

# Montana Consumer Counsel



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August 11, 2015

TO: Ms. Kate Whitney

FROM: Laura Shively

RE: Docket No. D2014.12.99, Order No. 73921 – Liberty Utilities Company, Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company

Enclosed is Motion to Suspend the Procedural Schedule and Response to Liberty's Motion for Clarification of the Montana Consumer Counsel in the above matter.  
Thank you.

cc: Service List

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 )  
Transfer of Stock )

**THE MONTANA CONSUMER COUNSEL'S  
MOTION TO SUSPEND THE PROCEDURAL SCHEDULE  
AND RESPONSE TO LIBERTY'S MOTION FOR CLARIFICATION**

**Introduction**

Intervenor Montana Consumer Counsel (MCC) (1) moves the Commission to suspend the procedural schedule that it established in Order No. 7392, as modified in the Notice of Staff Action issued June 29, 2015, and (2) submits its response to the August 7, 2015, motion of Liberty Utilities Co. and Liberty WWH, Inc. (collectively, "Liberty") motion for clarification of Order No. 7392l, issued July 28, 2015.

Liberty has refused to comply with *three* Commission Orders directing it to produce its financial information in this docket. See Commission Order No. 7392e, issued June 3, 2015; Order 7392k, issued June 29, 2015, and Order No. 7392l, issued July 27, 2015. To date Liberty has not delivered the financial information requested and ordered to be produced.

Liberty's motion for clarification, and its positions taken since the Commission issued Order No. 7392l, demonstrate that it will continue to refuse to

produce the financial information ordered produced in Order Nos. 7392e, 7392k and 7392l. Liberty's motion for clarification is in fact nothing more than a request that the Commission reverse the finding in ¶ 41 that the MCC's work product privilege plainly applies here.<sup>1</sup> To be clear, the "financial model" under discussion is an Excel spreadsheet. The spreadsheet can easily be provided to MCC under protective orders for MCC's unimpeded use and review, and then be returned to Liberty and all copies destroyed at the conclusion of this docket.

Liberty's refusal to comply with its discovery obligations requires suspension of the procedural schedule until such time as Liberty has actually produced the information it was directed to produce in Order Nos. 7392e, 7392k and 7392l. Then, and only then, should the Commission restart the clock on a revised procedural schedule that allows sufficient time for the preparation and submission of pre-filed testimony.

Rather than complying with the Commission Orders issued in this docket, Liberty asks the Commission to order the MCC to comply with Liberty's refusal to produce its financial spreadsheets to the MCC by "directing" the MCC to review Liberty's "confidential information at the Crowley Fleck office most convenient to the reviewer." Brief p. 20. Liberty's motion is an attempt to avoid complying with the central finding of Order No. 7392l:

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<sup>1</sup> Liberty's Brief, p. 20, asks that the Commission "clarify that the MCC's expert may access the live version of Liberty's model through the electronic portal offered by Liberty." Order 7392l finds that the work product doctrine extends to the agents of an attorney and plainly applies to MCC's counsel and expert witnesses. Order 7392l ¶ 41. Liberty is in fact seeking a reversal of Order 7392l, not clarification.

The 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. The parties will simply have to reach an arrangement whereby parties are provided a reasonably private space in which to review and work with the subject information in order to adequately prepare their cases.<sup>2</sup>

Liberty's reiteration of its prior proposals has fallen short of providing any "reasonably private space" for review of the Excel spreadsheet by counsel and expert witnesses for intervenors. Liberty has instead continued to adhere to all-or-nothing terms that at best impede the free communication between counsel and expert that it is the central goal of the work product doctrine to protect, and at worst present an opportunity for surveillance and observation that is inconsistent with the work product doctrine.

Accordingly, Liberty should be directed to produce its financial information in order to proceed with its Application. All deadlines should be suspended until Liberty has produced that information.

### **Argument**

Liberty has not produced the information requested in MCC 010. Order 73921 finds the MCC's work product privilege applies. Liberty's position, in spite of that order, remains unchanged. Liberty's entire argument on this issue (Brief p. 5-8) is predicated on its characterization that the Commission rejected MCC's

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<sup>2</sup> Order No. 73921 at ¶ 47. Liberty repeatedly claims that it has "complied with the Commission's instructions contained in ¶ 54 and ¶ 29 of Order No. 73921." Brief p. 2, p. 4. Para. 29 of Order 73921 does not contain Commission instruction. Para. 29 is a recitation of Liberty's self-imposed limitations, which the Commission did not adopt and specifically rejected in finding, in Para. 41 that the work product doctrine "plainly applies to MCC's counsel and expert witnesses." Para. 41 of Order 73921. Liberty's statement that the Commission instructed it to "arrange for remote access to the financial model by experts through a Webex portal" is incorrect. See Liberty Brief p. 4, Order 73921 ¶ 29, ¶ 54.

work product theory. Brief p. 5. It is difficult to comprehend how the conclusion in ¶ 41 of Order 73921 that the work product doctrine plainly applies to MCC's counsel and expert witnesses is a rejection of the MCC's theory that the work product privilege applies.

Liberty claims that MCC introduced the issue of work product privilege for the first time in its reply brief. Liberty Brief p. 5. This is incorrect. Liberty itself argued that MCC was not entitled to claim work product privilege in its Response to MCC's Second Motion to Compel responses to MCC 010.<sup>3</sup> Liberty cited no authority to support that argument. MCC appropriately replied and Commission Order 73921 adopted the MCC's position.

Liberty's motion for "clarification" is in fact a request that the Commission reverse its finding that the work product privilege applies. Liberty's interpretation of Order 73921 conflates the Order's recitation of Liberty's position (¶ 29) and the conclusions of the Hearing Examiner. Brief p. 5-6. For example, Liberty states that "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." Brief p. 6. Liberty's statement directly contravenes the finding in ¶ 41 of Order 73921 that the work product doctrine plainly applies to MCC's counsel and expert witnesses. Nowhere in the Order is there any conclusion remotely close to Liberty's statement that "Examiner Farkas then adopted the special provision requested by Liberty, including provision of

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<sup>3</sup> See Liberty response brief p. 9-10 filed July 2, 2015.

access of Liberty's financial model to MCC's expert via web portal." Brief p. 6. Liberty's citation to its own position, set out in ¶ 29, is not a Commission decision adopting Liberty's unilateral terms of supervised access to its Excel spreadsheet.

To get around the fact that the Commission has determined Liberty must produce its Excel spreadsheet to the MCC, Liberty argues that it is not required to convey "possession" of Liberty's confidential information related to its acquisition activities to a public agency in Montana.<sup>4</sup> Liberty's position flies in the face of its attempt to purchase a public utility and to be regulated as such in Montana. The Commission is a public agency responsible for protecting the public's interest in essential public service monopolies that are accorded the privilege of operating monopoly public enterprises that are clothed in the public interest. If Liberty desires this privilege it must comply with its obligations to provide information that accompany that status. Liberty's suggested limitations on the production and use of the information would eviscerate any meaningful public hearing and opportunity to be heard. If the information is not produced and able to be used and explained by all experts, the Commission has no basis to adjudicate the merits of Liberty's Application.

Liberty argues that the work product privilege does not apply to the MCC's testifying expert because Liberty is entitled to inquire into the information that the

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<sup>4</sup> See Exhibit 1 attached hereto. In response to MCC's effort to convene a call to discuss modifications to the procedural schedule, Liberty indicated that its "goal is to maintain possession of the confidential materials in the possession of Liberty or its attorneys." Email from Mike Green August 5, 2105 at 10:20 a.m.

expert used in formulating his opinions.<sup>5</sup> This question has been fully briefed and decided. In addition, Liberty's claim is inconsistent with legal authority in Montana.<sup>6</sup> The right to cross examine an expert witness about the underlying data and facts upon which that expert relied is a far cry from being able to step into the thought process of the expert and the attorney while developing a final opinion and work product. Liberty's proposal is prohibited by M.R.Evid. 26(b) (3) (B) and this Commission has already rejected it. Order 73921. No amount of the circumlocution and distraction attempted in Liberty's motion for clarification will change that fact, or mitigate the impermissible nature of the intrusion that its proposed "special provisions" attempt. See e.g., *Sara Lee Corp. v. Kraft Foods, Inc.*, 273 F.R.D. 416, 420-421 (N.D. Ill. 2011); *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 664 (S.D. Iowa 2000). Nor will promises not to peek, or assurances that it "will not monitor" MCC's use of the spreadsheet (Brief p. 6) redress the intrusion.

The Commission has rejected Liberty's attempt to preemptively strip the MCC of that "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel"<sup>7</sup> that work product immunity is intended to

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<sup>5</sup> Liberty's arguments should be summarily rejected as out of time. This argument was briefed and rejected by the Hearing Examiner, and Liberty does not present its motion as one for reconsideration of the work product privilege but rather a request for "clarification." By clarification, Liberty means only that the MCC should be directed to abide by Liberty's unilateral terms.

<sup>6</sup> M.R.Evid. 705 provides:

**Rule 705. Disclosure of facts or data underlying expert opinion.**

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

<sup>7</sup> *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

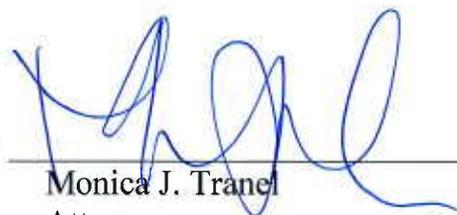
protect. See, e.g., *In re Allen*, 106 F.3d 582, 608 (4<sup>th</sup> Cir. 1997), *cert. denied sub nom. McGraw v. Better Government Bureau*, 522 U.S. 1047 (1998) (attorney's "choice and arrangement constitutes opinion work product because Allen's selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation"). See Order 73921. It should do affirm its position.

### **Conclusion**

Liberty's motion for clarification should be rejected. The procedural schedule should be suspended until such time as Liberty complies with the Commission's Orders.

DATED this 11<sup>th</sup> day of August, 2015.

By: \_\_\_\_\_



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Comments of the Montana Consumer Counsel has been served upon the following person by first class mail this 11th day of August, 2015:

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