

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

\*\*\*\*\*

<b>IN THE MATTER OF</b> the Joint Application of )	
Liberty Utilities Co., Liberty WWH, Inc., )	REGULATORY DIVISION
Western Water Holdings, LLC, and Mountain )	
Water Company for Approval of a Sale and )	DOCKET NO. D2014.12.99
Transfer of Stock )	

---

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S RESPONSE  
TO CLARK FORK COALITION’S MOTION FOR  
ALGONQUIN POWER & UTILITIES CORP. TO APPEAR IN PROCEEDINGS  
AND THE CITY OF MISSOULA’S MOTION TO STAY**

---

Pursuant to Procedural Order No. 7392, Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, oppose the City of Missoula’s motion to stay and Clark Fork Coalition’s (“CFC”) motion to force Algonquin Power & Utilities Corp.’s (“APUC”) appearance in this matter. Liberty requests the Montana Public Service Commission (“Commission”) deny both motions.

**ARGUMENT**

As an initial matter, Liberty joins Western Water Holdings and Mountain Water Company’s response to the City of Missoula’s motion to stay, which has been supported by CFC. For the reasons outlined in their response, Liberty joins with Western Water Holdings and Mountain Water Company’s request that the Commission deny the City of Missoula and CFC’s motion to stay and allow this case to continue with the schedule established in Procedural Order No. 7392.

//

Additionally, the Commission should deny CFC's motion because it is the only party seeking the appearance of APUC, but has failed to establish any direct connection between the interest CFC asserts in this docket and the information it contends should be solicited from APUC. Further, regardless of who makes the request, it is inappropriate to join APUC as a party to this docket because the Commission does not have jurisdiction over APUC. It is not the "acquiring entity," does not have a direct interest in the transaction, and will not have direct control over the Montana utility, Mountain Water, if the requested approval is granted. Finally, it is unnecessary to add APUC as a party because Liberty has committed to provide responses to discovery directed at determining APUC's role in the future management of Mountain Water, and any ring-fencing provisions can only be imposed between Mountain Water and Park Water, and not above Liberty Utilities.

**I. APUC'S APPEARANCE DOES NOT ASSIST CFC'S PARTICIPATION.**

As an initial matter, the Commission should reject CFC's motion because it fails to establish any connection between its request to force the appearance of APUC and the interests CFC intervened to assert. CFC fails to establish how APUC's appearance in this docket serves its stated interests in protecting the Clark Fork watershed. Its motion focuses on purported concerns about APUC's financial condition and execution risk, and the bold assertion that Missoula ratepayers need to understand APUC's motivation. However, Clark Fork has no role in representing ratepayers in this docket, and has no basis for insisting on joining a third-party when the party charged with representing ratepayers, the Montana Consumer Counsel ("MCC") has not seen fit to make the request. It also should be noted that Clark Fork's desires to delve into

the “motivations” of APUC have no bearing on this regulatory docket.<sup>1</sup> Liberty can fully and adequately address how Mountain Water will be operated, financed and managed under Liberty’s ownership. As a result, the Commission should reject CFC’s impermissible attempt to expand the parties to this docket without establishing a direct need to do so.

**II. APUC IS NOT A PROPER PARTY TO THIS DOCKET BECAUSE IT HAS NO RIGHTS OR INTERESTS THAT WILL BE RESOLVED AND THE COMMISSION DOES NOT HAVE JURISDICTION OVER APUC.**

The Commission must reject CFC’s motion because it fails to provide any legal authority to support its request or to demonstrate the existence of Commission jurisdiction over APUC. Further, the limited rules and precedents governing the Commission’s consideration of CFC’s motion require denial of the request to force APUC’s appearance.

CFC’s Motion does not cite any authority under which it asserts the Commission can order APUC to appear as a party to this proceeding. Further, Liberty’s counsel has been unable to find any Commission precedent suggesting the Commission has previously expanded the parties to a docket seeking approval of a proposed utility acquisition or merger. To the contrary, Commission precedents and rules suggest the Commission accepts those parties who seek to participate, and does not expand these types of acquisition to other potential corporate affiliates of the parties who appear and participate.

---

<sup>1</sup> APUC’s September 19, 2014 press release announcing the agreement by Liberty Utilities to purchase Western Water Holdings explains the reasons behind the transaction: “The acquisition of [Western Water Holdings] strategically expands our utility presence in California and marks our entry into the state of Montana. . . . The acquisition builds on our strong water utility expertise, provides continuing opportunity for organic growth, and increases the proportion of our earnings from long-term, stable utility assets. We look forward to bringing our caring, local and responsive business approach to the communities served by Park Water.” Liberty can adequately address those issues and there simply is not any reason to make APUC a party in this regulatory docket.

The Commission “has repeatedly carefully considered that it has limited jurisdiction and that doubt as to its power should be resolved against the existence of a power.” D2011.1.8, Order No. 7149c, ¶ 19 (September 14, 2011). In reviewing a proposed utility transaction the Commission has defined its role as ensuring that “utility customers will receive adequate service and facilities, that utility rates will not increase as a result of the sale or transfer, and that **the acquiring entity** is fit, willing, and able to assume the service responsibilities of a public utility.” D2006.6.82, Order No. 6754e, Conclusions of Law ¶ 6 (July 31, 2007) (emphasis added); *see also* D2011.1.8, Order No. 7149c, ¶ 30 (September 14, 2011).

In the prior Mountain Water acquisition docket Carlyle Infrastructure Partners, L.P.’s (“CIP”) intervened and was considered the “acquiring entity” for purposes of the Commission’s review. *See generally* Docket D2011.1.8. There was no effort in that docket to pull in CIP’s parent entity, The Carlyle Group. The Carlyle Group, as an entity, did not participate in the Commission’s review of CIP’s purchase and was not a party to the stipulation or letter agreement with CFC and the City. There has been no suggestion that the absence of The Carlyle Group as a formal party to that matter limited the Commission’s review. In this matter, Liberty Utilities is the entity that will replace CIP in the chain of ownership at issue, so there is no demonstrable need to expand the scope of the review in this proceeding to entities above the level reviewed in that docket.

Even beyond the directly relevant precedent of the Commission’s consideration in Docket D2011.1.8, the relevant administrative rules require denial of CFC’s motion. Under the Commission’s rules, a “party” is defined as an entity that invokes the Commission’s authority through an affirmative request (e.g. complaint, application, etc.) or who is named by the Commission to a proceeding “whose legal rights, duties, and privileges will be determined by the

commissioners' decision." ARM 38.2.301(1)(n). Further, the Commission can require the appearance of a "respondent" only if the entity is "subject to the jurisdiction of the commission." ARM 38.2.901(1)(d).

CFC suggests without any support that APUC must be joined because it is the "acquiring entity" the Commission must review in this docket. This assertion ignores the well-established and long-recognized legal distinctions among separate corporate entities. Under Montana law, "a corporation retains its separate and distinct identity where its stock is owned partly or entirely by another corporation" and "mere control by one corporation of another is not sufficient to invoke the rule permitting disregard of the corporate entity." *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 124 P.2d 994, 996 (1942).

In this case, there is no entity actually acquiring the Montana utility, Mountain Water. Rather, Liberty Utilities is acquiring the stock of Western Water Holdings. Even so, to remain consistent with the review conducted in Docket D2011.1.8, Liberty Utilities has joined this matter as a joint applicant and submitted to review of its proposed acquisition of Western Water Holdings as the "acquiring entity." This is consistent with CIP's participation in the prior docket, and will permit the same level of review as the Commission conducted there.

Liberty Utilities accepts that the Commission has the authority through this docket to determine its legal rights, duties, and privileges regarding the proposed transaction. However, the Commission's determination of Liberty Utilities' rights does not extend to APUC. Nor can the Commission's jurisdiction be expanded to encompass a separate corporate entity that is not acquiring or merging any interest at issue in this docket. As a result, there is no legal justification for the Commission to assert jurisdiction over APUC.

Given that the Commission's regulatory authority extends only to Mountain Water, it seems unlikely the Commission could assert jurisdiction over any upstream entities without their voluntary appearance through the application or intervention. In keeping with Commission precedents, Liberty Utilities and Liberty WWC consented to Commission jurisdiction for the limited purpose of supporting the request for approval of the proposed merger. Liberty Utilities and Liberty WWC filed as joint applicants in this matter because they are parties to the Plan and Agreement of Merger at issue. Liberty Utilities has filled this role in several transaction and regulatory dockets considering those transactions throughout the United States. APUC has not been a party to any of the acquisition dockets in other states in which Liberty Utilities has participated as utility purchaser.

The Commission must reject the CFC motion to require APUC to appear in this matter because the Commission lacks the legal authority to do so. Further, granting CFC's motion would be an impermissible departure from the Commission's precedent in approval dockets in general, and the Mountain Water dockets in particular. The Commission should reject the request to assert its jurisdiction beyond the entities currently participating in this docket. APUC is not a party to the transaction at issue, and has no rights, title or interest to be resolved in this docket, and should not be forced to participate in this docket.

**III. THE COMMISSION SHOULD NOT REQUIRE APUC TO JOIN THE MATTER AS A PARTY BECAUSE ITS PARTICIPATION IS UNNECESSARY FOR A FULL REVIEW OF THE MERITS OF THE PROPOSED TRANSACTION.**

CFC suggests APUC's joinder is required to allow the Commission to conduct a full review of the proposed transaction and to impose appropriate ring-fencing provisions, if needed. Both of these assertions are false, and do not provide a basis for requiring APUC's appearance even if the Commission had the authority to do so.

As acknowledged in CFC's motion, Liberty has done nothing to disguise its relationship with APUC, or APUC's role in Liberty Utilities' acquisition of Western Water Holdings. Further, in its initial response to CFC's petition to intervene, Liberty Utilities invited intervenors to address discovery to it, and asserted its willingness to provide relevant information for consideration in this docket. Since that filing, Liberty has submitted responses to Commission data requests seeking information about APUC. To clarify even further its position on discovery in this case, Liberty Utilities commits it will not object to data requests directed to it on the basis that they seek information within the exclusive control of APUC.<sup>2</sup> As a result, there is no need to add APUC as party to permit appropriate discovery in this case. As noted above, Liberty can fully and adequately address how Mountain Water will be managed, operated and financed under Liberty's ownership.

As outlined above, CFC's assertion that the Commission and interested parties conducted discovery on The Carlyle Group in docket D2011.1.8, is untrue. The Carlyle Group was not a party to that docket and did not respond to data requests or enter any stipulations or agreements. CIP was the acquiring entity that participated in that docket responsible for all discovery response, briefing, testimony, and stipulations. CFC recognized that corporate distinction in addressing its data requests in that docket to CIP. *See e.g.* Clark Fork Coalition Data Requests to Carlyle Infrastructure Partners, LP dated May 19, 2011. As a result, Docket D2011.1.8 does not provide any support for CFC's suggestion that APUC must be joined as party in this matter to allow proper discovery.

---

<sup>2</sup> Liberty expressly reserves its right to assert any other appropriate objection and to seek appropriate protective orders or discovery limitations as are necessary to preserve the confidentiality of information belonging to Liberty or APUC sought in this matter.

Similarly, CFC fails to provide any support for its assertion that APUC's appearance is necessary for the Commission to impose appropriate ring-fencing provisions. CFC's assertion ignores that the purpose of ring-fencing is to "isolate a utility from the risks of other entities and operations." D2011.1.8, Order No. 7149c, ¶ 58 (September 14, 2011). As a result, any ring-fencing provisions will be imposed on the jurisdictional utility, Mountain Water, and not on any upstream affiliate. CFC has not provided any authority for the proposition that the Commission could impose ring-fencing on or at any level above Mountain Water's immediate parent, Park Water. As a result, there is no basis to suggest that APUC is a necessary party to the imposition of ring-fencing provisions.

In Docket D2011.1.8, the Commission did impose a condition on approval requiring CIP file a plan for future disposition of Park Water upon the expiration of CIP's limited life. D2011.1.8, Order No. 7149c, ¶ 70 (September 14, 2011). This condition cannot be considered a ring-fencing provision, and should not be an issue in this docket as none of the entities involved here are limited-life entities. This specific provision, which will not be an issue in this docket, similarly does not provide justification for requiring the appearance of APUC.

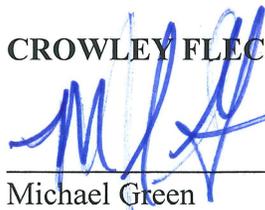
In short, Liberty Utilities is a well-established utility company in the United States. It has participated in multiple acquisition approval dockets in the last ten years, and is prepared and willing to fully participate in this docket. As a result, it is unnecessary for the Commission to attempt to impermissibly expand its asserted jurisdiction to separate non-party entities, and the Commission should reject CFC's motion.

### **CONCLUSION**

For these reasons, Liberty requests the Commission deny the City's motion to stay and CFC's motion to require the appearance of APUC in this matter.

Submitted this 23rd day of February, 2015.

**CROWLEY FLECK PLLP**

A handwritten signature in blue ink, appearing to be 'M Green', is written over a horizontal line. The signature is stylized and overlaps the line.

---

Michael Green  
Gregory F. Dorrington  
CROWLEY FLECK PLLP  
P. O. Box 797  
Helena, MT 59624-0797  
Telephone: (406) 449-416  
Fax: (406) 449-5149  
mgreen@crowleyfleck.com  
gdorrington@crowleyfleck.com

**ATTORNEYS FOR LIBERTY UTILITIES CO.  
AND LIBERTY WWH, INC.**

**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on February 23, 2015, the foregoing Liberty Utilities Co. and Liberty WWH, Inc. Response to Clark Fork Coalition's Motion for Algonquin Power & Utilities Corp. to Appear in Proceeding and the City of Missoula's Motion to Stay was served via electronic and U.S. mail on:

Thorvald A. Nelson  
Nickolas 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, CEO  
Leigh Jordan, Executive VP  
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@mtwater.com

Todd Wiley  
Assistant General Counsel  
Liberty Utilities  
12725 West Indian School Road  
Suite D-101  
Avondale, AZ 85392  
Todd.Wiley@libertyutilities.com

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

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

Robert Nelson  
Monica Tranel  
Montana Consumer Counsel  
111 North Last Chance Gulch, Suite 1B  
Box 201703  
Helena, MT 59620-1703  
robnelson@mt.gov  
mtranel@mt.gov

Barbara Chillcott  
Legal Director  
Clark Fork Coalition  
140 S 4<sup>th</sup> Street West, Unit 1  
P.O. Box 7593  
Missoula, MT 59801  
barbara@clarkfork.org

Gary M. Zadick  
UGRIN, ALEXANDER, ZADICK &  
HIGGINS, P.C.  
#2 Railroad Square, Suite B  
P.O. Box 1746  
Great Falls, MT 59403  
gmz@uazh.com

