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**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

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

v.

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

Defendants.

and

THE EMPLOYEES OF MOUNTAIN
WATER COMPANY, et al.

Intervenors.

Cause No. DV-14-352

Dept. No. 4

**BRIEF IN RESPONSE TO
DEFENDANTS' AND
INTERVENORS' MOTION TO STAY
VALUATION PROCEEDINGS
PENDING APPEAL**

Montana law presumes that entry of a preliminary order of condemnation does not result in a stay of proceedings pending appeal: “An appeal does not stay any further proceedings under this chapter except that the district court on motion or ex parte may grant a stay for a period of time and under conditions that the court considers proper.” Mont. Code Ann. § 70–30–312(2) (Emphasis added.) Yet, Carlyle, Mountain Water, and the Mountain Water Employees ask the Court to stay the valuation phase of this case pending appeal because, among other things, they might have to print new letterhead and issue new work clothes to the employees if the City takes possession of the water system.¹ The City has not moved to take possession of the property, and there are no other exigent circumstances that would justify staying this case. Accordingly, until such circumstances present themselves, Defendants’ motions are not ripe and lack merit for that reason alone.

More important, the City and the people of Missoula stand to lose far more if this case is stayed than Carlyle, Mountain Water, and the Employees stand to lose if it is not. Missoula’s water system is failing, and rehabilitation is needed now, not after months or years of delay created by

¹ This brief is filed in response to both Carlyle and Mountain Water’s brief and the Employees’ brief. For convenience of the parties and the Court, the City has combined its briefs opposing these motions into a single brief. Although the combined brief exceeds 20 pages, it is substantially shorter than the 40 pages of briefing the City would be entitled to submit by filing separate response briefs.

Carlyle, Mountain Water, and the Employees. What is more, the City is losing hundreds of thousands of dollars that could be invested in repairs to the water system for every month this case is delayed.

This is, at last count, Carlyle's and Mountain Water's ninth attempt to unnecessarily delay this proceeding. They did not have good reasons to delay this case the previous eight times, and their previous attempts were denied. They do not have a good reason now. The Court should deny their motion.

I. Montana law mandates that condemnation proceedings proceed swiftly and without delay.

Montana law presumes that a stay should not be ordered after a preliminary order of condemnation is issued and that the case proceeds to final disposition on an expeditious basis. Montana Code Annotated § 70–30–312(2) provides: “An appeal does not stay any further proceedings under this chapter except that the district court on motion or ex parte may grant a stay for a period of time and under conditions that the court considers proper.” (Emphasis added.) Carlyle and Mountain Water argue there is no reason for the Court to proceed expeditiously with the valuation phase of this case because Montana law encourages “swift progression” for only the necessity phase of a condemnation case. They are wrong.

Montana Code Annotated § 70–30–206(5) states that “all parties shall proceed as expeditiously as possible” with the preliminary condemnation proceedings and that the “court shall give the proceedings expeditious and priority consideration.” This mandate applies to all preliminary procedures in a condemnation case, not merely the determination of whether condemnation is a public necessity. The statute governing the appointment of condemnation commissioners—which is one of the next steps in this case—is part of the “preliminary procedure” under the statutes. See Mont. Code Ann. § 70–30–207. So, contrary to Carlyle’s and Mountain Water’s argument, the mandate to proceed “expeditiously as possible” applies to the appointment of condemnation commissioners and their proceedings just as it does to the necessity phase of the case. Indeed, upon appointment of the commissioners, valuation evidence must be presented to them within 10 days. Mont. Code Ann. § 70–30–301(1).

Even setting aside § 70–30–206(5), the statutes as a whole evince a clear mandate to proceed expeditiously during all phases of a condemnation proceeding. In their opening brief, Carlyle and Mountain Water suggest that the next step in this case is a jury trial where the fair market value of the water system “must be tried upon the same notice and in the same manner as other civil actions.” (Opening Br., p. 5). This is not

so. The next step of this case requires Carlyle and Mountain Water to promptly file their statement of just compensation:

Within 30 days of entry of a preliminary condemnation order, the condemnee shall file a statement of the condemnee's claim of just compensation. If within 20 days of service of the condemnee's claim the condemnor fails to accept the claim, the court shall appoint condemnation commissioners.

Mont. Code Ann. § 70–30–207(1) (emphasis added). Carlyle's and Mountain Water's statement is due on July 15, 2015. A jury trial would occur only as an appeal from the commissioners' decision or if both parties waived the commissioner hearing, which has not occurred. See *id.*; Mont. Code Ann. § 70–30–304.

Montana law is clear: (1) There is a presumption against staying a condemnation proceeding pending appeal and (2) under Montana law, all phases of a condemnation case should proceed expeditiously, not just the public necessity phase.

II. A stay pending appeal would unduly prejudice the City.

The Montana Legislature has directed condemnation proceedings to proceed expeditiously. That much is clear from the statutes. And there is good reason for that. If a court determines that municipal ownership of property—like Missoula's water system—is necessary, then that means

municipal ownership is important and that steps should promptly be taken to transfer ownership to the municipality.

Here, Carlyle and Mountain Water apparently contend that the appeal and valuation phases of this case will be a “multi-year” endeavor. (Western Water Holdings and Mountain Water’s Brief in Response to the City’s Motion to Stay PSC proceedings, p. 7, attached as **Exhibit A.**) Algonquin and Liberty seem to agree: “The District Court’s Preliminary Order is only the first step in a multiple phase, multiple year process.” (Liberty’s Brief in Response to the City’s Motion to Stay PSC proceedings, p. 3, attached as **Exhibit B.**)

Missoula’s water system and the people of Missoula cannot wait that long. Staying this case and resuming only after an appeal has run its course is contrary to the statutory scheme and would only add unnecessary and harmful delays that defeat the intent of the law. The longer Carlyle and Mountain Water delay this case, the further the water system falls into disrepair and the more costs the City and people of Missoula have to pay. The water system needs capital investment and repairs now, not years down the road.

Carlyle and Mountain Water claim, “This is not the case of a system being condemned because it is distressed and in need of urgent repair . . .”

(Opening Br., p. 7.)² They are wrong—that is precisely one of the reasons why the Court concluded that City ownership of the water system is a public necessity. In its Findings of Fact and Conclusions of Law (“FOFCOL”), the Court wrote:

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

60. Under private ownership, maintenance of key assets has been deferred, including the Rattlesnake dams, equipment for operating wells, metering, service lines and main replacement.

61. Leakage is a significant measure of the quality and condition of a water system.

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

(FOFCOL ¶¶ 59–62.) Carlyle and Mountain Water are mismanaging Missoula’s water system—a water system that delivers more water to

² Carlyle and Mountain Water also claim the Court found that Mountain Water is “presently providing a valuable public service.” (Opening Br., p. 7.) The Court never made that finding, and Carlyle and Mountain Water provide no citation for where the parties or Court might find that finding. Indeed, nothing could be further from the truth. The Court found that “Mountain Water’s leakage rate reflects poor utilization of a valuable resource, failure to conform operations to industry standards and to the extent that leaks may occur in portions of the delivery system not under Mountain Water’s control, is an indicator of failed coordination with the City and other stakeholders.” (FOFCOL, ¶ 62.)

leakage than it delivers to its customers. Every day of delay that Carlyle and Mountain Water add to this case is another day of mismanagement and another day of delay confounding the City's efforts to rehabilitate the water system.

In addition to delaying much-needed repairs to the water system, a stay would also cost the City or its ratepayers approximately \$350,000 dollars each month of delay. In its FOFCOL, the Court found that the City presented credible evidence that it would be able to reduce administrative expenses, eliminate taxes paid by Mountain Water, reduce insurance costs, and eliminate annual contract services and "Home Office Expenses." (FOFCOL, ¶¶ 86–87.) That cost savings—more than \$4.2 million annually and \$350,000 per month—represents money that either the City would be able to put toward rehabilitating the water system or which the ratepayers would not be required to fund. (See Affidavit of Dale Bickell, filed under seal, attached as **Exhibit C**.) Granting a stay and unnecessarily delaying this case would cost the City hundreds of thousands if not millions of dollars of capital investment. A stay would only force the people of Missoula to needlessly continue footing the bill for all of Carlyle's and Mountain Water's unnecessary administrative expenses (not to mention their inflated executive salaries and bonuses).

Finally, the City currently has access to low interest revenue bonds to fund the purchase of the water system. (FOFCOL, ¶¶ 135–36.) Those low interest rates would be placed in jeopardy by unnecessarily delaying this case with a stay, which could cost the City millions of dollars over the life of the bond. (See Bickell Aff., Ex. C (filed under seal).)

In their opening brief, Carlyle and Mountain Water argue the City and people of Missoula will suffer no prejudice because the City intends to operate the water system the same way that Carlyle and Mountain Water have operated it:

In a standard condemnation case, the government seeks to take real property devoted to private use in order to construct a new improvement for public use, such as a road or school. Any delay in possession is a delay of that public improvement coming into existence. In contrast, here the City seeks to take improvements already devoted to the public use and *continue that same use*, but under different ownership. Rather, while the Supreme Court resolves vital issues from the necessity phase the people of Missoula will continue to receive the same clean, safe drinking water service as they have for the past century.

(Opening Br., p. 14–15 (emphasis original)). Carlyle and Mountain Water are grossly mistaken—the City has no intention to continue their legacy of mismanagement, inflated costs, executive payouts, and lack of capital investment. The fact that the City will implement a fundamentally different

philosophy of management and operation presumably is one of the very reasons the Court concluded that City ownership is a public necessity.

To use Carlyle's and Mountain Water's words: Any delay in the City's possession is a delay to implementation of all the City's cost savings and improvements to the water system coming into existence. Carlyle, Mountain Water, and the Employees are simply asking to kick the can down the road, which, for the reasons above, will only result in substantial and undue prejudice to the City and the people of Missoula.

III. Carlyle and Mountain Water will not be unduly prejudiced if the valuation phase goes forward, as required by Montana law.

Carlyle and Mountain Water claim they will suffer "serious injury" if the valuation phase is not stayed because the City might someday seek to take possession of the water system. Carlyle and Mountain Water list 17 purported changes to the water system that will occur if the City takes possession (including the need to change the employees' clothing and letterhead). Their argument falls flat without regard to its merit.

The City has not moved to take immediate possession of the water system under Section 70-30-311(1), and the Court cannot issue a final order of possession until the valuation phase is complete. Until the City moves to take possession (whether immediate or final), Carlyle's and Mountain Water's complaints about "handing over the keys" to the City are

paranoid as a practical matter and not ripe as a matter of law. The appropriate time for Carlyle and Mountain Water to raise these complaints is when the City actually seeks to take possession of the water system. In *City of Bozeman v. Taylen*, for instance, the Montana Supreme Court observed that a party opposing possession (like Carlyle and Mountain Water) can move to stay possession pending appeal, whether possession is sought as a result of a preliminary or final order of condemnation. 2007 MT 256, ¶ 29, 339 Mont. 274, 170 P.3d 939. But that is a different proposition than staying the case. A stay of possession does not prevent the valuation phase of the case from going forward.

There is work that can and has to be done in this case before the City takes final possession of the water system (e.g. completing the valuation phase). Mountain Water details much of that work in its response to the City's motion to stay the PSC proceeding. (See Ex. A.) There is no reason to delay progress in the remaining Court proceedings simply because Carlyle and Mountain Water have concerns with the City someday taking possession of the water system. The Court need not and should not address Carlyle's and Mountain Water's "parade of horribles" until it is time for the City to actually take possession of the water system. Even in their briefs before the PSC, Mountain Water and the Employees argue they are

in control of the water system operations until the City seeks to take possession. (See Ex. A.) The positions they are taking with this motion are flatly inconsistent with the positions they are taking before the PSC.

Regardless, even if the City takes possession of the water system, many of Carlyle's and Mountain Water's concerns would be easy to resolve without a stay. Printing new letterhead, issuing new work clothes, and changing signage are not insurmountable tasks in the broader context of this case. (Opening Br., p. 10.) Nor is transferring customer information or explaining new "vacation policies." (*Id.*)

Indeed, Carlyle and Mountain Water cannot be too concerned about structural and operational changes within the water system because these are the very changes that would accompany the sale of the system to Algonquin and Liberty if the PSC approves the sale. Yet, Carlyle and Mountain Water vehemently oppose a stay of the PSC proceedings even though continuing forward with those proceedings could force them to twice make the very same structural and operational changes they complain of with this motion. Carlyle and Mountain Water want to play it both ways.

The "serious injuries" alleged by Carlyle and Mountain Water—to the extent they are injuries at all—are not only premature, they are also substantially outweighed by the concrete injuries the City and people of

Missoula would suffer if a stay is granted. The same is true with respect to Carlyle's and Mountain Water's argument that going forward will result in additional legal fees and expenses. Those costs pale in comparison to the costs the City will incur if this case is stayed.

As long as Carlyle and Mountain Water are operating the water system, the system will continue to lose more water than it delivers—by the defendants own studies, over 4 billion gallons annually (7,888 gallons per minute as of 3/14/2014). (Public Necessity Trial Exhibit 1261-001, attached as **Exhibit D**.) Missoula's water system needs to be repaired now, not later. What is more, every month of delay in this case costs the City no less than \$350,000 that could be invested in capital expenditures for the water system, not to mention the millions of dollars that could be lost if revenue bond interest rates rise while the case is stayed. The City and people of Missoula have far more to lose if this case is stayed than Carlyle and Mountain Water do if it is not.

IV. Mountain Water's Employees would not be unduly prejudiced if the valuation phase goes forward, as required by Montana law.

Mountain Water's Employees join in Carlyle's and Mountain Water's motion, and they filed a separate brief. They argue, "Unlike the great majority of condemnation actions which involve condemnation of bare ground for highways, utilities, etc., the City of Missoula seeks to take over,

against the will of The Employees, a successfully operating business.”

(Opening Br., p. 2.) The City and the people of Missoula have been on the losing end of that “successful” enterprise, which is precisely why, as the Court concluded, City ownership is a public necessity.

The Employees argue the valuation phase should be stayed because, if the City takes possession, the Employees will get a raw deal. They complain about uncertain terms of employment and that employment will be “more dangerous from an injury standpoint,” though they offer no explanation as to what they mean by that. The Employees’ arguments fail for several reasons.

First, the Court has already addressed the Employees’ list of stated concerns and found they lack credibility. In the public necessity phase of this case, the Court carefully considered the impact that City ownership of the water system would have on the Employees. (FOFCOL ¶¶ 180–98.) The Court found that “[t]he City’s offer of employment is reasonable and fair to Employees.” (*Id.* at ¶ 197.) The City guaranteed employment of five years at current wages and benefits to all Employees except three top executives. (*Id.* at ¶ 183.) Even the top three executives, though, would be guaranteed employment at current salary and equivalent benefits for at least a year. (*Id.* at ¶ 183.)

Second, the Employees, like Carlyle and Mountain Water, confuse the valuation phase of the case with the City taking possession of the water system. Every one of the Employees' alleged "irreparable injuries" hinges on the City actually taking possession of the water system. Until the City moves to take possession (whether immediate or final), none of the Employees' alleged injuries are ripe. For that reason alone, their motion should be denied.

Third, the City's offer is better than Algonquin and Liberty's offer, which offers employment measured in months, not years, and provides no stability:

Liberty is contractually bound to provide job security for Employees for a term measured in months.

So long as Mountain Water is a part of a large for-profit enterprise, Employees have no guarantees regarding continuity of ownership or job security. Changes in corporate ownership, changes in corporate structures and changes in corporate management subject Employees to potentially drastic personal consequences without notice, including changes in compensation, benefits, working conditions, changes to job descriptions and organizational structures and income and benefit disparities.

Employees face disruption and uncertainty in the immediate future under an imminent change in ownership. Employment by Liberty exposes Employees to the vagaries of employment by an extremely large for-profit enterprise. Employment by the City confers advantages on Employees in terms of job security, the

benefits of stability of ownership and much greater accessibility to information, managers and decision makers.

(FOFCOL ¶¶ 191, 193, 196)

Yet, despite the pitfalls of employment under Algonquin and Liberty, the Employees are anxious to race toward a sale of the water system to these foreign owners only to trigger the same disruptions of which they now complain in their motion and on less favorable terms than what the City offered. One can understand, though, why at least one of Mountain Water's Employees would take this position: If the sale to Algonquin and Liberty goes through, "John Kappes will receive class B shares, along with eight other executives of Park Water, Apple Valley Ranchos and Central Basin, worth millions of dollars, intended to secure the alignment of their interests with Liberty." (FOFCOL, ¶ 185.) Perhaps this is why the Employees want to stay this proceeding but not the PSC proceeding—their executives are setting the litigation direction in these actions, and the executives personally stand to benefit if they pursue Carlyle's interests rather than the interests of Missoula's water consumers.

The Court should deny the Employees' Motion to Stay. None of the Employees' alleged "irreparable injuries" are ripe until the City seeks to take possession of the water system. Regardless, the Court has already

addressed each of the Employees' concerns and rejected them. The terms the City offered are reasonable and better than what Algonquin and Liberty offered.

V. Proceeding with the valuation phase will not result in inconsistent opinions.

Carlyle and Mountain Water attempt to concoct two scenarios where, according to them, failing to stay this case pending appeal could lead to "inconsistent" opinions. If true, every case should be stayed pending appeal of an affirmative determination of public necessity, and the statute should be rewritten to say so. Defendants' strained hypotheticals do not realistically present inconsistent results, and, even if they did, any inconsistencies could be easily resolved.

The first scenario is telling in terms of how Carlyle and Mountain Water will approach the valuation phase of this case—they plan to inflate the value of the water system and try to squeeze the most from the City without regard to the factual evidence. Carlyle and Mountain Water argue that if the case goes forward and either the condemnation commissioners or jury place a fair market value on the water system, then that will potentially prejudice Carlyle and Mountain Water if the Montana Supreme Court reopens the public necessity phase and allows Carlyle and Mountain Water to present evidence of valuation in that phase. Carlyle and Mountain

Water are worried that the condemnation commissioners' or jury's determination of fair market value might be much lower than what Carlyle and Mountain Water would like to argue to the Court if the public necessity phase is re-opened.

To be sure, the water system is worth substantially less than what Carlyle and Mountain Water publicly claim it is worth. But a commissioner or jury finding to that effect would not result in "inconsistent" results. Instead, Carlyle and Mountain Water are worried that a jury finding could be competing evidence if the public necessity phase were reopened. Why would Carlyle and Mountain Water be worried about a commissioners' or jury's finding in the first place if Carlyle and Mountain Water are so confident in the accuracy of their inflated value of the water system?

Regardless, if the Montana Supreme Court ordered the Court to reopen the public necessity phase to allow presentation of valuation evidence, then Carlyle and Mountain Water would presumably be free to move to exclude evidence of the commissioners' or jury's finding (whether that motion should be granted is a different question). That would be the appropriate time to address Carlyle's and Mountain Water's concern, not now in their concocted hypothetical.

As a second potential “inconsistent” result, Carlyle and Mountain Water argue that if the valuation phase goes forward, then the value placed on the water system could ultimately be based on an “inaccurate corpus of assets.” (Opening Br., p. 13.) This scenario is based on Carlyle’s and Mountain Water’s argument that the City cannot condemn property outside its municipal boundaries—e.g. the wilderness lakes, dams, and infrastructure outside the municipal boundaries. This Court rejected that argument, as there was a statute and case law directly on point—specifically refuting Carlyle’s and Mountain Water’s argument. According to Carlyle and Mountain Water, if they appeal that issue and the valuation phase nevertheless goes forward, then the commissioners’ or jury’s finding on value could be based, in part, on assets the City ultimately cannot condemn (assuming, of course, that Carlyle and Mountain Water succeed on their appeal).³

³ As an aside, Carlyle and Mountain Water’s rationale for pursuing this legally unsupported argument makes sense only if they view these “extra-territorial” properties as a liability rather than asset. If the Wilderness dams, lakes, and infrastructure outside City limits are a liability, then including them in the valuation phase would lower the water system’s enterprise value. One can understand why this would cause Carlyle and Mountain Water concern and why they would want that property excluded from the valuation. On the other hand, if the property is an asset—which is what Carlyle and Mountain Water appear to believe—then Carlyle and Mountain Water’s concern is that the City could be forced to pay more for the water system than what it is actually worth when the “extra-territorial” property is excluded. Is it truly Carlyle and Mountain Water’s concern that the City might ultimately have to pay too much for the water system?

Carlyle's and Mountain Water's concern is easy to resolve. If a jury makes a finding of fair market value on the water system under the assumption that property outside the municipal boundaries is part of the water system, then Carlyle and Mountain Water could simply move to stay the entry of judgment pending the Montana Supreme Court's decision on that issue. That way, if Carlyle and Mountain Water are unhappy with the jury's finding and if the Supreme Court subsequently concludes that the law has somehow changed and that property outside municipal boundaries cannot be condemned, then Carlyle and Mountain Water could move for a new jury trial on the narrow issue of how the exclusion of that property affects the value of the water system as a whole. That, of course, assumes the planets will all fortuitously align and the Montana Legislature convenes to change the law in Carlyle's and Mountain Water's favor. Needless to say, this is, without question, a contrived hypothetical.

Fundamentally, though, even if inconsistent results were possible, the Montana Legislature has expressly made the decision that, as a matter of course, stays are presumptively denied. See Mont. Code Ann. § 70–30–312(2). In that respect, this case is no different than any other condemnation proceeding. There is no reason for the Court to grant a stay

based on Carlyle's and Mountain Water's cooked up and strained scenarios that have no support in Montana law.

VI. Carlyle's, Mountain Water's, and the Employees' request for a stay is inconsistent with their opposition to stay the PSC proceedings.

In their brief opposing the City's Motion to Stay the PSC proceedings, Western Water, Mountain Water, and the Employees write:

An indefinite or multi-year stay of this proceeding would not be "immoderate in extent" as required by *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 645 P.2d 13 (Mont. 1982)

A long term stay would "in fact be oppressive in consequence to Mountain Water, pursuant to the *Henry* case."

(Ex. A, p. 5 (quoting PSC Order No. 7392b, ¶¶ 7, 13).)

Yet, a "long term" or "multi-year" stay is precisely what Carlyle, Mountain Water, and the Employees are asking the Court to impose here. If a "long term" or "multi-year" stay is so "oppressive," why do they ask for one here?

Staying the PSC proceeding but moving forward with this proceeding makes sense. The Court has ordered that the City's ownership of the water system is a public necessity and that the City is entitled to take ownership of the system. Going forward with Carlyle's proposed sale of the water system to Algonquin and Liberty would mean the water system would have to change hands twice—once to Algonquin and Liberty and then to

the City. If Carlyle, Mountain Water, and the Employees are truly worried about “disrupting” the water system, then they should be very troubled by going forward with the sale of the water system to Algonquin and Liberty.

Unlike the PSC proceedings, the proceedings in this Court are mandated by law to proceed swiftly and expeditiously. There is good reason for that—it’s important for the City to take ownership of the water system because it continues to fall into disrepair under corporate ownership and the City is losing hundreds of thousands of dollars each month that could be invested in rehabilitating the water system. The City and the people of Missoula stand to lose far more if this proceeding is stayed and the sale goes forward than Carlyle, Mountain Water, and the Employees stand to lose if this proceeding goes forward and the sale is put on hold.⁴

CONCLUSION

Defendants’ and Intervenors’ motion to stay presumes that the Court’s carefully considered Findings of Fact and Conclusions of Law constitute error. There is no reason for this Court to so presume. For the

⁴ In their opposition to the City’s motion to stay the PSC proceeding, Western Water, Mountain Water, and the Employees write: “[A] multi-year stay of this [PSC] proceeding to allow for a final resolution in the condemnation case could certainly have the impact of terminating the proposed sale of Western Water stock.” (Ex. A, p. 7.) The City cannot be responsible for Carlyle’s and Liberty’s bad business decisions. Both Carlyle and Liberty went into the proposed sale with eyes wide open. The City served the condemnation complaint on them in May 2014 and Carlyle and Algonquin entered their merger agreement in September 2014. They cannot credibly claim they had hoped to wrap up their sale without regard to the condemnation proceeding.

reasons above, the City respectfully requests the Court to deny Carlyle, Mountain Water, and the Employees' Motion to Stay the valuation phase pending appeal.

DATED this 13th day of July 2014.

BOONE KARLBERG P.C.



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by email upon the following counsel of record at their address this 13th day of July 2015:

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Tina Sunderland

EXHIBIT “A”

EXHIBIT “A”

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

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

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

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

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

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

² Order No. 7392b at ¶ 16.

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

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

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

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

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

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

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

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

³ Emphasis added.

⁴ The Order was included as Exhibit A to Motion.

⁵ Emphasis added.

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

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

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

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

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

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

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

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

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

⁷ Order No. 7392b at ¶ 16.

⁸ *Id.* at ¶ 10.

⁹ *Id.*

¹⁰ *Id.* at ¶ 12.

¹¹ *Id.* at ¶ 7.

¹² *Id.* at ¶ 13.

¹³ *Id.*

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

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

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

¹⁴ *Id.* at ¶ 14.

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

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

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

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

IV. Conclusion.

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

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

¹⁸ Order No. 7392b at ¶ 16.

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

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

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

Respectfully submitted this 30th day of June, 2015.

HOLLAND & HART LLP

s/ Thorvald Nelson

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**ATTORNEYS FOR MOUNTAIN WATER
COMPANY AND WESTERN WATER
HOLDINGS**

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

CERTIFICATE OF SERVICE

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

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s/ Adele C. Lee

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EXHIBIT “B”

EXHIBIT “B”

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

* * * * *

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

**LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.’S RESPONSE TO CITY OF
MISSOULA’S RENEWED MOTION TO DISMISS OR STAY THE PROCEEDINGS**

Liberty Utilities Co. (“Liberty Utilities”) and Liberty WWH, Inc. (“Liberty WWH”) (collectively, “Liberty”), by and through their counsel, hereby submits to the Montana Public Service Commission (“Commission”) this Response to the City of Missoula’s (“City”) renewed motion to dismiss or, in the alternative, stay these proceedings. The Commission should deny the City’s motion, just as it previously denied the City’s earlier motion to stay these proceedings, because the City has failed to establish the legal and factual basis necessary for the Commission to dismiss or stay these proceedings. Liberty, therefore, incorporates by reference the arguments Mountain Water Company (“Mountain Water”) raised in its February 23, 2015 response to the City’s earlier motion.

PROCEDURAL AND FACTUAL BACKGROUND

As the Commission is aware, the City initiated an eminent domain proceeding against Mountain Water in order to own and operate a municipal water system. The Montana Fourth Judicial District Court, Missoula County (“District Court”) denied Liberty’s motion to intervene in those proceedings, just as it denied the Commission’s similar motion to intervene. During a two week trial, the City attempted to prove that City ownership of Mountain Water was a “more

necessary public use” than continued private ownership of the water utility pursuant to Montana Code Annotated § 70-30-103(1)(c).

On June 15, 2015, the District Court entered its “Preliminary Order of Condemnation.” As indicated by its title, the District Court’s order is neither final nor permanent. The District Court’s preliminary order merely establishes that “the City’s condemnation of the Water System may proceed in accordance with Montana law.” *See* Preliminary Condemnation Order, p. 67, attached to City’s Motion as Exhibit A (emphasis added). However, the Preliminary Condemnation Order has been appealed and Mountain Water recently filed a motion to stay the proceedings before the District Court pending the Montana Supreme Court’s review of the Preliminary Order of Condemnation.

Furthermore, the City has taken none of the statutorily required steps necessary to take possession of Mountain Water’s system. As a result, the City has no current ownership interest in Mountain Water. Given the City’s position in response to Liberty’s request to intervene in the condemnation case, the Commission must reject any notion that the City has a present ownership interest in Mountain Water beyond that of a customer.

ARGUMENT

The Commission should deny the City’s pending motion because the City does not own Mountain Water, which continues to be an investor owned, privately-run water utility. The Commission already has concluded that it will not dismiss or stay these proceedings “until such time as the entity is no longer investor owned.” *See* Order No. 7392b, ¶ 16. The City’s motion generally ignores the Commission’s legal conclusions in Order No. 7932b. Furthermore, the District Court has concluded the City’s condemnation action “has no impact on the PSC’s continuing authority to regulate Mountain Water while it is investor owned.” *Order and*

Memorandum RE The Montana Public Service Commission’s Motion to Intervene, DV-14-352, p. 13 (Aug. 19, 2014) (emphasis added).

The District Court’s Preliminary Condemnation Order does not provide any support for the City’s argument that the City now “constructively” owns Mountain Water. Rather, the City merely has a right to continue through the condemnation process. As the District Court clearly ordered, the condemnation proceedings will continue and the City is now required to establish: (1) the fair value of Mountain Water; and (2) that the City can afford to pay that just compensation. Additionally, the preliminary condemnation order contains numerous legal and factual errors that constitute substantial grounds for reversible error on appeal. Ownership of Mountain Water will not transfer to the City until those issues are conclusively resolved both before the District Court and the Montana Supreme Court. As the Commission has recognized, “final resolution of the condemnation case is likely years away.” Order No. 7392b, ¶ 15. The District Court’s Preliminary Order is only the first step in a multiple phase, multiple year process.

I. THE CITY’S MOTION IS BASED ENTIRELY ON A BLATANTLY FALSE PREMISE.

The City’s motion to dismiss is premised on its unsupported assertion that Mountain Water is now a “municipally-controlled utility” because the City is the “constructive” owner of Mountain Water as a result of the Preliminary Condemnation Order. The City erroneously and singularly relies on Montana Code Annotated § 70-30-311(1)(a)(ii) for the assertion that it has the right to take immediate possession of the water system. City’s Motion, p. 1. However, the City has not taken possession and nothing in the Preliminary Condemnation Order or the governing statutes give the City the right to take possession at this time. Rather, the Preliminary Condemnation Order allows the next phase of the condemnation action to proceed, and Montana

Code Annotated § 70-30-311 sets forth the conditions by which the City could seek an order from the District Court allowing it to take possession during the pendency of the remaining condemnation proceedings and appeal. At this time, the City has not requested, and is unlikely to request, possession of Mountain Water, so its claim of constructive ownership is completely false.

In order to take possession, under Montana Code Annotated § 70-30-311, the City must seek an order from the District Court. *Bozeman Parking Comm'n v. First Trust Co. of Montana*, 190 Mont. 107, 113-14, 619 P.2d 168, 172 (1980) (citing Mont. Code Ann. § 70-30-311). In granting an order of possession, the District Court must require the City to deposit with the Court the amount claimed by the condemnee plus a bond or undertaking in an amount sufficient to cover “any additional damages and costs above the amount assessed” as well as “all damages that the condemnee may sustain if the property is not finally taken for public use.” Mont. Code Ann. § 70-30-311(1) and (3). Thus, the City cannot even seek an order granting possession until it can pay the amount Mountain Water seeks as compensation.

The City has not sought, and the District Court has not entered, any order allowing the City to take possession of Mountain Water pursuant to Montana Code Annotated § 70-30-311. Thus, the City’s reliance on that statute has no legal effect and offers no guidance to the Commission’s consideration of the City’s motion to dismiss. As a result, the City has no basis to claim any ownership interest in or control over Mountain Water or its system at this time.

The City’s contention that it currently has an ownership interest in Mountain Water pursuant to Montana Code Annotated § 70-30-311(1)(a)(ii) is incorrect as a matter of law. Even if the City were allowed to take *possession* under Montana Code Annotated § 70-30-311(1)(a)(ii), that statute does not establish that the City would have an *ownership* interest in

Mountain Water as a result. Ownership does not pass to the City until all payments due have been made, any required bond posted, and the Court has issued a final order of condemnation. Mont. Code Ann. § 70-30-309.

In this case, the City cannot establish constructive possession, and has no claim for and has provided no legal authority to support its assertion of “constructive ownership.” The Commission should not dismiss or stay these proceedings because Mountain Water will continue to be investor owned until all appeals are exhausted and conclusively resolved, the City has paid all compensation due, and the Court has entered the final order of condemnation. *See Order No. 7392b, ¶ 16, supra; see also Order and Memorandum RE The Montana Public Service Commission’s Motion to Intervene*, DV-14-352, p. 13 (Aug. 19, 2014), *supra*.

The City’s motion to dismiss these proceedings is entirely premised upon the City’s conclusion that the City is the “constructive owner” of Mountain Water under Montana Code Annotated § 70-30-311(1)(a)(ii). The City’s assertion that it has any rights or interest to Mountain Water based on that statute is baseless because it has not taken any of the steps necessary to invoke that statute. Moreover, even if the City had taken steps to take possession, Montana law does not recognize the concept of constructive ownership under eminent domain theory, and has not recognized the notion of a “constructive” municipal utility.

II. THE CITY’S MOTION IGNORES THE REASONS WHY THE COMMISSION DENIED THE CITY’S PRIOR MOTION TO STAY THESE PROCEEDINGS. THOSE COMPELLING REASONS REMAIN AND MANDATE THAT THE COMMISSION DENY THE CITY’S MOTION.

The Commission already has concluded that it will not dismiss or stay these proceedings “until such time as the entity is no longer investor owned.” See Order No. 7392b, ¶ 16. As established above, Mountain Water remains investor owned, even after the District Court entered its Preliminary Condemnation Order. The Commission should deny the City’s motion to dismiss

or stay these proceedings for the same reasons articulated in Order No. 7392b, ¶ 16. *See Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997) (“it is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure”). The City’s motion flatly ignores the Commission’s stated reasons for denying the City’s initial motion to stay these proceedings.

The Commission should deny the City’s motion to dismiss or stay these proceedings and continue to review the proposed sale and transfer of Western Water in this docket independent of the District Court’s condemnation proceedings. As the Commission appropriately recognized, “Liberty’s acquisition of Western Water is not contingent on the outcome of the pending condemnation proceeding.” Order No. 7392b, ¶ 9. Furthermore, the Commission’s review in this docket and the condemnation case “involve different issues and assets.” Order No. 7392b, ¶ 13. Thus, the Commission can and should continue to review the Joint Application without regard for developments in the condemnation action. Order No. 7392b, ¶ 10. The condemnation action can continue to proceed to a final resolution, which is “likely years away,” and meanwhile this Commission can fulfill its statutory obligations of regulatory review. Order No. 7392b, ¶¶ 10, 12.

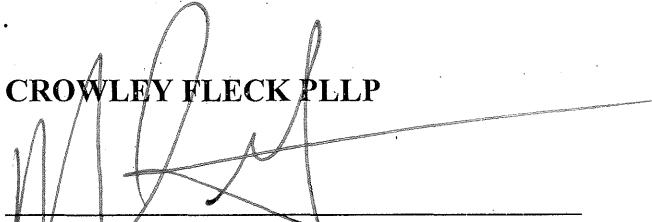
The Commission previously found that dismissing or staying these proceedings “would in fact be oppressive in consequence” to the Joint Applicants. Order No. 7392b, ¶ 13. The City does not refute that finding in its motion. Furthermore, the City has failed to carry its evidentiary burden of establishing a “clear case of hardship or inequity in being required to go forward.” *See Order No. 7392b, ¶ 6* (quoting *Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 9, 645 P.2d 1350).

Finally, the Commission should again reject the City's misplaced argument that continuing these proceedings would be cost-prohibitive. See City's Motion, p. 4. The City asserts, without support, that if these proceedings are not dismissed or stayed "the parties and the PSC will become mired in jurisdictional litigation, and could unnecessarily devote substantial time and resources" to completing the Commission's regulatory review over the proposed utility transfer. City's Motion, p. 4. The Commission correctly has rejected these arguments. The Commission has found that there are no jurisdictional problems with conducting its regulatory review contemporaneous with the District Court's condemnation proceedings. Order No. 7392b, ¶ 13. Furthermore, the Commission has noted that the City is a voluntary intervenor in these proceedings and the City's continued "participation and use of resources is voluntary." Order No. 7392b, ¶ 14.

CONCLUSION

For the foregoing reasons, the Commission should deny the City's motion to dismiss or stay these proceedings.

Submitted this 30th day of June, 2015.


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**ATTORNEYS FOR LIBERTY UTILITIES CO. AND
LIBERTY WWH, INC**

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on June 30th, 2015, the foregoing LIBERTY UTILITIES CO. AND LIBERTY WWH, INC.'S RESPONSE TO CITY OF MISSOULA'S RENEWED MOTION TO DISMISS OR STAY THE PROCEEDINGS was served via electronic and U.S. mail on:

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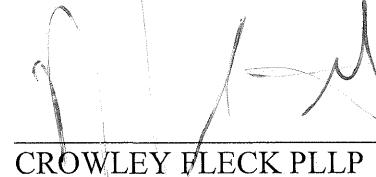
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CROWLEY FLECK PLLP

EXHIBIT “C”

**FILED
UNDER
SEAL**

Pursuant to the September 02, 2014 Protective Order

EXHIBIT “C”

**MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY**

THE CITY OF MISSOULA, a
Montana municipal corporation,
Plaintiff,
v.

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

Defendants.

and

THE EMPLOYEES OF
MOUNTAIN WATER COMPANY,
et al.

Intervenors.

STATE OF MONTANA)
 :ss
County of Missoula)

Dale Bickell, having first been duly sworn upon oath, deposes and
says:

1. I am the Chief Administrative Officer for the City of Missoula ("City") and I make the following statement based on both my personal

Cause No. DV-14-352

Dept. No. 4

AFFIDAVIT OF DALE BICKELL

knowledge and professional experience and opinion.

2. I hold a Masters of Accountancy from the University of Montana. Following graduation, I worked in public accounting for seven years in two different accounting firms.

3. In 2000, I moved to the public sector and took a position with Missoula County ("County"). At the County, I was employed as Chief Financial Officer and Chief Administrative Officer. I left the County in 2014 to take a position as Central Services Director for the City.

4. As Central Services Director of the City, I oversaw all the administrative functions for the City, including finance, human resources, information services, the City Clerk, and facilities/vehicle maintenance.

5. On June 1, 2015, I was promoted to Chief Administrative Officer for the City. I oversee all City operations and departments, including finance and utilities.

6. As I testified during the public necessity proceedings, there are substantial cost savings available to Mountain Water Company ("Mountain Water") if it were City owned, including, but not limited to: administrative expenses, taxes, insurance costs, contract expenses, and "Home Office Expenses."

7. I calculate those savings amount to approximately \$4.2 million per year (\$350,000 per month). See Table 1.

Table 1—Capital Expenditure Losses

	Annually	Semi-Annually	Monthly	Daily
City's Est. Savings	\$ 4,200,000	\$ 2,100,000	\$ 350,000	\$ 11,507

8. If the Court were to stay the valuation proceedings, the City and the People of Missoula would lose substantial revenues (the longer the stay, the greater the losses) needed to address and remediate the recognized infrastructure problems in the Mountain Water system.

9. The City currently has access to very favorable interest rates (3.7%–4.6%) in the current bond market to purchase the Mountain Water system.

10. Any delay in this proceeding could place the City at the mercy of an increased rate in the bond market and therefore locked into a higher interest rate for the length of the bond (30 years).

11. In its confidence letter regarding the City's ability to bond the purchase of Mountain Water, the City's underwriters (Barclays) prepared scenarios where bond markets could be 1% (or more, the market is unpredictable) in the future.

12. Depending on the purchase price (City experts place the value around \$50 million and Defendants' experts place the value around \$122 million and assuming the bond is only for the purchase price amount), even a 1% increase in interest rates subject the City—and ultimately the ratepayers in Missoula—to millions of dollars in increased interest payments.

13. At the City's valuation, the increase in interest payments from a 1% increase in rates will be \$10.5 million to \$11.1 million. At the Defendants' valuation, the increase in interest payments from a 1% increase in rates will be \$25.7 million to \$27.1 million. See Table 2.

Table 2—Bond Market Interest Rate Increased Payments

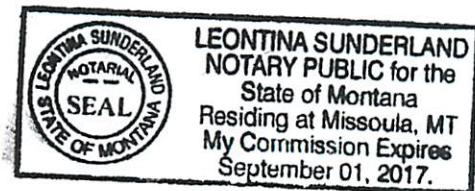
	<u>\$50m Purchase Price</u>					
	Current Bond Market			Potential Bond Market (+1%)		
Purchase Price	\$ 50,000,000	\$ 50,000,000	\$ 50,000,000	\$ 50,000,000	\$ 50,000,000	\$ 50,000,000
Interest Rate	3.7%	4.6%	4.6%	4.7%	4.7%	5.6%
Length (years)	30	30	30	30	30	30
Total Payments	\$ 83,198,237	\$ 92,684,857	\$ 93,769,766	\$ 103,796,918		
Total Interest	\$ 33,198,237	\$ 42,684,857	\$ 43,769,766	\$ 53,796,918		
Total Potential Increase (current int. – potential future int.)			\$ 10,571,529			\$ 11,112,061
<u>\$122m Purchase Price</u>						
	Current Bond Market			Potential Bond Market (+1%)		
Purchase Price	\$ 122,000,000	\$ 122,000,000	\$ 122,000,000	\$ 122,000,000	\$ 122,000,000	\$ 122,000,000
Interest Rate	3.7%	4.6%	4.6%	4.7%	4.7%	5.6%
Length (years)	30	30	30	30	30	30
Total Payments	\$ 203,003,698	\$ 226,151,050	\$ 228,798,229	\$ 253,264,479		
Total Interest	\$ 81,003,698	\$ 104,151,050	\$ 106,798,229	\$ 131,264,479		
Total Potential Increase (current int. – potential future int.)			\$ 25,794,531			\$ 27,113,429

Further affiant sayeth not.

DATED this 10th day of July, 2015.


Dale Bickell

SUBSCRIBED AND SWORN TO before me this 10th day of July,

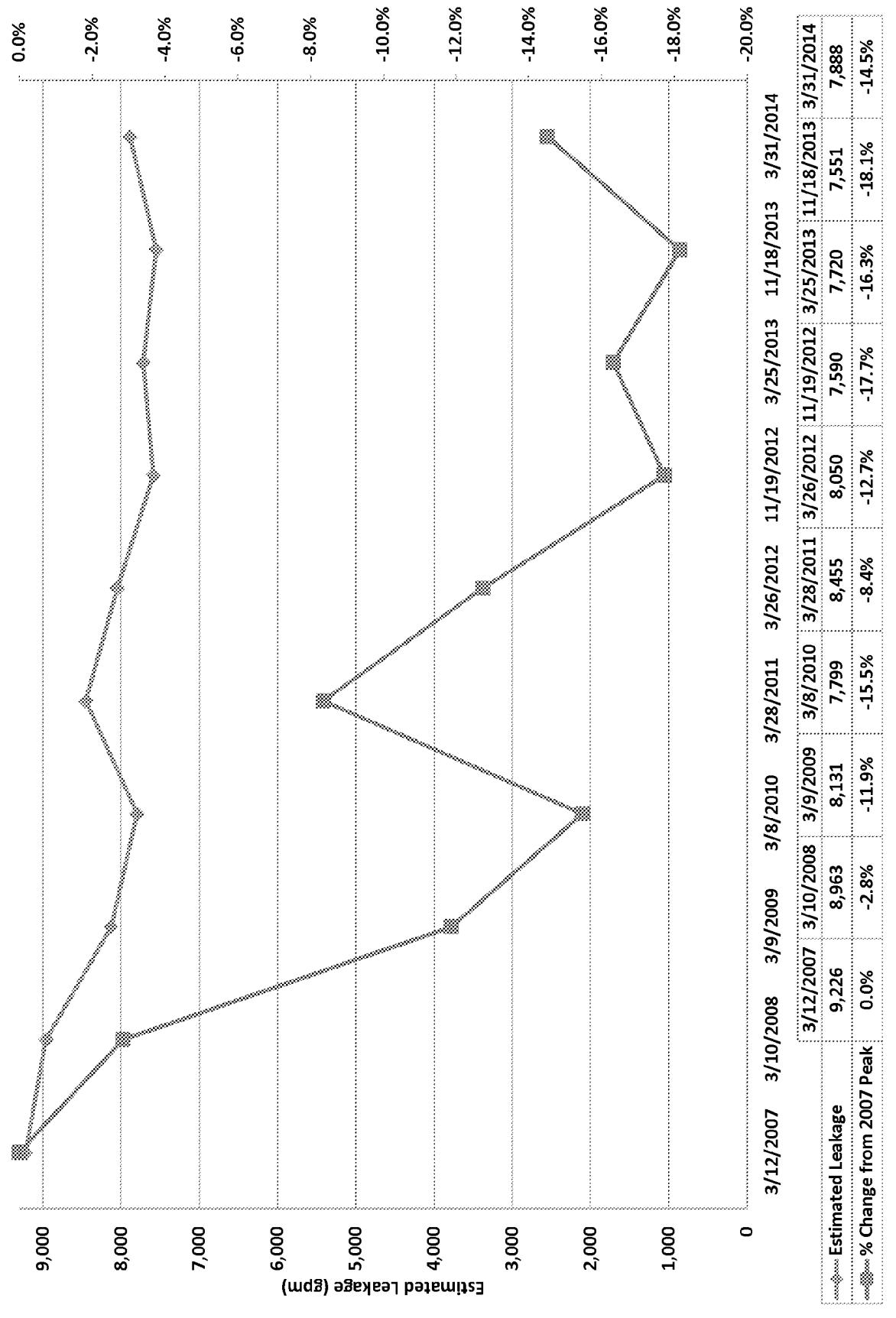



Printed Name: Leontina Sunderland
Notary Public for the State of Montana
Residing at Missoula, Montana
My commission expires: Sept. 1, 2017

EXHIBIT “D”

EXHIBIT “D”

MWCC Estimated Leakage from Reservoir Fall Studies



MW-018801

Ex 1261-001