

Scott M. Stearns  
Natasha Prinzing Jones  
Randy J. Tanner  
BOONE KARLBERG P.C.  
201 West Main, Suite 300  
P.O. Box 9199  
Missoula, MT 59807-9199  
Tel: (406) 543-6646  
sstearns@boonekarlberg.com  
npjones@boonekarlberg.com  
rtanner@boonekarlberg.com

Jim Nugent, City Attorney  
City of Missoula  
435 Ryman Street  
Missoula, MT 59802  
Tel: (406) 552-6020  
jnugent@ci.missoula.mt.us

*Attorneys for The City of Missoula*

**MONTANA FOURTH JUDICIAL DISTRICT COURT  
MISSOULA COUNTY**

THE CITY OF MISSOULA, a  
Montana municipal corporation,  
Petitioner,

vs.

THE MONTANA DEPARTMENT OF  
PUBLIC SERVICE REGULATION,  
MONTANA PUBLIC SERVICE  
COMMISSION,

Respondent,

and

MOUNTAIN WATER COMPANY and  
WESTERN WATER HOLDINGS,  
LLC,

Respondents-Intervenors

Cause No. DV-15-918

Dept. No. 1

**SECOND AMENDED PETITION  
FOR JUDICIAL REVIEW**

The City of Missoula ("City") petitions the Court to review the Montana Public Service Commission's ("PSC") decisions in Docket No. D2014.12.99, *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*. See Orders 7392n at Exhibit 20 and 7392p at Exhibit 21.

### **JURISDICTION AND VENUE**

The Court has jurisdiction to review the PSC's decisions under Montana Code Annotated §§ 2-4-701, 2-4-702 and 69-3-402.

Venue is proper in Missoula County, since that is where the City of Missoula is located. Mont. Code Ann. § 2-4-702(a).

Under Montana Code Annotated § 69-3-402(3), the Court's review of this proceeding "shall have precedence over any civil cause of a different nature pending in such court . . . ."

### **BACKGROUND**

1. On April 2, 2014, the City filed a condemnation action to acquire Missoula's water system from Carlyle Infrastructure Partners LP and Mountain Water Company. See *City of Missoula v. Mountain Water Company Co., et al*, Cause No. DV-14-352 (Fourth Jud. Dist. Court, Missoula County).

2. The City filed its condemnation action more than six months before the Joint Application was filed in the PSC proceeding that is the subject of this petition. (See Amended Complaint, attached as Exhibit 1).<sup>1</sup>

3. On June 14, 2015, Judge Karen Townsend entered Findings of Fact, Conclusions of Law, and a Preliminary Order of Condemnation. (See Exhibit 2.) The PSC moved to intervene in that proceeding, but the District Court denied the Motion. (See Exhibit 3.)

4. In that Order, Judge Townsend concluded that the City's acquisition of Missoula's water system is necessary to the public use of the water system. (*Id.*) Judge Townsend directed that the case immediately proceed to the valuation phase, where condemnation commissioners will determine the fair market value of the water system, which the City must pay to Carlyle as just compensation. (*Id.*) The City provided the PSC with notice of Judge Townsend's Order on June 23, 2015. (See Exhibit 4.)

5. The condemnation commissioner hearing to determine the fair market value of the water system will begin in on November 2, 2015.

6. Both the District Court and the Montana Supreme Court denied Mountain Water\Carlyle's and the Intervenors', Mountain Water Employees', Motions to Stay the valuation phase of the proceeding pending their

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<sup>1</sup> Exhibits 1 through 19 referenced herein are attached to the original Petition and are incorporated herein by reference. Exhibits 20 through 22 are attached to the Amended Petition.

appeals of Judge Townsend's order. (See District Court Order at Exhibit 5; Montana Supreme Court Order at Exhibit 6.) The City provided the PSC with notice of the District Court ruling. (See Exhibit 7).

7. On September 19, 2014—more than six months after the City filed its condemnation action—Liberty Utilities Co. and Liberty WWH Inc. (collectively, "Liberty") entered a merger agreement with Western Water Holdings, a subsidiary of Carlyle Infrastructure Partners. (See Exhibit 8.) As part of that agreement, Liberty agreed to pay Western Water for the stock of Park Water Company, which is Western Water's sole asset. (*Id.*)

8. Park Water Company consists of Mountain Water Company and two other California water utilities.

9. Liberty, Western Water Holdings, and Mountain Water filed a Joint Application with the PSC on December 15, 2014, seeking authorization for the merger from the PSC.

10. The City petitioned to intervene in the PSC proceeding on January 15, 2015. The PSC granted the petition on January 27, 2015. On February 17, 2015, the City moved to dismiss or stay the PSC proceeding in light of the pending condemnation proceeding. The PSC denied the motion on March 27, 2015.

11. In its Procedural Order, the PSC set a deadline of May 20, 2015

for the City to file its Intervenor Testimony and a hearing date of July 28, 2015. (See Exhibit 9.)

12. The Clark Fork Coalition, who intervened in the PSC proceeding, initially moved the PSC to join Liberty's parent company—Algonquin Power & Utilities Company—in the PSC proceedings since Algonquin, not Liberty, was making all the decisions on its side of the sale. The City filed a subsequent motion after discovery in the proceeding confirmed that conclusion. The PSC denied the Motions. (Order 7392b at Exhibit 10; Order 7392n at Exhibit 20.)

13. The PSC served its first set of discovery requests—i.e. “data requests”—on the joint applicants on February 2, 2015, and its second requests on April 2, 2015.

14. The City and the Montana Consumer Counsel served their data requests on the joint applicants in April 2015.

15. Through their data requests, the PSC, Montana Consumer Counsel, and City sought information related to the joint applicants' due diligence and financial analyses for the proposed merger.

16. The joint applicants repeatedly refused to provide much of that information, claiming it was irrelevant to the PSC proceedings. The PSC repeatedly rejected the joint applicants' arguments, concluding the

requested documents are relevant and that the joint applicants must provide the documents to the PSC, the Montana Consumer Counsel, and the City. (See Orders 7392e, 7392k, 7392l, 7392o at Exhibit 12.) Indeed, the PSC itself has noted that this same type of information is routinely requested and provided in similar PSC proceedings. (*Id.*; see also Order 7392o, Commr. Kavulla, dissenting.)

17. Because of the joint applicants' continued refusal to provide the requested material, including information that the PSC had ordered them to provide, the City and Montana Consumer Counsel were forced to file motions to compel and respond to numerous motions for protective orders over the next several months after serving their data requests. (See Ex. 12.)

18. Further, because of Joint Applicants' refusal to comply with the PSC's orders—in particular, Liberty's refusal to provide requested documents—the PSC was ultimately forced to extend the deadline for the City's Intervenor Testimony to September 4, 2015, and move the final hearing date to October 19–20, 2015. (See Notice of Staff Action at Exhibit 13.)

19. On June 14, 2015, in the midst of Liberty's months-long refusal to provide the material it was ordered to produce, Judge Townsend

issued her Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation.

20. On June 16, 2015, the City moved to join Algonquin in the PSC proceeding, given that Algonquin was responsible for all decisions on its side of the transaction.

21. Given the district court's preliminary order of condemnation, the City also moved the PSC on June 24, 2015, to dismiss the PSC proceeding or, in the alternative, stay the proceedings.

22. The PSC heard oral argument on the motions on July 28, 2015. The PSC orally indicated that it would be denying the City's motions.

23. On August 27, 2015, the City moved the PSC to compel Liberty to provide access to its financial model and due diligence. The PSC had repeatedly concluded the information is relevant and had ordered Liberty to provide access, yet Liberty continued to refuse to provide that access. The financial analysis and due diligence would be an important part of the City's intervenor testimony.

24. The City filed its original petition for judicial review in this case on August 28, 2015. The City challenged the PSC's oral rulings denying the City's motion to join Algonquin and its motion to dismiss or, in the alternative, stay the proceeding. At that time, the PSC had not issued its

written orders denying the City's motion to join Algonquin and motion to dismiss or, in the alternative, stay the proceedings.

25. The City was forced to file its petition before the PSC issued written orders because the deadline for the City's intervenor testimony was days away and Liberty had not yet provided access to its financial model and due diligence (as the PSC had ordered it to do). The financial analysis and due diligence would be a critical part of the City's intervenor testimony.

26. After the City filed the original petition for review in this case, the PSC vacated the remaining deadlines. (See Sept. 1, 2015 Notice of Staff Action at Exhibit 22.)

27. On September 22, 2015, the PSC heard oral argument on the City's motion to compel access to Liberty's financial model and due diligence. The PSC also heard argument on Liberty's motion in limine to exclude the City's experts from accessing the financial model and due diligence.

28. On September 24, 2015, the PSC issued its written order denying the City's motion to join Algonquin and its motion to dismiss or, in the alternative, stay the proceedings. (Order 7392n at Exh. 20.)

29. On October 2, 2015, the PSC issued its order granting in part and denying in part the City's motion to compel and Liberty's motion in



limine. (Order 7392p at Exh. 21.)

**I. The PSC erred by not dismissing or staying the PSC proceeding once the preliminary order of condemnation was issued.**

30. The PSC prejudiced the substantial rights of the City by denying its Motion to Dismiss or Stay the Proceedings once the District Court issued its Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation.

31. As the District Court and Montana Supreme Court have expressly recognized in the City's condemnation proceeding, the valuation phase of that case must proceed in an expeditious manner. (District Court Order at Ex. 5; Montana Supreme Court Order at Ex. 6; Mont. Code Ann. §§ 70-30-206(5) , 70-30-207(1), 70-30-301(1), 70-30-312(2)). Indeed, the condemnation commissioner hearing to determine the fair market value of the water system will take place in three weeks, beginning on November 2, 2015.

32. Under the Preliminary Order of Condemnation, the City of Missoula possesses an ownership interest in Missoula's water system and has the right to take immediate possession of the water system. Mont. Code Ann. § 70-30-311(1)(a)(ii).

33. The PSC does not have jurisdiction over municipally-owned utilities and does not have jurisdiction to adjudicate the City's ownership

interest in the water system. (See Ex. 3; Mont. Code Ann. §§ 69–3–101(2)(c), 69–3–102.)

34. The PSC proceedings constitute unlawful interference with the District Court’s exclusive jurisdiction over condemnation proceedings. Mont. Code Ann. §§ 70–30–102, 7–13–44.

35. Carlyle, Mountain Water, and the Mountain Water employees have not shown they are likely to prevail on appeal. (See Ex’s. 4 and 5)

36. If it is not dismissed or stayed, the PSC proceeding will needlessly force the City to bear significant financial hardships and result in a substantial waste of resources.

37. None of the Joint Applicants will be prejudiced if the PSC proceedings are dismissed or stayed.

38. The City respectfully requests the Court to order the PSC to dismiss the PSC proceeding or stay the proceeding pending the final resolution of the condemnation proceeding.

**II. The PSC erred by imposing special protections on Liberty’s production of discovery material and by not dismissing or staying the proceeding in light of Liberty’s discovery abuses.**

39. The PSC, the City, and the Montana Consumer Counsel repeatedly requested that Liberty provide access to its due diligence material and financial analyses. The PSC has ordered that this information

is highly relevant to the PSC proceedings because it bears directly on water rates the people of Missoula will be forced to pay if the PSC approves the sale. (See Ex. 12.)

40. Liberty repeatedly refused to provide that material even though it had been ordered to do so. (*Id.*)

41. Liberty refused to provide this material, even though the PSC imposed special protections for the information that required the material to be provided confidentially and accessed only through in-person viewing. (*Id.*)

42. These special protections violate the PSC's administrative rules governing the production of confidential information because the special protections were imposed without "good cause." See Admin. R. Mont. 38.2.5002(3).

43. The special protections further violate the City's due process rights under the United States and Montana constitutions, because they prevent the City from presenting meaningful testimony in the PSC proceeding and violate the City's work product privilege.

44. The imposition of special protections directly conflicts with the PSC determination that the work product privilege applies, and violates the intervenors' work product privilege. The Montana Consumer Counsel

argued that Liberty's proposed access to its financial material, which is nothing more than a simple Microsoft excel spreadsheet that is produced in nearly every docket the Commission reviews that involves transactions of this type, violated its work product privilege. (MCC reply brief in support of second motion to compel, Exhibit 16). In ruling on the Montana Consumer Counsel's second motion to compel, the Commission agreed that the intervenors' work product privilege remains intact. (Order No. 7392I, Ex. 12.) However, on reconsideration, the Commission found that the special provisions allowed Liberty to make its Excel spreadsheets available through an internet portal, in direct conflict with Order No. 7392I and the MCC's argument that an internet portal would allow Liberty access to and oversight of the intervenors' work.

45. In Commissioner Kavulla's opinion dissenting from the Commission's decision to impose special protections, Commissioner Kavulla observed that the unprecedented special protections are not warranted in the first place:

The PSC apparently has not issued an Order granting special-protections treatment under Admin. R. Mont. 5002(3) for more than a decade, and even then in substantially different circumstances . . .

. . .

I am left to wonder what the special provisions stand for other than nuisance. . . . [A]lready, the Commission's protective orders and rules require, prior to a party's accessing another party's protection information, a signed promise not to disclose that information and the prohibition of the use of that information for purposes other than the Commission proceeding in which the information was produced. . . . In my view, Liberty has not shown how the special protections in question will actually guard against the potential for abuses which are the subject of that party's concern.

. . .

I have had the opportunity to review the information which is specially protected at the Helena, Mont., offices of Liberty's counsel in this matter. In that review I am struck not so much by its exceptionality but by its sameness. It is essentially the same type of valuation any firm seeking to buy a regulated utility would and should conduct.

(Order 7392o, Commr. Kavulla, dissenting at Exhibit 17.)

46. The City respectfully requests the Court reverse the PSC's imposition of special provisions and direct the PSC to provide the City (and its experts) with full access to copies of the financial analysis and due diligence without special protections.

**III. The PSC erred by not joining Algonquin in the PSC proceeding.**

47. The PSC has prejudiced the substantial rights of the City by refusing to join Algonquin the PSC proceeding.

48. Discovery in the PSC proceeding has made one thing clear—Algonquin, not Liberty, controls all decisions on its side of the sale. Even

the PSC has acknowledged this:

[D]ata responses given by Liberty after the issuance of Order 7392b have revealed that Algonquin was not only consulted about the acquisition, but was also the primary decision maker. When asked to provide financial analysis, due diligence, and board minutes related to this acquisition, Liberty responded with its own financial model; a September 1, 2014 PowerPoint deck presented to the Algonquin Board; a Due Diligence Report compiled by Algonquin's General Counsel; a September 15, 2014 PowerPoint deck presented to Algonquin's Board; and excerpts of minutes from Algonquin Board meetings on August 14, 2014, September 4, 2014, and September 15, 2014. DRs PSC-033(b); MCC-10; CITY-031. It is unclear whether Liberty even held a board meeting to approve the acquisition before Algonquin acted on the question. The Commission finds that while some evaluation of the purchase may have been made under the name of Liberty, virtually all meaningful decision-making concerning the proposed acquisition of Park was made by Algonquin.

(Order 7392n, Ex. 20, at ¶ 41.)

49. Algonquin is the sole owner and sole recipient of Liberty's profits.

50. Algonquin's exercise of control over Liberty and the decision to purchase Park Water is exemplified by the substantial overlap between Algonquin's officers and board of directors and the officers and boards of its subsidiaries, including Liberty's officers and boards. (See Exhibit 19.)

51. The only records of decisions to purchase Park Water (which includes Mountain Water) are excerpts from Algonquin board minutes (dated August 14, 2014; September 4, 2014, and September 15, 2014), as well as a Liberty board resolution on September 15, 2014. Liberty adopted the resolution the same day Algonquin approved the sale. There is no evidence that Liberty even had a board meeting to discuss the purchase.

52. By Liberty's own admission, Algonquin is the only entity who had actual, meaningful discussions regarding the purchase of Park Water. The only function Liberty has served in this proposed sale is to collect and deliver information to Algonquin.

53. Liberty's attempt to hide its parent corporation is an attempt to hide Algonquin from scrutiny by both the people it intends to serve and the regulators it intends to convince.

54. The PSC denied the City's motion to join Algonquin because it concluded it did not have personal jurisdiction over Algonquin. In particular, the PSC based its personal jurisdiction analysis on the "alter ego test" for corporate parents and subsidiaries.

55. Under this test, the PSC concluded that, in order for Algonquin to be joined in the proceedings, the City must show: "(1) that there is such unity of interest and ownership that the separate personalities of the two

entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice.” (Order 7392n, ¶ 36 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001); *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir. 2003))).

56. The PSC concluded that, given the substantial overlap in board membership of Algonquin and its subsidiaries, as well as evidence showing that Algonquin (not Liberty) is the decision maker, the PSC concluded: “On total, there is such unity of interest and ownership that the separate personalities of Algonquin and Liberty no longer exist satisfying the first prong of the alter ego test.” (*Id.* at ¶ 42.)

57. The PSC, however, concluded that failing to join Algonquin would not “result in fraud or injustice.” (*Id.* at ¶ 43 (citing *Unocal Corp.*, 248 F.3d at 926.)) The PSC reasoned that Algonquin does not need to be a part of the proceeding because “Corporate organization has not been the basis of Liberty’s legal arguments in any of these discovery disputes.” (*Id.* at ¶ 44.)

58. The PSC’s reasoning, though, misses the point. As the PSC acknowledged, Algonquin—not Liberty—is making the decisions on its side of the proposed sale. Algonquin’s decisions—not Liberty’s decisions—lead



to the discovery disputes in this case.

59. Perhaps more important, though, Algonquin is under no compulsion to respond to any data requests in the PSC proceeding, whether those requests are made by the City, the Montana Consumer Counsel, or the PSC. When data requests were served on Liberty, Liberty was required to provide only what it had. It was presumably not required to provide material that only Algonquin possessed, such as financial analyses and due diligence. Algonquin undoubtedly has relevant material that Liberty does not possess and has not produced. After all, as the PSC itself acknowledged, Algonquin—not liberty—is calling all the shots and making all the decisions.

60. Contrary to the PSC's decision, failing to join Algonquin creates a "fraud or injustice" because it means Algonquin does not have to be accountable in the PSC proceeding, even though it is making all the decisions.

61. Regardless of whether the PSC's exercise of personal jurisdiction satisfies the alter-ego test, Algonquin has independently established sufficient minimum contacts to warrant the exercise of personal jurisdiction. Given Algonquin's independent contacts with the forum, the PSC need not apply the alter-ego test in order to exercise personal

jurisdiction.

62. The City of Missoula respectfully requests that the Court issue an order directing the PSC to join Algonquin in the PSC proceeding, to the extent it ever goes forward.

#### **IV. Review under § 2–4–701**

63. Montana Code Annotated § 2–4–701 provides: “A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.”

64. To the extent the Court reviews the City’s petition under § 2–4–701, the City asserts that review of the PSC’s final decision in this matter would not provide an adequate remedy.

65. The City further asserts that, for the reasons above, the PSC’s orders have denied the City fundamental fairness and due process.

#### **DEMAND FOR RELIEF**

The City of Missoula respectfully requests the Court issue an order:

1. Directing the PSC to dismiss the proceeding in Docket No. D2014.12.99: *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.*

2. Or, in the alternative, directing the PSC to stay the proceeding pending the resolution of the City's condemnation proceeding in *City of Missoula v. Mountain Water Company and Carlyle Infrastructure Partners*, Cause No. DV-14-352 (4th Jud. Dist., Dept. 4, Missoula County).

3. Vacate the PSC's imposition of special protections over Liberty's financial analysis and due diligence.

4. Directing the PSC to join Algonquin in the PSC proceedings and suspend the current deadlines in order to allow the City to serve data requests on Algonquin.

5. Awarding the City its attorney's fees and costs incurred in bringing this action.

6. Providing any further relief that the Court deems appropriate.

Dated this 27<sup>th</sup> day of October 2015.

BOONE KARLBERG P.C.



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Scott M. Stearns  
Natasha Prinzing Jones  
Randy J. Tanner  
*Attorneys for Petitioner*

## CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail and email upon the following counsel of record at their addresses this 27<sup>th</sup> day of October 2015:

Public Service Commission 1701 Prospect Avenue Helena, MT 59620-2601 kwhitney@mt.gov lfarkas@mt.gov jkraske@mt.gov jlangston@mt.gov	Thorvald A. Nelson Nikolas S. Stoffel Holland & Hart LLP 6380 South Fiddlers Green Circle, Suite 500 Greenwood Village, CO 80111 tnelson@hollandhart.com nsstoffel@hollandhart.com cakennedy@hollandhart.com aclee@hollandhart.com
William W. Mercer Adrain A. Miller Holland & Hart LLP 401 North 31 st Street, Suite 1500 Billings, MT 59101-1277 wwmercercer@hollandhart.com aamiller@hollandhart.com	Gary Zadick #2 Railroad Square, Suite B P. O. Box 1746 Great Falls, MT 59403 gmz@uazh.com
Michael Green Gregory F. Dorrington CROWLEY FLECK PLLP P.O. Box 797 Helena, MT 59624-0797 mgreen@crowleyfleck.com gdorrington@crowleyfleck.com cuda@crowleyfleck.com jtolan@crowleyfleck.com	Robert Nelson Monica Tranel Montana Consumer Counsel 111 North Last Chance Gulch, Suite 1B P.O. Box. 201703 Helena, MT 59620-1703 robnelson@mt.gov mtranel@mt.gov
Barbara Hall Legal Director The Clark Fork Coalition P.O. Box 7593 Missoula, MT 59801 Barbara@clarkfork.org	



Kate M. Palmer  
Paralegal