

Service Date: August 24, 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)

DISSENTING OPINION OF COMMISSIONER TRAVIS KAVULLA

I dissent generally from the decision to provide special protections to the secret information in question for three reasons.

I. The Order’s premise contradicts the Commission’s and a district court’s holdings on the intersection of eminent domain and public utility law

The PSC apparently has not issued an Order granting special-protections treatment under Admin. Rule Mont. 38.2.5002(3) for more than a decade, and even then in substantially different circumstances, where the intervening party seeking access to information was a direct competitor of a rival whose project was the subject of the Commission proceeding. Ord. 6633b (March 31, 2005), ¶ 20. In the current matter, a district court and the Commission previously have relied upon the theory that a condemnation proceeding and the Commission’s jurisdiction in this case, over the acquisition of the stock of Mountain’s parent company, do not intersect. Ord. 7392b, (March 27, 2015), ¶ 16, *citing to* Order and Memorandum re: the Montana Public Service Commission’s Motion to Intervene, p. 13, *City of Missoula v. Mountain Water Company*, DV-14-352 (Mont. 4th Jud. Dist., Aug. 19, 2014) (“the condemnation proceeding “has no impact on the PSC’s continuing authority to regulate Mountain Water while it is investor owned...”). The logic of this proposition cannot hold if the instant Order is the law, which purports that somehow what the City is doing, in condemning a property through eminent domain, and what Liberty is doing, in buying the stock that contains the property through a mutually agreed purchase, are

rivalrous with one another. Ord. 73921, (July 27, 2015) ¶ 45. On the contrary, it has been agreed to tacitly by all parties in one forum or another, whether in the City's successful request to exclude the Commission's intervention in the eminent domain proceeding, or in Carlyle's and Liberty's assertion that the Commission proceeding not be stayed in deference to the former, that whatever may happen in this proceeding has no bearing on the condemnation process. This ruling is the first time either jurisdiction has contradicted that notion.

II. The special protections do not meet the standard of 'good cause' and do not accomplish their stated objectives

I am left to wonder what the special protections stand for other than nuisance. They notionally are targeted at preventing the City from improperly using Liberty's financial model for external purposes. Yet, already, the Commission's protective orders and rules require, prior to a party's accessing another party's protection information, a signed promise not to disclose that information and the prohibition of the use of that information for purposes other than the Commission proceeding in which the information was produced. *See*, for example, Non-Disclosure Agreement attached to Order 7392j (June 19, 2015), which incorporates by reference Admin. Rules Mont. 38.2.5001-5030. These agreements prohibit release of the information to persons other than legal counsel and outside experts, such as internal employees, unless an agreement between the parties is reached or if the Commission orders such access based upon a finding that access would not "jeopardize the confidential nature of the information." Admin. Rule Montana 38.2.5024(1)(e). That rule, and not the special-protections rule invoked by the present Order, is the one which is on point to address the type of concern Liberty raises.

A determinedly unlawful intervenor will violate the protective-order process whether the information is in their possession or, as under the special protections, accessible to them only online via WebEx or in the office of opposing legal counsel. The special protections really offer no meaningful protection against such abuse. The theory that such abuse needs to be further protected against has as its premise a mistrust by the Commission in whether its Protective Order stands for what it says to begin with. If that is true, there are much larger, fundamental problems to worry about. The Commission has previously required that a party seeking special protections connect the dots by showing that "the information will not be adequately protected by the entry of an appropriate protective order, and make a cogent factual demonstration of the need for

special terms and conditions.” Ord. 6852i, (July 22, 2008) ¶ 12. In my view, Liberty has not shown how the special protections in question will actually guard against the potential for the abuses which are the subject of that party’s concern.

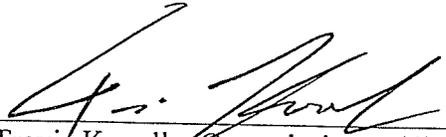
III. The information which is subject to special protections does not seem particularly sensitive

Finally, I have had the opportunity to review the information which is specially protected at the Helena, Mont., offices of Liberty’s counsel in this matter. In that review, I am struck not so much by its exceptionality but by its sameness. It is essentially the same type of valuation any firm seeking to buy a regulated utility would and should conduct. The things that make this proceeding of any particular interest—the substantially larger purchase price than book value, for instance—are explained by inputs to the financial model which are not exactly mysterious. In a regulated utility setting, firms grow profits on a long-term basis by growing the rate base, which drives greater earnings as a firm plows more capital into a utility that may require investment to serve new customers, to fix leaks, to upgrade its software, whatever. Ironically, many of the City of Missoula’s complaints about the lack of quality service of Mountain Water—leakage particularly—are the gateways through which the cost-of-service-regulated buyer of a privately-owned utility would project growing profits. In any case, it should be no surprise that


. Otherwise, there are a handful of other minor revelations in the supposedly highly sensitive material which are, in fact, relatively mundane. I would list them, but that would require the rest of this opinion to be redacted from the public record in its entirety—in my view, rather absurdly.

For the foregoing reasons, I would have reversed Order 73921, upon reconsideration.

Therefore, I respectfully DISSENT from the Order,


Travis Kavulla, Commissioner (dissenting)