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

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IN THE MATTER OF Joint Application of Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company for Approval of a Sale and Transfer of Stock.	REGULATORY DIVISION DOCKET NO. D2014.12.99

CITY OF MISSOULA'S MOTION FOR PROTECTIVE ORDER

The City of Missoula moves for a protective order from the Public Service Commission ("PSC") with respect to material requested by applicants Mountain Water Company and Western Water Holdings, LLC (collectively "Mountain Water"). This motion seeks protection from irrelevant, overly broad, and unduly burdensome data requests, pursuant to Mont. R. Civ. P. 26(c)(1)[1] and A.R.M. 38.2.5007(4), and from requests seeking privileged material pursuant to Mont. Code Ann. § 26-1-803 and Mont. R. Civ. P. 26(b)(3).

Mountain Water has served the City with extensive discovery requests, many of which address the City's successful condemnation action pending in Montana's Fourth Judicial District rather than any issue pending before the PSC. Additionally, many of the requests are unduly burdensome because they seek extensive materials far beyond the scope of this case, including confidential information of individuals and businesses not associated with this action. Finally, the requests seek material protected by attorney-client privilege and the work-product doctrine.

[1] The PSC has adopted Rule 26 of the Montana Rules of Civil Procedure. A.R.M. 38.2.3301(1).

The PSC should issue a Protective Order prohibiting data requests unrelated to this matter, prohibiting or limiting the scope of the overly broad and unduly burdensome data requests, and prohibiting discovery of material protected by Montana law.

The contact person to whom communications regarding this motion should be made is:

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Introduction

Mont. R. Civ. P. 26 provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. . . ." Mont. R. Civ. P. 26(b)(1). "The requirement . . . that the material sought in discovery be 'relevant' should be firmly applied . . ." *Herbert v. Lando*, 441 U.S. 153, 177 (1979). Rule 26(c) protects litigants from discovery requests that exceed the parameters of permissible discovery. It provides that upon motion and for good cause shown, the court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . (A) forbidding discovery . . . (D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters. . . ."

Mountain Water served its first set of discovery requests on the City on November 9, 2015. The salvo consists of 100 numbered requests, but most include several subparts, bringing the actual number of requests to several hundred. Numerous requests seek information pertaining solely to the City's attempts to obtain

the Water System through negotiation and then condemnation. The City's successful condemnation trial is, of course, not before the PSC. The District Court has exclusive jurisdiction over that matter. The only issue before the PSC is the proposed purchase of Mountain Water by Liberty/Algonquin. Thus, data requests regarding the City's acquisition efforts or post-acquisition plans are entirely irrelevant, outside the PSC's jurisdiction, and not subject to discovery in this proceeding.

Further, the Applicants have the burden of proving the proposed sale should be approved. *See* Order 7392n, ¶ 47 ("a proposed parent's active participation and voluntary presence increase the chances that it will meet its burden of proof under the public interest standard, the no-harm to consumers standard, or the net-benefit to consumers standard. The involvement of parent corporations in sale and transfer dockets will continue to bear on **the applicant's burden of proof** when personal jurisdiction over that parent corporation is lacking") (emphasis added). The City has no burden of proof in the PSC matter, which further renders any requests about the City's actions or intentions irrelevant.

The PSC should issue a Protective Order preventing discovery that pertains only to the Montana Fourth Judicial District Condemnation action. Other requests are grossly overbroad and unduly burdensome and will result in significant expense to irrelevant matters. The PSC's Protective Order should strike or substantially limit those overbroad requests. Finally, the PSC's Protective Order should prohibit discovery of privileged materials.

Analysis

A. The PSC should issue a Protective Order prohibiting discovery of information relevant only to the City's effort to acquire Mountain Water Company's assets.

The City seeks protection from all irrelevant, overly broad, and unduly burdensome data requests. The largest category of improper requests consists of requests regarding the City's efforts to obtain the Water System in the separate condemnation in Montana's Fourth Judicial District Court. Representative examples of these irrelevant data requests include:

MW/WWH-037

b. Please explain whether the City intends to pay for replacement of the service lines should it acquire Mountain Water's system.

c. Please explain why the City has not used its enforcement powers to pass an ordinance requiring customers to replace service lines.

d. Please explain why the City could not pass such an ordinance at any time and pay for the replacement of service lines using tax dollars.

MW/WWH-048

c. Please explain in detail how the City intends to recover its legal and administrative acquisition-related expenses.

e. Did Mr. Close or HDR prepare an analysis of the impact on taxes associated with City-ownership under Option 4? If no, please explain why not. If yes, please produce a copy of that analysis and all related documents in native format with links and formulae intact.

MW/WWH-063

Admit that the City's financial projections show reductions in payroll, benefits, and labor in connection with the City's acquisition of Mountain Water's assets. If your answer is anything other than an unqualified admission, please explain in detail and provide all documents used, referred to, or relied upon in answering this request.

MW/WWH-077

c. Admit the City has never requested audited financial statements in the years when Mountain Water did not file an application for a rate increase. If your answer is anything other than an unqualified admission, please explain in detail and provide all documents used, referred to, or relied upon in answering subpart (c).

MW/WWH-096

Please provide City payroll records detailing payroll charges and costs related to time spent by City administration and employees, including the mayor and city council, pertaining to (a) the condemnation case, and (b) this PSC transfer proceeding.

MW/WWH-099

a. Please provide all communications and correspondence between the Clark Fork Coalition and the City of Missoula referring or related to Mountain Water, Carlyle, Western Water, Park Water, Liberty, Algonquin, or any of their respective employees from January 1, 2013 until today.

b. Please provide a list of all meetings between the Clark Fork Coalition and the City of Missoula pertaining to Mountain Water, Carlyle, Western Water, Park Water, Liberty, Algonquin, or any of their respective employees from January 1, 2013 until today.

c. Please provide copies of all notes taken and other documents provided during the meetings identified in (b).

MW/WWH-0100

a. Please provide all notes, minutes, and agendas from all internal and external meetings where the integration of Mountain Water's operations and employees into the City's operations was discussed.

b. Please explain the terms of all offers made to the employees of Mountain Water from the City, and provide copies of all written offers.

c. Admit the City does not have experience operating the Mountain Water system for the citizens of Missoula. If your answer is anything other than an unqualified admission, please explain in detail and produce all documents used, referred to, or relied upon in answering subpart (c).

Discussion

Discovery of information irrelevant to the matters involved in a case is not permitted. *See* Mont. R. Civ. P. 26(b). The above data requests and others seek information pertinent *only* to the City's condemnation action. There is obvious irony in Mountain Water using PSC discovery procedures to develop information relevant only to the condemnation action. As the PSC is well aware, Mountain Water and co-applicant Liberty Utilities have spent months worrying the City might use the PSC proceedings to gather information for the condemnation action. *See e.g.* Liberty and Western Water's Motion *in Limine* (Aug. 28, 2015), p. 8. ("Discovery in the condemnation case is closed, and the Commission should not allow the City to conduct additional discovery in this forum."); Liberty's Response to the City of Missoula's Motion to Compel (May 8, 2015), p. 6 (same).

Here, Mountain Water is committing the same discovery abuse it wrongly accused the City of perpetrating - using the PSC proceeding to conduct condemnation discovery.[2] This is improper. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n. 17 (1978)("when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied.").

Alternatively, Mountain Water may be trying to gather information related to the City's condemnation action because it hopes to persuade the PSC that municipal ownership of the Water System is undesirable. This is irrelevant to the question before

[2] The City's assurances that it has no such intention have been vindicated, as it recently presented its valuation case to the Water Commissioners without any attempt to improperly use the protected information.

the PSC – which has no role in deciding the merits of City ownership – and therefore is also improper. As Liberty and Mountain Water have themselves observed:

> [T]he 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.'

Liberty and Western Water's Motion *in Limine.*, pp. 13-14, citing PSC Docket D2011.1.8, Order No. 7149(d), ¶ 51.

Whether City ownership is preferable to investor-driven ownership is a question not for the PSC, but for the Fourth Judicial District Court alone. Indeed, the Court has made that determination:

> Based on the credible evidence at trial, the Court concludes that the City has carried its burden of proof by a preponderance of the evidence in establishing that its contemplated use of the Water System as a municipally owned water is more necessary than the current use as a privately owned for-profit enterprise.

Finding of Fact, Conclusions of Law, and Preliminary Order of Condemnation, Conclusion (June 14, 2015), ¶ 10.

The only matter presently pending before the PSC is whether to approve Algonquin/Liberty's proposed purchase of Western Water. As such, only evidence actually related to Algonquin/Liberty's proposed purchase is relevant to the PSC's determination. Data requests that only go to the City's acquisition plans and efforts are irrelevant to any issue before the PSC.

The PSC granted Liberty extraordinary discovery protections because Liberty incorrectly assumed the City intended to apply information gleaned in the PSC proceedings to the Condemnation action. Pursuant to Mont. R. Civ. P. 26 and basic notions of fairness, the PSC should issue a Protective Order that disallows discovery of information or documents that pertain exclusively to the successful condemnation action or City ownership of the Water System.

Improper data requests in this category that should be included in the Protective Order are:

MW/WWH Nos. 001, 002, 012, 037, 048, 049, 050, 055, 063, 077, 083, 084, 086, 087, 090, 095, 096, 099, 100, 101.

B. The PSC should issue a Protective Order prohibiting overly broad and unduly burdensome discovery requests that exceed the scope of these proceedings.

Additional data requests served by Mountain Water should be prohibited or limited because they are far too broad and unduly burdensome. Some examples of these requests, with brief explanations of why they are improper, are set forth below:

MW/WWH-014: Please provide any studies performed by HDR regarding government-owned water systems that were prepared in the last five years.

Explanation: HDR is a worldwide engineering firm with 225 locations in the Americas, Asia, Australia, Europe, and the Middle East, with over 10,000 employees. Without any geographic limitation, a request for each and every study created by HDR regarding government-owned water systems in the last five years would be overly burdensome.

MW/WWH-042

a. Please provide a copy of all of the financial models developed by HDR in native format with all links and formulae intact.

b. Please provide all documents referred to or relied upon in developing the

financial models produced in response to subpart (a).

Explanation: HDR has 225 locations worldwide, over 10,000 employees, works for thousands of clients. Producing all financial models HDR has ever produced is unduly burdensome and overly broad.

MW/WWH-079

a. Please provide the annual cost of compliance with SEC filing requirements.

Explanation: This request is vague and overly broad in that it seems to request the cost of compliance nationwide for all entities to comply with any SEC filing requirements. It is also irrelevant.

Discussion

"[D]iscovery, like all matters, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). The above data requests seek information far beyond the scope of this proceeding, placing unnecessary and unwarranted demands on the City in final weeks before the PSC hearing. The production would be unduly burdensome and expensive. Mont. R. Civ. P. 26(c)(1).

Many of these requests also seek irrelevant information about experts' other clients who have nothing to do with this matter. The purpose of discovery is to allow both sides to obtain information that pertains to the claims or defenses of the parties involved and not privileged. Mont. R. Civ. P. 26(b). Moreover, the above requests that pertain to the City's experts are beyond the scope of permissible discovery under Rule 26(b)(4)(A).

The PSC should issue a Protective Order instructing Mountain Water to withdraw or circumscribe each of the requests in the attached table and requiring any future data requests to be narrowly tailored to address only the issues in this case.

Should the PSC permit Mountain Water to discover the information and materials sought in the attached requests, the City asks the PSC to order Mountain Water to pay for that production under Rule 26(b)(4)(C).

Improper data requests in this category that should be included in the Protective Order are:

MW/WWH Nos. 001, 002, 004, 006, 010, 011, 014, 015, 027, 036, 037, 042, 046, 047, 048, 049, 050, 053, 054, 055, 058, 059, 060, 061, 062, 063, 064, 065, 066, 067, 069, 072, 076, 0277, 078, 079, 080, 081, 082, 083, 084, 085, 086, 087, 088, 090, 093, 095, 096, 099, 100, 101.

C. The PSC should issue a Protective Order prohibiting discovery of privileged materials.

Several data requests propounded by Mountain Water (specifically identified in the attached table) seek materials prepared in anticipation of litigation, or information regarding communications between the City of Missoula and its legal counsel. These materials fall squarely within the work-product doctrine, Mont. R. Civ. P. 26(b)(3) and the attorney/client privilege, Mont. Code Ann. § 26-1-803. These well-established protections preclude discovery of the material requested. *See generally Palmer v. Diacon v. Farmers Ins. Exchange*, 861 P.2d 895 (Mont. 1993). The PSC should enter a protective order prohibiting discovery of documents prepared in anticipation of litigation, information based communications between the City and its attorneys, or any material otherwise protected from discovery by Montana law.

Improper data requests in this category that should be included in the Protective Order are:

MW/WWH Nos. 001, 002, 099, 100.

Conclusion

For the foregoing reasons, the City respectfully requests its Motion for Protective Order be granted, prohibiting or limiting the scope of the data requests identified herein.

Dated this 24th day of November 2015.

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BOONE KARLBERG P.C

Jim Nugent
City of Missoula
CITY ATTORNEY'S OFFICE

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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 24th day of November, 2015:

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