

1 Karen S. Townsend, District Judge
2 Fourth Judicial District, Dept. 4
3 Missoula County Courthouse
4 200 West Broadway
5 Missoula, MT 59802
6 (406) 258-4774

FILED JUN 15 2015

By SHIRLEY E. FRUST Clerk
Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 CITY OF MISSOULA, a
10 Montana municipal corporation,

Dept. 4
Cause No. DV-14-352

11 Plaintiff,

12 v.

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

17 Defendants,

18 THE EMPLOYEES OF MOUNTAIN
19 WATER COMPANY, (Shanna M.
20 Adams, Heather M. Best, Dennis M.
21 Bowman, Kathryn F. Datsopoulos,
22 Wayne K. Davis, Valarie M. Dowell,
23 Jerry E. Ellis, Greg A. Gullickson,
24 Bradley E. Hafar, Michelle Halley,
25 Douglas R. Harrison, Jack E. Heinz,
26 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,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
PRELIMINARY ORDER OF
CONDEMNATION**

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1 Logan M. McInnis, Ross D. Miller,
2 Beate G. Newman, Maureen L.
3 Nichols, Michael L. Ogle, Travis
4 Rice, Eric M. Richards, Gerald L.
5 Schindler, Douglas J. Stephens, Sara
6 S. Streeter, Joseph C. Thul, Denise T.
7 Tribble, Patricia J. Wankier, Michael
8 R. Wildey, Angela J. Yonce, and
9 Craig M. Yonce),

Intervenors.

10 I. PROCEDURAL BACKGROUND AND HISTORY

11 This is an eminent domain proceeding initiated by the Plaintiff City of
12 Missoula (“City”) for the acquisition of Defendant Mountain Water’s (“Mountain
13 Water”) water distribution system.

14 The City filed its *Complaint for Order of Condemnation Under Montana’s*
15 *Law of Eminent Domain* on April 2, 2014. The City filed a *First Amended*
16 *Complaint* on May 5, 2014. Mountain Water was served on May 5, 2014 and
17 Carlyle Infrastructure Partners, LP was served on May 6, 2014. Mountain Water
18 employees (“Employees”) moved to intervene on May 28, 2014 and their motion
19 was granted on June 27, 2014. Employees’ participation was limited to 12 areas.
20 The scope of Employees’ participation was further defined in an order dated
21 December 22, 2014. A stipulated Rule 16 Scheduling Order was issued on August
22 12, 2014. The parties agreed to the appointment of a special master to hear
23 discovery disputes and procedural disputes related to discovery.
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II. LEGAL STANDARD

1 The controlling statutes in this case are §§ 7-13-4401 through 4406 MCA and
2 those parts of Title 70 incorporated by reference.
3

4 In order to exercise the right of eminent domain, a condemnor must comply
5 with the provisions of Chapter 30 of Title 70 of the Montana Code Annotated.
6 Montana law establishes what types of property may be taken through eminent
7 domain, including “property already appropriated to a public use”, §70-30-
8 103(1)(c). Before a taking of private property may occur, the condemnor has the
9 burden to prove by a preponderance of the evidence that the public interest requires
10 the taking, § 70-30-111(1) MCA. If the findings of fact and conclusions of law
11 made by the court leads it to conclude that the public interest requires the taking of
12 private property and that the condemnor has met the burden of proof under § 70-30-
13 111(1), a preliminary condemnation order shall be entered, § 70-30-206(2) MCA.
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18 The right of eminent domain may be exercised for, among other things,
19 “water and water supply systems as provided in title 7, chapter 13, part 44”, § 70-
20 30-102(6) MCA. Therefore, pursuant to the provisions of Title 7, chapter 13, part
21 44, a municipality may condemn a water system. If a municipality meeting the
22 conditions established by § 7-13-4403(1) MCA and a private owner of the water
23 system do not agree upon purchase and sale terms for the water supply, the
24 municipality may proceed to acquire the plant or water supply by eminent domain
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1 pursuant to § 70-13-4404(1) MCA. A property already “appropriated to a public
2 use” may only be taken through eminent domain for a “more necessary public use
3 than that to which it has already been appropriated.” A public use is one that
4 confers some benefit or advantage to the public. *Park County ex rel. Paradise and*
5 *Shields Valley TV Districts v. Adams*, 2004 MT 295, ¶ 16. “Necessary” in the
6 context of eminent domain means reasonable, requisite and proper for the
7 accomplishment of the intended objective. *Shields*, 2004 MT 295, ¶ 17.

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9 The Montana Supreme Court has recognized that two questions are involved,
10 in determining necessity when a municipality seeks to acquire a water system:
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12 “1) Is it necessary that the City have its own water system? and 2) Must the
13 City take Mountain Water’s property in order to have its own system? Unlike the
14 typical case involving condemnation of land for a highway, the first question here is
15 not whether it is necessary to have the improvement but whether it is necessary to
16 have the improvement operated by the City instead of by private industry.”

17 *City of Missoula v. Mountain Water*, 228 Mont. 404, 412 (1987)

18 In making this determination, the Court must take into account a broad range
19 of considerations. Those considerations include but are not limited to effects on
20 employees, profit and out-of-state ownership, public savings, rates and charges,
21 cooperation between Mountain Water and the City and the effect of having the
22 home office in Missoula, public interest, the importance of the City obtaining
23 ownership of water rights themselves in order that the City may assure its
24 inhabitants of long range access to water.
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1 Trial on the issue of whether a preliminary order should issue herein was
2 accorded expeditious and priority consideration in accordance with § 70-30-202
3 MCA. The Court, sitting without a jury, held trial on March 18-20, 23, 25-27, 30,
4 April 1-3 and 6, 2015. Natasha Prinzing-Jones and Harry H. Schneider appeared on
5 behalf of the City. Kathleen DeSoto, Joe Conner and Adam Sanders appeared on
6 behalf of Mountain Water. William Mercer and Adrian Miller appeared on behalf
7 of Carlyle Infrastructure Partners. Gary Zadick appeared on behalf of the
8 Intervenors. The Court split the available time equally between Plaintiff and
9 Defendants/Intervenors and the minutes used by each side were tracked by the Court
10 to ensure parity. Witnesses testified for each party, exhibits were received and
11 certain deposition testimony was submitted. The Court having heard and considered
12 the testimony and evidence now makes the following:
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16 **III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

17 **A. PARTIES AND JURISDICTION**

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19 1. City is a municipal corporation of the State of Montana duly organized
20 and existing by virtue of the Constitution and the laws of the State of Montana. City
21 is a municipality with general powers, including the power to acquire by eminent
22 domain certain interests in real and personal property. City is the municipality in
23 charge of the public use for which the property it seeks to condemn will be used.
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1 2. Mountain Water Company is a Montana for-profit corporation with its
2 principal place of business in Missoula, Montana.

3 3. Mountain Water owns and operates a system of assets to collect, treat
4 and distribute water to the citizens and inhabitants of Missoula (“Water System”).

5 4. Mountain Water is wholly owned by Park Water Company (“Park
6 Water”), a California corporation with its principal place of business in Downey,
7 California. Park Water is wholly owned by Western Water Holdings, LLC
8 (“Western Water”), a limited liability company, which is in turn wholly owned by
9 Defendant Carlyle Infrastructure Partners, LP (“Carlyle Infrastructure” or
10 “Carlyle”).
11

12 5. Park Water functions as a holding company whose only business
13 involves the ownership of three operating companies in the business of selling and
14 distributing water in East Los Angeles, California (Central Basin Water Company);
15 the Town of Apple Valley, California (Apple Valley Ranchos Water Company) and
16 Missoula, Montana (Mountain Water Company).
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19 6. Carlyle Infrastructure is a limited partnership with its principal place of
20 business in Washington, D.C. Carlyle Infrastructure is in the business of investing
21 in and selling for profit various private businesses and public infrastructure projects,
22 including water and wastewater treatment and distribution systems. Western Water
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1 was created by Carlyle Infrastructure to facilitate Carlyle Infrastructure's purchase
2 of Park Water in December 2011.

3 7. At all times relevant to these proceedings, Carlyle Infrastructure was
4 the General Partner or Managing Member of the companies or partnerships that own
5 and operate the Water System. As such, Carlyle Infrastructure is the ultimate owner
6 of Mountain Water and exercised control over its affairs, including decisions
7 regarding sale of Mountain Water or its assets. Management and members of the
8 boards of directors of Western Water, Park Water, Mountain Water, Central Basin
9 and Apple Valley Ranchos serve at the pleasure of and take direction from Carlyle
10 Infrastructure. The Board of Directors of each of these companies is majority
11 controlled by Carlyle Infrastructure.
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15 8. The Carlyle Group, LP ("Carlyle Group") is a limited partnership with
16 its principal place of business in Washington, D.C. The Carlyle Group directly
17 owns or manages Carlyle Infrastructure as well as other successful investment
18 funds. Robert Dove, Managing Director of the Carlyle Group's Infrastructure Fund,
19 has acted at all times relevant to these proceedings as the person with apparent
20 authority to speak on behalf of Mountain Water with regard to the City's efforts to
21 acquire the Water System.
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24 9. Prior to 2011, Park Water was owned by a family owned corporation.
25 Sam Wheeler was the controlling shareholder.
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1 10. In December 2011, Carlyle Infrastructure acquired ownership of Park
2 Water and assumed the ultimate ownership of Mountain Water and the Water
3 System, along with the two California water companies.

4 11. In January 2014, the City submitted a written offer to Mountain Water
5 to purchase the assets that comprise the Water System for \$50 million. The City's
6 offer was rejected.
7

8 12. On September 19, 2014, a Plan and Agreement of Merger
9 ("Agreement") was entered into by and among Liberty Utilities Co. ("Liberty"),
10 Liberty WWH, Inc. (Liberty WWH") and Western Water Holdings. Pursuant to the
11 Agreement, Liberty is acquiring all the issued and outstanding capital stock and/or
12 shares of Western Water Holdings, which in turn owns all the stock of Park Water
13 Company. Under the Agreement, Liberty would acquire the effective ownership
14 and operation of Mountain Water and its assets.
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17 13. Liberty Utility is a Delaware corporation and wholly owned subsidiary
18 of Algonquin Power and Utilities Corporation, a Canadian corporation. Liberty is a
19 company that owns and operates regulated water, wastewater, gas and electric
20 utilities in ten states, including Arizona, California, Texas, Arkansas, Georgia, New
21 Hampshire, Massachusetts, Missouri, Iowa and Illinois.
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24 14. The Merger Agreement to purchase Western Water Holdings was not
25 conditioned on the outcome of this condemnation litigation. Once the Agreement is
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1 approved by the Montana Public Service Commission ("PSC") and closes,
2 Mountain Water will be run as part of Liberty.

3 15. Liberty sought to intervene in this matter on October 30, 2014, arguing
4 that its contractual interest in the property under the Agreement justified
5 intervention as a matter of right or permissive intervention. The motion to intervene
6 was denied. Liberty filed a petition for supervisory control, which was denied.
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8 16. Liberty's interests have been represented by Mountain Water
9 throughout this proceeding.
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11 17. Intervenor Employees are 39 individuals who were employed by
12 Mountain Water at the time the City served its First Amended Complaint.
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14 18. The Court has original jurisdiction of this proceeding pursuant to § 3-5-
15 302 and 70-30-202 MCA.

16 19. The Court has personal jurisdiction over the parties pursuant to § 70-
17 30-202 MCA because the property at issue, the Water System, is situated in the
18 Fourth Judicial District of the State of Montana.
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20 20. The Court has personal jurisdiction over the parties pursuant to Rule
21 4(A)(1) and (2) M.R. Civ. P. because the parties have transacted business in the
22 State of Montana or own, use or possess property interests in the State of Montana.
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1 21. Venue is proper in the Fourth Judicial District based on the parties'
2 doing business in Missoula and on the basis that the Water System is located
3 entirely in Missoula County and in the Fourth Judicial District.

4 **B. CITY'S EFFORT TO ACQUIRE WATER SYSTEM**

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6 22. The Montana Power Company owned Mountain Water from 1930 until
7 1979. In 1979, Park Water acquired Mountain Water from Montana Power
8 Company. Park Water was owned by the Wheeler family and Sam Wheeler was the
9 majority stockholder.
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11 23. The City of Missoula sought the purchase of Mountain Water from
12 Park Water in 1984. After the City was unable to purchase the Water System from
13 Mr. Wheeler, the City initiated a condemnation proceeding that was unsuccessful.
14 The City continued to have an interest in owning and operating the Water System.
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16 24. Mr. Wheeler was opposed to selling the Water System generally and he
17 was opposed to City ownership of Mountain Water in particular. Mr. Wheeler
18 assumed that ownership of Park Water would pass to his heirs upon his death and
19 that family members would continue to operate Park Water after his death. In
20 2009, Mr. Wheeler declined an offer from Carlyle to sell Park Water. In 2010,
21 estate planning considerations motivated Mr. Wheeler to reconsider the benefits of a
22 sale to Carlyle and discussions were renewed between Mr. Wheeler and Carlyle.
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1 The City's interest in acquiring Mountain Water was known to Mr. Wheeler and he
2 disclosed that interest to Carlyle.

3 25. The City desires to own and operate the Water System because City
4 leadership and elected officials believe a community's water system is a public asset
5 best owned and operated by the public, because the City has experience owning and
6 operating the City's wastewater treatment system ("Wastewater System"), because
7 public ownership would improve accountability, because the Mayor and City
8 Council members are elected by the public, live in the community and meet weekly
9 in open public meetings and because the City does not need to generate a profit in
10 operating the Water System.
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13 26. It is not feasible or practical for the City to build a second water system
14 to serve the community due to the prohibitive capital cost to construct a new system.
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16 27. Mr. Dove, acting on behalf of Carlyle visited Mayor John Engen in
17 2010, to inform him that Carlyle was attempting to buy Mountain Water.
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19 28. Mayor Engen and Mr. Dove held a series of discussions related to the
20 subject of Carlyle's purchase of the Water System from Mr. Wheeler that included
21 positioning the City to eventually purchase the Water System from Carlyle. Mr.
22 Wheeler intended to remain on the board of directors of Park Water for a year after
23 the sale. Mr. Dove and Mayor Engen were concerned that if the City moved to
24 purchase the Water System before Sam Wheeler left the board of directors, the sale
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1 by Wheeler to Carlyle would be jeopardized. Mayor Engen agreed to wait for a year
2 to pursue acquisition of the Water System, until Sam Wheeler left the Park Water
3 board of directors.

4 29. No officers or employees of Mountain Water participated in the
5 conversations or negotiations concerning Carlyle's eventual sale of Mountain Water
6 to the City. Mr. Dove requested the conversations be kept confidential and that Mr.
7 Kappes, President and General Manager of Mountain Water, should not know of
8 them.
9

10 30. On September 11, 2011, Carlyle, the Clark Fork Coalition and the City
11 signed an agreement ("Letter Agreement"). The Mayor informed the City Council
12 and the public of his efforts to acquire the Water System.
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15 31. The Letter Agreement memorialized the City's and Clark Fork
16 Coalition's agreement to support Carlyle's purchase of Mountain Water in
17 proceedings before the Montana Public Service Commission ("PSC"), Carlyle's
18 agreement to consider in good faith a future offer from the City to buy the Water
19 System at any time, Carlyle's agreement to give the City notice if it received an
20 offer to purchase Mountain Water prior to any sale and not to sell the system for a
21 minimum of 120 days in order to give the City the option to submit its own
22 proposal, and Carlyle's agreement to follow certain conservation and stewardship
23 measures with respect to Missoula's water sources. Carlyle's acquisition of
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1 Mountain Water depended on approval from the PSC. The City and Clark Fork
2 Coalition supported Carlyle's purchase of Mountain Water before the PSC and
3 Carlyle's purchase was approved in December 2011.

4 32. The City did not attempt to acquire the Water System by purchase until
5 after Sam Wheeler left the board of directors.

6
7 33. Roger Wood, an investment banker working with the City, participated
8 in discussions with Mr. Dove, including discussions of the sale price for Mountain
9 Water and sale of Mountain Water on a stand-alone basis. In January 2013, Mr.
10 Dove sent an email to Mayor Engen telling him it would be best to keep the City's
11 intention to make an offer to acquire the Water System "under the radar" until the
12 offer was made because learning that the City was pursuing acquisition of the Water
13 System had provoked a strong negative reaction from Mr. Kappes.
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16 34. An informal offer was made by the City in February 2013. Mr. Dove
17 communicated to Mr. Wood that an appropriate place to begin negotiations was at a
18 price nearly double what the City had offered.
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20 35. On October 13, 2013, the Missoula City Council passed Ordinance
21 3509, authorizing acquisition of the Water System through either a negotiated
22 purchase, or if necessary, by exercise of the City's power of eminent domain. The
23 Ordinance was passed by a 10-2 vote of the City Council.
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1 36. The Ordinance states: “The City hereby determines that it is in the best
2 interest of the City and its residents for the City to acquire the System.”

3 37. On October 29, 2013, the City sent a letter to Mr. Dove, formally
4 offering to purchase the equity of Mountain Water for \$65 million.

5 38. Mr. Dove replied in a letter dated November 4, 2013 that Carlyle had
6 no current intention to undertake a sale of the company but requested additional
7 information which the City supplied.
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9 39. In a letter dated November 26, 2013, Carlyle rejected the City’s offer.
10 Mayor Engen sent a letter to Mr. Dove, dated December 5, 2013 to address issues
11 raised by Mr. Dove in his November 26 letter and to invite a counter-offer or
12 negotiation. Mr. Dove responded in a letter dated December 13, 2013, again
13 declining the City’s offer.
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16 40. With the approval of the City Council, Mayor sent a final written offer
17 to Mr. Dove on January 28, 2014, offering \$50 million for the assets held by
18 Mountain Water.
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20 41. Mr. Dove rejected the final written offer in a letter dated January 31,
21 2014. The City Council subsequently voted in favor of initiating a condemnation
22 action and the City filed its *Complaint for Order of Condemnation Under*
23 *Montana’s Law of Eminent Domain* on April 2, 2014.
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42. In May 2014, Carlyle acknowledged publicly that Mountain Water was
for sale and on May 21, 2014, Carlyle provided the 120 day notice of sale to the
City as provided in the Letter Agreement.

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43. Carlyle signed the Merger Agreement with Liberty on September 19,
2014, 122 days after providing the 120 day notice of sale to the City.

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44. An effort to obtain the property interest sought to be taken was made by
submission of a final written offer prior to initiating condemnation proceeding and
the final written offer was rejected.

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45. Condemnation is the only means for the City to acquire the Water
System as the parties have been unable to negotiate a sale of the Water System and
it is not feasible for the City to develop or construct a competing water system.

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C. PUBLIC OPINION

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46. Public opinion is one factor to be considered in determining necessity.

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47. Testimony regarding public opinion was offered through three elected
officials, Mayor Engen, and Council members Bryan von Lossberg and Jason
Wiener. They testified that there was strong support for City ownership of the
Water System. In Mr. Wiener's opinion, "It's not even a close call."

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48. Further testimony was offered regarding the results of a public opinion
poll commissioned by the City to test public opinion. The poll was conducted by
Harstad Strategic Research shortly after the filing of the *First Amended Complaint*.

1 According to the results of the poll, as testified to by Michael Kulisheck, seventy
2 percent of active voters in the City favor the City purchasing the Water System at a
3 fair price and operating it as a city-owned utility. A number of other questions were
4 also included in the poll. The survey also showed that participants were highly
5 satisfied with Mountain Water's service. The overall results indicated that public
6 opinion favors City ownership of the Water System.
7

8 49. Mountain Water criticized the public opinion poll as to its methodology
9 and its failure to poll Mountain Water customers who live outside City limits.
10 Mountain Water also suggested that the poll was intentionally created to improperly
11 influence the Court. The Court has not been improperly influenced by the poll or by
12 any other extra-judicial means including newspaper advertisements placed by
13 Liberty prior to this proceeding.
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16 50. Use of a poll is a reasonable method of measuring public support for
17 acquisition of the Water System by the City.
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19 51. The methodology used by Harstad followed generally accepted
20 methodology in line with industry standards and is a reasonably reliable measure of
21 the opinions of the surveyed population.
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23 52. The Court acknowledges that 1500 of Mountain Water's 23,500
24 customers reside outside City limits and were not included in the surveyed
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1 population. The Court declines to speculate on what opinions these customers
2 might hold.

3 53. The public opinion poll conducted by Harstad provides credible
4 evidence of public support for City ownership of the Water System by City voters.

5 **D. CONDITION OF THE WATER SYSTEM**
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7 54. Mountain Water serves 23,500 customers with 1500 customers located
8 outside City limits. The Water System serves both commercial and residential
9 customers.
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11 55. The Water System pumps groundwater water drawn from the Missoula
12 Aquifer from 37 wells through 327 miles of water main.

13 56. The parties presented extensive evidence regarding the condition of the
14 Water System and its long term needs.
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16 57. The City's perspective is that there has been substantial deferred
17 maintenance of key assets. The City introduced testimony that:
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- 19 a. Almost 50% of the Water System mains are 45 years old or older and
20 20% of the Water System mains have exceeded their useful life.
21 b. Well assets are rated from fair to poor with antiquated pumping
22 equipment, seriously corroded piping, HVAC systems in extremely
23 poor condition; problems with chemical feed systems; well pumps and
24 booster pumps operating well below efficiency industry standards with
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1 capital investment needed in the range of \$4-\$7 million to bring the
2 wells up to industry standards.

- 3 c. Nineteen percent of Mountain Water customers are unmetered and
4 while 81% of the System is metered, only 40% of the water is
5 measured through meters; the average age of meters is over 20 years;
6 capital investment needed to bring the meters up to industry standards
7 is in the range of \$16-20 million.
- 8 d. Seventy-five percent of the service lines are galvanized steel and have
9 exceeded their useful life; the cost of bringing the service lines up to
10 industry standards is in the range of \$20-\$30 million.
- 11 e. The Rattlesnake Dams and Intake dams have not been maintained and
12 show problems with leakage, seepage, slope stability, erosion of the
13 embankments and spillway problems, safety recommendations from
14 annual inspections have been repeatedly deferred and the cost of
15 immediate repairs needed to bring the dams up to minimum safety
16 standards is estimated to be \$3 million.
- 17 f. The Water System leaks at a rate of 50% or more. Estimated leakage
18 in the Water System is 7,000 to 8,000 gallons per minute. Leakage is a
19 significant measure of the quality and condition of a water system.
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- g. From 2004 through 2014, Mountain Water has invested less than \$1 million per year to replace water distribution mains. Mountain Water has replaced only half of the pipe that its own analysis determined is the minimum necessary.
 - h. In 2009, Mountain Water spent \$588,888 to pump and treat water that leaked out of the Water System.
 - i. Mountain Water's leakage as measured by the American Water Works Association Infrastructure Leakage Index (ILI) is in the range of 18-20. The average ILI rating is 3.57. The ILI rating indicates a need for immediate action to address the inefficient use of water as a resource.
 - j. Mountain Water has done some testing to identify leakage but has tested less than 10% of the system. The leakage rate cannot be allocated with certainty in part because so many Water System connections lack meters.
 - k. Mountain Water's own studies and analyses indicate that its rate of pipe replacement is not sustainable and that pipe and mains need to be replaced at an accelerated rate of 2.48 to 3.24 miles per year to keep pace with the remaining useful life expectancies of pipes already in the Water System. To date, the budgeted amount for main replacements has not been tied to any reasonable estimate of a sustainable rate of

1 replacement. The current rate of main replacement is not adequate to
2 prevent main failures. Main failures are detrimental because they
3 cause increased replacement costs on an emergency basis, can cause
4 property damage and can interrupt service.

5 l. Mountain Water has built excess wells to compensate for leakage,
6 which causes excess operational costs.

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8 m. If leakage were fixed, fewer wells would be needed and costs could be
9 reduced.

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11 n. Investment in the range of \$66-95 million is needed in order to bring
12 the System up to industry standards.

13
14 58. Mountain Water contends the City was unable to show that Mountain
15 Water has failed to perform sufficient maintenance in recent years or that the Water
16 System has significantly deteriorated over the last 30 years. Mountain Water
17 offered testimony regarding the following:

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19 a. Currently, Mountain Water makes over \$4 million of capital
20 investments in the Water System annually. Mountain Water budgeted
21 approximately \$4.5 million for capital investment in 2014. That figure
22 is projected to rise steadily to approximately \$7.5 million annually by
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24 2019.

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- b. Mountain Water has replaced its manual read meters with automated read meters;
 - c. Mountain Water's expert Joseph Mantua conducted a replacement cost new less observed depreciation analysis, which showed the Water System is in good condition and its actual physical observed depreciation is generally much less than its book depreciation.
 - d. A source of leakage is Kalamein and invasion pipes. These materials are being removed from the Water System.
 - e. One of the key sources of leaks is believed to be customer service lines, accounting for half or more than half of the leakage. Customers own the service lines and Mountain Water cannot force repairs to these lines.
 - f. Mountain's leakage rate has not caused it to build excess well capacity and the System has at most one well that would not be required if 100% of leakage were eliminated.
 - g. A random sampling of piping by Mr. Mantua shows that the steel invasion pipe which makes up 1.51% of the system and is the priority of Mountain Water's main replacement is in poor condition. The sampling showed the remainder of the pipe was in excellent condition.

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- h. At the direction of PSC, Mountain Water prepared a study in 2010 of the leakage in the System. The study showed that the cost to replace all mains 40 years and older would be over \$128 million and would lead to rate increases of 107%. Last year, Mountain Water replaced half of the pipe its analysis determined is the minimum necessary.
 - i. Mountain Water has updated its main replacement study and plans to present it to the PSC in its next rate filing. Mountain Water has budgeted in the next five years to be able to replace mains at approximately \$2.4 million per year. This study will be included in Mountain Water's next general rate application with the PSC.
 - j. Leakage in the Water System does not actually waste water because leakage returns water to the aquifer.
 - k. The City has made capital improvement more costly for Mountain Water by charging pavement penalties for Mountain Water work.

19 59. Under private ownership there has been inadequate capital investment
20 in maintaining the Water System and upgrading aging infrastructure.

21 60. Under private ownership, maintenance of key assets has been deferred,
22 including the Rattlesnake dams, equipment for operating wells, metering, service
23 lines and main replacement.
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1 61. Leakage is a significant measure of the quality and condition of a water
2 system.

3 62. Mountain Water's leakage rate reflects poor utilization of a valuable
4 resource, failure to conform operations to industry standards and to the extent that
5 leaks may occur in portions of the delivery system not under Mountain Water's
6 control, is an indicator of failed coordination with the City and other stakeholders.
7

8 63. Overall, the Water System is aging and requires capital investment to
9 remedy deferred maintenance of key assets. Significant capital expenditures will be
10 required in the future regardless of the identity of the owner of the Water System.
11

12 Under municipal ownership, long term planning for maintenance and capital
13 expenditures can occur under the management of a stable, long term owner.
14

15 **E. CITY'S OPERATION OF WASTEWATER UTILITY AND**
16 **ABILITY TO OPERATE THE WATER SYSTEM**

17 64. The City owns and operates a wastewater treatment and disposal
18 system ("Wastewater System").

19 65. The City introduced evidence and testimony that its operation of the
20 Wastewater System is professional and efficient and evidenced the City's ability to
21 competently manage the Water System.
22

23 66. Karen Knudsen, Executive Director of the Clark Fork Coalition,
24 testified that the City's management of the Wastewater System over the last 25
25 years has led to improved conditions in the Clark Fork River and risks of
26

1 groundwater contamination have been reduced. Ms. Knudsen's testimony was
2 credible.

3 67. Mountain Water criticized the City's operation of the Wastewater
4 System, alleging various deficiencies, shortfalls and violations with lax attitudes
5 towards regulatory compliance. Mountain Water characterizes the Wastewater
6 System as generally inadequate as compared with other similar facilities in the state.
7 Further, Mountain Water offered evidence that Starr Sullivan, the Wastewater
8 System plant supervisor, has not received an award since 2005 and lives in Florence,
9 Montana.
10
11

12 68. The City's ownership and operation of the Wastewater System has
13 provided it with experience in managing a complex water utility that is critical to
14 public health, safety and well-being.
15

16 69. The City has a credible plan for operating the Water System.
17

18 70. Municipal ownership of both the Water System and the Wastewater
19 System facilities offers opportunities for increased efficiencies in public health,
20 safety and welfare functions performed by the City, including transportation, urban
21 planning and fire safety.
22

23 71. The City's history of ownership and operation of the Wastewater
24 System, including rate setting, supports the City's contention that it can operate the
25
26

1 Water System effectively and efficiently and in alignment with community
2 conservation and environmental protection values.

3 **F. FINANCIAL CONSIDERATIONS**

4 72. The parties offered evidence and testimony regarding financial
5 considerations relating to ownership and operation of the Water System.
6

7 73. The City offered evidence and testimony that there would be
8 substantial adjustment and savings to the Water System's expenses under City
9 ownership which would benefit the public.
10

11 74. Mountain Water contended the City could not prove any of its
12 allegations relating to financial savings under City ownership because the City did
13 not prove the value of Mountain Water assets. In Mountain Water's view, the
14 City's evidence was unduly speculative because all their information was contingent
15 on the price the City must pay for the Water System and the resulting debt service
16 and the City did not put on any evidence of value.
17
18

19 75. The Court has considered the following in its necessity determination.

20 Administrative Expenses

21
22 76. Mountain Water pays Park Water for certain administrative services
23 ("Home Office Expense"). Park Water Company's two other California water
24 systems also pay administrative expenses to Park Water. In recent years, Mountain
25 Water has paid \$2.2 million to \$2.5 million annually to Park Water for the Home
26

1 Office Expense. The Home Office Expense has been a feature of Mountain
2 Water's operations for many years.

3 77. The City contends that the Home Office Expense funds Park Water's
4 main office and general expenses. In 2011, this included \$1.3 million for salaries
5 for California staff, \$48,000 for "travel and entertainment", a Board of Directors fee
6 of \$103,000, a "Trustee's Fee" of \$108,000, another \$257,000 for maintenance of
7 California facilities and \$28,722 for a regulatory commission expense. In the
8 City's view these expenses are inflated and do not serve local ratepayers.
9

10
11 78. Dale Bickell testified that in addition to the annual Home Office
12 Expense of over \$2 million, Mountain Water spends \$1.4 million annually on local
13 administrative staff.
14

15 79. Mr. Bickell testified that the total administrative expenses paid by
16 Mountain Water exceed every other Montana water system by more than \$2 million;
17 that Mountain Water's estimated administrative cost per customer is the highest in
18 the state and Mountain Water's administrative costs as a percentage of revenue are
19 second highest in the state.
20

21 80. Mr. Bickell testified that under municipal ownership, the Home Office
22 Expense would be eliminated and other administrative expenses significantly
23 reduced. The savings would increase the City's bonding capacity.
24
25
26

1 81. Mountain Water contends that the administrative services are valuable,
2 that they have been approved by the PSC through repeated ratemaking proceedings,
3 and that Mountain Water enjoys the benefit of economies of scale and fixed costs
4 spread over 75,000 customers, rather than over just Mountain Water's 23,500
5 customers. Mountain Water contends that the City's plan to reduce administrative
6 expenses simply reclassified current expenses under other City departments.
7

8 82. Mountain Water offered no testimony or evidence that the
9 administrative services obtained from Park Water at the cost of over \$2 million
10 annually require unique qualifications or special expertise.
11

12 83. Mountain Water offered no evidence or testimony regarding plans to
13 reduce or eliminate the Home Office Expense or otherwise reduce administrative
14 expenses. Greg Sorenson, President of Liberty Utilities confirmed that under
15 Liberty's ownership, Mountain Water would be required to make payments to the
16 parent company for the services of Canadian personnel and corporate oversight.
17
18

19 84. Under municipal ownership, the Home Office Expense to a parent
20 company would be eliminated, reducing the cost of administrative services
21 supporting the Water System. Under private ownership, the Home Office Expense
22 will continue.
23

24 85. The City is currently performing administrative functions for the City
25 and is capable of performing the necessary administrative services for the efficient
26

1 operation of the Water System. The City can achieve economies of scale by
2 coordinating with the operations of other City departments.

3 86. Dale Bickell and Leigh Griffing testified that certain other expenses
4 will be eliminated or reduced under City ownership, including elimination of taxes
5 in the amount of \$4 million, reduced cost of insurance and elimination of annual
6 contract services currently paid by Mountain Water.
7

8 87. The City presented the more credible evidence at trial that it can
9 perform necessary administrative services for the operation of the Water System
10 while eliminating the Home Office Expense and reducing other administrative
11 expenses.
12

13 Profit

14
15 88. Mountain Water is a for-profit corporation. As a regulated entity, it
16 earns a profit on capital expenditures approved by the Montana Public Service
17 Commission ("PSC"). The current return on equity approved by the PSC for
18 Mountain Water is 9.8%.
19

20 89. As a municipality, the City does not operate on a for-profit basis. The
21 City contends that if it operates the Water System, it can operate it at cost and make
22 greater and faster reinvestment of revenue into the Water System.
23

24 90. Mountain Water does not dispute that it earns a profit and will continue
25 to earn a profit so long as it is privately owned. Mountain Water maintains that
26

1 while the City may have a lower interest rate on its debt service than Mountain
2 Water's authorized rate of return, the principal upon which the debt service will be
3 based will be much higher than the \$40 million basis for Mountain Water's rate of
4 return and that the City will probably have to pay bondholders more than Mountain
5 Water earns as a rate of return.

6
7 91. Under City ownership, the Water System would not have to generate
8 profits to meet investor expectations. Under City ownership, only those revenues
9 necessary to operate and maintain the Water System would be charged to customers.
10 Under private ownership, profits will continue to be earned for the benefit of owners
11 and investors.

12 Rate Setting

13
14
15 92. Mountain Water is subject to regulation by the PSC and its rates are set
16 by the PSC.

17
18 93. Under municipal ownership, rates would be set by the City pursuant to
19 statute.

20
21 94. Alec Hansen served as the executive director of Montana League of
22 Cities and Towns for 32 years and represented Montana's 129 cities and towns
23 before the Montana Legislature on aspects of municipal organization.

24
25 95. Mr. Hansen testified that Missoula is the only municipality in Montana
26 that does not own its own water system.

1 96. Until 1981, Montana municipalities could adjust water rates only after
2 obtaining approval from the PSC, which was a costly and time-consuming endeavor.
3 After 1981 that requirement was relaxed and later repealed entirely. All cities and
4 towns in Montana owning their own water system can now set their own rates.

5 97. Mr. Hansen testified that the rate setting process used by municipally-
6 owned water systems is successful. Consumers must be individually notified of any
7 proposed rate increase. Consumers have the opportunity to directly address council
8 members.
9

10 98. Mr. Hansen testified that PSC currently regulates 18 private water
11 systems, all very small, serving individual subdivisions or resorts with the exception
12 of Missoula's Water System. Mountain Water customers represent 90% of the
13 regulated water customers in Montana and are essentially subject to their own
14 private regulatory authority which is located in Helena.
15

16 99. David Nielsen is an attorney who has worked for numerous cities and
17 towns in Montana that operate their own water system. His opinion was that the
18 1981 deregulation of municipal water systems eliminating PSC oversight has been
19 beneficial for municipalities and consumers. Rates can be adjusted when necessary
20 without the expense and time associated with PSC proceedings and consumers can
21 easily express their opinions to local decision makers without traveling to Helena.
22 Mr. Nielsen's testimony was credible.
23
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1 100. John Rundquist is an engineer and was the director of Public Works for
2 the City of Helena for 14 years. In that capacity he supervised the city's water and
3 wastewater systems. He testified that the rate-setting process before the Helena City
4 Council was fair and reasonable for consumers, including those who lived outside
5 city limits due to the transparency and accountability required of the local governing
6
7 body.

8 101. Bryan von Lossberg and Jason Weiner, both City Council members,
9 testified regarding their experiences with setting rates for the Wastewater System.
10 They testified that the City's process was deliberative and open and accessible for
11 consumers. Further, consumers are not limited to ratemaking proceedings in order
12 to have their concerns heard. The City Council has regularly scheduled meetings
13 and members of the public may be heard at any meeting.
14
15

16 102. Mr. Wiener testified that the City's process in setting rates involves
17 several informational meetings with the public, detailed discussions about the
18 reasons for the rate increase, an initial public hearing, further committee debate
19 among City Council members, another public meeting where amendments were
20 heard and a final vote. City Council members take into account the discussions
21 among Council members and the comments from the public before making a
22
23 decision.
24
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26

103. Ken Toole, a former PSC Commissioner, testified on behalf of the City.
1 From his perspective, the PSC is not effective at making sure Mountain Water
2 provides water in the most efficient, least expensive manner.
3

4 104. Although PSC has historically regulated Mountain Water, it is the only
5 large municipal water system still regulated by the PSC. The other water systems
6 regulated by PSC are a few small water utilities.
7

8 105. Mr. Toole did not consider Mountain Water to be operated as well as
9 the municipally owned water systems in Helena and Butte. He opined that the City
10 of Missoula would be better able to plan for the future water needs of Missoula
11 citizens than a for-profit corporation.
12

13 106. Mountain Water offered testimony from John Guastella regarding
14 Mountain Water rates and the benefits of PSC oversight. Mr. Guastella is an
15 engineer and president of Guastella Associates, a consulting firm providing
16 management, rate and valuation services to utilities, including water and wastewater
17 utilities.
18
19

20 107. Mr. Guastella testified that oversight by a regulatory commission
21 serves as a substitute for competition. Regulatory oversight commissions such as
22 the PSC rely on trained professionals and use an intensive process, including
23 discovery, expert witnesses and briefing to examine information relevant to setting
24 rates.
25
26

1 108. Mr. Guastella was not familiar any with Montana municipalities that set
2 rates in accordance with Montana law. Even so, he testified that if he did examine
3 their rates and ratemaking processes, he would find they all did it wrong. In his
4 view, not only were municipal rate proceedings perfunctory, conducted without
5 sufficient expertise and done wrong, consumers did not even know what questions
6 to ask. Overall, his opinion was that ratemaking should be left to the experts under
7 the oversight of PSC.
8

9 109. Mr. Guastella regarded the City's evidence regarding rates as
10 "incompetent" and speculative because they did not know what their debt service
11 would be.
12

13 110. In 1981, the Montana Legislature recognized that regulatory
14 requirements applicable to municipally owned water systems could be relaxed.
15 Since then, numerous Montana cities and towns have managed rate setting without
16 oversight by PSC. The City has the ability to set water rates fairly and effectively
17 as is done in numerous other Montana cities and towns. Further, the City has
18 experience in setting rates for the Wastewater System.
19
20

21 111. The Court recognizes that some Mountain Water customers are not
22 eligible to vote in City elections. However, this state of affairs exists in numerous
23 cities and towns in Montana and has for many years. Montana law ensures those
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26

1 customers are informed of rate increases, can obtain information and can participate
2 before the City Council prior to a final decision.

3 112. Under the Montana Constitution, the public has a constitutional right to
4 be afforded reasonable opportunities for citizen participation in the operation of its
5 governmental agencies prior to final decisions as provided by law. Additionally, no
6 person may be deprived of the right to examine documents or observe the
7 deliberations of all public bodies of subdivisions of the State. Montana law is well
8 developed and robust regarding open government requirements and citizen
9 participation rights. Meetings must be open to the public, agendas must be
10 provided in advance of meetings, minutes must be maintained and made available
11 and press representatives may not be excluded from meetings. The rights of the
12 public to participate in government, to obtain public writings and records and to
13 have local access to decision makers are significant, meaningful and effective.
14 These constitutional rights ensure ample opportunity for all Mountain Water
15 customers to gain access to information regarding the operation of the Water System
16 and to appear and participate prior to final decisions by the City Council regardless
17 of their status as voters.
18
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23 113. PSC oversight protects consumers served by a monopoly from the
24 exploitation that may occur in the absence of competition. Protections against the
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1 potential for earning unfair profits from a captive market are not necessary under
2 municipal ownership because municipalities cannot earn profits.

3 114. The PSC process applicable under private ownership is cumbersome as
4 it is governed by complex administrative rules, including rules protecting certain
5 information from public disclosure, making navigation difficult for individual
6 consumers. Under municipal ownership, management of the Water System occurs
7 by locally elected officials who are legally required to operate with transparency and
8 to ensure opportunities for public participation prior to final decisions.
9
10

11 Impacts on Rates Due to Costs of Acquisition
12 and Needed Capital Improvements

13 115. The City has AA plus credit rating from Standard and Poor's Rating
14 Service.

15 116. The City is eligible for tax-exempt, low-interest municipal bonds that
16 are not available to private owners. The City's potential savings from low interest
17 rates are substantial over time.
18

19 117. The City is also eligible for federal and state grants to fund additional
20 capital improvements that are not available to private owners.
21

22 118. The City has performed due diligence regarding acquisition of the
23 Water System, including commissioning appraisals and soliciting advice about the
24 City's bonding capacity. The City can afford to acquire the Water System within
25
26

1 the parameters of the bonding consultant estimates for capacity and the valuation
2 appraisals conducted by the City.

3 119. Mountain Water contends that the City's evidence regarding its ability
4 to manage the Water System with greater cost effectiveness is too speculative
5 because it has not proved the value of the Water System.
6

7 120. Mountain Water offered testimony from Frank Perdue regarding rate
8 impacts resulting from City acquisition. Mr. Perdue testified that rates would
9 increase under municipal ownership because revenue requirements would be
10 increased by the cost of acquiring the Water System. His testimony was illustrated
11 using assumptions about three different valuations for Mountain Water.
12

13 121. Mountain Water contends the price Liberty will pay to acquire
14 Mountain Water will not affect rates but will be borne by Liberty investors.
15

16 122. David Pasieka is the President of Liberty Utilities (Canada) of
17 Oakville, Ontario, Canada. Mr. Pasieka's testimony reflects that Liberty engages in
18 acquisitions of regulated water, electric and gas utilities in order to deliver
19 predictable returns and earnings to Algonquin. Liberty makes acquisitions where
20 there is a statistical likelihood of predictable returns for Algonquin and that return is
21 expected to be a high return on investment, typically in the range of 9-10%.
22

23 123. The Court does not find it credible that revenue requirements due to
24 Liberty's acquisition costs will have no effect on rates.
25
26

1 124. The fair market value of the Water System must be determined at a
2 later stage of the proceedings.

3 125. The Court recognizes that acquisitions costs may affect revenue
4 requirements for the Water System and cause future rate increases, regardless of the
5 identity of the new owner. What those rates increases will be cannot be predicted
6 with certainty.
7

8 126. The evidence and testimony presented by the parties regarding the
9 relationship between acquisition costs and rates is sufficient for the Court to
10 determine public necessity.
11

12 127. The Court has previously found that the Water System is aging and that
13 under private ownership capital investments have been inadequate and maintenance
14 of key assets has been deferred. As a result, significant capital expenditures will be
15 required in the future.
16

17 128. Carlyle's marketing materials for Park Water and its subsidiaries
18 predicted a growth in the base rate of 13% compounded annually.
19

20 129. Carlyle's marketing brochure for Park Water and its subsidiaries
21 forecast a 50% increase to the rate base for Mountain Water between 2013 and
22 2019.
23

24 130. It is foreseeable that under private ownership, the filing of PSC rate
25 cases will occur on an annual basis rather than once every two years.
26

1 131. If the Water System is owned by private owner, the cost of capital
2 improvements will be increased by a rate of equity approved by the PSC, currently
3 9.8%. Under municipal ownership, the cost of capital improvements will not be
4 increased by a rate of equity.

5 132. Under private ownership, final budget decisions are made by a
6 corporate parent within the context of what is best for the corporate parent. Under
7 private ownership, local managers are allowed to make budget recommendations but
8 cannot approve final budgets.
9

10 133. Given the inevitability of future rate increases due to needed capital
11 investment in an aging Water System and costs of acquisition, the Court considers
12 that municipal ownership is more necessary than private ownership. Under
13 municipal ownership, significant decisions affecting rates can be made pursuant to
14 long term planning conducted within the context of stable ownership. Under
15 municipal ownership, financial decisions will be made by locally elected officials
16 who are required to operate with transparency and to provide the public with
17 opportunities to participate before final decisions are made. Under municipal
18 ownership, important financial decisions regarding the Water System can be based
19 on promoting public health, safety and welfare rather than on decisions regarding
20 returns on investments for a large and growing utility conglomerate. Finally, under
21 municipal ownership, important financial decisions can be made so that the Water
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1 System is by coordinated with other public welfare functions currently performed by
2 the City and in alignment with community conservation and environmental
3 protection values.

4 **G. ECONOMICS AND PUBLIC POLICY**

5
6 134. The City and Mountain Water offered testimony from experts in
7 Economics.

8 135. C. Kees Corrsmit is a Water Utility Economist with a Ph.D. in Natural
9 Resources Economics with a specialty in Water Economics. His experience
10 includes consulting with over 300 utilities, both publicly and privately owned, on
11 fees and rates. Dr. Corrsmit testified that from a water utility economist's
12 perspective, City ownership would confer a benefit, convenience or advantage on
13 the inhabitants of Missoula and that ownership by the City would be more likely to
14 achieve public benefit than maintaining the status quo. The basis for his opinion
15 was as follows:
16
17
18

- 19 a. In the public sector, long term studies and financial planning are
20 typical. These analyses provide a basis for establishing a system of
21 rates and charges that will be fairly predictable and steady over time.
22
23 b. Public ownership enables operations based on local preferences
24 because local officials must serve their constituents directly. If they
25
26

1 fail to do so, they will not continue to serve in office. Local
2 preferences include conservation and stewardship of natural resources.

3 c. Revenue requirements for municipally owned water systems are less
4 than privately owned systems because there is no need for profit.

5 Private water system owners make a profit either by collecting more
6 revenue than they spend or by selling the system for more than they
7 paid for it.

8
9 d. Private owners of utilities make money through the rate of return on the
10 rate base. The rate base is the investment that is owned by the private
11 owner. Private owners make money through current operations or by
12 selling the utility.

13
14 e. In the public sector, standards used to set rates prioritize equity and
15 cost. In the private sector, the rules used to determine rates consider
16 less detail in the cost of service studies and less focused on equity.

17
18 f. The Water System needs capital investment to install meters to enable
19 gathering information necessary to set rates so that a customer's bill
20 will reflect an appropriate cost for service. Other significant
21 improvements, such as replacing aging mains and service lines are
22 required to address an extraordinarily high leakage rate. The high
23 leakage rates signals significant inefficiencies.
24
25
26