

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. 7392n  
Transfer of Stock )

**ORDER DENYING THE CITY OF MISSOULA'S MOTION FOR DISMISSAL OR  
STAY and CITY OF MISSOULA'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, the Employees of Mountain Water, and the Montana Consumer Counsel.
3. On February 9, 2015, the Commission issued Procedural Order 7392, which provided the parties an opportunity to submit motions and briefs on whether to stay the proceedings and require Algonquin Power & Utilities Corp. ("Algonquin") to appear in the proceedings. Or. 7392 ¶ 6 (Feb. 9, 2015). These issues were fully briefed by Mountain Water, Liberty, the City, and the Clark Fork Coalition. On March 4, 2015, the Commission voted unanimously to deny both the motion to stay the proceeding and the motion to require Algonquin to appear in the proceedings. See Or. 7393b ¶¶ 29-30 (Mar. 27, 2015).
4. The City filed a Renewed Motion for Algonquin to Appear in these Proceedings on June 16, 2015. This issue was fully briefed by the City and Liberty. The City also filed a Motion to Dismiss, or, in the Alternative, to Stay the Proceedings on June 24, 2015. This issue

was fully briefed by the City, Mountain Water, and Liberty. On July 28, 2015, the Commission held oral arguments and a regularly scheduled work session to hear and rule on these motions.

## DISCUSSION

### Dismissing or Staying the Proceedings

5. The Commission previously ruled on this matter in *Order 7392b*, declining to stay the above entitled action. *See* Or. 7392b ¶¶ 4-16. The Commission reaffirms that it presently has jurisdiction over Mountain Water and therefore a dismissal or stay is unwarranted.

6. The City asserts that pursuant to the June 15, 2015 *Preliminary Order of Condemnation* issued by the District Court that the City is now the “constructive owner” of Missoula’s public water system, and thus requests that the Commission dismiss or in the alternative stay this proceeding. City Mot. to Dismiss p. 1. (June 23, 2015).

7. 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).

8. “The suppliant 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 some one else.” *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (quoting *Landis v. North American Co.*, 299 U.S. 248, 166 (1936)).

9. 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.*

10. *Lair v. Murry*, 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).

11. The City argues that a dismissal is justified because “authority over the water system is vested in the District Court.” Mot. at p. 1. The City argues that the Commission “has only limited powers” and that “Missoula’s water system is now constructively a municipally-controlled utility.” Mot. at pp. 2-3.

12. In the alternative, the City requests a stay, arguing that “if the proceeding is not dismissed or stayed, the parties and the PSC will become mired in jurisdictional litigation, and could unnecessarily devote substantial time and resources” to the docket. Mot. at p. 4.

13. In response, Mountain Water argues that the City is not the constructive owner of the utility and that the Commission disclaiming jurisdiction over this proceeding would put Mountain Water and its customers into a regulatory nowhere land. Mt. Water Resp. to City’s Mot. to Dismiss p. 4 (June 30, 2015).

14. Liberty argues that, contrary to the City’s assertions, Mountain Water is not a municipally-controlled utility and that the City is not the constructive owner of the utility. Liberty Resp. to City’s Mot. to Dismiss p. 3. (June 30, 2015). Liberty asserts that the facts have not changed since the first time the Commission rejected the City’s request for a stay. Liberty Resp. at pp. 5-6.

15. In reply, the 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.” City Reply p. 2 (July 7, 2015). The City states that it should be “obvious the PSC lacks jurisdiction regarding the instant proceeding.” *Id.* at p. 3. The City states that it could at any time take possession of the utility, pay the demanded fair compensation, or pursue the fair value determination and then purchase the system, and that there is “no role for the PSC in any of those actions.” *Id.*

16. The Commission concurs with Mountain Water that dismissing the instant proceeding outright would leave the utility in regulatory limbo. The City’s assertion that the Commission would retain jurisdiction over the operations of the utility without having jurisdiction over sales and transfers is unsupported by facts or evidence. If the Commission agrees with the position of the City, Mountain Water could be sold and transferred numerous times before the condemnation case is finalized. This timeframe could be several months or several years, during which there would be no review by any regulatory entity. In addition, the

MCC would be denied the opportunity to fulfill its statutorily obligated duty as the consumer advocate to review utility applications, file testimony, and participate in a hearing.

17. The District Court appears to agree, as 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. 4<sup>th</sup> Jud. Dist. Aug. 19, 2014).

18. At present, the City has not taken steps to legally possess the utility and its assets. "[U]pon payment into court of the amount of compensation claimed by the condemnee in the condemnee's statement of claim of just compensation under 70-30-207 or the amount assessed either by the commissioners or by the jury, the condemnor is authorized:...(ii) if not in possession, to take possession of the property and use and possess the property during the pendency and until the final conclusion of the proceedings and litigation." Mont. Code Ann. § 70-30-311(a). No payment has been established by the condemnation commissioners or a jury. No payment has been tendered by the City for the Mountain Water assets. The statute clearly requires payment of compensation in order for the City to take possession of the utility assets. It makes no mention of constructive possession that the City claims it has over Mountain Water. Therefore, Mountain Water it is still investor owned and controlled until payment is made. Mountain Water pays the employees, the utility expenses, property taxes, debt costs, and owns the water rights. The Commission regulates investor owned utilities until they are no longer investor owned.

19. Furthermore, it is not inevitable that the City will become the ultimate owner of the utility. In the last condemnation proceeding, the City was unsuccessful after more than four years of litigation, which is a possibility in this proceeding as well. The valuation phase and Montana Supreme Court appeals are currently pending. If the Commission dismisses the above entitled action and the City subsequently fails in its condemnation attempt at any point in the lengthy litigation process, the Commission will find itself in an awkward position, a regulatory nowhere land indeed. The Commission finds a dismissal is premature at this time. When and if the City has been granted full legal possession of the utility and its assets, the Commission will re-evaluate the request for dismissal.

20. In the alternative, the City requests a stay, despite the fact that the City states that it “has taken no steps to exercise its statutory authority to take possession” of the water utility. Reply at p. 4. The City argues that when the facts are applied to the four factors in *Lair v. Murray*, it is clear the proceedings should be stayed. Reply at p. 5.

21. The City argues that a stay will not be indefinite or lengthy. *Id.* at p. 8. The City points out that the prior 1980s condemnation case took almost two years to reach trial, but that the present case proceeded to trial in under a year. *Id.* at p. 9. The City also argues that the present day Montana Supreme Court “has dramatically improved the turnaround time for decisions.” *Id.* The City is correct that the District Court has been speedy it’s in treatment of the condemnation proceeding, and the Commission will not dispute the efficiency of the Montana Supreme Court.

22. However, as Mountain Water points out, appeals to the Montana Supreme Court have already been filed. Mt. Water Resp. at p. 6. Additionally, there may well be further notices of appeal filed, depending on how the valuation phase progresses. At minimum, the condemnation case could be resolved in four to six months, but that appears very unlikely considering the ongoing litigation between the City, Mountain Water, Carlyle, and the Mountain Water employees. It is doubtful that the condemnation proceeding will be resolved in a reasonable amount of time consistent with the first factor of the analysis to grant a stay. The City feels confident that it will be successful, but no one can guarantee that the City will inevitably own the water utility. Essentially, there is no way to ensure that a stay, if granted, would not be “indefinite” or “not immoderate in extent.” Considering the history of the previous condemnation proceeding, and the significant litigation presently occurring between the parties, a stay, if granted, more likely than not will be for a substantial, not moderate, amount of time.

23. The City argues that neither “Liberty nor Carlyle will have damages from a stay” and argues that a stay will facilitate an easier transition, ultimately, to the City. Reply at p. 5. Mountain Water beseeches the Commission to “recognize the potential harm to the Joint Applicants if this proceeding is stayed despite the uncertainty surrounding the condemnation proceeding.” *Id.* at p. 6. Mountain Water points out that the City “has not paid just compensation for Mountain Water and may well choose never to do so, nor has the City been authorized to take possession of Mountain water.” *Id.* Mountain Water is correct that it is not

certain that the City will own the water utility, as there are significant legal proceedings regarding valuation still ahead, as well as pending appeals.

24. In such a circumstance, a stay would only accomplish the halting of an ordinary Commission docket, preventing the parties from the benefit of an expeditious final determination regarding the Joint Applicant's request for approval. Intentionally decelerating the pace of this proceeding will not only harm the Joint Applicants, but may deny the other parties the opportunity to investigate and review the proposal in a timely manner. *See, e.g. In re Babcock & Brown Infrastructure Limited*, Dkt. No. D2006.6.82, Or. 6754e p. 57 (Jul. 31, 2007) (In denying the sale and transfer application, the Commission prevented NorthWestern Energy from being owned by a parent corporation that eventually filed for bankruptcy). The City, as the Commission has previously discussed, has been unencumbered by this proceeding in its efforts to condemn the water utility. Or. 7392b ¶ 10. In fact, the speed at which the condemnation proceeding is moving forward demonstrates just how little impact the above entitled action has had on the District Court proceeding.

25. The City argues that a transition to Liberty would involve disruptive and costly changes, which will have to be repeated when, or more appropriately if, the City takes ownership. Reply at pp. 6-7. The City also states that it is "not the City's responsibility to help Carlyle with poor business decisions." *Id.* at p. 11. It is the Commission's responsibility to efficiently render final dispositions of the dockets that come before it. It is fine for the City to do so, but the Commission will not prejudge whether the Joint Applicants' business decision is a poor one. To be able to make a determination on that matter, the Commission and the MCC need to closely review and scrutinize this Application through the administrative process and a hearing. If and when the City is ultimately successful in acquiring Mountain Water, the Commission will reconsider its decision here.

26. The type of harm the City alleges it will endure if the above entitled docket proceeds is general in nature. The City alleges that allowing this docket to proceed will be a waste of time and resources, and that allowing a transition to Liberty and possibly yet another transition to the City, is inefficient. These are concerns, yes, but the party requesting a stay must make "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* at 9.

27. The City has not made a clear case that it will suffer specific hardship or inequity with the continuation of this docket. As discussed, the City's condemnation case is not being hindered in the slightest. The City can participate in the above entitled docket as actively or passively as it desires, therefore the Commission cannot see how the City is being subjected to hardship. The brunt of the hardship in continuing forward, if as the City alleges its ownership of the water utility is all but certain, will be borne by the Joint Applicants.

28. On the other hand, there is a strong possibility that the stay will damage the Joint Applicants. Staying the proceeding, and the City failing to become the owner of the utility, will result in an unnecessary delay in the Joint Applicants receiving a determination on their request. Such a situation in turn may result in the transaction falling through, or possibly the Joint Applicants moving forward before the Commission can appropriately judge the record and make a determination. If the City does not succeed in taking possession of Mountain Water, the halting of the Joint Applicants' transaction will all be for naught.

29. When judging the potential harm, there are two scenarios. On the one hand, if the City ultimately owns the water utility, the above entitled action will result in inefficiency. On the other hand however, if the Commission halts this proceeding, and the City does not ultimately possess the water utility, the Commission will have essentially condemned a proposed sale and transfer without being able to judge the matter on a complete record. The more risky scenario is the later of the two.

30. It is benevolent of the City to attempt to, essentially, save the Joint Applicants from themselves, by preventing the Joint Applicants from moving forward with what the City perceives to be a futile yet costly and disruptive sale and transfer. However, if it is the Joint Applicants and not the general public who will bear the consequences from such a situation, and if the Joint Applicants still desire to move forward, the Commission is in no position to order a stay. The City has failed to make the requisite showing that a stay should be granted.

31. When applying the facts to the *Lair v. Murry* four part test, the factors do not weigh in favor of a stay. Despite the efficiency of the District Court and the Montana Supreme Court, it does not appear likely that the condemnation proceeding will conclude in a reasonable time. Appeals are presently pending, and there will likely be more. A stay in this instance will not merely be delaying monetary recovery, as the Joint Applicants are requesting approval of a proposed sale and transfer. The resolution of some initial determinations in the condemnation

case will not assist in the resolution of this proceeding, as the condemnation case is separate and distinct, as acknowledged by the District Court, and as the Joint Applicants are well aware of the concurrent proceeding and the possible results. Finally, a stay may be efficient to the extent that the Commission halting any proceeding would be efficient. Obviously if the Commission grants a stay it will no longer be necessary for the Commission nor parties to expend time and resources on this particular proceeding. However, in the long term, a stay is likely to create inefficiencies. In a potential future where the City does not become the owner of the water utility, staying this proceeding would have only caused unnecessary delay and the effective disapproval of a sale and transfer docket prior to the Commission being able to render a final decision on the merits. Restarting the proceeding from the beginning at a later date is in no way efficient and may violate all parties' rights to actively participate in this administrative process.

32. For the reasons discussed above, the Commission cannot grant the City's request for dismissal or a stay at this time. However, the Commission is considerate of the City's concerns regarding wastefulness. The Commission finds that the above entitled action should proceed to its conclusion in the most speedy manner possible, to minimize any unnecessary expenditure of time and resources.

### **Requiring Algonquin to Appear in Proceedings**

33. The Commission previously ruled on this issue in Order 7392b and declined to order Algonquin to appear in these proceedings. *See* Or. 7392b ¶¶ 17-28. The Commission reaffirms that Algonquin is a relevant party to this proceeding and could be considered a respondent party but for a lack of personal jurisdiction over Algonquin. *Id.* ¶¶ 18-21. A party can be considered highly relevant to a proceeding, but personal jurisdiction is still a necessary condition before a tribunal may force that party to appear before it:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

34. The Commission's jurisdiction is limited by the Due Process Clause of the U.S. Constitution. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). 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. 310, 316 (1945). “The Supreme Court has bifurcated this due process determination into two inquiries, requiring, first, that the defendant have the requisite contacts with the forum state to render it subject to the forum’s jurisdiction, and second, that the assertion of jurisdiction be reasonable.” *Amoco Egypt Oil Co. v. Leonis Navigation Co. Inc.*, 1 F.3d 848, 851 (9<sup>th</sup> Cir. 1993) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 (1987)).

35. Algonquin does not have any direct connections to Montana. Rather, Algonquin’s sole connection with Montana is that it is the parent of Liberty, which is a party to this proceeding. Joint Application for Sale and Transfer, p. 1 (Dec. 15, 2014). The existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ minimum contacts with the forum. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925). However, “if the parent and the subsidiary are not really separate entities, or one acts as an agent of the other, the local subsidiary’s contacts with the forum may be imputed to the foreign parent corporation.” *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9<sup>th</sup> Cir. 2001) (quoting *El-Fadl .v Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996)).

36. For either general or specific jurisdiction, to establish that a subsidiary is the alter ego of a parent, the party moving for joinder must make out a prima facie case “(1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice.” *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9<sup>th</sup> Cir. 2001) (internal citations, quotation marks, and brackets omitted); *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9<sup>th</sup> Cir. 2003).

37. A potential unity of interest and ownership between Algonquin has already been identified by the Commission. See Or. 7392b ¶¶ 24-25 (“[T]here is at least a scintilla of evidence that suggests that Algonquin exercises some control over Liberty”). The Order noted Algonquin was consulted in the decision of Liberty to purchase Park Water. Data Response (DR) PSC-005a (Feb. 17, 2015). The Commission went on to find there was sufficient separation between Algonquin and Liberty, but stated it would continue to monitor the situation.

Or. 7392b ¶ 25. The City now provides additional evidence of the control exerted by Algonquin over Liberty.

38. Order 7392b also expressed concern about the overlap of Ian Robertson on both Algonquin and Liberty boards. Or. 7392b ¶ 24. Further investigation demonstrates there is additional overlap between the two companies: As the President of Liberty Utilities (Canada) Corp., David Pasieka has personal knowledge of both Algonquin and Liberty's investments and has personal knowledge of how both companies protect their proprietary information. Aff. David Pasieka ¶ 3 (Jun. 10, 2015). David Bronicheski and Chris Jarratt are both associated with Algonquin and Liberty, but this information is less compelling since the City does not provide explanation of how these connections apply directly to the transaction at hand. When taken together, this information does demonstrate that there is an apparent overlap of directors and management between the various subsidiaries with the Liberty title and Algonquin.

39. The City points out that David Pasieka has provided his work address of Liberty Utilities (Canada) Corp. at 345 Davis Road, Oakville, Ontario. Aff. Pasieka at ¶ 1. This address is the same address that Algonquin provides on its website as its head office. Contact Us, Algonquin Power & Utilities Corp., <http://algonquinpower.com/contact-us/> (last visited Aug. 12, 2015). However, the Joint Application for Sale and Transfer states that the primary place of business for Liberty Utilities and Liberty WWH, Inc. is 15 Buttrick Road, Londonderry, New Hampshire 03053. Joint Application for Sale and Transfer, p. 1. It is unclear how much work between Algonquin and Liberty's Untied States operations are conducted in the same office.

40. While “[i]t is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary”, *United State v. Best Foods*, 524 U.S. 51, 69 (1998), and acceptable for the parent to approve of subsidiary acquisitions, *Joiner v. Ryder Sys.*, 966 F. Supp. 1478, 1485 (C.D. Ill. 1996), a parent will satisfy the first prong of this test when it “dictates ‘every facet [of the subsidiary’s] business—from broad policy decisions to routine matter of day-to-day operation.’” *Unocal*, 248 F.3d at 926 (citing *Rollins Burdick Hunter of So. Cal. v. Alexander & Alexander Servs.*, 206 Cal. App. 3d 1, 11 (Cal. App. 2d Dist. 1988)). Courts have also considered “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” for demonstrating parents and subsidiaries are the same entity. *Tokyo Boeki (U. S. A.), Inc. v. SS Navarino*, 324 F. Supp. 361, 366 (S.D.N.Y. 1971).

41. Most importantly to the question before the Commission in this docket, data responses given by Liberty after the issuance of Order 7392b have revealed that Algonquin was not only consulted about the acquisition, but also was the primary decision maker. When asked to provide financial analysis, due diligence, and board minutes related to this acquisition, Liberty responded with its own financial model; a September 1, 2014 PowerPoint deck presented to the Algonquin Board; a Due Diligence Report compiled by Algonquin’s General Counsel; a September 15, 2014 PowerPoint deck presented to Algonquin’s Board; and excerpts of minutes from Algonquin Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014. DRs PSC-033(b); MCC-010; CITY-031. It is unclear whether Liberty even held a board meeting to approve the acquisition before Algonquin acted on the question. The Commission finds that while some evaluation of the purchase may have been made under the name of Liberty, virtually all meaningful decision-making concerning the proposed acquisition of Park was made by Algonquin.

42. Alone, the overlap between boards of Liberty and Algonquin, the involvement of Algonquin in Liberty’s acquisitions or other evidence of shared operations is not dispositive of a unity of interest between the two companies. Rather, extent and pervasiveness of these facts in concert indicates that “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). Additionally, Liberty is the wholly-owned subsidiary of Algonquin. Joint Application for Sale and Transfer, p. 1. As a result, Algonquin has complete ownership over Liberty and derives the benefits of Liberty’s profits. *Tokyo Boeki*, 234 F. Supp. at 366. On total, there is such unity of interest and ownership that the separate personalities of Algonquin and Liberty no longer exist satisfying the first prong of the alter ego test. *See supra* ¶ 35.

43. The second requirement of the minimum contacts test is that failure to disregard the separate identities of the parent and subsidiary would result in fraud or injustice. *Unocal Corp.*, 248 F.3d at 926; *see, e.g. Lane v. Mont. Fourth Jud. Dist. Court*, 2003 MT 130, ¶ 30, 316 Mont. 55, 68 P.3d 819 (“[T]rier of fact must find evidence that the corporate entity was used as subterfuge to defeat public convenience, justify wrong, or perpetrate fraud”). The City argues that Liberty’s reluctance to provide certain information demonstrates that this requirement has

been satisfied. The Commission agrees that the discovery process in the proceeding has been challenging at times. *See* Or. 7392c (Mar. 6, 2015) (compelling production of redacted information); Or. 7392d (Apr. 15, 2015) (affirming reconsideration of Or. 7392c); Or. 7392e (Jun. 3, 2015) (compelling production of due diligence and financial projections); Or. 7392f (Jun. 5, 2015) (granting a challenged motion for protective order concerning Confidential Information Memorandum and Management Presentation); Or. 7392g (Jun. 5, 2015) (granting a challenged motion for protective order concerning employee compensation); Or. 7392j (granting a challenged motion for protective order concerning employee compensation); Or. 7392m (denying a motion to compel information).

44. Despite these challenges, the corporate structure of Algonquin and Liberty has not been the root-cause of these disputes. Many of the motions and objections in this Docket have been based on trade secret, privilege, and relevance. Had Algonquin been a party to these proceedings, it would have still had the opportunity to raise the same arguments. Corporate organization has not been the basis of Liberty's legal arguments in any of these discovery disputes. Therefore, the Commission finds that no fraud or injustice will occur as a result of Algonquin's absence and this requirement is not met.

45. There is the final question of whether requiring Algonquin to appear would be reasonable or offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Wash.*, 326 U.S. at 316; *Amoco Egypt Oil Co.*, 1 F.3d at 851. This requires examining Montana's interest in adjudicating the issue, the burden on Algonquin appearing in the proceeding, and the most efficient resolution of the controversy. *Bunch v. Lancair Int'l, Inc.*, 2009 MT 29, ¶ 42, 349 Mont. 144, 202 P.3d 784. The number of parties already involved in the proceeding has made the mere task of scheduling deadlines and events a difficult task. At this juncture, adding an additional party will only exacerbate these problems. A parallel procedural schedule would need to be established so that the parties could conduct discovery. Based on the thoroughness of discovery in this proceeding, this would likely result in duplicative questions already directed towards Liberty. The degradation of procedural efficiency and economy in attempting to accommodate an additional party is not worth the attenuated benefits that could be derived by having Algonquin directly available. Requiring Algonquin to appear in these proceedings would be unreasonable and would offend traditional notions of fair play and substantial justice. The Commission reiterates its expectation that Liberty provide information

about Algonquin and to not use corporate structure as a reason for withholding information. *See* Or. 7393b ¶ 26.

46. The Commission restates that other upstream parents of subsidiaries involved in sale and transfer dockets have not been required to appear; they have done so on their own volition. *See, e.g. In re Qwest Corp.*, Dkt. No. 2010.5.55, Or. 7096e ¶¶ 3-4 (Dec. 14, 2010) (voluntary participation of the parent company Qwest Corporation); *In re Mountain Water*, Dkt. No. D2011.1.8, Or. 7149b ¶ 12 (Aug. 3, 2015) (voluntary participation of the parent company Carlyle Infrastructure Partners, L.P.). The Commission shares the views of the California Public Utility Commission that “where when a utility tier transfer results in new indirect owners for that utility, we think naming all such entities as applicants is the better practice.” *In re Sierra Pacific Power Co.*, Order No. 10-10-017, p. 8 (Cal. Pub. Util. Comm’n Oct. 4, 2010). In that proceeding, the California Public Utility Commission found that the indirect owner’s active participation and voluntary presence served as acceptable substitute to the requirement of the California Public Utility Code that indirect prospective owners appear in sale and transfer dockets. *Id.* at pp. 7-8; *see also* Cal. Pub. Util. Code § 845(a).

47. Although Montana law has no such explicit provisions, 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”). The Commission has interpreted this authority to examine sale and transfer dockets under the public interest standard, the no-harm to consumers standard, or the net-benefit to consumers standard. *In re Babcock & Brown Infrastructure*, Dkt. No. D2006.6.82, Or. 6754e p. 13 (Jul. 31, 2007). In past proceedings, the Commission considered whether a parent’s proposed ownership of a subsidiary presents the likelihood that the subsidiary’s capital structure will deteriorate and become unacceptably leveraged. *Id.* at p. 49. While the Commission has been able to make this determination in part by reviewing a proposed parent corporation’s financial projections, *id.*, a proposed parent’s active participation and voluntary presence increase the chances that it will meet its burden of proof under the public interest standard, the no-harm to consumers standard, or the net-benefit to consumers standard.

The involvement of parent corporations in sale and transfer dockets will continue to bear on the applicant's burden of proof when personal jurisdiction over that parent corporation is lacking.

48. Based on this analysis, requiring Algonquin to appear in this proceedings is not consistent with the minimum contracts rule and fair play and substantial justice.

**ORDER**

IT IS HEREBY ORDERED THAT:

49. The City of Missoula's Motion for Dismissal or in the alternative to Stay Proceedings is denied.

50. The City of Missoula's Renewed Motion to Require Algonquin Power & Utilities Corp. to Appear in Proceedings is denied.

DONE AND DATED this 28<sup>th</sup> day of July, 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)

