

**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.,)	REGULATORY DIVISION
Western Water Holdings, LLC, and Mountain)	
Water Company for Approval of a Sale and)	DOCKET NO. D2014.12.99
Transfer of Stock)	

**WESTERN WATER HOLDINGS', MOUNTAIN WATER COMPANY'S, AND THE
EMPLOYEES OF MOUNTAIN WATER'S
RESPONSE TO THE CITY OF MISSOULA'S MOTION TO DISMISS OR STAY**

Western Water Holdings, LLC (“Western Water”), Mountain Water Company (“Mountain Water”), and the Employees of Mountain Water,¹ by and through their counsel, respectfully submit this response to the City of Missoula’s (“City”) motion to dismiss or, in the alternative, to stay the proceeding (“Motion”).

The City essentially presents two arguments to justify its requested relief. First, that the City somehow became the owner of Mountain Water’s assets due to the preliminary order of condemnation (“Order”) *without paying* for the condemned property as required by statute and the Montana Constitution. And second, that as a result of the Order the City’s victory in the condemnation case is imminent. But even a cursory review shows neither of these arguments are persuasive, and the Commission has no reason to abandon its prior analysis and conclusion in response to the City’s last motion to stay. Instead, the “Commission will only cease to have jurisdiction over Mountain Water at such time as the entity is no longer investor owned.”²

¹ In support of this response opposing the City’s request to dismiss or stay this proceeding, the Employees of Mountain Water provide the affidavit of Michelle Halley, Business Administration Manager for Mountain Water, attached as Exhibit A.

² Order No. 7392b at ¶ 16.

Because Mountain Water is still investor owned and a final resolution to the condemnation proceeding is likely years away, the Motion should be denied.

I. The City is not the “constructive owner” of Mountain Water.

Blinded by exuberance, the City does not rely upon any Montana law to support its claim that the Commission has been divested of its jurisdiction over Mountain Water. A comprehensive reading of the applicable statutes and Montana Constitution shows there are conditions to the City’s ownership that must be met before the Commission’s jurisdiction over Mountain Water is extinguished. These conditions were not addressed in the Motion to Dismiss or Stay, because the City has not satisfied the conditions precedent to even taking *possession* of Mountain Water’s assets (which still does not equate to ownership).

Specifically, under Mont. Code Ann. § 70-30-311(1)(a)(ii), the City can take possession of the property subject to the Order *only after* (A) applying for and receiving an order from the court allowing the City to take possession, and (B) paying (i) the amount of compensation claimed by Mountain Water in its claim of just compensation, (ii) the amount assessed by the commissioners, or (iii) the amount assessed by a jury. Notably, Mont. Code Ann. § 70-30-311 contains no language regarding “constructive ownership” during the interim period between the preliminary order of condemnation and the potential, subsequent payment of compensation. In fact, the term “constructive owner” does not appear anywhere in the applicable statutes. Because the City has neither received an order from the court authorizing it to take possession of Mountain Water nor paid anything to take possession of Mountain Water, it is legally incorrect to act as if the City holds any property rights in Mountain Water’s assets.

Moreover, as explicitly stated in the law, the City has no *ownership* interest in Mountain Water’s assets until a final order of condemnation has been issued *and* filed by the county clerk and recorder. According to Mont. Code Ann. § 70-30-309, when payment has been made by the

condemnor and the court has issued a final order of condemnation, “[a] copy of the order must be filed in the office of the county clerk and recorder, and *upon filing, the property described in the order vests in the condemnor* for the purposes specified in the order.”³ In short, the City does not have the right to even possess Mountain Water’s water system at this time, and does not have any ownership interest in Mountain Water’s assets because a final order of condemnation has not been issued and has not been filed with the county clerk and recorder.

The City’s argument is even inconsistent with the district court’s findings of fact, where the court clearly contemplated Commission approval of the sale of Western Water to Liberty and subsequent closing of the transaction by the parties. In paragraph 14 of the Order, the court concluded, “[o]nce the Agreement is approved by the Montana Public Service Commission and closes, Mountain Water will be run as part of Liberty.”⁴ Thus, the court’s apparent expectation was for this proceeding, and the underlying sale of Western Water stock, to proceed despite the issuance of the Order. Indeed, continuing with Commission review and approval of the sale of Western Water stock is consistent with the Montana law governing the condemnation process and the City’s lack of a possessory or ownership interest in Mountain Water’s assets.

Because the City has not satisfied the conditions precedent established by statute, Mountain Water is not a municipally owned utility. As Article 2, Section 29 of the Montana Constitution makes clear, “[p]rivate property *shall not* be taken or damaged for public use *without just compensation* to the full extent of the loss *having been first made to or paid into court for the owner.*”⁵ The City has not received a final order of condemnation from the court and has not provided the just compensation required to take Mountain Water. Consequently,

³ Emphasis added.

⁴ The Order was included as Exhibit A to Motion.

⁵ Emphasis added.

Mountain Water remains an investor owned utility subject to the Commission's jurisdiction and the Motion should be denied.

II. Disclaiming jurisdiction over Mountain Water would leave Mountain Water and its customers in regulatory nowhere land.

Because the City does not currently own, possess, or control Mountain Water, disclaiming Commission jurisdiction over the utility and its operations would put Mountain Water and its customers into a regulatory nowhere land. For example, how would Mountain Water seek rate adjustments to recover the capital investment made to improve its distribution system, including the planned investments to address leakage consistent with the Commission-approved capital investment plan? Would Mountain Water still be required to file annual reports with the Commission? Would Mountain Water still be bound by the Commission's statutes, rules, and orders? If a customer has a complaint regarding Mountain Water, would that complaint be brought to the Commission or City Council? Is the City now required to approve and fund any capital investment or other operational expenses incurred by Mountain Water? When the City's claim of "constructive ownership" of Mountain Water is viewed through a lens of practicality and the uncertainty associated with the condemnation proceeding is considered, it is apparent that the City is not the owner of Mountain Water.

The City makes an argument that "authority over the water system is vested in the District Court." This is another statement without support in Montana law. Mont. Code Ann. § 70-30-206 outlines the district court's powers related to issuance of a preliminary condemnation order. Notably absent is any power to regulate or operate a water utility that is the subject of the preliminary order. In short, the Order does not vest the district court with jurisdiction that has been legislatively granted to the Commission. Thus, this Commission still has jurisdiction over Mountain Water, the investor owned utility. Because the Commission must retain jurisdiction

over Mountain Water until a final resolution in the condemnation proceeding is reached, the Motion must be denied.

III. Because a final resolution of the condemnation case is not imminent, the Commission's previous decision denying the City's request to stay this proceeding is still applicable.

In response to the City's last motion to stay, the Commission thoroughly evaluated staying this proceeding pending resolution of the condemnation case against the requirements of Montana law.⁶ As a result of that analysis, the Commission determined that so long as Mountain Water is investor owned and therefore within the Commission's jurisdiction, it was appropriate to move forward in reviewing the sale and transfer of Western Water stock.⁷ In reaching this conclusion the Commission identified a number of factors, including:

- Mountain Water has not proposed any changes to Mountain Water or its utility assets;⁸
- The Commission's determination regarding the sale of Western Water stock will not impede the City's condemnation case from proceeding toward a final resolution;⁹
- A resolution to the condemnation case is likely years away;¹⁰
- An indefinite or multi-year stay of this proceeding would not be "immoderate in extent" as required by *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 645 P.2d 1350 (Mont. 1982);¹¹
- A long term stay would "in fact be oppressive in consequence to Mountain Water, pursuant to the *Henry* case";¹²
- The only parties that would be influenced by a stay are the Joint Applicants, and the City's condemnation proceeding will "not be impaired in any way";¹³ and

⁶ Mountain Water and Western Water incorporate by reference their Response to the City of Missoula's Motion to Stay dated February 23, 2015.

⁷ Order No. 7392b at ¶ 16.

⁸ *Id.* at ¶ 10.

⁹ *Id.*

¹⁰ *Id.* at ¶ 12.

¹¹ *Id.* at ¶ 7.

¹² *Id.* at ¶ 13.

¹³ *Id.*

- Because the condemnation case and this proceeding involve different issues and assets, a resolution in this proceeding will not be aided by a final determination in the condemnation case, nor would a stay of undetermined time aid the resolution of this proceeding.¹⁴

These factors are unaffected by the Order. And comparing the status of the current condemnation proceeding to the City's failed attempt at condemnation in the 1980s demonstrates how a final conclusion in the condemnation proceeding is not imminent. In the City's previous condemnation attempt, the decision in the initial trial on the right-to-take phase was issued in August of 1986; however, the Montana Supreme Court's final decision affirming that the City failed to satisfy its burden to condemn Mountain Water wasn't issued until March 1989.¹⁵ Guided by this history, where it took more than three years to reach a final conclusion following the initial decision on the City's right-to-take, the Commission should find the condemnation proceeding is closer to the beginning than the end. In fact, notices of appeal for the Order and a motion to stay the valuation phase of the condemnation proceeding pending appeal of the Order have already been filed.¹⁶

The Commission should also again recognize the potential harm to the Joint Applicants if this proceeding is stayed despite the uncertainty surrounding the condemnation proceeding. Not only would staying this proceeding for an indefinite period of time be contrary to Montana law, it would effectively hold the sale and transfer of Western Water stock, and its three utility assets, hostage. The potential damage flowing from a stay in these circumstances, where the City could ultimately choose not to pay the later-defined just compensation for Mountain Water or could lose the condemnation case at the appellate level, is clear. And, once again, there is no risk of harm for the City by continuing this proceeding. If the City ultimately prevails in the

¹⁴ *Id.* at ¶ 14.

¹⁵ *City of Missoula v. Mountain Water Co.*, 771 P.2d 103 (Mont. 1989).

¹⁶ See Motion to Stay Valuation Proceedings Pending Appeal attached as Exhibit B.

condemnation case, the outcome of this proceeding will have absolutely no impact on that result. Liberty's ownership of Western Water's stock would in no way affect the City's right to take Mountain Water's assets pursuant to its condemnation claim, if successful. In contrast, a multi-year stay of this proceeding to allow for a final resolution in the condemnation case could certainly have the impact of terminating the proposed sale of Western Water stock.¹⁷

Furthermore, the Commission's prior decision not to stay this proceeding turned on the Commission's current jurisdiction over Mountain Water.¹⁸ As established above, nothing in the Order changes that fact. Indeed, the City has not paid just compensation for Mountain Water and may well choose never to do so, nor has the City been authorized to take possession of Mountain Water. In this context, the Commission's previous decision denying the City's earlier request to stay this proceeding is just as well reasoned and applicable following the Order. The Commission retains jurisdiction over Mountain Water unless and until the City ultimately prevails in its condemnation effort, and finances and funds the just compensation required to acquire Mountain Water. Because the City does not own Mountain Water, because a final decision in the condemnation case is not imminent, and because the Commission's analysis and decision regarding the previous motion to stay is equally applicable after the Order, the Commission should deny the Motion.

IV. Conclusion.

Contrary to the City's assertions, Mountain Water is investor owned and will remain in private ownership until (A) the City prevails in the eminent domain action, *and* (B) decides to actually acquire Mountain Water's assets at the price set through the condemnation process, *and* (C) actually pays that price to Mountain Water. Until that time, Mountain Water remains subject

¹⁷ See Section 9.1(b) of the Plan and Agreement of Merger included as Exhibit B to the Joint Application.

¹⁸ Order No. 7392b at ¶ 16.

to the Commission's jurisdiction and there is no basis to support the City's request for this proceeding to be dismissed. Additionally, an indefinite stay of this proceeding would not be appropriate because:

- No changes to Mountain Water's operations or assets have been proposed in this proceeding;
- The property at issue in this proceeding and the condemnation case is not the same;
- The Commission's determination regarding the sale of Western Water stock will not impede the City's condemnation case from proceeding towards a final resolution;
- It is likely that the condemnation case will not be fully resolved for years;
- The Joint Applicants will be harmed by a stay because approvals from the Commission and the California Public Utilities Commission are required to complete the sale of Western Water stock; and
- An indefinite or multi-year stay would be contrary to Montana law.

For the reasons set forth above, the City's Motion should be denied and the Commission should proceed with its review of the sale and transfer of Western Water stock.

Respectfully submitted this 30th day of June, 2015.

HOLLAND & HART LLP

s/ Thorvald Nelson

Thorvald Nelson, # 8666

Nikolas Stoffel, # 13485

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COMPANY AND WESTERN WATER
HOLDINGS**

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Great Falls, Montana 59403

**ATTORNEYS FOR THE EMPLOYEES OF
MOUNTAIN WATER COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on this, the 30th day of June, 2015, **WESTERN WATER HOLDINGS’, MOUNTAIN WATER COMPANY’S, AND THE EMPLOYEES OF MOUNTAIN WATER’S RESPONSE TO THE CITY OF MISSOULA’S MOTION TO DISMISS OR STAY** was filed with the Montana PSC and served via U.S. Mail and/or e-mail, unless otherwise noted, to the following:

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s/ Adele C. Lee

EXHIBIT A

**AFFIDAVIT OF MICHELLE HALLEY
RE: OPPOSITION OF THE CITY OF
MISSOULA'S MOTION TO STAY
TRANSFER AND SALE OF
MOUNTAIN WATER COMPANY**

STATE OF MONTANA)
 : ss.
County of Missoula)

Michelle Halley, being duly sworn on oath, hereby deposes and states upon personal knowledge:

1. I am the Business Administration Manager for Mountain Water Company ("Mountain"), as part of my duties I am in charge of Human Resources and Customer Service.

2. I have been working for Mountain for over 24 years, beginning in 1991.

3. Based on my knowledge of the numerous concerns of Mountain's Employees ("Employees"), the pay and benefits that the Employees currently receive, the pay and benefits offered to the Employees under City ownership, and the needs and concerns of Mountain's customers, there would be numerous irreparable adverse impacts to the Employees and Mountain's customers if the City were to take possession of the water system prior to a final ruling on condemnation.

4. A premature reorganization and transfer of Employees to City employment would be an unnecessary stress and burden on all individuals involved. The Missoula community deserves excellent customer service and clean, safe, drinking water. Fragmenting a water operation workforce under 13 new and inexperienced supervisors as planned by the City will place Employees in a difficult position to continue operating the water system in the manner they know and take pride in.

5. The City made two time limited offers to the Employees prior to trial and each expired by its own terms. The City's offer expressly stated that if any Employee refused to sign an employment contract by a date certain that the City reserved the right to not hire them and they would have to reapply for their positions. Trial Exhibit 19. All 39 Missoula based Employees refused the City's offers since it froze wages and benefits, imposed less favorable working conditions and did not provide reasonable job security. Trial Exhibit 4017.

6. A premature reorganization would force the Employee group into City employment before all of its concerns were addressed through the appeal process. At that point in time, the Employees would be in a lawsuit against their "employer", creating a difficult and unnecessary new Employer-Employee relationship.

7. The City would require individual employment contracts which would reduce each Employee's job protection rights under Montana law. There is no guarantee of continued job responsibilities, pay, benefits, longevity, or working conditions. Under previous employment offers, The City only offered 12 months of employment (or the end of the individual's employment, whichever occurred first), to three local Employees and 5 years of employment (or the end of the individual's employment, whichever occurred first), to the remainder of local Employees. The Mayor acknowledged that they would not have job security beyond those terms. Trial Tran., Day 1, pp. 218-220; 223-224.

8. With the reduced job security and job satisfaction, Employee departures will likely occur.

9. Employees forced under City employment would have difficulty making long term union decisions with short-term instability. The work environment could very likely be less than friendly if Employees are working side-by-side with City Employees while an appeals process is ongoing.

10. The City's worker's safety MOD factor is 1.08, which is worse than the industry average. (Trial Tr., March 25, 2015, at 151).

11. Mountain's worker safety MOD factor is 0.68, which is far superior to the industry average of 1.0. (Trial Tr., April 2, 2015, at 238-239); (Trial Tr., March 25, 2015, at 151).

12. Mountain maintains a far safer work environment for its Employees than does the City, as proven by comparison of their respective MOD factors (0.68 for Mountain, 1.08 for the City). (Trial Tr., April 2, 2015, at 238-239); (Trial Tr., March 25, 2015, at 151).

13. Employees are concerned with the City's safety program in comparison to Mountain's. A hasty transfer to a higher MOD factor work safety environment would put Employees at a higher safety risk than they currently enjoy.

14. Employees and their dependents would not be eligible for City health insurance until 3 months of continued employment.

15. Employees would be required to pay higher annual deductibles and copays than they currently pay under MWC.

16. Employees would no longer be covered for life insurance, accidental death and dismemberment paid by their employer and would instead be responsible for paying for such coverage themselves.

17. The City refused to credit the Employees for years of service, thereby harming them with respect to retirement benefits. Trial Tran., Day 1, pp. 218-219.

18. Employees would no longer be covered for short-term disability and would not be covered for long term disability until five years of new employment with the City (not until vested in PERS).

19. Employees would lose their 3% employer 401k match. The City has no such benefit.

20. Two Employees will soon be vested in Mountain's defined benefit retirement plan or "Retirement Plan" (August 30th and October 10th of 2015). A change of control will negatively affect their vesting, as they could simply "lose it all". Additional Employees will soon be vested in 2016 and 2017, and would face a similar "lose it all" retirement scenario.

21. If an Employee departs Mountain employment for more than 5 years, and then becomes re-employed by Mountain, they lose any unvested years in the Retirement Plan (for example, a forced temporary transfer to City employment for more than 5 years). Even if an Employee was vested before transfer, they would need to start vesting anew upon re-employment with Mountain.

22. All time an Employee is not employed by Mountain is lost to the Employee in terms of additional vesting in the Retirement Plan (for example, a forced temporary transfer to City employment).

23. Employees would not vest in the City's PERS until they complete 5 years of new service under City employment and they must contribute 7.9% of their pay from their date of hire to receive the full PERS benefits. Under a scenario where the Employee was transferred to City employment for less than 5 years and then transferred back to Mountain, none of the Employee's years of service for the City would vest in the City's PERS and none would vest in Mountain's Retirement Plan, such years of service would be totally lost to the Employee in terms of vesting in any retirement plan.

24. Under a longer term scenario where the Employee was transferred to City employment for more than 5 years and then transferred back to Mountain

employment, the Employee would have to start a new 5 year vesting period in Mountain's retirement plan, thus potentially losing up to 5 years of vesting in Mountain's plan. Having breaks in years of service and moving to PERs has real negative consequences to employees. Moving from Mountain's Retirement Plan, then to the City's PERS, and then back again to Mountain's Retirement Plan has potentially disastrous financial impacts to Employees.

25. Employees under age 62 would lose their retiree medical benefit if employment ended with Mountain. Any Employee considering retirement under the City would not receive comparable employer-retiree shared medical premiums, if at all. The retiree health trust would not be available if Employees went back to work at Mountain.

26. Employees now over 62 would be forced to retire to get their retiree medical benefits which would put the City in a position of age discrimination.

27. Employees not in the Mountain retiree health trust would lose their annual Non Elective Contribution (NEC) towards retiree health care during City ownership. The City has no such benefit.

28. The City has refused to pay trustee fees for the Employee retirement trust.

29. A premature transition to the City would not allow Employees the opportunity to receive additional benefits offered by Liberty, such as a 4% 401k match, an opportunity to purchase stock at a discount, three paid Liberty days to support local community activities, award and recognition programs, and a colleague interconnect program.

30. Employees would lose their accrued sick time should they be required to depart Mountain, and then lose 75% of accrued sick time should they leave the City and return to Mountain.

31. Currently, all Mountain Employees are eligible for merit increases based on their performance. The City has refused to commit to merit increases and market based increases Trial Tran., Day 1, pp. 218-219.

32. A premature reorganization and transfer of Employees will cause administrative and operational burdens to Employees, Park Water Company, and the City, and it would be extremely costly, cumbersome and unnecessary to take on this effort for an unknown time frame only to be unwound later under a reversal.

Dated this 30th day of June, 2015.

Michelle Halley
Michelle Halley

Signed or acknowledged before me on this 30 day of June, 2015, by Michelle Halley.

(SEAL)

Brenda K. Maes
Notary Public for the State of Montana
Printed Name: _____
Residing at: _____
My Commission Expires: _____

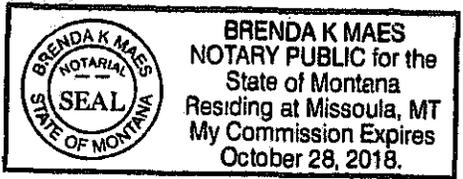


EXHIBIT B

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FILED JUN 30 2015

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Mountain Water Company

**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

THE CITY OF MISSOULA, a
Montana municipal corporation,

Plaintiff,

v.

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

Defendants.

Dept. No. 4
Cause No. DV-14-352

**DEFENDANTS’ MOTION TO STAY
VALUATION PROCEEDINGS
PENDING APPEAL**

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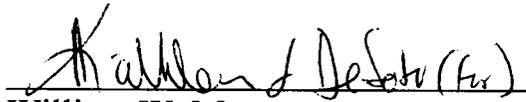
THE EMPLOYEES OF MOUNTAIN WATER COMPANY, (Shanna M. Adams, Heather M. Best, Dennis M. Bowman, Kathryn F. Datsopoulos, Wayne K. Davis, Valarie M. Dowell, Jerry E. Ellis, Greg A. Gullickson, Bradley E. Hafar, Michelle Halley, Douglas R. Harrison, Jack E. Heinz, Josiah M. Hodge, Clay T. Jensen, Kevin M. Johnson, Carla E. Jones, Micky A. Kammerer, John A. Kappes, Susan M. Lowery, Lee Macholz, Brenda K. Maes, Jason R. Martin, Logan M. McInnis, Ross D. Miller, Beate G. Newman, Maureen L. Nichols, Michael L. Ogle, Travis Rice, Eric M. Richards, Gerald L. Schindler, Douglas J. Stephens, Sara S. Streeter, Joseph C. Thul, Denise T. Tribble, Patricia J. Wankier, Michael R. Wildey, Angela J. Yonce, and Craig M. Yonce),

Intervenors.

Defendants Mountain Water Company and Carlyle Infrastructure Partners, LP, hereby move the Court to stay valuation proceedings while the pending appeals of the Court's holding in the preliminary condemnation proceedings are resolved by the Supreme Court.

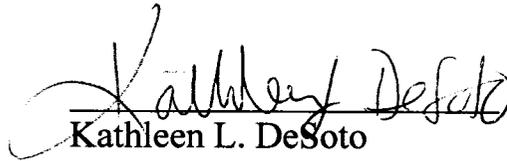
This motion is supported by the accompanying brief. Pursuant to Montana Fourth Judicial District Court Rule 3(G)(2), the other parties in this case have been contacted to determine whether they oppose the Motion. The City opposes this Motion. The Employees of Mountain Water Company do not oppose this Motion.

DATED this 30th day of June, 2015.



William W. Mercer
Adrian A. Miller
Holland & Hart LLP

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CARLYLE INFRASTRUCTURE
PARTNERS, LP



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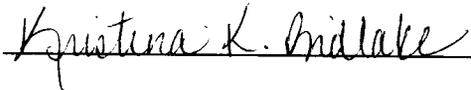
CERTIFICATE OF SERVICE

I hereby certify that on June 30th, 2015, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
_____ Mail
_____ Overnight Delivery Service
_____ Fax
1-4 E-Mail

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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

THE CITY OF MISSOULA, a
Montana municipal corporation,

Plaintiff,

v.

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

Defendants.

Dept. No. 4
Cause No. DV-14-352

**DEFENDANTS’ BRIEF IN SUPPORT
OF MOTION TO STAY
VALUATION PROCEEDINGS
PENDING APPEAL**

COPY

THE EMPLOYEES OF MOUNTAIN WATER COMPANY, (Shanna M. Adams, Heather M. Best, Dennis M. Bowman, Kathryn F. Datsopoulos, Wayne K. Davis, Valarie M. Dowell, Jerry E. Ellis, Greg A. Gullickson, Bradley E. Hafar, Michelle Halley, Douglas R. Harrison, Jack E. Heinz, Josiah M. Hodge, Clay T. Jensen, Kevin M. Johnson, Carla E. Jones, Micky A. Kammerer, John A. Kappes, Susan M. Lowery, Lee Macholz, Brenda K. Maes, Jason R. Martin, Logan M. McInnis, Ross D. Miller, Beate G. Newman, Maureen L. Nichols, Michael L. Ogle, Travis Rice, Eric M. Richards, Gerald L. Schindler, Douglas J. Stephens, Sara S. Streeter, Joseph C. Thul, Denise T. Tribble, Patricia J. Wankier, Michael R. Wildey, Angela J. Yonce, and Craig M. Yonce),

Intervenors.

Defendants Mountain Water Company (“Mountain”) and Carlyle Infrastructure Partners, LP (“Carlyle”) (collectively “Defendants”) file this brief in support of their Motion to Stay Valuation Proceedings Pending Appeal. For the reasons expressed below, Defendants respectfully submit that further proceedings in the “valuation phase” of this condemnation case should be stayed by the District Court while the pending appeals of the Court’s holdings in the preliminary condemnation proceedings are resolved by the Supreme Court.

I. LEGAL AND FACTUAL BACKGROUND

Montana statute describes a two-phase trial procedure for condemnation cases. First, “before property can be taken,” the government must show by a preponderance of the evidence that:

1. the use which the property is to be applied is a public use pursuant to Montana Code Annotated § 70-30-102;
2. the taking is necessary to the public use;
3. if already being used for a public use, that the public use for which the property is proposed to be used is a more necessary public use;
4. an effort to obtain the property interest sought to be taken was made by submission of a final written offer prior to initiating condemnation proceedings and the final written offer was rejected.

Mont. Code Ann. § 70-30-111 (2014). These four factors are to be adjudicated at a bench trial, referred to as the “preliminary condemnation proceeding,” or, for simplicity’s sake in this motion, the “necessity trial.” Mont. Code Ann. § 70-30-206(5). If the court finds the four factors favor the government, it shall enter a preliminary condemnation order.

If the court issues a preliminary condemnation order, the second phase of the condemnation litigation – herein referred to as the “valuation phase” – may begin. *See* Mont. Code Ann. §§ 70-30-206 *et seq.* The valuation phase is designed to arrive at the fair market value of the subject property. Mont. Code Ann. § 70-30-302(1). It entails appraisal by and a hearing before “condemnation commissioners,” Montana Code Annotated § 70-30-301, the opportunity to appeal the commissioner’s decision for a full jury trial, Montana Code Annotated § 70-30-

304, and the possibility of the government taking possession of the subject property at any time, even before fair market value has been established, upon payment of certain funds into court, Montana Code Annotated § 70-30-311.¹

As this Court found when denying Mountain's two motions for continuance of the necessity trial, Montana's condemnation statutes explicitly encourage swift progression of the *necessity phase* of condemnation litigation:

After a complaint . . . is filed and prior to the issuance of the preliminary condemnation order, all parties shall proceed as expeditiously as possible, but without prejudicing any party's position, with all aspects of **the preliminary condemnation proceeding**, including discovery and trial. The court shall give the proceedings expeditious and priority consideration.

Mont. Code Ann. § 70-30-206 (emphasis added). Likewise, Montana Code Annotated § 70-30-202 sets a default timeline of just 6 months between service of summons and the necessity trial, which may be extended for good cause.² In the case of a typical eminent domain proceeding for right-of-way or road expansion, this fast-tracked determination of necessity may make sense, considering the cloud hanging over the landowner's improvement to and disposition of his real property while the legality of a threatened

¹ However, the government obtains no interest, constructive or otherwise, in the property until payment is made.

² As the Court is aware, Mountain contended there was in fact good cause to continue the necessity trial, to avoid undue prejudice to Mountain and assure due process.

condemnation is yet unresolved.

However, there is no similar statutory fast-track mandated for the valuation phase of condemnation litigation. Rather, if a demand for jury trial is made by either party, the case “must be tried upon the *same notice* and in the *same manner* as other civil actions.” Mont. Code Ann. § 70-30-304(1) (emphasis added). Additionally, the statutes give the district court explicit authority to stay the valuation proceedings if a condemnee appeals the court’s findings and judgments in the necessity phase: “the district court on motion or ex parte may grant a stay for a period of time and under conditions that the court considers proper.” Mont. Code Ann. § 70-30-312(2).³

In this case, trial on the issue of whether a preliminary condemnation order should issue was held from March 18 to April 6, 2015. On June 15, 2015, the Court issued its written *Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation* (“Preliminary Condemnation Order”), which held the City had proven the four elements of Montana Code Annotated § 70-30-111, and was entitled to condemn Mountain’s property. On June 23, 2015, Defendants filed Notices of Appeal with the Supreme

³ Similarly, pursuant to Mont. R. App. P. 22, the district court may stay its own judgment or order pending appeal.

Court, appealing the Condemnation Order and predicate rulings and orders from the necessity phase. Defendants respectfully submit that in light of the pending appeals, a stay of the valuation phase is “proper” pursuant to Montana Code Annotated § 70-30-312(2) and Montana Rule of Appellate Procedure 22, in order to protect Defendants from potential serious injury, ensure an orderly resolution of legal and factual issues, and avoid unnecessary spending.

II. THERE IS GOOD CAUSE FOR A STAY HERE, AND COUNTERVAILING FACTORS ARE ESPECIALLY WEAK BECAUSE THE SUBJECT PROPERTY IS ALREADY SERVING THE PUBLIC

The relevant statute empowers this Court to stay the valuation phase proceedings if it determines such a stay would be “proper.” Mont. Code Ann. § 70-30-312(2). While no caselaw specifically addresses the circumstances where a stay of the valuation phase is “proper,” Montana Rule of Appellate Procedure 22, regarding stays of judgment pending appeal simply sets a “good cause” standard for requested stays. Mont. R. App. P. 22(2)(a)(i). That standard is likewise appropriate here, especially considering there is no statutory fast-track provision in the valuation phase as there is at the necessity phase. Clearly, there is ample good cause for a stay in this case.

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a. The Unique Appellate Backdrop of This Case Warrants a Stay to Prevent Serious Injury to Defendants, Avoid Inconsistent Results Between the Necessity and Valuation Phases, and Avoid Unnecessary Expense

A typical condemnation in Montana involves taking property currently serving only private interests in order to devote it to a new public use, such as a right-of-way for a highway expansion, or a new school.⁴ The present condemnation is far outside the usual condemnation case for at least three reasons: 1) it involves condemnation of an operating business rather than merely real property; 2) the government intends to carry on operation of that business rather than demolish it to build a new improvement; and 3) it involves condemnation of property that is already devoted to the public use, and thus requires a heightened showing that the City's intended use is a "more necessary public use." Mont. Code Ann. § 70-30-111. Moreover, as the Court found in the Preliminary Condemnation Order, Mountain is presently providing a valuable public service. This is not the case of a system being condemned because it is distressed and in need of urgent repair; rather, as the Court recognized, the public is "highly satisfied with Mountain Water's service," though the Court ultimately concluded the long-term interests of Missoula favor condemnation. The upshot of these distinctions is that

⁴ Indeed, besides the City's prior attempt to condemn Mountain in the 1980s, Defendants are unaware of any recent instances of Montana municipalities condemning a private business in order to continue running the business as a governmentally-owned operation.

the necessity phase of this case has been far more factually and legally robust than the usual condemnation case. Indeed, in a typical condemnation case there is no need for a necessity trial, because a simple “ordinance authorizing the taking of private property for a public use is conclusive as to the necessity of the taking.” Mont. Code Ann. § 7-5-4106.

Here, however, the necessity phase required 12 days of trial, and testimony by dozens of witnesses on topics as far-ranging as economic theory, ratemaking principles, municipal bonding, condition assessment of the distribution system, environmental concerns, public survey methodology, and many more. Simply put, the necessity phase of this case has been singular among Montana condemnations. Consequently, Defendants’ appeal of holdings in the necessity phase presents a more meaningful challenge to the Supreme Court than a standard appeal in a typical condemnation. Whereas a necessity determination is ordinarily all but unassailable, even conclusive, *see* Montana Code Annotated §7-5-4106, here the Supreme Court will be faced with numerous questions, some of first impression, that are genuinely contestable, including, *inter alia*:

- Whether it is proper to exclude all evidence of value from the necessity phase, particularly in light of the Supreme Court’s decision in the 1980’s finding valuation evidence to be crucial at the necessity phase;
- Relatedly, whether a finding that condemnation is necessary and the proposed use “more necessary” can be supported when all evidence regarding rate impact is excluded, particularly in light of the Supreme Court’s decision in the 1980’s finding rate impact is a crucial factor at the necessity phase;

- Whether the City is entitled to condemn property outside its corporate bounds, particularly when the City has testified that the property is not necessary to operation of the water system;
- Whether the City can show public opinion favors condemnation when it excludes the opinion of customers outside City limits, particularly in light of the Supreme Court's decision in the 1980's holding such omission does not support a finding of public support; and
- Whether a finding of "more necessary public use" can turn on factors that would apply to *any* municipal ownership of a utility, or must turn on specific factors applicable to *this* particular municipality and *this* particular utility.

This appellate backdrop, unique as compared to typical condemnations, suggests a stay is even more appropriate here than in an ordinary condemnation, for at least three reasons.

1. A Stay is Warranted to Avoid Serious Injury to Defendants

A stay pending appeal will protect Defendants from potential serious injury in case of reversal. The Supreme Court has explained that, even absent a statutory stay provision as there is here, a stay should be granted "whenever it is reasonably necessary to protect the appellant from serious injury in case of reversal." *Nepstad v. East Chicago Oil Ass'n*, 96 Mont. 183, 190, 29 P.2d 643, 644 (Mont. 1934). If no stay is granted here, it is conceivable that the City will take possession and ownership of Mountain's System,⁵ only to later have to "hand back the keys" after

⁵ In fact, per statute, the City need not wait until the valuation phase is concluded to take possession. Pursuant to Montana Code Annotated § 70-30-311(1), the City may petition, and the court may grant, that possession be given to the City upon the City's payment of certain funds into court.

a Supreme Court reversal.

This back-and-forth of ownership would be hugely disruptive to the operation and management of the System. The changes entailed by premature City acquisition will be far reaching, and will be difficult, expensive, and in some cases perhaps impossible to roll-back if ownership reverts to Mountain following appeal.

Following is a non-exhaustive list of changes City acquisition may bring:

- Change of corporate name, including signage, letterhead, vehicle, and clothing changes
- Administrative name changes to numerous water rights, property deeds, titles, and easements
- Change of billing software and transfer of confidential customer information
- Major human resources changes, including new employee insurance and benefits providers, new pension plans, new vacation policies, etc.
- Change in employment status under Montana law, including implementation of employment contracts
- Changes to employees' union status
- Complete employee reorganization and dispersal into various City departments
- Employees leaving for other job opportunities
- Implementation of a new system of accounting, in light of the utility's new unregulated status
- Notching of the wilderness dams
- Changes to rates to pay for acquisition cost and City's capital plan
- Changes in capital project and maintenance standards
- Discontinuation of current administrative services and replacement with new vendors or internal City providers
- Change of IT system
- Discontinuation of property tax
- Discontinuation of Mountain's contracts with long-term vendors and contractors, who are in the middle of capital improvements on the system
- The Special Use Permit for 5 dams and 3.14 miles of access road in the Rattlesnake Wilderness, which currently will not expire until 2031, will automatically terminate immediately upon City ownership or control, putting

the water rights for the 5 dams at risk

Put simply, premature City acquisition pending appeal of the Preliminary Condemnation Order will break apart and reconfigure the entire Mountain operation in countless ways. If the valuation phase is not stayed and Defendants subsequently prevail on their appeal, “unringing the bell” of these changes will be unnecessarily disruptive to customers and employees, a huge logistical burden, very expensive,⁶ and in some cases impossible. Moreover, City acquisition pending appeal will have immediate adverse financial effects on Defendants. Mountain will still carry a \$3 million pension liability and \$18 million liability on developer extension agreements, despite having no revenue source to satisfy these liabilities. In addition, there are costly complex financial and tax implications to Defendants resulting from payment of debt secured by the Mountain assets and then refinancing should the Supreme Court reverse on appeal. As a practical and public policy matter, it is unwise and inefficient to proceed with the valuation phase and potential acquisition, when such could cause enormous logistical difficulties at best, and serious harm to Defendants, customers, and employees at worst in the event of reversal. Accordingly, Defendants respectfully submit that a

⁶ Per Montana Code Annotated § 70-30-311(3), if Mountain prevails on appeal it will be entitled to compensation from the City for damages caused by the intermediate period of City possession. The damages exposure for “unringing the bell” of the above changes could be quite substantial.

stay is proper.

2. A stay is Warranted to Prevent Inconsistent Results Between the Necessity and Valuation Phases

A stay is also warranted to avoid potential inconsistent results between the necessity phase, as it may ultimately stand post-appeal, and the valuation phase. There are many possible examples, but here is one: Defendants are challenging the District Court's exclusion of all value-related evidence from the necessity trial. In Defendants' view, such evidence was indispensable for the Court to determine whether the taking is necessary and more necessary than the current public use, since if the City pays a cost consistent with Defendants' valuation, it will have to drastically raise customer rates. If Defendants are successful in this appeal, a possible outcome is that the necessity phase will need to be reopened to consider evidence of value. However, if in the meantime the fair market value has already been determined by a jury, such post-facto introduction of value-related evidence in a re-opened necessity phase may be impossible, inasmuch as it could be counter-factual to that value already established by jury. Thus, the Court could be placed in the inconsistent posture of having to weigh competing valuation evidence for re-opened necessity purposes while already having access to the value determined by jury.

As another example, in a pre-trial order, the District Court held that the City is entitled to condemn Mountain assets outside Missoula city limits, including

Mountain's numerous dams and lakes, and infrastructure serving non-Missoula resident customers. As a result of this ruling, these extra-territorial assets will factor into the fair market value assigned by the Court-appointed condemnation commissioners, and potentially a jury, during the valuation phase. However, Defendants are challenging this pre-trial order on appeal. This presents a particularly unique issue to the Supreme Court, in light of the fact the City testified that much of this property is not necessary to the operation of the water system, and should even be destroyed (e.g., the City's position that the Rattlesnake Wilderness dams should be notched). Should the valuation phase occur on a double-track with the appeal, and should the Supreme Court subsequently sustain Defendants' challenge to this order, the result would be inconsistency between the necessity and valuation phases, in that the fair market value already determined in the valuation phase would actually be based on an inaccurate corpus of assets. To prevent these and other potential inconsistencies between the necessity phase and valuation phase, a stay is proper.

3. A Stay is Warranted to Conserve Resources

Finally, and relatedly, a stay is warranted to conserve resources, both the litigants' and the Court's. If Defendants are ultimately successful in their appeal, the result will be that the valuation phase is either unnecessary or else will only be necessary pending the outcome of a remanded necessity trial. Both the City and

Defendants have already spent multiple millions of dollars in legal fees and expenses to date. Staying the valuation phase during the pendency of the appeal ensures that the parties will not spend millions more dollars on motion practice, a condemnation commissioner hearing, and a potential jury trial, all of which may ultimately prove unnecessary. Likewise, the Court has devoted substantial judicial resources to this case to date, including but surely not limited to the 12 days of trial. Waiting to proceed with the valuation litigation and trial until the Supreme Court has determined whether the valuation phase is even necessary will help conserve judicial resources and ensure all time devoted by the Court to this case is time well spent.

b. Any Urgency to Proceed With Valuation in a Typical Condemnation Case is Absent Here, Because the System is Already Serving the Public

Not only are factors favoring a stay here stronger than in the typical condemnation, but any countervailing urgency is weaker, due to the unique nature of the subject property. In a standard condemnation case, the government seeks to take real property devoted to private use in order to construct a new improvement for public use, such as a road or school. Any delay in possession is a delay of that public improvement coming into existence. In contrast, here the City seeks to take improvements already devoted to the public use and *continue that same use*, but under different ownership. If a stay is implemented here, no road will be left half-built or school opening delayed. Rather, while the Supreme Court resolves vital

issues from the necessity phase, the people of Missoula will continue to receive the same clean, safe drinking water service as they have for the past century.

Moreover, as the Court and the City have acknowledged, Mountain's water system is not a failing system, and the citizens of Missoula are satisfied with their service.

The City has admitted it will charge the same, or potentially higher, rates for this service than Mountain does. It is not urgent failings, but purported *long-term* benefits, which are at the heart of the Court's Preliminary Condemnation Order.

Defendants submit that in light of the property's current devotion to public use and the long-term rather than exigent rationale for condemnation, the benefits of a stay far outweigh any countervailing considerations.

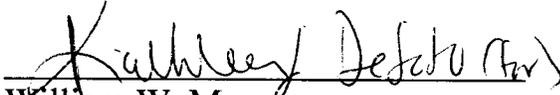
III. CONCLUSION

A stay of the valuation phase pending appeal of the necessity phase is proper here. Due to the unique circumstances and heightened legal standard for condemning a utility already devoted to public use, Defendants' appeal presents questions to the Supreme Court that are more substantial and unique than the typical condemnation case. Against this unique appellate backdrop, there is good cause for a stay in order to prevent injury to Defendants that would occur if the City takes possession only to subsequently have to return possession to Mountain, prevent inconsistent results between the necessity and valuation phases, and conserve the litigants' and Court's resources of time and money. Moreover, any

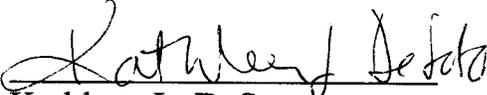
countervailing consideration of expediency is especially attenuated here, in light of the fact that the subject property is already satisfactorily serving the public.

Accordingly, Defendants request that the Court stay further proceedings in the valuation phase, pending resolution of Defendants' appeal.

DATED this 30th day of June, 2015.


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I hereby certify that on June 30th, 2015, a copy of the foregoing document was served on the following persons by the following means:

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