

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

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

CITY OF MISSOULA'S NOTICE OF FILING

This City of Missoula hereby provides notice that the Fourth Judicial District Court for the State of Montana issued an Order Denying Stay and for Further Proceedings on July 24, 2015. A copy is attached hereto.

Dated this 27th day of July 2015.



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Natasha Prinzing Jones
BOONE KARLBERG P.C

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City of Missoula
CITY ATTORNEY'S OFFICE

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 27th day of July 2015:

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<p>Kate Whitney Public Service Commission 1701 Prospect Avenue Helena, MT 59620-2601 kwhitney@mt.gov lfarkas@mt.gov jlangston@mt.gov ORIGINAL HAND DELIVERED</p>	<p style="text-align: center;"> Tina Sunderland</p>

1 S. Streeter, Joseph C. Thul, Denise T.
2 Tribble, Patricia J. Wankier, Michael
3 R. Wildey, Angela J. Yonce, and
4 Craig M. Yonce),

Intervenors.

5 This matter comes before the Court on Defendants' Mountain Water and
6 Carlyle's *Motion to Stay Valuation Proceedings Pending Appeal*. Intervenors
7 Employees joined in the motion. The City opposes the motion. As briefing is
8 complete, this matter is deemed submitted and ready for ruling.

10 ORDER

11 The motion is **DENIED**.

13 MEMORANDUM

14 I. FACTUAL AND LEGAL BACKGROUND

15 The Court has previously set forth the background of this case in its Order and
16 Memorandum dated February 23, 2015. The Court issued its *Findings of Fact*,
17 *Conclusions of Law and Preliminary Order of Condemnation* on June 15, 2015.
18 Defendants Mountain Water and Carlyle and Employees have filed notices of
19 appeal. Defendants Mountain Water and Carlyle and Employees seek a stay of
20 valuation proceedings pending appeal of the June 15th Order.

24 II. STANDARD OF REVIEW

25 Section 70-30-312 MCA provides:
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1 (1) Any party interested in the proceedings can appeal to the supreme
2 court from any finding or judgment made or rendered under this
3 chapter, as in other cases.

4 (2) An appeal does not stay any further proceedings under this chapter,
5 except that the district court on motion or ex parte may grant a stay for
6 a period of time and under conditions that the court considers proper.

7 The Court has not located any case law interpreting the granting or denial of a
8 stay under this section.

9 Montana Rules of Appellate Procedure 22 provides in pertinent part:

10 (1) Motion for stay in the district court.

11 a. A party shall file a motion in the district court for any of the
12 following relief:

13 i. To stay a judgment or order of the district court pending
14 appeal;

15 ...

16 c. The district court retains the power to entertain and rule upon a
17 motion filed pursuant to this rule despite the filing of a notice of
18 appeal or the pendency of an appeal.

19 d. The district court must promptly enter a written order on a
20 motion filed under this rule and include in findings of fact and
21 conclusions of law, or in a supporting rationale, the relevant facts
22 and legal authority on which the district court's order is based.
23 A copy of any order made after the filing of a notice of appeal
24 must be promptly filed with the clerk of supreme court.

25 The case law interpreting this rule is likewise sparse. However as noted by
26 other district courts¹, the rule is similar to Rule 8(a) Fed. R. App. P. and the United
States Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113,

¹ *State v. Philip Morris*, 2007 Mont. Dist. LEXIS 600; *Broadwater Development LLC and Lewis and Clark County*, 2009 Mont. Dist. LEXIS 487

1 95 L. Ed. 2nd 724 (1987) has established the following test for determination of
2 whether a stay should be granted:

- 3 1) Whether the stay applicant has made a strong showing that he is likely to
4 succeed on the merits;
5 2) Whether the applicant will be irreparably injured absent a stay;
6 3) Whether issuance of the stay will substantially injure the other parties
7 interested in the proceeding; and
8 4) Where the public interest lies.

9 III. MOTIONS TO STAY

10 A. Mountain Water and Carlyle

11 Mountain Water and Carlyle (“Mountain Water”) seek a stay of the valuation
12 proceeding pending appeal. Mountain Water contends the “good cause” standard in
13 Mont.R.App.P.22(2)(a)(i) applies, there is no statutory fast track provision in the
14 valuation phase as there is in the necessity phase and a stay in light of pending
15 appeals is proper. Mountain Water characterizes this case as having a unique
16 appellate backdrop that warrants a stay. The unique appellate backdrop is that the
17 condemnation involves operation of a business rather than real property, that the
18 City intends to carry on operation of the business rather than demolish it and that the
19 property is already appropriated to a public use which carries a heightened legal
20 standard for condemnation. The necessity phase of the proceedings was highly
21 contested and so the appeal presents a “more meaningful challenge to the Supreme
22 Court than a typical condemnation.” The appeal will address “numerous questions,
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1 some of first impression” including evidentiary rulings, the scope of the City’s
2 authority to condemn and the sufficiency of the findings.

3 Against this unique appellate backdrop, Mountain Water contends a stay
4 pending appeal will protect it from potential serious injury in case of reversal.
5 According to Mountain Water, if no stay is granted, it is conceivable that the City
6 will take ownership of the Water System. Premature City acquisition will break
7 apart Mountain Water’s operation resulting in huge disruption to customers and
8 employees and entail a huge logistical burden. Mountain Water also asserts
9 acquisition pending appeal will have immediate adverse financial effects because it
10 will still have a \$3 million pension liability and \$18 million liability on developer
11 extension agreements with no revenue to satisfy the liabilities along with costly
12 complex and tax implications.
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16 As a second basis for a stay, Mountain Water contends a stay is warranted to
17 prevent inconsistent results between the necessity and valuation phases. Mountain
18 Water maintains that if they are successful in their appeal, the necessity phase might
19 have to be re-opened to consider additional evidence regarding value. In the
20 meantime, value could have been established by commissioners or a jury and the
21 Court could be placed in the position of having to weigh competing valuation
22 evidence for re-opened necessity purposes. Also, Mountain Water might prevail on
23 its argument that extra-territorial assets must be excluded and then fair market value
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1 would have been determined by commissioners or a jury based on an inaccurate
2 corpus of assets.

3 Third, Mountain Water contends a stay is warranted to conserve assets. If
4 Mountain Water is successful on appeal, the valuation phase will not be necessary or
5 will only be necessary pending the outcome of a remanded necessity trial. If a
6 valuation proceeding proves not necessary, the parties will have spent unnecessary
7 time and money on the valuation proceedings. Mountain Water contends further
8 that waiting to proceed with the valuation proceeding until the Supreme Court has
9 decided whether the valuation phase is even necessary will help conserve judicial
10 resources.
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13 Mountain Water contends factors favoring a stay are stronger than in a typical
14 condemnation case while countervailing urgency is weaker because the subject
15 property is already appropriated to public use.
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17 B. Employees

18 Employees join in Mountain Water's motion and brief. Employees contend
19 City takeover of the Water System would cause irreparable harm to them pending
20 determination of the appeal of the preliminary condemnation order. Employees
21 contend irreparable harm will occur from a change from private employment to City
22 employment, impacting pensions and insurance, loss of matching contribution to
23 401(k) retirement accounts and risk of becoming uninsurable for life and disability
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1 insurance. Employees' motion is supported by an affidavit of Mountain Water
2 Business Administration Manager Michelle Halley alleging numerous irreparable
3 adverse impacts to Employees and Mountain Water customers if the City were to
4 take possession of the Water System prior to a final ruling on condemnation.

5
6 C. City's Response

7 The City opposes the motion for a stay. The City contends that Defendants'
8 motions are not ripe and lack merit because the City has not moved to take
9 possession of the property. Further, the City contends the public will be harmed by
10 delay.
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12 The City asserts there is a presumption against staying a condemnation
13 proceeding pending appeal and that under Montana law, all phases of a
14 condemnation proceeding should proceed expeditiously, not just the necessity
15 phase. In addition, the City contends a stay would only add unnecessary and
16 harmful delay that defeats the intent of the law. The City maintains the Water
17 System needs capital investment and repairs now, not years in the future. Delay
18 prevents the City from implementing cost savings and capital investment to
19 rehabilitate the Water System. Finally, the City argues it currently has access to low
20 interest rate revenue bonds to fund the purchase of the Water System. The low
21 interest rates would be placed in jeopardy by unnecessarily delaying the case with a
22 stay, which could cost the City millions of dollars over the life of the bond.
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1 The City asserts it has not moved to take immediate possession of the Water
2 System under § 70-30-311(1) MCA and the Court cannot issue a final order of
3 possession until the valuation phase is complete. The appropriate time for Mountain
4 Water and Employees to raise their concerns about the adverse impacts of premature
5 possession is when the City actually seeks to take possession of the Water System.
6 Thus, the potential serious injuries alleged are premature and are outweighed by
7 concrete injuries to Missoula residents.
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9 As to the potential for inconsistent opinions as to valuation, the City contends
10 the two hypotheticals posed by Mountain Water do not realistically present
11 unmanageable results. Finally, the City notes that in a recent PSC proceeding,
12 Mountain Water opposed the City's proposed stay of proceedings to transfer
13 ownership of the Water System to Liberty on the grounds that a stay would be
14 oppressive.
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17 D. Mountain Water Reply
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19 Mountain Water replies that the City fails to seriously engage with Mountain
20 Water's reasons for seeking a stay of the valuation proceedings pending an appeal.
21 Mountain Water disputes the City's position that there is a statutory requirement for
22 the valuation phase to proceed expeditiously. Mountain Water asserts the period of
23 statutory expeditiousness ends when the preliminary condemnation order is entered
24 and does not apply to the proceedings thereafter based on § 70-30-206(5) MCA.
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1 Thus, there is not the same statutory directive regarding the speed of the valuation
2 phase as compared to the necessity phase. Mountain Water asserts the City's
3 arguments against a stay are further weakened by a core contradiction. The core
4 contradiction is identified as the City's claims that, on the one hand, delay in
5 possession prevents necessary rehabilitation of the Water System under City
6 ownership. On the other hand, the City says that Mountain Water's alleged injuries
7 are premature because the City has not moved to be put in possession of the Water
8 System. Mountain Water contends that if the City's arguments as to expediency
9 requirements and the core contradiction are swept away, what is left is the City's
10 assumption that Mountain Water will be unsuccessful on appeal. Therefore,
11 Mountain Water asserts, the City actually supports Mountain Water's position that a
12 stay is prudent and necessary in order to avoid inconsistent results stemming from
13 the Supreme Court's resolution of the contested findings after the valuation phase
14 and avoids the costly consequences that would occur if the City takes the Water
15 System and then has to hand back the keys later.

20 E. Employees Reply

21 In Reply, Employees reiterate that forcing Employees to switch employment
22 pending appeal and then potentially switch back will have enormous, negative effect
23 on benefits, vesting, credit for years of service, loss of benefits and wages.
24 Employees dispute the City's contention that transfer of the Employees to City
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1 employment would be no more disruptive than transfer of the Employees to Liberty
2 Utilities. Employees maintain an interim takeover by the City before the appeal of
3 the Preliminary Condemnation Order is decided would have irreparable impacts on
4 the Employees and justifies a stay of the valuation process pending conclusion of
5 the appeal.
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7 IV. ANALYSIS

8 Turning to the four part test to determine whether a stay should be granted, the
9 Court first considers whether the applicants have made a strong showing that they
10 are likely to succeed on the merits. Mountain Water has characterized this case as
11 singular among Montana condemnations with first impression questions to be
12 presented on appeal that are “genuinely contestable.” Those issues include rulings
13 regarding the scope of valuation evidence and its effect on rates and consideration of
14 public opinion evidence which it contends are at odds with the 1980s Supreme
15 Court opinions. The Court notes the 1980s cases were different in many significant
16 respects than the present case, including the outcome. Mountain Water also
17 contemplates a successful appeal on a point of settled law, that is, whether the City
18 may condemn the portions of the Water System outside City boundaries.
19 Employees reiterated the concerns they articulated at trial.
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24 Mountain Water chastised the City in its Reply for assuming that it would
25 prevail on appeal. The Court does not discern that Mountain Water has done
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1 anything different in its motion, although it focuses on the possible complications
2 that could ensue in the event its assumptions prove prescient. The potential
3 complications are speculative and uncertain and the remedy proposed for potential
4 complications is delay for an indefinite term.² Stays are not presumed under § 70-
5 30-312(2) MCA. The appeal statute enables interested parties to appeal but does not
6 mandate that the proceedings be brought to a halt for the duration. The Court
7 acknowledges that parallel proceedings might present problems to be solved later
8 but is not persuaded any such problems would be insoluble. The Court finds
9 Mountain Water and Employees have not demonstrated a strong showing of the
10 likelihood of success on the merits on their challenge to the preliminary order of
11 condemnation.
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15 Next, the Court considers whether the applicant will be irreparably injured
16 absent a stay. Mountain Water and Employee contend irreparable harm will occur
17 with the City's potential possession of the Water System. Section 70-30-311(1)
18 MCA provides that at any time after the filing of the preliminary condemnation
19 order, the court upon application may make an order that upon payment into court of
20 the amount of compensation claimed by the condemnee in the condemnee's
21 statement of claim of just compensation under 70-30-207 or the amount assessed
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24 ² Although § 70-30-312(2) MCA provides the district court may grant a stay for a period of time and under conditions
25 that the court considers proper, it is not clear that the district court could or should prescribe a shortened timeline
26 for appeal that is inconsistent with the Rules of Appellate Civil Procedure as a measure to limit delay. The Court
notes that Mountain Water has not proposed an expedited appeal. However, even if Mountain Water were to do
so, the Montana Supreme Court could not be bound to an expedited schedule.

1 either by the commissioners or by the jury, allowing the condemnor to take
2 possession of the property and use and possess the property during the pendency and
3 until the final conclusion of the proceedings and litigation. However, the City has
4 not applied to be put in possession of the Water System. Therefore, the potential for
5 harm by transfer of the Water System to the City is remote and speculative. If the
6 City moves to be put in possession, the Court can appropriately consider the harms
7 identified by Mountain Water and Employees as attendant to the transfer of
8 ownership. Mountain Water and Employees have not addressed how a continuation
9 of the valuation proceedings while Mountain Water remains in possession of the
10 Water System and appeals the preliminary condemnation order will cause
11 irreparable injury. The Court finds Mountain Water and Employees have not
12 demonstrated they will be irreparably injured absent a stay.
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16 As to the third factor, the Court considers whether issuance of the stay will
17 substantially injure the other parties interested in the proceeding. Mountain Water
18 contends a stay will conserve resources of the parties and judicial resources while
19 Mountain Water continues to provide water for the community. Thus, Mountain
20 Water does not consider that substantial injury would be experienced by other
21 parties. The City contends a stay will cause harm because delay is contrary to the
22 requirements of the condemnation statutes, which mandate expeditious proceedings.
23 More concretely, the City contends that delay injures the City because it will prevent
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1 cost savings the City could achieve under its management and that low interest
2 revenue bonds are currently available. The Court is not able to predict the
3 availability of low interest revenue bonds in the future but it is reasonable to
4 conclude that delay in establishing valuation prevents purchase of revenue bonds at
5 current low rates. This circumstance presents prospective injury to the City.
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7 The Court is skeptical that conservation of resources can be realized by a stay
8 of the valuation proceeding. Other than speculation based on an unpredictable
9 outcome of an appeal, Mountain Water and Employees do not identify any prospect
10 of streamlining, narrowing or consolidation of proceedings that might result from a
11 stay of the valuation proceedings. Denial of a stay will not prevent Mountain Water
12 and Employees from pursuing their appeal.
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15 Finally, the Court must consider where the public interest lies. The Court
16 does not find it persuasive that the Legislature intended for condemnation
17 proceedings to be expeditious only until a preliminary order of condemnation is
18 made. The Legislature continued to set short deadlines for the steps following an
19 order of preliminary condemnation. Section 70-30-207 MCA requires the
20 condemnee to file a statement of just compensation within 30 days of entry of a
21 preliminary condemnation order. If the condemnor fails to accept the offer within
22 20 days of service, the court shall appoint commissioners. The statements of just
23 compensation have been filed by Mountain Water and Employees and the City has
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1 not accepted. The statute directs the district court to appoint three qualified
2 commissioners. The Court reads this statute to require that this appointment occur
3 expeditiously. Section 70-30-301(1) MCA requires condemnation commissioners to
4 meet not more than 10 days after the order of appointment. Within the ten day
5 period, the commissioners shall hear the allegations and evidence of all persons
6 interested in each parcel of land. Section 70-30-303(1) MCA requires the
7 commissioners to file their report within 10 days after the completion of the hearing
8 or within any additional time allowed by the judge upon a clear showing of
9 necessity. The Court concludes the setting of rigorous deadlines by the Legislature
10 after the entry of a preliminary order of condemnation reflects the interest of the
11 public in prompt disposition of condemnation matters in general. As noted by
12 Mountain Water and Employees, this condemnation proceeding involves property
13 that is already appropriated for a public use. The public use, supply of water, is a
14 matter of critical public health, safety and welfare. Delay caused by a stay pending
15 appeal slows the ultimate resolution of the condemnation proceeding.
16 Unnecessarily prolonging the resolution of ownership of the Water System is not in
17 the interest of the public.

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20 The parties shall submit their nominations for commissioner within seven
21 days of the date of this order. The parties shall appear for a status conference on
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Tuesday, August 4th at 3:30 p.m. to discuss proceedings before the commissioners.

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2 Out of town counsel may appear telephonically.

3 DATED this 24th day of July, 2015.

4 
5 Karen S. Townsend
6 District Judge

7 cc: Scott Stearns
8 Natasha Prinzing Jones
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