

**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 )	

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**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S RESPONSE TO CITY OF  
MISSOULA’S RENEWED MOTION FOR ALGONQUIN POWER & UTILITIES CORP.  
TO APPEAR IN THESE PROCEEDINGS**

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Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submits to the Montana Public Service Commission (“Commission”) this Response to the City of Missoula’s (“City”) renewed motion to force Liberty’s parent company, Algonquin Power & Utilities Corp. (“APUC”), to appear in these proceedings. The Commission should deny the City’s motion, just as it denied the Clark Fork Coalition’s (“CFC”) earlier motion to join APUC, because the City has failed to establish the legal and factual basis necessary for the Commission to assume jurisdiction over APUC, a foreign corporation whose sole connection to Montana public utilities is through its upstream ownership of Liberty. Liberty, therefore, incorporates by reference the arguments it raised in its February 23, 2015 response to CFC’s earlier motion.

## ARGUMENT

### **I. The Commission Already Has Determined It Lacks Jurisdiction Over APUC. The Commission Should Deny The City's Motion In Accordance With Order No. 7392b.**

The Commission previously denied CFC's motion to join APUC in these proceedings in Order No. 7392b. PSC Docket No. D2014.12.99, Order No. 7392b (March 27, 2015). The Commission's order was based on well-established legal principles of corporate law as well as its recognition that "the Due Process Clause of the U.S. Constitution limits a tribunal's exercise of personal and subject matter jurisdiction over parties." Order No. 7392b, ¶ 21 (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). The Commission correctly concluded that it could not exercise personal jurisdiction over APUC unless APUC had made certain "minimum contacts" with the State of Montana and the exercise of jurisdiction would be "fair and reasonable." Order No. 7392b, ¶ 22. The Commission found that APUC's "sole connection to Montana public utilities is through Liberty being a wholly owned subsidiary" of APUC. Order No. 7392b, ¶ 23. The City does not contest that factual finding in its motion.

The Commission appropriately concluded that APUC had not made the minimum contacts with Montana necessary for the Commission to establish personal jurisdiction over APUC. Order No. 7392b, ¶ 25. The Commission further found that that joining APUC in these proceedings "would offend traditional notions of fair play and substantial justice," in part because the Commission had never forced a parent company to appear in a docket proceeding when the parent company remained "uninvolved by its own choice." Order No. 7392b, ¶¶ 26-27. Correctly, the Commission recognized it would violate due process to force APUC to appear as a party in this docket given that the Commission does not and will not have any jurisdiction over APUC. Instead, the Commission ordered that Liberty should "provide relevant information

regarding Algonquin” to allow the Commission to consider APUC’s ownership of Liberty, in keeping with the Commission’s “past practices.” Order No. 7392b, ¶¶ 26-27.

The City’s motion flatly ignores the Commission’s legal reasoning and ultimate decision in Order No. 7392b. The City’s motion fails to articulate a legal or factual basis for the Commission asserting jurisdiction over APUC. The City has not identified any contacts that APUC has made in Montana that would allow the Commission to assert jurisdiction under the *International Shoe* framework. *See* Order No. 7392b, ¶ 22. Furthermore, the City fails to articulate an alternative legal theory under which the Commission could assert jurisdiction over Liberty. In fact, there are no legal citations in the City’s motion and the City’s motion does not use the word “jurisdiction” a single time. The Commission already has concluded that it lacks jurisdiction over APUC. The City’s motion does not contest that legal conclusion, and therefore, must be denied.

**II. Liberty Has Complied With The Commission’s Instruction That Liberty Provide Information Regarding APUC. Liberty’s Ability To Do So Does Not Establish That APUC Is Liberty’s Alter Ego.**

Liberty has been forthright with the parties and the Commission about its corporate relationship with APUC. Liberty has submitted responses to data requests seeking information about APUC and Liberty has pledged that it will not object to data requests on the basis that they seek information within the exclusive control of APUC. *See* Liberty’s Response to CFC’s Motion to Join APUC, p. 7. The Commission has instructed Liberty to continue providing information regarding APUC, and Liberty has acted in accordance with those instructions. *See* Order No. 7392b, ¶ 26. Liberty has conditionally agreed to provide APUC’s board minutes approving the acquisition of Western Water Holdings as well as portions of APUC’s analyses in

support of that acquisition.<sup>1</sup> Liberty also has submitted additional information regarding APUC through the testimony and affidavit of Liberty's president, David Pasioka.

In its motion, the City argues without authority that Liberty's ability to comply with the Commission's instructions and provide information regarding APUC is evidence that Liberty is controlled by APUC. Presumably, the City is arguing that the Commission should disregard the formal corporate structure between Liberty and APUC. *See* Order No. 7392b, ¶ 23. The City's argument fails as a matter of law, as demonstrated below. The City's motion also fails as a practical matter. The City has not identified any problems with Liberty providing information regarding APUC or explained how it could obtain additional information regarding APUC if the Commission joins APUC in these proceedings. Liberty has complied with the Commission's instructions to submit responses to data requests seeking information relating to APUC and Liberty will continue to do so in these proceedings. The Commission has identified an efficient way in which relevant information about APUC can be submitted in these proceedings without asserting jurisdiction over APUC. The Commission's solution has worked and there is no reason to suspect it will not work in the future.

### **III. The Commission Should Continue To Respect The Corporate Formalities Between Liberty and APUC.**

Montana and federal law requires the Commission to recognize Liberty and APUC as distinct corporate entities. It is a "fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity." *Kreisler v. Goldberg*, 478 F.3d 209, 213 (4th Cir. 2007) (emphasis added); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163, 121 S. Ct. 2087, 2091 (2001) ("incorporation's basic purpose is to create a distinct legal entity").

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<sup>1</sup> Liberty's original objection was related to the relevance of the information requested and not that it sought information Liberty did not possess.

Recognition of the formal distinction between corporations “has been described as an almost indispensable aspect of the public corporation.” *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75, 123 S. Ct. 1655, 1660 (2003). Thus, under well-established Montana and federal law, “a corporation retains its separate and distinct identity where its stock is owned partly or entirely by another corporation.” *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 Mont. 303, 124 P.2d 994, 996 (1942) (citing 18 C.J.S., *Corporations*, § 5, p. 375).

In its order denying CFC’s motion to join APUC in these proceedings, the Commission refused to disregard the formal corporate distinctions between Liberty and APUC, even though the Commission recognized that APUC exercises some control over Liberty. Order No. 7392b, ¶¶ 23-25. The Commission also correctly recognized the existence of “a formal corporate structure between the companies—like minutes, records and tax returns[.]” Order No. 7392b, ¶ 25.

The Commission’s order was supported by Montana and federal law. It is “well settled law that the organization of one company by another, or the ownership of all the stock of one company by another, or common officers and directors, or all these elements combined, are not sufficient to defeat separate corporate entity.” *Gillis v. Jenkins Petroleum Process Co.*, 84 F.2d 74, 79 (9th Cir. 1936). Similarly, the Montana Supreme Court has held that “mere control by one corporation of another is not sufficient to invoke the rule permitting disregard of the corporate entity.” *Holmes*, 124 P.2d at 996.

The City’s motion should be denied because it ignores the Commission’s legal conclusion and factual findings in Order No. 7392b and because it is not supported by Montana law. The City’s motion does not articulate a legal theory that would allow the Commission to disregard the independent corporate structures of Liberty and APUC. Presumably, the City’s

motion is a misguided attempt to pierce the corporate veil between Liberty and APUC. *See Dole Food Co.*, 538 U.S. at 475-76, 123 S. Ct. at 1661 (although veil separating corporations may be pierced, successful application of the doctrine of piercing the corporate veil “is the rare exception”). The City has failed to carry its burden of proving that the Commission can pierce the veil between Liberty and APUC.

The Montana Supreme Court requires that a two-prong test be satisfied before a tribunal may ignore the distinctions between corporations and pierce the corporate veil. *Lane v. Montana Fourth Judicial Dist. Court*, 2003 MT 130, ¶ 30, 316 Mont. 55, 68 P.3d 819. First, the “the trier of fact must find that the defendant was either the alter ego, instrumentality, or agent of the corporation.” *Lane*, ¶ 30. Fourteen different factors must be considered in determining whether a parent corporation is the alter ego of its subsidiary. *See Peschel Family Trust v. Colonna*, 2003 MT 216, ¶ 25, 317 Mont. 127, 75 P.3d 793 (abrogated on other grounds by *Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 25, 356 Mont. 408, 235 P.3d 1269). Second, the “trier of fact must find evidence that the corporate entity was used as a subterfuge to defeat public convenience, justify wrong, or perpetrate fraud.” *Lane*, ¶ 30. To satisfy the second prong, the City would need to present “substantial evidence” proving that Liberty was “created to further a wrongful purpose.” *Peschel*, ¶ 36; *Lane*, ¶ 30. The City cannot meet these tests.

The Commission should reject the City’s ill-founded and unsupported attempt to pierce the corporate veil between Liberty and APUC. The City failed to provide substantial evidence establishing that Liberty is the alter ego of APUC and that Liberty was created to further a wrongful purpose. Instead, the City willfully distorted the data requests Liberty has submitted on behalf of APUC to argue that APUC exerts control over Liberty. Specifically, the City relies upon:

- The June 10 affidavit of Liberty President David Pasioka.
- Liberty's supplemental responses to data requests PSC-033(b), CITY-010, and CITY-031.
- An affidavit of a law school student allegedly proving that APUC CEO Ian Robertson is a director, CEO or President of various APUC subsidiaries across the United States.

The evidence the City relies upon is wholly insufficient to allow the Commission to pierce the corporate veil between Liberty and APUC. As noted previously, the Commission has instructed Liberty to submit data requests on behalf of APUC; Liberty and APUC should not be punished for complying with the Commission's instructions. See Order No. 7392b, ¶ 26. Furthermore, the City has not yet seen Liberty's supplemental responses to data requests PSC-033(b), CITY-010, and CITY-031 because the Commission has not yet issued a protective order. The City essentially argues that, because Liberty's supplemental responses included APUC materials, APUC must be made a party. That argument is not grounded in fact or law. Liberty made a corporate decision to pursue acquisition of Park Water and APUC made an independent decision to invest in its subsidiary's acquisition. These decisions do not justify the piercing required for Commission jurisdiction over APUC. Even if true, these allegations would not allow the Commission to assert jurisdiction over APUC.

The Affidavit of Tyler Stockton is neither relevant nor instructive. The Stockton Affidavit purports to prove that Algonquin CEO Ian Robertson is a director, CEO, or President of various other APUC subsidiaries in the United States. However, the ownership and directors of APUC's other subsidiaries are not in dispute. Even if they were, a director of a parent company serving on the board of a subsidiary is insufficient, as a matter of law, to disregard the legal distinction between those two corporations. See *Gillis*, 84 F.2d at 79, *supra*. Because the City has no evidence that would support piercing the corporate veil between Liberty and APUC,

the City is attempting to distract the Commission by providing wholly irrelevant “evidence” of APUC’s relationship with various other corporate subsidiaries.

Liberty is an independent water, natural gas and electric company. Liberty is not the alter ego of APUC. As the Commission has recognized, Liberty is a stand-alone corporation that adheres to corporate formalities; its board of director’s holds meetings, keeps minutes and Liberty files its own tax returns. Order No. 7392b, ¶ 25. Liberty was not created to further a wrongful purpose. Rather, Liberty was created for the lawful purpose of providing local utility management, service and support to communities across the United States. Liberty is proud of the high quality services it has provided in ten different states, and it hopes to provide that same level of customer care in Montana.

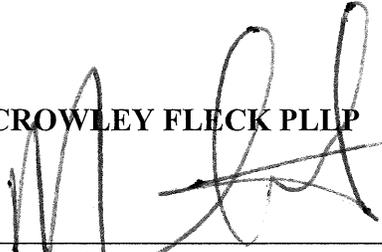
**CONCLUSION**

This Commission already has determined it lacks jurisdiction over APUC and that “requiring Algonquin to appear would offend traditional notions of fair play and substantial justice.” Order No. 7392b, ¶ 26. The City has ignored the factual findings and legal conclusions the Commission reached in Order No. 7392b. Both Montana and federal law require that the Commission respect the corporate distinctions between Liberty and APUC. The City has failed to articulate any legal theory that would allow the Commission to assert jurisdiction over APUC and the “evidence” the City relies upon is insufficient, as a matter of law, to allow the Commission to pierce the corporate veil between APUC and Liberty. For the foregoing reasons, the City’s motion to join APUC in these proceedings should be denied.

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Submitted this 2<sup>nd</sup> day of June, 2015.

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**ATTORNEYS FOR LIBERTY UTILITIES CO. AND  
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**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that on June 22<sup>nd</sup>, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S RESPONSE TO CITY OF MISSOULA'S RENEWED MOTION FOR ALGONQUIN POWER & UTILITIES CORPORATION TO APPEAR IN THESE PROCEEDINGS was served via electronic and U.S. mail on:

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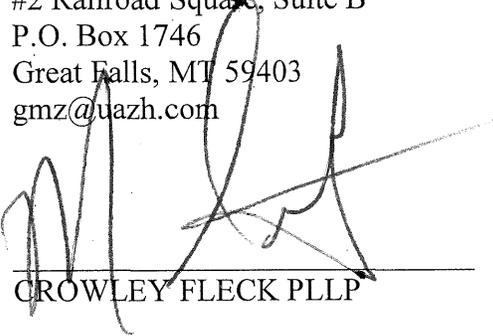
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