

Service Date: January 13, 2016

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

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

NOTICE OF OPPORTUNITY TO COMMENT

On December 15, 2014, Liberty Utilities Company filed a *Joint Application for Approval of a Sale and Transfer of Stock* with the Montana Public Service Commission (“Commission”). Joint Applicants include Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company.

On December 23, 2014, the Commission issued a *Notice of Application and Intervention Deadline* and granted intervention to the City of Missoula (“City”), Mountain Water Employees, the Clark Fork Coalition, and the Montana Consumer Counsel. On February 9, 2015, the Commission issued a *Procedural Order 7392* outlining deadlines for this docket.

On August 28, 2015, the City filed a Petition for Judicial Review before a Montana district court, challenging a number of the Commission’s intermediary procedural rulings. At hearing before the district court on December 18, 2015, the court ordered the Commission to stay the sale and transfer docket. Minute Entry, pp. 1-2 (Mont. 4th Dist. Ct. Dec. 18, 2015). The Commission subsequently vacated the remainder of its procedural schedule and halted all proceedings in its sale and transfer docket. Notice of Staff Action (8) (Dec. 21, 2015).

On January 11, 2016, the Joint Applicants filed a *Notice of Closing and Withdrawal of Joint Application* (“Notice”) with the Commission. The Commission requested that the district court lift the stay for the purposes of addressing the Notice. The district court granted the Commission’s request on January 12, 2016, for the purpose of allowing the PSC to take such action that it deems necessary and appropriate to fully and fairly address the *Notice* filed on January 11, 2016 by the Joint Applicants. (Order attached).

The Commission, pursuant to the Order issued by the district court, requests comments from the parties on the following issues **no later than January 27, 2016**.

1. Jurisdiction in general. The Notice filed by the Joint Applicants states:

By filing the transfer the Joint Application, the Joint Applicants specifically did not waive, and specifically reserved, any and all arguments related to the Commission's jurisdiction with respect to the upstream change in ownership of Western Water. The Joint Applicants also specifically reserved any and all arguments related to the Commission's lack of jurisdiction over these entities as upstream owners of Mountain Water as regulated water company in the state of Montana.

Notice ¶ 2. The Commission requests comments from the parties regarding the Commission's current jurisdiction over the sale and transfer of Mountain Water in the context of the ongoing condemnation proceeding, judicial review in the district court, and the Notice.

2. City's Previous Position on Commission Jurisdiction. The Notice also states:

Since the filing of the Joint Application, the City of Missoula has consistently and regularly contested the Commission's jurisdiction due to the City's ongoing attempts to obtain Mountain Water's assets through condemnation.

Notice ¶ 3 (citing City's Motion to Stay, filed February 13, 2015; Notice of Issuance of Preliminary Order of Condemnation and Motion to Dismiss or, in the Alternative, to Stay the Proceedings, filed June 23, 2015; City's Reply Brief to the City's Motion to Dismiss or Stay the PSC Proceedings, filed July 7, 2015; City's Responses/Objections to data requests). The Commission notes that its Reply Brief in Support of a Motion to Dismiss responded to a similar perception of the City's arguments regarding lack of jurisdiction over this sale and transfer docket:

The Commission's jurisdiction is not plainly lacking and the City has not raised a facial challenge of jurisdiction because the City's argument that the Commission lacks jurisdiction relies on an application of facts to assert an unproven constructive ownership concept. *See* City Response Brief p. 4 (Nov. 27, 2015) (“the City *plans* to initiate the process of taking possession of the Water System as authorized by Mont. Code Ann. § 70-30-311(1)(a)(ii)”) (emphasis added). The City has not taken actual possession of the water system and thus the Commission's proceeding is not yet moot.

Commission Reply Brief, p. 5 (Jan. 6, 2016). This perception is also reflected in *Order 7392n*: “[T]he City argues a dismissal is proper because while ‘the PSC has jurisdiction

to regulate the operations of Mountain Water’ the Commission’s ‘implied jurisdiction over regulatory transfers is removed.’” Order 7392n ¶ 15 (Sept. 24, 2015). In light of the previous perceptions of both the Joint Applicants and the Commission regarding the City’s position on the Commission’s jurisdiction, the Commission requests clarification from the City on these issues.

3. Joint Applicant’s previous position of Commission jurisdiction. The Commission requests comment on the Joint Applicants’ previous opposition to a dismissal of the sale and transfer docket, asserting that a stay or dismissal would harm the Joint Applicants because “approvals from the [Montana Public Service] Commission and the California Public Utilities Commission are required to complete the sale of Western Water stock...” Mt. Water Resp. to the City of Missoula’s Mot. to Dismiss or Stay, p. 8 (June 30, 2015). The Joint Applicants also stated “disclaiming Commission jurisdiction over the utility and its operations would put Mountain Water and its customers into a regulatory nowhere land.” *Id.* at p. 4. The Joint Applicants further claimed that the Commission should “continue to review the proposed sale and transfer of Western Water in this docket independent of the District Court’s condemnation proceeding” and that the Commission should not dismiss its proceeding because it must “fulfill its statutory obligations of regulatory review.” Liberty Resp. to City of Missoula’s Renewed Mot. to Dismiss or Stay the Proceedings, p. 6 (June 30, 2015).

4. Violation of any specific statutes, rules or orders. The Commission requests comment on whether the Joint Applicants are now in violation of any specific statutes, rules or orders. Of particular interest is the Commission’s previous Order concerning the sale and transfer of Mountain Water. *See In re Mountain Water Co.*, Dkt. No. D2011.1.8, Order 7149d ¶ 9 (Dec. 14, 2011). That Order states “[t]he Commission would review any future transfer of Mountain [Water] to the City or any other entity under the same standards that govern its decision in this case.” Order 7149d ¶ 9. Considering the language in *Order 7149d* and other applicable authorities concerning jurisdiction over sales and transfers of investor owned public utilities, the Commission requests comment of whether fines made available under Mont. Code Ann. §§ 69-3-209, -206 are appropriate.

5. Violation of ring fencing provisions. The Commission requests comment on whether the Joint Applicants are now in violation of applicable ring fencing provisions and whether risk mitigation actions, such as limitation of dividends, are appropriate.

6. Rate adjustments. During the proceeding, testimony was provided that indicated rate adjustments as a result of differing cost of capital of the parent corporation would be appropriate. *See* Test. John Wilson pp. 6-8, 14-19 (Nov. 4, 2015). Please provide comment on the appropriateness of such a rate adjustment and whether Commission procedure allows for such ratemaking acts in the context of a sale and transfer approval docket. *But see* Mont. Code Ann. §§ 69-3-303 (notice and hearing on proposed rate changes), -304 (temporary approval of rate increases or decreases), 2-4-623 (requirements of final orders under the Montana Administrative Procedure Act). Or whether it would be more appropriate to open a separate docket to address these rate adjustment concerns. *See* Mont. Admin. R. 38.5.101-195 (minimum rate case filing standards).

7. Notice in general. The Commission invites comments on any other issue related to the Joint Applicants' Notice.

DONE AND DATED this 13th day of January, 2016, by delegation to Commission staff as an Order of the Commission.

BY THE MONTANA PUBLIC SERVICE COMMISSION

BRAD JOHNSON, Chairman
TRAVIS KAVULLA, Vice Chairman
KIRK BUSHMAN, Commissioner
ROGER KOOPMAN, Commissioner
BOB LAKE, Commissioner

1 Leslie Halligan, District Court Judge .
2 Fourth Judicial District, Dept. 1
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, Montana 59802
6 Telephone: (406) 258-4771

FILED JAN 12 2016

ARLEY E. FAUST, CLERK
Jane M. Arnold
Deputy

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8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY
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10 THE CITY OF MISSOULA,
11 a Montana Municipal Corporation,

Cause No. DV-15-918
Dept. No. 1 - Halligan

12 Petitioner,

13 v.

14 THE MONTANA DEPARTMENT OF
15 PUBLIC SERVICE REGULATION,
16 MONTANA PUBLIC SERVICE
17 COMMISSION,

**ORDER GRANTING
RESPONDENT'S MOTION TO
LIFT STAY FOR PURPOSES OF
PSC ACTION ON NOTICE OF
CLOSING AND WITHDRAWAL
OF JOINT APPLICATION**

18 Respondent,

19 and

20 MOUNTAIN WATER COMPANY and
21 WESTERN WATER HOLDINGS, LLC,

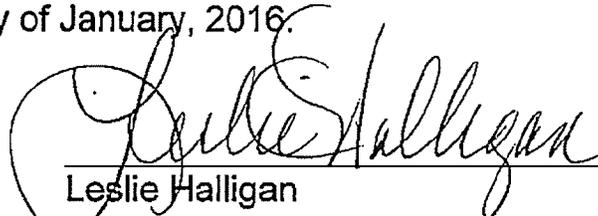
22 Respondent-Intervenors.

23 On January 11, 2016, the Montana Public Service Commission
24 ("PSC") filed a *Motion to Lift Stay*, requesting authority to take appropriate
25 action to address a *Notice of Closing and Withdrawal of Joint Application*
26 ("*Notice*") filed by the Joint Applicants on the same date. The PSC
27 requests authority to address the *Notice* by receiving comments from the
28 parties to the sale and transfer docket, and discussing and taking action on
29 the *Notice* at a work session. The City does not oppose this Motion.
30 Mountain Water is reported to take no position on the Motion.

1 Based upon review of the Respondent's unopposed request and
2 good cause appearing, the Court finds that the PSC seeks appropriate
3 authority to address the *Notice* filed by the Joint Applicants and the
4 temporary stay issued by this Court should be lifted for that purpose.
5

6 Therefore, IT IS HEREBY ORDERED that the stay imposed on
7 December 18, 2015 is lifted for the purpose of allowing the PSC to take
8 such action that it deems necessary and appropriate to fully and fairly
9 address the *Notice* filed on January 11, 2016 by the Joint Applicants.

10 DATED this 12th day of January, 2016.

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14 Leslie Halligan
District Judge

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26 cc: Thorvald A. Nelson/William W. Mercer/Adrian A. Miller
27 Scott Sterns/Natasha Prizing Jones
28 Laura J. Farkas/Jeremiah Langston
29 James P. Nugent
30 Michael Green/Gregory F. Dorrington
Robert Nelson/Monica Tranel
Barbara Hall
Gary Zadick