

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) REGULATORY DIVISION
of Liberty Utilities Co., Liberty WWH, Inc.,)
Western Water Holdings, LLC, and) DOCKET NO. D2014.12.99
Mountain Water Company for Approval of)
a Sale and Transfer of Stock)

COMMENTS OF THE MONTANA CONSUMER COUNSEL

I. BACKGROUND

On January 13, 2016, the Montana Public Service Commission (Commission) issued a Notice of Opportunity to Comment regarding its jurisdiction in relation to Liberty Utilities Company's ("Liberty") Joint Application for Approval of a Sale and Transfer of Stock, which it filed with the Commission on December 15, 2014. The Joint Applicants are Liberty, Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company ("Mountain") (collectively, "Joint Applicants").

Without any prior notice to the parties or the Commission and in contradiction of their representations throughout this docket, the Joint Applicants filed a Notice of Closing and Withdrawal of Joint Application with the Commission on January 11, 2016. This transfer of a regulated public utility's

ownership without the Commission's approval is a violation of Montana law and the Commission's long-standing regulatory practice.

The Commission's Notice of Opportunity to Comment invited comments on seven issues.¹ The MCC responds as follows.

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- (1) ¹ Jurisdiction in general.
 - a. Commission's current jurisdiction over the sale and transfer of Mountain Water in the context of the ongoing condemnation proceeding, Judicial review in the district court, and the Notice.
 - (2) City's Previous Position on Commission Jurisdiction
 - a. in Order 7392n: "[T]he City argues a dismissal is proper because while 'the PSC has jurisdiction to regulate the operations of Mountain Water' the Commission's 'implied jurisdiction over regulatory transfers is removed.'" Order 7392n ~ 15 (Sept. 24, 2015).
 - (3) Joint Applicant's previous position of Commission jurisdiction.
 - a. "approvals from the [Montana Public Service] Commission and the California Public Utilities Commission are required to complete the sale of Western Water stock ... " Mt. Water Resp. to the City of Missoula's Mot. to Dismiss or Stay, p. 8 (June 30, 2015). The Joint Applicants also stated "disclaiming Commission jurisdiction over the utility and its operations would put Mountain Water and its customers into a regulatory nowhere land." Id. at p. 4. The Joint Applicants further claimed that the Commission should "continue to review the proposed sale and transfer of Western Water in this docket independent of the District Court's condemnation proceeding" and that the Commission should not dismiss its proceeding because it must "fulfill its statutory obligations of regulatory review." Liberty Resp. to City of Missoula's Renewed Mot. to Dismiss or Stay the Proceedings, p. 6 (June 30, 2015).
 - (4) Violation of any specific statutes, rules or orders.
 - a. Whether the Joint Applicants are now in violation of any specific statutes, rules or orders. Of particular interest is the Commission's previous Order concerning the sale and transfer of Mountain Water. See In re Mountain Water Co., Dkt. No. D2011.1.8, Order 7149d ¶ 9 (Dec. 14, 2011). That Order states "[t]he Commission would review any future transfer of Mountain [Water] to the City or any other entity under the same standards that govern its decision in this case." Order 7149d. Para. 9. Considering the language in Order 7149d and other applicable authorities concerning jurisdiction over sales and transfers of investor owned public utilities, the Commission requests comment of whether fines made available under Mont. Code Ann. §§ 69-3-209 -206 are appropriate.
 - (5) Violation of ring fencing provisions.
 - a. Whether the Joint Applicants are now in violation of applicable ring fencing provisions and whether risk mitigation actions, such as limitation of dividends, are appropriate.
 - (6) Rate Adjustments
 - a. Whether rate adjustments as a result of differing cost of capital of the parent corporation would be appropriate. See Test. John Wilson pp. 6-8, 14-19 (Nov. 4, 2015);
 - b. the appropriateness of such a rate adjustment and whether Commission procedure allows for such ratemaking acts in the context of a sale and transfer approval docket. But see Mont. Code Ann. §§ 69-3-303 (notice and hearing on proposed rate changes), -304 (temporary approval of rate increases or decreases), 2-4-623 (requirements of final orders under the Montana Administrative Procedure Act);
 - c. or whether it would be more appropriate to open a separate docket to address these rate adjustment concerns. See Mont. Admin. R. 38.5.101-195 (minimum rate case filing standards).

III. MCC RESPONSES TO COMMISSION ISSUES.

A. *Jurisdiction in general.*

This Commission has itself carefully considered and consistently asserted its jurisdiction over sales and mergers. In D2013.7.57, *Devon Gas and Havre Pipeline*, Order No. 7307a, for example, the Commission declined to issue a declaratory ruling requested by Devon and Havre Pipeline to not assert jurisdiction over the sale. Later, the Commission asserted jurisdiction. See *Devon Gas and Havre Pipeline*, D2013.7.57 Order No. 7307b (2013 Mont. PUC LEXIS 62, 4-7 (Mont. PUC 2013)). The Commission's analysis was as follows:

Pursuant to its authority, the Commission **has jurisdiction over and must approve any sale or transfer of a public utility, its assets, or utility obligations** in order to assure generally 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." Order No. 6907b at P 6, *In the Matter of the Joint Application of Energy West Incorporated and Cut Bank Gas Company*, Docket No. D2008.3.27 (November 2, 2009). The jurisdiction of the Commission over the sale and transfer of Devon's ownership interest in Havre Pipeline to NWE is based on Havre Pipeline's status as a regulated utility.

The Commission has, in an abundance of previous dockets, exercised its authority over mergers, sales, and transfers of utilities and utility property. Order No. 7149c at P 19, *In the Matter of the Consolidated Petition by Mountain Water Company for Declaratory Rulings and Application for Approval of Sale and Transfer of Stock in Park Water Company*, Docket No. D2011.1.8 (September 14, 2011). The Montana Supreme Court has found that a utility may not abandon service without the Commission's consent. *Great Northern Ry. v. Board of R.R. Comm'rs*, 130 Mont. 250, 252, 298 P.2d 1093 (May 10, 1956). This Commission has asserted in the past, and reaffirms now, that the transfer of a utility's assets is a cessation or abandonment of service. Order No. 7149c at P 20.

(7) Notice in General. Any other comments related to the Notice.

In D2009.11.152, *Petition by Utility Solutions for Declaratory Ruling and Application for Approval of Transfer of Assets*, the Commission refused to issue a declaratory ruling renouncing jurisdiction over the sale and transfer of a regulated utility's assets. See Order No. 7062 issued January 27, 2010 in D2009.11.152. The Commission stated that it "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. The Commission has consistently exercised authority over mergers, sales, and transfers of utilities and utility property for many years." *Id.*, ¶ 19, citing dockets from 2008 going back in time to 1982. The Commission further noted that it has asserted jurisdiction over a public utility's abandonment of service, and that the Commission has expressly over-ruled any implication that it has interpreted its statutes as lacking jurisdiction over transfers and sales of public utilities. *Id.*, ¶¶ 20-21.

While Liberty and the Joint Applicants may argue that the Commission has no jurisdiction over a stock transfer to an upstream entity, the fact is that Applicants proposed to transfer ultimate control of regulated utility services to a new and unknown entity. Whether service will be safe and reliable and rates are just and reasonable under the auspices of the new owner, whether the financial circumstances and plans of the new owner will affect rates and service, and whether that new owner is deemed fit to provide essential public utility service, is clearly within the authority of the Commission to determine.

In the prior Mountain Water sale transaction, the Commission in its Final Order concluded that it's "jurisdiction in this case rests on its power to protect customers from harmful consequences of a purchase in the form of rate increases or deterioration of service." D2011.1.8 Final Order 7149d ¶ 5. Those conditions remain true regardless of whether the buyer is three times removed from Mountain Water or the direct parent of Mountain Water. In fact, the more removed the parent, the more critical it is for the Commission to ensure that Montana consumers are protected through its oversight and monitoring of consequences from a purchase and implications for service. Carlyle as buyer was subject to the jurisdiction of the Commission regarding the very same stock or ownership interest it now claims the Commission has no jurisdiction over when it is the seller.

Collateral pending cases do not affect the Commission's jurisdiction. There may be considerations such as judicial economy or venue to take into account, but the jurisdiction of the Commission is not dependent upon nor divested by collateral proceedings.

Whether the district court had the authority to review the Commission's actions in an interlocutory appeal is a question that is not currently before the Commission and which the Commission cannot remedy in any event. That question, if adequately raised by the parties in district court, may be addressed by the Montana Supreme Court if appropriate.

Under no circumstances can a utility simply provide notice that a sale has closed and thereby divest the Commission of jurisdiction to review the sale. That procedure would severely cripple effective public utility regulation and deprive Montana ratepayers of the protections from monopoly abuse to which they are entitled. In this regard, no regulatory protection is more fundamental or essential than the Commission's ability to determine fitness to serve.

(2)and(3) City's and Joint Applicant's Previous Positions on Commission Jurisdiction

A jurisdictional challenge cannot be waived and can be raised at any time. *Harris v. Smartt*, 2003 MT 135, ¶ 11 (Mont. 2003). Subject matter jurisdiction can neither be waived nor conferred by a party where there is no basis for the tribunal to exercise jurisdiction. *Id.*, citing *Balyeat Law, PC v. Pettit*, 1998 MT 252, ¶ 15, 291 Mont. 196, ¶ 15, 967 P.2d 398, ¶ 15.

Accordingly, the parties' prior positions may have changed, but they do not confer subject matter jurisdiction with their behavior, nor do they take it away with their behavior, or the unilateral closing of a transaction that is subject to the Commission's review and approval. That said, the cited Applicants' prior statements are accurate representations of the Commission's jurisdiction and may be viewed as admissions and a compelling basis for disregarding arguments to the contrary.

(4) *Violation of any specific statutes, rules or orders.*

As noted above, the Commission's general supervisory authority extends to review of sales and transfers such as this one. The Commission has itself repeatedly so found in numerous orders. More specifically, applying these statutory authorities and obligations to the recent Carlyle acquisition of Mountain Water, the Commission found "[t]he Commission would review any future transfer of Mountain [Water] to the City or any other entity under the same standards that govern its decision in this case." *In Re Mountain Water Co.*, Dkt. No. D2011.1.8, Order 7149d ¶ 9 (Dec. 14, 2011).

Since the Commission's approval of Carlyle's ownership was expressly predicated on the Commission reviewing any future transaction under the same standards it used in the Carlyle transaction, the Joint Applicants are clearly in violation of that Order.

(5) *Violation of ring fencing provisions*

In order to gain Commission approval to transfer Mountain Water to Carlyle ownership in 2011, Carlyle Infrastructure was a party to stipulated ring fencing provisions. These provisions were approved by the Commission and are set forth in Commission Order 7149d at ¶ 48 in D2011.1.8. The existence of these ring fencing provisions and Carlyle's commitment to them is further indication that the Commission's interest and jurisdiction extends to Mountain's ultimate owners. More specifically, there are aspects of these provisions that require application to Carlyle or its successor, such as Condition (c), which is a

commitment that Mountain “and its affiliates” will not encumber Mountain’s utility assets for specified purposes. The Notice of Closing seems to indicate that Carlyle has removed itself from these commitments and it is unclear how Liberty views them as it denies Commission jurisdiction. Given that the Commission has not reviewed the fitness to serve of the acquiring entity and the uncertainty surrounding the acquiring entity being subject to the ring fencing provisions, it would seem appropriate for the Commission to consider a limitation on the payment of dividends from Mountain Water to unrecognized upstream owners.

(6) *Rate Adjustments*

The MCC filed the direct testimony of Dr. John Wilson in which he explained that the rates paid by Missoula ratepayers should reflect the cost of service. There are dramatically differing capital costs incurred by the parent corporations, Carlyle and Liberty/Algonquin. In this acquisition, Liberty/Algonquin is buying out (replacing) Carlyle equity capital with debt capital costing only a small fraction of Carlyle’s equity cost. A rate adjustment to reflect Algonquin’s cost of service, based on its acquisition-enabled capital cost savings, is appropriate and necessary to maintain cost-of-service rates reflecting the acquisition-enabled capital cost reduction.

The Commission should consider implementing a rate adjustment to reflect the acquisition-enabled cost of capital reduction and comply with the notice and hearing requirements of § 69-3-303, MCA and other statutory requirements of the public utility statutes and the Montana Administrative Procedure Act.

The Commission need not open a separate docket to address this rate adjustment issue, as all the matters related to the acquisition-enabled cost of service reductions are contained in the current ongoing proceeding, which cannot be truncated by the unilateral action of the Joint Applicants.

(7) Notice in General. Any other comments related to the Notice.

The Commission at this juncture may reconsider the appropriate parties to this proceeding, and especially, in light of the Joint Applicant's flagrant disregard for the Commission's authority and the fact that Algonquin is clearly the party controlling the acquisition, joining Algonquin as a party to this case.

III. CONCLUSION

The Commission should exercise its jurisdiction over this transaction and pursue all remedies within its authority to sanction the Joint Applicants for violating Commission Orders and statutes.

Respectfully submitted January 27, 2016.

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