

**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.,) REGULATORY DIVISION
Western Water Holdings, LLC, and Mountain)
Water Company for Approval of a Sale and) DOCKET NO. D2014.12.99
Transfer of Stock)

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S BRIEF IN RESPONSE TO
CITY OF MISSOULA’S MOTION TO COMPEL AND RENEWED MOTION TO JOIN
ALGONQUIN**

Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submit to the Montana Public Service Commission (“Commission”) this response to the City of Missoula’s (“City”) motion to compel and renewed motion to join Algonquin. The City’s motion was premature, and finds no support in Montana law or the Commission’s prior orders in this docket. For these reasons, Liberty requests that the Commission deny Liberty’s motion, just as it has denied similar motions previously filed by the City.

PROCEDURAL AND FACTUAL BACKGROUND

The City’s motion is premised on its assumption that Liberty and/or Algonquin Power & Utilities, Corp. (“APUC”)¹ purposefully withheld Liberty’s complete financial model from the City’s experts, Craig A. Close and David L. Hayward, or otherwise violated the Commission’s instructions in Order No. 7392p. The City is incorrect. Despite being made aware that Liberty’s counsel initially erred by failing to produce Liberty’s full financial model and that Liberty’s

¹ The Commission has “require[d] that relevant information about Algonquin continues to be made available through Liberty[.]” *See* PSC Docket No. D2014.12.99, Order No. 7392b, ¶ 26; *see also* Order No. 7392n, ¶ 45.

counsel corrected that error by providing the City's experts access to the full model, the City has refused to withdraw its motion.

In Order No. 7392p, the Commission ordered Liberty to provide access to the City's valuation experts, subject to special provisions, "by October 15, 2015." Order No. 7392p, ¶ 24. Liberty decided to comply with Order No. 7392p to allow the Commission to review the joint application in this docket in a timely manner. Liberty did not file a motion for reconsideration with the Committee, as authorized by Admin. R. Mont. 38.2.4806. Similarly, Liberty did not initiate judicial review of Order No. 7392p and appeal the Commission's decision to district court. Furthermore, Liberty did not object to the City's notice of intent to provide Dale Bickell, a City employee-expert, with access to Liberty's confidential information, even though Liberty could have done so pursuant to Admin. R. Mont. 38.2.5024(1)(b).

Instead, Liberty instructed its counsel, Crowley Fleck PLLP ("Crowley Fleck"), to provide the City's experts with full access to Liberty's financial model at Crowley Fleck's offices. As a courtesy to the City's counsel, who are located in Missoula, Liberty authorized Crowley Fleck to allow the City and its experts to review Liberty's financial model in Crowley Fleck's Missoula office.

The Commission served Order No. 7392p on Friday, October 2, 2015. Counsel for the City and the undersigned arranged for the City and its experts to review Liberty's financial model in Missoula on Tuesday, October 6, 2015. The City's experts and attorneys reviewed Liberty's financial model on that date, seemingly without issue. In fact, neither the City's counsel nor the City's experts alerted Liberty or Crowley Fleck that it believed any information was missing from Liberty's financial model on October 6, 2015, or on any other date that week.

On the afternoon of Monday, October 12, Randy Tanner—an attorney for the City—emailed the undersigned the following message:

Mike,

Two of our experts—Craig Close and David Hayward—have viewed the financial analysis and due diligences. It is clear to them that Liberty has not disclosed all of the financial analysis and due diligence for this transaction.

Tomorrow, we intend to file a motion to compel production of that information and to file a renewed motion to join Algonquin. Please let me know whether you oppose that motion.

Randy

October 12, 2015, at 3:21 PM email from Randy Tanner to Mike Green, attached as Exhibit A.

Liberty’s counsel immediately responded and emailed Mr. Tanner the following message:

We oppose those motions. We have produced what we previously indicated we would produce in response to discovery requests. **Please advise what you believe is missing.**

Mike Green

October 12, 2015 at 4:38 PM email from Mike Green to Randy Tanner, attached as Exhibit B (emphasis added).

Mr. Tanner did not respond to that email or otherwise advise Liberty’s counsel what documents he believed were missing. Instead, the City filed its motion to compel, which immediately alerted the undersigned to a production error made in counsel’s office. After discussing this matter with Crowley Fleck’s Missoula office, the undersigned discovered that the City’s experts, in fact, had not been presented with every page of the Excel spreadsheet that is Liberty’s financial model. When Crowley Fleck’s Missoula office printed the spreadsheet, the default printing option was to print “active sheets,” and not “entire workbook.” As a result, the

Crowley Fleck Missoula office staff, who are unfamiliar with the substantive issues in this docket, only printed four pages of Liberty's fifty-four page spreadsheet for the City's experts to review.

After discovering that Crowley Fleck had failed to provide the City's experts with Liberty's entire financial model, the undersigned emailed Randy Tanner the following message:

Randy:

It appears we may have had a technical issue on the document production between our firm offices. The spreadsheet Liberty produced is actually 54 or 55 pages depending on the printer. I just spoke to Jeff Kuchel, I understand we only made 4 pages available in the Missoula office. We are making arrangements to make the full model available in our Missoula office as soon as possible. **While I take full responsibility for the error in production, a simple inquiry to Jeff or me during your review, or even a response to my email on Monday may have given us an opportunity to correct this issue.** There is simply no need for yet another motion in this case. In light of my error, I am hopeful you will withdraw the motion to compel until we have an opportunity confer regarding these discovery issues.

Also, you sent the confidential version of your motion to the entire email service list for this matter, many of whom have not signed NDA's regarding the information in your motion. I will be contacting the entire group tonight directly tonight to alert them to this breach of the Commission's rules and the protective order. I request that you contact each improper recipient to arrange and confirm destruction of any hard copies your office mailed to them.

Please contact me to indicate when you want to review the additional materials in the Liberty model.

Michael W. Green

October 13, 2015, at 9:42 PM email from Mike Green to Randy Tanner, attached as Exhibit C (emphasis added).

Liberty is not responsible for Crowley Fleck's failure to print and produce Liberty's entire financial model for review by the City's experts. Liberty instructed Crowley Fleck to

allow the City's experts to review Liberty's entire financial model, in full compliance with Order No. 7392p. Unfortunately, due to a technical mistake, Crowley Fleck failed to do so.

Upon discovering the production error, the undersigned immediately undertook efforts to correct the error. Liberty authorized the undersigned to provide the City's experts—David L. Hayward and Craig A. Close—with access to Liberty's full fifty-five page financial model at those experts' offices in San Diego, California beginning on October 14, 2015. Although Mr. Hayward was unable to review Liberty's financial model, Mr. Close inspected Liberty's full financial model on October 15, 2015. Mr. Close reviewed the full financial model and Tyler Stockton, a member of the City's legal team, contemporaneously reviewed the full financial model in Crowley Fleck's Missoula office. Thus, members of the City's legal team and one of its experts actually saw Liberty's full financial model by October 15, 2015, as directed by Order No. 7392p. Additionally, Liberty understands that Mr. Hayward intends to fly to Missoula to inspect Liberty's full financial model in person, and Crowley Fleck has agreed to pay for Mr. Hayward's travel expenses.

THE CITY'S MOTION SHOULD BE DENIED IN ITS ENTIRETY BECAUSE CROWLEY FLECK AND LIBERTY HAVE TAKEN REASONABLE EFFORTS TO CORRECT CROWLEY FLECK'S PRODUCTION ERROR AND ALLOW THE CITY'S EXPERTS TO REVIEW LIBERTY'S FULL FINANCIAL MODEL.

In response to counsel's error, which temporarily prevented the City's experts from reviewing the City's entire financial model, the City has submitted five separate requests to the Commission. *See* City's Motion to Compel and Renewed Motion to Join Algonquin, p. 9. Liberty did not purposefully withhold its financial model from the City's experts. Crowley Fleck has made good faith attempts to mitigate its production error and provide the City's experts with access to Liberty's full financial model. Provision of the financial model to the City's experts moots the requests made in the City's motion.

Many of the requests in the City's pending motion previously have been considered and denied by the Commission. All of the City's requests are premised on the City's erroneous assumption that Liberty purposefully has withheld its financial model from the City. As explained above, the City's experts were unable to review Liberty's financial model due to counsel's error, and Crowley Fleck has been attempting to resolve that error ever since it learned that it did not produce all documents for the City's review.

Because both Crowley Fleck and Liberty have made and continue to make good faith efforts to resolve that error, and the City's experts had an opportunity to review Liberty's confidential information before the October 15, 2015 deadline imposed by the Commission, the basis for the City's requests have been mooted. *See Cook v. McClammy*, 2009 MT 115, ¶ 8, 350 Mont. 159, 206 P.3d 906 ("an issue is moot when the controversy causing it ceases to exist and any action this [Commission] takes will have no effect on the situation of the parties"). As a result, the Commission should deny the City's motion in its entirety.

I. Liberty Has Made A Good Faith Attempt To Produce All of Its And APUC's Financial Analyses And Due Diligence, In Compliance With The Commission's Earlier Orders.

The Commission ordered Liberty to provide the City's valuation experts with access to Liberty's financial model, subject to special provisions, "by October 15, 2015." Order No. 7392p, ¶ 24. The City's pending motion, dated October 13, 2015, requests the same relief provided by Order No. 7392p. Because the City already has received the relief requested in the first prong of its pending motion, there is no basis for the Commission to enter a second order granting the same relief. Furthermore, because the City filed its motion to compel before the October 15 deadline the Commission set in Order No. 7392p, the City's motion necessarily was premature and should be denied on those grounds.

Crowley Fleck made a good faith attempt to provide the access required by Order No. 7392p on October 6, 2015. The City did not inform Crowley Fleck that it believed portions of Liberty's financial model had been withheld until October 13, 2015. The City also refused to respond to Crowley Fleck's requests to identify the information the City believed had been withheld, even though the City's motion correctly asserts that Crowley Fleck mistakenly failed to produce the "inputs" to Liberty's financial model. *See City's Motion*, p. 2.

In short, the Commission previously ordered Liberty to allow the City's experts to review Liberty's financial model. Liberty instructed Crowley Fleck to do just that, but Crowley Fleck erred while attempting to do so. Both Liberty and Crowley Fleck are working to mitigate that error, and a second order instructing Liberty to do so is unnecessary. *See Cook*, ¶ 8, *supra*.

II. Liberty Complied With The Commission's Requirements Regarding Identification Of Public And Privileged Information But Is Providing A Supplemental Privilege Log On A Form Provided By Staff Concurrent With This Motion.

In its motion, the City criticizes Liberty for failing to produce a privilege log regarding information withheld from production on the basis of privilege. To the contrary, however, in its supplemental responses to discovery, Liberty specifically identified the documents being withheld on the grounds of attorney-client privilege. As a result, Liberty has complied with the Commission's order regarding identification of privileged information.

Order No. 7392, ¶ 11, requires a party objecting to production on grounds of privilege to file a privilege log "with enough information for the commission to determine whether the privilege applies." However, neither the Order nor the Commission's rules prescribe a particular format for the required privilege log. The information Liberty previously provided in response to the supplemental discovery requests satisfy the requirement that it provide sufficient

information for the Commission to determine whether grounds for privilege exist. The documents withheld on privilege grounds were identified as follows:

2. A PowerPoint deck dated September 1, 2014 . . . Eight pages of that deck are a due diligence appendix, which was prepared by counsel, is an attorney/client communication and is withheld on privilege grounds.
3. Project Orchard Due Diligence Report dated September 1, 2014, compiled by APUC's general counsel's office consisting of 86 pages, is an attorney/client communication and is withheld on privilege grounds.

See Liberty's Supplemental Response to Data Requests MCC-010; see also Liberty's Supplemental Response to Data Request PCS-033(b). It is worth noting that Liberty did not withhold its financial model on privilege grounds. As a result, there is no basis for the City's request for additional privilege log information. To the extent that the procedural order is construed to require a particular format of the privilege log, Liberty has obtained a sample from PSC staff and is providing the required information in that format. Therefore, Liberty has satisfied any additional privilege log requirement with its concurrent filing.

III. The Commission Should Deny The City's Request To Hold An *In Camera* Review of Liberty's Documents Withheld On Privilege Grounds. There Is No Legal Basis For That Request.

The City provides no legal support for its request that the PSC hold an *in camera* review of Liberty's privileged documents; in fact, there is no legal basis for such a request. There is no administrative rule that allows the Commission to hold an *in camera* review of privileged documents. Similarly, Procedural Order No. 7392 does not support the City's requested *in camera* review, but instead merely requires Liberty to "respond with enough information [in its privilege log] for the Commission to determine whether the privilege applies." Procedural Order No. 7392, ¶ 11; see also M.R.Civ.P. 26(6)(A)(ii). Therefore, the Commission should deny the City's request for an *in camera* review of Liberty's documents withheld on privilege grounds.

IV. The Commission Should, Once Again, Deny The City's Motion To Join APUC.

Less than a month ago, the Commission denied—for the second time—the City's motion to include APUC in these proceedings. *See* Order No. 7392n, ¶ 48 (“requiring Algonquin to appear in [these] proceedings is not consistent with the minimum [contacts] rule and fair play and substantial justice”); *see also* Order No. 7392b, ¶ 28. The Commission's decision was well-reasoned and based on established law.

In relevant part, the Commission found that although discovery has been contentious in this docket, “the corporate structure of Algonquin and Liberty has not been the root-cause of these disputes” and, therefore, “no fraud or injustice will occur as a result of Algonquin's absence” from these proceedings. Order No. 7392n, ¶ 44. The Commission also determined that “at this juncture, adding an additional party” would result in the “degradation of procedural efficiency and economy” that would not be “worth the attenuated benefits that could be derived by having Algonquin directly available.” Order No. 7392n, ¶ 45. The Commission's finding that including APUC would result in the needless expenditure of additional resources is especially relevant in light of the City's recent Amended Petition for Judicial Review, wherein the City asserted that if these proceedings are not dismissed, “the PSC proceeding will needless force the City to bear significant financial hardships and result in a substantial waste of resources.” City of Missoula's Amended Petition for Judicial Review, Montana Fourth Judicial District Court, Cause No. DV-15-918 (October 8, 2015).

The City's pending motion to join APUC does not address the Commission's rationale for denying previous motions to join APUC. Instead, the City's motion is premised on its erroneous assumption that APUC *was* responsible for Crowley Fleck's failure to provide the City's experts with Liberty's full financial model:

But if the two presentations and the four-page spreadsheet are all that Liberty has, then Algonquin certainly has additional financial analysis and due diligence that it did not provide Liberty. That is why Algonquin should be joined in these proceedings.

City's Motion to Compel, p. 7.

The City is mistaken. As explained above, Crowley Fleck—and not the corporate structure between Liberty and APUC—is responsible for the failure to provide the City's experts with Liberty's full financial model. APUC's presence in these proceedings would not have prevented counsel's error, which prevented the City's experts from reviewing Liberty's full financial model, but it would lead to further "degradation of procedural efficiency and economy" in this docket. *See* Order No. 7392n, ¶ 45.

For these reasons, the Commission once more should deny the City's motion to join APUC in these proceedings.

V. The Commission Should Maintain The Amended Schedule In This Docket. Crowley Fleck And Liberty Have Worked To Ensure The City's Experts Are Able To Review Liberty's Financial Model As Ordered By The Commission.

The Commission should deny the City's perfunctory request to stay the deadlines in these proceedings. City's Motion to Compel, p. 9. As established above, Crowley Fleck and Liberty worked to ensure the City and its expert, Craig A. Close, were able to review Liberty's full financial model before the Commission's October 15, 2015 deadline. Crowley Fleck also has agreed to pay for David L. Hayward's travel expenses when he flies to Missoula to inspect Liberty's full financial model.

Liberty has reviewed the Commission's amended schedule Commission staff served on all parties on October 19, 2015, and Liberty believes that this amended schedule provides all parties with adequate time to prepare testimony while also maintaining the hearing date in this

docket. Liberty does not believe that any additional changes to the amended schedule are necessary or appropriate at this time.

CONCLUSION

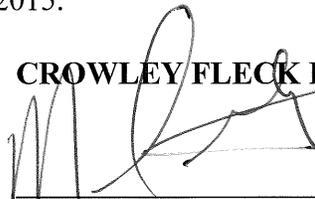
The City's motion to compel is premised on the City's erroneous assumption that Liberty and/or APUC have attempted to withhold Liberty's full financial model from the City's valuation experts. That is simply not true. To the contrary, Liberty instructed Crowley Fleck to allow the City's experts to review Liberty's full financial model. Due to counsel's error and a technical mistake, Crowley Fleck failed to do so.

Crowley Fleck has worked to mitigate its mistake and allow the City's experts to review Liberty's full financial model as quickly as possible. In fact, both the City's legal team and its expert, Craig A. Close, reviewed Liberty's full financial model before the Commission's October 15, 2015 deadline.

Because the City's motion lacks merit, the Commission should deny that motion in full.

Submitted this 23rd day of October, 2015.

CROWLEY FLECK PLLP



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**ATTORNEYS FOR LIBERTY UTILITIES CO. AND
LIBERTY WWH, INC**

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on October 23rd, 2015, the foregoing pleading was served via electronic and U.S. mail on:

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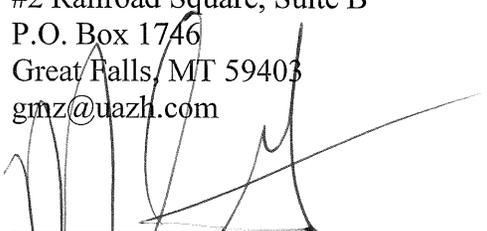
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CROWLEY FLECK PLLP

On Oct 12, 2015, at 3:21 PM, Randy Tanner
<rtanner@boonekarlberg.com<mailto:rtanner@boonekarlberg.com>> wrote:

Mike,

Two of our experts—Craig Close and David Hayward—have viewed the financial analysis and due diligences. It is clear to them that Liberty has not disclosed all of the financial analysis and due diligence for this transaction.

Tomorrow, we intend to file a motion to compel production of that information and to file a renewed motion to join Algonquin. Please let me know whether you oppose that motion.

Randy

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

From: Mike Green

Sent: Monday, October 12, 2015 4:38 PM

To: Randy Tanner

Cc: Nik Stoffel (NSStoffel@hollandhart.com); Scott Stearns; Tasha Jones; Tina Sunderland

Subject: Re: Motion to compel and motion to join Algonquin

We oppose those motions. We have produced What we previously indicated we would produce in response to discovery requests. Please advise what you believe is missing.

Mike Green

CROWLEY FLECK

406-457-2021 <tel:406-457-2021>

Sent from my iPhone

From: Mike Green [mgreen@crowleyfleck.com]

Sent: Tuesday, October 13, 2015 9:42 PM

To: Randy Tanner

Cc: Nik Stoffel (NStoffel@hollandhart.com); Scott Stearns; Tasha Jones; Tina Sunderland; Jeffrey Kuchel; Mark Stermitz; Langston, Jeremiah; Farkas, Laura

Subject: RE: Motion to compel and motion to join Algonquin

Randy:

It appears we may have had a technical issue on the document production between our firm offices. The spreadsheet Liberty produced is actually 54 or 55 pages depending on the printer. I just spoke to Jeff Kuchel, I understand we only made 4 pages available in the Missoula office. We are making arrangements to make the full model available in our Missoula office as soon as possible. While I take full responsibility for the error in production, a simple inquiry to Jeff or me during your review, or even a response to my email on Monday may have given us an opportunity to correct this issue. There is simply no need for yet another motion in this case. In light of my error, I am hopeful you will withdraw the motion to compel until we have an opportunity confer regarding these discovery issues.

Also, you sent the confidential version of your motion to the entire email service list for this matter, many of whom have not signed NDA's regarding the information in your motion. I will be contacting the entire group tonight directly tonight to alert them to this breach of the Commission's rules and the protective order. I request that you contact each improper recipient to arrange and confirm destruction of any hard copies your office mailed to them.

Please contact me to indicate when you want to review the additional materials in the Liberty model.

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