

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

IN THE MATTER OF Joint Application of
Liberty Utilities Co., Liberty WWH, Inc.,
Western Water Holdings, LLC, and
Mountain Water Company for Approval
of a Sale and Transfer of Stock.

REGULATORY DIVISION
DOCKET NO. D2014.12.99

CITY OF MISSOULA’S MOTION FOR PROTECTIVE ORDER

The City of Missoula (“City”) moves for a protective order from the Public Service Commission (“PSC”) with respect to material requested by applicant Liberty Utilities Co. and Liberty WWH, Inc. (collectively “Liberty”) and Intervenor The Employees of Mountain Water Company (the “Employees”). 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).

Liberty and the Employees have served the City with extensive discovery requests, many of which address the City’s successful condemnation action pending in the Montana Fourth Judicial District Court, Missoula County 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.

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

Finally, the requests seek material protected by attorney/client privilege and the work product doctrine.

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) (emphasis added). “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. . . .”

Liberty served its first set of discovery requests on the City on November 11, 2015, and its second set on November 16, 2015. The two sets include 93 numbered requests, but most include several subparts, bringing the actual number of requests to several hundred. The Employees served their data requests on November 13, 2015.

Numerous requests (all of the Employees’) 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 the Montana Fourth Judicial District Court, Missoula County.

Representative examples of these irrelevant data requests include:

Liberty-005 Re: City Financial Model

Witness:

Does the City of Missoula have a financial model for its expected acquisition and/or operation of the Mountain Water system?

- a. If not, explain why.
- b. If yes, identify the model, and provide a copy in native format with links and formulae intact.

Liberty-051 Re: Bickell Testimony, page 3, line 9
Witness: Dale Bickell

- a. What percentage debt or "leveraged financing" is the City of Missoula planning to use to fund its purchase of Mountain Water's assets?
- b. What interest rate does the City of Missoula expect to pay on the bonds that will be used to finance its acquisition of Mountain Water's assets?
- c. Please provide all available documentation regarding the City of Missoula's plans to fund its acquisition of Mountain Water's assets.

INTERVENOR/EMPLOYEES-001 RE: Mountain Water

Company Employee's being made whole upon City acquisition.

The City of Missoula in its Amended Complaint, Paragraphs 91-95 promised to make the Employees whole. Explain in detail how the City of Missoula plans to make the Employees whole with respect to their employment, including but not limited to:

- (a) Wages,
- (b) Benefits,
- (c) Retirement Plans,
- (d) Waiver of Five Year Vesting Requirement under Public Employees Retirement System,
- (e) Credit for years of service and seniority as it affects benefits,
- (f) Paid time off,
- (g) Sick leave,

- (h) Working conditions,
- (i) Job descriptions, duties and responsibilities; and
- (j) Retention of all Mountain Water Company Employees as full-time permanent employees subject to discharge only for cause.

INTERVENOR/EMPLOYEES-003

Produce all meeting minutes, agendas, memoranda and documents concerning the City's plan to integrate all Mountain Water operations and employees if the City acquires the water system.

* * * * *

Discovery of information that is 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 that relate *only* to the City's condemnation action. There is obvious irony in Liberty and the Employees using PSC discovery procedures to develop information relevant only to the condemnation action. As the PSC is well aware, Liberty and Mountain Water 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*, p. 8. (Aug. 28, 2015) ("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*, p. 6 (May 8, 2015) (same).

Here, Liberty and the Employees are committing the same discovery abuse they 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, Liberty and the Employees 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 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.

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.

Whether City ownership is preferable to investor-driven ownership is a question for the District Court alone, not for the PSC. 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 ¶ 10 (June 14, 2015).

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:

- Liberty Data Request Nos. 001, 004, 005, 013, 020, 023, 024, 036, 039, 051
- All of the Employees Data Requests

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

“[D]iscovery, like all matters, has ultimate and necessary boundaries.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Many 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 Liberty to withdraw or circumscribe each of the requests identified herein and requiring any future data requests to be narrowly tailored to address only the issues in this case. Should the PSC permit Liberty to discover the information and materials sought in the identified requests, the City asks the PSC to order Liberty 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:

- Liberty Data Request Nos. 001, 002, 003, 004, 005, 006, 007, 009, 010, 011, 013, 016, 021, 023, 025, 033, 036, 039, 040, 049, 052

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

Some of Liberty’s and the Employees’ data requests 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:

- Liberty Data Request Nos. 001, 022, 024
- Employees Data Request Nos. 001, 002, 003, 006, 007, 008, 009, 010, 011, 012, 013, 014, 015

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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 2nd day of December 2015.



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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 2nd day of December 2015:

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