

**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.

REGULATORY DIVISION  
  
DOCKET NO. D2014.12.99

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**CITY OF MISSOULA’S REPLY BRIEF TO LIBERTY’S REPLY TO THE CITY’S  
RENEWED MOTION FOR ALGONQUIN POWER & UTILITIES CORPORATION.  
TO APPEAR IN THESE PROCEEDINGS<sup>1</sup>**

The City of Missoula (“City”) moved the Public Service Commission (“PSC”) to require Algonquin Power & Utilities Company (“Algonquin”) to appear in these proceedings because it, not Liberty Utilities (“Liberty”), is the entity actually attempting to purchase Park Water Company (“Park Water”) and Mountain Water Company (“Mountain Water”). The PSC stated in Order No. 7392b that it would “reevaluate Algonquin’s involvement in this proceeding if this information or their representations change.” Order No. 7293b, ¶ 28 (Mar. 4, 2015). As evidenced by the recent discovery responses, Liberty did not make the decision to purchase Park Water; Algonquin did. There is no evidence that Liberty *even had a board meeting to discuss the purchase*; the evidence only shows Algonquin did. The ratepayers and regulators deserve to have the actual entity responsible for decision-making and corporate governance before the PSC

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<sup>1</sup> The City has recently filed a motion to dismiss or stay these proceedings in light of the Preliminary Order of Condemnation entered against Mountain Water’s assets. The City only files this reply because the PSC has yet to rule on that motion.

when deciding whether or not to approve the purchase. Anything less is a disservice to the Missoula consumers.

**I. Due Process is not a Barrier to Algonquin’s Participation in this Docket.**

To exercise personal jurisdiction, there must be minimum contacts with the jurisdiction and such jurisdiction must not violate “notions of fair play and substantial justice.” *Intl. Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945). The PSC determined in Order No. 7392b that it did not have personal jurisdiction over Algonquin but that it would “continue to monitor Algonquin’s control over Liberty and reevaluate this determination if a lack of meaningful separation becomes more apparent.” Order No. 7392b, ¶25. As demonstrated in the discovery Liberty has provided<sup>2</sup> since Order No. 7392b, there is no separation between Algonquin, and Liberty and the PSC should require Algonquin to be a respondent party in this matter.

Minimum contacts for specific personal jurisdiction requires:

(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

*King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 579–580 (9th Cir. 2011). Generally, the contacts of a subsidiary are not imputed to the parent corporation. But, where the

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<sup>2</sup> As a note, this discovery has still not been provided to the City. It has only been generally described and is the subject of a pending motion for a protective order that has yet to be granted. See City’s Response to Liberty’s Motion for a Protective Order (June 16, 2015).

subsidiary acts as the alter ego of the parent company, the contacts are imputed. *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001). Disregarding the formal corporate structure requires an examination whether “the parent controls the internal affairs of the subsidiary.” *Crow Tribe of Indians v. Mohasco Indus., Inc.*, 406 F. Supp. 738, 741 (D. Mont. 1975).

Sufficient minimum contacts, for example, exist when there is “regular interchange of managerial and supervisory personnel, the complete ownership of the subsidiary with the parent deriving the benefit of all the subsidiary's profits, the listing of the subsidiary as an [foreign] office or branch of the parent, the exchange of a variety of records and documents, . . . the overlap of directors on the boards of the parent and the subsidiary, and the very frequent communications between [foreign parent corporation] and [subsidiary].” *Tokyo Boeki (U.S.A.), Inc. v. S. S. Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971).

There is no question that Algonquin has availed themselves of Montana law proposing to purchase Park Water, and hence Mountain Water. Algonquin’s CEO personally came to Missoula and announced that Algonquin planned to purchase the water system. The instant transaction also clearly arises out of contact with Montana: the proposed sale depends on the PSC’s approval of the transaction.

In addition to the arguments and evidence presented in the Clark Fork Coalition’s brief regarding this matter, Algonquin’s relationship with Liberty is eerily similar to that seen in *Tokyo Boeki*. There is an interchange between both the management and directors of Algonquin and its subsidiaries. (See Affidavit of Tyler

Stockton, attached to Opening Br.). Directors are management in one subsidiary and then directors in another. Other managers are directors in some and then management of another. That interchange is universal throughout Algonquin's subsidiaries. As seen in the rest of the United States, and even in Algonquin's most recent purchase – Liberty Utilities (Pine Bluff Water) Inc. in Pine Bluff, Arkansas – Ian Robertson, the CEO of Algonquin, is a board member of even the tiniest subsidiaries. There is no question that Robertson, or some other Algonquin executive, will be a member of Mountain Water's board if the PSC approves this transaction and, for some reason, the City's Preliminary Order of Condemnation is vacated.

Algonquin is the sole owner and sole recipient of Liberty's profits. Algonquin describes its business as a "renewable energy and regulated utility company with assets across North America," which it acquires through "its two operating subsidiaries: Algonquin Power Company and Liberty Utilities." Algonquin Power & Utilities Company, Our Business, [http://algonquinpower.com/our\\_business/](http://algonquinpower.com/our_business/) (accessed June 23, 2015). Liberty's filings admit it is wholly owned by Algonquin and Algonquin's publicly filed earning reports include its Liberty income. There can be no reasonable dispute that Algonquin is the sole recipient of Liberty's profits.

Liberty has maintained that it will provide the necessary Algonquin documents to the PSC, thus exhibiting that Algonquin's and Liberty's documents and records are interchangeable. As noted in the City's opening brief, Liberty has identified only a few documents as responsive to data requests requesting core information regarding the instant proposed sale, and all but one are Algonquin documents. In fact, Liberty's

response brief admits that Liberty has had the Algonquin documents for some time: “Liberty’s original objection was related to the relevance of the information requested and not that it sought information Liberty did not possess.” (Liberty’s Response to City’s Renewed Motion for Algonquin to Appear, fn. 1.) Further, those documents demonstrate that Algonquin was the *only* entity who had actual, meaningful discussions regarding the potential purchase of Park Water. Algonquin’s board met multiple times to discuss the purchase, and the same day Algonquin approved its bid, Liberty adopted a board resolution authorizing the purchase with no evidence of an actual meeting. There is no evidence that Liberty conducted any independent discussion, thought, or work in the process of deciding to purchase Park Water. As the documents and Liberty’s own pleadings show, Algonquin’s complete control over Liberty creates complete interchangeability between the two entities.

Finally, there appears to be ready communication between all the entities. The impressive overlay of directors, CEOs, and Presidents between the parent corporation and the various subsidiaries implies ready communication. If the same people are in leadership throughout the entire corporate web, there can be no doubt that there is “very frequent communication” between them all. For example, David Pasieka is listed as President of Liberty Canada and, per his affidavit, happens to have personal knowledge—including confidential board discussions—about Liberty and Algonquin and also works at Algonquin’s parent headquarters in Ontario, Canada. Mr. Pasieka’s own affidavit speaks to the ready, frequent, and, indeed, necessary communication within Algonquin’s corporate morass.

The PSC should see this corporate shell game for what it is: an attempt to hide the parent corporation from scrutiny by both the people it intends to serve and regulators it intends to convince. Algonquin has never been “uninvolved by its own choice” and the recent discovery responses have revealed that. Algonquin is the heart of the proposed Park Water purchase and, as such, ought to be a proper party in this action, not one represented by a subsidiary.

## **II. Liberty is the Alter Ego of Algonquin.**

Liberty attempts to highlight its own actions to reinforce that it is not the alter ego of Algonquin, but in the process essentially admits it is not the proper party for this action. Liberty reminds the PSC that it has provided Algonquin’s board minutes, Algonquin’s analyses regarding the acquisition, and testimony regarding Algonquin from Mr. Pasioka. Wouldn’t it be easier to simply ask Algonquin? Absolutely. Liberty attempts to argue this setup respects corporate boundaries and is efficient, yet the PSC and the other intervenors are being forced to go through a middleman for its answers. With the affidavit of Mr. Pasioka, a second middleman has been introduced: Liberty Canada, who is not even a party to this proceeding. Further, as noted above, Algonquin is the actual decision-maker in this proceeding, not Liberty. Liberty is simply acting as a corporate shell and bike messenger from Ontario to Montana. Liberty is Algonquin’s alter ego; any other conclusion is unfounded.

### III. Liberty's Piercing the Corporate Veil Argument is a Red Herring.

The City has, by no means, moved to "pierce the corporate veil" in this proceeding and does not propose doing so. The City simply seeks to ensure that the proper parties are before the PSC. Admin R. Mont. 38.2.901 (proper parties include respondents). Liberty's arguments regarding piercing the veil are irrelevant and distract from the primary question.

Piercing the corporate veil is a theory of liability and nothing more. Ordinarily, "those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not *liable for the debts* of their corporations." Stephen B. Presser, *Piercing the Corporate Veil* § 1:1 (2014) (emphasis added); *see also Little v. Grizzly Mfg.*, 636 P.2d 839, 841-842 (Mont. 1981) (piercing the corporate veil is used to impose liability); *Lane v. Mont. Fourth Jud. Dist. Ct.*, 68 P.3d 819 (Mont. 2003) (piercing the corporate veil imposes liability on the shareholder(s) of a corporation).

The PSC recognized this principle in Order No. 7392b. Nowhere in addressing whether or not Algonquin should be a party to the instant proceeding did the PSC lay out the elements of piercing the corporate veil or even reference piercing the corporate veil. In fact, the PSC recognized that the proper inquiry was 1) whether Algonquin was a proper party under the PSC's procedural rules (per Order No. 7392b, it is) and 2) whether jurisdiction was proper. Order No. 7392b, ¶ 21.

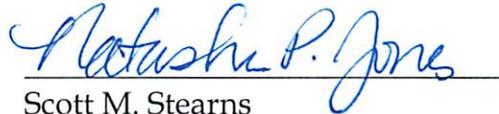
Liberty's specious argument that the elements for piercing the corporate veil are not met ignores the relevant question. The PSC is evaluating whether to approve the stock sale of Park Water to Algonquin, not deciding whether to impose liability.

Piercing the corporate veil is a red herring and is completely inapplicable to these proceedings.

### Conclusion

For the reasons above, the PSC should order Algonquin to appear in these proceedings. Algonquin, not Liberty, is calling the shots for this proposed sale.

Dated this 29<sup>th</sup> day of June 2015.



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 29<sup>th</sup> day of June 2015:

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