Service Date: February 5, 2016

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

IN THE MATTER OF the Joint Application of Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, and Mountain Water Company for Approval of a Sale and Transfer of Stock	)))))	REGULATORY DIVISION DOCKET NO. D2014.12.99 ORDER NO. 7392q

ORDER

Procedural history

1. On December 15, 2014, Liberty Utilities Co. ("Liberty"), Liberty WWH, Inc., Western Water Holdings, LLC and Mountain Water Company ("Mountain Water")—collectively known as the Joint Applicants—filed an *Application for Approval of Sale and Transfer of Stock* with the Montana Public Service Commission ("Commission"). Approval of this transaction would have allowed Liberty Utilities Co. to be the sole owner of Western Water Holdings, which is the sole upstream owner of Park Water Company. In turn, Park Water Company is the sole upstream owner of Mountain Water. The Montana Consumer Counsel ("MCC"), the City of Missoula ("City"), The Clark Fork Coalition ("CFC"), and the Employees of Mountain Water were granted intervention in this docket.

2. Over a period of 8 months the Commission endeavored to resolve the discovery and procedural disputes between the parties. Unsatisfied with the Commission's decisions, the City sought judicial review in Montana district court. *See City of Missoula v. Mont. Dept. of Pub. Serv. Regulation*, DV-15-918, Pet. for Judicial Review (Mont. 4th Dist. Ct. Aug. 31, 2015). Despite the Commission's and Mountain Water's motion to dismiss the proceeding, the district court stayed the Commission's proceeding allowing itself time to examine the merits of this interlocutory appeal. *See City of Missoula v. Mont. Dept. of Pub. Serv. Regulation*, DV-15-918, Minutes and Note of Ruling (Mont. 4th Dist. Ct. Dec. 18, 2015). On January 11, 2015, the Commission was informed through a *Notice of Closing and Withdrawal of Joint Application* that the Joint Applicants had closed on the sale of Park Water to Liberty WWH, which included

Mountain Water and two California water utilities. This sale and transfer occurred without Commission approval in apparent violation of the Commission's implied authority over sales and transfers.

3. On January 13, 2016, the Commission issued a *Notice of Opportunity to Comment* requesting parties to discuss the issues of 1) jurisdiction in general; 2) the City's previous position on Commission jurisdiction; 3) the Joint Applicant's previous position of Commission jurisdiction; 4) violations of any specific statutes, rules or orders; 5) violation of ring fencing provisions; 6) rate adjustments; and 7) the notice in general. On January 27, 2016, the Commission received comments from the MCC, the City, Mountain Water, Liberty, and the CFC. The Commission held a work session on January 29, 2016 to discuss and act on Joint Applicants' *Notice of Closing and Withdrawal of Joint Application* and the comments provided by the various parties.

Findings of Fact and Conclusions of Law

Jurisdiction

4. The Commission is vested with "full power of supervision, regulation, and control of... public utilities..." Mont. Code Ann. § 69-3-102 (2015). The Commission has the "power... to do all things necessary and convenient in the exercise of [its] powers..." Mont. Code Ann. § 69-3-103(1). The Commission is vested, by statute, with a broad grant of authority to regulate public utilities. This broad grant of authority vests the Commission with the power to supervise the sale and transfer of public utilities. The Commission has affirmed its jurisdiction over sales and transfers, and maintained that they must be approved by the Commission "in order to assure generally that utility customers will receive adequate service and facilities, and that utility rates will not increase... and that the acquiring entity is fit, willing, and able to assume the service responsibilities of a public utility." *In Re Devon Gas*, Dkt. No. D2013.7.57, Order No. 7307b, ¶ 12 (Mont. Pub. Serv. Commn. Oct. 29, 2013). The Commission has held that its jurisdiction "rests on its power to protect customers from harmful consequences of a purchase in the form of rate increases or deterioration of service." *In Re Mountain Water*, Dkt. No. D2011.1.8, Order No. 7149d, ¶ 5 (Mont. Pub. Serv. Commn. Dec. 13, 2011). The Commission has consistently exercised its authority over sales and transfers for decades. *Id.* ¶ 19. The Commission's assertion of authority is not new.

5. The Commission has also long held that a sale or transfer is a type of discontinuation of service. Dkt. No. D2013.7.57, Order No. 7307b, ¶ 13. The Montana Supreme Court has affirmed that a utility may not abandon service without the Commission's consent. *Great N. Ry. v. Board of R.R. Comm'rs*, 130 Mont. 250, 252, 298 P.2d 1093 (1956). The requirement that utilities seek Commission approval before abandoning service is not found in statute, rather, it is an implied power, similar to the Commission's power to oversee sales and transfers, which has been affirmed by the Montana Supreme Court. The Montana Supreme Court, when ruling that the Commission has the authority to oversee discontinuation of service, noted that it has been held that a public utility may not discontinue service without Commission approval "in a great many states under statutes no broader than ours." *Id.* The Kentucky Appeals Court has noted that:

> [A] public utility subject to the jurisdiction of the Public Service Commission cannot discontinue operation without approval of the commission. Obviously, if a sale were made to a purchaser incapable of carrying on the service, the sale would be the practical equivalent of a discontinuance of service. The Public Service Commission is charged with responsibility, and vested with power, to see that the service of public utilities is adequate, and where an existing utility proposes to sell its system the commission, in order to carry out its responsibility, must have the opportunity to determine whether the purchaser is ready, willing and able to continue providing adequate service.

Public Service Com. v. Southgate, Highland Heights, 268 S.W.2d 19, 21 (1954). The Kentucky Appeals Court also held that jurisdiction over sales and transfers "is implied necessarily from the statutory powers of the Commission to regulate the service of utilities." *Id.* Similar to when the Montana Supreme Court determined that the Commission has authority over discontinuation of service, other states with statutes "no broader than ours" have determined that Commissions have authority to oversee sales and transfers.

6. The Joint Applicants argued during the sale and transfer proceeding that a stay or dismissal of the Commission proceeding would be detrimental to them, because Commission approval was required to complete the sale. Mtn. Water Resp. Br. 8 (June 30, 2015). Now however, the Joint Applicants assert that the Commission lacks jurisdiction to oversee sales and transfers, arguing that the decision to seek Commission review was simply a contractual agreement between the parties, one the parties were free to waive. The Commission finds this argument unpersuasive, because, as noted by intervenors:

> Joint Applicants diligently prosecuted their case for over a year- premised on the notion that the Commission has jurisdiction over the sale. The Joint Applicants' assertion on January 11, 2016 that the Commission lacks jurisdiction was a sudden about-face in their rationale, and suggests that the Joint Applicants may have some other business interests in play.

Clark Fork Comments 4 (Jan. 27, 2016). However, it should be noted that "[s]ubject-matter jurisdiction can never be forfeited or waived . . . [and] cannot be conferred by the consent of a party." *Thompson v. State*, 2007 MT 185, ¶ 28, 338 Mont. 511, 167 P.3d 867. The Commission asserts that it has subject-matter jurisdiction over sales and transfers of Montana investor owned public utilities independently and not by virtue of the Joint Applicants' consent. Even with this jurisdictional underpinning in mind, the Commission has a regulatory obligation to investigate and understand why the Joint Applicants changed their perspective on Commission jurisdiction so suddenly and without notice. *See infra* ¶¶ 14-15.

7. The Joint Applicants then appear to concede that the Commission has authority over the sale and transfer of utilities and utility assets, but allege that the Commission has no jurisdiction over a sale of upstream stock between two private entities. This argument is not convincing, because if true, it would allow entities to create wholly owned subsidiaries between the utility and the ultimate upstream owner, intended solely to subvert the Commission's ability to oversee sales and transfers. The MCC states "the fact is that Applicants proposed to transfer ultimate control of regulated utility services to an unknown entity" and that such determination as whether service will be reliable and rates just and reasonable, and whether the new owner is deemed fit to provide essential public utility service "is clearly within the authority of the Commission to determine." MCC Comments 4 (Jan. 27, 2016). The Commission agrees. Liberty has assured the Commission that it has "directed Mountain Water" to file "a full rate case." Liberty Comments 16 (Jan. 27, 2016). It is clear that Liberty exercises significant control over the utility.

8. The Commission finds as it has in the past that is possesses jurisdiction over utility sales and transfers as a necessary function, incident to its statutory authority to exercise "full power of supervision, regulation, and control of... public utilities." Mont. Code Ann. § 69-3-10

Fines

8. Mountain Water is in violation of the Commission's previous Order approving the sale and transfer of Mountain Water. "The Commission would review any future transfer of Mountain to the City or any other entity under the same standards that govern its decision in this case." Dkt. No. D2011.1.8, Order No. 7149d, ¶ 9. Mountain Water argues that this only applies to transfers of Mountain Water and not upstream sales and this proceeding is different "because the entity being sold and transferred here was two levels removed from the public utility, Mountain Water." Mtn. Water Comments 11 (Jan. 27, 2016). Mountain Water goes on to argue "[i]n Docket No. D2011.1.18, Mountain Water's parent company, Park Water, was sold. On January 8, 2016, Park Water's parent company, Western Water, was sold. As a result, both Park Water and Mountain Water are completely intact following the transaction." *Id.* at n.20.

9. The MCC argues that "since the Commission's approval of Carlyle's ownership was expressly predicated on the Commission reviewing any future transaction under the same standards it used in the Carlyle transaction, the Joint Applicants are clearly in violation of that Order." MCC Comments 7.

10. The Commission agrees with the MCC's interpretation. If Mountain Water's argument is accepted as true, acquirers of Montana utilities could simply prevent regulatory scrutiny of sales and transactions by placing more holding companies between the actual utility and the actual corporate owner. *Order 7149d* reserves the right to approve upstream sales and transfers similar to what occurred through Carlyle's acquisition of Mountain Water in 2011. This addition of one additional holding company should not defeat this intent.

11. Therefore, the Commission will pursue fines against Mountain Water under Montana Code Annotated §§ 69-3-209 & 69-3-206. Mont. Code Ann. § 69-3-206 states "[i]f any public utility . . . refuses to obey any lawful requirement or order made by the commission or any court, then for every such violation, failure, or refusal the public utility is subject to the penalty prescribed by 69-3-206." Mont. Code Ann. § 69-3-209 states public utilities in violation of a Commission order "shall be subject to a fine of not less than $100 or more than $1,000" and "each day's refusal or failure . . . shall be deemed a separate offense and be subject to the penalty herein prescribed."

Ring-fencing

12. At this juncture, it does not appear as if there has been an explicit violation of the ring fencing conditions. Condition h of the Ring Fencing Stipulation states "PSC authorization is required prior to Mountain transferring, selling or otherwise disposing of any of Mountain[] [Water's] . . . Montana rate-based utility property with a net book value in excess of $1 million." Dkt. No. D2011.1.8, Order No. 7149d, ¶ 48. The Commission's understanding is that this sale and transfer concerned stock and not any rate-based utility property.

13. The MCC has questioned whether Liberty is still bound to the ring fencing provisions. MCC Comments 7-8. Liberty stated in its comments it "has acknowledged that Mountain Water remains subject to the stipulated ring-fencing provisions imposed in Order No. 7149d, Docket No. D2011.1.8." Liberty Comments 15.

14. Given that the Commission was unable to examine fully the parent before the transaction was closed, there remains significant unknowns about Liberty and its upstream parent Algonquin Power & Utilities ("Algonquin"). In order to answer these questions, Mountain Water must show cause demonstrating that it did not violate applicable ring fencing provisions and why the Commission should not immediately suspend upstream dividend payments.

Initiation of Commission Docket

15. As stated, the Commission is vested with "full power of supervision, regulation, and control of... public utilities..." Mont. Code Ann. § 69-3-102. Mountain Water is a utility subject to the Commission's control. Mont. Code Ann. § 69-3-101. The Commission may "at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, practices, and services" of a regulated utility. Mont. Code Ann. § 69-3-324; *see also Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 39, 340 Mont. 309, 318, 174 P.3d 496, 503 ("[T]he PSC's statutory duty to investigate utilities may not be hindered by limiting its ability to obtain information in a specific manner"). Utility rates must be "reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful." Mont. Code Ann. § 69-3-201. The Commission finds that the new ownership of Mountain Water and new capital structure is cause for concern about whether Mountain Water's current rates are just and reasonable. The Joint Applicants' acknowledge that the Commission has "the jurisdiction to

review and approve any changes in Mountain Water's rates on its own motion." Mtn. Water Comments 15. The MCC suggests that the Commission "consider implementing a rate adjustment to reflect the acquisition-enabled cost of capital reduction." MCC Comments 8. In response, the Joint Applicants argue that a separate docket would be a more appropriate venue to address the Commission's rate adjustment concerns. Liberty Comments 16. The Commission agrees, and on February 3, 2016, a new docket to address these concerns was initiated. Liberty states that it, through Mountain Water, "looks forward to working with the Commission to ensure that Mountain Water continues to provide adequate water utility services to the people of Missoula at reasonable and fair rates." Liberty Comments 7. The Commission expects the full cooperation of Mountain Water during the course of the newly initiated investigatory docket.

Other remedies

16. Mont. Code Ann. § 69-3-110(3) states "[u]pon the request of the commission, it is the duty of the attorney general or the prosecuting attorney of any county to aid in any investigation, prosecution, hearing, or trial had under the provisions of this chapter and to institute and prosecute all actions or proceedings necessary for the enforcement of this chapter." This Section also states in addition to the other remedies provided by statute, the Commission may seek remedies "by proceedings in mandamus, by injunction, or by other civil remedies." *Id.* (5). Therefore, Commission staff is directed to cooperate with the Montana Attorney General's Office to consider other remedies pursuant to Montana Code Annotated § 69-3-110.

Future proceeding

17. The proceeding concerning the sale and transfer of Mountain Water, D2014.12.99, will be held in abeyance until such a remedy is achieved that would necessitate continuance of this proceeding. The City and CFC have requested that the Commission join Algonquin. The City requests a decision of the merits. The Commission will address these issues, if the proceeding is ever capable of moving forward.

Order

18. The Commission has jurisdiction over sales and transfers of regulated utilities, and specifically has jurisdiction over the sale and transfer of Mountain Water.

19. Legal staff will pursue fines against Mountain Water under Montana Code Annotated §§ 69-3-209 and 69-3-206.

20. The Commission has concerns that, in addition to completing a sale and transfer without Commission approval, Mountain Water potentially violated applicable ring fencing provisions, and therefore will be ordered to show cause demonstrating why the Commission should not immediately suspend upstream dividend payments.

21. Mountain Water's rates may no longer be just and reasonable because they do not appropriately reflect the firm's capital structure and cost of capital, and therefore staff will initiate a proceeding to investigate its rates and receive a rate application. The Commission will institute an interim rate adjustment by February 26, 2016, if it finds such an action to be appropriate.

22. Legal staff will cooperate with the Montana Attorney General's office to consider other remedies pursuant to Montana Code Annotated § 69-3-110.

23. The Commission will hold this proceeding in abeyance until such a remedy is achieved that would necessitate continuance of this proceeding.

DONE AND DATED this 29th day of January, 2016, by a vote of 5-0 regarding paragraphs 18, 19, 20, 22, and 23.

DONE AND DATED this 29th day of January, 2016, by a vote of 4-1 regarding paragraph 20, Commissioner Bushman dissenting as to the initiation of a Commission docket.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BRAD JOHNSON, Chairman

TRAVIS KAVULLA, Vice Chairman

KIRK BUSHMAN, Commissioner (dissenting)

ROGER KOOPMAN, Commissioner

BOB LAKE, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)