

 **MDU RESOURCES**
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July 17, 2007

BY ELECTRONIC AND U.S. MAIL

Administrative Law Judge Dennis Moss
Washington Utilities and Transportation
Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

**Re: Docket No. UG-061721
In the Matter of the Joint Application of MDU Resources Group, Inc. and
Cascade Natural Gas Corporation**

Dear Judge Moss:

This is in response to the July 13, 2007 letters submitted by counsel for Commission Staff and Public Counsel, respectively, with respect to my July 10 letter advising the Commission of our intent to retain Perkins Coie LLP ("Perkins") for purposes of rendering the non-consolidation opinion required by Commitment 30 of the Stipulation adopted by the Commission in Order 06 in this docket.

By their letters, Staff and Public Counsel seek to impose a requirement that the firm providing the non-consolidation opinion be "independent"¹ and "disinterested."² Public Counsel acknowledges that the Commitment "does not expressly address whether the opinion must be obtained from an independent firm," but claims that the purpose of the Commitment "is clearly effectively served only by obtaining the opinion from an independent source."³ Staff, for its part, asserts that obtaining the opinion from Perkins "is not consistent with the intent" of the Commitment.⁴

With all due respect, these arguments should be given no weight by the Commission. These parties are effectively seeking to amend the Stipulation to add a requirement of "independent" and "disinterested" where none currently exists. Moreover, these arguments seem to be offered without the benefit of considerable experience with non-consolidation opinions in

¹ July 13, 2007 Letter from Gregory J. Trautman to ALJ Dennis Moss at 2; July 13, 2007 letter from Simon J. ffitich to Carole Washburn at 2.

² *Id.*

³ July 13, 2007 letter from Simon J. ffitich to Carole Washburn at 1.

⁴ July 13, 2007 Letter from Gregory J. Trautman to ALJ Dennis Moss at 1.

commercial transactions, pronouncements by the American Law Institute governing the issuance and use of opinion letters, and ethical requirements imposed on lawyers rendering opinion letters.

I. The Plain Language of Commitment 30. As noted in my July 10 letter, Commitment 30 does not impose any requirement with respect to whether or not the law firm retained for purposes of this Commitment may have a previous relationship with either MDU or Cascade. The precise wording of this Commitment was the subject of intense negotiations, and now, for the first time, additional conditions are being proposed that would impose unfounded limitations on our selection of the law firm to render this opinion. There is no basis for imposing these conditions. Staff cites a three-word excerpt from Mr. Goodin's answer to Commissioner Jones's question during the June 18 settlement hearing, and fails to include the remaining portion of the answer which makes it clear that MDU "routinely deal[s] with" several law firms and that it would be premature to identify the particular firm retained to render the opinion.⁵ Under Staff's and Public Counsel's proposed restrictive requirements of "independent" and "disinterested," it would seem that *none* of the several law firms with which MDU has worked in the past – to which Mr. Goodin refers – would be eligible to render the opinion. As discussed below, imposing an "independent" and "disinterested" requirement in the manner suggested by Staff and Public Counsel is neither reasonable nor necessary, given the accepted business practices with respect to the issuance and use of non-consolidation opinions.

With respect to Staff's argument that the "intent" of Commitment 30 requires that the opinion be from an "independent law firm,"⁶ there is no basis for looking to the intent of the Commitment where, as here, the Commitment is unambiguous on its face. To the extent the "intent" of the Commitment is relevant, the evidence suggests that no such "independence" requirement was contemplated. The language of Commitment 30 is very similar to a predecessor provision, Commitment Wa 8, from the Stipulation adopted in the Commission's approval of the acquisition of PacifiCorp by MidAmerican Energy Holdings Company ("MEHC") in Docket UE-051090.⁷ That commitment contains no requirement that the opinion be rendered by an "independent" and "disinterested" law firm. MEHC complied with that commitment by filing the opinion of Willkie Farr & Gallagher LLP, which had acted as counsel to MEHC in connection with the corporate aspects of the transaction.⁸ Similarly, the Stipulation adopted by the Commission in Docket UE-060273 with respect to Avista's corporate reorganization also includes a commitment with respect to a non-consolidation opinion that imposes no requirement of an "independent" or "disinterested" law firm.⁹

II. Industry Standard. Standard & Poor's, one of the country's two leading rating

⁵ Transcript at 43:24 – 44:11.

⁶ July 13, 2007 Letter from Gregory J. Trautman to ALJ Dennis Moss at 1.

⁷ Order 08, Attachment 2 at 15.

⁸ Letter of June 7, 2006 from Willkie Farr & Gallagher LLP, filed with the Commission on June 12, 2006 in Docket UE 051090. The letter acknowledges that Willkie Farr & Gallagher acted as counsel to MEHC in connection with the purchase of PacifiCorp and the other transactions.

⁹ Order 03, Appendix A to the Stipulation at 7, Commitment 35.

agencies, has prepared the most widely recognized statement of criteria regarding rating agencies' expectations with respect to non-consolidation opinions. For rating agencies, this issue arises in connection with collateral mortgage backed securities (commonly referred to as "CMBS"). Standard & Poor's has issued a 248 page publication entitled *U.S. CMBS Legal and Structured Finance Criteria*,¹⁰ which sets forth the widely accepted criteria applied by the rating agency in billions of dollars of transactions each year.

Section Five of the Standard & Poor's publication addresses legal opinions, with a specific section for non-consolidation opinions.¹¹ In this discussion of non-consolidation opinions, Standard & Poor's makes six separate references to a legal opinion from "independent legal counsel." Standard & Poor's states the following with respect to the meaning of "independent legal counsel" in connection with its criteria for non-consolidation legal opinions:

In order to confirm whether a given SPE [special purpose entity] structure is appropriately insulated from consolidation risk, Standard & Poor's relies on an *opinion of counsel for the SPE* to that effect.¹² (Emphasis added.)

In Appendix XVI on page 243 of the publication, Standard & Poor's sets forth certain general criteria for opinion letters, including the following statement:

As a general matter, Standard & Poor's requires that true sale, *nonconsolidation*, and security interest *opinions be delivered by outside counsel to any participant* in a structured transaction.

In short, the common understanding of the meaning of "independent legal counsel" among parties engaged in commercial transactions in which non-consolidation opinions are required is that *outside legal counsel* for one of the parties constitutes independent counsel for opinion purposes, as contrasted with an in-house attorney employed directly by a party. This common understanding is consistent with what we understand to be Perkins's experience over the years where, as counsel to a borrower or issuer, Perkins has provided non-consolidation opinions for use by lenders and rating agencies in billions of dollars of transactions.

III. Legal Duty of Opinion Giver. The *Restatement (Third) of the Law Governing Lawyers* (2002) of the American Law Institute addresses the issue of third-party opinion letters in Sections 51 and 52. The essence of the law is that when a lawyer provides an opinion to a non-client,¹³ the lawyer owes the non-client a duty of care that requires that the lawyer must exercise the competence and diligence normally exercised by lawyers in similar circumstances. Another articulation of this standard can be found in Instruction 105.01 of the *Illinois Pattern Jury Instructions*, which states:

¹⁰ Available at http://www2.standardandpoors.com/spf/pdf/structuredfinance/040103_cmbslegalcriteria14.pdf.

¹¹ See page 105 *et seq.*

¹² Standard & Poor's, *U.S. CMBS Legal and Structured Finance Criteria*, at 95.

¹³ In this case, the "non-client" is the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon, to which the opinion is directed.

In providing services relating to plaintiff a lawyer must possess and apply the knowledge and use the skill and care ordinarily used by a reasonably well-qualified lawyer under the circumstances similar to those shown by the evidence. A failure to do so is professional negligence.

The significance of this legal obligation was underscored in *Dean Foods Co. v. Pappathanasi*,¹⁴ where a law firm representing the seller was found liable for more than \$7 million as a result of its failure to meet this duty in connection with an opinion it provided to the buyer in an acquisition transaction.

IV. Ethical Requirements. Staff also makes allegations regarding claimed ethical violations, arguing that a "disinterested and independent law firm" is necessary "to avoid any possible perception of a conflict of interest."¹⁵ This is a serious allegation that is without merit. The Rules of Professional Conduct¹⁶ address the topic of a lawyer providing an opinion to a non-client, such as a non-consolidation opinion. Rule 2.3 provides that a lawyer may provide an evaluation of a matter affecting a client for use by someone other than the client only if the lawyer reasonably believes that making the evaluation is compatible with other aspects of his representation of the client.¹⁷ If the lawyer knows or reasonably should know that the evaluation will have a material adverse effect on the client's interest, the lawyer may only provide the evaluation after receiving the client's consent.¹⁸ In other words, ethically, the applicable Rules of Professional Conduct recognize the giving of opinions with respect to a client to a non-client and address the circumstance of when such an opinion would not be favorable to the client. The Rules assume that a lawyer's opinion of such matters is not going to vary depending on the party the lawyer represents. Rather, it addresses how the lawyer must proceed, relative to his client, if the opinion is an adverse one.

The American Bar Association and numerous state bar associations have provided voluminous materials regarding a lawyer's providing opinions to persons who are not the lawyer's client. Most commonly, these opinions arise in the context of business transactions, such as financing transactions (like the ones that are the subject of the Standard & Poor's publication described above) or merger or acquisition transactions. None of these publications contemplate that a lawyer's opinion will not be sufficiently "independent." Each of them assumes that a lawyer's evaluation of the particular topic of the opinion (*e.g.*, enforceability of a loan agreement, non-consolidation of parties) will be a matter of the opinion giver's good faith professional judgment.¹⁹

¹⁴ 2004 WL 3019442 (Mass. Super., 2004).

¹⁵ July 13, 2007 Letter from Gregory J. Trautman to ALJ Dennis Moss at 2.

¹⁶ Washington Rules of Professional Conduct, amended effective September 1, 2006. See http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC.

¹⁷ Rule 2.3(a).

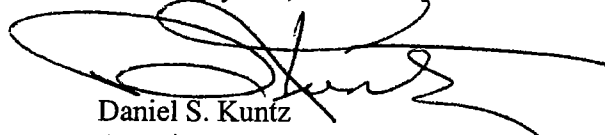
¹⁸ Rule 2.3(b).

¹⁹ See, for example, (a) *Third-Party Legal Opinion Report, Including the Legal Opinion Accord of the Section of Business Law, American Bar Association*, 47 Bus. Law. 167 (1991); (b) Legal Opinion Risk Seminar, Report of the Committee of Legal Opinions, ABA Section of Business Law published in 62 Bus. Law. 397; (c) the reports of the

V. **Summary.** Both the ethical requirements and the law make clear that an attorney providing an opinion to a non-client must comply with certain standards. It is very likely that the presence of both this law and the ethical requirement explain why bar association reports, case law and legal treatises with respect to opinion giving make no distinction between a law firm that is "independent" and one that is not. Lawyers simply do not have the freedom to write opinions in one manner if they are "independent" and in another if they are not independent. The business and commercial world understands this point, as demonstrated by Standard & Poor's publication referenced above. In that context, any law firm is considered "independent" and the reference to "independent" is intended solely to distinguish a law firm from in-house counsel.

For the reasons stated in the foregoing discussion, we respectfully submit that retaining Perkins for purposes of rendering the non-consolidation opinion satisfies the requirements of Commitment 30, and satisfies as well any requirements related to "independent legal counsel" imposed by the rating agencies with respect to non-consolidation opinions.²⁰

Sincerely yours,



Daniel S. Kuntz
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DSK:dma

cc: Service List
James M. Van Nostrand

Legal Opinion Risk Seminar II held in April, 2007, sponsored jointly by the American Bar Association, the TriBar Legal Opinion Committee, and the legal opinion committees of several major commercial states and law firms, available on the American Bar Association, Section of Business Law website; (d) the 1998 report of the Ad Hoc Committee on Third-Party Legal Opinions of the Washington State Bar Association; and (e) the Supplemental Report on Third-Party Legal Opinion Practice in the State of Washington Covering Secured Lending Transactions by the Ad Hoc Committee on Third-Party Legal Opinions of the Business Law Section of the Washington Bar Association published in October 2000.

²⁰ Presumably, this concept of "independence" as defined by the rating agencies was the premise for Commissioner Jones's question about whether the opinion would be provided by independent counsel.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this **Letter to Administrative Law Judge Dennis Moss**, in Docket UG-061721, by causing a copy to be sent by electronic mail and U.S. mail to:

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Dated this 17th day of July, 2007.

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By 

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