

Service Date: August 20, 2015

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

IN THE MATTER OF the Joint Application of) REGULATORY DIVISION
Liberty Utilities Co., Liberty WWH, Inc.,)
Western Water Holdings, LLC, and Mountain) DOCKET NO. D2014.12.99
Water Company for Approval of a Sale and) ORDER NO. 7392o
Transfer of Stock)

ORDER ON RECONSIDERATION

PROCEDURAL HISTORY

1. On December 15, 2014, Liberty Utilities Co., Liberty WWH, Inc., (“Liberty”), Western Water Holdings, LLC and Mountain Water Company (“Mountain Water”) filed a *Joint Application for Approval of Sale and Transfer of Stock* with the Montana Public Service Commission (“Commission”).
2. The Commission issued a *Notice of Application and Intervention Deadline* on December 23, 2014, and granted intervention to the Montana Consumer Counsel (“MCC”), the Clark Fork Coalition, the City of Missoula (“City”), and the Employees of Mountain Water Company on January 27, 2015.
3. On April 2, 2015, the Commission issued Data Request PSC-033(b) requesting the financial analysis done by Liberty in conjunction with its due diligence, including but not limited to projected financial results. On April 20, 2015, the MCC issued Data Request MCC-010, seeking the same information. The City also requested Liberty’s financial analysis in Data Request CITY-031, on April 22, 2015.
4. On April 21, 2015, Liberty submitted its *Responses to Data Requests PSC-028 through PSC-038*.
5. On May 4, 2015, Liberty submitted its *Responses to Data Requests MCC-001 through MCC-018*.
6. On May 4, 2015, Liberty filed its *Responses to Data Requests CITY-001 through CITY-031*.

7. On May 8, 2015, the MCC filed its initial *Motion to Compel a Response to MCC-010*. Liberty filed a *Response to the MCC's initial Motion to Compel MCC-010*. Citing Commission Order No. 7932e and a hope to facilitate resumption of the procedural schedule, Liberty provided Supplemental Responses to PSC-033(b), MCC-010, and CITY-031 on June 10, 2015. See Or. 7392e, ¶ 11 (Jun. 3, 2015).

8. On June 10, 2015, Liberty subsequently filed a *Motion for Protective Order and Brief in Support* for the following types of information:

- Liberty's due diligence materials and financial model that it relied upon in submitting its bid to merge with and acquire the stock of Western Water Holdings, LLC.
- Excerpts of minutes from Algonquin Power and Utilities Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014.
- Liberty's 2012 and 2013 United States income tax returns.

Mot. for Protective Order p. 3-4 (June 10, 2015). On June 11, 2015 the Commission published notice of the Motion in its weekly agenda.

9. On June 16, 2015, the City filed its *Response to Liberty's Motion for a Protective Order*. On June 24, 2015, the MCC filed its *Motion to Compel Complete Response to MCC-010*. Although the MCC has styled its response differently, this document is responsive to Liberty's *Motion for Protective Order* and is within the same thread of argumentation. On July 1, 2015, Liberty filed its *Response to the MCC's Motion to Compel a Complete Response to MCC-010*. On July 16, 2015, the MCC filed its *Reply in Support of Motion to Compel Complete Response to MCC-010*.

10. On July 27, 2015, the Commission issued Order No. 7392l, granting in part and denying in part Liberty's *Motion for Protective Order*. On August 6, 2015, the City filed its *Motion to Compel, for Reconsideration of Order No. 7392l, and for Extension of Deadlines*. On August 7, 2015, Liberty filed its *Response to the City's Motion to Compel, for Reconsideration of Order No. 7392l, and for Extension of Deadlines, and Motion for Reconsideration of Montana Public Service Commission Order Number 7392l*. On August 11, 2015, the Commission held a regularly scheduled work session to discuss and act on the motions for reconsideration.

DISCUSSION, ANALYSIS, FINDINGS & CONCLUSIONS

11. The Commission denies the City's Motions for Reconsideration but will take the opportunity in this Order to further clarify its previous decision for the benefit of the parties. The City argues that *Order 7392l* is clear and grants special provisions exclusively to Liberty's due diligence materials and financial model. Mot. for Reconsideration p. 2 (Aug. 6, 2015), *see also* Or. 72931 ¶ 52 (July 27, 2015). The City is correct. All of the information identified in Liberty's *Motion for a Protective Order* is granted some level of confidential protection. Liberty's tax returns are granted standard protection pursuant to Mont. Code Ann. § 15-31-511 and 26 U.S.C. § 6103. Liberty's excerpts of board minutes are granted standard trade secret protection pursuant to Admin. R. Mont. 38.2.5007. *Order 7392l* does not impose special provisions pursuant to Admin. R. Mont. 38.2.5002(3) upon the tax returns or the excerpts of board minutes. The only category of information that receives special protective provisions beyond standard protection is Liberty's financial model and due diligence materials. Special provisions contemplated by Admin. R. Mont. 38.2.5002 are applied solely to Liberty's financial model and due diligence materials.

12. Despite the fact that special provisions are only applicable to the financial model and due diligence materials, the City is not satisfied. The City argues the Commission should reconsider the implementation of any special provisions. Mot. at p. 4.

13. Pursuant to Admin. R. Mont. 38.2.5002(3), requests for special provisions to be included in protective orders "will not routinely be granted, but may be granted for good cause." Admin. R. Mont. 38.2.5023 states that when it is not feasible to provide confidential information to counsel and experts, "confidential information may be made available by the provider for inspection by legal counsel and experts at a place and a time mutually agreed on by the provider and the party, or as directed by the commission."

14. First, the City objects to a Liberty attorney or representative being present while the City reviews specially protected information. *Id.* The Commission agrees that such an arrangement does not constitute a "reasonably private space" for the City to review and work with the specially protected information. *See* Or. 7392l ¶ 47. However, Liberty subsequently agreed that its attorneys or agents will not be in the room while any party reviews the specially protected information. Mot. for Reconsideration p. 14 (Aug. 6, 2015). The City appears to have adopted the MCC's protest of special provisions based on the work product doctrine in its

Motion for Reconsideration even though it did not raise that issue in its *Response to Liberty's Motion for a Protective Order*.

15. In its *Reply in Support of Motion to Compel Complete Response to MCC-010* the MCC argues that its expert witness' use of the Webex portal "is an unacceptable and unauthorized intrusion into MCC's work product privilege." Reply p. 4 (July 16, 2015). *Order 7392l* acknowledged that the MCC's attorney and agents of the MCC's attorney are sheltered by the umbrella of protection provided by the work product privilege. Or. 7392l at ¶ 41. The MCC's counsel is not unique; the work product doctrine applies to every attorney and his or her agents. *See State v. Ugalde*, 2013 MT 308, ¶ 37, 372 Mont. 234, 311 P.3d 772.

16. However, *Order 7392l* concluded that "the work product doctrine does not prevent imposition of special provisions..." *Id.* at ¶ 42. *Order 7392l* requested that the parties "reach an arrangement whereby parties are provided a reasonably private space" to view and work with the information, and granted Liberty's request for special provisions. Or. 7392l ¶¶ 47, 52. The expectation was that the parties would be able to work out the minutiae of the arrangements themselves. This expectation was not well-founded however, as the parties have failed to work out anything, requiring yet more Commission intervention in what has been a lengthy discovery process.

17. The MCC did not seek reconsideration of *Order 7392l*. However, in Liberty's request for clarification and reconsideration, Liberty bolstered its arguments that use of the Webex portal by the MCC's expert witness does not violate the MCC's work product privilege.

18. The Commission has adopted Rules 26, 28 through 37 (excepting rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure. Admin. R. Mont. 38.2.3301. The work product privilege is codified within the Montana Rules of Civil Procedure. *See* Mont. R. Civ. Pro. 26(b)(3). The Montana Rules of Civil Procedure also require testifying experts to produce all "facts known and opinions held." Mont. R. Civ. Pro. 26(b)(4).

19. Montana's work product rule is identical to the federal work product rule. *Draggin' y Cattle Co. v. Addink*, 2013 MT 319, ¶ 43, 372 Mont. 334, 312 P.3d 451. The Supreme Court of Montana finds federal authority instructive when it interprets Federal Rules of Civil Procedure similar to Montana's Rules. *See Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 43, 366 Mont. 450, 288 P.3d 193. The Ninth Circuit Court of Appeals has noted that work product protection would typically be waived where the materials are disclosed to a

testifying expert. *Republic of Ecuador v. Mackay*, 742 F.3d 860, 871 fn. 4 (9th Cir. 2014). The manipulation of Liberty's financial model by the MCC's expert is not protected under the work product doctrine.

20. Nonetheless, Liberty has assured the MCC that it will not monitor the MCC's expert's manipulation of Liberty's financial model via the Webex portal. Hypothetically, even if Liberty did monitor the MCC's expert's activities, Liberty would not be able to listen in on conversations between the MCC's counsel and the expert, and Liberty certainly would not be able to hear the expert's thoughts. The manipulation of the model by the MCC's expert is discoverable, and presumably all will be revealed upon the filing of the MCC's expert's testimony. Based on the foregoing, the Commission determines that the use of the Webex portal by a testifying expert is not a violation of work product privilege.

21. Next, the City argues that the imposition of special provisions violates the Montana Rules of Civil Procedure. This argument was not raised by the City in its *Response to Liberty's Motion for a Protective Order*. The Commission cannot be expected to consider and address in its initial orders arguments not raised by the parties. *See e.g. State v. Johnson*, 2005 MT 318, ¶ 13, 329 Mont. 497, 125 P.3d 1096; *State v. Mallak*, 2005 MT 49, ¶ 31, 326 Mont. 165, 109 P.3d 209). Nonetheless, the Commission will address it.

22. The City specifically asserts that special provisions violate Rule 34 of the Montana Rules of Civil Procedure. The City argues that Rule 34 allows it unfettered access to responsive discovery materials. Mot. for Reconsideration p. 6 (Aug. 6, 2015). This is not a sound interpretation of Rule 34. The City completely ignores Rule 26, which lists acceptable methods for protecting information, including "specifying terms, including time and place" for discovery, "prescribing a discovery method other than the one selected by the party seeking discovery," and "designating the persons who may be present while the discovery is conducted," and so forth. Mont. R. Civ. P. 26(c)(1)(B),(C),(E).

23. The Commission's rules regarding protective orders, and special provisions, are compliant with both the Montana Rules of Civil Procedure and the directives of the Supreme Court of Montana. The Commission has abided by constitutional and statutory requirements through its own administrative rules concerning protective orders. *See Admin. R. Mont.* 38.2.5001-5030.

24. Mont. Code Ann. § 30-14-406 states that a tribunal “shall preserve the secrecy of an alleged trade secrecy by reasonable means, which may include granting protective orders... holding in-camera hearings, sealing the records of the action, and ordering any person involved... not to disclose an alleged trade secret...” The Supreme Court of Montana has clarified that the methods articulated in Mont. Code Ann. § 30-14-406 are available to the Commission, but that additionally “**the same or similarly reasonable means are useful and available to the PSC** in protecting property rights comprised of trade secrets in the process of fulfilling its regulatory duties over public service providers.” *Great Falls Tribune v. Mont. PSC*, 2003 MT 359, ¶ 62, 319 Mont. 38, 89 P.3d 876 (emphasis added).

25. Reasonable means “fair, proper, or moderate **under the circumstances**. Black’s Law, p. 1272, (Bryan A. Garner ed., 7th ed. 1999) (emphasis added). What constitutes “similarly reasonable means” is a subjective, case by case determination. What may be reasonable in one instance may not be in another. Regarding the issue at hand, the Commission determined that due to the unique circumstances of this case, the special provisions contemplated by *Order 73921* are reasonable means under the circumstances. Or. 73921 at ¶¶ 42-45.

26. Yet the City argues that the Commission is restricted to the methods articulated in Mont. Code Ann. § 30-14-406, and suggests that the Commission should issue a protective order for all the disputed information, with accompanying non-disclosure agreements that provide the parties actual copies of documents, but subjects the parties to penalties if the information is disclosed. Res. at p. 7.

27. The Commission’s standard NDAs do not in and of themselves subject the parties to penalties if confidential information is disclosed. *See Admin. R. Mont. 38.2.5012*. The City appears to suggest that it would rather receive copies of the information and sign an NDA subjecting it to penalties if the information is disclosed. This is an interesting argument, specifically because in its June 16, 2015 *Response to Liberty’s Motion for a Protective Order*, the City devotes the vast majority of its brief to fervently objecting to the custom NDA proposed by Liberty, which articulated that monetary damages and equitable relief would result if the information were improperly handled by parties.. Resp. pp. 1-7 (June 16, 2015), *See also* Liberty “Non-Disclosure and Confidentiality Agreement,” ¶ 6, Mot. for Protective Order (June 10, 2015).

28. On reconsideration the City seems to have reversed course, now suggesting that any issues could be resolved through the use of a stringent NDA, as long as the City were allowed possession of copies of the disputed information. The Commission was originally persuaded by the City's arguments against a custom NDA, and in *Order 7392l* denied Liberty's request for use of such. Or. 7392l at ¶¶ 31-35, 51. The City originally argued that the Commission's rules "allow the PSC to incorporate special provisions into its protective orders in very limited circumstances," but that "the rules do not permit the PSC to adopt 'custom' NDAs, as Liberty proposes." Resp. at p. 2. The Commission agrees with this assertion. The Commission is not persuaded to perform an about face and vacate the special provisions it imposed in favor of a stricter NDA that articulates specific penalties.

29. Finally, the City argues that the special provisions are so problematic as to prevent the parties from adequately preparing and presenting their cases. Mot. at p. 7. The City argues that it will be extremely inconvenienced and that its attorneys and experts will be prevented from using the documents as exhibits at hearing. *Id.* at pp. 7-8. As Liberty points out, these concerns are addressed by the Commission's administrative rules. Mot. at p. 15. Admin. R. Mont. 38.2.5021 states:

Where written or oral reference to confidential information is required, reference must be by general citation of title or exhibit number or by nonconfidential description and summary, such as the nonconfidential summary supplied by the provider pursuant to ARM 38.2.5007(3)(b). If further reference to confidential information is necessary, oral reference must be presented in camera and written reference must be separated, clearly marked, filed with the commission in a sealed envelope, and served only on legal counsel for each party.

The parties will be able to reference and cite to Liberty's specially protected information, both in testimony and at the hearing. The parties can file both confidential and non-confidential versions of their testimony. The hearing can be closed for the presentation and discussion of confidential evidence. That process has occurred in past Commission proceedings and hearings and has not substantially inconvenienced parties or the Commission. The Commission has no intention of creating a situation where the subject information cannot be utilized by Intervenors in their testimony, as well as preparation for and during the hearing.

30. As is suggested by Admin. R. Mont 38.2.5002(3), transfer of information through a special medium is intended to be used sparingly and only in unusual circumstances.

Determining when a protective order is warranted, and when special provisions are warranted, is

always decided by the Commission on a case by case basis, after careful consideration of the facts.

31. Special provisions are not to be used in an attempt to frustrate discovery. “The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith.” *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 67, 337 Mont. 411, 162 P.3d 106 (quoting *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634). The implementation of special provisions should not be used to prevent parties from meaningful access to the information necessary to pursue their cases. All parties are cautioned that abuse of discovery must not be dealt with leniently. *Id.* at ¶ 68.

ORDER

THEREFORE, based upon the foregoing, it is HEREBY ORDERED as follows:

32. The Motions for Reconsideration are denied, however the Commission clarifies the provisions of Order No. 73921 as follows:

33. Liberty’s request for special provisions pursuant to Admin. R. Mont. 38.2.5002(3) and Admin. R. Mont. 38.2.5023 are GRANTED only with respect to Liberty’s due diligence materials and financial model.

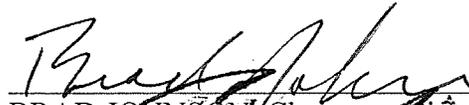
34. Liberty’s request for special provisions pursuant to Admin. R. Mont. 38.2.5002(3) and Admin. R. Mont. 38.2.5023 are DENIED with respect to Liberty’s tax returns and excerpts of board minutes.

35. Liberty will submit its tax returns and excerpts of board minutes to parties on yellow paper or contained on electronic media i.e. DVD no later than 3 calendar days of the service date of this Order. To expedite the delivery of these items, arrangements should be made between the parties to pick up these items at a Crowley Fleck office in Helena and Missoula.

36. Liberty will make its due diligence materials and financial model subject to special provisions available for inspection by Commissioners, legal counsel, and experts at either the Missoula or Helena Crowley Fleck offices at a time mutually agreed on by the parties within 3 calendar days of the service date of this Order. Liberty shall not have an attorney, attorneys’ agent, representative, etc. present in the room while the parties’ attorneys and experts review the information. Liberty will provide Webex access to one testifying expert identified by the MCC and one testifying expert identified by the City.

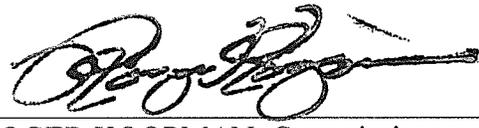
DONE AND DATED this 11th day of August, 2015, by a vote of 3-2. Commissioners Johnson and Kavulla dissenting.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman (dissenting)


TRAVIS KAVULLA, Vice Chairman (dissenting)


KIRK BUSHMAN, Commissioner


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner

ATTEST:


Aleisha Solem
Commission Secretary

(SEAL)