

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

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

CLARK FORK COALITION PETITION TO INTERVENE

Pursuant to the Notice of Application and Intervention Deadline, dated December 23, 2014, and Administrative Rules of Montana 38.2.2401, *et seq.*, the Clark Fork Coalition hereby petitions the Public Service Commission of the State of Montana for leave to intervene as a general intervener in the above-captioned proceeding.

I. PETITIONER

The Clark Fork Coalition (“CFC”) is a Montana non-profit corporation, founded in 1985. CFC’s 2,700 members are dedicated to protecting and restoring the 22,000 square mile Clark Fork River watershed. Hundreds of CFC members live in the Mountain Water Company (“Mountain Water”) service area and are ratepayers to Mountain Water, one of the applicants in this docket.

CFC has a 30-year history of working to improve water quality and stream flows in the Mountain Water service area, often in close collaboration with the City of Missoula (the “City”), Missoula County (the “County”), and a variety of public and private stakeholders. These partnerships have led to a ban on the use of damaging phosphate-based detergents; groundwater education around stormwater runoff and stormdrains; an aquifer protection ordinance; a riparian protection zoning regulation; a nutrient pollution reduction program; cleanup of contaminated industrial sites; closer monitoring of in-river petroleum pipeline crossings; implementation of state-of-the-art technologies at Missoula’s wastewater treatment plant; groundwater modeling studies at the site of the former Milltown Dam; and closure of a loophole that allowed unregulated pumping of groundwater. CFC is an active participant in developing policies and regulations that protect clean drinking water for area residents; is working with local residents on flow restoration projects and watershed planning in the Rattlesnake Creek watershed; and advocates for water conservation measures with Mountain Water, the City and the County.

Mountain Water is the primary public utility providing drinking water to the City and over half of CFC’s membership. In addition, Mountain Water controls a significant percentage of surface water rights on Rattlesnake Creek and the

majority of water rights to eight lakes in the Rattlesnake wilderness. As such, CFC will be directly affected by the Commission's decisions in this docket.

CFC petitioned for and was granted intervention by the Commission in Docket No. D2011.1.8, less than four years ago when Mountain Water was sold to the Carlyle Group ("Carlyle"). *Notice of Staff Action Granting Intervention* (Feb. 18, 2011.) CFC participated energetically in that docket on behalf of its members and in the public interest.

II. INTERESTS AND POSITION

A. CFC's Interests.

Based on CFC's mission to act on behalf of its members to protect the Clark Fork watershed, including improving the sustainability of our drinking water supplies and the integrity of our water quality and quantity, CFC's interests are unique and cannot be represented adequately by other parties to this proceeding.

In Docket No. D2011.1.8, CFC successfully advocated for the preservation and protection of the Rattlesnake Creek watershed, and CFC secured an agreement from the current owner, the Carlyle Group, that Mountain Water could not "transfer, sell, lease, or otherwise dispose of any of Mountain [Water]'s water rights, without Commission approval, with the exception of transfers that facilitate service to Mountain [Water]'s customers." Docket D2011.1.8, Order 7149d ¶ 3 (Dec. 14, 2011). The Commission observed that "[t]his prohibition on transfers of

water rights is a significant benefit to Mountain [Water]’s customers as no specific prohibition on transfers now exists.” Docket D2011.1.8, Order 7149d ¶ 3. As a science-based advocacy group with 30 years of experience working for the protection of water resources in the Clark Fork watershed, CFC has an important role to play in this docket, as it did in 2011.

As in Docket No. D2011.1.8, CFC is interested in ensuring that the transfer of ownership in Mountain Water is fully vetted by the Commission to ensure that the public interest in our clean, safe, and reliable water supply is fully protected.

B. CFC’s Position.

The December 15, 2014 *Joint Application for Approval of a Sale and Transfer of Stock* (the “Joint Application”) was filed by Liberty Utilities, Co. (“Liberty Utilities”), Liberty WWH, Inc., Western Water Holdings, LLC (“Western Water Holdings), and Mountain Water (collectively, the “Joint Applicants”). By portraying the next proposed change in ownership of Mountain Water as merely a stock sale or merger, the Joint Applicants are over-simplifying the transaction at issue in this docket. CFC believes that the parent company of Liberty Utilities, Algonquin Power & Utilities Corp. (“Algonquin”), must be a party to this docket. In addition, the Commission should question any attempt by the Joint Applicants to characterize the deal as having no effect on the ownership of Mountain Water. A contested case proceeding is appropriate and necessary in

this docket. Finally, due to the pending eminent domain action in the Fourth Judicial District Court, the Commission should stay the proceedings in this docket until a decision about the City's bid for ownership been resolved.

1. *Algonquin must be a party to the proceedings.*

Notably, the potential new owner of Mountain Water, Algonquin, is not a formal applicant. *Joint Application*, ¶ 6. Algonquin, as the parent company of Liberty Utilities, should be named a formal party to the proceeding. As we have seen under the short-term ownership of Mountain Water by Carlyle, via Western Water Holdings, it very much matters who the upstream owner of Mountain Water happens to be. Prior to the 2011 sale to Carlyle, the ownership of Mountain Water was stable and consistent for 32 years. Carlyle made the decision to sell Mountain Water to Algonquin after less than four years as owner. It appears that the agreed upon price tag of that sale is more than three times what Carlyle paid. Missoula ratepayers will see nothing from that significant increase in value, other than an increase in rates. Carlyle controlled the management of the company, purportedly increased its value, and now aims to dispose of the asset for a significant profit. The Commission and Missoula ratepayers need to know and understand Algonquin's motivations for this acquisition, its management vision, and its plans for the company over time.

Further, the Joint Applicants include a great deal of information on Algonquin's strategies, objectives, and goals that have led to its "substantial growth over the past decade," yet Algonquin is not an applicant. *Joint Application*, ¶¶ 4, 5, 6, 20. The Joint Applicants can't have it both ways. They cannot rely on Algonquin's reputation and track record, but prevent the Commission and interested parties and intervenors from obtaining information directly from the source.

In Docket No. D2011.1.8, the Commission and interested parties conducted extensive discovery on Carlyle. Direct testimony and questioning of Carlyle's director, was critical to determining whether the 2011 sale of Mountain Water was in the public interest. Based on information about Carlyle obtained in the proceeding, the Commission ordered as a condition of approval strong ring-fencing provisions that "provid[ed] important structural and financial protections for Mountain [Water] assets and limit[ed] subsequent negative impacts on ratepayers from activities of Carlyle and its other companies." D2011.1.8, Order 7149d, ¶ 6.

In addition, in its final order, the Commission noted that Carlyle expressed a commitment to working with the Missoula community:

As Robert Dove, of the Carlyle Group, indicated in his testimony during the hearing, Carlyle is interested in establishing an ongoing dialogue with the MCC, CFC, City, and other stakeholders. The Commission advises Carlyle and Mountain to work actively with its stakeholders and Mountain's customers to understand their priorities for the water system and to provide the best service possible at the

lowest cost. To fulfill these goals, the Commission advises Mountain to establish a stakeholder or citizen's advisory committee to conduct ongoing dialogue.

D2011.1.8, Order 7149d, ¶ 10.

In Docket No. D2011.1.8, CFC, the City and Carlyle executed a letter agreement, dated September 22, 2011, in which Carlyle made promises to the Missoula community. Those promises provided CFC with assurances that our water supplies would be protected under a short-term Carlyle ownership. CFC also viewed the provisions in the letter agreement regarding Carlyle's willingness to consider a sale of the utility to the City as a signal that public ownership of our water system could come to fruition with Carlyle as a stepping-stone. With Carlyle's proposed sale of Mountain Water to Algonquin and the City's attempt to assume ownership through eminent domain, it appears that Carlyle's decision, as the upstream owner, has significant ramifications for Mountain Water and for the Missoula community.

The Missoula community deserves to understand Algonquin's intentions for owning, managing, and operating Mountain Water, no matter how many complex corporate layers separate the Missoula ratepayers from the ultimate upstream owner. We request that the Commission order Algonquin to appear in this docket. If there is a legal question on whether it is appropriate for the ultimate upstream owner to be included, we request that the Commission set a briefing schedule on the question.

2. *The sale from Carlyle to Algonquin will impact and affect the ownership of Mountain Water.*

CFC also disagrees with the assertion by the Joint Applicants that this transaction does not constitute a sale or transfer of the utility assets of Mountain Water and will have no impact or affect on the ownership of Mountain Water. Merger, change in upstream ownership, stock acquisition: regardless of the term, the practical reality is that this transaction is a *sale* of Mountain Water. The common definition of the word “sale” is “the act of selling something; the exchange of goods, services or property for money.” *Merriam-Webster online dictionary*. The transfer of Mountain Water from Carlyle to Algonquin is a sale of the company.

Further, in an attempt to diffuse concerns day-lighted by CFC and others in Docket No. D2011.1.8 regarding Carlyle’s predicted short-term ownership timeframe and the likely revolving door of corporate ownership that would follow, the Joint Applicants assert that concerns over the duration of Algonquin’s ownership are inapplicable because Algonquin has never sold a regulated utility and Liberty Utilities intends to own and operate Mountain Water permanently. *Joint Application ¶¶ 6, 20*. We are concerned that under the Joint Applicants’ reliance on layers of corporate complexity in which common words take on different meanings, such as the word “sale,” this could be a hollow promise. Under the Joint Applicants’ view, any change in the upstream owner of Mountain

Water would not constitute a sale. It is conceivable that Algonquin could spin off Liberty Utilities to another foreign corporation or corporations at any time. This is the way private corporations operate. CFC is not opposed to complex, creative, and confidential business strategies – except when it concerns Missoula’s drinking water system.

CFC believes that any attempt by the Joint Applicants to characterize the transaction at issue in this docket as anything other than a sale of a Montana water utility to a Canadian corporation should be put to rest by the Commission immediately.

3. *A contested case hearing is necessary and desirable.*

The Joint Applicants request that the Commission issue a prompt determination on whether a contested case hearing is necessary or desirable. For all of the reasons set forth above, CFC believes it is both necessary and desirable for the Commission to set a contested case hearing in this docket. Only through a contested case hearing will the public be given the opportunity to engage in this proceeding. We request that the Commission set a public hearing both at the outset of the proceedings in this docket as well as at the final contested hearing to give the Missoula community an opportunity to inform the Commission of any issues or concerns early in the process and to react to information obtained during the course of the proceeding.

4. *City of Missoula v. Mountain Water, Carlyle, et al.*

The pending case before the Fourth Judicial District Court, *City of Missoula v. Mountain Water, Carlyle, et al.*, Docket No. DV-14-352, creates significant uncertainty over the outcome of the transaction proposed for approval in this docket. As the Commission is aware, the City is attempting to assume ownership of Mountain Water through the process of eminent domain. The proceedings in this docket concern future ownership of Mountain Water. We urge the Commission to stay the proceedings in this docket pending resolution of the district court case and any subsequent appeals.

IV. SERVICE OF DOCUMENTS

CFC requests that it receive copies of all documents filed in this proceeding, including but not limited to pleadings, testimony and exhibits, data requests and responses, correspondence and other documents. Documents may be served on CFC at the following address:

Barbara Chillcott
Legal Director
Clark Fork Coalition
140 S. 4th Street West, Unit 1
PO Box 7593
Missoula, Montana 59801
(406) 542-0539 ext 211
barbara@clarkfork.org

V. RELIEF REQUESTED

CFC respectfully requests the Commission to:

- (1) Grant its petition to intervene in this docket;
- (2) Order Algonquin to appear as an applicant;
- (3) Examine the proposed transaction as a sale of Mountain Water;
- (4) Establish a procedural schedule that includes one or more public

hearings at the beginning of the proceedings and one or more at the final hearing;

and

- (5) Stay these proceedings pending resolution of the pending eminent domain case in state district court.

Respectfully submitted this 12th day of January, 2015.

CLARK FORK COALITION

By:  _____

Barbara Chillcott
Legal Director
Clark Fork Coalition
140 S 4th Street West, Unit 1
PO Box 7593
Missoula, Montana 59801
(406) 542-0539 ext 211
barbara@clarkfork.org

CERTIFICATE OF SERVICE

I hereby certify that on this, the 12th day of January, 2015, the foregoing CLARK FORK COALITION PETITION TO INTERVENE was served via U.S. mail on:

Thorvald A. Nelson
Nickolas S. Stoffel
Holland & Hart LLP
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111

John Kappes
President & General Manager
Mountain Water Company
1345 West Broadway
Missoula, MT 59802-2239

Christopher Schilling, CEO
Leigh Jordan, Executive VP
Park Water Company
9750 Washburn Road
Downey, CA 90241

Michael Green
Gregory F. Dorrington
Crowley Fleck PLLP
100 North Park, Suite 300
PO Box 797
Helena, MT 59624-0797

Todd Wiley
Assistant General Counsel
Liberty Utilities
12725 West Indian School Road,
Suite D-101
Avondale, AZ 85392

Robert Nelson
Montana Consumer Counsel
111 North Last Chance Gulch, Suite 1B
Box 201703
Helena, MT 59620-1703

Jim Nugent
City Attorney
The City of Missoula
City Attorney's Office
435 Ryman Street
Missoula, MT 59802

The foregoing was served electronically on:

Cathy Uda
cuda@crowleyfleck.com
Cynthia Kennedy
cakennedy@hollandhart.com

Jennifer Tolan
jtolan@crowleyfleck.com
Adele C. Lee
aclee@hollandhart.com

The foregoing was e-filed with and the original hand-delivered to:

Public Service Commission
1701 Prospect Avenue
P. O. Box 202601
Helena, MT 59620-2601

By: 
Barbara Chillcott