

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

IN THE MATTER OF the Joint Application of  
Liberty Utilities Co., Liberty WWH, Inc.,  
Western Water Holdings, LLC, and Mountain  
Water Company for Approval of a Sale and  
Transfer of Stock

REGULATORY DIVISION  
DOCKET NO. D2014.12.99

**PETITION TO INTERVENE BY THE CITY OF MISSOULA**

**An Interested Party Directly Affected By Mountain Water  
Company's Sale and Transfer of Stock**

The City of Missoula ("City") respectfully petitions to intervene in Docket number D2014.12.99. On December 15, 2014, Liberty Utilities Company ("Liberty"), Mountain Water Company ("Mountain Water"), and Western Water Holdings, LLC ("Western Water") filed a consolidated petition with the Montana Public Service Commission ("PSC") for approval of sale and transfer of stock in Western Water, the holding company of Park Water Company ("Park Water"). Park Water owns Mountain Water, which provides the Missoula community's public water supply.

The City is currently in litigation against Carlyle Infrastructure Partners ("Carlyle") and Mountain Water to acquire the water system via eminent domain. *City of Missoula v. Mountain Water Co.*, No. DV-14-352 (Mont. 4th Jud. Dist Ct.). The trial is set to begin March 18, 2015. The pendency of the eminent domain proceeding limits the jurisdiction of the PSC to take action at this time. (*See Id.*, Order and Memorandum Re: The Montana Public Service Commission's Motion to Intervene, dated Aug. 19, 2014, p. 8, attached hereto as Exhibit "A" ("Eminent domain actions are within the exclusive jurisdiction of the district courts.")) The City believes

it is in the best interest of Mountain Water customers that the utility be publicly owned, not owned by a for-profit corporation or a foreign, for-profit entity. The instant proceedings will conflict with the District Court's jurisdiction of the ongoing eminent domain proceedings and potentially create confusion regarding discovery, trial, and the potential appeals process in the eminent domain case. Moreover, if the City is successful, there will be no need for Liberty to seek permission for approval of the sale of Mountain Water's parent corporation and this proceeding would be a waste of taxpayer money.

The City opposes the PSC's potential approval of Mountain Water's sale to a foreign, publicly-traded corporation. The City desires to be informed about, monitor, and participate in the PSC's regulatory process to review this application in order to protect its citizens from further profiteering on its essential natural resource. As the PSC will recall, it was just a few years ago, in 2011, that Mountain Water was sold to a private hedge fund, and now Carlyle intends to flip it to a foreign corporation. Carlyle promised, under oath before the PSC, that it would be a "long-term" owner of Mountain Water, but now attempts to sell Mountain Water in less than three years. While Liberty too claims it plans to be a "long-term" owner, such assurances turned out to be false when made by Carlyle. The City is concerned that this has simply begun a cycle of speculation: profit-motivated owners beholden to distant investors looking to get their return on investment before selling to the next entity. This juggling of ownership harms consumers and developer confidence.

Further, the proposed sale to Liberty is dramatically different from the sale to Carlyle a few years ago. Liberty, through its acquisition, will subsume Mountain Water into its nationally owned utility enterprise. While Carlyle assumed management and oversight of the existing structure in order to later sell Missoula's water for profit, Liberty is proposing full-scale

integration. Unlike the upstream takeover by Carlyle, Liberty's integration will fundamentally alter how Park Water and Mountain Water conduct business. For example, if Liberty's own engineers handle all new design requirements for repairs or infrastructure improvements, those jobs will, for sure, be reduced or even eliminated in Missoula. Liberty's takeover, just a few short years after Mountain Water went through another change of ownership, promises to bring substantial changes in maintenance, operations, and leadership. The City is concerned about those changes and their resulting impact.

The City is also a major customer of Mountain Water. As a customer, the City is concerned about the future plans a foreign, for-profit entity has for ratepayers. Liberty has agreed to pay over twice what Carlyle paid for Park Water in 2011 and the City, through the eminent domain case, has learned that the system is in serious disrepair and needs millions in capital investment per year to bring it up to industry standards. The City is concerned that, under foreign ownership, the cost of repairs will directly impact customer rates. Further, at some point, Liberty must recoup the purchase price and the City is concerned how that repayment will occur and the impact it will have on rates, adequacy of service, and the maintenance of capital investment in the system.

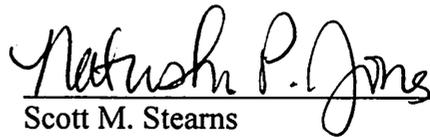
Additionally, a sister company of Mountain Water, Apple Valley Ranchos (also owned by Park Water), is involved in a condemnation process in California. Condemnation of the Apple Valley Ranchos system could have a dramatic, detrimental impact on the ratepayers of Mountain Water if the water system remains privately owned. While Liberty notes in its merger agreement the existence of the California condemnation proceeding, there is no mention in Liberty's application to approve the sale of the impact the condemnation in California might have on the ratepayers of Missoula. If Apple Valley Ranchos is condemned, Missoula ratepayers

will, instead of bearing the brunt of Park Water's excessive overhead costs split three ways, be forced to split the costs two ways. This will undoubtedly raise rates.

For the foregoing reasons, the City respectfully requests the PSC: (1) grant the City intervenor status in the instant proceedings and notice the City on all further proceedings; (2) stay these instant proceedings until the ongoing eminent domain action has been fully resolved, including the potential appeals process; and (3) deny the instant request for approval of sale and transfer of stock in Western Water because it will have a materially negative effect on the ratepayers of Missoula.

The City will brief its request for a stay of the proceedings upon grant of intervenor status.

Dated this 12<sup>th</sup> day of January 2015.



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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 12th day of January, 2015:

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Tina Sunderland

EXHIBIT “A”

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1 Karen S. Townsend, District Judge  
2 Department 4  
3 Fourth Judicial District Court  
4 Missoula County Courthouse  
5 200 West Broadway Street  
6 Missoula, MT 59802-4292  
7 (406) 258-4774

FILED AUG 19 2014

SHIRLEY E. FAUST, CLERK  
By Darci Lehman  
Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 THE CITY OF MISSOULA, a  
10 Montana municipal corporation,

11 Plaintiff,

12 v.

13 MOUNTAIN WATER COMPANY, a  
14 Montana corporation; and CARLYLE  
15 INFRASTRUCTURE PARTNERS,  
16 LP, a Delaware limited partnership,

17 Defendants,

18 and

19 THE EMPLOYEES OF MOUNTAIN  
20 WATER COMPANY, (Shanna M.  
21 Adams, et al.),

22 Intervenors.

Dept. No. 4  
Cause No. DV-14-352

ORDER AND MEMORANDUM RE  
THE MONTANA PUBLIC SERVICE  
COMMISSION'S MOTION TO  
INTERVENE

23  
24 This matter comes before the Court upon the Montana Public Service  
25 Commission's Motion to Intervene. As briefing is complete, this matter is  
26 deemed submitted and ready for ruling.  
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**ORDER**

IT IS HEREBY ORDERED that the Montana Public Service Commission's Motion to Intervene is DENIED.

**MEMORANDUM**

**I. Factual and procedural background**

On May 5, 2014, the City of Missoula (the "City") filed its First Amended Complaint for Order of Condemnation Under Montana's Law of Eminent Domain. The City seeks to acquire Missoula's water supply and distribution system ("Water System") owned by Mountain Water Company ("Mountain Water"). This Court granted the Employees of Mountain Water Company ("Employees") Motion to Intervene on June 27, 2014. The Montana Public Service Commission ("PSC") has now moved to intervene.

In 2011, the PSC approved the sale of Mountain Water from Park Water Company ("Park Water") to the Carlyle Infrastructure Partners, L.P. ("Carlyle"). In its December 14, 2011 Final Order approving the sale, the PSC discussed the City's interest in purchasing the water system and noted that "[t]he parties have presented an agreement that does not allow Mountain to transfer, sell, lease, or otherwise dispose of any of Mountain's water rights, without Commission approval, with the exception of transfers that facilitate service to Mountain's customers." *In re Consolidated Pet. of Mountain Water*, Docket No. D2011.1.8, Order No. 7149d, ¶ 3 (Dec. 14, 2011). The language of the stipulation was as follows:

Without the prior and specific authorization of the Commission, MWC shall not transfer, sell, lease or otherwise dispose of:

- (a) Any of MWC's water rights, with the exception of transfers that may be required for permitting of new water rights required to provide water service to existing or new customers, provided that such permitting falls within the jurisdiction of the

1 Montana Department of Natural Resources and Conservation  
2 and/or the Montana Water Court:

3 (b) Any utility property which has a net book value in excess  
4 of \$1,000,000 and which is included in Montana rate base.

5 *Stipulated Ring Fencing Conditions for Park to Carlyle Stock Transaction,*  
6 *Proposed Condition (h) (Oct. 28, 2011).*

7 The PSC also stated in its Final Order that it "would review any future  
8 transfer of Mountain to the City or any other entity under the same  
9 standards that govern its decision in this case," that "the Commission will  
10 fully evaluate any future proposal by Carlyle to sell, transfer or otherwise  
11 dispose of Mountain" and that "Mountain is prohibited from transferring  
12 significant utility property or any of its water rights without prior  
13 authorization from the Commission." *In re Consolidated Pet.*, ¶¶ 9, 76, 6.

## 14 **II. PSC's Motion to Intervene**

15 The PSC asserts that the City's eminent domain action conflicts with  
16 its Final Order approving the sale of Mountain Water to Carlyle and the  
17 stipulation. The PSC claims that it has regulated Mountain Water since  
18 1953 and previously reviewed several Mountain Water transfer applications  
19 including a sale of the Superior Montana water system in 2000 and the sale  
20 of Park Water/Mountain Water to Carlyle in 2011. The PSC requests  
21 intervention as a matter of right based on legal rights created through its  
22 Final Order and the stipulation. The PSC also asserts that it has rights  
23 based on its regulatory scheme for public water utilities. Alternatively, the  
24 PSC requests permissive intervention due to a common interest in the  
25 possible condemnation of the Water System.

26 The City argues that this Court has exclusive jurisdiction regarding  
27 eminent domain and that the PSC has no authority to rule administratively

1 on any issue presented in this matter. Additionally, the City notes that if  
2 this Court ultimately determines that there is "public necessity" for eminent  
3 domain, the PSC will have no post-taking authority to regulate the  
4 municipally owned water company. The City claims that the PSC has no  
5 property rights at risk and it lacks standing to seek any relief from the  
6 Court. The City argues that the PSC's authority is prescribed and  
7 proscribed by statute and that its authority does not extend to participation  
8 as a party in this litigation.

9 **A. Intervention legal standard**

10 Rule 24, M. R. Civ. P., provides the standards for an intervention.  
11 Rule 24 is a discretionary judicial efficiency rule used to "avoid delay,  
12 circuitry and multiplicity of actions." *Loftis v. Loftis*, 2010 MT 49, ¶ 9, 355  
13 Mont. 316, 227 P.3d 1030, *citing In re Marriage of Glass*, 215 Mont. 248,  
14 253, 697 P.2d 96, 99 (1985). Rule 24 states, in relevant part:

15 (a) Intervention of Right. On timely motion, the court must  
16 permit anyone to intervene who:

- 17 (1) is given an unconditional right to intervene by statute; or  
18 (2) claims an interest relating to the property or transaction  
19 which is the subject of the action, and is so situated that  
20 disposing of the action may as a practical matter impair or  
21 impede the movant's ability to protect its interest, unless the  
22 existing parties adequately represent that interest.

23 (b) Permissive Intervention.

24 (1) In General. On timely motion, the court may permit  
25 anyone to intervene who:

- 26 (A) is given a conditional right to intervene by statute; or  
27 (B) has a claim or defense that shares with the main  
action a common question of law or fact.

\* \* \*

(3) Delay or Prejudice. In exercising its discretion, the court  
must consider whether the intervention will unduly delay or  
prejudice the adjudication of the original parties' rights.

1 A motion for intervention as a matter of right pursuant to Rule 24(a)  
2 must satisfy the following factors: (1) be timely; (2) show an interest in the  
3 subject matter of the action; (3) show that the protection of the interest  
4 may be impaired by the disposition of the action; and (4) show that the  
5 interest is not adequately represented by an existing party. *Sportsmen for*  
6 *I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40  
7 P.3d 400, *citing Estate of Schwenke*, 252 Mont. 127, 131, 827 P.2d 808,  
8 811 (1992). Rule 24 is liberally interpreted in favor of intervention. *Id.*,  
9 *citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983);  
10 *see also State ex rel. Thelen v. Dist. Ct.*, 93 Mont. 149, 155, 17 P.2d 57,  
11 58 (1932) ("the courts are quite liberal, both from a desire to do no  
12 injustice and from a desire to do complete justice, in allowing the  
13 intervention of parties whose rights will be directly affected by their  
14 decree.").

15 However, a "mere claim of interest is insufficient to  
16 support intervention as a matter of right." *DeVoe v. State*, 281 Mont. 356,  
17 363, 935 P.2d 256, 260 (1997). Instead, the party seeking intervention  
18 must make a *prima facie* showing of a "direct, substantial, legally  
19 protectable interest in the proceedings." *Id.*, 935 P.2d at 260. "A district  
20 court's determination regarding whether a party has made a *prima facie*  
21 showing is a conclusion of law." *Id.*, 935 P.2d at 260. However, a district  
22 court's ruling on whether or not to grant permissive intervention under Rule  
23 24(b) is discretionary. *Loftis*, ¶ 6.

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1                   **B. Intervention as a matter of right**

2                   **1. Timeliness**

3                   The timeliness of the PSC's motion is not in dispute. It was filed less  
4 than two months after the City's First Amended Complaint, before answers  
5 had been filed by the defendants or Employees, and before the scheduling  
6 conference. The motion is timely and this element will not be addressed  
7 further.

8                   **2. Interest in the subject matter of the action**

9                   The PSC has identified no statute that gives it an unconditional right  
10 to intervene, thus its assertion of an intervention by right is analyzed under  
11 Rule 24(a)(2). The PSC argues that the Final Order and the stipulation are  
12 legally enforceable instruments that demonstrate a *prima facie* showing of  
13 a legal interest under Rule 24(a). The PSC notes that it does not have  
14 authority to enforce its own rules, but may fine non-complying parties and  
15 recover those amounts in a civil action, citing Mont. Code Ann. §§ 69-3-209  
16 and 69-3-206.

17                  The PSC argues that the stipulation incorporated into the Final Order  
18 is a contract between the adopting parties that reserves to the PSC the  
19 ability to review any transfer of the Water System. The PSC also argues  
20 that it has a legal right to intervene through its obligation to regulate public  
21 utilities. The PSC claims that "the [PSC]'s statutorily created rights are  
22 endangered by the City's request for relief."

23                  The City contends that the PSC has no statutory authority to  
24 intervene in this action. The City asserts that pursuant to Mont. Code Ann.  
25 §§ 69-3-101 to 69-3-2010, the PSC is only empowered to regulate privately  
26 held utilities and nothing more. If the City fails in its condemnation action,  
27 the PSC continues to regulate Mountain Water. However, if the City

1 prevails in this action, the PSC's regulatory authority will cease. The City  
2 argues that this Court is the only authority that may adjudicate an eminent  
3 domain action.

4 The City also asserts that even if the PSC has authority to intervene,  
5 it has no legally protectable interest in the outcome of this action because  
6 the PSC will continue to have authority to regulate all privately held utilities  
7 regardless of whether condemnation is granted. The City also argues that  
8 the Final Order does not create a protectable interest. The City claims that  
9 the Final Order and stipulation concern only voluntary sales of the Water  
10 System and not an eminent domain action. The City asserts that private  
11 parties have no authority to expand the PSC's jurisdiction and that the  
12 stipulation was only a ring-fencing provision to protect Missoula's Water  
13 System customers from actions of Mountain Water's parent companies.  
14 Lastly, the City contends that the PSC has no authority to decide what is in  
15 the public's interest on matters that are outside its regulatory authority and  
16 that the determination of necessity is exclusively in the jurisdiction of this  
17 Court.

18 The PSC "is a mere administrative agency, created to carry into effect  
19 the legislative will." *State v. Boyle*, 62 Mont. 97, 102, 204 P. 378, 379  
20 (1921). The PSC "has only limited powers, to be ascertained by reference  
21 to the statute creating it, and any reasonable doubt as to the grant of a  
22 particular power will be resolved against the existence of power." *Id.*; *Great*  
23 *N. Util. Co. v. Pub. Serv. Comm'n.*, 88 Mont. 188, 203, 293 P. 294, 298  
24 (1930) ("[T]he Commission is a creature of, owes its being to, and is  
25 clothed with such powers as are clearly conferred upon it by statute."). The  
26 PSC "has no inherent common law powers." *Montana Power Co. v. Pub.*  
27 *Service Comm'n.*, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983), *citing*

1 *City of Polson v. Pub. Serv. Comm'n.*, 155 Mont. 464, 473 P.2d 508 (1970).

2 The statute enabling the PSC states that the PSC is:

3       invested with full power of supervision, regulation, and control  
4       of such public utilities, subject to the provisions of this chapter  
5       and to the exclusion of the jurisdiction, regulation, and control of  
6       such utilities by any municipality, town, or village.

7 Mont. Code Ann. § 69-3-102. The PSC has no judicial powers. Mont.  
8 Code Ann. § 69-3-103(1); *Montana Power Co.*, 206 Mont. at 372, 671 P.2d  
9 at 611-14. The PSC has no control over municipally or publically owned  
10 utilities. *City of Billings v. Co. Water Dist. of Billings Heights*, 281 Mont.  
11 219, 225, 935 P.2d 246, 249 (1997) (municipalities have the power “to set  
12 their own utility rates without PSC review”); Mont. Code Ann, §§ 69-3-  
13 101(2)(c) and 69-7-101 *et seq.*

14       **(a) Final order and stipulation**

15       Here, to the extent the PSC is asserting that its legally enforceable  
16 interest derives from the language of the Final Order in which it asserted  
17 that it would have authority to review any future transfer of the Water  
18 System by Mountain Water, its argument lacks support. So long as the  
19 Final Order is consistent with the PSC's statutory authority, it may create a  
20 legal interest, but the Final Order may not establish any rights in PSC  
21 without statutory support. The PSC's authority may only derive from the  
22 legislature's enactment of statutes. Eminent domain actions are within the  
23 exclusive jurisdiction of the district courts. Mont. Code Ann. § 70-30-202.  
24 The PSC has provided to legal support for its proposition that it should be  
25 allowed to review any eminent domain action against a utility it regulates.  
26 The PSC may not simply decree that it has authority greater than powers  
27 enumerated in statutes.

1           However, the Final Order also incorporated the stipulation agreed to  
2 among the parties, which reserves in the PSC the benefit of reviewing any  
3 transfer of the Water System by Mountain Water. But again, the PSC has  
4 given no authority for how private parties may agree to grant additional  
5 authority to the PSC in the absence of existing statutory authority. Even if  
6 the PSC could be given authority to determine or intervene in an eminent  
7 domain action, their reliance on the stipulation for their legally protectable  
8 interest is not supported by a plain reading of the stipulation. The  
9 stipulation states that "MWC shall not transfer, sell, lease or otherwise  
10 dispose of" its water rights or utility assets with a value exceeding  
11 \$1,000,000 without PSC approval. The stipulation clearly, by its plain  
12 terms, concerns only actions taken by Mountain Water.<sup>1</sup> Mountain Water is  
13 taking no action, and has refused to sell or transfer its assets to the City.  
14 Instead, the City initiated this action for eminent domain. Clearly, the  
15 potential of eminent domain existed at the time of the Final Order  
16 considering the City's interest in acquiring the Water System and its  
17 previous eminent domain action in the 1980's. The Court finds no  
18 indication of any mention of an action other than a voluntary sale discussed  
19 in either the Final Order or the stipulation. Even had eminent domain been  
20 addressed in the Final Order, it is a matter in the exclusive jurisdiction of  
21 the district court.

22           The Court finds that the PSC has no legally protectable interest in this  
23 matter that is derived from the Final Order or stipulation.

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26       <sup>1</sup> The Court also notes that Mountain Water and Carlyle asserted in the PSC proceedings, which approved the sale of  
27 stock of the Park Water Company, that the PSC had no jurisdiction over the stock sale, but the Mountain Water and  
Carlyle consented to participate. See PSC Dkt. 2011.1.18, Transcript of Public Hearing (Sept. 26, 2011).

1                   **(b). Regulatory Scheme**

2                   The PSC also argues that its regulatory authority should allow it to  
3 intervene as a matter of right. It is not in dispute that the PSC has current  
4 authority to regulate Mountain Water while it is investor owned. It is equally  
5 not in dispute that the PSC has no authority to regulate a municipally  
6 owned water system. Rule 24(a)(2) requires the party seeking to intervene  
7 to demonstrate a *prima facie* "interest relating to the property or transaction  
8 which is the subject of the action, and is so situated that disposing of the  
9 action may as a practical matter impair or impede the movant's ability to  
10 protect its interest." The subject matter of this case is condemnation, under  
11 a determination of public necessity. No outcome in this case impacts the  
12 PSC's general duty to regulate privately owned public utilities. The PSC's  
13 purported interest is whether or not eminent domain should be granted is  
14 not an authority or interest recognized in Montana statutes. Montana's  
15 eminent domain statutes require that "[a]ll proceedings under this chapter  
16 must be brought in the district court of the county in which the property or  
17 some part of the property is situated." Mont. Code Ann. § 70-30-202.  
18 While the PSC notes that it has exercised authority over at least 23  
19 mergers, sales or transfers of utilities, all of the examples were voluntary  
20 sales and none of them involved eminent domain.

21                   Montana's regulatory scheme is in stark contrast to other states that  
22 require their public utility commissions to supervise and approve of any  
23 eminent domain action by a municipality to acquire a privately owned utility.  
24 New Hampshire for instance, delegates the determination of necessity or  
25 public interest to its state utility commission. See N.H. RSA §§ 38.09, 38.10

26                   The PSC argues that it must only claim an interest in the action, and  
27 this Court need not conclude whether it has an actual interest. Rule

1 24(a)(2) requires a claim of interest, but also a demonstration that the party  
2 is so situated that disposing of the action may impair or impede the  
3 movant's ability to protect its interest. Thus, the required *prima facie*  
4 showing requires more than a mere claim. The PSC does not have a  
5 legally recognizable interest in the determination of public necessity in this  
6 eminent domain action, which is the subject of this case. Disposing of this  
7 action will not impair or impede the PSC's interest in regulating public  
8 utilities. While granting eminent domain to the City may remove Missoula's  
9 Water System from PSC oversight, that determination is not one that the  
10 PSC has a legally protectable interest in. Accordingly, the PSC's motion to  
11 intervene as a matter of right is denied on this point.

12 **3. Protection of the interest may be impaired by the**  
13 **disposition of the action**

14 Having determined that the PSC has no legally recognizable interest  
15 in a condemnation action, a further analysis of any impairment is not  
16 necessary other than to repeat that nothing in this action affects the PSC's  
17 current regulatory authority over investor owned utilities. Furthermore, the  
18 Montana Legislature affirmatively amended Title 69, concerning the PSC in  
19 1981 to remove municipally owned utilities from PSC oversight.  
20 Considering that clear limitation of PSC authority, it makes little sense for  
21 the PSC to be the entity that determines necessity and whether an investor  
22 owned utility should be condemned and put in public management. Thus,  
23 the PSC has no interest to protect in a condemnation action because the  
24 legislature has clearly determined that municipally owned utilities are not  
25 supervised by the PSC. It follows that the PSC may not intervene in this  
26 action as a party to offer an opinion to this Court as a matter or right  
27 regarding that transfer because standards used by the PSC in determining

1 a voluntary sale or in regulating an investor owned utility are not  
2 necessarily the same factors that may be used in determining public  
3 necessity.

4 In the PSC's proposed answer it requested the following relief:

5 24. Based on the forgoing, the Commission requests that this  
6 Court determine the extent of the Commission's authority to  
7 review the potential transfer of the Mountain Water System  
8 from Mountain Water to the City in the context of this eminent  
9 domain proceeding under Uniform Declaratory Judgments Act.  
10 Mont. Code Ann. §§ 27-8-101 to 313.

11 The PSC has not identified what relief it would seek in this action,  
12 other than to suggest that it should be the entity that analyzes  
13 condemnation. Having determined that it may not do so, the PSC has no  
14 interest that may be impaired and may not intervene as a matter of right.

15 **4. Whether the interest is adequately represented by an**  
16 **existing party.**

17 Lastly, the PSC argues that it is the only entity that would represent  
18 the interests of Mountain Water customers that live outside the City's limits,  
19 that it has an interest in continued capital improvements while this action  
20 proceeds, and that it may provide insight into its authority and  
21 administrative process to set rates for investor owned utilities.

22 The Court is concerned about the representation of water users  
23 outside the City of Missoula, but is unconvinced that the PSC is the proper  
24 entity to represent those interests in determining public necessity, or that  
25 this argument permits intervention as a matter of right. A municipal utility  
26 has the authority to provide services to "other persons served by municipal  
27 utility." Mont. Code Ann. § 69-7-101. The PSC's admitted duty is to  
"balance between customer interests and the utilities' expected return on

1 investment.” See PSC Brief, n. 3. It is the Montana Consumer Counsel  
2 that typically represents the consumer public in front of the PSC. See  
3 Mont. Code Ann. § 69-2-201. In the event that this Court finds public  
4 necessity, the Consumer Council maintains authority to appear and be  
5 heard at any municipal rate hearing, but the PSC does not. See Mont.  
6 Code Ann. § 69-7-112.

7 Second, this action has no impact on the PSC’s continuing authority  
8 to regulate Mountain Water while it is investor owned and to supervise  
9 capital improvements.

10 Lastly, the Court is unclear how the process that the PSC uses to set  
11 rates cannot be adequately addressed by the parties and their anticipated  
12 experts. The PSC asserts that it has a well-developed perspective on the  
13 potential change from an investor owned utility to a municipal utility, but this  
14 Court is unaware of any similar circumstance in Montana other than the  
15 City’s previous attempt to condemn Mountain Water in the 1980’s. The  
16 PSC was not an intervenor in that action. The PSC’s attestation regarding  
17 its experience on this matter is to cite the dissent in *Missoula v. Mountain*  
18 *Water Co.*, 228 Mont. 404, 415, 743 P.2d 590, 597 (1987), where Justice  
19 Sheehy described as “frightening” a presumption that the City’s adoption of  
20 an ordinance to condemn could be sufficient to prove necessity. This Court  
21 is certain that the PSC members and their staff have extensive and  
22 impressive expertise in regulatory matters, but the Court finds that their  
23 expertise does not entitle them to intervene as a matter of right in this  
24 condemnation action.

### 25 C. Permissive intervention

26 The PSC also requests permissive intervention if this Court  
27 determines that it may not intervene as a matter of right. The PSC’s

1 requested relief in its proposed answer only requests that the Court  
2 determine the “extent of the Commission's authority to review the potential  
3 transfer of the Mountain Water System.” Additionally, the PSC only directly  
4 denied two allegations from the City's First Amended Complaint, which  
5 stated that the City was authorized to acquire the water system either by  
6 negotiated purchase or by eminent domain. While not explicitly stated, the  
7 PSC appears to oppose this eminent domain action either because if  
8 granted its regulatory control over Missoula's Water System would cease,  
9 or because it should be the entity that decides. However, the Court does  
10 not find this potential divestment of regulatory authority is a “claim or  
11 defense that shares with the main action a common question of law or fact”  
12 as required by Rule 24(b)(1)(B). Additionally, no statute gives the PSC a  
13 conditional authority to intervene. The PSC asserts that it should be  
14 allowed permissive intervention because of its long history regulating  
15 Mountain Water. But if this Court grants the condemnation, the PSC's  
16 regulation comes to an end. The potential taking is not an issue that the  
17 PSC should be a part of because it is outside the PSC's clearly limited  
18 statutory authority. The PSC's experience in regulating investor owned  
19 utilities does not sufficiently justify why it should be allowed to participate as  
20 a party in the determination of necessity in an eminent domain action.  
21 Permissive intervention is more discretionary than an intervention of right.  
22 The Court exercises that discretion and denies the PSC's motion for  
23 permissive intervention.

#### 24 **D. PSC's notice of meeting**

25 Having denied the PSC's motion to intervene, the Court declines to  
26 analyze whether or not the notice of the PSC's meeting where the PSC  
27

1 voted to move to intervene was properly noticed under Montana's  
2 constitutional and statutory Right-to-Know provisions.

3 IT IS HEREBY ORDERED that the Montana Public Service  
4 Commission's Motion to Intervene is DENIED.

5 DATED this 19<sup>th</sup> day of August, 2014.

6   
7  
8 Karen S. Townsend  
District Judge

9 c: Scott Sterns  
10 Natasha Prinzing Jones  
11 William K. VanCanagan  
12 Harry Schneider, Jr.  
Counsel for City of Missoula County

13 William Wagner  
14 Stephen Brown  
15 John Alke  
16 Joe Conner  
17 Adam Sanders  
18 W. Patton Hahn  
19 William Mercer  
Adrian Miller  
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20 Gary Zadick  
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