

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. 7392p
Transfer of Stock)

ORDER

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 July 27, 2015, the Commission issued Order 7392l granting Liberty’s Motion for Protective Order including a request for special provisions limited to due diligence materials and financial models. Or. 7392l ¶ 52 (Jul. 27, 2015). 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 20, 2015, the Commission issued Order 7392o clarifying that the special provisions “are GRANTED only with respect to Liberty’s due diligence materials and financial model”, and:

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

Or. 7392o ¶¶ 33, 36 (Aug. 11, 2015)

4. Pursuant to these two orders, the City and Liberty scheduled a review session of the due diligence and financial model at Crowley Fleck's office in Missoula on August 26, 2015. City Motion to Dismiss or Compel, Ex. A (Aug. 27, 2015). On August 25, 2015, the City provided the Non-Disclosure Agreements ("NDA") of David Hayward, Dale Bickell, Randy Tanner, Natasha Prinzing Jones, Tina Sunderland, and David Vinso. *Id.* Tyler Stockton's NDA was submitted and approved at an earlier date. Liberty Motion in Limine, Ex. A (Aug. 31, 2015). On August 25, 2015, legal counsel for Liberty canceled the review session scheduled for August 26, 2015 citing the short notice of individuals participating in the review session and the inclusion of individuals participating in the condemnation matter currently occurring before the Montana Fourth Judicial District Court ("District Court"). Motion to Dismiss at Ex. A.

5. On August 27, 2015, the City filed a *Renewed Motion to Dismiss or, in the Alternative, Compel Access and Stay the Proceedings* in response to Liberty's refusal "to provide access to its due diligence materials and financial model because the experts the City designated to view the material are also participating in the condemnation proceeding." Motion to Dismiss at p. 1.

6. On August 31, 2015, Liberty filed a *Motion in Limine and Combined Brief in Support and Response to the City of Missoula's Motion to Dismiss or Stay the Proceedings*. The Motion in Limine requested "the Commission to prohibit access to Liberty's confidential materials subject to special protections by counsel who have not appeared in this matter, and experts or witnesses retained by the City who are or will be witnesses for the City in the current condemnation matter currently occurring before the Montana Fourth Judicial District Court ('District Court') or who have or plan to consult with the Town of Apple Valley regarding its potential condemnation of Apple Valley Ranchos Water Company." Motion in Limine at p. 1.

7. On September 2, 2015, Liberty filed a *Motion for Oral Argument* on these issues. On September 22, 2015, Oral Argument and a Work Session were held to discuss and act on these issues.

DISCUSSION

8. The City moves this Commission to enforce Order 7392 and either dismiss the proceedings or stay the proceedings until Liberty provides the City and its experts access to its financial model and due diligence materials. Mot. to Dismiss p. 6. Liberty on the other hand moves the Commission to “ensure that Liberty’s confidential information is not provided to individuals working in support of the condemnation proceedings against the subsidiaries of Park Water, including Mountain Water.” Mot. In Limine p. 10.

9. 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. Mont. Admin R. 38.2.3301(1)(2015).

10. However, “[n]othing in (1) of this rule shall be construed to limit the free use of data requests among the parties. The exchange of information among parties pursuant to data requests is the primary method of discovery in proceedings before the commission.” *Id.*

11. “The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.” *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).

12. However, when the purpose of discovery is to gather information for use in proceedings other than the pending suit, such discovery is properly denied. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 353 ft. 17, 98 S. Ct. 2380, 2390 (1978).

13. Discovery is for use in the preparation and conduct of the present proceeding. Pursuant to Mont. Admin R. 38.2.5014:

All persons who are entitled to receive or access confidential information shall neither use nor disclose the confidential information for any purpose other than the purposes of preparation for and conduct of the proceeding before the commission in which the protective order has been issued, and then solely as contemplated in the governing protective order and these rules, and shall take reasonable precautions to keep the confidential information secure in accordance with the purposes and intent of the protective order and these rules.

The City submitted four types of individuals to the review session that was scheduled for August 26, 2015: legal counsel for a requesting party; legal counsel for a non-party; employee expert for a requesting party; and experts for a requesting party. These types of individuals are addressed in turn.

Legal Counsel for Requesting Parties

14. Mont. Admin R. 38.2.5023 states, “[t]he provider, and legal counsel for requesting parties who have been granted access to confidential information, must give confidential information to legal counsel for requesting parties, when legal counsel for requesting parties has signed a nondisclosure agreement pursuant to these rules.” Pursuant to this rule Liberty must make information subject to special provisions available to the attorneys who have represented the City in this proceeding. Neither the Commission nor the providing party has authority under this rule to determine which legal counsel for requesting parties have access to confidential information. Access to the due diligence materials and financial models is granted to attorneys for the City Natasha Prinzing Jones and Randy Tanner. Scott Sterns will be granted access to the same information once he follows the NDA procedure proscribed by Commission rules. *See infra* ¶¶ 20-21. Additionally, Paralegal Tina Sunderland and Law Student Tyler Stockton will also be granted access to the same information.

Legal Counsel for a Non-party

15. For a non-party attorney, nothing in the Commission’s rules allows access to confidential information. *See* Mont. Admin R. 38.2.5023. William VanCanagan, an attorney from Datsopoulos, MacDonald & Lind, has not made an appearance in this proceeding and no attorney from his firm has been involved in the Commission’s proceeding. Therefore, access to this information is denied to Mr. VanCanagan until he has made an appearance in this proceeding.

Employee Expert for Requesting Party

16. For an employee expert for a requesting party, Commission rules require a specific process to be followed before access to confidential information can be granted. *See* Mont. Admin R. 38.2.5024. The City acknowledged at oral argument that it had not used this process and would use the proper avenues to gain access to this information for its employee expert. Dale Bickell is denied access until the process provided in Mont. Admin R. 38.2.5024 is completed.

Experts for Requesting Party

17. Mont. Admin R. 38.2.5023 states:

Access to confidential information may be authorized by legal counsel to expert witnesses of the requesting party. Except as otherwise agreed to by the provider, the designated expert may not be an officer, director, or employee of any party, or

an officer, director, employee, stockholder, or member of an association or corporation of which any party is a member or affiliate.

This rule does not contemplate any additional process for or restrictions on a party's experts seeking confidential information. However by comparison, the Commission's rules provide a particular process and potential denial of access to certain types of party affiliates. *See* Mont. Admin R. 38.2.5024. The implication of this rule's substance and structure is that experts for a party cannot be denied access to information if they are authorized by legal counsel for the requesting party.

18. The Commission has only denied access of confidential information to intervening parties in rare circumstances. *See, e.g. In re Judith Gap Wind PPA*, Dkt. No. D2005.2.14, Or. 6633b ¶¶ 17-22 (Mar. 31, 2005). In that Docket, the Commission limited the scope of intervention of private parties to access confidential information.

The Commission allowed the private intervenors to present their respective cases and to cross examine witnesses. The only restriction placed on private intervenors was to prohibit access to the confidential information of others. In its decision limiting the private intervenors' access to confidential information, the Commission specifically waived ARM 38.2.5023.

Id. at ¶ 20. The same limitations of intervention have not been enacted here. The City of Missoula is additionally not a private party. However, the City of Missoula is in the unique position of also being involved in other proceedings involving this water utility. Or. 7392i ¶ 42-45; Or. 7392o ¶ 25. The Commission reiterates that abuses of discovery will not be dealt with leniently and that the special provisions are in place to prevent against inappropriate use in other proceedings. Or. 7392o ¶ 31 (citing *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 67, 337 Mont. 411, 162 P.3d 106). The Commission's NDAs also carry similar effect and sentiment. *See* Mont. Admin R. 38.2.5012. The Commission fully expects the City to uphold its assurances that "[the City] is not using discovery in this case as a subterfuge" and "City's experts are well aware of the limitations imposed by the NDAs, as well as the Commission's express order that 'abuse of discovery must not be dealt with leniently.'" Motion to Dismiss at p. 1.

19. Therefore, David Hayward and Joseph Vinso are granted access. Once Craig Close has been established as an expert for the City, he may also access the confidential information.

Timing of NDAs

20. The City asserts that it "and its experts could have showed up at Crowley Fleck's

office the day of the viewing with NDAs in hand if it had chosen to do so.” Motion to Dismiss at p. 3 n.1. This is not entirely correct. Mont. Admin R. 38.2.5012 requires that a party file an NDA with the Commission prior to reviewing the confidential information. On August 28, 2015, the Commission posted on its website the NDAs of David L. Hayward, Joseph D. Vinso, Natasha Prinzing Jones, Randy J. Tanner, Tina Sunderland, Tyler M. Stockton; these individuals are now granted access of the confidential information subject to special provisions once they have provided the same NDAs to Liberty. The Commission also received NDAs from Dale D. Bickel and William K. VanCanagan; these individuals will be granted access to the confidential information subject to the special provisions once they have followed the proper procedures. *See supra* ¶¶ 15-16.

21. Liberty and the City must arrange for viewing of the confidential information subject to special provisions by October 15, 2015 so that the Commission may resume its procedural schedule in this Docket.

Stay or Dismissal

22. The City’s primary concern in requesting dismissal or stay of the proceedings was over being denied access to the confidential information subject to special provisions: “The Commission’s procedural order makes clear that if a party fails to produce discovery, the Commission may ‘dismiss the proceeding’ or ‘stay the proceeding until the request is satisfied.’ Liberty has repeatedly shown that it has no intention of complying with the Commission’s orders.” Motion to Dismiss at p. 1 (internal citations omitted). Since the Commission has ordered the City’s access to this information, the City’s concerns about allowing this case to move forward and the facts at hand remain largely the same from the last time the Commission addressed this issue in Order 7392n. The Commission acknowledges that this is one additional discovery dispute that has resulted in “protracted legal wrangling over semantic nuances and technicalities.” Or. 7393d ¶ 9 (May 12, 2015) (citing *Richardson v. State*, 2006 MT 43, ¶ 63, 331 Mont. 231, 130 P.3d 634 (2006)) However, Liberty’s resistance does not appear to be a pure act of recalcitrance, but rather was a plausible, albeit incorrect, interpretation of the Commission’s previous orders on this matter. *See, e.g.* Or. 73931 ¶ 45 (“The Commission finds that the unique circumstances of the concurrent condemnation proceeding creates additional risk”). The Commission does not find these discovery disputes arise to the level warranting dismissal under Paragraph 15 of Procedural Order 7392. Therefore, the reasoning of Order

7392n concerning dismissing or staying the proceedings is incorporated into this Order and the request to dismiss or stay the proceedings is denied. *See* Or. 7292n ¶¶ 5-32.

ORDER

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

23. The City's *Renewed Motion to Dismiss or in the Alternative, Compel Access and Stay the Proceedings* is granted in part and denied in part. Liberty's *Motion in Limine* is granted in part and denied in part.
24. Liberty must arrange for viewing of the confidential information subject to special provisions as discussed above by October 15, 2015. All individuals seeking access to the confidential information must follow the proper procedures as outlined above in order to be granted access.

DONE AND DATED this 22nd day of September, 2015, by a vote of 4-1. Commissioner Bushman dissenting.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION



BRAD JOHNSON, Chairman



TRAVIS KAVULLA, Vice Chairman



KIRK BUSHMAN, Commissioner (dissenting)



ROGER KOOPMAN, Commissioner



BOB LAKE, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)