

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

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IN THE MATTER OF 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

UTILITY DIVISION  
DOCKET NO. D2014.12.99

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**MOTION TO STAY PROCEEDINGS**

The City of Missoula (“City”) moves the Montana Public Service Commission (“PSC”), pursuant to Admin R. Mont. 38.2.1501, to stay the instant proceedings until the pending condemnation case between Mountain Water Company (“Mountain Water”), Carlyle Infrastructure Partners, LP (“Carlyle”), and the City has been fully resolved. As set forth more fully below, the need for these proceedings may well be mooted by the eminent domain action, which is set for trial in just over one month. A stay of this matter would be consistent with applicable law, principles of fundamental fairness to the parties, and considerations of judicial economy and the responsible use of government resources.

**BACKGROUND**

These proceedings commenced on December 15, 2014, when Liberty Utilities Co. (“Liberty”), Liberty WWH, Inc. (“Liberty WWH”), Western Water Holdings, LLC (“Western Water”), and Mountain Water (collectively, “Applicants”) submitted a Joint Application for Approval of a Sale and Transfer of Stock. The City moved to intervene. On January 27, 2015, a Notice of Staff Action was issued granting intervention to

Montana Consumer Counsel, Clark Fork Coalition, the City, and the employees of Mountain Water Company.

On April 2, 2014, the City filed an action in the Montana Fourth Judicial District Court to acquire the assets of Mountain Water. *City of Missoula v. Mountain Water Co.*, No. DV-14-352 (Mont. 4th Jud. Dist Ct.). Since that time, Mountain Water, Carlyle, and the City have been engaged in litigation, and the trial in the eminent domain action is scheduled to begin on March 18, 2015. Order Re Mountain Water's Motion to Continue Trial, *City of Missoula v. Mountain Water Co.*, No. DV-14-352 (Mont. 4th Jud. Dist Ct. Dec. 23, 2014). Thus, Applicants have chosen to initiate the PSC's review of their proposed transaction on the very eve of the necessity determination in the City's condemnation case.

The District Court for the Fourth Judicial District currently has jurisdiction over the assets at issue in this proceeding. Moreover, if the City prevails in the eminent domain action, the PSC will have no regulatory authority over Mountain Water's assets, and the time and resources expended in this administrative case – by the PSC, the parties, and the intervenors – will have been for naught. In addition, proceeding with this case before the eminent domain action is resolved will introduce confusion, uncertainty, and likely delay into both proceedings. While Applicants may well see this as posing a strategic advantage, it is contrary to the public interest the PSC is charged to safeguard. For these reasons, the City respectfully requests a stay until its condemnation case is concluded.

## ANALYSIS

**I. A STAY IS WARRANTED TO AVOID INCONSISTENT RULINGS, PREJUDICE, AND TO ENSURE THE RESPONSIBLE USE OF GOVERNMENT RESOURCES.**

The PSC is invested with the full power of supervision, regulation, and control of public utilities. Mont. Code Ann. § 69-3-102. This authority includes the implied power to exercise authority over private mergers, sales, and transfers of utilities. PSC Docket D2011.1.8, Order No. 7149d. As an adjudicatory body in these matters, the PSC “has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 645 P.2d 1350, 1352 (Mont. 1982); Admin R. Mont. 38.2.301 (2014); Mont. Code Ann. § 69-3-301.

Where the viability of a proceeding depends on another proceeding’s outcome, the dependent proceeding must be stayed. *Schara v. Anaconda Co.*, 610 P.2d 132, 136 (Mont. 1980); *In re McGovern’s Estate*, 250 P. 812 (Mont. 1926) (proceedings dependent on another proceeding should be suspended until the underlying action has been resolved). In *Schara*, the Anaconda Company filed an eminent domain action to condemn a two-acre piece of private property. *Id.* at 133. The property owners filed a separate action to restrict the Anaconda Company’s use of the property surrounding their land under a zoning ordinance. *Id.* The Anaconda Company sought a stay of the zoning ordinance action pending the outcome of the condemnation suit because the zoning issues would be moot if the condemnation was successful. *Id.* at 134. The district court denied the request, but the Montana Supreme Court reversed. *Id.* Because the condemnation action determined whether the zoning action was moot or not, the district court’s denial

of the stay “was in error.” *Id.* at 136 (citing *Landis v. N. Am. Co.*, 299 U.S 248, 254-255 (1936)).

As in *Schara*, the City’s condemnation case determines if the instant proceeding are moot. If the City is successful in condemning the assets of Mountain Water, those assets will no longer be subject to the PSC’s jurisdiction. Under Montana law and the PSC’s inherent authority as an adjudicatory body, therefore, the PSC should stay this proceeding pending the District Court’s determination.

The principles mandating a stay when proceedings are dependent upon or may be mooted by previously-instituted proceedings are well established in the law. For example, like the PSC, district courts have inherent power to stay proceedings pending a decision by a superior court that would directly impact the resolution of the case. *Lair v. Murray*, 871 F.Supp.2d 1058, 1068 (D. Mont. 2012); *see also Am. Life Ins. Co. v. Steward*, 300 U.S. 203 (1937) (“In the exercise of a sound discretion [an adjudicatory body] may hold one lawsuit in abeyance to abide the outcome of another. . . .”). The Court in *Lair* outlined four factors to evaluate if a stay ought to be granted: 1) stays should not be indefinite and not granted unless the other proceedings will be concluded in a reasonable time; 2) stay orders are appropriate where there is no continuing harm or injunctive or declaratory relief; 3) stays are appropriate if resolution of issues in other proceedings would aid in resolving the instant case; and 4) stays may be appropriate for docket efficiency and fairness to the parties pending resolution of the other cases. *Id.*

In this case, these factors all weigh heavily in favor of a stay. Of course, there would be no “indefinite stay” pending the outcome of the condemnation action. Far from

it. Montana condemnation statutes require that “all parties shall proceed as expeditiously as possible.” Mont. Code Ann. § 70-30-206(5). The District Court has acted in accordance with the statute and has scheduled trial for March 18, 2015, less than a year after the initial complaint was filed. The District Court recently denied Mountain Water’s attempt to delay the trial. (Order Re Mountain Water’s Motion to Continue Trial (Dec. 23, 2014), attached as **Exhibit A**.) Also, the Montana Supreme Court, on February 5, 2015, denied Liberty’s Emergency Petition for Writ of Supervisory Control and Request for Stay. (See Order (Feb. 5, 2015), attached as **Exhibit B**.) The Montana Supreme Court specifically “declined to enter an immediate stay of the proceedings in light of the evident intent of the District Court to proceed with all aspects of the preliminary condemnation proceeding ‘as expeditiously as possible,’ as required under § 70-30-206(5), MCA.” (Ex. B, p. 1.)

Thus, the necessity determination will occur soon and Applicants will suffer no continuing harm with a stay of these proceedings. Moreover, there is no question the resolution of the condemnation case would aid in resolving the instant proceeding. If the District Court rules in favor of the City, there will be no need to approve the sale to Liberty. Mont. Code Ann. § 69-3-103(1). Further, a stay would foster both docket efficiency for the PSC and fairness to the parties involved. A stay would free the PSC’s docket until such time, if ever, that the issue of Mountain Water’s sale to Liberty actually needed to be decided. Also, requiring the parties to conduct a full, separate administrative proceeding that could potentially be a waste of time and resources – in the very midst of the condemnation trial – is not a fair use of such resources or in the public

interest. A stay would allow the involved parties to solve the ongoing, underlying question of whether or not the assets of Mountain Water ought to be condemned.

This conclusion aligns with the general principle of government demanding responsible use of resources. *E.g.*, *State v. Richards*, 906 P.2d 222, 226–227 (Mont. 1995); *Mountain Water Co. v. Mont. Dept. of Public Service Regulation*, 110 P.3d 20, 22 (Mont. 2005) (holding all administrative remedies must be exhausted before using the scarce resources of the courts.). The PSC is charged with executing its statutory authority consistent with this principle.

The instant proceeding is nearly identical to the proceeding initiated by the sale of Park Water to Carlyle in 2011. That prior proceeding, therefore, provides some insight into the time and resources this proceeding would ultimately entail for the parties and the PSC. Carlyle's request for approval to purchase Mountain Water began in January of 2011 and the PSC entered its final order almost one year later, in December of 2011. The proceeding involved numerous parties: the City, Mountain Water, the Clark Fork Coalition, Carlyle, and the Montana Consumer Counsel. The data requests between the parties were extensive, involving lengthy requests and even longer replies between all parties involved, including protracted efforts to force Carlyle to disclose certain information. *See* PSC Docket No. D2011.1.8, MCC Data Request 004 (Carlyle was forced to supplement four times before finally providing the proper information). And, finally, the public hearings, held in Missoula, took multiple days and included extensive testimony from experts and representatives from each party as well as lengthy public

comment. In sum, the approval of the sale to Carlyle involved extensive time, effort, and financial investment from all involved. *See* PSC Docket D2011.1.8.

This proceeding promises to be even more extensive than the 2011 Carlyle sale. There will likely be just as many parties involved and even more discovery. The City, unlike 2011, directly opposes the approval of the sale for multiple reasons, including the fact that Liberty is the subsidiary of a foreign corporation. In this regard, it is noteworthy that over 70% of Mountain Water customers support the City's efforts to condemn Mountain Water and bring it into public ownership. Sale to a foreign corporation is directly against the expressed wishes of the public.

If the PSC were to proceed with the instant proceeding before the condemnation case is fully resolved, the PSC risks wasting incredible resources. It is unclear why the PSC would embark on such an endeavor. The Applicants cannot demonstrate any prejudice or continuing harm if a stay is granted. To the contrary, a stay would only promote efficiency and clarity for all involved. The PSC proceedings would, if not stayed, proceed simultaneous to the condemnation action and if the City is successful, waste what work has been done in the regulatory approval process. Good stewardship of government resources demands that the instant proceedings be stayed until there is a final resolution to the condemnation action.

## II. THE DISTRICT COURT CURRENTLY HAS JURISDICTION OVER MOUNTAIN WATER'S ASSETS.

A stay is further supported by the fact that jurisdiction over Mountain Water's assets currently rests in the District Court. The City filed its action to acquire the assets of Mountain Water well before Applicants entered into the proposed transaction at issue here. Applicants cannot undermine the District Court's jurisdiction with a belated attempt to move the assets under review. "Eminent domain actions are within the exclusive jurisdiction of the district courts." (Order and Memo. Re the Mont. PSC's Mot. to Intervene (Aug. 19, 2014), attached as **Exhibit C**).

Montana's statutory scheme for eminent domain actions provides that "[a]ll proceedings under this chapter [eminent domain] must be brought in the district court of the county in which the property or some part of the property is situated." Mont. Code Ann. § 70-30-202 (2013). The District Court therefore holds exclusive power to give the preliminary condemnation order, after which valuation is determined. Mont. Code Ann. § 70-30-206; Mont. Code Ann. § 70-30-304. Thus, Montana's statutes leave no doubt the ownership of assets subject to an eminent domain action must be adjudicated by the District Court.

Of course, regulation of private investor owned utilities and voluntary asset sales of regulated utilities are properly within the jurisdiction of the PSC. Mont. Code. Ann. § 69-3-102. That being said, the PSC's authority over a utility ends if the utility becomes owned by a municipality. The PSC's regulatory authority is specifically limited to exclude the "jurisdiction, regulation, and control of such utilities [owned] by any

municipality, town, or village.” Mont. Code. Ann. § 69-3-102; *City of Billings v. County Water Dist. of Billings Heights*, 935 P.2d 246, 228–229 (Mont. 1997).

Where the district court and the PSC’s respective authorities intersect, as here, the PSC’s jurisdiction should yield to the district court until the eminent domain proceedings have concluded. This approach makes inherent sense. Any other approach would inevitably occasion waste, confusion and delay. This is particularly true because a necessity finding in the City’s eminent domain action is likely mere weeks away. *See Docket, City of Missoula v. Mountain Water Co.*, No. DV-14-352 (Mont. 4th Jud. Dist Ct.). As discussed above, the District Court recently denied Mountain Water’s motion to postpone the trial date, confirmed the statutory mandate to proceed as “expeditiously as possible,” and the Montana Supreme Court confirmed this approach just days ago. (See Exs. A, B.)

Depending on the necessity finding reached by the District Court, the PSC may or may not have jurisdiction over Mountain Water in approximately two months. If the City is successful, the PSC’s regulatory authority over Mountain Water’s assets ends. Mont. Code Ann. § 69-3-102. If the City is not successful, and Mountain Water is not condemned, then the PSC’s regulatory authority remains intact and the PSC may exercise its jurisdiction to approve or deny the sale of Mountain Water’s assets to Liberty. In the interim, however, the PSC should stay its hand and wait for the District Court’s determination.

## CONCLUSION

For the foregoing reasons, the City respectfully requests a stay of these proceedings until the condemnation case between Mountain Water, Carlyle, and the City has been fully resolved.

Respectfully submitted this 13<sup>th</sup> day of February, 2015.



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Scott M. Stearns  
Natasha Prinzing Jones  
BOONE KARLBERG P.C  
P.O. Box 9199  
Missoula, MT 59807-9199  
(406) 543-6646  
npjones@boonekarlberg.com  
sstearns@boonekarlberg.com

Jim Nugent  
City of Missoula  
City Attorney's Office  
435 Ryman Street  
Missoula, MT 59802  
JNugent@ci.missoula.mt.us

Attorneys for the City of Missoula

## 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 13th day of February 2015:

Thorvald A. Nelson Nikolas S. Stoffel Holland & Hart LLP 6380 South Fiddlers Green Circle Suite 500 Greenwood Village, CO 80111 tnelson@hollandhart.com nsstoffel@hollandhart.com cakennedy@hollandhart.com aclee@hollandhart.com	Christopher Schilling Chief Executive Officer Leigh Jordan Executive Vice President Park Water Company 9750 Washburn Road Downey, CA 90241 cschilling@parkwater.com leighj@parkwater.com
John Kappes President & General Manager Mountain Water Company 1345 West Broadway Missoula, MT 59802-2239 johnk@mtnwater.com	Michael Green Gregory F. Dorrington CROWLEY FLECK PLLP 100 North Park, Suite 300 P.O. Box 797 Helena, MT 59624-0797 mgreen@crowleyfleck.com gdorrington@crowleyfleck.com cuda@crowleyfleck.com jtolan@crowleyfleck.com
Todd Wiley Assistant General Counsel Liberty Utilities 12725 West Indian School Road, Suite D-101 Avondale, Arizona 85392 todd.wiley@libertyutilities.com	Barbara Hall Legal Director The Clark Fork Coalition P.O. Box 7593 Missoula, MT 59801 Barbara@clarkfork.org
Robert Nelson Consumer Counsel Montana Consumer Counsel 111 North Last Chance Gulch, Suite 1B P.O. Box. 201703 Helena, MT 59620-1703	ORIGINAL MAILED TO: State of Montana Public Service Commission 1701 Prospect Avenue P.O. Box 202601 Helena, MT 59620-2601

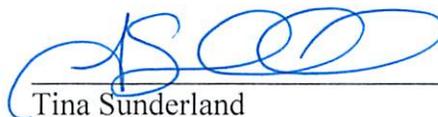
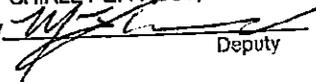
  
\_\_\_\_\_  
Tina Sunderland

EXHIBIT “A”

EXHIBIT “A”

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

FILED DEC 23 2014

SHIRLEY E. FAUST, CLERK  
By  Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 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 THE EMPLOYEES OF MOUNTAIN  
19 WATER COMPANY, (Shanna M.  
20 Adams, Heather M. Best, Dennis M.  
21 Bowman, Kathryn F. Datsopoulos,  
22 Wayne K. Davis, Valarie M. Dowell,  
23 Jerry E. Ellis, Greg A. Gullickson,  
24 Bradley E. Hafar, Michelle Halley,  
25 Douglas R. Harrison, Jack E. Heinz,  
26 Josiah M. Hodge, Clay T. Jensen,  
27 Kevin M. Johnson, Carla E. Jones,  
Micky A. Kammerer, John A.  
Kappes, Susan M. Lowery, Lee  
Macholz, Brenda K. Maes, Jason R.  
Martin, Logan M. McInnis, Ross D.  
Miller, Beate G. Newman, Maureen

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

ORDER RE MOUNTAIN WATER  
COMPANY'S MOTION TO  
CONTINUE TRIAL

1 L. Nichols, Michael L. Ogle, Travis  
2 Rice, Eric M. Richards, Gerald L.  
3 Schindler, Douglas J. Stephens,  
4 Sara S. Streeter, Joseph C. Thul,  
5 Denise T. Tribble, Patricia J.  
6 Wankier, Michael R. Wildey, Angela  
7 J. Yonce, and Craig M. Yonce),

8 Intervenor.

9 This matter comes before the Court upon Mountain Water Company  
10 ("Mountain Water")'s Motion to Continue Trial. While a reply brief has not  
11 yet been filed, the Court finds that an expeditious ruling is necessary so as  
12 to not prejudice the parties or cause further delay and so that the parties do  
13 not change their litigation strategy based on assumptions of a continuance.

#### 14 **MEMORANDUM**

#### 15 **I. Relevant Factual and Procedural Background**

16 The City of Missoula ("City") filed its First Amended Complaint in this  
17 matter on May 5, 2014. On July 7, 2014, after the Court consulted with the  
18 parties, a hearing/trial was scheduled to begin on March 18, 2015, for the  
19 necessity portion of this proceeding. Thereafter, the parties stipulated to a  
20 Rule 16 Scheduling Order providing further deadlines for discovery,  
21 motions, and settlement conferences leading up to that March 18, 2015  
22 date.

23 Mountain Water now moves this Court to continue the hearing date.

#### 24 **II. Mountain Water's Motion to Continue**

25 Mountain Water asserts that despite diligent efforts, a continuance is  
26 needed to allow Defendants sufficient time to adequately prepare for trial.  
27 Specifically, Mountain Water asserts that there are a large number of

1 expert and fact witnesses and the City has been unwilling to disclose fact  
2 witnesses, that the City took an unreasonable position on deposition limits,  
3 the City engaged in late production and privilege maneuverings, the City  
4 failed to produce expert files, and the City refused to produce documents in  
5 a reasonably useful format. Mountain Water asserts that 18 expert  
6 witnesses named by the City is overwhelming and fact witnesses have not  
7 been disclosed. Mountain Water asserts that requiring it to go to trial ten  
8 months after service of process implicates its Due Process rights under the  
9 U.S. Constitution.

10 The City asserts that Mountain Water is engaging in a litigation  
11 strategy to make this case long and expensive for the City. The City also  
12 asserts that a large number of witnesses and discovery disputes do not  
13 constitute good cause to continue the trial date. The City asserts that at  
14 the time of its response brief Defendants had taken only 5 depositions.  
15 Other discovery matters have now been resolved by the special master.

16 Rule 16, M. R. Civ. P., provides that a case schedule may be  
17 modified "only for good cause and with the judge's consent." Consideration  
18 of good cause may include consideration of the moving party's diligence  
19 and how that diligence relates to the proposed modification or amendment.  
20 *See Lindsey's, Inc. v. Professional Consultants, Inc.*, 244 Mont. 238, 243,  
21 797 P.2d 920, 923-924 (1990); *In re Marriage of Smith*, 270 Mont. 263, 271,  
22 891 P.2d 522, 527 (1995), *overruled on other grounds by In re Marriage of*  
23 *Funk*, 2012 MT 14, 363 Mont. 352, 270 P.3d 39.

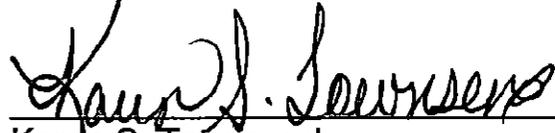
24 Furthermore, Mont. Code Ann. § 70-30-202 provides a statutory six  
25 month default time for eminent domain actions from the time of service of  
26 summons to trial. Furthermore, § 70-30-206(5) requires the parties to  
27 proceed as "expeditiously as possible" in a condemnation proceeding.

1 The Court denies Mountain Water's motion for a continuance. The  
2 March hearing date provided the parties ten months from the service of the  
3 First Amended Complaint until the necessity hearing. Which is four months  
4 longer than contemplated by Mont. Code Ann. § 70-30-202. On July 7,  
5 2014, the parties consented to the March hearing date. Additionally, the  
6 parties agreed on a Rule 16 Scheduling Order that provided various other  
7 deadlines. The Defendants still have over one month to conduct discovery  
8 and nearly three months to prepare for trial. The parties have already  
9 been permitted time greater than that contemplated by the statute because  
10 of the complexity and importance of this case. Further continuances will  
11 not be granted.

12 The Court is confident that the parties have diligently litigated this  
13 action and the Court acknowledges the complexity of this case, its  
14 importance and the extensive discovery disputes. However, this case will  
15 be just as complex and contentious if it is held 12 months from the time of  
16 service as if it is held 10 months from the time of service. Even if this Court  
17 found that several additional weeks were justified, this Court and this  
18 Courthouse have no sufficient blocks of time or available space to change  
19 the date of this hearing for the foreseeable future. The Court will not  
20 reschedule other pending trials because Mountain Water wants more time.  
21 Lastly, the Court notes that several of the discovery disputes noted by  
22 Mountain Water have been resolved by the special master. Discovery is  
23 ongoing in this case and depositions are still being taken. Discovery is not  
24 set to end until January 30, 2015. While the timelines in this case are  
25 undoubtedly demanding and difficult, they are necessary in light of  
26 Montana statutes and the prior agreement of the parties and will not be  
27 modified.

1 IT IS HEREBY ORDERED that Mountain Water Company's Motion  
2 for a Continuance is DENIED.

3 DATED this 23rd day of December, 2014.

4   
5 \_\_\_\_\_  
6 Karen S. Townsend  
7 District Judge

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

13 William Wagner  
14 Stephen Brown  
15 Joe Conner  
16 Adam Sanders  
17 W. Patton Hahn  
18 William Mercer  
19 Adrian Miller  
20 Counsel for Defendants

21 Gary Zadick  
22 Counsel for Intervenors  
23  
24  
25  
26  
27

EXHIBIT “B”

EXHIBIT “B”

FILED

February 5 2015

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 15-0028

FILED

Case Number: OP 15-0028

LIBERTY UTILITIES CO.,

FEB 05 2015

Petitioner,

*Ed Smith*

v.

CLERK OF THE SUPREME COURT  
STATE OF MONTANA

MONTANA FOURTH JUDICIAL DISTRICT  
COURT, MISSOULA COUNTY, AND THE  
HONORABLE KAREN S. TOWNSEND,  
PRESIDING JUDGE,

O R D E R

Respondents.

Petitioner Liberty Utilities Company, by counsel (Liberty), has filed an emergency petition for supervisory control and request for an order staying proceedings in a condemnation action pending in the Missoula Fourth Judicial District Court. Pursuant to our Order of January 15, 2015, the City of Missoula (the City) has filed a response to Liberty's petition.

On December 22, 2014, the District Court denied Liberty's motion to intervene in the condemnation action filed by the City against Mountain Water Company. Liberty seeks an Order from this Court granting it the right to intervene as a defendant in the action. Liberty also asks that we impose an immediate stay of the District Court proceedings pending our determination of the merits of its petition because trial on the "necessity" phase of the condemnation action is scheduled for March 18, 2015, and witnesses and exhibits must be submitted by February 6, 2015. In our January 15 Order, we declined to enter an immediate stay of proceedings in light of the evident intent of the District Court to proceed with all aspects of the preliminary condemnation proceeding "as expeditiously as possible," as required under § 70-30-206(5), MCA.

Liberty has entered into a Merger Agreement with the owners of Mountain Water to purchase the company. It argues that because it is under contract to purchase Mountain

Water, its contractual interest in the property justifies its intervention in the condemnation proceeding as a matter of right, or in the alternative, that permissive intervention is justified. Liberty maintains that the District Court incorrectly implied that present (as opposed to contingent) vested ownership is necessary for intervention under M. R. Civ. P. 24(a), and that its participation is necessary so as to generate the evidence required to evaluate the necessity of condemnation. Liberty maintains that the Montana condemnation code explicitly recognizes the need to join contingent interest holders by requiring a complaint to name any “purchaser under contract for deed.” Section 70-30-203, MCA. It argues that because its Merger Agreement is not contingent upon the outcome of the condemnation case, it has adequately demonstrated that its interest may be impaired as a result of the condemnation proceeding. Finally, Liberty argues that its interests are not adequately protected by the existing parties, as they do not bear the same financial risk related to the outcome of this dispute as does Liberty.

The City opposes Liberty’s petition. It points out that Liberty voluntarily entered into the Merger Agreement with defendants Carlyle Infrastructure Partners, LP (Carlyle), owners of Mountain Water, five months after the City commenced its condemnation action, and that it knew at that time that a March, 2015 trial date was in place and that Carlyle would be responsible for defending the City’s action. Further, it argues that Liberty did not secure the contractual right in the merger proceedings to participate in or undertake the defense of Carlyle in the condemnation action. The City also maintains that Liberty’s claim of interest in Mountain Water is not akin to a contract for deed and is insufficient to support intervention as a matter of right (*DeVoe v. State*, 281 Mont. 356, 362, 935 P.2d 256, 260 (1997)), and that being a party to an executory contract does not entitle it to participate in condemnation proceedings under § 70-30-203(1)(b), MCA.

The City further argues that Carlyle adequately represents Liberty’s interest in the litigation as both parties share the same ultimate objective, and that therefore the requisites of Rule 24(a)(2) are not met. It also contends that simply because Liberty may be in possession of relevant evidence about future prospects for the utility operation does not render intervention necessary, as a third party may present relevant evidence without the necessity of

attaining intervenor status. Finally, the City maintains it would be prejudiced by delay and the exponential increase in costs if intervention is allowed, new attorneys join the fray, and the current case schedule is derailed.

Supervisory control is an extraordinary remedy, exercised on a case-by-case basis, which may be justified when urgency or emergency factors make the normal appeal process inadequate, when the case involves purely legal questions, and when the court is proceeding under a mistake of law and causing a gross injustice. M. R. App. P. 14(3). Under the facts as outlined above, we cannot conclude that the District Court is proceeding under mistake of law and causing a gross injustice by denying Liberty the right to intervene, so as to justify our exercise of supervisory control. Accordingly,

IT IS HEREBY ORDERED that Liberty's emergency petition for writ of supervisory control and order staying the proceedings is DENIED.

The Clerk of this Court is directed to provide immediate notice hereof to all counsel of record and to the Honorable Karen S. Townsend, Montana Fourth Judicial District Court.

DATED this 5<sup>th</sup> day of February, 2015.



Chief Justice



Justices

Justice Laurie McKinnon, concurring.

I agree that supervisory control should not be ordered in these proceedings, primarily because Liberty's Merger Agreement with Carlyle was executed *after* condemnation proceedings had been initiated. However, had Liberty's interest been established prior to initiation of these proceedings, I believe they would have had a right of intervention under M. R. Civ. P. 24(a)-if not as a matter of statutory right based upon the requirement that they be named a party, M. R. Civ. P. 24(a)(1); § 70-30-203 (1) (b), MCA, then upon the provisions of M. R. Civ. P. 24(a)(2) and the factors set forth in *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶¶ 7-17, 308 Mont 189, 40 P. 3d 400.



Justice

EXHIBIT “C”

EXHIBIT “C”

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  
Counsel for Defendants

20 Gary Zadick  
21 Counsel for Intervenors