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**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)
Water Company for Approval of a Sale and) DOCKET NO. D2014.12.99
Transfer of Stock)
)

**CLARK FORK COALITION'S
PRELIMINARY REPLY BRIEF**

Pursuant to the Procedural Order No. 7392, on February 13, 2015, the Clark Fork Coalition (the "Coalition") filed its preliminary brief requesting the Public Service Commission of the State of Montana (the "Commission") to order Algonquin Power & Utilities Corp. ("Algonquin" or "APUC") to appear along with the Joint Applicants: Liberty Utilities Co., Liberty WWH Inc. (collectively, "Liberty Utilities"), Western Water Holdings, LLC ("Western Water"), and Mountain Water Company ("Mountain Water") as an applicant in this docket. Algonquin, a Canadian corporation, seeks to acquire Mountain Water through its wholly owned subsidiary, Liberty Utilities. On February 23, 2015, Liberty Utilities filed its response claiming, essentially, that the Commission has no authority to order Algonquin to appear and must simply accept those parties who

choose to participate in these types of acquisitions. *Liberty Utilities' Response*, p.

3.

The Joint Applicants are urging the Commission to entrust the future of Missoula's public water supply to a decision maker who claims to be out of reach of the State of Montana's jurisdiction. Liberty Utilities asserts that the Coalition should not be interested in looking behind the curtain to see who actually wants to own the Missoula community's most precious and valuable natural asset – its drinking water. However, the Coalition disagrees and, as set forth below, the Commission should look to Algonquin's direct control over the decision making of Liberty Utilities, including the decision to acquire Mountain Water and exercise its broad authority to order Algonquin to appear in this docket as an applicant.

I. An examination of the ultimate owner of Mountain Water has everything to do with the Coalition's mission to ensure protection of the Clark Fork watershed.

Liberty Utilities asserts that the Coalition should not concern itself with understanding Algonquin's motivations for this acquisition, its financial health or execution risk because none of these has anything to do with advancing the Coalition's mission to protect the Clark Fork watershed. *Liberty Utilities' Response*, p. 2. Liberty Utilities also believes the notion that Missoula ratepayers – hundreds of whom are also members of the Coalition – need to understand Algonquin's motivations for its decision to acquire Mountain Water amounts to a

“bold assertion.” *Id.* The Coalition disagrees. What is a bold assertion, however, is Liberty Utilities’ insistence that the proposed transaction is not a sale of Mountain Water, that this Commission has no jurisdiction over upstream owners of Mountain Water, and that this Commission must simply accept the limited information provided by the Joint Applicants to promptly determine that the sale of Mountain Water and the associated rights to the Missoula aquifer and Rattlesnake Creek to an unknown foreign corporation is in the public interest.¹

The Coalition has worked for 30 years to protect the waters of the Clark Fork watershed. The Coalition’s mission is intertwined with the safety and security of the Missoula Valley’s public water supply. Each day, the Coalition’s staff and members work to undo the mark on the Clark Fork watershed left by decades of exploitation by out-of-state corporate interests. As stated by the Coalition in its *Petition to Intervene*, much of our work in the Missoula Valley is done in close collaboration with partners in the watershed, including Missoula County and the City of Missoula.² Because of the importance of these local

¹ The Coalition notes that, in response to several data requests from the Commission, Liberty Utilities objected and refused to provide information responsive to every request seeking information regarding the decision-making process and underlying financial projections for the acquisition of Mountain Water. *Liberty Utilities’ Responses to Data Requests PSC-001 through PSC-027*, Responses 2(a), 2(b), 2(c), 2(d), 2(e), 7(b), and 20(b) (February 17, 2015).

² As stated in the Coalition’s *Petition to Intervene*, “[t]hese partnerships have led to a ban on the use of damaging phosphate-based detergents; groundwater education around stormwater runoff and stormdrains; an aquifer protection ordinance; a riparian protection zoning regulation; a nutrient pollution reduction program; cleanup of contaminated industrial sites; closer monitoring

partnerships, it very much matters to the Coalition when a new player enters the community seeking to control significant public water resources.

By virtue of its control over access to a sensitive sole-source aquifer and large urban watershed, ownership in Mountain Water carries with it certain responsibilities to protect those public resources. As the Commission has recognized, “[p]roperty becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.” *In the Matter of the Joint Application of Northwestern Corporation and Babcock & Brown Infrastructure, Ltd*, 2007 Mont. PUC LEXIS 54, ¶ 23, 259 P.U.R. 4th 493, ¶ 23 citing *Munn v. Illinois*, 94 U.S. 113 (1876). Nowhere is this maxim more apparent than when considering the ownership and control of a public resource as essential to the community well being as drinking water.

The identity of the ultimate owner of Mountain Water matters to the Coalition. It matters when another unknown entity seeks to profit from the waters that we seek to protect. It matters when the proposed new owner of Mountain Water refuses to participate in this Commission’s review of a potential sale. And the Coalition respectfully asserts that it should also matter to the Commission.

of in-river petroleum pipeline crossings; implementation of state-of-the-art technologies at Missoula’s wastewater treatment plant; groundwater modeling studies at the site of the former Milltown Dam; and closure of a loophole that allowed unregulated pumping of groundwater.” *Petition* at 2.

II. The rights and interests of Algonquin are very much at issue in this docket.

Liberty Utilities improperly relies on the existence of complex corporate layers as the basis for claiming that Algonquin, to paraphrase, has no skin in this game and is not a proper party to this docket. Liberty Utilities' asserts that, according to the Commission's rule defining "party" Algonquin cannot be ordered to appear in this docket, because its "legal rights, duties and privileges" will not be determined by the Commission. *Liberty Response*, 5. Liberty Utilities argues that there is "no entity actually acquiring the Montana utility, Mountain Water," yet it is willing to play the part of the "acquiring entity" and consent to the Commission's jurisdiction "for the limited purpose of supporting the request for approval of the proposed merger." *Id.* at 6.

Liberty Utilities claims that Algonquin's appearance in this docket is unnecessary because Liberty Utilities is willing and able to provide relevant information in this case. Thus far, however, Liberty Utilities has objected and failed to provide responses to data requests from the Commission seeking relevant information about the proposed transaction. *See*, fn. 1, *infra*. Liberty Utilities has not even attempted to seek a protective order for this information, claiming that it cannot be guaranteed that its confidential information will be protected from disclosure by the Commission.

The argument that the parent company does not actually own a subsidiary is a familiar one when it comes to Mountain Water. And twice the Fourth Judicial District Court has rejected this argument, most recently in denying the motion for summary judgment by The Carlyle Group (“Carlyle”) in which Carlyle claimed that it does not own Mountain Water. *City of Missoula v. Mountain Water, Carlyle, et al.*, Docket No. DV-14-352, Order and Memorandum (Feb. 3, 2015). As Judge Townsend explained, because Carlyle has the ability to “buy and sell Mountain Water,” “to make managerial decisions regarding Mountain Water,” and “to transfer compensation from Mountain Water to parent companies,” “Carlyle’s rights as shareholders go well beyond Mountain Water’s less extensive rights as title holders to the subject property under Carlyle’s governance.” *Id.* at 19-20. In short, Judge Townsend noted that the “undisputed domination of Mountain Water by Carlyle” makes it a proper party to the condemnation proceeding, given its control over Mountain Water and each of the corporate entities separating it from the company. *Id.* at 19.

There is no question that Algonquin will step into the shoes of Carlyle if this proposed transaction is consummated. In its response to data requests, Liberty Utilities demonstrates that Algonquin makes the decisions for its subsidiaries, just as Carlyle has. For example, in response to PSC-004(b), Liberty Utilities’ provides Algonquin’s *Cost Allocation Manual* (Jan. 2, 2014), which provides at page 3,

“APUC is the ultimate corporate parent and affiliate that provides financial, strategic management, corporate governance, administrative and support services to [Liberty Utilities] and its subsidiaries . . .” Further, in response to PSC-005, Liberty Utilities explains that the board of directors of Algonquin was consulted and determined that the acquisition is “*in the best interest of APUC*,” and that Ian Robertson, CEO of Algonquin and one of three board members of Liberty Utilities, “was involved in approving the transaction at the APUC and Liberty Utilities levels” (emphasis added).

In data request PSC-002(b), the Commission asks for “copies of all correspondence . . . between Liberty Utilities and Western Water regarding the sale and purchase of Western Water.” Liberty Utilities objected to the request, providing no information. Mountain Water and Western Water, however, respond with a list of four dates in 2014 in which the purchase and sale was discussed in person or by phone. In each of these four meetings, Robertson represented Algonquin, and there is no specific representative for Liberty Utilities. Further, the deal was negotiated in a meeting in which only Carlyle managing director, Robert Dove, and Robertson were present.

Most telling, however, is the response of Mountain Water and Western Water to PSC-002(d), which asked for board meeting minutes where there was a discussion of the sale and purchase of Western Water. In response, Mountain

Water and Western Water state, “[t]here are no discussions regarding the sale of Western Water in any of the minutes from the Mountain Water Company, Park Water Company, or Western Water Board meetings, nor have any notes been identified that are responsive to this request.” Given this statement, it seems clear that Carlyle, as the upstream owner of Mountain Water, exerted its “ultimate domination” over Mountain Water and all of its upstream owners, and made the decision to sell Missoula’s public water system to Algonquin without formally consulting with Missoula-based lower management at Mountain Water. Even though Liberty Utilities has refused to respond to the relevant data requests of the Commission to date, it seems clear that Algonquin expects to exert the same level of domination over Mountain Water as Carlyle has.

Liberty Utilities argues, however, that it will simply take the place of Carlyle Infrastructure Partners (CIP), in the “chain of ownership at issue” and that the Coalition’s position that Algonquin should appear is inconsistent with its position in Docket D2011.1.8 because the Coalition never asked the Commission to order CIP’s parent company, Carlyle, to formally appear. A quick comparison of the organizational charts and corporate governance structure of Algonquin and Carlyle provides an explanation as to why it is important to bring Algonquin into these proceedings. *See, Exhibit A.* All three board members of The Carlyle Group were also on the board of CIP, and thus each of the individuals engaged in decision

making at both the parent and the subsidiary levels were at the table. However, it appears that only Robertson sits on the boards of both Algonquin and Liberty Utilities. Without bringing Algonquin to the table, the Commission will have limited access to the ultimate decision makers.

III. The Commission has broad authority to fully consider the proposed transaction and to conduct extensive inquiry into each of the potential upstream owners of Mountain Water, including Algonquin.

Liberty Utilities claims that the Commission has no authority to “assert jurisdiction over any upstream entities without their voluntary appearance through the application or intervention.” *Liberty Response*, 6. Further, Liberty Utilities claims that Algonquin “has not been a party to any of the acquisition dockets in other states in which Liberty Utilities has participated as a utility purchaser.” *Id.* Even if this is the case, it is clear that other jurisdictions have certainly considered the upstream ownership structure and Algonquin’s status as parent company, even placing conditions on transaction approvals that extend directly to Algonquin’s officers and employees.

Notably, in response to data request PSC-004, Liberty Utilities provides a decision from the California Public Utilities Commission (“CPUC”) regarding a transaction in which an Algonquin subsidiary, California Pacific Electric Company, LLC (CalPeco) acquired control of Sierra Pacific Power Company. CPUC, Applications A.09-10-028, A.10-04-032; *see*, *Liberty Response*, PSC-004,

Attachment PSC-004 (LIB-C). In that transaction, CPUC conditioned its approval on a requirement that “CalPeco and its upstream owners must expressly recognize the [CPUC]’s legal right to call their officers and employees to testify in California regarding matters pertinent to CalPeco, consistent with the established principles of due process and fundamental fairness.” CPUC, Decision 10-10-017, p. 2 (Oct. 14, 2010). In that case, the upstream owners of CalPeco, including Algonquin, did not appear in the docket as applicants, and the CPUC noted that “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 . . . [that should be] broadly and consistently followed.” *Id.* at 8. Given this policy, the CPUC considered the absence of the upstream owners and found that its review of the proposed transaction was not affected because the upstream owners, including Algonquin, participated in the docket. The CPUC concluded, “we intend that the reach of today’s decision extend to the direct and indirect owners of CalPeco and will require their assent as a condition of any authority granted . . .” *Id.* at 9.

In this case, Liberty Utilities implies that the Commission lacks jurisdiction to even review the proposed transaction because it merely involves the transfer of stock of one of Mountain Water’s upstream entities, over which the Commission likewise has no jurisdiction. In Docket D2011.1.8, however, in response to Mountain Water’s request for a declaratory ruling that the Commission lacked the

authority to review the proposed sale of Mountain Water to Carlyle, the Commission said,

The sale and transfer of Park stock to Carlyle, if approved, would result in a change in control of Mountain, a Montana public utility within the Commission's jurisdiction. The strategic objectives of Carlyle are the framework within which the subordinate goals of Park are defined and constrained. Carlyle would hold the entirety of Park stock and would control how Park operates. Mountain customers pay rates that provide a significant amount of funding for Park Water employee salaries, facilities, and operating expenses. Changes in Park operations will directly impact Mountain's ratepayers in Missoula. The purchase of Park stock could affect Mountain's quality of service, employment and pension decisions, use of aquifers and water rights, and utility rates. Mountain could be significantly impacted by Park's change of ownership.

Docket D2011.1.8; Order No. 7149c, ¶ 25 (Sept. 14, 2011).

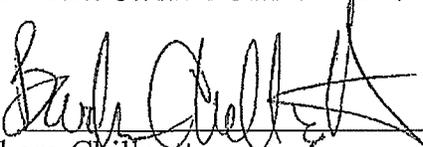
The Commission found that it in fact has the jurisdiction over the sale and transfer of Park Water Company stock "based on Mountain Water's status as a regulated subsidiary of Park and its public utility status in Montana." *Id.* at ¶ 30. The Commission's rationale in finding in 2011 that it has jurisdiction over the stock sale upstream from Mountain Water is relevant for this case. Algonquin is attempting to step into the shoes of Carlyle as ultimate owner of Mountain Water. This change in ownership deserves at least the same level of scrutiny that the Commission gave to the previous sale of Mountain Water. As in the CPUC docket discussed above, it will likely be necessary for the reach of the Commission's decisions in this docket to extend to all direct and indirect owners of Mountain

Water. If there is any question on the Commission's ability to obtain information from Algonquin, or to impose conditions or other requirements on any of Mountain Water's new potential upstream owners, the Commission should err on the side of caution and order Algonquin to appear.

For all of the above reasons, the Coalition respectfully requests the Commission to order Algonquin to appear in this docket as an applicant.

Respectfully submitted this 2nd day of March, 2015.

CLARK FORK COALITION

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 2nd day of March, 2015, the foregoing CLARK FORK COALITION'S PRELIMINARY REPLY BRIEF was served via U.S. mail on:

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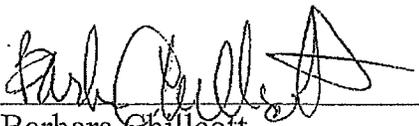
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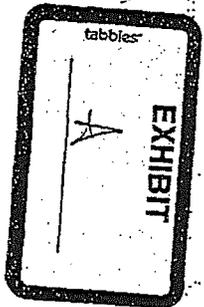
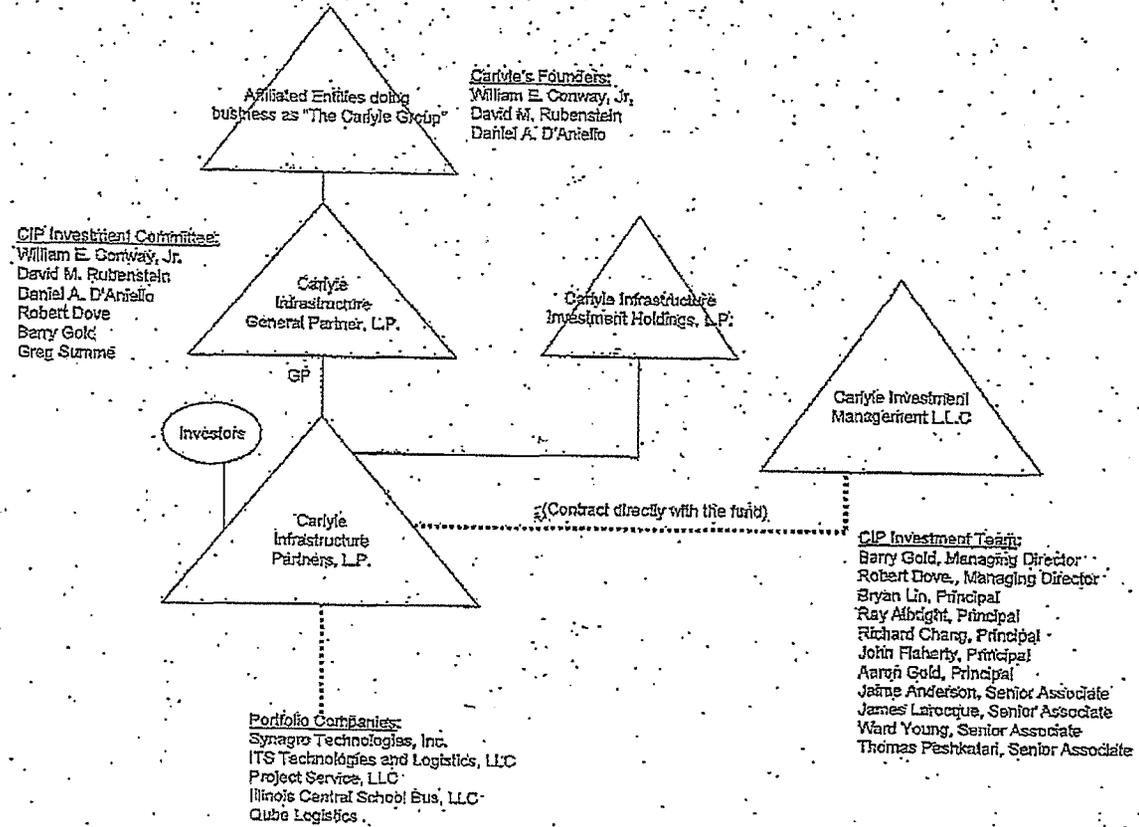
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Carlyle Infrastructure Partners



LIBERTY UTILITIES
ORGANIZATION CHART
(After Park Water Acquisition)

KEY

1. Corporation
or LLC



Chart A

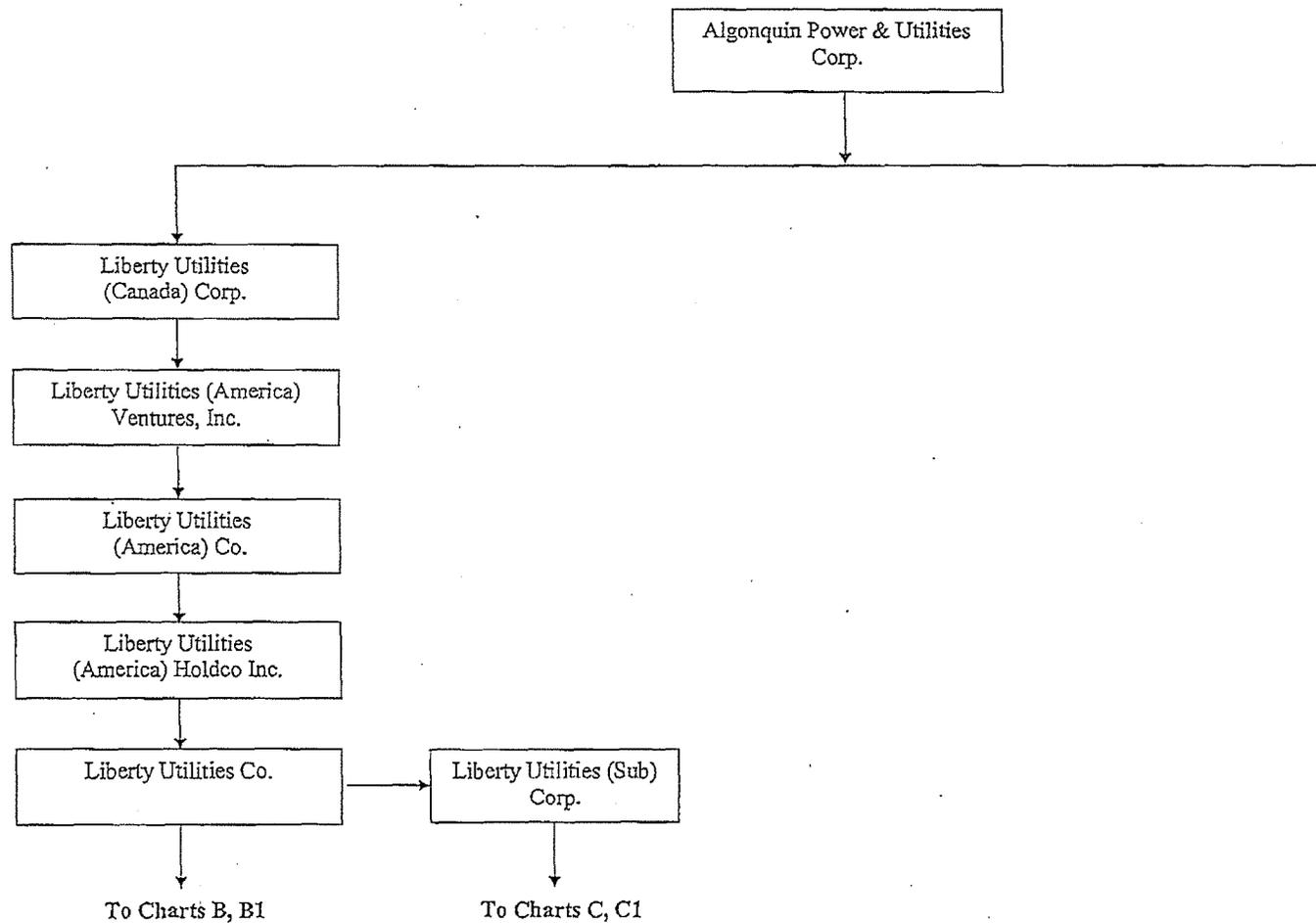


Chart B
(Continued on Chart B1)

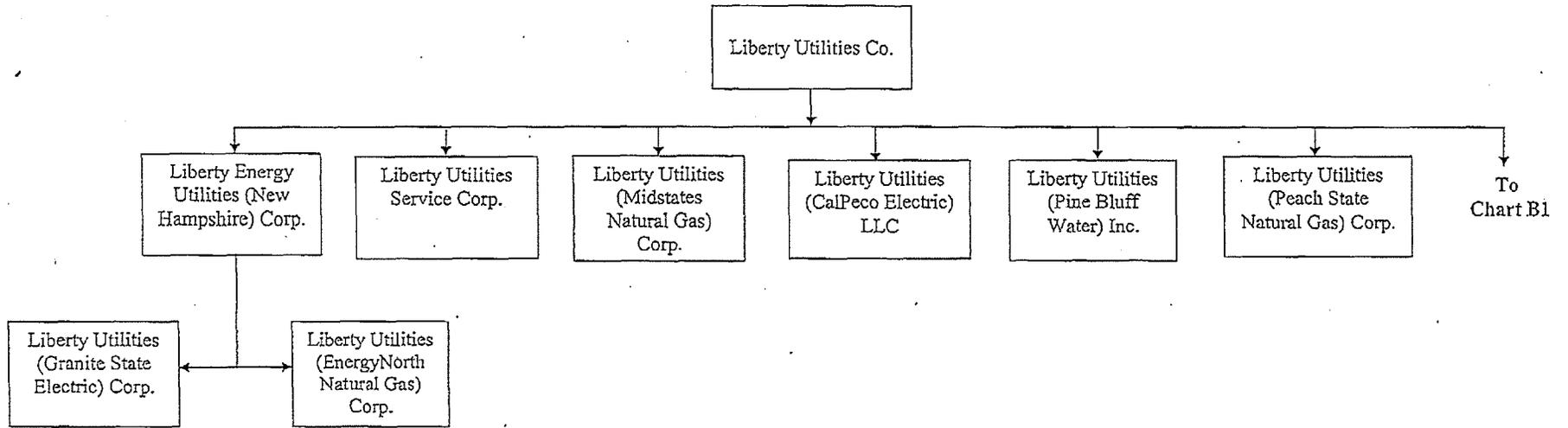


Chart B1

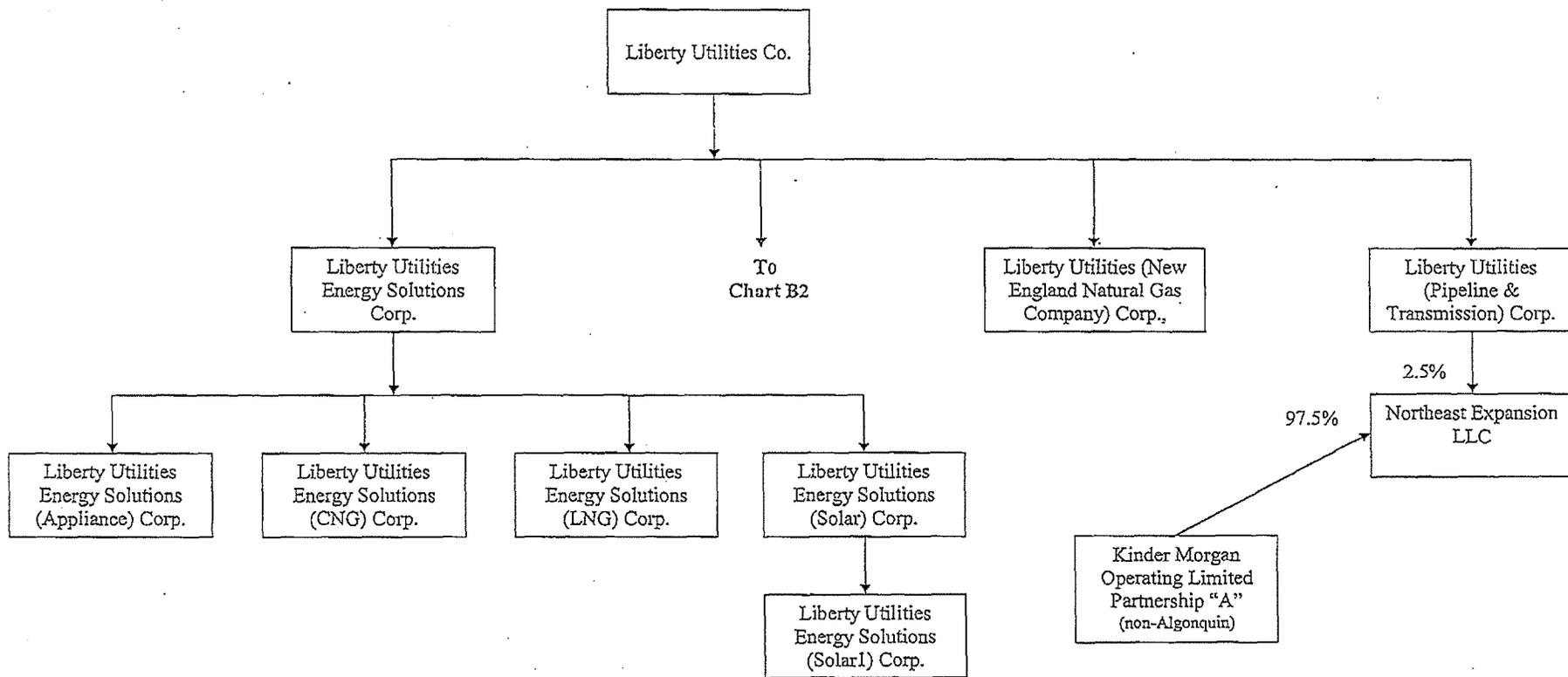


Chart B2

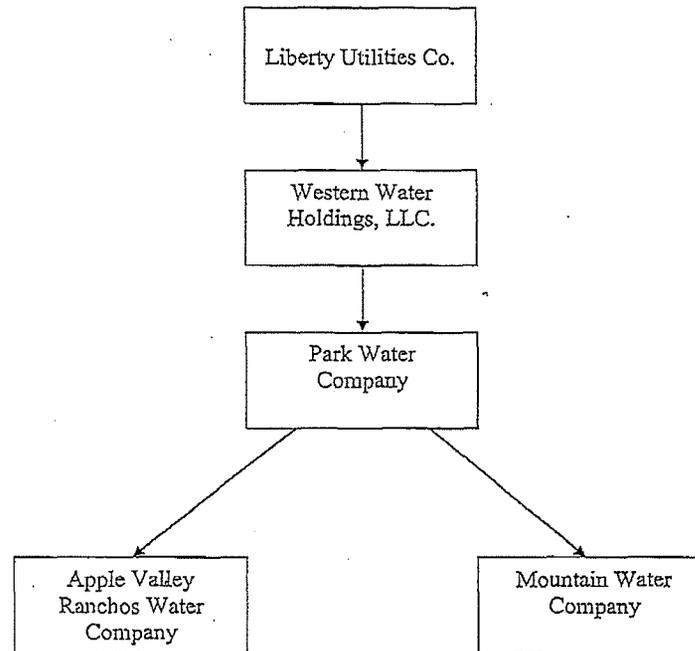


Chart C
(continued on Chart C1)

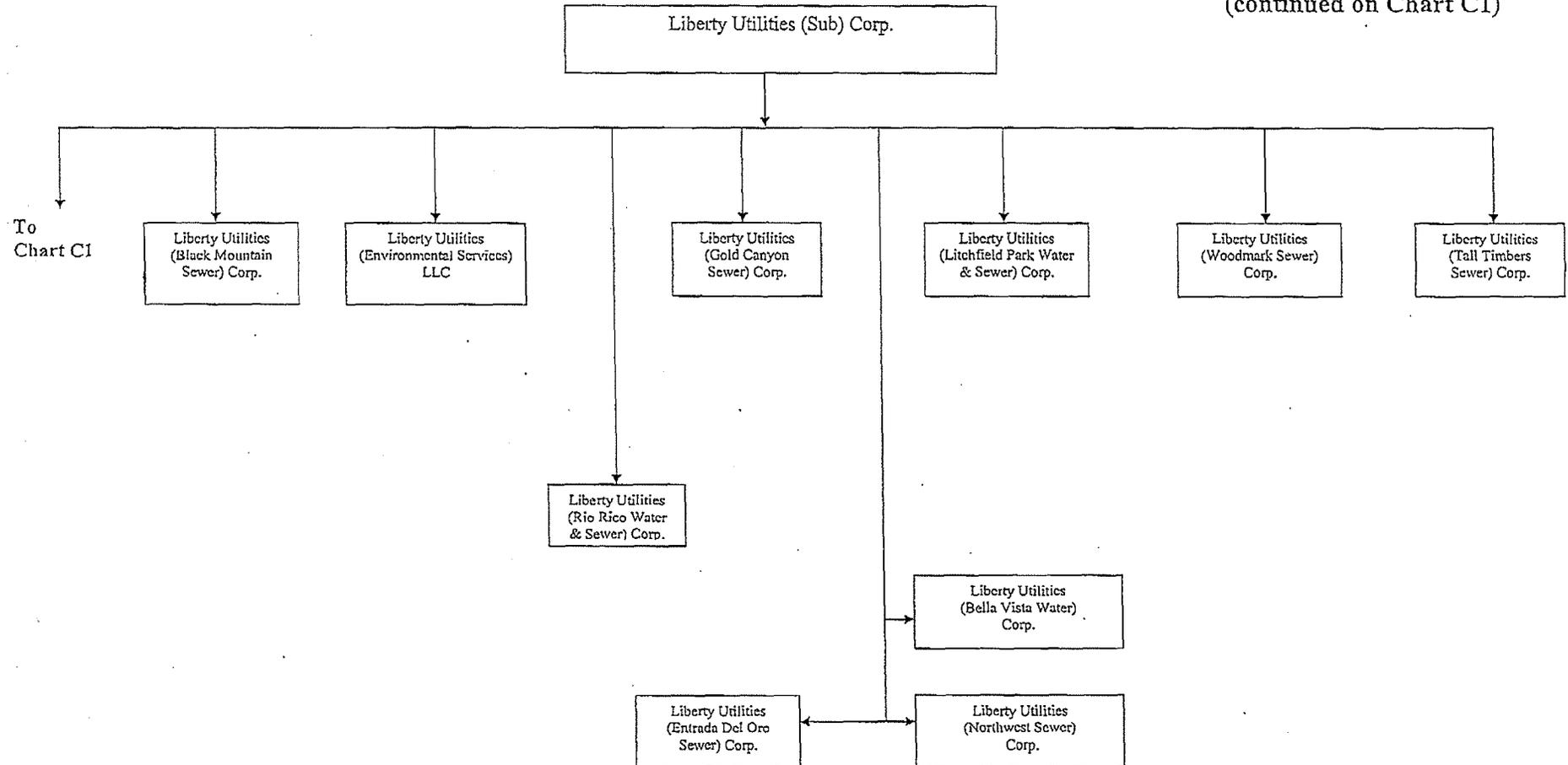
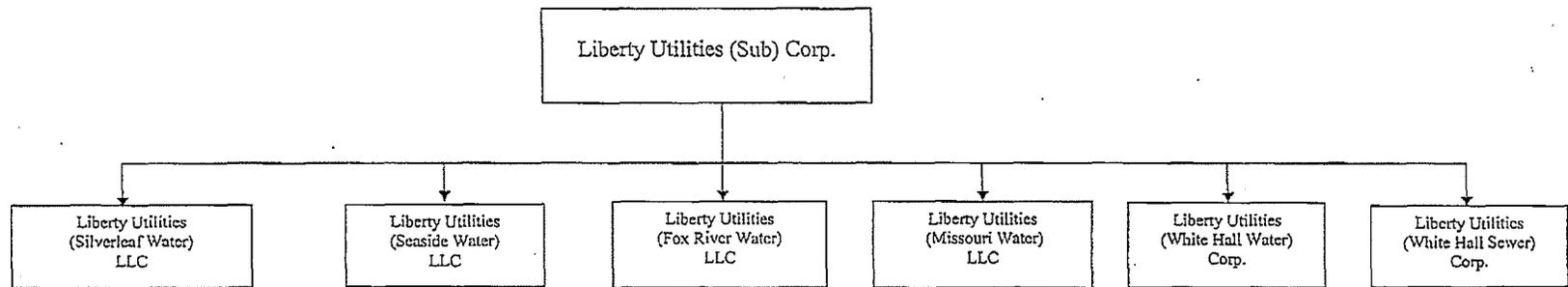
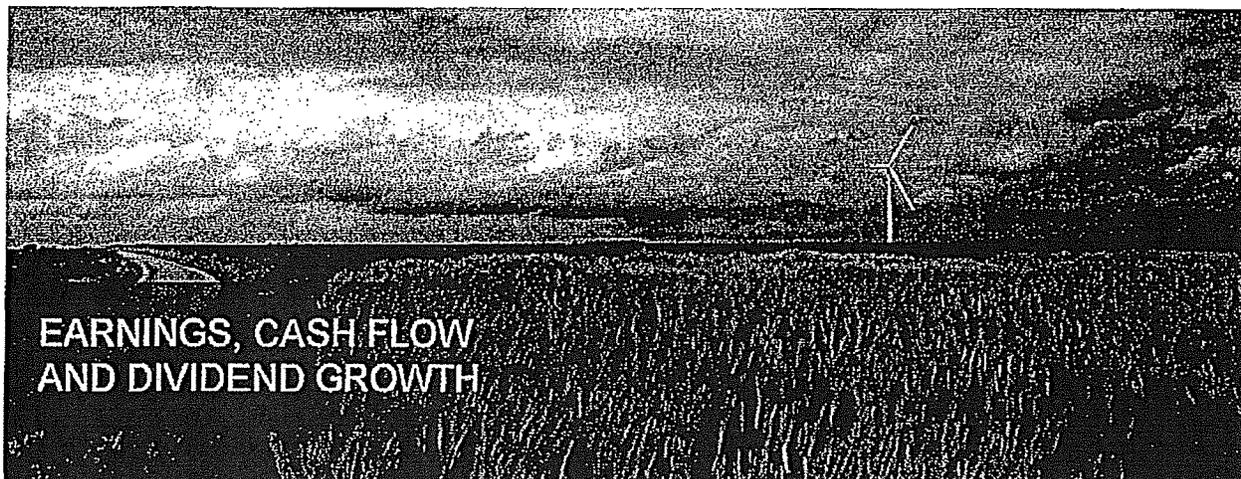


Chart C1




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INVESTOR CENTRE

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Linda Beairsto
General Counsel & Corporate Secretary

David Pasieka
President, Liberty Utilities

Board of Directors

Kenneth Moore
Chair of the Board

Christopher Huskilton
Chair, Compensation Committee

Ian Robertson
Director

Dilek L. Samli
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