Service Date: September 14, 2011

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

IN THE MATTER OF the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company	)))))	REGULATORY DIVISION DOCKET NO. D2011.1.8 ORDER NO. 7149c

ORDER ON PETITION FOR DECLARATORY RULING

1. On January 24, 2011, Mountain Water Company (Mountain) filed a Consolidated Petition for Declaratory Ruling and Application for Approval of Sale and Transfer of Stock (Consolidated Petition & Application).

2. Section 2-4-501, MCA, provides in part, "Each agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." The Public Service Commission (Commission) has adopted ARM 38.2.101 which, in part, adopts ARM 1.3.226 – 1.3.229. ARM 1.3.226 – 1.3.229 govern the Commission's consideration of and action on requests for declaratory rulings.

3. On February 1, 2011, the Commission issued a Notice of Application and Intervention Deadline. The Commission granted intervention to the Carlyle Infrastructure Partners, L.P. (Carlyle), Clark Fork Coalition (CFC), City of Missoula (Missoula), and the Montana Consumer Counsel (MCC). The administrative record in a declaratory ruling proceeding includes the petition and a statement of matters officially noticed. ARM 1.3.227(4).

4. A petition for declaratory ruling must include: (a) the name and address of the petitioner; (b) a detailed statement of the facts upon which the petitioner requests the agency to base its declaratory ruling; (c) sufficient facts to show that the petitioner will be affected by the requested ruling; (d) the rule or statute for which the petitioner seeks a declaratory ruling; (e) the questions presented; (f) propositions of law asserted by the petitioner; (g) the specific relief

requested; and (h) the name and address of any person known by petitioners to be interested in the requested declaratory ruling. ARM 1.3.227(2).

5. The Consolidated Petition & Application includes (a) the name, but not the address of the petitioner (Consolidated Petition & Application, ¶ 1); (c) sufficient facts to show that the petitioner will be affected by the requested ruling (Consolidated Petition & Application, ¶¶ 4, 6 and 7); (e) the questions presented (Consolidated Petition & Application, ¶ 9); and (g) the specific relief requested (Consolidated Petition & Application, ¶¶ 16-19).

6. With respect to (e) the questions presented, in the Consolidated Petition & Application, Mountain requested that the Commission answer the following two questions:

7. Question # 1: Whether, on the facts of this case, the Commission has the implied power to review and approve the sale and transfer of Park stock to Carlyle?

8. Question # 2: Whether, on the facts of this case, the Commission should decline, in its discretion, to exercise jurisdiction over the sale and transfer of Park stock to Carlyle?

9. The Commission restates the first question as follows:

> Question # 1: On the alleged facts of this case, does the Commission lack the jurisdiction to review and approve, reject, or condition the sale and transfer of Park stock to Carlyle?

10. With respect to (b) a detailed statement of the facts upon which petitioner requests the agency to base its declaratory ruling and (f) propositions of law asserted by the petitioner, Mountain set out the purported facts and assertions of law throughout the Consolidated Petition & Application.

11. With respect to (d) the rule or statute for which the petitioner seeks a declaratory ruling, Mountain did not identify a specific rule or statute. For purposes of this order, the Commission assumes that Mountain seeks a declaratory ruling with respect to §§ 69-3-102, 69-3-110(1), and 69-3-201, MCA.

12. With respect to (h) the name and address of any person known by petitioner to be interested in the requested declaratory ruling, Mountain identified the MCC. The Commission assumes that Mountain's customers in Missoula, Montana would also be interested in the requested declaratory ruling.

13. The Commission finds that the purported facts are contained in ¶¶ 1-7, and that assertions of law are contained in ¶¶ 11-15, and ¶¶ 17-18 of the Consolidated Petition & Application.

14. The Commission restates the relevant purported facts as follows:

a. Mountain was formed in 1978 to acquire from the Montana Power Company the water system serving the City of Missoula and since that time it has been operated as a public utility subject to Commission jurisdiction;

b. Mountain is a closely held Montana corporation with the entirety of its issued stock owned by the Park Water Company (Park);

c. Park is a closely held California corporation and is a public utility subject to the jurisdiction of the California Public Utilities Commission;

d. On December 21, 2010, Park entered into an agreement (Merger Agreement) pursuant to which a wholly-owned subsidiary of Western Water Holdings, LLC, a Delaware limited liability company (Western Water), controlled by Carlyle Infrastructure Partners Western Water, L.P. (Carlyle Western Water), will merge with and into Park, with Park continuing as the surviving corporation after the Merger as a wholly-owned subsidiary of Western Water.

e. Carlyle Western Water is wholly owned by a group of investment vehicles associated with Carlyle.

f. The sale of Park stock to Carlyle has no impact or effect on the ownership of Mountain. Both before and after the sale of Park stock to Carlyle, the utility assets of Mountain will be owned by Mountain, and Mountain will be owned by Park.

15. The Commission restates the relevant Mountain assertions of law as follows:

a. The Commission's jurisdiction is limited to those items set forth in its enabling legislation;

b. Any doubt as to the existence of a particular power or authority must be exercised against the existence of the power or authority;

c. The Commission does not have statutory jurisdiction over transfers and sales of utilities and every subsequent effort to vest the Commission with statutory authority over transfers and sales of utility assets has failed;

d. The Commission has asserted implied power to review the transfer of regulated utility assets by a regulated utility;

e. The Commission does not have the implied power to review and approve the sale and transfer of the stock of Park, as the sale of the stock has no effect on the ownership of Mountain.

f. Even if the Commission claims the implied power to review and approve the sale of Park stock, the Commission is not required to exercise the jurisdiction that it possesses; and

g. There is no compelling reason for the Commission to exercise jurisdiction over the transaction between Park and Carlyle.

16. As the Commission has previously stated, it is not required to issue a declaratory ruling on request, but if it declines to issue a ruling it must provide a statement of reasons. *See, e.g., In the Matter of the Complaint by Colstrip Energy Limited Partnership against the Montana Power Co.*, Docket No. D97.7.127, Order No. 6017a, p. 6 (December 16, 1997), citing §2-4-501, MCA. "The criteria for deciding whether to issue a declaratory ruling are not defined precisely in Montana law; but the Commission believes it has considerable flexibility, taking into account the underlying purpose for declaratory rulings and sound administrative practice, when deciding whether to issue a declaratory ruling." *Id.*

17. In Montana, administrative agencies have both express authority and implied authority to discharge their duties. The Commission has not been granted explicit power from the Montana Legislature to exercise authority over mergers, sales, and transfers of regulated utility assets. However, the Commission has been granted implicit power from the Montana Legislature and there is a long history of the Commission asserting implicit power to exercise authority over mergers, sales, and transfers of utilities and utility property.

18. The Commission's duty is to supervise and regulate the operations of public utilities in conformity with Title 69, MCA. § 69-1-102, MCA. The Commission is invested with the full power of supervision, regulation, and control of public utilities. § 69-3-102, MCA. In addition to normally implied powers, the Commission is expressly granted the power to do all things necessary and convenient in the exercise of the powers conferred by Title 69, Chapter 3, excluding judicial powers. § 69-3-103(1), MCA. Sections 69-1-102, 69-3-102, and 69-3-103(1), MCA, are substantially unchanged from their original form enacted in 1913 and manifest the

legislature's recognition that given the complexity of the task assigned to the Commission, it was impossible to enumerate every specific power necessary for effective regulation. The legislature has granted the Commission the general powers necessary to perform the task assigned to it.

19. The Commission has repeatedly carefully considered that it has limited jurisdiction and that doubt as to its power should be resolved against the existence of a power. The Commission has consistently exercised authority over mergers, sales, and transfers of utilities and utility property for many years. *See* Docket No. D2009.11.152, Order No. 7062 (Utility Solutions to Four Corners Water and Sewer District); Docket No. D2008.3.27, Order No. 6907b (Cut Bank Gas to Energy West); Docket D2006.6.82, Order No. 6754e (NorthWestern Corp. to Babcock & Brown Infrastructure Limited); Docket No. D2001.1.5, Order Nos. 6353 and 6353c (Montana Power Co. to NorthWestern Corp.); Docket No. D98.10.218, Order No. 6103a (PacifiCorp to Flathead Electric Cooperative, Inc.); Docket No. D97.10.191, Order No. 6043b (MCI Communications Corp. to WorldCom, Inc.); Docket No. 97.10.187, Order No. 6025 (Montana-Dakota Utilities Co. to Miller Oil Co.); Docket No. 97.8.140, Order No. 6027 (Lone Mountain Springs Inc. to Big Sky Water and Sewer District No. 363); Docket No. D96.10.169, Order No. 5953 (Communications Network Corp. to WorldCom Network Services, Inc.); Docket No. 93.7.30, Order No. 5731c (GTE Northwest Inc. to Citizens Telecommunications Co. of Montana); Docket No. 93.5.23, Order No. 5712a (US West Communications, Inc. sale of exchanges); Docket No. 92.11.74, Order No. 5688 (KN Energy, Inc. to Montana-Dakota Utilities Co.); Docket No. 92.1.3, Order No. 5616 (Consumers Gas Co. to Town of Sunburst); Docket No. 91.3.4, Order No. 5553 (Midvale Water Service to Victor and Betty Peltier); Docket No. 90.12.93, Order No. 5536c (Butte Water Co. to Silver Bow Water, Inc./MERDI); Docket No. 90.10.64, Order No. 5517 (Redgate Water Co. to Mike and Jackie Pitzen); Docket No. 90.4.26, Order No. 5487 (Granrud Water Co. to Dennis Granrud); Docket No. 87.9.49, Order No. 5298a (Merger of Pacific Power and Light Co. and Utah Power and Light Co.); Docket No. 86.8.55, Order No. 5237 (Pacific Power and Light Co. to Bigfork County Water and Sewer District); Docket No. 86.3.9, Order No. 5205 (Pacific Power and Light Co. to City of Libby); Docket No. 85.5.20, Order No. 5148 (Somers Water Co. to Somers Water District); Docket No. 84.4.12, Order NO. 5084a (Burlington Northern Railroad Co.'s water utility to Sanders County Water District); and Docket No. D82.10.71, Order No. 4472 (Little Chicago Water Co. to Black Eagle Cascade County Water District).

20. The Commission has asserted jurisdiction over a public utility's abandonment of service since at least 1948. *See Re East Side Telephone Co.*, 77 PUR NS 87, 91 (PSC November 8, 1948). The Montana Supreme Court has recognized that a utility may not abandon service without the Commission's consent. *Great Northern Ry. v. Board of R.R. Comm'rs*, 130 Mont. 250, 252 (1956). The transfer of a utility's assets is a cessation or abandonment of service.

21. To the extent that *Re East Side Telephone Co*. stood for the proposition that the Commission lacks jurisdiction over transfers and sales of public utilities, the Commission has expressly overruled it. *In the Matter of the Joint Application of NorthWestern Corp. and Babcock & Brown Infrastructure Limited*, Docket No. D2006.6.82, Order No. 6754e, ¶ 20 (August 1, 2007). Generally, there are three standards that regulatory commissions employ when reviewing transfers and sales of public utilities: the public interest standard, the no-harm to consumers standard, or the net-benefit to consumers standard. *Id.* ¶ 35.

22. Mountain argued that the Commission's jurisdiction is not implicated or impacted by the sale of Park stock as neither the assets nor the stock of Mountain are being sold or transferred, only the parent company, Park's stock is being sold. Mountain states that the Commission does not have the implied power to review and approve the sale and transfer of the stock of Park, as the sale of the stock has no effect on the ownership of Mountain.

23. In Montana, the Commission assumed jurisdiction over the Qwest Communications International Inc. (Qwest) purchase by CenturyLink Inc. (CenturyLink) in Docket No. D2010.5.55. In that docket the parent company, Qwest requested approval for the subsidiaries of Qwest to be sold to Century Link. Qwest and Century Link did not contest or argue against Commission jurisdiction and review of the proposed merger and stock for stock transaction. The Commission issued Order No. 7096e approving the transaction.

24. In other states, utility commissions have determined that parent corporations' sales or transfers that involve regulated subsidiaries in the respective state are considered public utilities and the state utility commissions have authority to review and decide on the transfer or sales transaction. In Indiana, the Ameritech Corporation (Ameritech), as the corporate parent of Indiana Bell Telephone Company (Indiana Bell), agreed to merge with SBC Communications, Inc. (SBC). The Indiana Utility Regulatory Commission initiated an investigation into the merger of Indiana Bell's parent company, Ameritech and SBC. However, unlike Montana, Indiana has an explicit statute requiring that sales, assignments, transfers, leases, or

encumbrances of a public utility system to any other person or corporation be approved by the Commission after hearing. I.C. 8-1-2-83(a). The Indiana Commission determined that the proposed transfer necessarily involves the transfer or encumbrance of Ameritech Indiana and its franchise, works, or system. 1999 Ind. PUC LEXIS 175, 15. The Indiana Commission also found that "to transfer a public utility's franchise, works, or system is consistent with the statutory definition of a public utility found in I.C. 8-1-2-1(a), which definition isn't limited to operation or management of utility plant or equipment, but includes ownership or control." 1999 Ind. PUC LEXIS 175, 5.

25. The sale and transfer of Park stock to Carlyle, if approved, would result in a change in control of Mountain, a Montana public utility within the Commission's jurisdiction. The strategic objectives of Carlyle are the framework within which the subordinate goals of Park are defined and constrained. Carlyle would hold the entirety of Park stock and would control how Park operates. Mountain customers pay rates that provide a significant amount of funding for Park Water employee salaries, facilities, and operating expenses. Changes in Park operations will directly impact Mountain’s ratepayers in Missoula. The purchase of Park stock could affect Mountain’s quality of service, employment and pension decisions, use of aquifers and water rights, and utility rates. Mountain could be significantly impacted by Park’s change of ownership.

26. In Texas, the Public Utility Commission of Texas has previously decided that parent corporations of regulated subsidiaries are public utilities under the Texas Public Utility Regulatory Act (Texas PURA). 1991 Tex. PUC LEXIS 282, 6. The Texas Commission has found that both Alltel and CP National Corporation were public utilities under the Texas PURA due to their ownership of telecommunications utilities with the State of Texas. 1991 Tex. PUC LEXIS 282, 7. However, unlike Montana, Texas has an explicit statute that requires a public utility to inform the Texas Commission if it sells any plant or if a major sale of stock occurs. Texas PURA Section 63. The Texas Commission is required to investigate that transaction once it is informed of the sale or transfer. Therefore, the Texas Commission asserted its jurisdiction to investigate the merger between Alltel and CP National Corporation.

27. The Commission’s authority over sale and transfers of assets or utilities can be inferred from the unique status of public utilities. Public utilities have an obligation to furnish reasonably adequate service and facilities while charging just and reasonable rates. § 69-3-201,

MCA. Because of their obligation to serve, public utilities have a special status in the law as entities affected with a public interest. The Court affirmed this special status in *Great Northern Utils. Co. v. Public Serv. Comm'n*, 88 Mont. 180, 205, 293 P. 294, 298 (1930), quoting Lord Chief Justice Hale: "When 'one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created'[.]" The Court also cited from *Munn v. Illinois*, 94 U.S. 113 (1876), "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large." *Id.* Logically, a regulated entity that (1) has a duty to provide service, (2) has granted the public an interest in the use of that property, and (3) is affected with a public interest may not sell assets or transfer control of them without the approval of the Commission.

28. In addition, the Commission's authority over transfers and sales may be implied from the Commission's authority over complaints. Sections 69-3-321(1) (b) and (c), 324, and 330(3), 501 and 504(1). Section 69-3-321, MCA reads as follows:

> **69-3-324. Initiation of action by commission itself.** The commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, practices, and services and after a full hearing as provided in this part may make by order such changes as may be just and reasonable, the same as if a formal complaint had been made.

29. These sections give the Commission jurisdiction to receive a complaint, or to initiate a complaint on its own motion, about the acts or practices of public utilities that affect utility service. Section 69-3-330(3), MCA, specifically gives the Commission authority to respond to such complaints by "substitute[ing] . . .other . . .practices . . . or acts and mak[ing] such order relating thereto as is just and reasonable." The sale and transfer of a utility or of utility assets is obviously an act or practice of a utility company. Therefore, the Commission's jurisdiction to investigate, hold a hearing on, and respond to such action by public utilities is necessarily implied from these statutes.

30. "Pursuant to its authority, the Commission has jurisdiction over and must approve any sale or transfer of a public utility, its assets, or utility obligations in order to assure generally that utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that the acquiring entity is fit, willing, and able to assume the service responsibilities of a public utility." *In the Matter of the Joint Application of Energy West Incorporated and Cut Bank Gas Company*, Docket No. D2008.3.27, Order No.

6907b, Conclusions of Law ¶ 6 (November 2, 2009). The jurisdiction of the Commission over the sale and transfer of Park stock is based on Mountain Water's status as a regulated subsidiary of Park and its public utility status in Montana.

31. The proper subject of a declaratory ruling is the applicability of any statutory provision, rule, or of any rule or order of the agency. § 2-4-501, MCA. An agency decision to not exercise jurisdiction is not within the statutory area for declaratory rulings.

Conclusions of Law

1. The Commission may deny a petition for a declaratory ruling. § 2-4-501, MCA, and ARM 1.3.228.

Order

For the reasons stated above, the Commission declines to issue a declaratory ruling as requested by the Mountain Water Company.

DONE AND DATED this 28th day of June 2011 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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TRAVIS KAVULLA, Chairman

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GAIL GUTSCHE, Vice Chair

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W.A. GALLAGHER, Commissioner

_____
BRAD MOLNAR, Commissioner

_____
JOHN VINCENT, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)