

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

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

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

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Western Water Holdings, LLC (“Western Water”) and Mountain Water Company (“Mountain Water”), by and through their counsel, Holland & Hart LLP, respectfully submit this response to the City of Missoula’s (“City”) Motion to Compel and Stay the Proceeding Pending Responses (“Motion to Compel”).

To date, through the initial discovery process Mountain Water and Western Water have responded to 46 individual questions (excluding subparts) and produced 119 documents (excluding supplemental responses). Some of these requests were directed at the Joint Application, while others were focused on Mountain Water’s and Western Water’s direct testimony which was filed with the Commission on March 12, 2015. Where parties took issue with the responses or documents provided by Mountain Water and Western Water, supplemental responses have been provided voluntarily (such as in response to the Montana Consumer Counsel’s motion to compel) or after exhausting the available rights to limit discovery based on discoverability or limit access to information under the Commission’s confidentiality rules. In short, when Mountain Water’s and Western Water’s responses have been contested, additional

information has been provided voluntarily or provided in a timely fashion following a Commission order.

But despite having *40 days* to propound discovery regarding the Joint Application and supporting testimony, which provided ample time to resolve discovery disputes within the agreed-upon procedural schedule, the City waited until the last day of the *extended* deadline to serve its first set of data requests to the Joint Applicants.<sup>1</sup> Mountain Water and Western Water provided timely responses to all of the requests that could reasonably be interpreted as being directed at them on May 4, 2015. Apparently dissatisfied with those responses, the City filed its Motion to Compel on May 18, 2015, the last day such a motion was permitted under the procedural schedule.

In the Motion to Compel, the City has attempted to impermissibly amend or supplement its requests, implicitly acknowledging the last-minute requests were, in many cases, poorly drafted to begin with. And, in addition to moving to compel responses to several of the City's data requests, the City requested this proceeding be stayed "pending complete, supplemental responses to the City's data requests" because Mountain Water and Western Water "are preventing the City from providing adequate testimony and participating meaningfully in this matter."<sup>2</sup> However, the record in this proceeding, and specifically the City's deadline-oriented approach to discovery, shows the City alone is responsible for impairing its ability to provide adequate testimony or meaningfully participate in this matter. Ultimately, the City's Motion to Compel is not about compelling discovery, but instead the City's attempt to reargue for this

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<sup>1</sup> The City initially served its discovery requests on the Joint Applicants on April 20, 2015, but those requests contained a numbering error. Accordingly, Mountain Water and Western Water treated the requests as timely although the City now states they were served on April 21, 2015, one day after the deadline. *See* April 14, 2015 Notice of Staff Action at ¶ 4; Motion to Compel at p. 2.

<sup>2</sup> Motion to Compel at p. 20.

proceeding to be stayed pending the outcome of the City's ongoing condemnation case, using the City's own failure to actively participate as justification for the stay.

That said, Mountain Water and Western Water do not oppose an extension of time for intervenors to file testimony, provided the hearing still commences on July 28, 2015. Indeed, Mountain Water and Western Water agreed to such an extension following discussions with the Montana Consumer Counsel ("MCC") regarding its motion to compel. But some of the City's requests are clearly more targeted to the City's condemnation case than the application before the Commission, so Mountain Water and Western Water have faced the difficult task of responding to those requests while simultaneously protecting the scope of this proceeding.

With its Motion to Compel, the City seeks responses from Mountain Water and Western Water to CITY-002, CITY-003, CITY-010, CITY-011, and CITY-015. As discussed below, Mountain Water and Western Water responded to each of these requests (to the extent a response could reasonably have been expected given the request) or have timely objected to the requests based on discoverability.<sup>3</sup> Because these questions have either been answered or seek information that is not discoverable, and because any delay associated with the City's discovery requests is largely attributable to the City's own failure to participate in this proceeding in a timely manner, the Motion to Compel and the associated request for a change to the procedural schedule should be denied.

## **ARGUMENT**

### **I. CITY-002**

CITY-002 contained the following request:

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<sup>3</sup> Order No. 7392 at ¶ 11 ("Only objections based on discoverability will be considered...")

**CITY-002:** RE: Due Diligence  
Witness:

- a. Have you ever performed any evaluation, due diligence, or analysis regarding this potential or anticipated increase in rates charged to customers of Mountain Water?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including but not limited to your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in the evaluation, due diligence, or analysis referenced above.

Mountain Water and Western Water objected to this request for a variety of reasons, including the fact it was vague and ambiguous because (1) the reference to “you” was not defined and no witness was referenced or identified in the question, and (2) no potential or anticipated increase in rates was cited in the question and no reference to testimony or the application was provided in the request. Additionally, the reference to “evaluation, due diligence, or analysis” indicates that this question was intended to be directed at Liberty Utilities (“Liberty”) as the buyer of Western Water, rather than the Western Water as the seller or its subsidiary Mountain Water. In the ordinary course and in the context of this proceeding, “evaluation, due diligence, or analysis” is a process undertaken by a potential buyer of an asset (Liberty), not by the seller owning the asset (Western Water). Mountain Water and Western Water also believe the issue of a hypothetical future rate increases is irrelevant to this proceeding, given Liberty’s commitment not to seek an acquisition adjustment and the fact no increase in Mountain Water’s rates is being requested.

However, despite this well-founded and timely objection, Mountain Water and Western Water answered the question, stating:

- a. The proposed transfer and sale of stock in Western Water will not impact Mountain Water's rates. Any change in Mountain Water rates will be for the normal course of capital investing and operations which will be effectuated through an application for a rate increase, subject to approval by the Montana Public Service Commission.
- b. N/A.
- c. N/A.

Because a reference to a *specific* “potential or anticipated increase in rates” was absent from the question, Mountain Water’s and Western Water’s answer was provided in the context of the proceeding in which the data request was asked. The proposed sale and transfer of stock in Western Water will not impact Mountain Water’s rates, and consequently there is no “evaluation, due diligence, or analysis” to describe, or documents that were “reviewed, prepared or relied upon” to provide.

In the Motion to Compel, the City argues this request should be interpreted as: “[t]he question is whether they have done *any* analyses related to potential or anticipated rate increases.”<sup>4</sup> First, this is an impermissible attempt by the City to use a motion to compel as a vehicle to rewrite its discovery request into a different question after the deadline passed. One of the issues associated with waiting until the last minute to propound discovery is there is no time to follow up with additional or clarifying questions—a direct result of timing decisions entirely within the City’s control. Second, without context, this question is both overly broad and unduly burdensome, and it is unreasonable to expect Mountain Water and Western Water to respond to a question that is unlimited in scope. However, Mountain Water and Western Water did respond to the question within the context of this proceeding — there will be no impact on Mountain Water’s rates as a result of the sale and transfer of Western Water stock, and subparts (b) and (c)

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<sup>4</sup> Motion to Compel at p. 7 (emphasis added).

are therefore inapplicable. The Commission should find Mountain Water's and Western Water's interpretation of and response to CITY-002 is reasonable and adequate.

## II. CITY-003

CITY-003 contained the following request:

**CITY-003:** RE: Project Orchard Confidential Information Memorandum  
Witness:

In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 97, that "Mountain Water has historically filed rate cases every two years." Following Mountain Water's next rate case filing, the utility intends to begin filing annual rate cases with the MPSC. Mountain Water had originally planned to file its next rate case by April 2014 using a 2013 test year, however given issues around the condemnation proceedings, the rate case filing timing for 2014 is under review."

- a. Did you perform any evaluation, due diligence, or analysis regarding Mountain Water's intention to begin filing a rate case every year?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including but not limited to your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in the evaluation, due diligence, or analysis referenced above.

Again, Mountain Water and Western Water objected to this request for a variety of reasons, including (1) the fact it was vague and ambiguous because the reference to "you" was not defined and no witness was referenced or identified in the question, and (2) on the grounds it was not reasonably calculated to lead to the discovery of evidence admissible in this proceeding. On its face, this question should be interpreted as being solely directed at Liberty as the buyer of Western Water's stock due to the reference to "evaluation, due diligence, or analysis." Again, in the ordinary course and in the context of this proceeding, "evaluation, due diligence, or analysis" is a process undertaken by a potential buyer of an asset (Liberty), not by the seller owning the asset (Western Water). Additionally, if this question were to be awkwardly interpreted as being directed at Mountain Water, it would ask if Mountain Water has done any "evaluation, analysis, or due diligence" regarding its own intent. What exactly does it mean to do an evaluation,

analysis, or due diligence on your own intent? However, despite the well-founded and timely objection, Mountain Water and Western Water *responded* to this request with the following:

- a. Mountain Water did not file a rate case in 2014 and has not filed a rate case in 2015. Mountain Water’s intent regarding annual rate cases has not been revisited since the Confidential Information Memorandum was finalized, and no decisions have been made regarding future rate cases for Mountain Water.
- b. N/A.
- c. N/A.

Given the awkward question, Mountain Water and Western Water answered as best as they could. All of Mountain Water’s and Western Water’s evaluation, due diligence, and analysis regarding Mountain Water’s intent to file annual rate cases is contained in the Confidential Information Memorandum (“CIM”), produced in response to PSC-028(b). Specifically, this intent to file annual rate cases was one of the “Key Assumptions,” identified on page 105 of the CIM, that was used to inform the projected capital investment and financial performance for Mountain Water in the CIM.<sup>5</sup> An assumption, by definition, is not a conclusion based on evaluation, due diligence, or analysis. That information was already provided to the City. Accordingly, Mountain Water and Western Water responded to the request to state that, since the CIM was finalized, Mountain Water has not acted on the stated intent, nor has Mountain Water made any decisions regarding future rate cases. It is unclear what additional information the City is looking for based on this request. Accordingly, the Commission should find Mountain Water’s and Western Water’s interpretation of and response to CITY-003 is reasonable and adequate.

### **III. CITY-010**

CITY-010 contained the following request:

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<sup>5</sup> See WWH000882 produced in response to PSC-028(b).

**CITY-010:** RE: Project Orchard Confidential Information Memorandum  
Witness:

In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 74, that "[a]s the only large investor-owned water utility in Montana, Mountain Water is well-positioned to acquire small water utilities around Missoula and other parts of the state."

- a. Did you perform any evaluation, due diligence, or analysis regarding Mountain Water's ability to acquire small water utilities?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in answering this data request.

Again, Mountain Water and Western Water objected to this request for a variety of reasons, including (1) the fact it was vague and ambiguous because the reference to "you" was not defined and no witness was referenced or identified in the question, and (2) on the grounds it was not reasonably calculated to lead to the discovery of evidence admissible in this proceeding. On its face, this question should be interpreted as being solely directed at Liberty as the buyer of Western Water's stock due to the reference to "evaluation, due diligence, or analysis." Again, in the ordinary course and in the context of this proceeding, "evaluation, due diligence, or analysis" is a process undertaken by a potential buyer of an asset (Liberty), not by the seller owning the asset (Western Water). However, despite this objection Mountain Water and Western Water provided a detailed response.<sup>6</sup>

Apparently dissatisfied with the original question, in the Motion to Compel the City now characterizes its request as a specific request made to Mountain Water and Western Water, which is not a logical interpretation of the actual question, and also claims that it asked "Mountain Water and Western Water "to identify and provide *any* evaluations, analyses, or due

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<sup>6</sup> See Mountain Water's and Western Water's full response to CITY-010, attached as Exhibit A.

diligence regarding Mountain Water's ability to acquire small water utilities."<sup>7</sup> But that *is not* what the City asked for in CITY-010. Instead, subpart (c) specifically asks for "all documents reviewed, prepared, or relied upon in answering this data request." The answer to the City's question in subpart (c) is N/A, because *no documents were reviewed, prepared, or relied upon* in answering subparts (a) and (b) of CITY-010. That is the response to the question presented in CITY-010(c). Unlike the City, Mountain Water has experience operating a water system in Montana, and specifically in and around Missoula, and employees with years of knowledge in water issues and the current and prior operations of Mountain Water. Mountain Water did not need to prepare any evaluation, analysis, or due diligence to answer this question.

A party's obligation in discovery is to answer the question posed, within the confines of discoverability. Following a response, the discovering party is entitled to explore the issues further in their testimony or through cross-examination, and there is no rule requiring a party to "substantiate" with documentation a response to an interrogatory. Here, the City is attempting to inappropriately supplement or amend its request after recognizing that it did not actually ask for what it wanted in CITY-010. This is an unfortunate consequence of starting to participate in discovery *on the last day* discovery was permitted regarding the Joint Application and testimony, and the Commission should not reward the City's passive participation in this proceeding by allowing after-the-fact revisions to the City's request. Instead, this question and answer only highlight how the City alone is responsible for preventing itself from providing adequate testimony or participating meaningfully in this matter, not Mountain Water or Western Water. Because Mountain Water and Western Water responded to the question presented, the Commission should find that response is reasonable and adequate.

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<sup>7</sup> Motion to Compel at p. 12 (emphasis added).

#### IV. CITY-011

CITY-011 contained the following request:

**CITY-011:** RE: Project Orchard Confidential Information Memorandum  
Witness:

In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 74, that "[w]ater loss due to leakage remains high with non-revenue water production accounting for over 40% of total water production."

- a. Did you perform any evaluation, due diligence, or analysis regarding leakage at Mountain Water, including necessary capital expenditures and maintenance to address the problem?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in answering this data request.

Again, Mountain Water and Western Water objected to this request for a variety of reasons, including (1) the fact it was vague and ambiguous because the reference to "you" was not defined and no witness was referenced or identified in the question, and (2) on the grounds it was not reasonably calculated to lead to the discovery of evidence admissible in this proceeding. As the Commission made clear in its last review of the sale and transfer of Park Water, Mountain Water's parent company, "[t]he rate of leakage on Mountain's system is a *service-related issue* that will continue to *be addressed in rate cases*."<sup>8</sup> Thus, because this is not a rate case, the Commission has already determined leakage on Mountain Water's system is not relevant to evaluating the proposed sale and transfer of Western Water stock. However, despite the relevance objection, Mountain Water and Western Water provided a detailed response.<sup>9</sup>

Once again, the City must be dissatisfied with its original request in CITY-011, not with Mountain Water's and Western Water's response to the request. Just like CITY-010, subpart (c)

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<sup>8</sup> Docket No. D2011.1.8, Order No. 7148d at ¶ 72 (emphasis added).

<sup>9</sup> See Mountain Water's and Western Water's full response to CITY-011, attached as Exhibit B.

asks for the production of “all documents reviewed, prepared, or relied upon in answering this data request.” And, just like CITY-010, the answer to the City’s question in subpart (c) is N/A, because *no documents were reviewed, prepared, or relied upon* in answering subparts (a) and (b) of CITY-011. This is not an issue of Mountain Water and Western Water failing to answer the question presented, but instead is an issue of the City failing to ask the question it wanted answered. But as a consequence of the City’s last-minute approach to discovery, its opportunity to remedy the shortcomings with this request has lapsed.

Although Mountain Water and Western Water responded to the question presented, Mountain Water and Western Water also provided a supplemental response to CITY-011 in order to provide the documents referenced in Liberty’s response. The Commission should thus find Mountain Water’s and Western Water’s interpretation of and response to CITY-011 is reasonable and adequate.

#### **V. CITY-015**

CITY-015 contained the following request:

##### **CITY-015**

**Regarding: Payment of Salaries**

**Witness:**

- a. Please provide the current salary information for all individuals you employ who would be paid, in whole or in part, from the allocation of any proceeds from Mountain Water.**
- b. Please produce all documents reviewed, prepared, or relied upon in answering this data request.**

Mountain Water and Western Water did not respond or object to this request because it cannot reasonably be interpreted as being directed at Mountain Water or Western Water. First, the City failed to identify a witness, leaving it to Mountain Water, Western Water, and Liberty to determine which party the question was directed at based on the text of the question. Looking at

the question, it asks “who *would* be paid” from any allocation of any proceeds from Mountain Water. In light of this use of the future tense, Mountain Water and Western Water read the question as being directed at the post-transfer ownership of Western Water by Liberty.

Supporting this interpretation is the reference to “any proceeds from *Mountain Water*.” Again, Mountain Water and Western Water did not interpret this question as being directed at them, because Mountain Water *is not* being sold under the proposed sale and transfer of Western Water stock. Therefore, there are no “proceeds from Mountain Water” to be addressed in the context of this proceeding. Instead, Mountain Water and Western Water interpreted the reference to “proceeds from Mountain Water” as being directed at Liberty and potentially concerning the allocation of overhead expenses under the new ownership structure. Additionally, although the City cites to the Class B Units to support its claim that some employees “stand to receive payouts,” the City ignores the sworn statement of Robert Dove that any compensation for the Class B Unit holders will be paid using “proceeds generated by the sale of stock in Western Water,”<sup>10</sup> not by proceeds from Mountain Water. Thus, further information about the Class B Units is not responsive to this request. Accordingly, the Commission should find Mountain Water’s and Western Water’s interpretation of and response to CITY-015 is reasonable and adequate.

### **CONCLUSION**

For the forgoing reasons, the Commission should find that Mountain Water and Western Water have either responded or provided well-founded objections to the City’s data requests subject to the Motion to Compel. The Commission should also find that to the extent the City has been deprived of a “meaningful opportunity to participate in these proceedings,” that

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<sup>10</sup> Affidavit of Robert Dove at ¶ 6, filed with the Commission on April 27, 2015. The City’s Motion to Compel was filed on May 18, 2015, well after the source of funds for any compensation under the Class B Units was publicly confirmed by Mr. Dove’s sworn statement.

deprivation is largely the result of the City's own actions and the Motion to Compel and associated motion to modify the procedural schedule should be denied.

Respectfully submitted this 28th day of May, 2015.

**HOLLAND & HART LLP**

s/ Thorvald Nelson

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**ATTORNEYS FOR MOUNTAIN WATER  
COMPANY AND WESTERN WATER  
HOLDINGS**

**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 28th day of May, 2015, **WESTERN WATER HOLDINGS' AND MOUNTAIN WATER COMPANY'S RESPONSE TO THE CITY OF MISSOULA'S MOTION TO COMPEL** was filed with the Montana PSC and served via U.S. Mail and e-mail, unless otherwise noted, to the following:

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*s/ Adele C. Lee* \_\_\_\_\_

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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 Compel

**CITY-010:** RE: Project Orchard Confidential Information Memorandum  
Witness:

In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 74, that "[a]s the only large investor-owned water utility in Montana, Mountain Water is well-positioned to acquire small water utilities around Missoula and other parts of the state."

- a. Did you perform any evaluation, due diligence, or analysis regarding Mountain Water's ability to acquire small water utilities?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in answering this data request.

**Objection:**

Mountain Water and Western Water object to this request to the extent it seeks information not relevant to the subject matter of the instant proceeding and information not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding. Mountain Water and Western Water also object to this request on the grounds the reference to "you" is vague and ambiguous.

**Response to CITY-010:**

- a. Yes.
- b. Over the recent decades, Mountain Water has proven its ability to acquire and integrate public water systems. Such acquisitions are Clark Fork Water System, 1991; Linda Vista Water System, 1998; Fort Missoula System, 2000; and Missoula Water Works, 2001.

In 2011, Mountain Water created an inventory of all public water systems in Missoula County. Mountain has made initial contacts with a number of the system owners. Although no arrangements have been made, initial discussions were productive. Prior acquisitions made by Mountain Water were up to seven years after initial discussions with owners. Mountain refocused its efforts in 2012, 2013 and 2014 to working with the Twite/Maloney Development to assure it connected its 1,500 future units to the Mountain Water system. Mountain Water was successful in finalizing the necessary water rights to begin the construction phases in 2014.

Mountain Water's staff is also familiar with difficulties the Montana Department of Environmental Quality and the Montana Public Service Commission have had over the years in regulating the numerous small systems throughout the state. As these systems age, capital improvements and professional operation of the

systems will become more necessary. Mountain's professional water staff, access to capital, and successful operational processes could be beneficial to these systems as they look for assistance.

Mountain Water has involved itself in rule making and intervening in court cases in relation to the Department of Natural Resources and Conservation's efforts to deal with the issue of combined appropriations with exempt wells. Prior practice has allowed development throughout the state to occur on exempt wells instead of public water supplies. This practice increases risks to water quality and quantity. Changes to the combined appropriations rule in Montana will require development to properly use public water supply systems for their water needs. This improves the water quality and quantity issues relating to exempt wells, while increasing the number of public water systems around the state.

c. N/A.

Docket No. D2014.12.99

Exhibit B

to

Western Water Holdings' and Mountain Water  
Company's Response to the City of Missoula's  
Motion to Compel

**CITY-011:** RE: Project Orchard Confidential Information Memorandum  
Witness:

In the Project Orchard Confidential Information Memorandum of June 2014, it was represented, on page 74, that "[w]ater loss due to leakage remains high with non-revenue water production accounting for over 40% of total water production."

- a. Did you perform any evaluation, due diligence, or analysis regarding leakage at Mountain Water, including necessary capital expenditures and maintenance to address the problem?
- b. If so, please describe, in detail, the evaluation, due diligence, or analysis you performed, including your conclusions.
- c. Please produce all documents reviewed, prepared, or relied upon in answering this data request.

**Objection:**

Mountain Water and Western Water object to this request to the extent it seeks information not relevant to the subject matter of the instant proceeding, information not reasonably calculated to lead to the discovery of evidence admissible in the instant proceeding, and on the grounds the reference to "you" is vague and ambiguous.

**Response to CITY-011:**

- a. Yes.
- b. Mountain provided a detailed 5 year financial analysis and action plan in 2010 to the PSC to identify its five year program for addressing leakage in the system. Mountain has continued to spend capital dollars on main replacement at a minimum as was stated in that plan. This plan was part of the Carlyle transaction docket with the PSC and was agreed to by all parties in that proceeding.

At the time of June 2014, Mountain had a draft report it had prepared for its next filing to the PSC with its plan for the next five years. In that plan, Mountain has implemented new studies and procedures to better understand its non-revenue water and provide a comprehensive program for its next five years. Included in that study: 1) An industry accepted statistical analysis of its long term main replacement needs by main type [KANEW]; 2) New prioritization guidelines for prioritizing specific main projects by year; 3) AWWA water audit for non-revenue water in addition to its annual reservoir study; 4) District metering for valve to valve leakage tests; 5) Acoustic sounding for leak investigations; and 6) Proposed DSiC program to assist with long term main replacement revenue requirements in a historical rate making environment.

Mountain's 2015, 5 year capital budget, has been adjusted from its 2010 plan to increase its capital spend associated with mains from an average of \$1m per year to closer to \$2.4m, with the plan to get to \$2.8m on average to match its findings in the KANEW study.

c. N/A.