Court should either (1) reject its use entirely, or (2) adopt the generally accepted exceptional circumstances test used in some parts of United States for use of the “cost approach” valuation methods.

ii. Piecemeal valuations, such as RCNLD, are not an acceptable valuation methodology in Montana.

The value of the property is not found by valuing each individual comprising part and then summing those values. *State v. Petersen*, 328 P.2d 617, 625 (Mont. 1958). Rather, if the property being condemned has

“been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit so combined, adjusted, synchronized, and perfect, as it existed at the moment of appropriation.” *Id.*

Therefore, individual asset parts cannot be summed together for a total value of the system. The system must be valued as a whole. Mountain Water’s expert reports rely extensively on individual valuations, especially the Black & Veatch RCNLD report. The RCNLD valuation done by Black & Veatch systematically adds up what each part in the Mountain Water distribution system would cost to replace and rebuild. Black & Veatch’s own report notes:

For estimating the replacement cost of a new system, the existing system inventory is utilized. The inventory is grouped by the type of asset (e.g. pipe, valve, hydrant, etc.), and each type is further broken down in sub-groups using characteristic (e.g. material or diameter for pipes, type of valve, etc.). Each component of the sub-group is reviewed for relevancy for direct replacement in today’s market, and substitutions with desirable equal component are made. The estimation of replacement cost new for each component is developed based on several factors including engineering judgment, current industry information, historical cost trends and cost of similar systems. The cost is rolled up by subgroups and consolidated for each asset type.

Black & Veatch Expert Report, 5 (Attached as Exhibit C, filed under seal) (attached exhibit only contains the report summary and example pages from the report's appendix demonstrating the over 1500+ additional pages listing each and every asset of Mountain Water down to even the number of copies of Windows XP, folding tables, and battery backups.). Similarly, the Hall-Widdoss report on each and every piece of land, building, and easement owned by Mountain Water and the DMS Natural Resources report on claimed excess water rights are both used by the Willamette Management Associates final valuation as parts to simply add in to the valuation. Each of those reports individually values each piece of land, building, easement, or water right and then sums up the value to get a final value.

Per *Petersen*, individual, piecemeal valuations are not allowed in Montana. Therefore, the individual asset valuations cannot be introduced as evidence because they represent adding up each miniscule part for the value, rather than evaluating the system value as a whole. Mountain Water has built this system over the years and it would never be sold piecemeal. Rather, it would only be sold as a single unit. Individual valuations of various parts, therefore, do not present an accurate understanding of the value of Mountain Water and should, therefore, be excluded.

iii. **Courts use RCNLD in only exceptional circumstances.**

The Federal system and many state jurisdictions only allow RCNLD in exceptional circumstances. As the 5th Circuit noted:

Thus, it has almost uniformly been held that, absent some special showing, reproduction cost evidence is not admissible in a condemnation proceeding. **This rule stems from a recognition of the fact that reproduction cost evidence almost invariably tends to inflate valuation.**

U.S. v. Benning Housing Corp., 276 F.2d 248, 250 (5th Cir. 1960) (emphasis added); see also *U.S. v. 55.22 Acres of Land*, 411 F.2d 432, 435 (9th Cir. 1969) (“Generally speaking, reproduction cost is not considered the best evidence of fair market value if other evidence is available.”). To use RCNLD, its use must meet the following elements:

- (1) that the interest condemned must be one of complete ownership;
- (2) that there must be a showing that substantial reproduction would be a **reasonable business venture**; and
- (3) that a proper allowance be made for depreciation.

Id. (emphasis added); see also *Spitzer v. Stichman*, 278 F.2d 402 (2d Cir. 1960) (“[I]n a condemnation proceeding, evidence of the cost of reproduction is not to be considered as bearing upon value unless reproduction at that cost would be a **reasonable commercial investment**.” (emphasis added)).

Nichols on Eminent Domain and multiple states echo the test set forth by the 5th Circuit. RCNLD use requires:

- (1) property is unique;
- (2) use is based on uniqueness; and
- (3) **reasonable** to believe the **owner will replace** the building with one similar in character.

4 *Nichols on Eminent Domain* 12B.11. Core to RCNLD use is that replacement must be feasible and it must be reasonable that the owner would *actually replace or reproduce* the property being taken. *Rangeley Water Co. v. Rangeley Water Dist.*, 691 A.2d 171, 175 (Me. 1997) (The Maine Supreme Court upheld special master's rejection of RCNLD as a valuation method and his determination that it was highly improbable anyone would reconstruct the system as it was.); *U.S. v. Buhler*, 305 F.2d 319, 325 (5th Cir. 1962); *Denver Urban Renewal Authority v. Pogzeba*, 558 P.2d 442, 443 (Colo. Ct. App. 1976) (“[A]bsent a reasonable expectation that the building would be replaced, evidence of replacement cost is not proper.”); *Commonwealth v. Massachusetts Turnpike Authority*, 352 Mass. 143, 148 (Mass. 1966) (Replacement cost is used when the “same type of structure at the same site or elsewhere would be reasonable in the event of its destruction or taking.”); *Southern Indiana Gas & Electric Co. v. Russell*, 451 N.E.2d 673, 676 (Ind. Ct. App. 1983) (Cost approach is only used if “it

is reasonable to believe that the owner will replace the building with one similar in character.”); *Port Auth. Trans-Hudson Corp. v. Hudson & Manhattan Corp.*, 276 N.Y.S.2d 283, 292 (N.Y. App. Div. 1st Dept. 1966) (“It should be shown also that reproduction at such cost figure represents a reasonable commercial investment.”) aff’d as modified sub nom. *Port Auth. Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 231 N.E.2d 734 (N.Y. 1967); *Allied Corp. v. Town of Camillus*, 604 N.E.2d 1348, 1351 (N.Y. 1992) (“[T]he improvement must be an appropriate improvement at the time of the taking or assessment and its use must be economically feasible and reasonably expected to be replaced.”).

Without doubt, Mountain Water is: 1) unique, and 2) being wholly condemned. Further, Mountain Water’s experts using RCNLD have applied a form of depreciation. However, there is no possible way to conclude that replacing the system is a reasonable business venture or that Carlyle (or anyone) will “replace the [water system] with one similar in character.”

First, the Court concluded in its Findings of Fact and Conclusions of Law “[i]t is not feasible or practical for the City to build a second water system to serve the community due to the prohibitive capital cost to construct a new system.” FOFCOL, ¶ 26. This in and of itself discredits

the RCNLD valuation methodology. It is not just prohibitive for the City to build a new system from scratch, it is prohibitive for any company. The Mountain Water system was built over the past hundred or more years. Some parts have been upgraded and replaced, others have not. Some work was done when labor was cheaper and before the City grew and developed streets and other obstructions to work. Some pipe technology today is far more expensive than older pipes, not to mention the disagreement over what types of material should be considered in a replacement system. Finally, due to the nature of the pipes, there is no realistic way to accurately know the actual depreciation of the system. Determining depreciation is not an easy matter for even structures wholly above ground, much less over three hundred miles of buried infrastructure.

Second, there is no indication that Carlyle or Mountain Water intend to replace the water system with one similar in character. In fact, *no one* has proposed replacing the Mountain Water System. Recently, Carlyle's regulatory attorney before the PSC noted that Carlyle would "either have these assets, or it will have a big pile of cash. And the big pile of cash is whatever it is the condemnation Court declares is the just value of those assets." Transc. of Thorvald Nelson, *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, 69:4–8 (July 28, 2015) (attached as Exhibit D). That “big pile of cash” will be dividends to Carlyle’s shareholders, not for building a new system in Missoula, Montana or anywhere else in the world for that matter. There is a system already in place in Missoula; building a second system would be repetitive and unnecessary and not an option for any party involved.

Third, as noted above, there are some comparable sales, and there is extensive, reliable financial information for using revenue based valuation methodologies. As noted by both treatises and Montana case law, where there is reliable income information, reproduction or replacement costs are not a valid methodology. As such, RCNLD valuation evidence should not be allowed in this proceeding.

III. Speculative evidence regarding water rights valuation must be disregarded

Mountain Water retained DMS Natural Resources, LLC (“DMS”) to conduct an analysis of the value of what, it claims, are marketable excess water rights in preparation for the valuation proceeding. The idea was formulated by Mountain Water’s internal attorney Ross Miller who pitched the idea to DMS stating: “I just want to throw out the idea that MWC could take virtually ALL of the rattlesnake water rights and export it to the Bitterroot via the Missoula Irrigation Ditch.” (See Miller Emails, MWC-ED-

016699 (attached as Exhibit E.) The Rattlesnake Creek water rights are currently held for the benefit of Missoula citizens as an emergency backup water supply and Miller suggested selling or “exporting” these precious rights to large private subdivisions in the valley. (Ex. D.) The DMS report should be excluded because it is speculative and inadmissible under the requirements for condemnation evidence.

A. Condemnation evidentiary rules do not allow evidence regarding the claimed excess water rights to be admitted.

Fair market value “is the price that would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors: the highest and best reasonably available and its value for such use, provided current use may not presumed to be the highest and best use.” Mont. Code. Ann. § 70–30–313. This valuation is based on the “highest and best use to which the land is adaptable, whether actually used or not.” *State v. Vaughan*, 470 P.2d 967, 970 (Mont. 1970). However, the land “must be available for such use on the date of service of summons and marketable at that time for such use.” *Id.* “Available” means “capable of being used for that purpose” and the land must have been **marketable at the time** for the purpose stated. *State v. Hoblitt*, 288 P. 181, 185 (Mont. 1930) (emphasis added). Further, such highest and best use must be a use “reasonably” applied to the land. *Id.* For example,

assuming a town or neighborhood might be built on the land when no town is nearby, the profits from Bing cherries grown on the land if the Bing cherry trees were planted, or the future value if oil was discovered are all **not** reasonable uses applied to the land. *Id.* Rather, they are speculative and “remote and conjectural possibilities” which cannot be taken into consideration. *Id.* When valuing the property being taken, “speculative and conjectural possibilities are not to be taken into consideration.” *State v. Temple Baptist Church*, 859 P.2d 1015, 1017 (Mont. 1993) (See also *Hoblitt*, 288 P. at 185). The *Temple Baptist Church* Court ruled that the church’s past history and future plans were not relevant for determining the value of the land. Only the value on the date of summons was relevant. *Id.*

Further, Mountain Water has the claimed excess water rights using incredibly speculative means. The DMS Resources report assumes the surface water rights from the Rattlesnake Creek, currently in use as permits for drawing water from the Missoula aquifer, can be diverted through the Missoula Irrigation Ditch system. Regulatory approval has not been granted for this use and the MID has not been asked nor has it approved this use. The MID has never been tested for this purpose and is certainly not marketable in this manner “at this time.” Instead, there would need to be substantial revisions to make it usable.

It also assumes that Mountain Water would be able to market its water rights to other subdivisions in the associated basins. These conclusions are implausible and unrealistic. Marketability of water rights to another municipal user or for mitigation are the very definition of “speculative” and, further, there is no excess water to market. Missoula will continue to grow and Mountain Water’s water rights are an intrinsic part of the system, not something that can be sold for profit. As such, any evidence regarding the speculative and implausible use of water rights must be excluded.

B. Valuing assets separate from the business as a whole is not allowed in condemnation cases.

Mountain Water’s claim there are excess water rights that should be valued is also baseless. The value of the property is not found by valuing each individual comprising part and then summing those values. *State v. Petersen*, 328 P.2d 617, 625 (Mont. 1958). Rather, if the property being condemned has “been combined, adjusted, synchronized, and perfected into an efficient functioning unit of property, then it must be paid for that unit so combined, adjusted, synchronized, and perfect, as it existed at the moment of appropriation.” *Id.*

Mountain Water has water rights necessary to accommodate Missoula’s growth as a function of being a water utility business serving the

Missoula community. As detailed above, businesses should be valued using their income—which includes all the assets they own—because those assets are the ones it needs to function as a business now and in the future. Mountain Water has long claimed the water rights it owns are part of future planning for Missoula growth. Further, some of the water rights claimed to be “excessive” now are the oldest water rights owned by Mountain Water (the Rattlesnake Creek flow rights) and have long been considered an emergency water supply, not something it could simply sell. Valuing the water rights claimed not currently in use separately from the entire enterprise runs afoul of the principle set forth in *Petersen*. The enterprise needs to be valued as a whole, not as individual parts then summed together. Therefore, any evidence regarding Mountain Water’s claimed excess water rights and the associated valuation should be excluded.

CONCLUSION

For the reasons stated above, the Court should grant the City’s Motions *in Limine* to exclude post-summons valuation evidence, RCNLD evidence, and evidence regarding claims of excess water rights and affirmatively declare that income and comparable sales based valuation methods are the best valuation methods in this given case.

DATED this 17th day of August 2015.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by email upon the following counsel of record at their address this 17th day of August 2015:

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