

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

* * * * *

IN THE MATTER OF the Investigation of the)
Montana Public Service Commission into) **REGULATORY DIVISION**
whether Mountain Water Company's rates are)
Just and Reasonable.) **DOCKET NO. D2016.2.15**
)

**MOUNTAIN WATER COMPANY'S MOTION FOR RECONSIDERATION OF
PROCEDURAL ORDER NO. 7475A**

Mountain Water Company ("Mountain Water") by and through its undersigned counsel and pursuant to Admin. R. Mont. 38.2.4806, hereby submits this motion for reconsideration of the Montana Public Service Commission's ("Commission") Procedural Order No. 7475a ("Procedural Order"). Mountain Water integrates into its motion a brief in support. Mountain Water requests the Commission revise the Procedural Order to allow the parties to issue data requests in response to the testimony filed in Docket D2016.2.15, in keeping with established Commission practices and as required by settled Montana law.

PROCEDURAL AND FACTUAL BACKGROUND

On January 29, 2016, the Commission "voted to initiate a proceeding to inquire into whether Mountain Water Company's current water rates . . . are just and reasonable." Notice of Investigation, PSC Docket No. D2016.2.15 (Feb. 3, 2016). The Commission initiated these proceedings to determine whether Mountain Water's rates are just and reasonable "under the

current capital structure and cost of capital now that Liberty Utilities is the new owner of Mountain Water.” *Id.*

The Commission subsequently issued the Procedural Order on March 7, 2016. In relevant part, the Procedural Order set the following procedural schedule for this docket:

- (a) March 25, 2016: Final day for data requests to parties regarding the limited matter of whether Mountain Water’s current rates are just and reasonable whether the Commission should order such changes to rates as may be just and reasonable. *See infra* ¶ 9.
- (b) April 1, 2016: Final day for parties to respond to data requests. *See infra* ¶ 9.
- (c) April 15, 2016: Final day for testimony from parties regarding whether Mountain Water’s rates are just and reasonable and whether the Commission should order such changes to rates as may be just and reasonable.
- (d) April 28, 2016: Hearing commences in Missoula, Montana and continues day to day as necessary.
- (e) May 3, 2016: Work session on whether Mountain Water’s rates are just and reasonable and whether the Commission should order changes to rates as may be just and reasonable.

Procedural Order, ¶ 5. Notably, the Commission’s schedule does not permit the parties to file data requests in response to the testimony due to be filed on April 15, 2016.

This stark limitation on the pre-hearing discovery process is unprecedented. The Commission’s procedural orders generally allow parties to file data requests after expert testimony is filed. Moreover, Montana law—including Montana’s rules of civil procedure and Montana’s constitution—requires that Mountain Water be permitted to discover the basis of any adverse expert testimony before the rate hearing in this docket. If the Commission does not amend the Procedural Order to permit data requests to be filed in response to filed testimony, the parties will be unable to fully participate in the hearing in this docket.

LEGAL ARGUMENT

Mountain Water is entitled to discover all “facts known and opinions held” by adverse experts in this docket as established by the Montana Rules of Civil Procedure. *See* PSC Docket No. D2014.12.99, Order No. 7392o, ¶ 18 (Aug. 20, 2015) (citing Mont.R.Civ.P. 26(b)(4)). Mountain Water’s right to engage in meaningful discovery also is protected by the Montana Constitution. The Procedural Order prevents Mountain Water from discovering the factual basis for adverse expert opinions, however, by not allowing Mountain Water to serve data requests after the adverse parties’ experts file testimony in this docket. Montana law plainly does not allow the Commission to restrict Mountain Water’s right to engage in discovery in this manner.

A. Mountain Water Has A Procedural Right To Serve Data Requests After Adverse Experts File Testimony.

The purpose of discovery is “to promote the ascertainment of truth . . . by assuring the mutual knowledge of all relevant facts gathered by both parties.” *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 67, 337 Mont. 411, 162 P.3d 106. Similarly, the Commission has held that “the rule authorizing the use of interrogatories for pretrial discovery from an adverse party is to be liberally construed to make all relevant facts available to parties in advance of trial in order to assure a decision on the facts as they actually exist.” PSC Docket No. D97.5.87, Order No. 5982e, ¶ 12 (June 29, 1998). Under Montana law, the rules of discovery are governed by Montana Rule of Civil Procedure 26. The Commission has adopted and applies Rule 26 in all contested cases. Admin.R.Mont. 38.2.3301(1); *see also* Order No. 7392o, ¶ 18.

The Montana Supreme Court requires “full disclosure” of expert opinions under Rule 26, as well as the factual basis for those opinions, to “eliminate surprise and to promote effective cross-examination of expert witnesses.” *Christofferson v. City of Great Falls*, 2003 MT 189, ¶ 11, 316 Mont. 469, 74 P.3d 1021. Ensuring the full disclosure of expert opinions is especially

important in contested cases before the Commission, where testifying experts “sort through the morass of theory and data, and provide expert opinions.” *State ex rel. Dep't of Pub. Serv. Regulation v. Montana Irrigators, Inc.*, 209 Mont. 375, 382-83, 680 P.2d 963, 967 (1984).

The Procedural Order violates Rule 26 because it does not permit the “full disclosure” of the factual basis of adverse expert opinions. Under the Procedural Order, Mountain Water will not be served with adverse testimony until April 15, 2016—twenty-one days after the deadline for serving data requests on adverse parties. Procedural Order, ¶ 5 (a) and (c). Thus, under the current Procedural Order, Mountain Water will be provided adverse expert opinions, but Mountain Water will not be permitted to serve responsive data requests and obtain the “morass of theory and data” underlying those adverse expert opinions. *Montana Irrigators Inc.*, 209 Mont. at 382-83. Additionally, Mountain Water will be unable to effectively cross-examine adverse expert witnesses during the hearing because Mountain Water will not possess the factual basis for the experts’ opinions. *Christofferson*, ¶ 11.

To satisfy Rule 26, the Commission must amend the Procedural Order to allow Mountain Water to serve data requests after testimony is filed to determine the factual basis of the expert testimony. The Montana Supreme Court came to a similar conclusion in *Montana Power Co. v. Wax*. In *Wax*, a plaintiff was permitted to serve interrogatories on the opposing party regarding adverse expert testimony, but “**the basis for the [expert] opinions was not set forth** in the answer supplied by” the opposing party. *Wax*, 244 Mont. 108, 112, 796 P.2d 565, 567 (1990) (emphasis added). The Montana Supreme Court concluded that “this failure severely limited [the plaintiff’s] ability to cross-examine” the adverse expert, and the Court further determined that the expert was appropriately excluded from testifying. *Id.* The Montana Supreme Court

reasoned it was necessary to exclude the expert testimony “to prevent the abuse of surprise on the part of the proponent.” *Id.*

Wax compels the Commission to amend the Procedural Order and allow Mountain Water to serve responsive data requests on adverse parties after testimony is filed. The only meaningful difference between this case and *Wax* is that, in *Wax*, the plaintiff at least was allowed to serve interrogatories on the opposing party; conversely, the current Procedural Order does not allow Mountain Water to serve any data requests in response to adverse expert testimony. In any event, like in *Wax*, Mountain Water will not be permitted to discover “the basis for the expert opinions,” and, as a result, Mountain Water’s ability to cross-examine the adverse experts at the hearing will be “severely limited.” *Wax*, 244 Mont. at 112. Montana law forbids such a result. *Id.*, see also Mont.R.Civ.P. 26.

B. Mountain Water Has A Constitutional Right To Serve Data Requests On Adverse Parties After Adverse Experts File Testimony.

Mountain Water also possesses a constitutional right to serve data requests in response to expert testimony and obtain the factual basis for that testimony. Mountain Water has a right to due process of law pursuant to Article II, § 17 of the Montana Constitution. See also *Montana Power Co. v. Pub. Serv. Comm'n*, 206 Mont. 359, 364, 671 P.2d 604, 607 (1983) (“a corporation is a ‘person’ within the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution” and “administrative agencies are not exempt from the constitutional restraints of due process requirements”).

If the Commission does not amend the Procedural Order to allow Mountain Water to serve responsive data requests on adverse parties after testimony is filed, the Commission will have violated Mountain Water’s due process rights. The Montana Supreme Court reached a similar conclusion in another Commission case. See *Wilson v. Mont. Public Service Commn.*,

260 Mont. 167, 172, 858 P.2d 368, 371 (1993). In *Wilson*, a party appearing before the Commission was denied the opportunity to discover “the nature of the evidence that will be presented in support of the possible agency action” against him. *Wilson*, 260 Mont. at 172. The Montana Supreme Court concluded the Commission’s actions violated Wilson’s due process rights and ultimately held that parties appearing before the Commission are guaranteed the right to “procedural due process which includes, among other things, the ability to discover information relevant to the case against them[.]” *Id.*

The current Procedural Order denies Mountain Water the ability to discover information relevant to the ultimate goal of this docket—a determination as to “whether Mountain Water Company’s current water rates . . . are just and reasonable.” Notice of Investigation, PSC Docket No. D2016.2.15 (Feb. 3, 2016). As noted, the Procedural Order allows Mountain Water to review adverse expert opinions, but it does not permit Mountain Water to serve responsive data requests to obtain the “morass of theory and data” underlying those adverse expert opinions. *Montana Irrigators Inc.*, 209 Mont. at 382-83. That underlying theory and data certainly amounts to “evidence that will be presented in support of the possible agency action” and, thus, Mountain Water has a due process right to discover that information before the hearing in this docket. *Wilson*, 260 Mont. at 172.

CONCLUSION

For the foregoing reasons, Mountain Water respectfully requests that the Commission amend the Procedural Order and allow Mountain Water to serve responsive data requests on adverse parties after testimony is filed. Mountain Water is simultaneously filing a motion to continue the current hearing date, which if granted would present the Commission an opportunity to allow discovery after testimony is filed.

Dated this 18th day of March, 2016.

CROWLEY FLECK PLLP

A handwritten signature in black ink, appearing to read "Michael Green", with the initials "(P.R.)" written to the right. The signature is written over a horizontal line.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on March 18, 2016, the foregoing was served via electronic and U.S. mail on:

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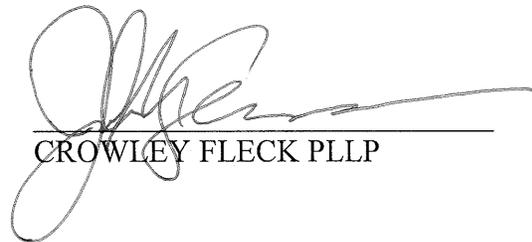
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