BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Joint Application of Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, Park Water Company (U 314 W), and Apple Valley Ranchos Water Company (U-346-W) for Authority for Liberty Utilities Co. to Acquire and Control Park Water Company and Apple Valley Ranchos Water Company.	Application No. 14-11-013 (Filed November 24, 2014)

[redacted]

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June 29, 2015

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Joint Application of Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC, Park Water Company (U 314 W), and Apple Valley Ranchos Water Company (U-346-W) for Authority for Liberty Utilities Co. to Acquire and Control Park Water Company and Apple Valley Ranchos Water Company.	Application No. 14-11-013 (Filed November 24, 2014)

TOWN OF APPLE VALLEY'S COMMENTS ON THE JOINT MOTION OF THE OFFICE OF RATEPAYER ADVOCATES, LIBERTY UTILITIES CO., LIBERTY WWH, INC., WESTERN WATER HOLDINGS, LLC, PARK WATER COMPANY (U 314 W), AND APPLE VALLEY RANCHOS WATER COMPANY (U-346-W) FOR APPROVAL OF SETTLEMENT AGREEMENT

I. Introduction

Pursuant to Rule 12.2 of the Commission's Rules of Practice and Procedure (RPP) , the Town of Apple Valley (Town) files these comments on the Joint Motion of the Office of Ratepayer Advocates, Liberty Utilities Co., Liberty WWH, Inc., Western Water Holdings, LLC (Western Water Holdings), Park Water Company (Park Water) and Apple Valley Ranchos Water Company (AVR) (collectively, the Joint Applicants) for Approval of Settlement Agreement (Settlement Agreement).

The Town is located in the Victor Valley of San Bernardino County, within the Mojave River Basin in the region known as the "High Desert." The Town has an incorporated boundary consisting of 78 square miles and a current population of approximately 70,000 residents. In an attempt to secure a safe, reliable and affordable water supply for its residents, the Town intervened in this proceeding.

From the beginning of this proceeding, the Joint Applicants refused to provide the Town with the information it needed to evaluate the Joint Application. Nearly every data request submitted to the Joint Applicants was met with an objection that the material sought was confidential because the Town is a "market participant" and disclosure of the requested information would result in disclosure of trade secrets or market sensitive information.

Consequently, the Town has been unable to evaluate the merits of the Joint Application or the terms of the Settlement Agreement.

Also, as the Commission is aware, Mountain Water Company, located in Missoula, Montana, is an affiliated water company that will also change hands in the transaction outlined in the Joint Application. Notably, the City of Missoula initiated an eminent domain proceeding against Mountain Water Company, and on June 15, 2015, the trial court issued the Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation granting the City of Missoula the right to take Mountain Water Company through eminent domain. (See Attachment A.) Because Park Water and AVR share administrative costs with Mountain Water Company, ratepayers will likely be impacted by the condemnation.

Given the Joint Applicants failure to produce documents related to the Joint Application and their failure to address the Mountain Water Company eminent domain proceeding, the Town files these comments on the Settlement Agreement.

II. Comments on Settlement Agreement

The Town cannot determine whether the Settlement Agreement is reasonable in light of the whole record, consistent with the law, and in the public interest because the Joint Applicants failed to produce documents responsive to the Town's data requests by asserting bogus "market participant" objections. Adequate responses were paramount to the Town's evaluation of the Joint Application in the context of the ratepayer indifference standard. The Town's limited resources precluded it from engaging in lengthy and expensive discovery disputes and, as a result of the Joint Applicants' tactics, the Town cannot support or endorse the Settlement Agreement.

The Town is also concerned about the Joint Applicants' reliance on their regulatory commitments as satisfying both the ratepayer indifference and reasonableness standards. The 26 commitments commit the Joint Applicants to doing little more than what is required by law, or the Commission's orders, rules and decisions. Moreover, most of the commitments are vague and ambiguous, leaving the Commission to guess as to their meaning, and the Joint Applicants offer no performance metrics or forum for challenging compliance. At the very least, the Commission should impose a regulatory requirement that imposes a process discovering compliance with the commitments and administrative remedies for non-compliance.

Finally, the Joint Applicants point to the CalPeco regulatory commitments in D. 10-10-017 as the basis for the commitments in this proceeding. In the CalPeco proceeding, the Commission was concerned about its ability to assert jurisdiction over foreign management and, in its conclusions of law, the Commission conditioned approval of the application on the following:

> 7. The reach of today's decision necessarily extends to the direct and indirect owners of CalPeco; specifically, any approval of the proposed transaction must be conditioned upon access to such officers and employees of CalPeco's jurisdictionally foreign, upstream owners as the Commission, itself, may determine to be necessary, consistent with established principles of due process and fundamental fairness. (D.10-10-017, p. 60.)

Those same concerns exist in the context of this proceeding and the Town has additional concerns about the fitness of future management, given the experience in trying to obtain basic discovery. Therefore, the Town requests the inclusion of the same condition in any approval of the Settlement Agreement.

III. Conclusion

For the reasons stated above, we strongly urge the Commission to closely evaluate the reasonableness of the Settlement Agreement, and we respectfully request that the Commission impose reasonable and enforceable conditions on the parties, should it decide to approve the Settlement Agreement.

DATED: June 29, 2015

Respectfully submitted,

/s/ Jason M. Ackerman

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ATTACHMENT A

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

Intervenors.

I. PROCEDURAL BACKGROUND AND HISTORY

This is an eminent domain proceeding initiated by the Plaintiff City of Missoula ("City") for the acquisition of Defendant Mountain Water's ("Mountain Water") water distribution system.

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

II. LEGAL STANDARD

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

In order to exercise the right of eminent domain, a condemnor must comply with the provisions of Chapter 30 of Title 70 of the Montana Code Annotated. Montana law establishes what types of property may be taken through eminent domain, including "property already appropriated to a public use", §70-30-103(1)(c). Before a taking of private property may occur, the condemnor has the burden to prove by a preponderance of the evidence that the public interest requires the taking, § 70-30-111(1) MCA. If the findings of fact and conclusions of law made by the court leads it to conclude that the public interest requires the taking of private property and that the condemnor has met the burden of proof under § 70-30-111(1), a preliminary condemnation order shall be entered, § 70-30-206(2) MCA.

The right of eminent domain may be exercised for, among other things, "water and water supply systems as provided in title 7, chapter 13, part 44", § 70-30-102(6) MCA. Therefore, pursuant to the provisions of Title 7, chapter 13, part 44, a municipality may condemn a water system. If a municipality meeting the conditions established by § 7-13-4403(1) MCA and a private owner of the water system do not agree upon purchase and sale terms for the water supply, the municipality may proceed to acquire the plant or water supply by eminent domain pursuant to § 70-13-4404(1) MCA. A property already "appropriated to a public use" may only be taken through eminent domain for a "more necessary public use than that to which it has already been appropriated." A public use is one that confers some benefit or advantage to the public. *Park County ex rel. Paradise and Shields Valley TV Districts v. Adams,* 2004 MT 295, ¶ 16. "Necessary" in the context of eminent domain means reasonable, requisite and proper for the accomplishment of the intended objective. *Shields*, 2004 MT 295, ¶ 17.

The Montana Supreme Court has recognized that two questions are involved in determining necessity when a municipality seeks to acquire a water system:

> "1) Is it necessary that the City have its own water system? and 2) Must the City take Mountain Water's property in order to have its own system? Unlike the typical case involving condemnation of land for a highway, the first question here is not whether it is necessary to have the improvement but whether it is necessary to have the improvement operated by the City instead of by private industry."

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

In making this determination, the Court must take into account a broad range of considerations. Those considerations include but are not limited to effects on employees, profit and out-of-state ownership, public savings, rates and charges, cooperation between Mountain Water and the City and the effect of having the home office in Missoula, public interest, the importance of the City obtaining ownership of water rights themselves in order that the City may assure its inhabitants of long range access to water.

Trial on the issue of whether a preliminary order should issue herein was accorded expeditious and priority consideration in accordance with § 70-30-202 MCA. The Court, sitting without a jury, held trial on March 18-20, 23, 25-27, 30, April 1-3 and 6, 2015. Natasha Prinzing-Jones and Harry H. Schneider appeared on behalf of the City. Kathleen DeSoto, Joe Conner and Adam Sanders appeared on behalf of Mountain Water. William Mercer and Adrian Miller appeared on behalf of Carlyle Infrastructure Partners. Gary Zadick appeared on behalf of the Intervenors. The Court split the available time equally between Plaintiff and Defendants/Intervenors and the minutes used by each side were tracked by the Court to ensure parity. Witnesses testified for each party, exhibits were received and certain deposition testimony was submitted. The Court having heard and considered the testimony and evidence now makes the following:

III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A. PARTIES AND JURISDICTION

1. City is a municipal corporation of the State of Montana duly organized and existing by virtue of the Constitution and the laws of the State of Montana. City is a municipality with general powers, including the power to acquire by eminent domain certain interests in real and personal property. City is the municipality in charge of the public use for which the property it seeks to condemn will be used.

2. Mountain Water Company is a Montana for-profit corporation with its principal place of business in Missoula, Montana.

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

4. Mountain Water is wholly owned by Park Water Company ("Park Water"), a California corporation with its principal place of business in Downey, California. Park Water is wholly owned by Western Water Holdings, LLC ("Western Water"), a limited liability company, which is in turn wholly owned by Defendant Carlyle Infrastructure Partners, LP ("Carlyle Infrastructure" or "Carlyle").

5. Park Water functions as a holding company whose only business involves the ownership of three operating companies in the business of selling and distributing water in East Los Angeles, California (Central Basin Water Company); the Town of Apple Valley, California (Apple Valley Ranchos Water Company) and Missoula, Montana (Mountain Water Company).

6. Carlyle Infrastructure is a limited partnership with its principal place of business in Washington, D.C. Carlyle Infrastructure is in the business of investing in and selling for profit various private businesses and public infrastructure projects, including water and wastewater treatment and distribution systems. Western Water

was created by Carlyle Infrastructure to facilitate Carlyle Infrastructure's purchase of Park Water in December 2011.

7. At all times relevant to these proceedings, Carlyle Infrastructure was the General Partner or Managing Member of the companies or partnerships that own and operate the Water System. As such, Carlyle Infrastructure is the ultimate owner of Mountain Water and exercised control over its affairs, including decisions regarding sale of Mountain Water or its assets. Management and members of the boards of directors of Western Water, Park Water, Mountain Water, Central Basin and Apple Valley Ranchos serve at the pleasure of and take direction from Carlyle Infrastructure. The Board of Directors of each of these companies is majority controlled by Carlyle Infrastructure.

8. The Carlyle Group, LP ("Carlyle Group") is a limited partnership with its principal place of business in Washington, D.C. The Carlyle Group directly owns or manages Carlyle Infrastructure as well as other successful investment funds. Robert Dove, Managing Director of the Carlyle Group's Infrastructure Fund, has acted at all times relevant to these proceedings as the person with apparent authority to speak on behalf of Mountain Water with regard to the City's efforts to acquire the Water System.

9. Prior to 2011, Park Water was owned by a family owned corporation. Sam Wheeler was the controlling shareholder.

10. In December 2011, Carlyle Infrastructure acquired ownership of Park Water and assumed the ultimate ownership of Mountain Water and the Water System, along with the two California water companies.

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

12. On September 19, 2014, a Plan and Agreement of Merger ("Agreement") was entered into by and among Liberty Utilities Co. ("Liberty"), Liberty WWH, Inc. (Liberty WWH") and Western Water Holdings. Pursuant to the Agreement, Liberty is acquiring all the issued and outstanding capital stock and/or shares of Western Water Holdings, which in turn owns all the stock of Park Water Company. Under the Agreement, Liberty would acquire the effective ownership and operation of Mountain Water and its assets.

13. Liberty Utility is a Delaware corporation and wholly owned subsidiary of Algonquin Power and Utilities Corporation, a Canadian corporation. Liberty is a company that owns and operates regulated water, wastewater, gas and electric utilities in ten states, including Arizona, California, Texas, Arkansas, Georgia, New Hampshire, Massachusetts, Missouri, Iowa and Illinois.

14. The Merger Agreement to purchase Western Water Holdings was not conditioned on the outcome of this condemnation litigation. Once the Agreement is

approved by the Montana Public Service Commission ("PSC") and closes, Mountain Water will be run as part of Liberty.

15. Liberty sought to intervene in this matter on October 30, 2014, arguing that its contractual interest in the property under the Agreement justified intervention as a matter of right or permissive intervention. The motion to intervene was denied. Liberty filed a petition for supervisory control, which was denied.

16. Liberty's interests have been represented by Mountain Water throughout this proceeding.

17. Intervenor Employees are 39 individuals who were employed by Mountain Water at the time the City served its First Amended Complaint.

18. The Court has original jurisdiction of this proceeding pursuant to § 3-5-302 and 70-30-202 MCA.

19. The Court has personal jurisdiction over the parties pursuant to § 70-30-202 MCA because the property at issue, the Water System, is situated in the Fourth Judicial District of the State of Montana.

20. The Court has personal jurisdiction over the parties pursuant to Rule 4(A)(1) and (2) M.R. Civ. P. because the parties have transacted business in the State of Montana or own, use or possess property interests in the State of Montana.

21. Venue is proper in the Fourth Judicial District based on the parties' doing business in Missoula and on the basis that the Water System is located entirely in Missoula County and in the Fourth Judicial District.

B. CITY'S EFFORT TO ACQUIRE WATER SYSTEM

22. The Montana Power Company owned Mountain Water from 1930 until 1979. In 1979, Park Water acquired Mountain Water from Montana Power Company. Park Water was owned by the Wheeler family and Sam Wheeler was the majority stockholder.

23. The City of Missoula sought the purchase of Mountain Water from Park Water in 1984. After the City was unable to purchase the Water System from Mr. Wheeler, the City initiated a condemnation proceeding that was unsuccessful. The City continued to have an interest in owning and operating the Water System.

24. Mr. Wheeler was opposed to selling the Water System generally and he was opposed to City ownership of Mountain Water in particular. Mr. Wheeler assumed that ownership of Park Water would pass to his heirs upon his death and that family members would continue to operate Park Water after his death. In 2009, Mr. Wheeler declined an offer from Carlyle to sell Park Water. In 2010, estate planning considerations motivated Mr. Wheeler to reconsider the benefits of a sale to Carlyle and discussions were renewed between Mr. Wheeler and Carlyle.

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by Wheeler to Carlyle would be jeopardized. Mayor Engen agreed to wait for a year to pursue acquisition of the Water System, until Sam Wheeler left the Park Water board of directors.

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

30. On September 11, 2011, Carlyle, the Clark Fork Coalition and the City signed an agreement ("Letter Agreement"). The Mayor informed the City Council and the public of his efforts to acquire the Water System.

31. The Letter Agreement memorialized the City's and Clark Fork Coalition's agreement to support Carlyle's purchase of Mountain Water in proceedings before the Montana Public Service Commission ("PSC"), Carlyle's agreement to consider in good faith a future offer from the City to buy the Water System at any time, Carlyle's agreement to give the City notice if it received an offer to purchase Mountain Water prior to any sale and not to sell the system for a minimum of 120 days in order to give the City the option to submit its own proposal, and Carlyle's agreement to follow certain conservation and stewardship measures with respect to Missoula's water sources. Carlyle's acquisition of

Mountain Water depended on approval from the PSC. The City and Clark Fork Coalition supported Carlyle's purchase of Mountain Water before the PSC and Carlyle's purchase was approved in December 2011.

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

33. Roger Wood, an investment banker working with the City, participated in discussions with Mr. Dove, including discussions of the sale price for Mountain Water and sale of Mountain Water on a stand-alone basis. In January 2013, Mr. Dove sent an email to Mayor Engen telling him it would be best to keep the City's intention to make an offer to acquire the Water System "under the radar" until the offer was made because learning that the City was pursuing acquisition of the Water System had provoked a strong negative reaction from Mr. Kappes.

34. An informal offer was made by the City in February 2013. Mr. Dove communicated to Mr. Wood that an appropriate place to begin negotiations was at a price nearly double what the City had offered.

35. On October 13, 2013, the Missoula City Council passed Ordinance 3509, authorizing acquisition of the Water System through either a negotiated purchase, or if necessary, by exercise of the City's power of eminent domain. The Ordinance was passed by a 10-2 vote of the City Council.

36. The Ordinance states: "The City hereby determines that it is in the best interest of the City and its residents for the City to acquire the System."

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

38. Mr. Dove replied in a letter dated November 4, 2013 that Carlyle had no current intention to undertake a sale of the company but requested additional information which the City supplied.

39. In a letter dated November 26, 2013, Carlyle rejected the City's offer. Mayor Engen sent a letter to Mr. Dove, dated December 5, 2013 to address issues raised by Mr. Dove in his November 26 letter and to invite a counter-offer or negotiation. Mr. Dove responded in a letter dated December 13, 2013, again declining the City's offer.

40. With the approval of the City Council, Mayor sent a final written offer to Mr. Dove on January 28, 2014, offering $50 million for the assets held by Mountain Water.

41. Mr. Dove rejected the final written offer in a letter dated January 31, 2014. The City Council subsequently voted in favor of initiating a condemnation action and the City filed its *Complaint for Order of Condemnation Under Montana's Law of Eminent Domain* on April 2, 2014.

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.

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.

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.

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.

C. PUBLIC OPINION

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

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."

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.*

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

49. Mountain Water criticized the public opinion poll as to its methodology and its failure to poll Mountain Water customers who live outside City limits. Mountain Water also suggested that the poll was intentionally created to improperly influence the Court. The Court has not been improperly influenced by the poll or by any other extra-judicial means including newspaper advertisements placed by Liberty prior to this proceeding.

50. Use of a poll is a reasonable method of measuring public support for acquisition of the Water System by the City.

51. The methodology used by Harstad followed generally accepted methodology in line with industry standards and is a reasonably reliable measure of the opinions of the surveyed population.

52. The Court acknowledges that 1500 of Mountain Water's 23,500 customers reside outside City limits and were not included in the surveyed

population. The Court declines to speculate on what opinions these customers might hold.

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

D. CONDITION OF THE WATER SYSTEM

54. Mountain Water serves 23,500 customers with 1500 customers located outside City limits. The Water System serves both commercial and residential customers.

55. The Water System pumps groundwater water drawn from the Missoula Aquifer from 37 wells through 327 miles of water main.

56. The parties presented extensive evidence regarding the condition of the Water System and its long term needs.

57. The City's perspective is that there has been substantial deferred maintenance of key assets. The City introduced testimony that:

a. Almost 50% of the Water System mains are 45 years old or older and 20% of the Water System mains have exceeded their useful life.

b. Well assets are rated from fair to poor with antiquated pumping equipment, seriously corroded piping, HVAC systems in extremely poor condition; problems with chemical feed systems; well pumps and booster pumps operating well below efficiency industry standards with capital investment needed in the range of $4-$7 million to bring the wells up to industry standards.

c. Nineteen percent of Mountain Water customers are unmetered and while 81% of the System is metered, only 40% of the water is measured through meters; the average age of meters is over 20 years; capital investment needed to bring the meters up to industry standards is in the range of $16-20 million.

d. Seventy-five percent of the service lines are galvanized steel and have exceeded their useful life; the cost of bringing the service lines up to industry standards is in the range of $20-$30 million.

e. The Rattlesnake Dams and Intake dams have not been maintained and show problems with leakage, seepage, slope stability, erosion of the embankments and spillway problems, safety recommendations from annual inspections have been repeatedly deferred and the cost of immediate repairs needed to bring the dams up to minimum safety standards is estimated to be $3 million.

f. The Water System leaks at a rate of 50% or more. Estimated leakage in the Water System is 7,000 to 8,000 gallons per minute. Leakage is a significant measure of the quality and condition of a water system.

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

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

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

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

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

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

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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.

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.

63. Overall, the Water System is aging and requires capital investment to remedy deferred maintenance of key assets. Significant capital expenditures will be required in the future regardless of the identity of the owner of the Water System. Under municipal ownership, long term planning for maintenance and capital expenditures can occur under the management of a stable, long term owner.

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

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

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

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

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

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

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

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

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

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

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

F. FINANCIAL CONSIDERATIONS

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

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

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

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

Administrative Expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Profit

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

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

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

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

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

Rate Setting

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

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

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

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

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

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

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

99. David Nielsen is an attorney who has worked for numerous cities and towns in Montana that operate their own water system. His opinion was that the 1981 deregulation of municipal water systems eliminating PSC oversight has been beneficial for municipalities and consumers. Rates can be adjusted when necessary without the expense and time associated with PSC proceedings and consumers can easily express their opinions to local decision makers without traveling to Helena. Mr. Nielsen's testimony was credible.

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

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

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

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

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

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

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

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

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

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

112. Under the Montana Constitution, the public has a constitutional right to be afforded reasonable opportunities for citizen participation in the operation of its governmental agencies prior to final decisions as provided by law. Additionally, no person may be deprived of the right to examine documents or observe the deliberations of all public bodies of subdivisions of the State. Montana law is well developed and robust regarding open government requirements and citizen participation rights. Meetings must be open to the public, agendas must be provided in advance of meetings, minutes must be maintained and made available and press representatives may not be excluded from meetings. The rights of the public to participate in government, to obtain public writings and records and to have local access to decision makers are significant, meaningful and effective. These constitutional rights ensure ample opportunity for all Mountain Water customers to gain access to information regarding the operation of the Water System and to appear and participate prior to final decisions by the City Council regardless of their status as voters.

113. PSC oversight protects consumers served by a monopoly from the exploitation that may occur in the absence of competition. Protections against the

potential for earning unfair profits from a captive market are not necessary under municipal ownership because municipalities cannot earn profits.

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

<u>Impacts on Rates Due to Costs of Acquisition and Needed Capital Improvements</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

133. Given the inevitability of future rate increases due to needed capital investment in an aging Water System and costs of acquisition, the Court considers that municipal ownership is more necessary than private ownership. Under municipal ownership, significant decisions affecting rates can be made pursuant to long term planning conducted within the context of stable ownership. Under municipal ownership, financial decisions will be made by locally elected officials who are required to operate with transparency and to provide the public with opportunities to participate before final decisions are made. Under municipal ownership, important financial decisions regarding the Water System can be based on promoting public health, safety and welfare rather than on decisions regarding returns on investments for a large and growing utility conglomerate. Finally, under municipal ownership, important financial decisions can be made so that the Water

System is by coordinated with other public welfare functions currently performed by the City and in alignment with community conservation and environmental protection values.

G. ECONOMICS AND PUBLIC POLICY

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

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

a. In the public sector, long term studies and financial planning are typical. These analyses provide a basis for establishing a system of rates and charges that will be fairly predictable and steady over time.

b. Public ownership enables operations based on local preferences because local officials must serve their constituents directly. If they fail to do so, they will not continue to serve in office. Local preferences include conservation and stewardship of natural resources.

c. Revenue requirements for municipally owned water systems are less than privately owned systems because there is no need for profit. Private water system owners make a profit either by collecting more revenue than they spend or by selling the system for more than they paid for it.

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

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

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

public policy objectives are promoted by municipal ownership, including predictability and stability in rates, ability to obtain low cost financing not available in the private sector, lack of a profit motive, coordination with City services, planning and development efficiencies, greater transparency and accessibility to leadership and reflection of local preferences including conservation and stewardship.

137. Thomas Power is a professor of Economics (Emeritus) at the University of Montana and served as the Chair of the Economics Department for 30 years. He specializes in natural resources economics focusing particularly on water and energy.

138. Dr. Power's opinion is that from an economic perspective, public ownership of Missoula's Water System offers significant benefits, compared to continued private ownership.

139. The basis for Dr. Power's opinion is as follows:

a. Public ownership has been the overwhelming choice for the provision of water supply and wastewater treatment services for nearly a century. In Montana and across the United States approximately 85% of people served by community water systems are served by municipally owned systems. In Montana, all of the major cities except for Missoula have publically owned water systems. Public ownership has been determined to be more necessary than private ownership.

b. There is a close relationship between the water supply and the protection of the public health, public safety, economic vitality, urban planning, efforts to protect environmental quality and quality of life. Private companies are not well suited to the promotion of public interest goals because it requires them to step away from pursuing profits and returns to stockholders.

c. Local government ownership and management of water systems allows the stable pursuit of the important public purposes associated with local systems. Private ownership is unlikely to provide either stable ownership or locally oriented management.

d. Over the last 25 years, there has been an ongoing change in ownership of water utilities from small private ownership to regional, national and international conglomerates. This has happened in Missoula when Carlyle purchased the Water System and then sold it to a Canadian conglomerate which has been in the water business for less than ten years.

e. Changing ownership creates uncertainty and makes it difficult to engage in long range planning or budgeting for capital expenditures.

As a result of what appears to be a speculative process, constantly bidding up of the value of water supply companies creates a difficult environment in which to engage in long term planning. Rate increases will ensue in order for the acquiring utility to avoid losing its shirt.

f. State regulation of a privately owned local water system is a poor substitute for local government ownership and management of the water system. Water utilities are a natural monopoly as the sole provider of a necessary service. A system of cost-based regulation has been adopted to make sure there is no monopoly profit being earned that the utility is not discriminating among its customers. A system of cost-based regulation is not effective at evaluating how the utility has served other critical public interests related to water supply.

g. In Missoula's case, state regulation moves management of the Water System out of the City to a state commission in Helena that may be less attuned to the community. Under public ownership, management is undertaken by democratically elected representatives who recognize the public interests that a water utility is expected to pursue.

h. City owned water utilities in Montana provide water services at a lower price than privately owned water utilities.

i. There is no convincing empirical evidence that municipal water utilities are less efficient than privately owned water utilities. There is some evidence that city-owned water utilities are as efficient as or more efficient than privately owned utilities.

j. City ownership of the Water Supply would open up the potential for cost savings as a result of the City's ability to integrate the management of the Water Supply with the Wastewater System and coordinate with other City service departments, including streets, urban planning, fire protection and environmental protection.

k. From a straight forward economic perspective, public ownership confers a benefit, convenience and advantage on the citizens of Missoula that is superior to the status quo.

140. Dr. Power's testimony was credible. From an economic perspective, public ownership of the Water System is a more necessary public use of the Water System than private ownership.

141. Dr. Arthur Laffer was called by Mountain Water. Dr. Laffer's extensive experience includes teaching and serving as the Chief Economist of the Office of Management and Budget in the administration of former President Ronald Reagan. Currently he sits on various boards and provides economic consulting

services for investment firms, money management firms and plan sponsors and state and local governments.

142. Dr. Laffer opined that there was no compelling reason for public ownership of the Water System. Public ownership is not more necessary because Mountain Water has served the community for a long time without major glitches. His view was "primum non nocere". He translated this as "first do no harm" or "if it ain't broke, don't fix it". In Dr. Laffer's opinion, private ownership of water systems has increased greatly over the preceding 35 years.

143. In Dr. Laffer's opinion, municipal ownership is more necessary when a private owner has failed to maintain the water system.

144. Dr. Laffer testified further that private companies bear the consequences of bad behavior. Private companies can hire and fire, pay bonuses and other things that a public utility cannot. Water is a product and not like other public services like fire and police. Because it is a product, it lends itself to being a regulated utility that is privately owned. It is a natural monopoly and has to be regulated for quality. His experience is that private companies are far more concerned about water quality than municipalities. In particular, private companies worry about breaking rules and want to avoid expensive disasters such as BP. A good company that is profitable does a good job for customers.

145. Dr. Laffer's testimony was not well-grounded in Montana law. Acquisition of a water supply system by a municipality is not limited to only those instances in which the private owner is failing. In a condemnation proceeding, the Court is required to consider more than whether the Water System is "broke". Dr. Laffer described water as a "product". Dr. Laffer's testimony did not address the critical nature of water supply and its inextricable link to the public health, safety and well-being of the community.

H. PUBLIC HEALTH, SAFETY AND WELFARE

146. Water is a necessity of life.

147. Water quality and availability is inextricably linked to public health, safety and welfare and to economic prosperity.

148. Missoula's primary water supply is the Missoula Aquifer. It provides an abundant supply of clean water.

149. The Water System serves as the primary source of water for Missoula residents. For most residential, commercial and public water users, there is no feasible or practical alternative source of water.

150. Effective and consistent management of Missoula's Water System is critically important to the public health, safety and welfare and requires sustained effort and continuity.

151. Protection and promotion of the public health, safety and welfare is the fundamental duty of a municipality. Private corporations have no duty to protect and promote the public health, safety and welfare.

152. The importance of protection of natural resources for the benefit of the public is deeply embedded in Missoula's culture. This is reflected in municipally supported efforts over many years to promote water quality projects undertaken to protect public health, safety and welfare, including the removal of the Milltown dam, the creation of the Missoula Water Quality District, remediation of contaminants from various sources and locations, including the Milltown Reservoir and surrounding areas, the Missoula Sawmill, the landfill, dry cleaning and automotive repair businesses, fuel storage tanks and pipeline leaks. The number of septic systems has been greatly reduced by extension of the municipal sewer system, in Wapikiya-Bellvue, Linda Vista, East Reserve, Rattlesnake, East Missoula, Mullan Road and the Wye.

153. The ownership of Mountain Water as a part of Park Water, a family controlled corporation, was stable from 1979 until 2011. In 2011, Sam Wheeler sold Park Water to Carlyle.

154. Mountain Water introduced portions of a PSC order approving the Carlyle transaction in 2011. The order said: "Carlyle witness Dove testified frankly

that Carlyle's plan for recovery of its investment is a future sale of Park to a new owner."

155. Carlyle invested in Park Water for the purpose of investment and planned to recover its investment in a subsequent sale. As such, it was a short term investment for the benefit of a corporate owner and its shareholders and investors. Short term investments for the benefit of investors are incompatible with long term planning and investment needed to ensure the reliable delivery of clean water.

156. Carlyle entered into an agreement to sell Park Water to Liberty Utilities during the pendency of these proceedings. The turnover in ownership is consistent with the trend described by Dr. Power of the change in ownership in utilities from regional to national to international conglomerates.

157. Ownership of the Water System by a private corporation separates the management and control of a vital natural resource from those most dependent upon it. Each transfer of ownership of the Water System has further removed the management and control of the Water System to greater distances from those most dependent upon it.

158. Greg Sorenson, President of Liberty, testified that Liberty is a company that owns and operates regulated water, wastewater, gas and electric utilities in ten states with 480,000 customers. Upon the closing of the sale to Liberty and transfer

of the ownership of Park Water, Liberty would expand to eleven states and add an additional 70,000 to 75,000 customers for a total of about 550,000 customers.

159. Mr. Sorenson testified further that Liberty's business plan is to acquire, own and operate utilities in the United States. He expects growth to occur organically, that is, by natural growth of existing service areas and through acquisition growth, by buying additional utilities. Over the past few years, Liberty and Algonquin has been in acquisition mode.

160. Under private ownership, the Water System will be a very small part of a very large and growing international utility conglomerate.

161. Although Mr. Sorenson testified that Liberty intends to own Park Water for generations, it cannot be known with any degree of assurance that Liberty will exist in its present form for generations or that future transfers of ownership of the Water System will not occur if transfer is deemed to best serve the interests of the corporate parent and its investors and shareholders.

162. Stability of ownership of the Water System is critical to the health, safety and well-being of the community.

163. Stability of ownership of the Water System is best achieved under municipal ownership of the Water System. While City leaders may change over time and City boundaries may change over time, the municipal corporate identity of the City is firmly fixed by the Montana Constitution and state law. The City exists

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south of the Clark Fork River from Russell to Reserve, West of Reserve in Target Range and Orchard Homes, Mullan Road west of Reserve Street, portions of the Rattlesnake, areas along West Broadway and the Wye.

168. Peter Nielsen, supervisor of the Missoula Water Quality District, testified that Mountain Water's failure to extend water service to the Grove Street areas concurrent with the extension of public sewer has resulted in unnecessary development of private wells and small water systems which have remained even after Mountain Water was eventually extended to serve a portion of the area. Further, he testified that when development occurs before water service is extended, later extension of water service is confounded.

169. Mr. Nielsen testified that Mountain Water's failure to expand into the Wye area has been detrimental and threatens public health and safety. The area has substantial industrial and commercial activity, is a major transportation hub at the intersection of Highway 93 and Interstate 90 and is the route for rail transport of hazardous materials including petroleum products. The area lacks an adequate water system with fire hydrants for fire suppression or emergency response. Two small water systems in the area have nitrate levels exceeding the drinking water standard.

170. Mr. Nielsen testified that Mountain Water requires developers to finance expansion of the Water System and then pays developers back over 40

years. Mountain Water imposes its own construction requirements on developers. The long payback period discourages some developments altogether and prompts other developers to utilize private wells or small water systems.

171. Jason Diehl is the Fire Chief for the City of Missoula Fire Department. He testified there are gaps in Missoula where there are no hydrants due to lack of access to the Water System which creates a public safety risk. Areas of Missoula that are not adequately served by the Water System and have less than adequate fire protection include parts of 44 Ranch on Mullan Road, the Wye and various other pockets spread throughout the City. Where there is no reliable water available, firefighters must transport water in tanker trucks. The hydrant gaps are a public health and safety concern for citizens and firefighters.

172. John Rundquist is the former Public Works Director for the City of Helena. In that capacity, he supervised the Helena's water and wastewater system. Mr. Rundquist testified that management of both the water and wastewater utility under one department enables efficiencies that cannot be otherwise obtained. Further, he testified that fire safety is improved when the water utility and the fire department are part of a single organization.

173. Mountain Water contends it has a long history of cooperating with the City. Mountain Water has entered into 411 main extension contracts in the last 30 years and it provides main extensions whenever a developer is willing to sign a

contract for the extension. Where water mains have not been extended, it is because the extension would have been too expensive and developers opted for a more cost effective solution for water supply.

174. Mountain Water engages in advertising to educate the public about environmental concerns, including the closeness of the Missoula Aquifer to the surface of the ground and the importance of protecting it from contamination. Mountain Water has contributed to many local water education programs, participated in legislative and legal proceedings to benefit the water resources of the community, is a business supporter of the Clark Fork Coalition, initiated a filing that allowed it to alter its tariffs to fund the 3rd Street Project, pursued a water rights solution to assist the Twite-Maloney development, provides GIS data and maps to the City, attends Design Review Team meetings, provides meter data for wastewater billing, meets regularly with the Fire Department to coordinate on operational issues, discusses upcoming projects with City Engineering and Development Services staff, provides the City with its list of potential main replacements in order to try to develop a coordinated project list for the upcoming year and works to coordinate projects if possible.

175. Mountain Water contends that while it has a history of coordinating with the City, the City coordinates itself badly.

176. The Court recognizes that Mountain Water has shown itself to be a good corporate citizen of Missoula. Its engagement with the City and the community is part of the good customer service provided by Employees.

177. The Court recognizes that Mountain Water engages in cooperative efforts with the City. The Court makes a distinction between cooperation and coordination. When cooperation occurs between the City and Mountain Water, each entity retains its separate identity, is governed separately, serves different purposes and has distinctly different duties. Cooperation is beneficial to both entities but does not provide the greater benefits of coordination, that is, the integration of the Water System with other public health, safety and welfare functions under stable ownership and local management.

178. Under private ownership, residential and commercial development has occurred in areas of Missoula without coordination of the Water System with other important public infrastructure. This has resulted in gaps in water service and supply that are detrimental to public health, safety and welfare.

179. Under municipal ownership, the Water System can be integrated with the City's other public health, safety and welfare functions to the benefit of the public.

I. IMPACT ON EMPLOYEES

180. Employees have intervened to oppose condemnation of Mountain Water.

181. Currently there are 39 employees. Employees are well-trained, experienced, capable water professionals.

182. With the exception of three executive level positions, the current Mountain Water employees' salaries are comparable to those in the municipal environment.

183. The City intends to hire current Mountain Water Employees to operate the Water System and does not want to terminate their employment or reduce their pay and benefits. To that end, the City made two offers of employment to Employees to hire them at their current wages and benefit levels. For all Employees except the top three executives, employment would be guaranteed for a period of not less than five years. The top three executive positions, who currently earn substantially more than comparable City employees, would be guaranteed employment at current salary and equivalent benefits for at least a year. For executive level positions, salary disparities would be resolved through raises and attrition. The employment offers were rebuffed by all Employees and the City's efforts to negotiate further were unsuccessful.

184. Mountain Water was owned by Park Water from 1979 until December 2011 when it was acquired by Carlyle. In September 2014, Carlyle entered into a Merger Agreement with Liberty for Liberty to acquire Park Water.

185. The Merger Agreement between Liberty and Carlyle provided that Employees would be retained for eighteen months. Subsequent to the Merger Agreement Liberty represented that it would retain Employees for five years. No Employees have written employment agreements with Liberty. 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.

186. Employees contend they would be harmed if the City owns the Water System and that Employees have a protected interest in their employment and are entitled to be made whole under condemnation just as the owner of the assets is entitled to receive fair market value. Employees contend the City has failed to make Employees whole by not committing to the pay matrix of Mountain Water for as long as they would be employed by using a cost of living adjustment based on the Western CPI, that the City has refused to commit to the COLA adjustment beyond five years, that the City refuses to commit to the merit based pay adjustments throughout the term of employment of Employees, that the City has refused to commit to credit for years of service for purposes of retirements and Public

Employees Retirement System benefits, that the City has failed to match or better the commitment made by Liberty and that the City engaged in unfair labor practices by offering time limited take-it-or leave-it offers that constituted regressive bargaining.

187. Employees also express concerns that the City would not retain Mountain Water's organizational structure but would disburse Employees into different departments under different supervisors resulting in changes to their job descriptions, effectively demoting some of them and putting them at risk of being overburdened and therefore more likely to be terminated from employment, that there would be fewer opportunities for advancement, that Mountain Water has a superior safety record to the City's and that they would be subject to a City ordinance requiring certain employees to reside within City boundaries. Employees also articulated a concern that the City had not addressed how to manage the disparity between pay and benefits for Employees compared to City union and non-union employees.

188. Mountain Water maintained continuity of ownership between 1979 and 2011, which benefitted Employees. Sam Wheeler, the majority stockholder, evidenced unusual concern for and loyalty to Employees. After 2011, however, when Sam Wheeler sold Park Water to Carlyle, significant and permanent changes occurred to the culture of employment stability at Mountain Water. The scope of

this cultural change is evident in the Merger Agreement between Carlyle and Liberty, which provides for retaining Employees for eighteen months.

189. Greg Sorenson testified that the eighteen month guarantee in the Merger Agreement was "more or less a form agreement that the seller was requiring and requesting and that it was one of the terms of the agreement." However, the Merger Agreement provides at Section 10.18 that each party acknowledges that it participated in the drafting of the Merger Agreement.

190. According to Mr. Sorenson, in mid-February 2015, Liberty expressed a commitment to Employees that compensation and compensation procedures would not change for five years. Employees' benefits would be "no worse" than they are now. Mr. Sorenson was not sure what had brought about the improved offer to Employees but agreed it had happened after the City offered five years.

191. While there was testimony that Liberty has recently said it would match the City's last offer of five years guaranteed employment, the Merger Agreement is the best evidence of the true level of Liberty's commitment to the security of Employees. Liberty is contractually bound to provide job security for Employees for a term measured in months.

192. Employees were excluded from important decisions regarding their futures after October 2010 when Sam Wheeler began serious negotiations regarding the sale of Park Water to Carlyle. Mr. Dove requested information about the City's

efforts to acquire the Water System be kept under the radar to avoid provoking Mr. Kappes. Mr. Kappes and Employees were likewise kept uninformed of Carlyle's plans to sell Park Water to Liberty during the first five months of 2014 when Carlyle had been planning its sale since at least January 2014.

193. Mountain Water changed hands in 2011 and will change hands again upon the closing of the Merger Agreement with Liberty. 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.

194. The effect on Employees is one factor to be considered in determining whether acquisition by the City is more necessary but is not dispositive.

195. The City has been limited in its ability to make detailed plans regarding the integration of Employees into the City's organizational structure because it does not own the Water System presently and because Employees have been opposed to future employment by the City. However, the City's preliminary plan is credible and addresses the essential aspects of integrating Employees into the City's organizational structure. The business plan identifies specific placements and

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200. The Water System the City seeks to acquire by its power of eminent domain consists of all components that currently comprise the water supply and distribution system, including well sites and all other water sources, easements, licenses, water rights, water transmission lines and pipes, office buildings, maintenance buildings, equipment, water meters, inventory, tools and spare parts, vehicles, business records and such property as appropriately taken by the exercise of eminent domain pursuant to § 70-30-103 MCA.

201. The interests in Defendants' property sought to be taken includes the whole of Mountain Water assets and the interests sought are the minimum necessary to achieve the taking.

202. The use to which the property is to be applied is a public use, as ownership and operation of the Water System confers a benefit to the public by ensuring the reliable delivery of clean water and the preservation of the available water supply.

203. The Water System serves as the primary source of water for Missoula residents. For most residential, commercial and public water users, there is no feasible or practical alternative source of water.

204. The public use for which the property is proposed to be used is a more necessary public use because it is more reasonable, requisite and proper for the accomplishment of the intended objective than the present use.

205. Benefits to be derived from City ownership include:

a. Stability of ownership;

b. Prioritization of the public health, safety and welfare of Missoula residents in the management of the Water System;

c. Local control by of a vital natural resource integral to public health safety and welfare by locally elected officials who are required to assure the public's right to participate in government before final decisions are made and to comply with statutory provisions governing the setting of rates;

d. Opportunities for public participation in the planning decisions required for capital improvements needed to address leakage and deferred maintenance of key Water System assets and to maintain, expand and upgrade an aging Water System;

e. Opportunities for cost savings when infrastructure is replaced at cost rather than cost plus a rate of return, reduced operating expenses by elimination of the Home Office Expense, reductions in other administrative expenses including taxes, costs of insurance and by coordination with other City departments;

f. Benefits of coordination with other public health, safety and welfare water related functions currently performed by the City including urban planning, wastewater treatment and disposal , management of storm water run-off, transportation and fire safety;

g. Public support of municipal ownership;

h. Support of a majority of the City's elected leadership;

i. City's access to capital through grants, bonds and loan programs not available to the private sector

j. The City's ability to manage and operate the Water System to assure long term access to a reliable, adequate supply of clean water for Missoula residents.

CONCLUSIONS OF LAW

1. The Court has original subject matter jurisdiction.

2. The Court has personal jurisdiction over the parties.

3. Venue is proper in the Fourth Judicial District.

4. The City is authorized to own and operate a municipal water system and the City has the authority under § 7-13-4402 to contract to own public water works for the benefit of Missoula residents.

5. The Water System that is the subject of this proceeding is a municipal water system serving Missoula and is the type of water works that the City is entitled to own and operate.

6. The City's authority under law includes the right to acquire a privately owned water system either by negotiated purchase or through the City's exercise of its power of eminent domain.

7. The City is empowered pursuant to § 7-1-4124 to acquire by eminent domain any interest in property for a public use authorized by law. The City is authorized by § 7-13-4403 MCA to commence eminent domain proceedings in order to secure a supply of water or an existing system of water supply and water distribution for the public use of the City and the residents of Missoula. The Water System is such a supply and existing system.

8. Based on credible evidence at trial, the Court concludes that the object of this condemnation proceeding, the use of the Water System, is a public use for which the right of eminent domain may properly be exercised pursuant to § 70-30-102(6) MCA.

9. Based on credible evidence at trial, the Court concludes that the City has carried its burden of proof by a preponderance of the evidence in establishing that public necessity and the public interest requires that the City take ownership of the Water System.

10. Based on the credible evidence at trial, the Court concludes that the City has carried its burden of proof by a preponderance of the evidence in establishing that its contemplated use of the Water System as a municipally owned

water system is more necessary than the current use as a privately owned for-profit enterprise. The City has carried its burden of proof establishing that, as a matter of public necessity and the public interest and pursuant to § 70-30-206(2) MCA it is more necessary that the City own the Water System than it is necessary to preserve the status quo.

11. Having considered the broad range of circumstances so as to weigh the benefits to be derived from the proposed public use against the impairments to the existing use, the Court finds the proposed public use is more reasonable, request and proper for the accomplishment of the intended objective than the proposed use.

12. Having concluded from the evidence presented that the public interest requires the City's taking of the Water System and that the City has met its burden of proving by a preponderance of the evidence:

a. The use to which the property is to be applied is a public use pursuant to § 70-30-102 MCA.

b. The taking is necessary to the public use.

c. The public use for which the property is proposed to be used is a more necessary public use than its current use.

d. An effort to obtain the property sought to be taken was made by submission of final written offer prior to initiating condemnation proceedings and the final written offer was rejected.

The Court will enter a Preliminary Condemnation Order providing that the City's condemnation of the Water System may proceed in accordance with Montana law.

PRELIMINARY ORDER OF CONDEMNATION

Based on the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that a Preliminary Order of Condemnation is issued.

DATED this 15th day of June, 2015.

Karen S. Townsend

Karen S. Townsend
District Judge

cc: Scott Stearns
Natasha Prinzing Jones
(Boone Karlberg)

William K. VanCanagan
Phil McCreedy
(Datsopoulos, MacDonald & Lind)

Harry Schneider, Jr.
(Perkins Coie)

William Wagner
Stephen Brown
Katie DeSoto
Brian Smith
(Garlington, Lohn & Robinson)

Joe Conner
Adam Sanders
D. Eric Setterlund
(Baker, Donelson, Bearman, Caldwell & Berkowitz)

William Mercer
Adrian Miller
(Holland & Hart)

Gary Zadick
(Ugrin, Alexander, Zadick & Higgins)