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

* * * * *

IN THE MATTER OF the 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

LIBERTY UTILITIES CO.'S RESPONSE TO THE MONTANA PUBLIC SERVICE COMMISSION'S NOTICE OF OPPORTUNITY TO COMMENT

Liberty Utilities Co. and Western Water Holdings LLC (collectively "Liberty Utilities"),[1] by and through counsel, hereby submits to the Montana Public Service Commission ("Commission") this response to the Commission's Notice of Opportunity to Comment ("Notice"). The Commission issued the Notice after Liberty Utilities and Mountain Water Company ("Mountain Water") (collectively "Joint Applicants") filed their Notice of Closing and Withdrawal of Joint Application on January 11, 2016 ("Withdrawal").

Introduction

As an initial matter, Liberty Utilities fully understands and respects the Commission's jurisdiction to regulate the rates and service of Mountain Water, and intends to be the long term owner of Mountain Water while maintaining a constructive relationship of mutual respect with the Commission in the same way it owns and operates regulated utilities in ten other states serving over 500,000 customers. While Liberty Utilities contends there are no issues remaining

[1] In previous filings in Docket No. D2014.12.99, Liberty Utilities filed documents together with Liberty WWH, Inc. ("Liberty WWH"). On January 8, 2016, however, the stock of Western Water Holdings, LLC ("Western Water") was sold and transferred to Liberty WWH, with Liberty WWH merging into Western Water and Western Water continuing as a wholly-owned subsidiary of Liberty Utilities Co. As a result of the closing of that sale, Liberty WWH no longer exists and will not participate further in this or any other matter.

to be resolved in this docket and that the Withdrawal terminated this matter, out of recognition of the work committed to this matter during its pendency by the Commission and its staff, and in the interest of attempting to resolve legitimate questions about the conclusion of this matter, Liberty Utilities provides this filing for the limited purpose of responding to the Notice.

While the Commission has historically asserted authority over transactions involving Montana public utilities, its exertion of authority is not universal, and it is undisputed there are no Montana statutes, administrative rules, or reported judicial decisions providing the Commission with jurisdiction over the stock sale and merger of entities two levels upstream from a public utility operating in Montana.[2] Nevertheless, Liberty Utilities agreed to seek Commission approval out of deference to the Commission's past practices and given the closing condition requiring Commission approval in the merger agreement with Western Water. The Joint Applicants sought Commission approval for the transaction to facilitate Liberty Utilities' relationship with the Commission and to align with the timeline expected for consideration and approval by the California Public Utilities Commission ("CPUC"). As a result, Commission approval of the transaction was incorporated as a closing condition of the "Plan and Agreement of Merger." Naturally, Western Water and Liberty Utilities were always free to waive that closing condition.

Liberty Utilities welcomed the Commission's review of the Joint Application and the opportunity to begin building what its management hoped would be a long-term relationship with the Commission and its staff. Liberty Utilities currently operates public utilities in ten states and it was confident that, upon diligent investigation, the Commission would conclude that Liberty Utilities' acquisition of the stock of a parent company several layers upstream of

[2] As noted in the Notice of Closing and Withdrawal of Joint Application, the Joint Applicants specifically reserved all arguments relating to the Commission's "implied jurisdiction" with respect to the upstream change in ownership of Western Water.

Mountain Water would not alter Mountain Water's ability to continue providing adequate water utility services to the people of Missoula at reasonable rates. Liberty Utilities sought the Commission's approval of the Joint Application in good faith and, for over a year, Liberty Utilities devoted considerable resources to fully participating in the Commission's regulatory review process. Liberty Utilities looked forward to participating in the Commission's public hearing of the Joint Application, which had been set for January 2016.

Unfortunately, however, the City of Missoula ("City") played a dilatory and disruptive role in Docket No. D2014.12.99. The City consistently challenged the Commission's authority and jurisdiction over Docket D2014.12.99 in light of the City's efforts to condemn Mountain Water, first in various motions to stay and/or dismiss filed with the Commission, and later by filing a Petition for Judicial Review before a Montana district court. As part of that interlocutory appeal, the City convinced the district court to impose the extraordinary remedy of an indefinite stay of the Commission's proceedings in Docket D2014.12.99, based in part on the City's arguments that the Commission lacked jurisdiction over the docket. That stay was entered on December 18, 2015.

The district court's stay placed the Joint Application in regulatory limbo, and created significant risk for the overall transaction. In light of the stay, as well as the City's litigation tactics, it became doubtful that the Commission would be able to review the Joint Application in a manner that would allow timely closing of the transaction. As the Commission is aware, Western Water owns the stock of Park Water, which in turns owns the stock of Mountain Water Company and Apple Valley Ranchos Water Company. As a result, despite CPUC approval, the uncertainty created by the City's dilatory tactics put the entire transaction at risk if the parties continued to insist on Commission approval as a closing condition.

On December 18, 2015, CPUC approved the application filed by Liberty Utilities, Western Water, Park Water and Apple Valley Ranchos Water relating to the Central Basin system and Apple Valley Ranchos Water Company. Following approval in California, Liberty Utilities and Western Water made a business decision to close on the "Plan and Agreement of Merger" submitted to the Commission as Exhibit B to the Joint Application after all parties agreed to modify the agreement and allow for closing without Commission approval. Liberty Utilities and Western Water waived the closing condition requiring Commission approval in Montana given the Commission's lack of jurisdiction over stock sales of corporate parents under Montana law. On these issues, Liberty Utilities and Western Water adopt and incorporate by reference Mountain Water Company's Comments Regarding the Notice of Closing and Withdrawal of the Joint Application filed on January 27, 2016.

In turn, Liberty Utilities and Western Water withdrew the joint application for approval in this docket. Because the Joint Application has been withdrawn, there is nothing remaining for the Commission to review in this docket. The Plan and Agreement of Merger formally has closed, consideration has been exchanged, and there is no legal mechanism to unwind that transaction. For these reasons, Liberty Utilities is no longer appearing before the Commission as a Joint Applicant, but rather as the upstream owner of Western Water, which is the shareholder of Park Water, which is the sole shareholder of Mountain Water. Closing of the transaction and withdrawal of the Joint Application did not result in *any* changes to the day-to-day operations of Mountain Water, or impact the Commission's express legal jurisdiction over Mountain Water as a public water utility. It cannot be emphasized strongly enough that the Plan and Agreement of Merger resulted in a transfer of stock of Western Water two levels upstream from Mountain

Water.[3] That change in upstream ownership does not affect Mountain Water's assets or the water utility services it provides to the people of Missoula. Under Liberty Utilities, Mountain Water will continue to operate "as is" in providing water service to customers utilizing the same employees, using the same local management and using the same utility assets and facilities. Mountain Water's property, plant, equipment and personnel will remain intact and for the time being it will continue to receive the same centralized and shared services it has historically received from Park Water. Mountain Water will provide the Commission with notice of any material changes in Mountain Water's operations or the shared services arrangement.

To be clear, Liberty Utilities respects and acknowledges the Commission's authority over ratemaking and the Commission's authority to regulate Mountain Water. Liberty Utilities always has anticipated and acknowledged that Mountain Water Company will be subject to the full and exclusive jurisdiction of the Commission relating to utility service, rates and operations. Furthermore, Liberty Utilities recognizes that Mountain Water remains subject to the stipulated ring-fencing provisions imposed in Order No. 7149d, Docket No. D2011.1.8, and that that as long as Mountain Water remains under private ownership, the Commission maintains exclusive jurisdiction to determine the reasonable cost of capital, address changes in the cost of service, approve any changes in rates, and address any concerns regarding the condition of Mountain Water's system in Missoula.

Liberty Utilities understands the difficult position in which it placed the Commission by withdrawing the Joint Application. Liberty Utilities' decision to do so was not motivated by a lack of respect for the Commission or Montana's public utility laws. To the contrary, the Joint Application was filed with the Commission as a result of Western Water's and Liberty Utilities'

[3] Even after closing of the Plan and Agreement of Merger, Western Water Holdings continues to be the direct parent company of Park Water and indirect parent of Mountain Water.

decision to include Commission approval as a contractual contingency to closing of the sale and transfer of Western Water. Because the Joint Application was due to those contractual terms (and not pursuant to the provisions of Montana law), Western Water and Liberty Utilities were free to waive the contractual condition and close the sale of Western Water without the Commission's approval. Liberty Utilities would have preferred to close the sale and transfer of Western Water with the Commission's approval. After all, Liberty Utilities requested that the Commission continue forward with its review. Once the Commission's proceeding became bogged down as a result of the City's efforts to inject irrelevant issues into the proceeding (such as comparisons of public versus private ownership) and interfere with or entirely halt the Commission's review of the sale of Western Water (including the stay issued by the district court to review the Commission's intermediate decisions), Liberty Utilities and Western Water determined that continuing to pursue Commission approval no longer presented the best path forward, especially given that the Commission lacked jurisdiction over the stock sale of Western Water in the first place. Liberty Utilities regrets that forces outside its or the Commission's control effectively denied the Commission the opportunity to complete its review, and offers its sincere appreciation to Commission and staff for their valiant efforts to review the Joint Application.

In essence, the City's dilatory tactics and judicial stay took the transaction review process out of the Commission's hands, and put Liberty in a state of limbo with no end in sight. This "hijacking" of the review process by the City deprived both the Commission and Liberty of the regulatory review that both the Commission and Liberty desired. Liberty was left with two unsavory choices: (1) close the transfer of Western Water without Commission approval, or (2) continue to bear the consequences, costs and expenses of the City's dilatory tactics. Under these circumstances, Liberty Utilities and Western Water made a reasonable business decision to move

forward with closure of the transaction.

Liberty Utilities, through Mountain Water, looks forward to working with the Commission to ensure that Mountain Water continues to provide adequate water utility services to the people of Missoula at reasonable and fair rates. In that spirit of cooperation, Liberty Utilities offers the following responses to the items directed to it, as requested by the Commission, and joins in the separate response submitted by Mountain Water.

1. Jurisdiction in General.

The Commission "requests comments from the parties regarding the 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."

As an initial matter, Liberty Utilities emphasizes that neither the Joint Application nor the Plan and Agreement of Merger contemplated the "sale and transfer of Mountain Water," the public utility operating in Montana. Rather, the closing of the Plan and Agreement of Merger resulted in the sale and transfer of stock of Western Water (a Delaware limited liability company) to Liberty Utilities (a Delaware corporation); that transaction occurred two levels upstream from Mountain Water. Ownership of Mountain Water's assets, its capital structure and its operations were not sold or affected by the sale, and Mountain Water continues to provide adequate water utility services to the people of Missoula.

Liberty Utilities respectfully suggests that the critical jurisdictional inquiry should be whether the Commission has any jurisdiction or investigatory authority over a sale and transfer of stock that already has occurred. It is Liberty Utilities' understanding that withdrawal of the Joint Application necessarily ended the Commission's jurisdiction and review of the upstream acquisition of Western Water stock. Now that the Plan and Agreement of Merger has closed and

the Joint Application has been withdrawn, there is nothing further for the Commission to review. Liberty Utilities is not aware of any authority that would permit the Commission to reject the Notice of Withdrawal or unwind the fully-executed Plan and Agreement of Merger, especially given that the closing has occurred and consideration has been exchanged.

Furthermore, the district court actions, i.e. the preliminary condemnation order entered by Judge Townsend and the stay entered by Judge Halligan, do not affect the Commission's authority to regulate Mountain Water. Judge Townsend has instructed that the condemnation action "has no impact on the PSC's continuing authority to regulate Mountain Water while it is investor owned and to supervise capital improvements." Montana Fourth Judicial District Court, *Order and Memorandum RE The Montana Public Service Commission's Motion to Intervene*, Cause No. DV-14-352, p. 13 (Aug. 19, 2014). Similarly, the stay entered by Judge Halligan applies only to Docket No. D2014.12.99, and not to the Commission's general regulatory authority over Mountain Water. See City of Missoula's Second Amended Petition for Judicial Review, Montana Fourth Judicial District Court, Cause No. DV-15-918, pp. 18-19 (October 27, 2015) (requesting that the District Court only dismiss or stay "the proceeding in Docket No. D2014.12.99"). Liberty Utilities welcomes the Commission's regulation of Mountain Water's operations as well as Commission supervision over any necessary capital improvements to the Mountain Water system.

Liberty incorporates by reference the statements in Mountain Water's response regarding Commission jurisdiction. Liberty also notes that this case highlights the fundamental flaw in the Commission's assertion of implied authority over upstream transactions among parent companies. The Commission's regulatory authority over public utilities operating in Montana is well established in statute, and subject to clear limits and standards. Conversely, the

Commission's clear lack of statutory authority over upstream entities or individuals that do not operate public utilities in Montana has created a situation in which there is no defined jurisdictional limit to the Commission's authority.

The Commission has acknowledged that its "implicit authority to review significant transactions involving regulated public utility property" stands in stark contrast to "public utility commissions in 45 states[, which] have explicit statutory authority to review utility sales and transfers." *See* Commission Memorandum to Energy & Telecommunications Interim Committee "RE PSC authority over utility transactions" (Oct. 31, 2003), attached as Exhibit A. The Commission also has conceded that its lack of "clear statutory authority" produces "substantial uncertainty about [the Commission's] authority to review" the sale of public utilities in Montana, and presumably even more uncertainty regarding the Commission's authority to review transactions involving upstream entities located elsewhere. *Id.* For those reasons, the Commission asked the Montana Legislature to grant the Commission "express statutory authority" to review the sales of public utilities. *Id.* The Legislature refused. To the extent the Commission continues to rely upon and expand its "implied authority," which has no specific statutory basis, the Commission encourages legal challenges to its authority to act. *See Montana Soc'y of Anesthesiologists v. Montana Bd. of Nursing*, 2007 MT 290, ¶ 43, 339 Mont. 472, 171 P.3d 704 ("an administrative agency can exercise only those powers <u>specifically conferred</u> on it by the Legislature") (emphasis added); *see also, City of Billings v. Pub. Serv. Comm'n of Montana*, 193 Mont. 358, 369, 631 P.2d 1295, 1303 (1981) ("as an administrative agency <u>the PSC may not assume jurisdiction without **express delegation** by the legislature</u>") (emphasis added).

Commission jurisdiction over the stock sale is simply not supported by the Commission's

enabling legislation and to date has not been embraced in prior cases. In the past, the Commission has limited its assertion of implied review to authority over the sale of Montana utility assets or Montana public utility companies. Even in the Carlyle docket (D2011.1.8), the Commission denied the applicants' request for a declaratory judgment regarding the Commission's authority. (Order, 7149c). While refusing the request to clearly specify the scope of its own authority under a declaratory order, in its final order, the Commission stated its authority as:

> Pursuant to its authority, the Commission has jurisdiction over any sale or transfer of a public utility; acquisition of its stock, assets or utility obligations, in order to assure 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.

(D2011.1.8, Order 7149d, p. 28, COL 5.) This assertion is consistent, at least, with Commission precedent, where it has limited its review to the transactions directly involving a Montana public utility company (e.g. sales or transfers of actual utility assets to another utility or municipality, or the sale or transfer of stock of a Montana utility). There is no basis, then, even under its own precedent, for the Commission to attempt to expand its "implied authority" to cover a stock sale between two companies that are two corporate levels above the Montana utility. Furthermore, an upstream transaction between parent companies does not divest the Commission of its authority to regulate and supervise Mountain Water. The Commission's lack of authority over the stock sale here does not change or limit the Commission's ongoing jurisdiction over Mountain Water Company, and neither Liberty Utilities nor Mountain Water has suggested it has done so in this case.

2. <u>City's previous position on Commission jurisdiction</u>.

Liberty Utilities joins in Mountain Water's response to this request as it is directed to the

City of Missoula and no separate response is required.

3. Joint Applicants' Previous Position of Commission Jurisdiction.

The Commission has asked Liberty Utilities to address various statements made by the Joint Applicants regarding the Commission's jurisdiction over Docket No. D2014.12.99. As an initial matter, Liberty Utilities reiterates its understanding that its decision to withdraw the Joint Application and close on the Plan and Agreement of Merger effectively closed Docket No. D2014.12.99 and, as a result, there is nothing further for the Commission to review, regardless of whether the Commission ever had jurisdiction over the docket. Furthermore, it is axiomatic that "jurisdiction involves the fundamental authority of [an agency] to determine and hear an issue" and "subject-matter jurisdiction cannot be conferred by the consent of a party." *Indian Health Bd. of Billings, Inc. v. Montana Dep't of Labor & Indus.*, 2008 MT 48, ¶ 20, 341 Mont. 411, 177 P.3d 1029 (quoting *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867). Thus, the Commission could not have obtained jurisdiction over Docket No. D2014.12.99 based solely on the statements of the Joint Applicants.

The Commission questions Liberty Utilities' prior statement 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 <u>must</u> 'fulfill its statutory obligations of regulatory review.'" (Emphasis added). Liberty Utilities did not state that the Commission "<u>must</u> fulfill its statutory obligations of regulatory review," as the Commission suggests. The paragraph the Commission referred to states as follows:

> 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, ¶ 9. 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.

Liberty Resp. to City of Missoula's Renewed Mot. To Dismiss or Stay the Proceedings, p. 6 (Jun 30, 2015) (Emphasis added).

Liberty Utilities' statements in this filing are unremarkable. As discussed previously, Judge Townsend's order stated that the condemnation action had "no impact on the PSC's continuing authority to regulate Mountain Water while it is investor owned and to supervise capital improvements." Montana Fourth Judicial District Court, *Order and Memorandum RE The Montana Public Service Commission's Motion to Intervene*, Cause No. DV-14-352, p. 13 (Aug. 19, 2014). Liberty agrees with the Commission's continuing authority to regulate Mountain Water. However, as noted above, there is no express statutory basis for the Commission's assertion of authority to review stock transactions involving the upstream parent that is not itself a public utility. Prior to docket D2011.1.8, the Commission had never asserted jurisdiction over a stock sale occurring several corporate parent levels removed from a Montana utility.[4] In its 2011 application, Carlyle specifically claimed the Commission did not have "the implied power to review and approve the sale and transfer of Park stock to Carlyle" and sought a declaratory ruling as such, and only as an ***alternative***, did Carlyle request approval of the sale. *See generally* Consolidated Petition for Declaratory Ruling and Application for Approval of

[4] As noted previously, neither Liberty Utilities, nor Western Water nor Park Water operate public utilities in Montana and, therefore, those entities are not "public utilities" as defined in Montana Code Annotated § 69-3-101(1).

Sale and Transfer of Stock (Jan. 24, 2011), docket D2011.1.8. Furthermore, Liberty Utilities and the Joint Applicants here specifically reserved questions about the Commission's jurisdiction to review the sale and merger of entities two levels upstream from a public utility operating in Montana. Liberty Utilities' questions regarding the Commission's jurisdiction over sales of upstream entities have never dissipated and, even if they had, Liberty Utilities' statements could not confer subject matter jurisdiction on the Commission. *Indian Health Bd. of Billings, Inc.*, ¶ 20, *supra*.

4. <u>Violation of Any Specific Statutes, Rules, or Orders</u>.

As described above, there are no statutes or rules giving the Commission express authority over the upstream change in ownership of a public utility in Montana. Indeed, the Commission has sought (unsuccessfully) to obtain statutory authority from the Montana Legislature over the type of sale and transfer at issue. *See Montana Soc'y of Anesthesiologists*, ¶ 43, *supra*. As a result, there are no statutes or rules that were violated when the sale of Western Water to Liberty Utilities was completed without the Commission's approval. The only entity subject to the Commission's jurisdiction—Mountain Water Company—remains in full compliance with any and all applicable statutes, rules and orders regarding water service in Montana.

The Commission asks whether the "Joint Applicants are now in violation of any specific statutes, rules, or orders." Mountain Water is not in violation of any specific statutes, rules, or orders. To the extent any of the parties in Docket D2014.12.99 or the Commission asserts Mountain Water is in violation of any specific statutes, rules, or orders, Liberty Utilities and Mountain Water request notice and the opportunity to be heard before the Commission takes any remedial actions.

The Commission also requests comment on whether imposing any of the "fines made available under Mont. Code Ann. §§ 69-3-209, -206 are appropriate." The Commission cannot fine Liberty Utilities because it is not a public utility. Furthermore, even if it were, Liberty Utilities has not violated any statutes, rules, or orders and, thus, there is no basis to impose a fine pursuant to Montana Code Annotated §§ 69-3-209, -206. The plain language of those statutes does not afford a basis to impose any fines on Liberty Utilities.

Montana Code Annotated § 69-3-209 states as follows:

> **69-3-209. Violations of public utility laws or orders**. If any public utility violates any provision of this chapter, does any act herein prohibited, or fails or refuses to perform any duty enjoined upon it, fails to place in operation any rate or joint rate, or fails, neglects, or refuses to obey any lawful requirement or order made by the commission or any court, then for every such violation, failure, or refusal the public utility is subject to the penalty prescribed by 69-3-206.

Montana Code Annotated § 69-3-206 states as follows:

> **69-3-206. Penalty for failure to make reports or permit examinations**. (1) Any officer, agent, or person in charge of the books, accounts, records, and papers or any of them of any public utility who shall refuse or fail for a period of 30 days to furnish the commission with any report required by the provisions of this chapter and any officer, agent, or person in charge of any particular books, accounts, records, or papers relating to the business of such public utility who shall refuse to permit any commissioner or other person duly authorized by the commission to inspect such books, accounts, records, or papers on behalf of the commission shall be subject to a fine of not less than $100 or more than $1,000.
> (2) Such fine shall be recovered in a civil action upon the complaint of the commission in any court of competent jurisdiction. Each day's refusal or failure on the part of such officer, agent, or person in charge shall be deemed a separate offense and be subject to the penalty herein prescribed.

As previously noted, Liberty Utilities is not a "public utility" as that term is defined by Montana Code Annotated § 69-3-101(1). The Commission's jurisdiction is expressly limited to the supervision and regulation of *public utilities* in Montana.[5] "Public utility" is narrowly defined by Montana law to only include entities "that own, operate, or control any plant or equipment,

[5] Mont. Code Ann. § 69-1-102.

any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing to or for other persons, firms, associations or corporations" certain utility services, including water.[6] The statutory definition of public utility does not include individuals or entities owning public utilities in Montana and, as a result, the Commission's jurisdiction does not include the individuals or entities that own public utilities in Montana either. Here, that definition of public entity definitely does not apply to entities owning the stock of a company such as Western Water two corporate levels above the public utility.

Because Montana Code Annotated §§ 69-3-209 and -206 only apply to "public utilit[ies]," the Commission may not impose a fine on Liberty Utilities pursuant to those statutes. Further, pursuant to Montana Code Annotated § 69-3-206(2), the Commission lacks authority to directly order a public utility to pay a fine and, instead, may only assert fines upon filing a "complaint of the commission in any court of competent jurisdiction."

5. <u>Violation of Ring-Fencing Provisions</u>.

The Commission asks "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." Liberty Utilities has acknowledged that Mountain Water remains subject to the stipulated ring-fencing provisions imposed in Order No. 7149d, Docket No. D2011.1.8. Mountain Water is not in violation of any ring-fencing provisions. To the extent any of the parties in Docket D2014.12.99 or the Commission assert Mountain Water is in violation of any ring-fencing provisions, Liberty Utilities and Mountain Water request notice and the opportunity to be heard before the Commission takes any "risk mitigation actions, such as limitations of dividends," or other remedial actions.

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[6] Mont. Code Ann. § 69-3-101.

6. Rate Adjustments.

The Commission requests comments addressing testimony from the Montana Consumer Counsel's ("MCC") expert witness, Dr. John W. Wilson, that Mountain Water's rates should decrease as a condition to sale. The Commission also asks "whether Commission procedure allows for such ratemaking acts in the context of a sale and transfer approval docket." Liberty Utilities addressed and rejected the premise of Dr. Wilson's testimony in Peter Eichler's testimony, which was submitted in Docket No. D2014.12.99. See Test. Peter Eichler testimony, pp. 13-14 (Dec. 10, 2015).

Liberty agrees that it would be "more appropriate to open a separate docket to address [the Commission's] rate adjustment concerns." To that end, Liberty Utilities has directed Mountain Water to offer to file a full rate case within six months of the City's condemnation efforts being finally resolved in Mountain Water's favor.

CONCLUSION

Despite the City's efforts to disrupt, if not outright take over the process, Mountain Water and Liberty Utilities have been working closely together for over a year to ensure a smooth transition to Liberty's upstream ownership. Plans and strategies have been painstakingly crafted to assure customers and Mountain employees have a positive experience under the transition, and quality of service remains extremely high. In particular, much work has been done to assure that service remains adequate and there will be no impact on rates resulting from the transition, in other words, that there will be no harm to consumers.

Liberty Utilities is appreciative of the hard work the Commission and staff expended on Docket No. D2014.12.99. Liberty Utilities regrets the circumstances that forced it to withdraw the Joint Application and close on the Plan and Agreement of Merger without first obtaining

Commission approval and reaffirms its intent to be a good corporate citizen of Montana with constructive regulatory relationships. As noted, the closing of the Plan and Agreement of Merger did not result in the sale and transfer of any Mountain Water assets. Mountain Water continues to provide excellent water utility services to the people of Missoula at reasonable rates. Furthermore, Mountain Water's operations continue to be subject to the ring-fencing provisions the Commission imposed in Order No. 7149d, Docket No. D2011.1.8 and subject to the Commission's general regulatory powers of "public utilities" operating in Montana.

Submitted this 27th day of January, 2016.

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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on January 27, 2016, the foregoing Liberty Utility Co.'s Response to the Montana Public Service Commission's Notice of Opportunity to Comment was served via electronic and U.S. mail on:

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CROWLEY FLECK PLLP

Memorandum

To: Energy & Telecommunications Interim Committee

From: PSC

Date: October 31, 2003

Re: PSC authority over utility transactions

Background

Currently, the PSC asserts under its general supervisory powers the implicit authority to review significant transactions involving regulated public utility property. In contrast, public utility commissions in 45 states have explicit statutory authority to review utility sales and transfers. State commissions in our region (North Dakota, South Dakota, Wyoming, Idaho, Colorado, Utah, Oregon and Washington) are among the majority of states with explicit statutory authority to approve utility sales and transfers. Copies of the relevant statutes from those states are attached to this memo.

In most cases where the Montana PSC asserts its authority to review a sale or transfer of assets, the utility concerned challenges the assertion as being without clear statutory authority. Clarification of the PSC's authority over these transactions is advisable to avoid future disputes and litigation regarding PSC authority. PSC review under clear statutory authority will streamline the process.

The current arrangement produces substantial uncertainty about authority to review and produces weaker results for all concerned. In one case, Pacificorp's sale to Flathead Electric Co-op, the PSC had to obtain a court order slowing the sale for 30 days while conducting a cursory review. In particular, the PSC was unable to conduct any meaningful review of the sale price. Subsequently, a former PacifiCorp manager confirmed to the Flathead Co-op board what many believed – the sales price was many millions too high. A transaction that was, as a general matter, clearly in the public interest saddled the purchaser and its members with substantial excess debt with which they are still struggling.

Also, current law specifically prevented the PSC from conducting any review of the MPC generation sale to PPL. At the time, many argued that a sale of all generation to one purchaser would create substantial local market power in supply. The PSC was powerless even to evaluate that question.

PSC review of utility transactions produces substantial benefits both to the purchaser and to the customers, ensuring an acceptable purchaser and a transaction that does not harm the utility, the

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customers, or the public interest. Good review should not be prolonged, but must be long enough to examine the financial underpinnings on which a transaction will succeed or fail.

Key elements of statutory authority

The key elements of of the express statutory authority the PSC seeks are straightforward:

- A requirement for prior PSC approval of public utility property sale, transfer, merger, disposition, etc.

- Exceptions from the PSC approval requirement for: (1) sales/transfers of utility property in the ordinary course of business that the commission determines is not necessary or useful in the performance of the utility's duties to the public; and (2) sales/transfers of utility property valued at less than $200,000 or 10% of the value of the utility's jurisdictional property, whichever is less.

These elements are present in similar laws in surrounding states concerning state commission authority over utility sales.

Attachments (relevant laws from surrounding states)