

**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 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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**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S MOTION *IN LIMINE* AND
COMBINED BRIEF IN SUPPORT AND RESPONSE TO THE CITY OF MISSOULA’S
MOTION TO DISMISS OR STAY THE PROCEEDINGS**

Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submit to the Montana Public Service Commission (“Commission”) this motion *in limine* and combined response to the City of Missoula’s (“City”) motion to dismiss or stay the proceedings and brief in support of Liberty’s motion *in limine*. Liberty moves *in limine* for the Commission to prohibit access to Liberty’s confidential materials subject to special protections by counsel who have not appeared in this matter, and experts or witnesses retained by the City who are or will be witnesses for the City in the current condemnation matter currently occurring before the Montana Fourth Judicial District Court (“District Court”) or who have or plan to consult with the Town of Apple Valley regarding its potential condemnation of Apple Valley Ranchos Water Company. Permitting access violates Liberty’s property rights, as well as the Commission’s orders in this matter. Liberty also requests the Commission deny the City’s motion to dismiss or stay, because there is no legal or factual basis to do so.

BACKGROUND

For good reason, Liberty has sought to protect its confidential valuation model from disclosure to the City out of concern for potential misuse in the ongoing condemnation case or disclosure to the Town of Apple Valley. Further, Liberty has contended that access to its acquisition model is largely irrelevant to this regulatory docket because Liberty has committed in writing that it will not seek an acquisition adjustment or premium in rates for Mountain Water Company, which necessarily means that valuation is not relevant to whether the proposed acquisition meets the Commission's no-harm-to-consumers standard—a fact recognized in statements by Commissioners. Liberty has consistently maintained that the City's purported need to review Liberty's model has more to do with the effort to advance the City's condemnation case than any issues related to the regulatory docket.

On August 25, 2015, Liberty's fears were confirmed when, after already providing access to the City's regulatory attorney to all the confidential information in question, the City notified Liberty that it was seeking access to Liberty's confidential information for virtually its entire condemnation trial team and valuation experts supporting both the City and the Town of Apple Valley in attempts to condemn assets of companies that Liberty is seeking to acquire. Now, in a particular twist of irony, the City is claiming to be punished for its "good deed" of providing NDAs at the last minute and without complying with applicable Commission rules. Simply put, the City has failed to comply with the Commission's rules, delayed to the last minute¹ the disclosure of experts and counsel it intended to have review Liberty's material, and continues to

¹ Order 73921 was entered on July 28, 2015. The City first demanded access to information based on that order on July 30, 2015. Order 73920 was entered on August 20, 2015. The witness NDAs the City provided on August 25, 2015, in anticipation of review on August 26, 2015, were signed on August 24, 2015, and finally filed on August 27, 2015 (the day after the City filed its motion to dismiss).

blame Liberty for delays in this case and make unsubstantiated attacks on Algonquin Power & Utilities Corp.

While Liberty has objected strenuously to providing the City access to its confidential transaction information, Liberty has engaged in ongoing efforts to move the matter forward as expeditiously as possible, through communication with both MCC and Commission staff about facilitating their access to the information.² Through this process, Liberty has followed the Commission's procedural schedule and rules in lodging discovery objections, responding to discovery motions, and seeking the protective order authorized by Montana law. As a result, Liberty's efforts to avoid producing information to the City's condemnation counsel and witnesses were good faith attempts to protect Liberty's property interests, and do not justify suspension of the schedule or dismissal.

The City's actions, however, have not been a good faith effort discover information relevant to the Commission's consideration in this matter. Rather, the City has ignored Liberty's property interests, the Commission's special protections to preserve those interests, and the Commissioners' public statements that valuation is not an issue in this docket. As a result, the Commission should consider that Liberty was ready, willing, and did provide access to the confidential information to the City's attorney and only raised objection when in the eleventh hour the City tried to undermine the Commission's order by accessing the model for its entire *condemnation* (emphasis added) team, rather than for legitimate regulatory evaluation purposes. Liberty therefore requests that the Commission grant its motion *in limine* and allow consideration of the relevant substantive issues to move forward.

² To date, the Montana Consumer Counsel has declined Liberty's repeated offers to allow the MCC and its expert to review and work with Liberty's financial model and due diligence materials.

On August 20, 2015, the Commission issued Order No. 7392o, recognizing again that the proceedings in this docket are occurring under unique and unprecedented circumstances, and upholding and clarifying the special protections ordered by Examiner Farkas in Order No. 7392l. In response, on Friday, August 21, Liberty's counsel hand delivered a copy of the board materials and tax returns it was ordered to submit to the City and MCC. The cover letter with those materials identified the individuals from whom Liberty had received signed NDAs, reminded counsel of their obligation to file and serve the NDAs for any additional reviewers, and invited counsel to contact Liberty's counsel to arrange access to the remaining materials. *See e.g.*, Letter from Mike Green to Scott Stearns, (8/21/15), attached as Ex. A.

On Monday, August 24, Liberty's counsel had telephone and email exchanges with the City's counsel to coordinate access in Crowley Fleck's Missoula office. In that email exchange, the undersigned requested counsel to identify the expert for whom the City sought WebEx access and the other reviewers, and to provide copies of NDAs. *See* email exchange between Mike Green and Tyler Stockton and Randy Tanner, (8/24/15), attached as Ex. B. On August 25, 2015, Tyler Stockton from Boone Karlberg reviewed Liberty's confidential materials in Crowley Fleck's Missoula office, and an additional review meeting was scheduled for the afternoon of August 26, 2015. The City then provided copies of the NDAs of individuals it expected to access the materials the afternoon of August 25, 2015. That list included condemnation attorneys, a law clerk and a paralegal from Boone Karlberg, an attorney from the City's other local condemnation law firm, an active City employee (the City's chief financial officer), and two outside experts who are currently expert witnesses for the City in its condemnation proceeding, one of whom is also actively consulting with the Town of Apple Valley in its efforts to condemn Apple Valley Ranchos Water Company, an affiliate of Mountain Water that is also

being acquired by Liberty Utilities in its current transaction. Specifically, the City has submitted non-disclosure agreements to Liberty for the following individuals:

- David L. Hayward, who was identified as a valuation expert for the City in its condemnation action against Mountain Water, and who has consulted with the Town of Apple Valley on its potential condemnation. (See Missoulian Article, Apple Valley votes to make offer for Mountain Water Co.'s sister utility in California, June 5, 2015, attached as Exhibit C.)
- Joseph D. Vinso, an appraiser with no background in regulatory review of public utilities. Mr. Vinso also acted on behalf of the City of Missoula in its condemnation action against Mountain Water and is a designated expert witness for the City.
- Dale Bickell, a City of Missoula employee³ and director of the City's Finance Department. Mr. Bickell testified on behalf of the City in its condemnation action against Mountain Water.
- William K. VanCanagan, an attorney from Datsopoulos, MacDonald & Lind, who has not appeared on behalf of the City in this docket. Mr. VanCanagan is counsel for the City in the condemnation action.
- Natasha Prinzing Jones and Randy Tanner, Boone Karlberg attorneys working on both the condemnation and regulatory matters. Ms. Jones is one the City's lead trial counsel during the City of Missoula's condemnation action against Mountain Water.

³ Because Mr. Bickell is an employee City, the issue of his access is not technically ripe because the City has completely failed to comply with the procedures set out in Admin. R. Mont. 38.2.5024. *See also* Docket No. D2006.6.82, Order No. 6754d, ¶ 10 (Feb. 13, 2007).

- Tyler Stockton, a Boone Karlberg law clerk.
- Tina Sunderland, a Boone Karlberg paralegal.

Tellingly, the list did not include Scott Stearns, the Boone Karlberg attorney who has acted as the City's lead regulatory attorney, in this and other PSC dockets.

The City has not previously filed or served NDAs for a witness to access any of the other confidential information previously filed in this case, and now has effectively requested that Liberty provide the entire core of the City's condemnation valuation team, but not regulatory counsel, with full access to Liberty's proprietary model. In short, the City's singular focus on Liberty's financial model by members of its condemnation litigation team (to the exclusion of its regulatory counsel) confirmed the concerns Liberty raised previously about the City's use of the information in its model. As a result, Liberty notified the City's counsel of its objections to the proposed reviewers and cancellation of the meeting in the email the City provided with its motion.

The City incorrectly asserts that "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" and "nothing in the rules . . . prevented it from doing that." City's Motion to Dismiss, p. 3 fn. 1. Once again, the City demonstrates its fundamental lack of understanding of Commission rules. Admin. R. Mont. 38.2.5012(1) clearly requires that "all persons, including legal counsel, having a right pursuant to protective order to access confidential information, **shall sign and file with the commission and serve on the provider a nondisclosure agreement, on a form as attached to each protective order, prior to receiving or reviewing the confidential information.**" Full compliance with Admin. R. Mont. 38.2.5012 was a condition precedent to the City's legal entitlement to review Liberty's confidential information, yet the City did not file any non-disclosure agreements for Order

No. 7392l with the Commission until after filing the present motion. Once again, the City's conclusion that it could simply "show up" with NDAs in hand and demand unlimited access to Liberty's confidential information conflicts with established Commission rules.

The City has now filed a motion criticizing Liberty's approach and seeking dismissal of this case. However, contrary to the City's assertions, the City's actions in this matter do not support the City's claim that it is not seeking an advantage in the condemnation case. The City's suggestion that its limited resources prevent it from retaining a qualified expert other than its valuation experts in the condemnation case is equally meritless. The City has spent millions of dollars on attorneys, experts and other consultants in the condemnation case. Further, the City's motion ignores that it had not previously disclosed any experts or provided NDAs from anyone outside of Boone Karlberg at any point in this case, has not complied with the Commission's rules governing NDAs, and did not comply with the requirements for conferring with Liberty regarding access by an employee witness. Now, despite failing to previously seek access for its witnesses to the other confidential materials previously exchanged in this case, and identifying experts whose access violates Liberty's property interest in its confidential materials, the City blames Liberty and seeks further delay or dismissal of the case. Nevertheless, Liberty continues to make good faith offers to the City to provide access to regulatory attorneys and a regulatory expert witness who is not simultaneously testifying against Mountain Water or its affiliates in a condemnation case.

The City of Missoula has fundamentally abused both the spirit and the letter of the Commission's decision in Order Nos. 7392f, 7392l, and 7392o. The City has given Liberty copies of non-disclosure agreements for nine different individuals, with the expectation that those individuals be allowed to review Liberty's confidential and proprietary financial

information. The City's proposed list include various individuals who have played, and continue to play, an active role in the City of Missoula's condemnation proceedings against Mountain Water and/or who have worked on behalf of the Apple Valley's condemnation efforts against Park Water in California. Furthermore, the City flatly admits that the experts it designated to review Liberty's financial model "**are also participating in the condemnation proceeding**" currently taking place. City's Motion to Dismiss, p. 1 (emphasis added).

The City's assertion that these individuals are entitled to review Liberty's confidential information only serves to substantiate Liberty's fears that the City intends to use these proceedings as a second avenue of discovery in support of its condemnation proceedings before the District Court as well as an opportunity to provide the Town of Apple Valley with confidential information in support of its condemnation efforts against Park Water. *See* Liberty's Response to The City Of Missoula's Motion to Compel Production Of Documents Withheld in Response to Data Requests PSC-031 to PSC-033(B), p. 6 fn. 2 (May 8, 2015) ("The City's stated desire to evaluate the "deal" suggests it is looking for an opportunity to conduct additional discovery relative to the potential damages phase of its condemnation case against Mountain Water, rather than seeking information relevant to its participation in this case. Discovery in the condemnation case is closed, and the Commission should not allow the City to conduct additional discovery in this forum.") The Commission's decisions in Order Nos. 7392f, 7392l, and 7392o forbade the City from doing so and, furthermore, the City's attempt to do so violates well-settled law. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17, 98 S. Ct. 2380, 2390 n.17 (1978) ("when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied"). Allowing access to the City's stable of condemnation experts and attorneys further creates the issue of those

individuals forming mental impressions that cannot be erased and cannot be protected by any NDA. In short, the City's proposal is consistent with Liberty and the Commission's fears that the City would use this docket to support the condemnation efforts in Missoula and California.

For Liberty, the City's repeated assertions that it is not attempting to use this matter as a means of access to information for the condemnation case rings as hollow as the City's claim it lacks the financial resources to hire relevant and disinterested experts. The City has now indicated that a huge part of its valuation litigation team should have access to Liberty's financial model, including an attorney who has not appeared or participated in this docket, and valuation experts who have apparently not reviewed any of the other confidential information submitted in this matter.

The City attempts to justify these outrageous discovery positions in its renewed motion to dismiss or stay these proceedings. A plain reading of the City's motion clearly establishes that: (1) the City believes it is entitled to share Liberty's confidential information directly with individuals actively working to condemn the assets of Park Water; (2) that the City mistakenly believes the Commission's investigatory role in these proceedings is to determine whether the purchase price Liberty agreed to is an appropriate valuation of Mountain Water; and (3) the experts the City has designated to review Liberty's confidential financial model only are "qualified to offer expert testimony on the value of the water system." City's Motion to Dismiss, pp. 1, 4-5. Furthermore, the City again failed to provide the legal basis necessary to stay or dismiss these proceedings that the Commission established as necessary in Order No. 7392b. The City's motion to dismiss is simply a preposterous interpretation of Liberty's discovery obligations, and the City's discovery entitlements, in this docket. The City's Motion should be denied in its entirety.

LEGAL ARGUMENT

I. THE COMMISSION SHOULD GRANT LIBERTY’S MOTION IN LIMINE AND PROHIBIT THE CITY FROM PROVIDING LIBERTY’S CONFIDENTIAL INFORMATION TO INDIVIDUALS WHO ARE WORKING TO CONDEMN THE WATER UTILITIES LIBERTY HAS AGREED TO ACQUIRE.

Liberty requests the Commission grant its motion *in limine* to ensure that Liberty’s confidential information is not provided to individuals working in support of the condemnation proceedings against the subsidiaries of Park Water, including Mountain Water. Admin. R. Mont. 38.2.1501 allows parties before the Commission to file a motion regarding “any matter relevant to the clarification of the proceeding before the commission.” The Commission previously has granted motions *in limine*. See Docket No. D.99.4.111, Notice of Staff Action (Oct. 8, 1999); *see also* Docket No. 92.8.39. Order No. 5648b (Oct. 6, 1992), *infra*.

Liberty filed a motion for a protective order based on its fears that its confidential and proprietary financial model would be used by the City of Missoula or the Town of Apple Valley in their condemnation actions against Park Water owned utilities. The Commission granted that motion and imposed special provisions protecting Liberty’s confidential information because of “the distinct and concurrent proceeding regarding the City’s condemnation of the water utility in Montana District Court.” Order No. 73921, ¶ 42. The City has confirmed Liberty’s fears and circumvented the Commission’s Orders by attempting to abuse its intervenor status in these proceedings and **directly** provide Liberty’s confidential financial model to individuals who are actively working on behalf of the condemnation actions against Park Water in Montana and California. The City’s attempts to provide Liberty’s confidential information to experts retained by the Town of Apple Valley is especially troubling given the municipalities’ agreement to work together and the Town’s recent statement that “as we explore acquisition of Apple Valley Ranchos Water Company, **what we have learned from Missoula will be invaluable.**” Town of

Apple Valley Press Release, “The Town of Apple Valley issued the following statement today on Missoula,” (June 18, 2015), attached as Exhibit D.⁴

The City’s decision to provide Liberty’s confidential financial model directly to individuals working to support efforts to condemn the assets of companies Liberty is seeking to acquire creates an inherent conflict between the objectives of Liberty’s condemnation experts and the Commission’s determination that Liberty’s financial model should be protected from use in condemnation proceedings. Order Nos. 7392f, 7392l, and 7392o. Furthermore, the City’s stated desire to allow its condemnation team to review Liberty’s financial model is wholly unreasonable, and violates Montana law as well as the non-disclosure agreement adopted by the Commission in this docket. Liberty cannot allow its economic and proprietary business interests to be sabotaged in this manner.

Liberty’s financial model is a confidential “trade secret” protected by Montana Code Annotated §§ 30-14-401, *et seq.* Montana law prohibits the “misappropriation” of a trade secret. Mont. Code Ann. § 30-14-403. Montana law defines “misappropriation” to include the “use of a trade secret” acquired from a person who had “a duty to maintain its secrecy or limit its use.” Mont. Code Ann. § 30-14-402(2)(b). In Order Nos. 7392f, 7392l, and 7392o, the Commission concluded that it was obligated to protect Liberty’s confidential information from being used in condemnation actions against Park Water. Nevertheless, the City wants to give Liberty’s financial model to its condemnation experts, who also have been retained by the Town of Apple Valley. By “using” information whose secrecy must be maintained, the City’s condemnation experts necessarily will violate Montana’s Uniform Trade Secrets Act.

⁴ It also should be noted that the City opposed and Judge Townsend denied Liberty’s motion to intervene in the City’s condemnation action against Mountain Water Company. In the event that the City gains access to the valuation model and then uses the valuation model in the condemnation case, Liberty does not have party status to explain, address or object to the City’s use of that model. The City simply should not have its cake and eat it too on these issues.

Furthermore, the Commission's non-disclosure agreement adopts Admin. R. Mont. 38.2.5001 – 38.2.5030 by reference. Admin R. Mont. 38.2.5014(1) establishes that individuals who review Liberty's confidential information can "**neither use nor disclose the confidential information for any purpose other than the purposes of preparation for and conduct of the proceeding before the Commission.**" (Emphasis added). The City would ask this Commission to believe that its condemnation experts can review Liberty's financial model, which includes confidential and proprietary information regarding Liberty's acquisition of Park Water, and that those condemnation experts will not use the mental impressions obtained from reviewing Liberty's financial model in either of the condemnation proceedings against Park Water. The City's position is disingenuous and impossible to enforce. That position also defies common sense.

As the Commission consistently has recognized, the condemnation efforts against Park Water should not benefit from the City's participation in this docket. If anything, the City's discovery positions illustrate that the City should not have intervenor status in this docket because the primary focus of the City's involvement revolves around its condemnation efforts. For these reasons, the Commission should grant Liberty's motion *in limine* and prohibit the City from providing Liberty's confidential information to individuals who are working to condemn the water utilities Liberty has agreed to acquire.

Furthermore, the Commission should grant Liberty's motion *in limine* because providing Liberty's confidential information to self-professed valuation experts will not assist the Commission's regulatory review of Liberty's agreement to acquire the stock of Western Water. In its motion to dismiss, the City reiterates its mistaken understanding of the Commission's core investigatory function in this docket. The City asserts that it should be entitled to provide

Liberty’s confidential information to individuals actively working to condemn the assets of Park Water because “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 Missoula will be paying for their water in the future.**”

City’s Motion to Dismiss, pp. 4-5 (emphasis added).

That statement is a flat falsehood. Liberty has committed that it will not seek any acquisition adjustment in rates or rate base. That necessarily means that the value and/or price to be paid for Mountain Water Company will not affect the rates of customers. The City’s understanding that the Commission will review Liberty’s valuation of Mountain Water in those proceedings is incorrect as a matter of law. At the Commission’s July 28, 2015 work session after oral argument denying the City’s second motion to dismiss, Commissioner Kavulla specifically rejected the City’s counsel’s understanding of how the Commission reviews regulated utilities:

Fundamentally, what we’re deciding here is not really the valuation of the utility. That’s for Liberty and Algonquin and Carlisle to decide. And they have decided on a value.

* * * * *

Whatever Liberty and Algonquin paid for utilities is not what consumers will be paying for their utilities.

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That’s not how utility regulation works. Just because a parent acquirer determines to pay something for a utility doesn’t mean that that enters into the utility’s rate base. It’s the book value less depreciation that utility consumers pay for regulated utility services. I think that needs to be pointed out [to the City].

Audio recording of Montana Public Service Commission work session, at 23:30—25:07 (July 28, 2015). Furthermore, the Commission routinely has determined that its regulatory review of proposed mergers or acquisitions of regulated utilities is limited to

determining that “utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that the acquiring entity is fit, willing, and able to assume the service responsibilities of a public utility.” PSC Docket D2011.1.8, Order No. 7149(d), ¶ 51. Concerns about an acquiring entity’s “valuation” of the regulated utility simply plays no role in the “no harm” standard the Commission applies.

Liberty agrees with Commissioner Kavulla’s remarks and consistently has expressed that valuation plays no role in the Commission’s regulatory review of this docket and that Liberty’s valuation of Mountain Water will not affect utility rate payers. *See, e.g.*, Liberty’s Response to Data Requests PSC-002, PSC-008, and PSC-009. Furthermore, Liberty President David Pasieka provided this Commission with sworn testimony that “the price that Liberty will pay for Park Water, Apple Valley Ranchos, and Mountain Water has no impact on water rates to be paid by customers of Mountain Water” because “Liberty Utilities will not seek an acquisition or rate base adjustment to cover or reflect the purchase price in water rates.” Testimony of David Pasieka, p. 5 (March 12, 2015).

Even though valuation plays no role in the Commission’s regulatory review of this docket, the City’s valuation experts currently can analyze Liberty’s valuation of Mountain Water based on documents already in the City’s possession. In the first document Liberty filed in this docket, Liberty informed the Commission and all parties that Liberty’s valuation of Park Water “is \$327 million.” Joint Application, ¶ 13. In response to City data requests, Liberty clearly indicated that reached its valuation of Mountain Water based on assumptions provided in the Confidential Information Memorandum (“CIM”). *See, e.g.*, Liberty’s Response to Data Requests CITY-001, CITY-003, CITY-010, CITY-013, and CITY-016. Both the Commission and the

City received an unredacted copy of the CIM on May 27, 2015. *See* Western Water Holdings, LLC’s Supplemental Responses to Data Requests PSC-028 and PSC-029 (May 27, 2015). The City also has received unredacted copies of all documents in the Park Water “virtual data room” or “electronic data room,” which Liberty also relied upon in valuing Mountain Water. *See* Liberty’s Response to Data Request CITY-001(b); *see also* Western Water’s Supplemental Response to Data Request PSC-028 and PSC-032 (April 21, 2015). Liberty has never hid its ultimate valuation of Park Water—or the basis for that valuation—from the City. Because the City’s valuation experts can analyze Liberty’s valuation of Mountain Water based on existing documents previously disclosed to the City, there is simply no reason to allow the City’s entire condemnation team to review Liberty’s confidential and proprietary financial model.

The Commission should grant Liberty’s motion *in limine* because the City’s purported “need” to share Liberty’s confidential information with its condemnation experts is premised on the City’s fundamental misunderstanding of the Commission’s regulatory review function in this docket. Prohibiting access by valuation experts and counsel who are not representing the City in this matter will not limit the City’s ability to participate in the Commission’s review of the material substantive issues in this docket. Furthermore, to the extent the City mistakenly believes Liberty’s valuation of Mountain Water is critical to the Commission’s regulatory review, the City and its experts can explore Liberty’s valuation based on documents already in the City’s possession. As a result, the Commission should grant Liberty’s motion *in limine* and prohibit the City from sharing Liberty’s financial model with the City’s condemnation team.

II. THE CITY’S PROCEDURAL REQUEST TO DISMISS THESE PROCEEDINGS IS INCORRECT AS A MATTER OF LAW.

The Commission should deny the City’s motion to dismiss or stay these proceedings, just as it denied two previous motions to dismiss or stay these proceedings, because the City has not

established a legal basis for staying or dismissing these proceedings. In Order No. 7392b, the Commission denied the Clark Fork Coalition's motion to stay or dismiss these proceedings. In doing so, the Commission laid out the detailed legal requirements that must be met before the Commission would stay or dismiss these proceedings. Furthermore, the Commission already has concluded that staying or dismissing these proceedings "would in fact be oppressive in consequence" to the Joint Applicants. Order No. 7392b, ¶ 13. The City does not refute that finding in its motion.

The Commission should deny the City's motion to dismiss or stay these proceedings for the same reasons articulated in Order No. 7392b, ¶ 16. *See Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) ("it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure"). The City has failed to establish the legal basis required for staying or dismissing these proceedings. Specifically, the City has failed to prove a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." Order No. 7392b, ¶ 6 (quoting *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 9, 645 P.2d 1350).

Similarly, the Commission should reject the City's unsubstantiated assertion that it cannot afford to hire the independent regulatory experts needed to analyze Liberty's confidential information. City's Motion to Dismiss, p. 4. The Commission has noted that the City's continued "participation and use of resources is voluntary." Order No. 7392b, ¶ 15. If the City cannot afford to participate in this docket, it can choose to refrain from further participation in these proceedings. The City's financial inability to hire the appropriate regulatory experts to

review Liberty's confidential information does not provide a legal basis for allowing the City's condemnation team to review Liberty's financial model, however.

Furthermore, the City's motion to dismiss or stay these proceedings is founded on an incorrect legal premise. The City suggests that Liberty has violated Order No. 7392o because Liberty has refused to allow the City to review Liberty's financial model and due diligence materials. That argument ignores the fact that Liberty has already allowed a member of the City's legal team, Tyler Stockton, to review those documents. Liberty does not believe that its decision to deny the City's condemnation team's access to Liberty's financial model violates Order No. 7392o.

Further, the City has not demonstrated how denying access to the City's condemnation valuation experts prejudices the City in this case. To date, the City has not filed NDAs for any witnesses to access the confidential information previously served on its counsel in this case. If the City is actually interested in submitting valuation testimony to the Commission, Mountain Water has provided all the confidential information the City's experts would need to accomplish that. As a result, the record in this case establishes the basis for the value Liberty has agreed to pay, and provides the assumptions about Mountain Water that Liberty used in conducting its model. With that information, the City cannot demonstrate why its condemnation experts need to review Liberty's model if the City's experts' purpose is to evaluate Liberty's value (which has been publicly disclosed) or to establish a different value. As a result, the denial of access to Liberty's proprietary review has not prevented the City from developing its own expert valuation testimony, if it believes that is relevant to this matter.

Finally, the City's motion to dismiss misrepresents ¶ 15 of Procedural Order 7392. The City asserts that the Procedural Order authorizes the Commission to dismiss a proceeding "if a

party fails to produce discovery.” City’s Motion to Dismiss, p. 6. That is incorrect. The Procedural Order provides that the Commission may resort to a variety of options “in response to a party’s failure to answer a data request.” Procedural Order No. 7392, ¶ 15. Liberty has answered all data requests submitted to it. Significantly, Liberty has provided the Commission and all requesting parties with hard copies of Liberty’s board meeting materials and tax returns. Liberty also has offered to allow the Commission and all requesting parties to review and work with Liberty’s financial model and due diligence materials, provided that those materials are protected from the condemnation proceedings against utilities currently owned by Park Water. Commissioners, Commission staff, and the City’s counsel have all reviewed Liberty’s financial model and due diligence materials. These undisputed facts establish that Liberty has answered all data requests submitted to it, contrary to the City’s assertions.

CONCLUSION

Liberty understands and respects the Commission’s cautionary instruction that “abuse of discovery must not be dealt with leniently.” Order No. 7392o, ¶ 31. Liberty has fully complied with Order Nos. 7392o and 7392l by allowing the Commission and the City’s regulatory attorney (and offering to allow the MCC) to review Liberty’s financial model and due diligence materials.

Liberty fundamentally believes that the Commission granted its motion for a protective order and entered Order Nos. 7392l and 7392o because the Commission was concerned that Liberty’s confidential information could be used to facilitate the City of Missoula and Town of Apple Valley’s condemnation proceedings against the Park Water utilities. *See* Order No. 7392l, ¶¶ 42, 45. The City ignored those concerns by asserting that it is entitled to provide Liberty’s confidential information to the City’s condemnation team, which is working in concert with the

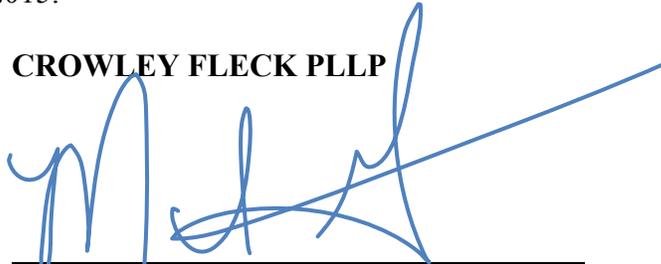
Town of Apple Valley's condemnation team. The City's position is unreasonable and unsupported by Montana law.

In 7392o, the Commission warned "all parties" not to abuse the discovery process. Order No. 7392o, ¶ 31. The City's attempt to provide Liberty's confidential information to its condemnation team can only be regarded as an abuse of the discovery process. Liberty has asked the Commission to approve its joint application to acquire the stock of Western Water Holdings. Liberty is entitled to have the Commission complete its regulatory review in this docket without continued, unreasonable discovery abuses from the City of Missoula.

For the foregoing reasons, the Commission should deny the City's motion to dismiss and grant Liberty's motions *in limine*.

Submitted this 28th day of August, 2015.

CROWLEY FLECK PLLP

A handwritten signature in blue ink, appearing to read 'Michael Green', is written over a horizontal line. The signature is stylized and extends above and below the line.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on August 28, 2015, the foregoing pleading was served via electronic and on August 31, 2015, by U.S. mail on:

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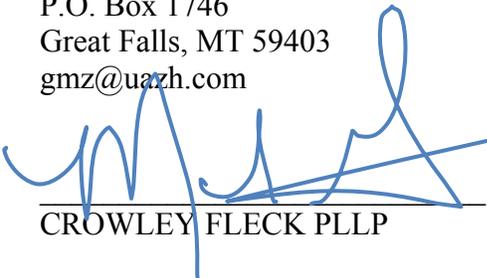
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CROWLEY FLECK PLLP

Mike Green

From: Mike Green
Sent: Monday, August 24, 2015 5:15 PM
To: 'Tyler Stockton'; Jeffrey Kuchel
Cc: Scott Stearns; Randy Tanner; Tina Sunderland; Tasha Jones; Bill VanCanagan
Subject: RE: Liberty Document Viewing

Tyler:

I will let Jeff respond regarding particular times, but the split times are not a problem. Please advise who the other reviewers will be and provide copies of the NDA's as soon as possible.

Jeff- we have Tyler's NDA, so he is authorized to review.

Mike 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

From: Tyler Stockton [<mailto:tstockton@boonekarlberg.com>]
Sent: Monday, August 24, 2015 4:58 PM
To: Jeffrey Kuchel
Cc: Mike Green; Scott Stearns; Randy Tanner; Tina Sunderland; Tasha Jones; Bill VanCanagan
Subject: Liberty Document Viewing

Jeff,

Mike Green said to contact you regarding a time to view Liberty's due diligence materials and financial model at your Missoula office. Due to scheduling conflicts, we will need to setup two separate times, one Tuesday and the other Wednesday.

Could we setup tomorrow (no particular time) for one person (myself)?

And, then Wednesday, at 1:30pm for the rest of our attorneys and experts?

Best,

Tyler Stockton
Law Clerk
Boone Karlberg P.C.
201 W. Main St., PO Box 9199
Missoula MT 59802
406.543.6646

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201 W. Main St., PO Box 9199
Missoula MT 59802
406.543.6646

Mike Green

From: Mike Green
Sent: Tuesday, August 25, 2015 8:39 AM
To: 'Tyler Stockton'; Jeffrey Kuchel
Cc: Scott Stearns; Randy Tanner; Tina Sunderland; Tasha Jones; Bill VanCanagan
Subject: RE: Liberty Document Viewing

I just spoke to Jeff. We have a conference room available today and on Thursday, but our conference rooms are full for a mediation on Wednesday. Jeff has made arrangements to have an empty office available for your use on Wednesday. Please let us know how many people to expect and at what time on Wednesday so we can arrange the space.

Thanks.

Mike 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

From: Tyler Stockton [<mailto:tstockton@boonekarlberg.com>]
Sent: Tuesday, August 25, 2015 8:10 AM
To: Jeffrey Kuchel
Cc: Mike Green; Scott Stearns; Randy Tanner; Tina Sunderland; Tasha Jones; Bill VanCanagan
Subject: RE: Liberty Document Viewing

Jeff,

For today, 1:30 will be great. Let us know about Wednesday.

Thanks,

Tyler

From: Jeffrey Kuchel [<mailto:jkuchel@crowleyfleck.com>]
Sent: Monday, August 24, 2015 5:49 PM
To: Tyler Stockton
Cc: Mike Green; Scott Stearns; Randy Tanner; Tina Sunderland; Tasha Jones; Bill VanCanagan
Subject: Re: Liberty Document Viewing

Tyler,

I apologize for having to respond from my phone. We will make the two work. I have to confirm Wednesday's schedule, though we will make it work. As for tomorrow, 1:30 would also work if that works for you. Please feel free to call me in the office tomorrow morning if you need an alternate time. My office number is (406) 523-3629.

Thanks,

Jeff

Sent from my iPhone

On Aug 24, 2015, at 5:10 PM, Tyler Stockton <tstockton@boonekarlberg.com> wrote:

Jeff,

Mike Green said to contact you regarding a time to view Liberty's due diligence materials and financial model at your Missoula office. Due to scheduling conflicts, we will need to setup two separate times, one Tuesday and the other Wednesday.

Could we setup tomorrow (no particular time) for one person (myself)?

And, then Wednesday, at 1:30pm for the rest of our attorneys and experts?

Best,

Tyler Stockton
Law Clerk
Boone Karlberg P.C.
201 W. Main St., PO Box 9199
Missoula MT 59802
406.543.6646

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Mike Green

From: Mike Green
Sent: Monday, August 24, 2015 1:14 PM
To: 'Randy Tanner'
Cc: Scott Stearns; Tyler Stockton; Tina Sunderland; John M. Semmens; Jeffrey Kuchel
Subject: RE: In-office view of Liberty data

Randy:

Jeff Kuchel in Missoula can coordinate times on Tuesday for access by you, Scott and Tyler, during our normal business hours. We have not received NDAs from anyone else. You can reach Jeff at 406.523.3629.

As we previously discussed and the Commission ordered, no one from Crowley will sit in the room during your review. However, we will ask you to confirm to Jeff on your arrival that you are not bringing any phone, camera or other device that takes copies or photos.

You can also discuss with Jeff directly other times this week for access, but please direct questions about process and information about any experts you intend to have view the information to me.

Thanks.

Mike 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

From: Randy Tanner [<mailto:rtanner@boonekarlberg.com>]
Sent: Monday, August 24, 2015 11:07 AM
To: Mike Green
Cc: Scott Stearns; Tyler Stockton; Tina Sunderland
Subject: In-office view of Liberty data

Mike,

I wanted to check in with you about setting up a time for the in-office viewing of the Liberty data. Are you available for that tomorrow (Tuesday)?

Also, we'd like to get our out-of-town expert access through WebEx. Please let me know how we can get that set up. We'll have NDAs to you soon, but I wanted to touch base with you on this sooner rather than later.

Thanks,

Randy

Randy J. Tanner
Boone Karlberg P.C.
201 West Main St., PO Box 9199
Missoula, MT 59807
406-543-6646



MOUNTAIN WATER CO.'S SISTER UTILITY IN CALIF.

Apple Valley votes to make offer for Mountain Water Co.'s sister utility in California



JUNE 05, 2015 6:15 AM • BY KEILA SZPALLER

A water company roughly the same size as Mountain Water Co. is worth some \$45.54 million, according to the town manager.

Last week, the Apple Valley town council moved to make an offer of "just compensation" for the Apple Valley Ranchos Water Co., said town manager Frank Robinson.

Apple Valley Ranchos and Mountain Water Co. are owned as part of a package along with a third company in California. The Carlyle Group, a global equity firm, owns the group.

The estimated value of Apple Valley Ranchos is significant in Missoula because the city took Carlyle and Mountain Water to court to try to condemn and buy the local water system.

The trial ended in April, and the judge has not yet issued a ruling.

If the judge rules it is "more necessary" for the city to own the utility, another court proceeding will set a fair price the city will pay for the system. So far, the city of Missoula and Carlyle have been far apart on their estimates of the worth of the company.

Before taking legal action, the city of Missoula offered \$50 million and \$65 million for the company. Carlyle, however, said a more realistic price – albeit a back-of-the-napkin one – would be closer to \$120 million.

In 2011, Carlyle paid \$102 million for all three water companies. In September, the firm announced it had a proposal to sell the companies as a package for \$327 million; that deal is pending approval by the Montana Public Service Commission.

"That's quite a return on investment if you think about it," Robinson said.

EXHIBIT C

Even if debt is not included in the equation and the price is closer to \$250 million, he said, it's still a 110 percent increase in three years.

Apple Valley has some 70,000 residents, and the systems in Apple Valley and Missoula are roughly the same size, Robinson said. He estimated the utility in California has 20,000 connections; Mountain Water counts some 23,000 service lines.

On Thursday, city of Missoula communications director Ginny Merriam said the administration would not comment on the case – and how the value set in Apple Valley could affect Missoula – until the judge issues a verdict.

A Carlyle spokesman also did not comment on the value found in Apple Valley or on historic rate increases there.

Apple Valley will deliver an offer to Carlyle within a couple of weeks, Robinson estimated. If Carlyle rejects it, which seems likely given the pending sale of all three companies, the town council may take another step toward acquisition.

In California, a town council itself can determine municipal ownership is a "necessity" and in the best interest of the public, Robinson said. If the town council decides that ownership is necessary, he said, the court will then determine the value of the asset.

Over the past decade, water rates for Apple Valley customers have increased 68 percent, with roughly half the increase taking place in the past four years under ownership by Carlyle, Robinson said. He said the total ask over the same time period was even more, 112 percent.

"The ratepayers have voiced their opinion very, very loudly to their town council, that they want these rate increases stopped, these double-digit rate increases," Robinson said. "They want to see an end to it. The only way to put a stop to it is for the town to take control."

Liberty Utilities of Algonquin Power and Utilities Corp. is the company that has proposed to purchase all three water companies.

Earlier, Carlyle confirmed the proposed sale to the subsidiary of Algonquin, a Canadian conglomerate, was not contingent on the outcome of the trial in Missoula.

If the city of Missoula and Apple Valley both acquire their community's water company, Algonquin could end up paying \$327 million for just one company instead of three. Liberty responded to whether it is considering legal action to protect the pending purchase.

"Liberty Utilities entered into an agreement to purchase the stock of Western Water Holdings to own three utilities for the long term and have committed to the employees of all three utilities that we will do whatever is necessary, within the law, to aggressively

fight for keeping them within the Liberty family of companies," said Brian Ketcheson, vice president of operations for Liberty Utilities, in a statement provided by a spokeswoman.

Liberty disputed it had signed on to pay a premium for the companies, however: "We believe we paid fair market value for the utilities as evidenced by multiple bidders with very similar bids for the combined utilities," Ketcheson said. "The ultimate purchase was the result of a fully competitive bidding process that resulted in a fair market price being paid."

He also said that if the judge rules in favor of Missoula in the condemnation case, he anticipates the subsequent proceeding "will result in a value far in excess of the city of Missoula's expert valuation."

The valuation in Apple Valley was completed by Hayward Consulting Group of California, which also estimated the value of Mountain Water for the city of Missoula.

Utilities expert David Hayward of Hayward Consulting wrote a textbook on water utility valuation, in its third edition, and has served as a senior utility policy adviser "on World Bank, U.S. Agency for International Development, and Asian Development Bank-funded projects to cabinet-level government leaders," according to his curriculum vitae.



Town of Apple Valley NEWS RELEASE

Town of Apple Valley **FOR IMMEDIATE RELEASE**

Contact: Kathie Martin, Public Information Officer

Phone: (760)240-7000 x 7070 Fax: (760)961-6242 E-mail:kmartin@applevalley.org

Town of Apple Valley and City of Missoula forge collaboration

Leaders of the City of Missoula, Montana and the Town of Apple Valley, met Monday in Missoula to discuss efforts to bring water service to citizens as municipal utilities owned by the public.

In Apple Valley, the Town's water system is owned and operated by Apple Valley Ranchos Water Company (AVRWC). In Missoula, it is Mountain Water Company (MWC). Both entities are owned by Park Water Company, which is owned by Western Water Holdings, LLC. In turn, Western Water Holdings is a wholly-owned indirect subsidiary of Carlyle Infrastructure Partners, a division of The Carlyle Group. According to a 2011 ranking called the PEI 300 based on capital raised over the last five years, Carlyle was ranked as the third largest private equity firm in the world.

In the face of continuing rate hikes and lack of local control over such an important resource, both communities are exploring options to acquire their respective water systems. They agreed Monday to share resources and collaborate in their efforts.

"Missoula and Apple Valley have a lot in common," Missoula Mayor John Engen said. "We have a belief that a community's water system should be under public ownership. We're disconcerted when we hear about proposed 35 percent increases in Apple Valley's water rates and bills higher than \$300 a month for residential service. We need to make sure this essential resource is treated with the respect it deserves and preserved in public ownership in perpetuity for the public."

Apple Valley officials who visited Missoula were Town Manager Frank Robinson, assistant town managers Marc Puckett and Dennis Cron and Town attorney John Brown.

"In light of the recent decision by Western Water Holdings, LLC, to accept offers to purchase its stock in Park Water, it makes sense to compare notes and possibly consider uniting resources in this effort," Town attorney Brown said.

Both Apple Valley and Missoula are committed to acquisition of their water utilities. Apple Valley's Town Council recently authorized the preparation of a Request for Proposals for appraisal services for appraisals of property including the Apple Valley Ranchos Water Company system and related entities. The City of Missoula has made offers to purchase Mountain Water and is now pursuing condemnation through the exercise of eminent domain, pending in District Court.

Leaders of the City and the Town hope to collaborate on continuing efforts to fairly value their municipal water systems and to strategize about ways to raise capital to fund acquisition of those systems. They also hope to reach out to the water customers in the three separate water systems in southeast Los Angeles County also served by Park Water Company.

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