

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

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

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S 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**

Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submit to the Montana Public Service Commission (“Commission”) this Motion for Reconsideration of Order No. 7392L. *See* PSC Docket No. D.2014.12.99, Order No. 7392L (July 27, 2015). Liberty’s motion is submitted pursuant to ¶ 16 of Procedural Order No. 7392 and Admin. R. Mont. 38.2.4806.

As an initial matter, Liberty generally does not object to the terms of Order No. 7392L.¹ Liberty submits this motion to seek clarification of issues raised by the City of Missoula (“City”) and the Montana Consumer Counsel (“MCC”) regarding Order No. 7392L, and in response to the City’s motion to reconsider filed August 5, 2015.

Examiner Farkas followed Commission precedent and correctly concluded that the information identified in ¶ 8 of Order No. 7392L (Liberty’s “confidential information”) was confidential and entitled to protection from public disclosure pursuant to Admin. R. Mont.

¹ Order No. 7392L denied Liberty’s request that a heightened non-disclosure agreement be used to protect Liberty’s confidential information. Order No. 7392L, ¶¶ 38, 51. Liberty disagrees with that conclusion for the reasons expressed in Liberty’s briefing on the issue. Nevertheless, Liberty is not asking the Commission to reconsider its denial of that request.

38.2.5007. Order No. 73921, ¶ 50. To Liberty’s knowledge, no requesting party has asserted that Liberty’s confidential information is not entitled to protection under that administrative rule. Examiner Farkas also correctly concluded that, “due to the unique set of circumstances surrounding this proceeding, specifically, the distinct and concurrent proceeding regarding the City’s condemnation of the water utility in Montana District Court, **the Commission is convinced that special provisions are warranted in this instance.**” *Id.*, ¶ 42. Pursuant to Admin. R. Mont. 38.2.5002(3) and 38.2.5023, Examiner Farkas correctly adopted the special provisions identified in ¶ 29 of Order No. 73921. *Id.*, ¶ 52. Examiner Farkas then summarized Order No. 73921 as follows:

Liberty will make its confidential information subject to special provisions available for inspection by Commissioners, legal counsel, and experts at a place and a time mutually agreed upon by the parties within 5 calendar days of the service date of this Order.

Order No. 73921, ¶ 54.

FACTUAL BACKGROUND

Liberty complied with the Commission’s instructions contained in ¶ 54 and ¶ 29 of Order No. 73921. Liberty offered to allow the City, the MCC, and PSC Commissioners and staff to “review and work with” Liberty’s confidential information requested in the applicable data requests. *See* Order No. 73921, ¶ 47. PSC Commissioners and staff elected to review Liberty’s confidential information in person on August 5, 2015; to date, the City and MCC have chosen not to review Liberty’s confidential information.

Liberty received notice of Order No. 73921 at the same time as the other parties during oral argument on Tuesday, July 28, 2015. Liberty’s counsel sent emails to counsel for MCC and the City on the morning of Friday, July 31, 2015, prior to the five day deadline imposed by the order.

Liberty emailed counsel for the City and offered to make the confidential information identified by the City in its data requests available for review. Liberty's written offer to the City is attached for Commission review as Exhibit A. In relevant part, Liberty offered to provide "the City's counsel access to copies" of the following information:

1. The non-privileged portion of the PowerPoint deck dated September 1, 2014 consisting of 36 total pages, presented to the APUC Board. Eight pages of that deck are a due diligence appendix which was prepared by counsel, is an attorney/client communication and is withheld on privilege grounds.
2. The PowerPoint deck dated September 15, 2015, consisting of eight pages, presented to the APUC Board;
3. The excerpt certified by the corporate secretary and general counsel of Algonquin Power & Utilities, Co. ("APUC") of the APUC minutes from its board meetings on August 14, 2015, September 4, 2014, and September 15, 2014;
4. The Board Resolution of Liberty Utilities approving the Western Water final bid on September 15, 2014; and
5. The U.S. consolidated tax returns for Liberty Utilities for 2012 and 2013.

Exhibit A. Liberty also stated that it had "made arrangements for a Crowley Fleck attorney or paralegal to be present at mutually acceptable times beginning on Friday, July 31, to provide the three Boone Karlberg attorneys who have signed NDA's access to copies of these materials in a conference room in our Missoula or Helena office." Exhibit A. Liberty also invited the City's counsel to take notes regarding Liberty's confidential information, but stated that the City would not be allowed to copy the confidential information. Liberty provided the same accommodations to the Commission and staff, without issue.

Despite claiming that access to Liberty's confidential information is critically important, the City repeatedly has refused Liberty's offer to allow the City to review and work with Liberty's confidential information. The Commission instructed all parties to determine "a place and time mutually agreed on" to review Liberty's confidential information. Order No. 73921, ¶

54. Liberty offered to make the information referenced above available to the City's attorneys at any time convenient to the City at the Helena or Missoula law offices of Crowley Fleck PLLP. The City did not present counter-proposals indicating a time or place acceptable to the City. Instead, the City flatly refused to exercise its right to review Liberty's confidential information, but rather insists Liberty produce copies of its confidential information. The City's emails to Liberty on this subject are attached as Exhibit B. Liberty will respond to the substantive concerns raised in those emails, as well the City's motion for reconsideration, below.

Liberty Counsel's email to the MCC offered similar access, plus an additional means of access for MCC's expert, John Wilson. Liberty offered to make that information available to the MCC at any convenient time at the Helena law offices of Crowley Fleck PLLP. Understanding that MCC's expert would be unable to review Liberty's financial model in person, Liberty complied with the Commission's instruction to "arrange for remote access to the financial models by experts through a Webex portal." Order No. 73921, ¶ 29. Liberty's email to the MCC is attached as Exhibit C.

MCC's counsel indicated she was rejecting the terms of Liberty's offer during a telephone conversation with Liberty's counsel the afternoon of July 31. MCC's counsel outlined the basis of her objections by email on August 4 and 6. MCC's email exchanges with Liberty are attached as Exhibit D. In those emails, the MCC indicated that it objects to Liberty providing access to the MCC's expert via web portal, as an alleged violation of the work product doctrine.

Liberty made a good faith attempt to "reach an agreement" with the MCC that would allow the MCC and its experts to "review and work with" Liberty's confidential information. Order No. 73921, ¶ 47. The terms Liberty offered to MCC were nearly identical to those the PSC Commissioners and staff accepted when they reviewed Liberty's confidential information on

August 5, 2015. The MCC has refused the opportunity to review Liberty's confidential information by relying on its unsupported "work product" theory. Because the MCC raised that argument for the first time in its reply brief supporting its pending motion to compel, Liberty has never been afforded an opportunity to explain to the Commission why MCC's argument is not supported by Montana law.

LEGAL ARGUMENT

I. The Commission Correctly Rejected MCC's Work Product Theory When It Adopted The Special Provisions Requested By Liberty, Including Providing MCC's Expert Access to Liberty's Financial Model Via Web Portal.

By its own admission, the MCC did not file a timely response to Liberty's motion for a protective order and request for the special provisions authorized by Admin. R. Mont. 38.2.5002. *See* MCC's Reply In Support Of Motion To Compel A Complete Response To MCC-010 (July 16, 2015), p. 1 ("MCC did not object to Liberty's motion for a protective order"). Instead, the MCC indirectly responded to Liberty's request for special provisions by filing a second motion to compel answers to MCC-010, even though the Commission had just granted MCC's initial motion to compel. *See* Liberty's Response to MCC's Renewed Motion to Compel (July 2, 2015). Liberty argued that MCC's strategic decision to file an untimely objection to Liberty's motion for a protective order under the guise of a motion to compel was procedurally deficient and fundamentally unfair. *Id.*, pp. 3, 5-6. In its reply brief in support of its renewed motion to compel, the MCC introduced for the first time the work product theory it relies upon now to refuse Liberty's offer of access to its confidential information.

Examiner Farkas considered MCC's work product theory in Order No. 73921 at paragraphs 41 and 42. Examiner Farkas appropriately relied on Montana Supreme Court precedent for the proposition that "the work product doctrine protects against the disclosure of

the mental processes of an attorney.” *Id.*, ¶ 41 (emphasis added) (quoting *Draggin' y Cattle Co. v. Addink*, 2013 MT 319, ¶ 44, 372 Mont. 334, 312 P.3d 451). Examiner Farkas correctly recognized that allowing MCC’s expert to review and work with Liberty’s financial model via web portal would not affect the mental process of MCC’s attorney. For example, the MCC attorney and expert would be free to take their own notes on the financial model, discuss the financial model in-person, via telephone or email, and while completing the various drafts of the expert’s report on Liberty. Liberty would have no oversight or knowledge of **the mental processes** of MCC’s attorney and expert as they analyzed Liberty’s financial model via web portal. Thus, Examiner Farkas correctly determined that “the work product doctrine does not prevent imposition of special provisions pursuant to Admin. R. Mont. 38.2.5002(3).” Order No. 73921, ¶ 42. Examiner Farkas then adopted the special provision requested by Liberty, including provision of access of Liberty’s financial model to MCC’s expert via web portal. *Id.*, ¶¶ 54, 29.

The MCC contests Examiner Farkas’ legal conclusion that web portal review does not violate the work product doctrine. Presumably, the MCC continues to believe that Liberty’s theoretical ability to monitor the MCC expert’s use of its financial model via web portal² violates the work product doctrine. *See* MCC’s Reply In Support Of Motion To Compel A Complete Response To MCC-010, p. 4. The MCC’s position lacks legal support.

Montana’s “work product doctrine” is codified at Montana Rule of Civil Procedure 26(b)(3), which “is identical to its federal counterpart.” *Draggin' y Cattle Co.*, ¶ 43. The Montana Supreme Court has repeatedly held that the work product doctrine “is not an absolute privilege.” *Tacke v. Energy W., Inc.*, 2010 MT 39, ¶ 37, 355 Mont. 243, 227 P.3d 601. The work product privilege establishes that “materials that contain the mental impressions and

² Liberty went to great lengths to assure MCC that Liberty would not monitor the MCC expert’s manipulation of Liberty’s financial model via web portal. *See* Liberty’s Response to MCC’s Renewed Motion to Compel, p. 9.

opinions of counsel are immune from discovery under the work-product doctrine, unless a waiver occurred.” *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶ 25, 364 Mont. 299, 280 P.3d 240.

Liberty’s position is that the MCC testifying expert’s manipulation of Liberty’s financial model is not protected by the work product doctrine because the expert’s use of that model does not contain the “mental impressions and opinions of counsel” or the “mental processes of an attorney.” *Am. Zurich Ins. Co.*, ¶ 25; *Draggin’ y Cattle Co.*, ¶ 44, *supra*. In any event, Montana’s work product privilege plainly does not extend to testifying experts. The next subsection in the Montana Rule of Civil Procedure, Rule 26(b)(4), requires MCC to produce all “facts known and opinions held” by testifying experts, which includes the manner in which MCC’s testifying expert manipulated Liberty’s financial model.

Opinions from federal courts confirm the Montana Supreme Court’s determination that the work product privilege does not apply to testifying experts. *See Republic of Ecuador v. Hincee*, 741 F.3d 1185, 1192-93 (11th Cir. 2013) (“there is good reason why the general work-product doctrine of Rule 26(b)(3)(A) does not cover a testifying expert”) (emphasis added). The Montana Supreme Court finds “federal authority . . . instructive” when it interprets Federal Rules of Civil Procedure similar to Montana’s Rules of Civil Procedure. *See Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 43, 366 Mont. 450, 288 P.3d 193.

The federal courts of appeals have consistently interpreted and applied Rule 26 to mean that materials provided to testifying experts are discoverable and not protected by the work product doctrine. *See Republic of Ecuador v. Mackay*, 742 F.3d 860, 871 fn. 4 (9th Cir. 2014) (“any ordinary work product protection (i.e., for trial preparation materials prepared by non-attorneys that do not reflect an attorney’s mental impressions, conclusions, opinions, or legal

theories) would typically be waived where the materials are disclosed to a testifying expert”); *see also Elm Grove Coal Co. v. Dir., O.W.C.P.*, 480 F.3d 278, 303 (4th Cir. 2007) (“because any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver” of the work product privilege); *see also In re Pioneer Hi-Bred Int’l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (work product privilege does not apply to testifying experts because “fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony”). The most cogent explanation of why the work product doctrine does not protect information provided to testifying experts comes from the Eleventh Circuit:

There is good reason why the general work-product doctrine of Rule 26(b)(3)(A) does not cover a testifying expert.

* * * * *

Unlike an “attorney, consultant, surety, indemnitor, insurer, or agent,” *see Fed.R.Civ.P. 26(b)(3)(A)*, a testifying expert’s role is to provide independent, impartial, qualified opinion testimony helpful to the trier of fact. Given that testifying experts offer evidence in court, the opposing side must have the opportunity to challenge the opinions of a testifying expert, including how and why the expert formed a particular opinion. *See Fed.R.Civ.P. 26*, advisory committee notes (1970) (Subdivision (b)(4)). Cloaking all materials prepared by or for a testifying expert under the work-product doctrine inhibits the thorough and sharp cross examination that is vital to our adversary system. *Id.*

In sum, neither the text of Rule 26(b)(3)(A) nor its structure, history, and rationale support extending the work-product doctrine to all testifying expert materials.

Republic of Ecuador, 741 F.3d at 1192-93 (emphasis added).

The MCC’s primary objection to the special provisions Liberty requested and the Commission imposed was that allowing MCC’s expert to review Liberty’s financial model via web portal violated the MCC’s work product protections. However, MCC’s position is not supported by the applicable rules or law, because the work product doctrine does not apply to materials provided to or relied upon by testifying experts.

II. The City of Missoula Has Unreasonably Rejected Liberty’s Good Faith Offer To Provide The City With Access To Liberty’s Confidential Information.

The City of Missoula rejected Liberty’s offer to review and work with Liberty’s confidential information based on its erroneous and unreasonable interpretation of Order No. 73921. *See* Exhibit B. The City reiterated the concerns it raised in its emails to Liberty and raised new concerns never communicated to Liberty in its recently-filed motion for reconsideration. The concerns raised by the City do not provide a legal basis for revising or eliminating the heightened protections adopted in Order 73921, which the “Commission is convinced . . . are warranted in this instance.” *Id.*, ¶ 42.

i. Order No. 73921 Imposed The Same Heightened Protections On All Documents Containing Liberty’s Confidential Information.

The City incorrectly interprets Order No. 73921 to have created “two classes of documents: (1) due diligence materials and the financial model; and (2) non-due-diligence materials.” Exhibit B; *see also* City’s Motion to Reconsider, p. 2. The City does so by isolating one phrase in paragraph 52 of the Order to the exclusion of the Order’s plain language and clear intent; the plain language of Order No. 73921 does not create two separate classes of information. The City then selectively reads its two newly-created categories into paragraphs 53 and 54 of the Order, both of which refer generally to “confidential information,” to modify the plain language of those two paragraphs. By manipulating the Order in this manner, the City takes the position that Order No. 73921 requires Liberty produce to the requesting parties hard copies of all documents that do not contain due diligence materials.

The City’s interpretation of Order No. 73921 is not a fair or reasonable reading of the order or a reasonable characterization of the materials at issue. The Montana Supreme Court has held that when interpreting a written instrument, “the whole of a [writing] is to be taken together

so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.” *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 13, 364 Mont. 455, 276 P.3d 922. The Montana Supreme Court rejects “isolate[ing] certain phrases of the instrument to garner the intent of the parties,” and instead looks to the “entire instrument.” *Id.*

A fair reading of all nine pages of Order No. 73921 establishes that Examiner Farkas did not intend to create a distinction between due diligence materials and non-due diligence materials. Liberty’s interpretation of the Order is that the Commission determined all information identified in ¶ 8 is confidential information entitled to protection from public disclosure. Notably, Examiner Farkas did not deny Liberty’s request that any of the information identified in ¶ 8 be protected as confidential information. Order No. 73921 then establishes that this “confidential information must be made available by Liberty for inspection by Commissioners, legal counsel, and experts at a place and a time mutually agreed upon,” without making any artificial distinctions between due diligence materials and non-due diligence materials. *Id.*, ¶ 47. Order No. 73921 treats all of Liberty’s confidential information in the same way and requires Liberty to make all of that confidential information available for inspection by the requesting parties, which Liberty in fact has done. Conversely, it is undisputable that there is no language in Order No. 73921 that would require Liberty to produce hard copies of any portion of its confidential information, as the City erroneously suggests.

Even if the Commission agrees that Order No. 73921 requires production of non-due diligence materials, the City’s severely limited determination of what constitutes due diligence materials must be rejected. All of the documents identified in ¶ 8 of Order No. 73921 actually contain due diligence materials relating to Liberty’s acquisition of Western Water Holdings, LLC, with the exception of Liberty’s consolidated tax returns for 2012 and 2013. As a result,

there can be no argument that the financial model as well as the board documents are not due diligence materials.

ii. Order 73921 Imposed Appropriate Special Provisions.

The City seeks reconsideration of the special protections Examiner Farkas imposed on access to Liberty's confidential materials. The special conditions Examiner Farkas imposed were appropriate and reasonable under the circumstances with the clarity required now due to the parties' inability to reach mutual agreements regarding implementation of those provisions.

As an initial matter the Commission must reject the City's suggestion on page seven of its motion to reconsider that the Commission could provide additional protections to Liberty through a protective order and an enhanced NDA that subjects the City to penalties for disclosure. In addition to the special provisions requested by Liberty, Liberty proposed, and the City opposed, an enhanced NDA in this matter that sought exactly the type of protections the City suggests should be ordered here. The Commission should reject the City's disingenuous change in position.

Further, the Commission must reject the City's suggestion that Liberty's objections and motion for protective order were inappropriate or improper attempts to limit access to regulated utility information. This argument ignores the important distinction between Liberty's role as a prospective purchaser of Mountain Water's parent corporation, and Liberty's anticipated future role in Mountain Water's regulated operations. Contrary to the City's repeated assertions, the issue in this docket is not whether the financial terms of Liberty's purchase are "good or bad" but rather whether Liberty's acquisition will result in "no harm" to Mountain Water's customers. Liberty has asserted and continues to believe that the confidential information at issue now will provide no meaningful evidence regarding that standard. However, to the extent the Commission previously disagreed with that position and ordered it produced, Liberty has a

legitimate interest in maintaining to the maximum extent possible the confidentiality of materials that disclose the proprietary models, methods and considerations Liberty and its corporate parent apply in making investment and acquisition decisions.

Without any legal or factual support, the City asserts Liberty has waived its right to “privacy” because it is a regulated business and challenges Liberty’s commitment to transparency. The City’s argument fails to recognize that the information relevant to a review of the operations of Mountain Water as a regulated monopolistic utility are different than the information Liberty is being asked to disclose in this matter. Liberty has been and will continue to be completely transparent about its current and ongoing plans for operation of Mountain Water after acquisition. Those are the items relevant to the Commission’s “no harm” review, and that information was produced without objection.

The information subject to the protective order and over which Liberty has expressed serious and legitimate concerns about disclosure all relate to Liberty’s review of the financial terms of the Park Water acquisition. Liberty’s acquisition activity occurs in a highly competitive environment, and in this case, the disclosure of materials must be considered in the context of the ongoing condemnation action. Liberty has been denied the opportunity to participate in that matter, and therefore, it is appropriate for the Commission to impose increased protections in this docket to reasonably limit the risk of public disclosure or unauthorized use of Liberty’s confidential due diligence information in another pending matter. Examiner Farkas recognized the unique circumstances and properly imposed appropriate special measures. Order No. 73921, ¶ 42.

iii. The City Erroneously Claims That The Commission Does Not Recognize Liberty's Claims Of Attorney-Client Privilege.

On page 3 of its motion to reconsider, the City makes the unsupported argument that after Liberty submitted its Supplemental discovery responses, “Liberty’s claims [of privilege] were not upheld by the PSC in Order No. 73921.” A more accurate statement is that the Commission did not address Liberty’s privilege claims in Order 73921. The Commission did not address those claims, in part, because the City did not object to Liberty’s claim of privilege after Liberty submitted its Supplemental responses or in its response to Liberty’s motion for a protective order. Commission staff has asked Liberty to provide a privilege log identifying the documents withheld on privilege grounds and Liberty’s basis for asserting privilege claims. Liberty has agreed to do so, and trusts this arrangement satisfies the City’s concerns.

iv. The Commission Should Reject The City’s New Argument That The Special Provisions Authorized By Admin. R. Mont. 38.2.5002 And Imposed By Order No. 73921 Conflict With Mont. R. Civ. P. 34.

The City incorrectly asserts that the Commission’s determination that special provisions are necessary to protect Liberty’s confidential information is prohibited by Mont. R. Civ. P. 34. City’s Motion to Reconsider, pp. 5-6. The City did not raise this issue in its response to Liberty’s motion for a protective order, and the Commission should not consider new arguments raised in a motion for reconsideration. *See, e.g., City of Missoula v. Moore*, 2011 MT 61, ¶ 13, 360 Mont. 22, 251 P.3d 679.

In any event, the City’s argument ignores the protections Montana law imposes to protect confidential information. For example, Mont. R. Civ. P. 26(c) allows parties to file motions for protective orders to specify “terms, including time and place for the discovery,” prescribe “a discovery method other than the one selected by the party seeking discovery,” or require that confidential information “be revealed only in a specified way,” among other allowable discovery

restrictions. *See also* Mont. Code Ann. § 30-14-406. The Montana Rules of Civil Procedure plainly do not entitle the City to inspect, copy, test, or sample Liberty's confidential information in any way the City sees fit. City's Motion to Reconsider, p. 6.

Liberty appropriately relied upon the administrative rules governing protective orders issued by the Commission in its motion for a protective order. *See* Admin. R. Mont. 38.2.5001, et seq. Those administrative rules expressly authorize the Commission to impose special provisions controlling the discovery process. Admin. R. Mont. 38.2.5002. Those administrative rules also expressly authorize the Commission to determine the time and place for requesting parties to review confidential information. Admin. R. Mont. 38.2.5023(2). The City unreasonably ignores those administrative rules, even though the Commission appropriately cited to those rules as the basis for Order No. 73921. *See* Order No. 73921, ¶ 52. The Commission plainly had legal authority to rely upon Admin. R. Mont. 38.2.5002 and 38.2.5023 in issuing Order No. 73921.

v. Liberty Agrees That The City/MCC May Review Liberty's Confidential Information Without The Presence Of Liberty's Counsel.

In its Motion to Reconsider, the City objects to the presence of any Liberty representatives while the City reviews Liberty's confidential information at the law offices at Crowley Fleck PLLP. *See* City's Motion to Reconsider, p. 4 (citing Email from Mike Green, July 31, 2015). Although the City raised various objections to Liberty's offer of access to review Liberty's confidential information, the City never raised this concern in its emails to Liberty. *See* Exhibit B. If the City had raised this concern with Liberty, this issue could have been resolved without Commission involvement. In the spirit of cooperation with the City, Liberty agrees that Liberty's attorneys or agents will not be in the room while the City (and MCC) reviews Liberty's confidential information at Crowley Fleck. Liberty maintains its offer that a

Liberty representative be available in person or via phone to informally answer any questions the MCC or City might raise.

vi. Admin. R. Mont. 38.2.5021 Establishes How The City May Reference Liberty's Confidential Information At Hearing.

The City questions how it will be able to use Liberty's confidential information at a Commission hearing and in the City's expert reports. *See* City's Motion To Reconsider, p. 8. Montana's administrative rules squarely answer the City's concerns. Admin. R. Mont. 38.2.5021(1) establishes the manner in which oral or written reference to confidential information may be made before the Commission:

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.

Admin. R. Mont. 38.2.5021 applies to all confidential information, regardless of whether a requesting party possesses copies of the confidential information. Further, hearing proceedings and the admissibility of evidence will be dealt with at a later stage of schedule. Thus, the City's concerns will exist regardless of whether the Commission grants the City's motion to reconsider.

vii. There Is No Legal Basis For The Commission To Force Liberty To Pay For Costs Incurred By The City's Experts In Reviewing Liberty's Confidential Information.

The City makes the novel request that Liberty pay for the costs the City's experts incur in reviewing Liberty's confidential information. The City fails to cite any legal authority that would permit the Commission to grant such a request, because no such legal authority exists. As the Commission has repeatedly and appropriately recognized, the City's continued participation in this docket is elective and voluntary. Its retention of an expert and requested review of

Liberty's confidential information is even more so. No further accommodations are necessary, and Montana law certainly does not support the City's request for travel and lodging expenses.

The Commission must reject the City's request to reconsider and deny Liberty's request for special provisions in this matter. Examiner Farkas properly considered and fairly balanced the competing interests in imposing special provisions, and the City's motion to reconsider must be denied.

III. THE COMMISSION SHOULD RECONSIDER AND CLARIFY ORDER 7392L IN LIGHT OF THE PARTIES' INABILITY TO AGREE ON IMPLEMENTATION OF THE SPECIAL PROVISIONS.

Order 7392l as written requires the parties to mutually agree to a place and time at which Liberty's confidential information will be made available for inspection by counsel and experts. The order also granted Liberty's request and imposed special provisions to protect Liberty's confidential information. In the context of Liberty's supplemental responses to data requests, its motion for a protective order, the City and MCC's briefs, and the provisions of the order itself, Liberty believed the scope and impact of Order 7392l were clear. Based on its interpretation of that order, Liberty made similar offers of access to the City, MCC, and PSC Commissioners and staff. PSC Commissioners and staff accepted Liberty's offer and reviewed Liberty's confidential information without issue, whereas the City and MCC rejected Liberty's offer of access based on their unreasonable interpretations of Order No. 7392l. As a result, and in order to keep the current hearing date and to allow a reasonable prehearing schedule, Liberty requests the Commission clarify the order.

i. Liberty Requests That The Commission Clarify The Intent Of Order No. 73921 By Identifying The Time And Place Where The City And MCC Review And Work With Liberty’s Confidential Information, Pursuant To Admin. R. Mont. 38.2.5023(2).

As outlined above, the City and MCC have expressed concern and objection to the terms Liberty proposed in compliance with its obligation to try to reach mutual agreement on inspection of its confidential documents. In light of the objections raised, it appears unlikely the parties will be able to timely reach a mutual agreement on access. As a result, clarification and additional direction from the Commission appear necessary. Admin. R. Mont. 38.2.5023(2) states “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.**” (Emphasis added). Therefore, Liberty requests the Commission exercise its authority to specifically set the time, location and manner in which Liberty will produce its confidential materials. Specifically, Liberty requests the Commission order as follows:

1. All confidential materials Liberty identified in its original motion for protective order are subject to special provisions;
2. Liberty is required to make hard copies of its confidential materials, except the financial model, available for inspection and review, but not copying, upon request during normal business hours at the office of Crowley Fleck most convenient to the reviewer;
3. Liberty is required to provide the Commission, its staff, and MCC’s expert, John Wilson, access to the live version of its financial model via web portal³; and

³ Although Liberty had represented the electronic portal would be established using Webex, Liberty’s IT department now uses GlobalMeet, a web portal that is the functional equivalent to Webex.

4. Any other access to Liberty's confidential information will only be as mutually agreed by Liberty and the reviewer.

ii. Liberty Will Support Modifications To The Scheduling Order Provided Those Modifications Do Not Move The Hearing Date For A Second Time.

The MCC and City seek extensions to the existing schedule based on unfounded accusations that Liberty has engaged in dilatory tactics and further claim that Liberty was required to provide its confidential information three months ago. *See e.g.* City's Motion to Reconsider, p. 9. The Commission should reject those assertions, as Liberty has acted reasonably to protect the confidentiality of its proprietary information related to acquisition strategies. Moreover, Liberty has produced virtually all information requested in data requests within the deadlines imposed by the original procedural order. Procedural Order No. 7392 anticipated discovery objections, however, and expressly authorized Liberty to file a motion for a protective order. Liberty exercised its legal rights and filed a motion to protect its confidential information from public disclosure.

Even before Liberty moved for formal protection of its confidential information, Liberty presented a standing offer to allow counsel and MCC's outside expert access to Liberty's confidential information in mid-May. *See* Exhibit E. MCC consistently has rejected Liberty's offered access and filed untimely motions addressing concerns over Liberty's desire to maintain possession of its confidential information. Despite its claimed need to access Liberty's confidential information, MCC has made no effort to conduct any review of Liberty's materials, either before or after entry of the formal protective order. The MCC must accept some responsibility for its refusal to accept the access it was offered months ago.

The Commission ultimately granted Liberty's motion for a protective order on July 27, 2015, after extensive briefing by the City and the MCC. Liberty offered both the City and the

MCC access to Liberty's confidential information three days after receiving notice of the order. Both the City and the MCC rejected Liberty's offer. The suggestion that Liberty solely is responsible for delays in this docket is not credible.

The Commission should reject calls to suspend the existing procedural schedule or vacate the current hearing date. Liberty will stipulate to extensions to the existing deadlines to facilitate review of the confidential information, but requests the Commission maintain the current hearing date.⁴ Liberty believes that the City and MCC could be provided an additional two weeks of discovery to review Liberty's confidential information and provide testimony without moving the existing hearing date in this docket for a second time. Liberty has attached a proposed prehearing schedule, which provides intervenors until August 25 to file their testimony and adjusts the remaining deadlines in a way that allows the hearing to remain on schedule. *See* Exhibit F. As proposed, this schedule puts most of the burden for any shortened deadlines after the intervenor testimony on the Joint Applicants.

CONCLUSION

The Commission's decision to grant Liberty's motion for a protective order and impose special provisions was appropriate and supported by Montana law. Liberty believes that Order No. 73921 is reasonably clear. In compliance with ¶ 47 of Order No. 73921, Liberty has offered to allow the requesting parties to "review and work with" Liberty's confidential information at the law offices of Crowley Fleck PLLP at any time that is convenient to the requesting parties. Both the City and the MCC rejected that offer and demanded that Liberty produce hard copies of Liberty's confidential information. No fair reading of Order No. 73921 requires Liberty to produce hard copies of its confidential information.

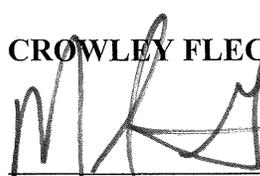
⁴ Counsel for Liberty conferred with counsel for Mountain Water and Western Water regarding the proposed extensions and is authorized to represent that the dates set forth in Exhibit F are acceptable to the Joint Applicants.

To date, the City and MCC have failed to comply with the Commission's instructions to identify an acceptable "place and time" to "review and work with" Liberty's confidential information. Order No. 73921, ¶ 47. Liberty remains committed to allowing the City and MCC to review its confidential information at any convenient time. Liberty recognizes that the City and MCC have rejected Liberty's offer of access to its confidential information because City and MCC reject the premise that the Commission may impose special provisions, Montana law and the protective order notwithstanding.

With this in mind, Liberty respectfully requests the Commission exercise its authority under to Admin. R. Mont. 38.2.5023(2) to direct the MCC and City's counsel to review Liberty's confidential information at the Crowley Fleck office most convenient to the reviewer, and at times mutually agreed by the parties. Liberty's counsel is committed to making the information available at reasonable times convenient to reviewers. Liberty further requests the Commission clarify that the MCC's expert may access the live version of Liberty's model through the electronic portal offered by Liberty.

Submitted this 7th day of August, 2015.

CROWLEY FLECK PLLP



Michael Green
John M. Semmens
CROWLEY FLECK PLLP
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**ATTORNEYS FOR LIBERTY UTILITIES CO. AND
LIBERTY WWH, INC**

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on August ~~7th~~^{7th} 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S 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 was served via electronic and U.S. mail on:

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CROWLEY FLECK PLLP

From: Mike Green
Sent: Friday, July 31, 2015 9:57 AM
To: Randy Tanner
Cc: Scott Stearns; Tina Sunderland; John M. Semmens
Subject: RE: DOCKET NO. D2014.12.99

Randy:

Thank you for initiating contact regarding the discovery documents in the pending PSC case. I am hopeful we reach an agreement to provide you and your experts access to Liberty's confidential documents. As an initial matter, Liberty is not obligated to provide the City or its experts access to the information outlined in the second paragraph of your email. In addition, we are not obligated to and will not be delivering to you copies of any of the documents referenced in your email. Rather, we will comply with the Commission's order by making copies of information subject to the order available in the offices of Liberty's counsel.

The information subject to the protective order are those items identified in our supplemental responses to the data requests you referenced. As a result, Liberty is obligated to provide the City's counsel access to copies of the following only:

1. The non-privileged portion of the PowerPoint deck dated September 1, 2014 consisting of 36 total pages, presented to the APUC Board. Eight pages of that deck are a due diligence appendix which was prepared by counsel, is an attorney/client communication and is withheld on privilege grounds.
2. The PowerPoint deck dated September 15, 2015, consisting of eight pages, presented to the APUC Board;
3. The excerpt certified by the corporate secretary and general counsel of Algonquin Power & Utilities, Co. ("APUC") of the APUC minutes from its board meetings on August 14, 2015, September 4, 2014, and September 15, 2014;
4. the Board Resolution of Liberty Utilities approving the Western Water final bid on September 15, 2014; and
5. the U.S. consolidated tax returns for Liberty Utilities for 2012 and 2013.

I have made arrangements for a Crowley Fleck attorney or paralegal to be present at mutually acceptable times starting on Friday, July 31, to provide the three Boone Karlberg attorneys who have signed NDA's access to copies of these materials in a conference room in our Missoula or Helena office. To facilitate your review, one of our attorneys or paralegals will be present and Liberty will arrange to have an appropriate representative available by phone to answer informal questions reviewers might have. Please contact John Semmens at 457-2015 to coordinate times. We will extend the same opportunity for review of these documents to your outside experts upon notification and execution of the required NDA.

As you know, Liberty considers and the Commission determined that these materials are highly sensitive and subject to special protections. As a result, Liberty expects that all individuals entitled to view Liberty's non-privileged, confidential information will comply with Order No. 73921 and Montana law. Liberty will allow the entitled individuals to "review and work with" Liberty's non-

privileged, confidential information. Order No. 73921, ¶ 47. Liberty will not allow any requesting party to copy Liberty's confidential information in any way. In anticipation that authorized reviewers may wish to take notes, Liberty will provide pencils, pens and yellow sheets of paper that are marked with a clear indication that the paper contains confidential information for note-taking purposes use. *See* Admin. R. Mont. 38.2.5022(2).

Please indicate by reply to this email your agreement to this arrangement, and contact John to arrange mutually acceptable times. Please contact me with any comments or questions about our proposed access arrangements.

Michael W. Green
Crowley Fleck PLLP
900 N. Last Chance Gulch, Suite 200
Helena, Montana 59601 USA
voice 406-457-2021 fax 406-449-5149
mgreen@crowleyfleck.com

From: Randy Tanner [<mailto:rtanner@boonekarlberg.com>]
Sent: Thursday, July 30, 2015 8:53 AM
To: Mike Green; Gary Zadick; Scott Stearns; Tranel, Monica; Thor Nelson; 'nsstoffel@hollandhart.com'; Greg Dorrington; Nelson, Robert (MCC); 'barbara@clarkfork.org'
Subject: RE: DOCKET NO. D2014.12.99

Mike,

I'm e-mailing in regard to Liberty's responses to PSC-033(b), MCC-010, and CITY-031. The City's attorneys and experts will sign and deliver to you the standard non-disclosure agreement, as ordered by the PSC in Order No. 73921. Accordingly, by this Friday, please send us copies of Algonquin's board minutes from the three meetings, Liberty's purchase resolution, the September 1st PowerPoint (except the 8 pages identified as "due diligence"), the September 15th PowerPoint, and Liberty's 2012 and 2013 tax returns.

With respect to Excel workbook, the 8 pages from the Sept. 1st PowerPoint, and the Sept. 1st due diligence report, we will not be able to reach an agreement for in person viewing by Friday. Even if Liberty chartered a flight for our experts to bring them to Montana to view the documents, the timeline would be impossible to meet. Unfortunately, this is a problem that Liberty has created by refusing to provide copies of the relevant documents.

Unless Liberty agrees to provide copies of these documents, we will file a motion to reconsider, asking the PSC to extend the timeframe for in person viewing, extend other deadlines in this matter, and order Liberty to pay the travel costs for the City's experts.

Thanks,

Randy

From: Randy Tanner [<mailto:rtanner@boonekarlberg.com>]
Sent: Friday, July 31, 2015 12:04 PM
To: Mike Green
Cc: Scott Stearns; Tina Sunderland; John M. Semmens
Subject: RE: DOCKET NO. D2014.12.99

Mike,

We do not believe your reading of Order 73921 is correct.

Paragraph 52 of the order states that Liberty's request for special provisions (viewing in-house at Crowley Fleck's office) applies only "with respect to Liberty's due diligence materials and financial model." The next paragraph orders Liberty to submit—not view in person—the remaining confidential information. The order clearly creates two categories of information: due diligence/financial model and non-due diligence materials. Further, the PSC did not grant your motion with respect to claims of attorney/client privilege.

In Liberty's own responses to MCC-010, PSC-033(b), and CITY-031, Liberty freely acknowledges that some of the purported confidential information is "due diligence" and some is not. From the September 1, 2014 PowerPoint deck, your response clearly stated that only "[e]ight pages of that deck are a due diligence appendix." The other slides are not due diligence. The PowerPoint deck from September 15, 2014 is not classified as due diligence. Further, Liberty's tax returns; the minutes from the board meetings on August 14, 2015, September 4, 2015, and September 15, 2015, and the September 15, 2015; and the Liberty board resolution are also not due diligence. Liberty must "submit" all of these non-due diligence materials to the City, the MCC, and the PSC, as required by the PSC's protective order.

Please deliver copies of this information by the end of the day today, as required by the PSC's order. If you do not provide copies of the information—as ordered by the PSC—we will file a motion to compel. By refusing to provide copies of the documents the PSC ordered Liberty to provide, Liberty is only creating more delay that will require further extensions of the deadlines in this case.

As mentioned in my previous e-mail, we further intend to file a motion for reconsideration, asking the PSC to reconsider its ruling on in-person viewing of the due diligence and financial models.

Randy

From: Mike Green
Sent: Friday, July 31, 2015 10:02 AM
To: Tranel, Monica
Cc: John M. Semmens
Subject: Mountain Water- Liberty confidential information.

Monica,

I have tried several times to reach you by phone to discuss access to Liberty's confidential materials in the Mountain Water Docket. As you know, the Montana Public Service Commission ("PSC") granted Liberty's motion for a protective order by issuing Order No. 73921, which was served on Liberty on July 28, 2015. In compliance with Order No. 73921, Liberty offers to make its non-privileged, confidential information available for the Montana Consumer Counsel's ("MCC") review beginning today, July 31, 2015.

Specifically, Liberty proposes to make the following information available to MCC's legal counsel for in-person review:

1. The non-privileged portion of the PowerPoint deck dated September 1, 2014 consisting of 36 total pages, which was presented to the APUC Board. Eight pages of that deck are a due diligence appendix which was prepared by counsel, is an attorney/client communication and is withheld on privilege grounds;
2. The PowerPoint deck dated September 15, 2015, consisting of eight pages, which was presented to the APUC Board;
3. The excerpt certified by the corporate secretary and general counsel of Algonquin Power & Utilities, Co. ("APUC") of the APUC minutes from its board meetings on August 14, 2015, September 4, 2014, and September 15, 2014;
4. The Board Resolution of Liberty Utilities approving the Western Water final bid on September 15, 2014; and
5. The United States consolidated tax returns for Liberty Utilities for 2012 and 2013.

Liberty will make the foregoing non-privileged, confidential information available for review at the law offices of Crowley Fleck PLLP in Helena. Those offices can be found at the following address:

Crowley Fleck PLLP
900 N. Last Chance Gulch, Suite 200
Helena, Montana 59601

I have made arrangements for a Crowley Fleck attorney or paralegal to be present at mutually acceptable times to provide you with access to copies of these materials in a conference room in our Helena office. To facilitate your review, one of our attorneys or paralegals will be present and

Liberty will arrange to have an appropriate representative available by phone to answer informal questions reviewers might have. Please contact John Semmens at 457-2015 to coordinate times.

The Commission also has instructed Liberty to “arrange for remote access . . . through a Webex portal” to provide MCC’s expert witness with live access to Liberty’s financial model. Order No. 73921, ¶ 29. MCC’s expert witness may review Liberty’s confidential and proprietary financial model through a Webex portal beginning today, July 31, 2015 if he has executed an NDA. Please provide me and John with your expert witness’s email address so that Liberty can provide instructions on how to gain access to the Webex portal.

Please provide us copies of NDA’s that MCC’s legal counsel, staff and its expert witness have signed prior to reviewing Liberty’s confidential information.

As you know, Liberty considers and the Commission determined that these materials are highly sensitive and subject to special protections. As a result, Liberty expects that all individuals entitled to view Liberty’s non-privileged, confidential information will comply with Order No. 73921 and Montana law. Liberty will allow the entitled individuals to “review and work with” Liberty’s non-privileged, confidential information. Order No. 73921, ¶ 47. Liberty will not allow any requesting party to copy Liberty’s confidential information in any way. In anticipation that authorized reviewers may wish to take notes, Liberty will provide pencils, pens and yellow sheets of paper that are marked with a clear indication that the paper contains confidential information for note-taking purposes use. See Admin. R. Mont. 38.2.5022(2).

Please indicate by reply to this email your agreement to this arrangement, and contact John to arrange mutually acceptable times. Please contact me with any comments or questions about our proposed access arrangements.

Michael W. Green
Crowley Fleck PLLP
900 N. Last Chance Gulch, Suite 200
Helena, Montana 59601 USA
voice 406-457-2021 fax 406-449-5149
mgreen@crowleyfleck.com

From: Tranel, Monica [mailto:MTranel@mt.gov]
Sent: Tuesday, August 04, 2015 12:44 PM
To: 'Barbara Chillcott'; Mike Green; Gary Zadick; Scott Stearns; Thor Nelson; 'nsstoffel@hollandhart.com'; Greg Dorrington; Nelson, Robert (MCC)
Cc: Randy Tanner; Schulz, Paul
Subject: RE: DOCKET NO. D2014.12.99

Can we schedule a call tomorrow at 10 a.m. to discuss the procedural schedule? Specifically, MCC requests three weeks after receiving the financial information to file its testimony. Staff's order finds that the work product privilege is intact, and therefore the webex access is unacceptable. We have not yet received the information and full responses, so please keep that in mind as we discuss the procedural schedule and attempting to set any dates.

If anyone can set up a call in bridge that would be helpful. Please let me know.

Monica

From: Tranel, Monica [mailto:MTranel@mt.gov]
Sent: Wednesday, August 05, 2015 9:28 AM
To: Mike Green; 'Barbara Chillcott'; Gary Zadick; Scott Stearns; Thor Nelson; 'nsstoffel@hollandhart.com'; John M. Semmens; Nelson, Robert (MCC)
Cc: Randy Tanner; Schulz, Paul
Subject: RE: DOCKET NO. D2014.12.99

Mike –

Liberty's offer of access has always been at the cost of our work product privilege, which remains intact and we are not willing to waive.

We can have a call at 10:30 if someone is willing to arrange a call in bridge. We are requesting a firm date of production of Liberty's financial information to MCC per the Commission's orders. Once those dates are agreed on and compliance is made in full, we are asking three weeks to prepare our testimony. If your position remains that you will not produce the information without MCC waiving its work product privilege, please advise.

Monica

From: Tranel, Monica [mailto:MTranel@mt.gov]
Sent: Wednesday, August 05, 2015 10:24 AM
To: Mike Green; 'Barbara Chillcott'; Gary Zadick; Scott Stearns; Thor Nelson; 'nsstoffel@hollandhart.com'; John M. Semmens; Nelson, Robert (MCC)
Cc: Randy Tanner; Schulz, Paul
Subject: RE: DOCKET NO. D2014.12.99

Mike –

Your goal, which I've highlighted below, by definition requires MCC to waive its work product privilege. We will not do so. If you are unwilling to produce the information in a way that does not violate our privilege please let us know. Thanks,

Monica

From: Mike Green [mailto:mgreen@crowleyfleck.com]
Sent: Wednesday, August 05, 2015 10:20 AM
To: Tranel, Monica; 'Barbara Chillcott'; Gary Zadick; Scott Stearns; Thor Nelson; 'nsstoffel@hollandhart.com'; John M. Semmens; Nelson, Robert (MCC)
Cc: Randy Tanner; Schulz, Paul
Subject: RE: DOCKET NO. D2014.12.99

Monica:

Liberty has not asked MCC or any other party to waive its work product privilege, and will not assert that review under mutually agreed terms constitutes a waiver of that privilege. **Our goal is to maintain possession of the confidential materials in the possession of Liberty or its attorneys.** As I indicated, Liberty's confidential materials are available for review in my office at your convenience, and I remain open to discussions of alternative production means that prevent Liberty's materials from entering the possession of a public agency.

I am available at 10:30 to discuss and have set up a conference number as follows:

Conference ID- 1165

External Call-In Numbers & Toll Free: Please join the conference bridge by dialing either the Toll Free line, or one of our many available local dialing numbers. When the greeting starts, dial conference ID.

Toll Free	1-866-757-9721
Helena	406-457-2055
Missoula	406-523-3655

Michael W. Green
Crowley Fleck PLLP
900 N. Last Chance Gulch, Suite 200
Helena, Montana 59601 USA
voice 406-457-2021 fax 406-449-5149
mgreen@crowleyfleck.com

From: Tranel, Monica [mailto:MTTranel@mt.gov]
Sent: Thursday, August 06, 2015 1:28 PM
To: 'Gary Zadick'; Mike Green; 'Barbara Chillcott'; Scott Stearns; Thor Nelson; 'nsstoffel@hollandhart.com'; John M. Semmens; Nelson, Robert (MCC)
Cc: Randy Tanner; Schulz, Paul
Subject: RE: DOCKET NO. D2014.12.99

Mike:

This email is in response to your e-mail of July 31 stating Liberty's position on when and how it intends to produce the materials it has designated as confidential under Commission Order No. 73921, and various subsequent communications. MCC does not agree with the reading of Order No. 73921 expressed in your e-mails. Specifically, MCC does not believe that your proposal to provide Liberty's tax returns, Board minutes, due diligence materials only at your offices, or your proposal to make Liberty's financial model available to MCC's expert only through a Webex portal satisfy the requirement of Paragraph 47 of Order No. 73921 that parties taking discovery be "provided a reasonably private space in which to review and work with the subject information in order to adequately prepare their cases." In this regard, the "goal" expressed in your e-mail of August 5 – "to maintain possession of the confidential materials in the possession of Liberty or its attorneys" – is inconsistent with the requirements of Paragraph 47 and with Order No. 73921's concern (at ¶¶ 40-41) with preservation of MCC's work product immunity.

Our preferred means for Liberty to comply with its obligation to produce these materials would be for Liberty to provide them directly to Dr. Wilson, at his office in Arlington, Virginia, subject to (i) our provision of a Non-Disclosure Agreement specific to Order No. 73921 executed by Dr. Wilson; and (ii) our undertaking to return the financial model without having copied it. We believe this satisfies all of the applicable requirements of Order No. 73921 without unduly burdening MCC or its expert and without threatening our work product immunity.

We must also insist on a reasonable (minimum of three weeks) extension of the procedural schedule in order to allow sufficient time for review of these materials once they are actually produced by Liberty, and for the preparation of testimony based on expert evaluation of these materials.

Please let me know at your earliest convenience whether Liberty will comply with its discovery production obligations.

Thanks,

Monica

From: Mike Green
Sent: Tuesday, May 19, 2015 9:19 PM
To: Tranel, Monica; Farkas, Laura
Cc: 'Langston, Jeremiah'; Todd.Wiley@libertyutilities.com; John M. Semmens
Subject: D2014.12.99- Liberty discovery proposal

Laura and Monica:

In follow up to our separate phone calls earlier today, Liberty is interested in attempting to resolve the outstanding discovery issues in the motions to compel recently filed regarding Liberty's due diligence materials. As outlined in our objections, we do not believe Liberty's financial modeling or analysis is relevant to this case, because it will not have any impact on rates or on the level of service Mountain Water provides after the transaction. That said, in an effort to resolve the outstanding discovery dispute, Liberty proposes to make available, on a confidential basis, information presented to the APUC board for their approval and the financial model used to analyze the Park Water transaction as follows:

Upon entry of a protective order and signature of appropriate NDA's, Liberty will make available for inspection by counsel and necessary staff of the PSC and MCC and MCC's outside expert Dr. John Wilson, at the offices of Crowley Fleck in Helena, and a mutually agreeable location in the Washington, D.C. area, copies of the non-attorney/client privileged portion of the power point decks presented to the APUC Board of Directors as well as the proprietary financial model Liberty used to analyze the proposed transaction. There are two board decks, which Liberty considers proprietary and highly confidential. The first deck is dated September 1, 2014 consisting of 36 total pages. Eight pages of that deck are a due diligence appendix which was prepared by counsel, is privileged and will be withheld on privilege grounds. The second deck is dated September 15, 2014, and consists of eight pages. Liberty will provide access to a "live" version of its financial model on a computer we provide, in a manner that will allow review of the imbedded formulas. Liberty will also make Bill Killeen, its Director of Regulatory Strategy, available for informal questions (either in person or by telephone) about the information provided. These materials will be provided on the condition that no electronic copies of documents or information will be taken.

These measures would allow access by counsel, staff and Dr. Wilson to information responsive to DRs seeking due diligence materials, but will ensure that Liberty's proprietary information does not become a "public" document by submission to the Commission or MCC. While I recognize this approach is somewhat unusual for a Commission docket, the information being sought by the Commission and MCC is unprecedented in Liberty's extensive experience. In the companion docket in California, the Office of Ratepayer Analysts did not seek access to the financial models (in any form) and conducted its review of the board decks in Liberty's counsel's office, under similar conditions as I am proposing here. As a result, the level of access we are proposing is much greater than has been sought in any other state, or that Liberty has granted in the past, and we are hopeful this proposed compromise will satisfy all our respective needs.

If we can agree to appropriate confidentiality terms, Liberty is prepared to grant Monica and Dr. Wilson access to this information as soon as possible, while we simultaneously prepare a motion for protective order to submit to the Commission. I am working on both tonight and Wednesday.

In light of the City's pending condemnation action, and the interplay of the issues between this docket and that case, Liberty remains extremely concerned about providing the City access to information that it did not have access to in the condemnation case, and to which it does not require access here. The potential for abuse is considerable, and we intend to continue our objection to providing this information to the City.

I appreciate your consideration of this offer, and hope you will agree it strikes an appropriate balance among our clients' interests. I can be available at your convenience on Wednesday to discuss by telephone if helpful.

Michael W. Green
Crowley Fleck PLLP
900 N. Last Chance Gulch, Suite 200
Helena, Montana 59601 USA
voice 406-457-2021 fax 406-449-5149
mgreen@crowleyfleck.com

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**LIBERTY'S PROPOSED REVISIONS TO PARAGRAPH 6 OF PROCEDURAL ORDER
NO. 7392 IN PSC DOCKET NO. D2014.12.99**

<u>Current Schedule</u>	<u>Proposed</u>
(h) August 11, 2015: Final day for intervenor testimony.	(h) August 25, 2015: Final day for intervenor testimony.
(i) August 25, 2015: Final day for data requests to intervenors.	(i) September 1, 2015: Final day for data requests to intervenors.
(j) September 2, 2015: Final day for the Commission to identify additional issues.	(j) September 4, 2015: Final day for the Commission to identify additional issues.
(k) September 9, 2015: Final day for intervenors to respond to data requests issued on August 25, 2015.	(k) September 11, 2015: Final day for intervenors to respond to data requests issued on September 1, 2015.
(l) September 16, 2015: Final day for Joint Applicants to file rebuttal testimony and for intervenors to file cross-intervenor response testimony.	(l) September 18, 2015: Final day for Joint Applicants to file rebuttal testimony and for intervenors to file cross-intervenor response testimony.
(m) September 23, 2015: Final day for written discovery to Joint Applicants about their rebuttal testimony and written discovery to intervenors about cross-intervenor response testimony.	(m) September 25, 2015: Final day for written discovery to Joint Applicants about their rebuttal testimony and written discovery to intervenors about cross-intervenor response testimony.
(n) September 30, 2015: Final day for Joint Applicant's responses to written discovery about its rebuttal testimony and intervenors' responses to written discovery about cross-intervenor response testimony.	(n) October 2, 2015: Final day for Joint Applicant's responses to written discovery about its rebuttal testimony and intervenors' responses to written discovery about cross-intervenor response testimony.
(o) October 7, 2015: Deadline for pre-hearing memorandum.	(o) October 9, 2015: Deadline for pre-hearing memorandum.
(p) October 19-20, 2015: Hearing.	(p) October 19-20, 2015: Hearing.