

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

IN THE MATTER OF the Joint Application of) REGULATORY DIVISION
Liberty Utilities Co., Liberty WWH, Inc.,)
Western Water Holdings, LLC, and Mountain) DOCKET NO. D2014.12.99
Water Company for Approval of a Sale and) ORDER NO. 7392b
Transfer of Stock)

**ORDER DENYING THE CITY OF MISSOULA'S MOTION FOR STAY and
DENYING CLARK FORK'S MOTION TO INCLUDE ALGONQUIN IN THE
PROCEEDING**

PROCEDURAL HISTORY

1. On December 15, 2014, Liberty Utilities Company filed a Joint Application for Approval of a Sale and Transfer of Stock with the Montana Public Service Commission ("Commission" or "PSC"). Joint Applicants included Liberty Utilities Co., Liberty WWH, Inc. (collectively, "Liberty"), Western Water Holdings, LLC, and Mountain Water Company (collectively, "Mountain Water").
2. On December 23, 2014, the Commission issued a Notice of Application and Intervention Deadline and granted intervention to the City of Missoula ("City"), the Clark Fork Coalition ("CFC"), and the Montana Consumer Counsel.
3. On February 9, 2015, the Commission issued *Procedural Order 7392*, which provided the parties an opportunity to address preliminary briefing issues. Or. 7392 ¶ 6 (Feb. 9, 2015). The Commission received briefs from the CFC, the City, Mountain Water, and Liberty. The parties raised the issues of whether to stay the proceedings and require Algonquin Power & Utilities Corp. ("Algonquin") to appear in the proceedings. On March 4, 2015, the Commission held a regularly scheduled work session to rule on these preliminary briefing issues.

DISCUSSION

Staying the Proceedings

4. The City moves the Commission, pursuant to Admin. R. Mont. 38.2.1501 (2015), to stay the subject proceedings until such time as the pending condemnation case between Mountain Water and Carlyle Infrastructure Partners and the City has been fully resolved. City Mot. to Stay Proceedings p.1. (Feb. 13, 2015).

5. The Commission is vested with the power of supervision, regulation, and control of public utilities. Mont. Code Ann. § 69-3-102 (2013). As the adjudicatory body in this docket, the Commission has broad discretion to stay proceedings as an incident to its power to control its own dockets. *Clinton v. Jones*, 520 U.S. 681, 706 (1997).

6. “The supplicant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 9, 645 P.2d 1350 (quoting *Landis v. North American Co.*, 299 U.S. 248, 166 (1936)).

7. In cases of extraordinary public interest, a party may be required to submit to delay that is not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted. *Id.*

8. In its Motion, the City argues that a stay is justified to avoid inconsistent rulings. The City cites to *Schara v. Anaconda Co.*, in which the Montana Supreme Court determined the district court’s failure to stay a proceeding was an error, because one proceeding rendered the other moot due to the two proceedings involving the same real property. *Schara v. Anaconda Co.*, 187 Mont. 377, 384, 610 P.2d 132 (1980). The City asserts that similar to *Schara*, “the City’s condemnation case determines if the instant proceedings are moot.” City Mot. at p. 4.

9. However, Mountain Water argues that Liberty’s acquisition of Western Water is not contingent on the outcome of the pending condemnation proceeding. Mountain Water Resp. to Mot. to Stay Proceedings, p. 3 (Feb. 23, 2015). Mountain Water argues that a change in control of Western Water Holdings “would not have an effect on the outcome of the condemnation case at the asset level regardless of who prevails in that litigation.” *Id.* Mountain Water also points out that the subject proceeding “does not involve the sale or transfer of any of Mountain Water’s utility assets that are the subject of the pending condemnation.” *Id.*

10. The Commission finds that there is no risk of inconsistent rulings. Mountain Water, unlike the *Schara* case, has not proposed any changes to Mountain Water or its utility assets. In addition, the Commission's determination in this matter will not impede the City's condemnation case from proceeding forward to a final resolution. Whatever that resolution may be, the Commission determination in this matter will not affect it.

11. The City also cites to *Lair v. Murry*, which articulates the following four part test to be applied by courts when determining whether or not to grant a stay:

- (1) stays should not be indefinite in nature and should not be granted unless it appears likely the other proceeding will be concluded within a reasonable time;
- (2) courts more appropriately enter stay orders where a party seeks only damages, does not allege continuing harm, and does not seek injunctive or declaratory relief since a stay would result only in delay in monetary recovery;
- (3) stays may be appropriate if resolution of issues in the other proceeding would assist in resolving the proceeding sought to be stayed; and
- (4) stays may be appropriate for courts' docket efficiency and fairness to the parties pending resolution of independent proceedings that bear upon the case.

Lair v. Murry, 871 F. Supp.2.d 1058, 1068 (D. Mont. 2012).

12. The City argues that if the four part test is applied, the factors "weigh heavily in favor of a stay." City Mot. at p. 4. Specific to the first factor of the four part test, the City asserts that there will be a speedy resolution to the condemnation proceeding. City Mot. at p. 5. Yet Mountain Water points out that a past condemnation fight involving the same property and parties was quite protracted. Mountain Water Resp. to Mot. at p. 9. Though it is impossible to determine with any certainty, based on available facts, one can conclude that a resolution to the condemnation proceeding is likely years away. *See, e.g., Missoula v. Mountain Water Co.*, 228 Mont. 404, 407-408 (1987) (describing the lengthy procedural history of the previous Mountain Water condemnation case). A multi-year stay is not "immoderate in extent" as required by the *Henry* case.

13. Mountain Water insists that a long term stay will cause harm, in that the two parties cannot complete the transaction without Commission approval, and argue that granting a stay will effectively allow the City to "hold the transaction underlying this case captive for years." Mountain Water Resp. to Mot. at p. 10. The Commission finds that such a stay would in fact be oppressive in consequence to Mountain Water, pursuant to the *Henry* case. Mountain Water asserts that on the other hand, "denying the Motion will have absolutely no impact on the

City's condemnation effort." The Commission agrees. The only parties that would be influenced by a stay are the Joint Applicants. The City's condemnation proceeding will not be impaired in any way.

14. The City further argues that "there is no question the resolution of the condemnation case would aid in resolving the instant proceeding." City Mot. at p. 5. Due to the fact that this proceeding and the condemnation case involve different issues and assets, the Commission does not see how a resolution of this proceeding will be aided by a final determination in the condemnation case, nor will a stay of undetermined time aid the resolution of this proceeding.

15. The City also asserts that if the "PSC were to proceed with the instant proceeding before the condemnation case is fully resolved, the PSC risks wasting incredible resources." City Mot. at p. 7. Mountain Water disagrees. They argue that due to the fact that a final resolution of the condemnation case is likely years away, it would be inefficient for the Commission to stay this proceeding. Mountain Water Resp. to Mot. at p. 11. Mountain Water also argues that the City is an intervenor in this proceeding, and their participation and use of resources is voluntary. *Id.* The Commission agrees and additionally, has already issued a procedural order which will facilitate the efficient and timely resolution of this proceeding. *See* Or. 7392 at ¶ 6.

16. The key to this determination is the fact that the Commission clearly has jurisdiction over Mountain Water at present. The City argued as much in its Brief in Opposition to Montana Public Service Commission's Motion to Intervene filed in the condemnation proceedings. Plaintiff's Brief in Opposition to the Montana Public Service Commission's Motion to Intervene, p. 5, *City of Missoula v. Mountain Water Company*, DV-14-352 (Mont. 4th Jud. Dist. July 15, 2014). The presiding judge in the condemnation case, when denying the Commission's intervention, stated that the condemnation proceeding "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, p. 13, *City of Missoula v. Mountain Water Company*, DV-14-352 (Mont. 4th Jud. Dist. Aug. 19, 2014). The Commission will only cease to have jurisdiction over Mountain Water at such time as the entity is no longer investor owned. At present, the utility is still investor owned, and therefore under

the Commission's jurisdiction, as acknowledged by the district court. Therefore, the Commission shall proceed forward with this action as it ordinarily would.

Requiring Algonquin to Appear in Proceedings

17. The Clark Fork Coalition ("CFC") moves to require Algonquin to appear in this sale and transfer proceeding. CFC Mot. to Require Algonquin to Appear in Proceedings (Feb. 13, 2015); CFC Reply to Mot. Require Algonquin to Appear in Proceedings (March 3, 2015). Liberty opposes CFC's Motion. Liberty Resp. to CFC Mot. to Require Algonquin to Appear in Proceedings (Feb. 23, 2015). Algonquin is the parent company of Liberty. CFC Mot. at p. 1.

18. In determining whether a third-party can be brought into an ongoing proceeding, the Commission's rules regarding parties must be examined. Party status is defined by Admin. R. Mont. 38.2.901. *See also* Or. 5566b p. 3 (Oct. 29, 1991) ("The Montana Public Service Commission has adopted reasonable rules relative to party status") (citing Admin. R. Mont. 38.2.901). Algonquin does not meet the criteria of a petitioner, complainant, defendant, intervener, or protestant under Admin. R. Mont. 38.2.901. However, Algonquin does appear to qualify as a respondent party:

"Respondent" means any party subject to the jurisdiction of the commission to whom the commission issues notice instituting a proceeding or investigation or inquiry of the commission; and any party in interest or person ordered before any pending proceeding of the commission.

Admin. R. Mont. 38.2.901(e).

19. The Commission's authority over transfers and sales is implied by its investigative and complaint driven authority. Or. 7149c ¶¶ 28-29 (June 28, 2011); Mont. Code Ann. §§ 69-3-324, -106; *See, e.g. Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 39, 340 Mont. 309, 174 P.3d 496 ("PSC's statutory duty to investigate utilities may not be hindered by limiting its ability to obtain information in a specific manner"). This authority, in conjunction with Admin. R. Mont. 38.2.901(e), grants the Commission the ability to bring parties before it that are relevant to the issuing of final decisions on sale and transfers. Moreover, only "part[ies] subject to the jurisdiction of the [C]ommission" may be brought in as a respondent party. Admin. R. Mont. 38.2.901(e).

20. CFC raises several arguments that favor finding that Algonquin is a relevant party to this proceeding. CFC argues “there have been significant issues related to Algonquin's history of self-dealing, debt load, high execution risk, and recent acquisition spree.” CFC Mot. at p. 7. The Commission agrees sources of financing, including the parent corporation, are relevant to sale and transfer decisions. *See* Or. 6907b ¶ 19 (Oct. 27, 2009) (evaluating Energy West, Inc.'s financial resources in approving its acquisition of Cut Bank Gas Co.). CFC points out “[w]ithout access to direct information from Algonquin, it will be impossible to craft the most protective ring fence.” CFC Mot. at p. 10. The Commission agrees the effectiveness of ring fencing may depend on a parent's relationship with its subsidiary. *See* Or. 7149d ¶¶ 58-70 (Dec. 13, 2011) (discussing the need for ring-fencing due to Carlyle Infrastructure Partners, L.P.'s financial relationship with Park Water). CFC also states, “Joint Applicants appear to be relying on Algonquin's reputation and track record, though Algonquin has chosen not to subject itself to the jurisdiction of the Commission.” CFC Mot. at pp. 3-4. The Commission agrees investment strategy of the parent company over subsidiaries has been relevant in past proceedings. *See* Or. 6754e ¶¶ 148-156 (July 31, 2007) (analysis of Babcock & Brown Infrastructure's investment expectations in the denied acquisition of NorthWestern Energy).

21. Based on the Commission's authority and this information, Algonquin is sufficiently relevant to be declared a respondent party pursuant to Admin. R. Mont. 38.2.901(e). Under the same rule, a party must also be subject to the jurisdiction of the commission. *See also Mont. Human Rights Div. v. City of Billings*, 199 Mont. 434, 440, 444 (1982) (an agency has subpoena power over third parties if the inquiry is within the authority of the agency). Establishing jurisdiction requires that an administrative tribunal establish both personal and subject matter jurisdiction. *First v. State*, 247 Mont. 465, 469, 808 P.2d 467 (1991). In addition to the Commission's own rules, the Due Process Clause of the U.S. Constitution limits a tribunal's exercise of personal and subject matter jurisdiction over parties. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945). These same jurisdictional requirements apply to the involuntary inclusion of third parties in a proceeding. *Ioerger v. Reiner*, 2005 MT 155, ¶ 17, 327 Mont. 424, 114 P.3d 1028.

22. The Commission has subject matter jurisdiction “over . . . any sale or transfer of a public utility, its assets, or utility obligations.” Or. 7149c ¶ 30. Liberty has consented to the personal jurisdiction of the Commission through filing of its Application. *Milanovich v.*

Schnibben, 2007 MT 128, ¶ 10, 337 Mont. 334, 160 P.3d 562. Personal jurisdiction over Algonquin, the parent corporation of Liberty, requires further inquiry. A tribunal may not exercise personal jurisdiction over a party unless the defendant has “minimum contacts” with the state in which the tribunal sits, and the exercise of jurisdiction would be fair and reasonable. *Int'l Shoe Co. v. Wash.*, 326 U.S. at 316.

23. Algonquin’s sole connection to Montana public utilities is through Liberty being a wholly owned subsidiary of Algonquin. A wholly owned subsidiary’s contacts with the forum state will not automatically confer jurisdiction over an out-of-state or foreign corporate parent. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925). However, if a subsidiary is the corporate parent’s alter ego or is specifically acting as the corporate parent’s agent, then its contact may be imputed to the corporate parent. *Id.* To make the finding whether to disregard formal corporate structure, courts examine whether “the parent controls the internal affairs of the subsidiary.” *Crow Tribe of Indians v. Mohasco Industries, Inc.*, 406 F. Supp. 738, 741 (D. Mont. 1975).

24. CFC points out relevant information to this determination:

Algonquin CEO, Ian Robertson was the spokesperson in all press coverage of the announced sale; there were no statements from any Liberty Utilities executives. Shortly after the deal became public, Robertson made the journey to Missoula to meet with community members, including the Coalition with assurances that - unlike Carlyle - Algonquin makes community relations a top priority and is in this for the long haul.

CFC Mot. at p. 4. Furthermore, the Board of Algonquin was consulted in the decision of Liberty to purchase Western Water. Data Response (DR) PSC-005a (Feb. 17, 2015). And Ian Robinson serves on both the Liberty and Algonquin boards. *Id.* This is not an insignificant overlap since Liberty’s Board only consists of three members: Ian Robertson, Richard Leehr, and Greg Sorensen. DR PSC-005c.

25. There is at least a scintilla of evidence that suggests that Algonquin exercises some control over Liberty. Still and all, this information is insufficient to find that Algonquin made minimum contacts with the forum state establishing personal jurisdiction. *Compare Tokyo Boeki (U. S. A.), Inc. v. SS Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971) (jurisdiction over the parent with evidence of “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 overseas office or branch of the parent, . . . [and] the overlap of

directors on the boards of the parent and the subsidiary”) *with Wireline, Inc. v. Byron Jackson Tools, Inc.*, 239 F. Supp. (1964) (“[N]o jurisdiction over the parent corporation since the subsidiary had conducted its own meetings, kept minutes, maintained separate records, and filed separate corporate and tax returns”). A formal corporate structure between the companies—like minutes, records, and tax returns—appears to exist. Additionally, the instances of lack of separation identified by CFC do not appear to be pervasive and ongoing. The Commission will continue to monitor Algonquin’s control over Liberty and reevaluate this determination if a lack of meaningful separation becomes more apparent.

26. In light of these common corporate aspects between Liberty and Algonquin, the Commission still examines whether requiring Algonquin to appear would offend traditional notions of fair play and substantial justice. *Int’l Shoe Co*, 326 U.S. at 316. In determining whether a tribunal taking jurisdiction is consistent with notions of fair play and substantial justice, “Montana’s interest in adjudicating the dispute” and “[t]he most efficient resolution of the controversy” have been considered. *Bunch v. Lancair Int’l, Inc.*, 2009 MT 29, ¶ 42, 349 Mont. 144, 202 P.3d 784. At this point in the proceeding, these interests primarily require that relevant information about Algonquin continues to be made available through Liberty, as has been represented by the joint applicants: “Liberty Utilities commits it will not object to data requests directed to it on the basis that they seek information within the exclusive control of [Algonquin].” Liberty Resp. at p. 7. Tribunals have also looked to the burden of the party being forced to appear in Montana. *Bunch*, ¶ 42. The burden of requiring Algonquin to appear and participate in the proceedings exceeds the benefit of having Algonquin directly available in the proceeding when Liberty has pledged to provide relevant information regarding Algonquin. Thus, requiring Algonquin to appear would offend traditional notions of fair play and substantial justice.

27. As has been mentioned numerous times, Algonquin is likely to be a relevant topic in this proceeding, but the company currently remains uninvolved in this proceeding by its own choice. When parent companies have appeared before the Commission, it has been on their own volition. Qwest was a joint applicant in the approval of the sale of Qwest’s subsidiaries to CenturyLink. Or. 7096e ¶¶ 3-4 (Dec. 14, 2010). In the previous Mountain Water transfer and sale docket, Carlyle Infrastructure Partners, L.P. voluntarily intervened in the proceedings. Or. 7149b ¶ 12. However, the Carlyle Group, the parent of Carlyle Infrastructure Partners, L.P., did

not appear in that Docket though it was considered in the final decision. *Id.* at ¶ 19. Allowing Algonquin to remain uninvolved in this case, but considering its ownership of Liberty is consistent with the Commission's past practices.

28. Based on this analysis, requiring Algonquin to appear in this proceeding is not consistent with the minimum contacts rule and fair play and substantial justice. However, this conclusion is based on information and representations currently available to the Commission. Other than jurisdictional concerns, Algonquin's role in this proceeding is sufficiently relevant to qualify as a respondent party. Admin. R. Mont. 38.2901(e). The Commission will reevaluate Algonquin's involvement in this proceeding if this information or their representations change.

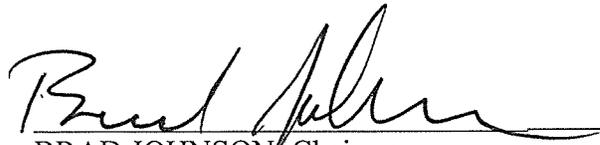
ORDER

IT IS HEREBY ORDERED THAT:

29. The City of Missoula's Motion to Stay Proceedings is denied.
30. Clark Fork Coalition's Motion for Algonquin Power & Utilities Corp. to Appear in Proceedings is denied.

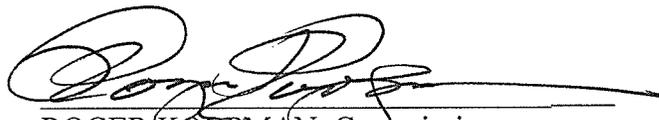
DONE AND DATED this 4th day of March, 2015 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


KIRK BUSHMAN, Commissioner


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner

ATTEST:



Aleisha Solem
Commission Secretary

(SEAL)

