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

WESTERN WATER HOLDINGS AND MOUNTAIN WATER COMPANY'S
RESPONSE TO THE CITY OF MISSOULA'S
MOTION TO STAY

Western Water Holdings, LLC ("Western Water") and Mountain Water Company ("Mountain Water"), by and through their counsel, Holland & Hart LLP, and pursuant to Procedural Order No. 7392, respectfully submit this Response to the City of Missoula's ("City") Motion to Stay ("Motion") that was filed with the Montana Public Service Commission ("Commission") on February 13, 2015. For the reasons set forth below, the Commission should deny the City's Motion and allow this case to continue in accordance with the procedural schedule established in Procedural Order No. 7392.

The City asserts that the Commission should grant a stay because: (1) the property at issue in the case before the Commission and the condemnation case initiated by the City in state district court is identical, (2) the condemnation case will be concluded in a reasonable amount of time, (3) the applicants would not be harmed by a stay, (4) a decision in the condemnation would aid the Commission in resolving the instant case, and (5) inaction by the Commission would be efficient and fairer to the parties. These arguments are without merit. Whether Carlyle Infrastructure Partners ("Carlyle Infrastructure") or Liberty Utilities Co. ("Liberty Utilities") owns Western Water is irrelevant to the City's attempt to condemn the assets of Mountain Water.

If the acquisition is approved by the Commission and closes before the condemnation case is over, Mountain Water will continue to (1) own the assets at issue in state district court; and (2) be a defendant in that case. Conversely, if the Commission grants the requested stay, the Commission's consideration of the pending application could be needlessly delayed for years.

ARGUMENT

On December 15, 2014, Mountain Water, Western Water, Liberty Utilities Co., and Liberty WWH, Inc. ("Liberty WWH") filed a joint application with the Commission for approval of a sale and transfer of stock. That filing has been properly noticed by the Commission, interventions have been sought and granted, and the Commission has issued a procedural order that will, if followed, resolve the issues raised in the application in a reasonably timely fashion while affording all parties their due process rights.

Yet the City now argues that the Commission should stay the consideration of this application for approval of the acquisition of Western Water until the pending condemnation case, that it initiated for Mountain Water's assets in the judicial branch, has been fully resolved.[1] This relief, if granted, could prevent the Commission's consideration of this application for years. While no one knows how long the pending condemnation case will take before it is fully resolved, it is instructive that the City filed a condemnation petition for Mountain Water's assets in 1984[2] and that case didn't conclude until 1989.[3] During that five year period, there were two trials and two appeals to the Montana Supreme Court before a final resolution was achieved. Ultimately, the City lost its condemnation effort and Mountain Water continues to be privately owned. The Commission should reject the extraordinary relief sought in the City's Motion and

[1] Motion at p. 1.
[2] *See City of Missoula v. Mountain Water Co.*, 743 P.2d 590, 592 (Mont. 1987).
[3] *See City of Missoula v. Mountain Water Co.*, 771 P.2d 103 (Mont. 1989).

allow this docket to proceed in the orderly fashion set forth in the Commission's Procedural Schedule.

There are two facts critical to the Motion that the City either ignores or misunderstands. First, Liberty Utilities' acquisition of Western Water is not contingent on the outcome of the pending condemnation proceeding brought against Mountain Water and Carlyle Infrastructure by the City of Missoula. The Merger Agreement does not include a closing condition, escrow requirement, or price adjustment to account for the ongoing condemnation proceeding, and the change in control of Western Water would not have an effect on the outcome of the condemnation case at the asset level regardless of who prevails in that litigation.

Second, this proceeding does not involve the sale or transfer of any of Mountain Water's utility assets that are the subject of the pending condemnation. Instead, the Commission has been asked to approve the sale and transfer of Western Water's stock, an upstream entity that owns Mountain Water's direct parent, Park Water. Mountain Water is just one of several entities owned by Park Water, all of which are being sold and transferred to Liberty Utilities in the agreement before the Commission. If the Commission issues an indefinite stay to this proceeding, that decision would impact the entire transaction.

Notwithstanding these facts, the City has effectively asked the Commission to prematurely surrender its jurisdiction over Mountain Water, in a manner that is both contrary to the Commission's authority under existing law and inconsistent with the City's previous arguments regarding the impact of the condemnation proceeding on the Commission's jurisdiction. A review of those prior statements shows that the City agrees the Commission loses its jurisdiction *only if* the City ultimately successfully condemns Mountain Water's assets. Thus the City has essentially asked the Commission to share its optimism for a victory in the

condemnation case by staying this proceeding, based almost entirely on the unrealistic assumption that a final resolution in the condemnation case is imminent. Again, history shows that a final resolution in the condemnation case is likely years, not months, away. Not only must the City be successful in its legal complaint to condemn Mountain Water, but the City also must be able to finance and fund any fair market value determination for Mountain Water. The possibility of the City ultimately taking over Mountain Water is subject to myriad contingencies, both legal and factual, that undercut the City's request to stay this proceeding.

Based on the Commission's authority and obligation to consider the application before it and the significant uncertainty surrounding a final resolution in the City's most recent attempt to condemn Mountain Water's utility assets, the Commission should deny the Motion.

I. The condemnation action has no impact now on the Commission's jurisdiction over Mountain Water and the pending application.

The regulation of privately owned utilities in Montana, such as Mountain Water, is properly within the Commission's jurisdiction.[4] Based on this authority, the Commission has exercised jurisdiction over the sale and transfer of utility assets, and even claimed jurisdiction over the upstream change in ownership of utilities in Montana. In light of this history, the Commission has been asked in this docket to review and approve the change in ownership of Western Water, which owns the stock of Park Water. But both before and after the merger, Mountain Water and its assets will still be privately owned, and therefore subject to the Commission's jurisdiction. Conversely, *only if and when* the City prevails in its pending eminent domain action, *and* decides to actually acquire Mountain Water's assets at the price set through the condemnation process, *and* actually pays that price to Mountain Water, will Mountain Water's assets and operations be removed from the Commission's jurisdiction.

[4] Motion at p. 8 (citing MCA § 69-3-102).

Importantly, when seeking to keep the Commission out of the condemnation case, the City responded to the Commission's concerns that the eminent domain proceeding would challenge or interfere with the Commission's authority to determine whether the transfer of Mountain Water's assets was in the public interest by stating: "[i]n reality, there is no such threat."[5] As the City explained further:

> If the City's eminent domain action is unsuccessful, the PSC will continue to function as the regulatory body over Mountain Water, with no change whatsoever to the status quo. On the other hand, if the City's eminent domain action is successful, the PSC will have no ability under Montana law to exercise regulatory control. Either way, the PSC's properly exercised authority, as defined by statute, is unaffected by the outcome of this case.[6]

The City went on to explain that the Commission's interest in the condemnation proceeding—an interest specifically tied to the Commission's authority over Mountain Water—was "both remote and contingent, and would only arise if and when the Court determines the City has met the public necessity requirement for the condemnation, and after the City tenders fair value as determined by the Commissioners to be appointed after the Court's decision."[7] As the City put it, the condemnation action ***"simply has no bearing on the PSC's authority or jurisdiction."***[8]

Thus, in order for the Commission to be stripped of its jurisdiction over Mountain Water, at least two things must occur: first, the City must prevail in the condemnation action (which will be hotly contested as an inappropriate taking of private property); and second, the City must finance, fund, and pay fair value as established in the condemnation case for Mountain Water's assets. The Commission should hold the City to its previous statements and find the condemnation proceeding has no bearing on the Commission's jurisdiction unless and until the

[5] Plaintiff's Brief in Opposition to Montana Public Service Commission's Motion to Intervene ("City Brief") at p. 11 (Attached as Exhibit A).
[6] City Brief at p. 13 (emphasis in original omitted).
[7] City Brief at 13-14 (emphasis in original omitted).
[8] City Brief at 14.

City successfully condemns and pays for Mountain Water's utility assets. In the absence of these "remote and contingent" events, the Commission should proceed with its business under the status quo.

II. The sale and transfer of Western Water is independent from the condemnation case regarding Mountain Water's utility assets, and there is no risk of inconsistent rulings.

In arguing for a stay, the City fabricates a dependent relationship between this proceeding and the condemnation case where no such relationship exists. This proceeding involves the sale and transfer of Western Water, a holding company that indirectly owns Mountain Water, not a sale or transfer Mountain Water's utility assets. In contrast, the sole focus of the condemnation case is Mountain Water's utility assets. Thus, the viability of this proceeding is not dependent on the outcome of the condemnation case, and there is no requirement for this case to be stayed. Instead, the Commission should proceed with reviewing and approving the sale and transfer before it, recognizing that the condemnation case involves issues that are entirely independent from this proceeding.

To support its argument that a dependent relationship between this proceeding and the condemnation action exists, the City points to *Schara v. Anaconda Co.*[9] This comparison is inapplicable, and *Schara* actually helps to illustrate the independent relationship between the two proceedings. In *Schara*, the Anaconda Company filed an eminent domain action to condemn a two-acre piece of private property.[10] The property owners filed a separate action to restrict the Anaconda Company's use of the property surrounding their land under a zoning ordinance.[11] The Anaconda Company sought a stay of the zoning ordinance action pending the outcome of

[9] 610 P.2d 132 (Mont. 1980)
[10] *Id.* at 133.
[11] *Id.*

the condemnation suit because the zoning issues would be moot if the condemnation was successful.[12] The district court denied the request, but the Montana Supreme Court reversed that decision because the condemnation action determined whether the zoning action was moot.[13] In reversing the denial of the stay, the Supreme Court concluded "that a restrictive covenant action is moot when a preliminary condemnation action involving *the same property* is pending."[14] Thus, in *Schara*, the *same property* was the focus of both proceedings, a situation that is not analogous to the one before the Commission here.

Instead, under the transaction before the Commission, the parties have proposed absolutely no changes to Mountain Water or its utility property. Rather, the Commission has only been asked to approve a change in the indirect ownership of Mountain Water. The only asset at issue before the Commission is Western Water's stock, not Mountain Water's utility assets that are the focus of the condemnation proceeding. In fact, the agreement memorializing the sale and transfer of Western Water was executed after the condemnation action was initiated, yet that agreement is not conditional on the outcome of that proceeding. Instead, the risk of the City successfully condemning Mountain Water's assets is appropriately considered a liability being sold and transferred in the transaction before the Commission. Reviewing and approving the sale and transfer in no way changes the current use or ownership of Mountain Water's utility property, and therefore the issues in this proceeding are independent from those in the condemnation action. Because of the independent nature of both the assets and issues presented in the condemnation case and this proceeding, the Commission should recognize there is no threat of inconsistent rulings and the City's Motion should be denied.

---

[12] *Id.* at 134.
[13] *Id.* at 136.
[14] *Id* (emphasis added).

III. Because the sale and transfer of Western Water's stock is independent from the condemnation of Mountain Water's assets, and because of the uncertainty regarding final conclusion in the condemnation case, the Commission should not stay this proceeding.

With the independent nature of the two proceedings established, the City's other arguments for a stay are easily unraveled. First, the City argues that the condemnation proceeding will be concluded in a reasonable time. However, the history of the City's previous failed attempt to condemn the same property shows that a final decision in the condemnation proceeding is likely years away, regardless of which party prevails.

Second, the City argues there would be no harm from the stay, a conclusion based primarily on the mistaken belief that the condemnation proceeding will be concluded in a reasonable time. This is an optimistic but unrealistic assumption, and staying this proceeding in the face of a prolonged battle over condemnation of the assets of one operating unit owned by Park Water would result in holding hostage the $327 million deal for the acquisition of Western Water by Liberty Utilities.

Third, the City claims that resolving the condemnation action would aid in the resolution of this proceeding. But this conclusion relies on the City's misunderstanding of the issue before the Commission in this case (*i.e.*, the sale and transfer of *Western Water*), compared with the narrow issue before the court in the condemnation action (*i.e.*, the need for public ownership of *Mountain Water's* utility assets). In reality, these issues are completely independent, and the risk of the City successfully condemning Mountain Water's assets after the acquisition by Liberty Utilities is part of what is being transferred in the deal for the sale and transfer of Western Water.

Finally, the City argues that a stay is appropriate because of efficiency and fairness. But what the City views as efficient and fair is nothing but undue delay and prejudice to the parties to the transaction before the Commission. The City alone can control the extent it participates in

this proceeding, and any problems presented by participating in multiple proceedings would be self-inflicted.

a. It will likely take years to obtain final resolution in the condemnation proceeding.

The City points to the condemnation statutes and the scheduled trial date for the condemnation case to support the conclusion that the condemnation proceeding will conclude within a reasonable time. It also asserts that a ruling in its favor by the district court will obviate the need for the Commission "to approve the sale to Liberty." In making this argument, the City appears to have forgotten the protracted condemnation fight, over the same property and between the same parties, that occurred in the 1980s, including two appeals to the Montana Supreme Court.

Setting aside the lack of efficiency provided by precedent—precedent the City must overcome to prevail in the current condemnation action—there is no reason to expect the current condemnation proceeding to be any less contentious or any more expeditious. Although the trial to determine necessity may be scheduled for March 18th, the ultimate resolution is likely years away regardless of which party prevails. In light of the history surrounding condemnation proceedings and the uncertainty regarding a final resolution of the pending condemnation case, the Commission should allow this case to proceed in accordance with the procedural schedule established in Procedural Order No. 7392.

b. Given the unpredictable future of the condemnation proceeding, the Joint Applicants will be harmed by a stay.

As set forth above, it is unreasonable to expect that a final resolution in the condemnation proceeding is imminent. Thus, the City's claim that "the necessity determination will occur soon and Applicants will suffer no continuing harm with a stay of these proceedings" is simply untrue.

Staying this proceeding now, despite the reality that it cannot be determined when or how the condemnation trial will conclude, will have the practical effect of allowing the City to hold the transaction underlying this case captive for years.

This Commission has been asked to approve an agreement for the sale and transfer of Western Water, an entity that owns 100% of the Park Water Company, which in turn owns and operates a public utility water system in southeast Los Angeles and operates as a parent company for two other water utilities: Apple Valley Ranchos Water Company and Mountain Water. The purchase price for Western Water is $250 million, plus assumption of approximately $77 million in debt. The Commission's approval is a condition to the closing of this transaction,[15] and a decision on that approval should not be withheld or delayed based on the mere possibility that the City could prevail in the condemnation action. This is particularly true when a final resolution of the condemnation issue is likely years away, and the agreement could be terminated as a result of the Commission's failure to render a decision in an efficient and expeditious manner.[16]

In contrast, denying the Motion will have absolutely no impact on the City's condemnation effort. That is a separate proceeding, involving separate assets, and a municipal entity can exercise its eminent domain power at any time, regardless of who the upstream owner is. While the risk of harm to Western Water, Mountain Water, and Liberty Utilities is significant if the Motion is granted, there is no risk of harm to the City if the Motion is denied.

c. Because the condemnation case and this proceeding involve independent issues and assets, the resolution of this proceeding will not be aided by a stay.

[15] Section 7.2(d) to Exhibit B to the Joint Application.
[16] Section 9.1(b) to Exhibit B to the Joint Application.

As established above, this proceeding and the condemnation case are focused on entirely different issues and assets. Here, the Commission must consider the sale and transfer of Western Water's stock. In the condemnation case, the court must consider whether the City needs to condemn Mountain Water's utility assets. There is simply no way the resolution of this proceeding will be aided by a decision in the condemnation case, nor will it be aided by an indefinite stay to allow for that decision.

d. Efficiency and fairness support denying the stay.

Finally, the City supports its request for a stay based on the concepts of efficiency and fairness. Setting aside the irony of the City arguing for the responsible use of government resources while it once again pursues a condemnation that was already rejected before, the entire context of this proceeding shows that neither efficiency nor fairness support granting the stay.

First, it is doubtful that the City will prevail in its condemnation effort, and, even if the City were to prevail, a final determination in the condemnation case is likely years away. It would be inefficient for the Commission to stay this case based on the false expectation of a quick resolution in the condemnation case, only to recommence this proceeding when another prolonged fight over condemnation ensues. Instead, the Commission should acknowledge that a prompt resolution of the condemnation case is highly unlikely, and should allow this proceeding to continue in an efficient manner consistent with the procedural schedule already established.

Second, it bears reminding that the City is an intervenor in this proceeding, and therefore the extent of its participation is entirely voluntary. If the City is determined to fulfill its promise that this proceeding will be "even more extensive" than the 2011 sale to Carlyle Infrastructure, then the City has chosen to balance that effort with the ongoing demands in the condemnation trial. Any confusion, uncertainty, or delay as a result of that effort would be self-inflicted.

Alternatively, the City could choose to focus on its condemnation action and, if successful, condemn Mountain Water's assets when Western Water is owned by Liberty Utilities. Indeed, since the upstream owner is irrelevant to the assets being condemned, if the City is as confident in its condemnation case as reflected in the Motion, then it should not be concerned about contesting the sale and transfer of Western Water.

By comparison, the Commission's approval is a necessary step of completing the sale and transfer of Western Water where Mountain Water and its utility assets are just one part of the deal. In this context, it is more efficient and fair for the Commission to continue with this proceeding under the procedural schedule in place, rather than suspending this proceeding for what could be years before a final resolution in the condemnation action is reached.

CONCLUSION

The Commission should deny the City's Motion and allow this proceeding to continue in accordance with Procedural Order No. 7392, because:

(1) the property at issue in this docket and the condemnation case is not identical (this case involves the stock of Western Water; the condemnation involves the assets of Mountain Water);

(2) the condemnation case will likely not be concluded for years;

(3) the Applicants will be harmed by a stay because approvals from the Commission and the California Public Utilities Commission are required to complete the transaction for the stock of Western Water; and

(5) although inaction by the Commission might be more efficient for the City, a voluntary participant in the docket, it would not be more efficient or fair for the Applicants.

Respectfully submitted this 23rd day of February, 2015.

HOLLAND & HART LLP

s/ Thorvald Nelson
Thorvald Nelson, # 8666
Nikolas Stoffel, # 13485
Holland & Hart LLP
6380 South Fiddlers Green Circle, Suite 500
Greenwood Village, CO 80111
Telephone: (303) 290-1601, 1626, respectively
Facsimile: (303) 290-1606
tnelson@hollandhart.com
nsstoffel@hollandhart.com

ATTORNEYS FOR MOUNTAIN WATER COMPANY AND WESTERN WATER HOLDINGS

CERTIFICATE OF SERVICE

I hereby certify that on this, the 23rd day of February, 2015, **WESTERN WATER HOLDINGS AND MOUNTAIN WATER COMPANY'S RESPONSE TO THE CITY OF MISSOULA'S MOTION TO STAY** was filed with the Montana PSC and served via U.S. Mail and/or e-mail, unless otherwise noted, to the following:

Kate Whitney Montana PSC 1701 Prospect Avenue PO Box 202601 Helena, MT 59620-2601 kwhitney@mt.gov	Robert Nelson Monica Tranel Montana Consumer Counsel 111 North Last Chance Gulch, Suite 1B P.O. Box 201703 Helena, MT 59620-1703 robnelson@mt.gov MTranel@mt.gov
Barbara Chillcott Legal Director The Clark Fork Coalition 140 S 4th Street West, Unit 1 PO Box 7593 Missoula, MT 59801 barbara@clarkfork.org	Jim Nugent City Attorney The City of Missoula City Attorney's Office 435 Ryman Street Missoula, MT 59802 JNugent@ci.missoula.mt.us
Gary Zadick #2 Railroad Square, Suite B P. O. Box 1746 Great Falls, MT 59403	Scott Stearns Natasha Prinzing Jones BOONE KARLBERG P.C P.O. Box 9199 Missoula, MT 59807-9199 npjones@boonekarlberg.com sstearns@boonekarlberg.com
Thorvald A. Nelson Nikolas S. Stoffel Holland & Hart LLP 6380 South Fiddlers Green Circle Suite 500 Greenwood Village, CO 80111 tnelson@hollandhart.com nsstoffel@hollandhart.com	John Kappes President & General Manager Mountain Water Company 1345 West Broadway Missoula, MT 59802-2239 johnk@mtnwater.com
Christopher Schilling Chief Executive Officer Leigh Jordan Executive Vice President Park Water Company 9750 Washburn Road Downey, CA 90241 CSchilling@parkwater.com LeighJ@parkwater.com	Michael Green Gregory F. Dorrington CROWLEY FLECK PLLP 100 North Park, Suite 300 P. O. Box 797 Helena, MT 59624-0797 mgreen@crowleyfleck.com gdorrington@crowleyfleck.com

Todd Wiley Assistant General Counsel Liberty Utilities 12725 West Indian School Road, Suite D-101 Avondale, Arizona 85392 Todd.Wiley@LibertyUtilities.com	
	For electronic service only: cakennedy@hollandhart.com aclee@hollandhart.com camayers@hollandhart.com cuda@crowleyfleck.com jtolan@crowleyfleck.com sscherer@mt.gov

s/ Adele C. Lee

7531978_3

Docket No. D2014.12.99

Exhibit A to Western Water Holdings and Mountain Water Company's Response to the City of Missoula's Motion to Stay

Scott M. Stearns
Natasha Prinzing Jones
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199
Tel: (406)543-6646
sstearns@boonekarlberg.com
npjones@boonekarlberg.com

FILED JUL 15 2014
SHIRLEY E. FAUST Clerk
By_____ Deputy

William K. VanCanagan
Phil L. McCreedy
DATSOPOULOS, MACDONALD & LIND, P.C.
201 West Main, Suite 200
Missoula, MT 59802
Tel: (406) 728-0810
bvancanagan@dmllaw.com
pmccreedy@dmllaw.com

Attorneys for Plaintiff

Harry H. Schneider, Jr.
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
HSchneider@perkinscoie.com

Admitted Pro Hac Vice

MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

THE CITY OF MISSOULA, a Montana municipal corporation,

Plaintiff,

vs.

MOUNTAIN WATER COMPANY, a Montana corporation; and CARLYLE INFRASTRUCTURE PARTNERS, LP, a Delaware limited partnership,

Defendants,

and

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, et al.

Intervenors.

Cause No. DV-14-352

Dept. No. 4

PLAINTIFF'S BRIEF IN OPPOSITION TO MONTANA PUBLIC SERVICE COMMISSION'S MOTION TO INTERVENE

INTRODUCTION

This Court, not the Montana Public Service Commission ("PSC"), has exclusive jurisdiction and absolute legal authority to decide the City's eminent domain case. Mont. Code Ann. § 70-30-101, *et seq.* The PSC has no adjudicative power to rule administratively on any issues presented in this condemnation case. And, if the Court ultimately decides that "public necessity" is proved, the PSC will not have any post-transaction authority to regulate the municipally owned water company once the City acquires and begins to operate Missoula's water system.

Unlike the parties already named in the caption, the PSC has no property rights at risk, nor any property rights to enforce in this case. For instance, the PSC does not have standing to seek any relief from the Court, and in its proposed Answer to the City's Amended Complaint, it seeks no specific relief. The PSC will not forfeit any property rights if the City prevails in its effort to condemn defendants' property. Similarly, the PSC has no contractual entitlements that it will be unable to enforce if a Preliminary Condemnation Order is entered against Defendants Mountain Water Company ("Mountain Water") and Carlyle Infrastructure Partners, LP ("Carlyle").

In short, the PSC has no standing to participate as a party in this case, and standing cannot be magically conferred just because the PSC Commissioners wish to be heard. The City's initiation of a condemnation

proceeding is not an invitation for any agency or individual with a political opinion to intervene as a party in order to express their views. The PSC is a creature of the Montana Legislature and its authority is both prescribed and proscribed by statute. Clearly, the PSC's authority does not extend to participation as a party in this litigation. The PSC's unilateral attempt to expand by fiat the scope of its statutory authority should be rejected and its motion to intervene as a party should be denied.

BACKGROUND

The City seeks a judicial determination entitling it to acquire by exercise of its power of eminent domain Missoula's water supply and distribution system. The water system is currently owned by Defendants Mountain Water and Carlyle. The PSC has no power to condemn property itself, and it has no property that is the object of the City's condemnation lawsuit.

Curiously, the PSC's motion to intervene is unopposed by both Mountain Water and Carlyle, even though both Defendants have strenuously argued in the past that the PSC has no jurisdiction over sales or transfers of utilities, even sales of privately owned utilities.[1]

[1] In 2000, Mountain Water argued the PSC had no authority to approve its sale of the Superior water supply to the Town of Superior. Mountain Water's current counsel of record, John Alke, argued that because Montana did not have a certificate system to govern utilities and no asset transfer statute, the PSC had no jurisdiction. (2000 John Alke Letter, **Exhibit A**.) As recently as 2011, Mountain Water and Carlyle denied the PSC had jurisdiction over the sale of the Missoula water system. Mr. Alke noted, "[s]o again, the consistent position – our position has been, from the beginning, that this Commission does not have jurisdiction over this transaction." (*See* Testimony of Robert Dove on Behalf of Carlyle, 12:18-21; pp. 12-18 (Sept. 26, 2011), **Exhibit B**.)

The PSC's motion to intervene is based on a 2011 administrative order from the PSC. Specifically incorporated into that order was a stipulation by Mountain Water, Carlyle, the City, and the Montana Consumer Counsel which provided that, in the future, Mountain Water "shall not transfer, sell, lease or otherwise dispose of" the Missoula water system "[w]ithout the prior and specific authorization of the Commission." (Stipulated Ring Fencing Condition, Appx. B to the PSC's Brief.) The PSC concluded it "would review any future transfer of Mountain [Water] to the City or any other entity under the same standards that govern its decision in this case." (Order 7149d, Appx. A to the PSC's Brief.)

As set forth in the City's Amended Complaint, Carlyle has rejected the City's good faith offers to purchase the Missoula water system. Accordingly, there is not yet a "transfer of Mountain [Water]" for the PSC to review. Instead, the City has been forced to seek relief in this Court through eminent domain. Until that effort is successful, any review by the PSC is premature. Apparently, the PSC believes the parties' 2011 preservation of their right to insist that the PSC review a future transfer of Mountain Water somehow bestows on the PSC a legal right to participate in the current lawsuit. As set forth below, the PSC is wrong. It has no legally protectable interest in this case, and has it no standing to assert a claim or defense that shares a common question of law or fact with the claims and defenses of the entities who are proper parties. The PSC's motion must be denied.

ANALYSIS

I. THE PSC HAS NO AUTHORITY TO INTERVENE IN THIS EMINENT DOMAIN ACTION.

A. The PSC Has No Statutory Authority To Intervene.

The PSC describes its own role in state government as follows: "The Commission is established by the Montana Legislature to regulate the rates and service quality of privately owned water utilities and is required by law to make decisions consistent with the public interest." (PSC's Brief, p. 11 (emphasis added) (citing Mont. Code Ann. §§ 69-3-101 to 69-3-2010).) By its own admission, the PSC is empowered to regulate the customer rates and the service provided by only privately held utilities, nothing more. By definition, the PSC will continue to do just that if the City's condemnation action fails. And, if the City's condemnation action succeeds, the PSC's regulatory authority will cease because Missoula's water system will no longer be privately held.

The Montana Supreme Court has ruled the PSC "is a mere administrative agency, created to carry into effect the legislative will." *State v. Boyle*, 204 P. 378, 379 (Mont. 1921). Thus, the PSC "has only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power will be resolved against the existence of power." *Id.*; *see also Great Northern Utilities Co. v. Public Service Com'n.*, 293 P. 294, 298 (Mont. 1930) ("[T]he Commission is a creature of, owes its being to,

and is clothed with such powers as are clearly conferred upon it by statute."). The PSC "has no inherent common law powers." *Montana Power Co. v. Public Service Commission*, 671 P.2d 604, 611 (Mont. 1983) (citing *City of Polson v. Public Service Com'n.*, 473 P.2d 508 (Mont. 1970)).

As the PSC aptly notes in its motion to intervene, its authority derives solely from the Montana Legislature, as defined in its enabling statute: "A public service commission is hereby created, whose duty it is to supervise and regulate the operation of public utilities. . . . Such supervision and regulation shall be in conformity with this title." Mont Code Ann. § 69-1-102. The legislature expressly provided this power does not include judicial powers. Mont. Code Ann. § 69-3-103(1); *see also Montana Power Co.*, 671 P.2d at 611-14. In addition, the authority conferred by the legislature does not include control and oversight over municipal or other publicly owned utilities. *City of Billings v. County Water District of Billings Heights*, 935 P.2d 246, 249 (Mont. 1997).

In view of its limited grant of authority, the PSC's argument that it is in danger of "losing jurisdiction" as a result of this eminent domain proceeding simply makes no sense. The Montana Code is perfectly clear that eminent domain actions are <u>judicial</u> determinations. The Montana Constitution states "[t]he judicial power of the state is vested in one supreme court, district courts, justice courts, and other such courts as may be provided by law." Mont. Const.

art. VII, § 1. The Montana Legislature has been explicit that the PSC does not have judicial authority. Mont. Code Ann. § 69-3-103(1). This Court is the only authority empowered to adjudicate this eminent domain proceeding, and the Montana Supreme Court is the only body with authority to conduct an appellate review of this Court's decision.

The PSC's authority to supervise, regulate, and control customer water rates and customer service provided by utilities is limited to the provisions of Title 69. Importantly, supervision, regulation, and control constitute oversight that is exercised over the operations of the entity itself, such as implementation of rate increases, and determining adequate levels of customer satisfaction and quality of service. In no way does that limited mandate confer on the PSC a "legally protectable interest" entitling it to litigate in favor of or in opposition to the City's power to condemn the property at issue in this case. In fact, the words "eminent domain" are only mentioned once in Title 69 – in the statute stating public utilities have the right to acquire property by eminent domain. Mont. Code Ann. § 69-3-113.

Not only does Title 69 fail to provide any statutory support – direct or implied – for the PSC's attempt to intervene in this lawsuit, Montana's eminent domain statutes (Title 70) also refute the position the PSC takes here. Those statutes expressly provide the state may take "water and water supply systems" from private owners for public use. Mont. Code Ann. §§ 70-30-101; 70-30-102.

Because the PSC's regulatory activities only extend to privately owned water supply systems, any state entity exercising its power of eminent domain over a water supply is necessarily condemning an entity that is regulated by the PSC. *See* Mont. Code Ann. § 69-1-102. And yet, the PSC is mentioned nowhere in the eminent domain statutes. The statutes require that the eminent domain proceedings "be brought in the district court of the county in which the property or some part of the property is situated," not in the PSC's offices in Helena. Mont. Code Ann. § 70-30-202.

There is no question under Montana law that the exclusive adjudicator of the City's right to acquire Defendants' property is a Montana State District Court Judge, not the PSC. Montana law gives the PSC no role whatsoever in eminent domain actions. The PSC's motion to intervene in this matter should be denied because, if granted, the Court would be expanding the PSC's statutorily prescribed authority.

B. The PSC's Decision To Intervene Is Void Because It Violated Open Meeting Laws.

The PSC's decision to file a motion to intervene not only strays outside the boundaries of its well defined statutory authority, but that unprecedented and controversial decision also was made without providing the public an opportunity to be heard. The Montana Constitution provides "[t]he public has a right to expect governmental agencies to afford such reasonable opportunity for

citizen participation in the operations of the agencies prior to the final decision as may be provided by law." Mont. Const., Art. II, § 8. The Montana Legislature has mandated that:

> Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures must ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public.

Mont. Code Ann. § 2-3-103 (emphasis added).

Any agency decision not made in compliance with the above statute can be set aside by the District Dourt. Mont. Code. Ann § 2-3-114. Without adequate notice, "an 'open' meeting is open in theory only, not in practice." *Common Cause of Montana v. Statutory Committee to Nominate Candidates for Com'r of Pol. Pract.*, 868 P.2d 604 (Mont. 1994).

Here, the entirety of the PSC's purported "notice" is found in just one of eight agenda items for its July 1, 2014 meeting, posted just one week in advance, which simply stated: "Missoula and Mountain Water Condemnation District Court Case – Update Commission on Mountain Water District Court condemnation case and receive direction." (PSC Agenda, **Exhibit C**.) Nowhere in this "notice" does the PSC even hint that there would be an action item on the agenda to decide to try to intervene in the City's lawsuit. Indeed, given the fact that such intervention is outside the PSC's statutory authority, one would have been hard pressed to even guess that this is what the PSC had in

mind when prepareing its public notice regarding "update" and "direction." The Missoulian Editorial Board noted in its July 14 editorial reprimanding the PSC for its failure to follow Montana's open meeting laws: "Before our elected officials get involved in a lawsuit, shouldn't they pause to hear from the people who elected them? Especially when it concerns an issue as vital to Missoulians as our local water utility?" (*Missoulian* Editorial: Open meeting reminder for PSC (July 14, 2014), **Exhibit D**.)

The PSC's notice was not adequate and it failed to provide a meaningful opportunity for the public to participate. This provides yet another, independent basis to deny the PSC's motion to intervene.

II. THE PSC HAS NO LEGALLY PROTECTABLE INTEREST IN THIS MATTER.

Assuming *arguendo* that the PSC had the requisite statutory authority to intervene, and assuming further that it complied with its obligations under Montana's open meeting laws in deciding to intervene, the PSC still has no legally protectable interest that could be impaired by the Court's disposition of this case. Nor does it have a claim or defense that shares a common question of law or fact already present in the case. See Mont. R. Civ. P. 24. As such, the PSC cannot meet the threshold showing necessary for intervention. *See id.*; *Sportsmen for I-143 v. Montana Fifteenth Jud. Dist. Ct., Sheridan County*, 40 P.3d 400, ¶ 7 (Mont. 2002).

A. This Action Will Not Impair the PSC's Authority or Jurisdiction.

At its core, the PSC's motion is based on some sort of perceived threat to its authority and jurisdiction. More specifically, the PSC posits that this eminent domain proceeding will challenge or interfere with its authority to determine whether the transfer of Mountain Water's assets is in the best interests of the public. In reality, there is no such threat. The PSC has authority, with certain limitations, to regulate, control, and supervise public utilities that are privately owned. Mont. Code Ann. § 69-3-102. That authority will continue undiminished regardless of the outcome of this lawsuit. And such authority does not extend to utilities owned and operated by municipalities. *City of Billings v. County Water Dist. of Billings Heights*, 935 P.2d 246, 249 (Mont. 1997). Thus, no matter the eventual outcome of this litigation, the PSC's authority and jurisdiction to regulate and supervise privately owned public water utilities will remain wholly intact and need not be defended by the PSC in this lawsuit.

In the past, the PSC was empowered to regulate municipally owned utilities. *See City of Billings v. Public Service Commission*, 631 P.2d 1295, 1304 (Mont. 1981). But that was changed in 1981 when the legislature enacted "the first of a number of statutes which effectively abrogated the PSC's power to oversee water rates." *County Water Dist. of Billings Heights*, 935 P.2d at 249. Such legislation granted to municipalities the "power and authority to regulate, establish, and change, as it considers proper, rates, charges, and classifications

imposed for utility services to its inhabitants and other persons served by municipal utility systems." Mont. Code Ann. § 69–7–101. Municipal utilities were further authorized to create, with some limitations, their own operating rules. Mont. Code Ann. § 69–7–201. By 1995, with the amendment of Mont. Code Ann. § 69–7–101, and the repeal of Mont. Code Ann. § 69–7–102, effectively allowing municipalities to set their own utility rates without PSC review, "the control and oversight of municipal utility rates was now largely in the hands of the municipalities themselves." *County Water Dist. of Billings Heights*, 935 P.2d at 249.

As a result, today the Montana Legislature has restricted the PSC's authority to regulation of <u>privately</u> owned utilities, and has granted to municipalities the authority to regulate utilities that are <u>publicly</u> owned. Thus, in reality the PSC now exercises very little regulatory authority over water utilities in the state because so few are privately owner or investor-owned. All of the major cities in Montana, with the conspicuous absence of Missoula, own, operate and regulate their own water supplies with zero PSC oversight. They are subject to statutory requirements to, *inter alia*, provide direct mail notice to each consumer and set "reasonable and just" rates. Mont. Code Ann. §§ 69-7-101, 69-7-111. In 2014, the PSC regulates just 18 water utility companies, all privately owned, and with the single exception of Mountain Water, most of these utilities are run by homeowners associations and very small non-incorporated

communities. (*See* PSC Water Rate Comparison Spreadsheet, attached as **Exhibit E**.) Absent Missoula, their told rate base of customers is tiny.[2]

If the City's eminent domain action is unsuccessful, the PSC will continue to function as the regulatory body over Mountain Water, with no change whatsoever to the status quo. On the other hand, if the City's eminent domain action is successful, the PSC will have no ability under Montana law to exercise regulatory control. Either way, the PSC's properly exercised authority, as defined by statute, is unaffected by the outcome of this case. As such, the PSC has no legally protected interest to prosecute or defend in this action, and thus no basis to intervene.

Moreover, even if some actual threat to the PSC's statutory authority was presented by the City's action, the PSC's claimed interest – maintaining authority to review and approve the transaction despite the eminent domain statutes – is purely legal in nature. As a general rule, pure legal interests do not merit intervention. *See* Moore's Federal Practice 24.03[2][b]; *McDonald v. Means*, 309 F.3d 530, 540-41 (9th Cir. 2002). Furthermore, the PSC's claimed interest is both remote and contingent, and would only arise if and when the Court determines the City has met the public necessity requirement for the condemnation, and after the City tenders fair value as determined by the

[2] It is noteworthy that, while the PSC touts a deep breadth of experience and invaluable perspective, it fails to inform the Court that the only water utility of any size that it regulates is Mountain Water. For several years now, the PSC's regulatory experience over water utilities has been very limited. Regardless, experience and perspective alone are insufficient to establish a right to intervene. *See, e.g.,* Moore's Federal Practice § 24.03[5][b].

Commissioners to be appointed after the Court's decision. Interests that are contingent on the occurrence of future events are not a proper basis for intervention. *See* Moore's Federal Practice 24.03[2][a].

The PSC has failed to demonstrate its own legally protectable interest in this matter, or a viable claim or defense that shares a common question of law or fact already present in this case. Despite the PSC's arguments, this action simply has no bearing on the PSC's authority or jurisdiction. The PSC has not satisfied the requirements for intervention. *See* Mont. R. Civ. P. 24.

B. The PSC's 2011 Administrative Order Does Not Create a Protectable Interest.

In attempting to assert jurisdiction that otherwise does not exist, the PSC relies heavily on its 2011 administrative order approving the sale of Mountain Water to Carlyle. According to the PSC, that order, and in particular the stipulation referenced in the order, created a protectable interest and confers authority on the PSC to intervene in this case. This interpretation of the 2011 order ignores the critical distinction between a voluntary sale, as envisioned by the parties who entered the subject stipulation in 2011, and an eminent domain proceeding that is exclusively within the City's power to initiate.

The PSC's prior order did not create any right, interest, or entitlement for the PSC's five elected Commissioners to assert in subsequent litigation. Any reading otherwise not only disregards the statutes discussed above, but

disregards the PSC's own administrative order and the 2011 stipulation upon which it was based. First and foremost, the 2011 stipulation was entered into to govern the anticipated voluntary sale of Mountain Water to the City at sometime in the future. To convince the City to agree to the stipulation and support the sale, Carlyle offered the City the right of first refusal for a later purchase of the Missoula water system, and the parties entered into a written agreement to that effect. (Letter Agreement, ¶ 2, **Exhibit F**.) The stipulation upon which the PSC relies expressly referenced that written agreement:

> Having entered into a letter agreement with Carlyle, both the City and the CFC support the approval of the transaction set forth in the Acquisition Agreement. . . The MCC, Mountain, Carlyle, and the City propose the ring fencing conditions set forth in Appendix 1 as a means of resolving the remaining issues in this proceeding not addressed in the letter agreement between Carlyle, the City, and the CFC.

(2011 Stipulation, ¶ 5, 8.)

The stipulation, by its own terms, was intended to govern the future sale of Mountain Water to the City if it exercised its right of first refusal, or to a private entity if it did not. It was not intended to, nor could it have, expanded the PSC's authority to encompass jurisdiction over eminent domain proceedings. Private parties have no power to expand the PSC's statutory jurisdiction.[3]

[3] It should be noted that the PSC is neither a party to or a beneficiary of the Stipulation, even if it was viewed as a contract, and neither the parties to the stipulation nor the PSC can waive or limit the City's power of eminent domain.

The stipulation concerned the PSC's authority to assess a private, negotiated sale of Mountain Water's assets, but a negotiated sale is not at issue here. For example, in its motion to intervene, the PSC cites to 23 examples of the PSC exercising jurisdiction over utility sales, but each of those examples involved a private, voluntary, and negotiated sale. None of the 23 cited examples involved condemnation of a utility by the state or a municipality. The PSC has failed to cite a single case where it has exercised any kind of authority over a taking by eminent domain. And for good reason. No such authority can be found, and no corresponding "legally protectable interest" exists.

The PSC also chooses to ignore the fact that the subject stipulation was a "ring fencing" agreement. As the PSC explained to the Montana Legislature in 2003, "ring fencing" agreements serve "to separate regulated utilities from <u>the risks of their holding companies and their non-regulated affiliates</u>." Montana Public Service Commission, *Ring Fencing – Statutory Authority*, http://leg.mt.gov/content/committees/interim/2003_2004/energy_telecom/staff_reports/ETIC-ring%20fencing.pdf, (Oct. 31, 2003) (emphasis added). A "ring fence," therefore, generally requires a regulatory body to review asset transfers, dividend tests, and restrictions on inter-company advances to protect the public from the volatility that might be experienced by investor-owners. A utility that has been properly "ring fenced" will be largely insulated from the misguided

ventures, bankruptcy, or credit downgrades of its parent corporation, hence protecting the ultimate consumer.

The stipulation at issue here, entitled "Stipulated Ring Fencing Conditions for Park to Carlyle Stock Transaction," is clearly a ring fence. It was intended to protect Missoula's consumers from the actions of Mountain Water's parent corporations, who are in the business of taking risk in order to return profits to their investors. The stipulation did not purport to amend the Montana Code in order to expand the scope of the PSC's jurisdiction.

The PSC attempts to exploit a standard regulatory provision designed to protect utilities from the investor driven economic risk embraced by their parent corporations, but this argument fails to create a "legally protectable interest" that the PSC can defend in this case. Neither the PSC's prior administrative order, nor the stipulation referenced therein, provides any greater jurisdictional authority or legally protected interest than what already has been created by the Montana Legislature.

C. Vague Claims of a "Public Interest" at Issue Do Not Give Rise to a Legally Protectable Interest of the PSC.

Finally, the PSC argues it has a duty to look out for the public interest and, therefore, should be allowed to intervene to ensure the public interest is protected. (PSC's Brief, P. 11.) This argument, too, is fundamentally flawed. First, the Court is responsible to decide the issue of "public necessity," which

means the Court will also decide what is in the public's interest. Second, the argument is more than a little ironic, given the PSC's history of "regulating" Mountain Water. The PSC's actions over the past several years have resulted in Park Water and Mountain Water employing both the highest paid executives and the most executives earning greater than $100,000 annually than any water utility in Montana. How is that protecting the public interest? The PSC has approved more than $2 million being sent annually to Park Water in California, all funded by water bills paid by the residents of Missoula. The PSC has allowed Missoulians to be charged the highest water rates in the State compared to any other major Montana cities. (Montana Rate Comparison, **Exhibit G**; Park Water Salary Information, **Exhibit H.**)

The PSC has not been granted a broad mandate to protect the public interest in any capacity. Rather, the legislature directed it to protect the public interest <u>within</u> its statutorily granted authority. Mont. Code Ann. § 69-3-102. In other words, the PSC must consider the public interest when setting utility rates, when approving private asset transfers, and the like. It has no mandate to intervene in a judicial proceeding simply because it claims some unspecified "public interest" may be at stake. *See, e.g., Boyle*, 204 P at 379. Moreover, as the PSC appears to acknowledge, if it was proper for an entity to intervene "to protect the public interest" in this matter, it would be the Montana Consumer Counsel ("MCC"), not the PSC. (PSC's Brief, fn. 3.) Needless to say, the mere

fact that the MCC has not moved to intervene does not make the PSC the backup consumer advocate. To the contrary, it strongly suggests the PSC's claim to protect Missoula from threats to the "public interest" are, at best, overstated.

The PSC claims the public interest it seeks to protect requires "a balance between customer interests and the utility's expected return on investment." (PSC's Brief, fn. 3.) Such a definition might make sense in the PSC's own sphere of authority, the regulation of investor-owned utilities trying to earn a return on investment. However, that convenient definition of its mission is misguided and of little relevance in an eminent domain proceeding, where the party seeking to condemn the property intends to operate the utility at cost, not to earn a return for investors. Mont. Code Ann. § 70-30-111(c).

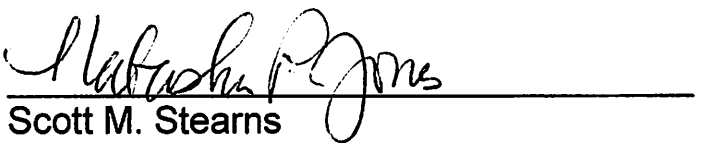
The PSC claims that because some Mountain Water consumers are located outside the city limits of Missoula, they have "no representation in the City's government," and the PSC needs to intervene to protect them. This argument again ignores Montana law. In fact, many municipally owned public water utilities and public wastewater treatment utilities serve properties located outside their existing city limits yet they remain statutorily required to operate reasonably, fairly and equitably in proportion to the services the property receives. Mont. Code Ann. § 7-13-4304(4). And they do so without PSC oversight.

The PSC also asks the Court to recognize and protect its "legally protectable interest" to approve any sale or transfer of Mountain Water assets. For the Court to recognize and protect such a right, the Court would have to effectively abdicate its own authority and defer entirely to the PSC. Again, it could not be more clear that under Montana law eminent domain actions are judicial determinations, and condemnation decisions are to be made by district courts, not the PSC, and reviewed by the Montana Supreme Court, not the PSC. Mont. Const., Art. VII, §§ 1, 2; Mont. Code Ann. § 69-3-103(1).

CONCLUSION

The PSC has no jurisdiction over the property interests being adjudicated in this action, and therefore has no claims to assert or interests to protect by intervening. Intervention would only serve to give the elected PSC Commissioners a voice in the courtroom to make their political arguments for or against condemnation. This is no guarantee that the Commissioners would necessarily speak with one voice if they testified, which would be their right and their obligation once the PSC is joined as a party. The PSC's motion to intervene should be denied for lack of standing and because the PSC has no legally protected interest in the outcome of the instant proceeding.

DATED this 15th day of July 2014.



Scott M. Stearns
Natasha Prinzing Jones
BOONE KARLBERG P.C.

William K. Vancanagan
Phil L. McCreedy
DATSOPOULOS MacDONALD & LIND, P.C.

Harry H. Schneider, Jr.
PERKINS COIE LLP

Attorneys for Plaintiff