

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

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IN THE MATTER OF 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 CITY OF
MISSOULA’S RENEWED MOTION TO DISMISS OR STAY THE PROCEEDINGS**

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 dismiss or, in the alternative, stay these proceedings. The Commission should deny the City’s motion, just as it previously denied the City’s earlier motion to stay these proceedings, because the City has failed to establish the legal and factual basis necessary for the Commission to dismiss or stay these proceedings. Liberty, therefore, incorporates by reference the arguments Mountain Water Company (“Mountain Water”) raised in its February 23, 2015 response to the City’s earlier motion.

PROCEDURAL AND FACTUAL BACKGROUND

As the Commission is aware, the City initiated an eminent domain proceeding against Mountain Water in order to own and operate a municipal water system. The Montana Fourth Judicial District Court, Missoula County (“District Court”) denied Liberty’s motion to intervene in those proceedings, just as it denied the Commission’s similar motion to intervene. During a two week trial, the City attempted to prove that City ownership of Mountain Water was a “more

necessary public use” than continued private ownership of the water utility pursuant to Montana Code Annotated § 70-30-103(1)(c).

On June 15, 2015, the District Court entered its “Preliminary Order of Condemnation.” As indicated by its title, the District Court’s order is neither final nor permanent. The District Court’s preliminary order merely establishes that “the City’s condemnation of the Water System may proceed in accordance with Montana law.” *See* Preliminary Condemnation Order, p. 67, attached to City’s Motion as Exhibit A (emphasis added). However, the Preliminary Condemnation Order has been appealed and Mountain Water recently filed a motion to stay the proceedings before the District Court pending the Montana Supreme Court’s review of the Preliminary Order of Condemnation.

Furthermore, the City has taken none of the statutorily required steps necessary to take possession of Mountain Water’s system. As a result, the City has no current ownership interest in Mountain Water. Given the City’s position in response to Liberty’s request to intervene in the condemnation case, the Commission must reject any notion that the City has a present ownership interest in Mountain Water beyond that of a customer.

ARGUMENT

The Commission should deny the City’s pending motion because the City does not own Mountain Water, which continues to be an investor owned, privately-run water utility. The Commission already has concluded that it will not dismiss or stay these proceedings “until such time as the entity is no longer investor owned.” *See* Order No. 7392b, ¶ 16. The City’s motion generally ignores the Commission’s legal conclusions in Order No. 7932b. Furthermore, the District Court has concluded the City’s condemnation action “has no impact on the PSC’s continuing authority to regulate Mountain Water while it is investor owned.” *Order and*

Memorandum RE The Montana Public Service Commission's Motion to Intervene, DV-14-352, p. 13 (Aug. 19, 2014) (emphasis added).

The District Court's Preliminary Condemnation Order does not provide any support for the City's argument that the City now "constructively" owns Mountain Water. Rather, the City merely has a right to continue through the condemnation process. As the District Court clearly ordered, the condemnation proceedings will continue and the City is now required to establish: (1) the fair value of Mountain Water; and (2) that the City can afford to pay that just compensation. Additionally, the preliminary condemnation order contains numerous legal and factual errors that constitute substantial grounds for reversible error on appeal. Ownership of Mountain Water will not transfer to the City until those issues are conclusively resolved both before the District Court and the Montana Supreme Court. As the Commission has recognized, "final resolution of the condemnation case is likely years away." Order No. 7392b, ¶ 15. The District Court's Preliminary Order is only the first step in a multiple phase, multiple year process.

I. THE CITY'S MOTION IS BASED ENTIRELY ON A BLATANTLY FALSE PREMISE.

The City's motion to dismiss is premised on its unsupported assertion that Mountain Water is now a "municipally-controlled utility" because the City is the "constructive" owner of Mountain Water as a result of the Preliminary Condemnation Order. The City erroneously and singularly relies on Montana Code Annotated § 70-30-311(1)(a)(ii) for the assertion that it has the right to take immediate possession of the water system. City's Motion, p. 1. However, the City has not taken possession and nothing in the Preliminary Condemnation Order or the governing statutes give the City the right to take possession at this time. Rather, the Preliminary Condemnation Order allows the next phase of the condemnation action to proceed, and Montana

Code Annotated § 70-30-311 sets forth the conditions by which the City could seek an order from the District Court allowing it to take possession during the pendency of the remaining condemnation proceedings and appeal. At this time, the City has not requested, and is unlikely to request, possession of Mountain Water, so its claim of constructive ownership is completely false.

In order to take possession, under Montana Code Annotated § 70-30-311, the City must seek an order from the District Court. *Bozeman Parking Comm'n v. First Trust Co. of Montana*, 190 Mont. 107, 113-14, 619 P.2d 168, 172 (1980) (citing Mont. Code Ann. § 70-30-311). In granting an order of possession, the District Court must require the City to deposit with the Court the amount claimed by the condemnee plus a bond or undertaking in an amount sufficient to cover “any additional damages and costs above the amount assessed” as well as “all damages that the condemnee may sustain if the property is not finally taken for public use.” Mont. Code Ann. § 70-30-311(1) and (3). Thus, the City cannot even seek an order granting possession until it can pay the amount Mountain Water seeks as compensation.

The City has not sought, and the District Court has not entered, any order allowing the City to take possession of Mountain Water pursuant to Montana Code Annotated § 70-30-311. Thus, the City’s reliance on that statute has no legal effect and offers no guidance to the Commission’s consideration of the City’s motion to dismiss. As a result, the City has no basis to claim any ownership interest in or control over Mountain Water or its system at this time.

The City’s contention that it currently has an ownership interest in Mountain Water pursuant to Montana Code Annotated § 70-30-311(1)(a)(ii) is incorrect as a matter of law. Even if the City were allowed to take *possession* under Montana Code Annotated § 70-30-311(1)(a)(ii), that statute does not establish that the City would have an *ownership* interest in

Mountain Water as a result. Ownership does not pass to the City until all payments due have been made, any required bond posted, and the Court has issued a final order of condemnation. Mont. Code Ann. § 70-30-309.

In this case, the City cannot establish constructive possession, and has no claim for and has provided no legal authority to support its assertion of “constructive ownership.” The Commission should not dismiss or stay these proceedings because Mountain Water will continue to be investor owned until all appeals are exhausted and conclusively resolved, the City has paid all compensation due, and the Court has entered the final order of condemnation. *See* Order No. 7392b, ¶ 16, *supra*; *see also* Order and Memorandum RE The Montana Public Service Commission’s Motion to Intervene, DV-14-352, p. 13 (Aug. 19, 2014), *supra*.

The City’s motion to dismiss these proceedings is entirely premised upon the City’s conclusion that the City is the “constructive owner” of Mountain Water under Montana Code Annotated § 70-30-311(1)(a)(ii). The City’s assertion that it has any rights or interest to Mountain Water based on that statute is baseless because it has not taken any of the steps necessary to invoke that statute. Moreover, even if the City had taken steps to take possession, Montana law does not recognize the concept of constructive ownership under eminent domain theory, and has not recognized the notion of a “constructive” municipal utility.

II. THE CITY’S MOTION IGNORES THE REASONS WHY THE COMMISSION DENIED THE CITY’S PRIOR MOTION TO STAY THESE PROCEEDINGS. THOSE COMPELLING REASONS REMAIN AND MANDATE THAT THE COMMISSION DENY THE CITY’S MOTION.

The Commission already has concluded that it will not dismiss or stay these proceedings “until such time as the entity is no longer investor owned.” *See* Order No. 7392b, ¶ 16. As established above, Mountain Water remains investor owned, even after the District Court entered its Preliminary Condemnation Order. The Commission should deny the City’s motion to dismiss

or stay these proceedings for the same reasons articulated in Order No. 7392b, ¶ 16. *See Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) (“it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure”). The City’s motion flatly ignores the Commission’s stated reasons for denying the City’s initial motion to stay these proceedings.

The Commission should deny the City’s motion to dismiss or stay these proceedings and continue to review the proposed sale and transfer of Western Water in this docket independent of the District Court’s condemnation proceedings. As the Commission appropriately recognized, “Liberty’s acquisition of Western Water is not contingent on the outcome of the pending condemnation proceeding.” Order No. 7392b, ¶ 9. Furthermore, the Commission’s review in this docket and the condemnation case “involve different issues and assets.” Order No. 7392b, ¶ 13. Thus, the Commission can and should continue to review the Joint Application without regard for developments in the condemnation action. Order No. 7392b, ¶ 10. The condemnation action can continue to proceed to a final resolution, which is “likely years away,” and meanwhile this Commission can fulfill its statutory obligations of regulatory review. Order No. 7392b, ¶¶ 10, 12.

The Commission previously found that dismissing or staying these proceedings “would in fact be oppressive in consequence” to the Joint Applicants. Order No. 7392b, ¶ 13. The City does not refute that finding in its motion. Furthermore, the City has failed to carry its evidentiary burden of establishing a “clear case of hardship or inequity in being required to go forward.” *See* Order No. 7392b, ¶ 6 (quoting *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 9, 645 P.2d 1350).

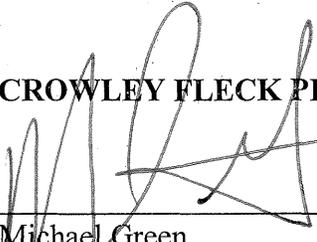
Finally, the Commission should again reject the City's misplaced argument that continuing these proceedings would be cost-prohibitive. *See* City's Motion, p. 4. The City asserts, without support, that if these proceedings are not dismissed or stayed "the parties and the PSC will become mired in jurisdictional litigation, and could unnecessarily devote substantial time and resources" to completing the Commission's regulatory review over the proposed utility transfer. City's Motion, p. 4. The Commission correctly has rejected these arguments. The Commission has found that there are no jurisdictional problems with conducting its regulatory review contemporaneous with the District Court's condemnation proceedings. Order No. 7392b, ¶ 13. Furthermore, the Commission has noted that the City is a voluntary intervenor in these proceedings and the City's continued "participation and use of resources is voluntary." Order No. 7392b, ¶ 14.

CONCLUSION

For the foregoing reasons, the Commission should deny the City's motion to dismiss or stay these proceedings.

Submitted this 30th 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 30th, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S RESPONSE TO CITY OF MISSOULA'S RENEWED MOTION TO DISMISS OR STAY THE PROCEEDINGS was served via electronic and U.S. mail on:

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