IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 15-0375

THE CITY OF MISSOULA, a Montana Municipal Corporation,

Plaintiff/Appellee

v.

MOUNTAIN WATER COMPANY, a Montana Corporation; and CARLYLE INFRASTRUCTURE PARTNERS, LP, a Delaware Limited Partnership;

Defendants/Appellants

Shanna M. Adams, Heather M. Best, Dennis M. Bowman, Kathryn F. Datsopoulos, Wayne K. Davis, Valarie M. Dowell, Jerry E. Ellis, Greg A. Gullickson, Bradley E. Hafar, Michelle Halley, Jack E. Heinz, Josiah M. Hodge, T. Clay Jensen, Kevin M. Johnson, Carla E. Jones, Micky A. Kammerer, John A. Kappes, Susan M. Lowery, Lee Macholz, Brenda K. Maes, Jason R. Martin, 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/Appellants.

On Appeal from the Fourth Judicial District, Missoula County
Cause No. DV-14-365
Honorable Karen Townsend, District Judge

APPELLANTS/INTERVENORS' OPENING BRIEF

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STATEMENT OF ISSUES

1. Did the Court err in its Findings regarding harm to the Employees by finding that the Employees would be "more secure" as employees of the City of Missoula and that the wage, benefits and terms of employment offered by the City of Missoula were "fair", "reasonable" or "comparable" to their wages, benefits and terms of employment under private ownership?

2. Did the Court err by failing to apply or by misapplying the controlling law that harm to the Employees is a factor that militates against the Conclusion that City ownership was "more necessary" than the present private ownership?

3. Did the Court err in its Findings that acquisition costs may cause future rate increases if Liberty acquires the Water System, supporting condemnation and harming the Employees?

STATEMENT OF THE CASE

This action is the second attempt by the City of Missoula to condemn Mountain Water Company. The first attempt failed and the denial by the District Court was affirmed by the Supreme Court in ***City of Missoula v. Mountain Water Co.***, 236 Mont. 442, 771 P.2d 103 (Mont. 1989). The City of Missoula filed a First Amended Complaint on May 5, 2014 and served it on Mountain Water. Although the City of Missoula was directed in the first action to allow the intervention of the Employees of

Mountain Water the City did not join the Employees in this second attempt to condemn Mountain Water Company. *See*: Appendix, **Tab A**, *Order of Supreme Court*, Cause No. 85-543, also attached as Tab A to *Intervenors' Memorandum in Support Motion to Intervene*, Cause No. DV-14-352. Further, without any new basis to oppose intervention, the City of Missoula objected to the participation of the 39 Missoula based employees ("The Employees/Intevenors) of Mountain Water. Over the objection of the City, the District Court granted The Employees' Motion to Intervene. The District Court allowed the Employees to intervene but limited their participation to twelve areas asserted in their motion. The District Court later narrowed their participation to only their employment interests and instructing them that they could not "advance alternative perspectives simply to defeat eminent domain to protect their interests." Order of December 22, 2014, p. 4. The District Court forbade them from attempting to "stand in the shoes of the Montana Consumer Counsel or Public Service Commission." *Id.*

The Public Service Commission (PSC) itself also moved to intervene. The PSC contended that: (1) it is the only entity that would represent the interests of Mountain Water customers living outside the City's limits; (2) it has an interest in continued capital improvements in the water system while the case is pending; and (3) it could provide insight into its authority and the administrative process of setting rates for

investor-owned utilities. *See* Order, at 12 (Aug. 29, 2014). The District Court denied the PSC's motion, holding that the PSC has "no legally protectable interest in this matter." *Id.* The court found that the PSC was not the proper entity to represent customers who did not live in the City and denied that the PSC has a unique perspective on its own ratemaking process. *Id.* at 12-13.

The District Court also refused to allow Liberty Utilities Company to intervene. On September 19, 2014, Liberty and Carlyle entered into a merger agreement under which Liberty will acquire Carlyle's interest in Western Water. *See* Order, at 2 (Dec. 22, 2014). While correctly characterizing the merger as "a stock transaction of a company that owns Mountain Water's parent company," and recognizing that Liberty would "stand in the shoes of Carlyle, an existing party," the District Court nevertheless denied Liberty's motion. *Id.* at 5-7.

The case proceeded to trial before Judge Karen Townsend. The District Court issued its Findings of Fact, Conclusions of Law and Preliminary Order of Condemnation on June 15, 2015. Appendix **Tab B**. From that Order the Employees/Intervenors appeal.

STATEMENT OF THE FACTS

The City of Missoula filed this second action seeking to condemn Mountain Water Company, a Montana corporation. The City opposed the participation of the

Missoula based employees of Mountain Water even though the Supreme Court in the first action granted a Writ of Supervisory Control directing the District Court to allow intervention of the Employees. The City's opposition to intervention foretold its plan to harm the Employees.

Article II, Section 29 of the Constitution of the State of Montana guarantees just compensation when a governmental entity seeks to condemn a private business. The Employees sought fair and just compensation since the City, in its formal offer pursuant to 70-30-111(1)(d) M.C.A. proposed "at will" employment. Subsequent pretrial offers proposed termination of some Employees, refusal to match pay, benefits and credit for years of service. Of course, "at will" employment was statutorily abrogated in Montana under 39-2-904 M.C.A. *See*: City of Missoula's Formal Offer, Appendix, **Tab C,** which was attached as Exhibit H to the First Amended Complaint for Condemnation.

The Employees sent written discovery which focused on whether or not the City would retain all of the Missoula based employees and whether the City would maintain their wages and benefits:

> **Interrogatory No. 1**: Will the City of Missoula make a commitment to the Employees of Mountain Water to pay them at least the same wages and benefits that they presently earn after any takeover?
>
> **Interrogatory No. 2**: Will the City of Missoula make a

commitment to retain all the Employees of Mountain Water as permanent, full-time employees after any takeover?

Instead of a direct answer (the City was later compelled to properly respond) the City made a time limited offer of employment that had to be individually signed by each employee within 30 days or it was withdrawn: *See*: *Plaintiff City of Missoula's Response to Intervenors' First Discovery Requests* attached at Appendix **Tab D**. The offer cut out some employees and did not offer equal pay and benefits.

After being compelled to provide a proper response, the City served a supplemental response, Appendix **Tab E**. Again, instead of answering directly, the City offered to "mediate". The City then violated the statute on mediation, 26-1-813, MCA, by making public its mediation offer before the Employees could respond. The City published its mediation offer to the media and argued that the Employees said it was not enough before the Employees responded. *See: City's Response to Employees Motion for Summary Judgment*, pp. 8-9 and Exhibit J attached thereto. The mediation offer (the City's second pretrial offer) did not make the Employees whole. Because the City violated the statute on mediation, the process was terminated.

The Employees deposed Mayor John Engen and again focused on whether or not the City intended to retain all Employees as permanent, full-time employees of the City of Missoula and whether the City would maintain the pay matrix and benefits of the Employees. The Mayor acknowledged in his deposition that the City **could not**

and would not commit to maintaining wages, benefits, cost of living increases and merit raises historically provided to all Mountain Water Company Employees. *Deposition of Mayor Engen*, pp. 31-38, 47.

At trial the Mayor ***admitted*** that the City **could not** match the wages, merit and cost of living raises and benefits of the Employees:

> Q: Will you commit to that today? To all the employees, for as long as they are employed by the City, that they will have the same Western CPI COLA escalator applied annually?
>
> A: I cannot commit to that today.
>
> Q: What about merit raises? Do you have any authority to commit to merit raises annually for the remainder of their employment?
>
> A: I have authority, but I can't commit to that today.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 217, lines 7-16.

> Q: And that's essentially what you and Mr. Bender and Mr. Bickell said previously when I asked. It's a matter of negotiation. Correct? Is that correct?
>
> A: Yes.
>
> Q: And so you cannot commit today to make them whole.
>
> A: I believe I can commit today through a negotiated deal to make them whole.
>
> Q: You cannot commit to making them whole today without negotiation; is that what you are telling me?

A: Those are your words, sir.

Q: I thought I repeated your question. Let's cut out the negotiation part.

A: Okay.

Q: Can you commit today to make them whole without negotiation?

A: Yes, I can commit to make them whole.

Q: And that includes the COLA escalator?

A: It includes--well, I will commit to making them whole for five years.

Q: Not beyond?

A: That's what I've committed to all along.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 217, line 25 – p. 218, line 22.

Q: Would the same be true of the merit raise system? You cannot commit to that today?

A: Correct.

Q: Sure. Part of the pay matrix of Mountain Water is they do an annual survey, market-based survey, done by an independent third-party company that surveys wages across the [country], creates an average, adjusts it to the Missoula base and make sure they are keeping up with similar jobs in similar-sized private companies.

A: Yes, I would commit to that.

Q: You would commit to that?

A: Yes, sir.

Q: To the end of their employment?

A: For five years.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 219, line 16 – p. 220, line 12.

Q: Well, when you say it's for a five-year minimum but you won't go beyond five years, so it's really just five years, isn't it?

A: Well, it allows me to make some choices along the way. There may be another mayor by that time.

Q: That doesn't make my folks whole, and that's why I'm asking.

Q; So this part of it that we're focusing on right now, the retirement credit years of service against PERS or giving them cash, you cannot commit to that beyond five years, correct.

A: Correct.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 222, lines 12-24.

As to three of the Employees, the City offered them a ***12 month employment term***:

Q: And in one of the disputed exhibits the Judge hasn't ruled on yet, your plan is three employees only for 12 months and then they have to negotiate with you. Do you recall that?

A: A minimum of 12 months, yes, sir.

Q: Well, what job security would you have if I said, "John, I'll hire you for 12 months"?

Q: You've just got 12 months, don't you?

A: Yes, sir.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 225, lines 17-25.

As to the other Missoula based Employees the City offered employment ***for up to five years but not beyond***:

Q: Okay. So to be clear then, and to finish this area, you will not commit beyond five years?

A: Correct.

Q: And after five years, what lay them off? Tell them they are taking a cut in pay? They are gone?

A: I'm willing to--well, I can't really assume. No, that wouldn't be our intention, but things change.

Q: Sure. And if I offered you something for five years and said, "John, things could change," you wouldn't have any security beyond five years would you?

A: I don't have any security beyond four years.

Q: to get back to my question. If I said to you, "John, I'll give you a job for five years but beyond that things could change, "you wouldn't have any security in five years, would you?

A: I would not.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 226, line 11 – p. 227, line 5.

The City's eight unions are watching to see what occurs in this case. The City has not addressed parity issues with the unions and that is one of the reasons, as admitted by the Mayor, why the City would not commit to make the Employees whole:

> Q: Now, part of the problem is you have eight other unions, at least, at the City, right?
>
> A: Yes, sir.
>
> Q: And you haven't even checked with them on what will happen if you bring Mountain Water people to work, right?
>
> A: Correct.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 227, lines 6-12.

Referring back to the City's First Amended Complaint, which appeared to promise to make the Employees whole, the Mayor admitted that the City would not commit to make the Employees' whole:

> Q: And so as in your First Amended Complaint where you say you are going to take care of all of us, in your opening remarks in response to Mr. Schneider, you want to make us whole, the bottom line is you cannot commit beyond five years to any of these?
>
> A: I'm sorry, was that a question?
>
> Q: I'm sorry. Is that correct?
>
> A: Oh, that's correct.

Testimony of John Engen, Trial Transcript, Vol. 1, p. 228, lines 17-25.

Michelle Halley, the Business Administration Manager of Mountain Water, testified concerning the Employees' wages and benefits and the losses they would suffer under City ownership and control. The City's two pretrial, time limited offers to the Employees were on a "take it or leave it" basis and expired by their own terms. Not a single employee accepted the terms. In fact, the Employees ***unanimously*** signed a letter to the Mayor and City Council rejecting the City's proposals. *See, Trial Exhibit 4017*, Appendix **Tab F,** and Testimony of Michelle Halley:

> A: We had 100 percent of our employee group not sign the stipulation. We formed a letter that we did mail respectively to the Mayor and the City Council declining the offer.
>
> At that point in time our operations had already been challenged, our reputation had been challenged. We did not see this employment agreement as a willingness to enter --to make the employees whole and we felt that that was harm--harm to the employees.
>
> We feel that this was an unnecessary forced attempt to take a company that would also affect the customers as well, when we provide very good service.
>
> Q: Did the employees respond in writing?
>
> A: We did. We all signed individually a letter to the Mayor and Council and we did submit that.
>
> Q: Would you turn to Exhibit 4017 in your book. What is that?
>
> A: This is a letter that the employees signed; and all, 100

percent, of the employees signed and sent to the Council and Mayor.

Q: What was done with the letter? Was it delivered?

A: It was e-mailed to all of the Council members and to the Mayor, is my memory.

Q: Is this exhibit a true and correct copy of the letter?

A: Yes, it is.

Testimony of Michelle Halley, Trial Transcript, Vol. 9, pp. 2706-2707

Michelle Halley also testified concerning demonstrative Exhibit 4021 which reviewed and compared the City's two pretrial offers to the Employees present pay and benefit terms. As reflected in Exhibit 4021, Appendix, **Tab G,** the City's first offer excluded three employees, froze wages as of the filing date of the condemnation action (April 2, 2014), did not match benefits, did not protect retiree health benefits and eliminated market based wage adjustments, merit increases and cost of living adjustments. The City's second pretrial offer offered three employees twelve months of employment, other employees five years, froze wages as of February 9, 2015 and any adjustments after that required City approval, froze benefits but added a monetary difference for up to five years or end of employment which ever occurred first (the City could cease after a week, a month or a year) and did not provide credit for years of service for retirement benefits causing the employees to have to start over.

Michelle Halley also prepared an Affidavit in Support of the Motion to Stay Valuation Proceedings which was filed with the District Court and is on file with this Court. It similarly reviewed the harm and losses to the Employees under City ownership. Appendix, **Tab H**.

The testimony of Michelle Halley was unchallenged and undisputed by the City. The City did not cross examine Michelle Halley, *Testimony of Michelle Halley, Trial Transcript, Vol. 9,* p. 2714.

At trial Mayor Engen was questioned concerning the City's plan for The Employees. The Mayor again reaffirmed that three employees would be offered only twelve months of employment, the remainder were offered five years of employment and the Mayor admitted The Employees would have no protection beyond twelve months and five years respectively. *Trial Transcript, Vol. l,* March 18, 2015, pp. 214-229.

At trial, the Mayor ***admitted***:

- The City of Missoula could not provide the same level of benefits including pension and stock purchase options. (*Trial Transcript, Vol. 1, March 18, 2015*, pp. 214-229).

- The City's twelve month offer to the three employees had no job security beyond twelve months. (*Trial Transcript, Vol. 1, March 18, 2015*pp. 214-229).

- The five year offer to the other Missoula based employees had no job security beyond five years. (*Trial Transcript, Vol. 1, March 18, 2015*, pp. 214-229).
- The City would not match merit raises presently in the benefit package of Mountain Water Company. (*Trial Transcript, Vol. 1, March 18, 2015,* pp. 214-229).
- The City would not match the market place wage adjustments currently in the benefit package of Mountain Water. (*Trial Transcript, Vol. 1, March 18, 2015*, pp. 214-229).
- The City did not provide the Employees with job descriptions, working conditions or an organizational structure that would assure employees or the public that continuity to serve would still be provided by experienced colleagues working together side by side. Finally, on March 9, 2015 the City's plan was presented and dispersed the employees under 4 different City branches having 13 different supervisors. (*City Demonstrative Exhibit 1499A*). The Chief Engineer at Mountain Water who currently oversees more than half of the 39 Employees would be moved to the bottom rung of Development Services and would not supervise or have any influence over the water utility. (Trial Transcript, Volume 7, March 27, 2015, Logan McInnis pg. 269-271).
- The City's Ordinance 3495 requires city department heads hired after May 6, 2013 to maintain residence within city limits. This ordinance restricts three Mountain Water department heads currently living outside of city limits (John Kappes,

Logan McInnis, and Michelle Halley) from advancing to a higher level position unless they relocate their families into city limits. (*Trial Transcript, Volume 7, March 27, 2015, Logan McInnis* p. 1863-1864 and *Trial Transcript, Volume 9, April 1, 2015, Michelle Halley* p. 2682). It would additionally limit any of the other Mountain employees from advancing in the city if they currently, or choose in the future to, live outside city limits.

The City acknowledged at trial that it has ***zero experience*** operating a water system. Under its plan it prepared shortly before trial, would terminate software and IT support that is necessary to support the employees in operating the system. (*Testimony of Dale Bickell, Trial Transcript, Vol. 3, March 3, 2014*, pp. 848-849).

The Missoula based Employees have tremendous experience operating the system with the resources and software from their corporate office. They have a combined 613 years of experience. There are 19 certified water operators. They are cross-trained to be "three deep" for reliability. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2684-2686.

Mountain Water has never had a layoff. The Employees do not have to *reapply* for jobs after 12 months or 5 years- which is prohibited under Montana law.

Mountain Water has an excellent safety record and safety program that includes an in-house safety trainer and a risk management individual. Mountain Water has won

local, state and national safety awards. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2686-2687. The Employees are active in community events, give to local charities, and Mountain Water makes matching contributions. *Testimony of Michelle Halley, Trial Transcript, Vol. 9,* pp. 2690-2691.

Under the plan presented by the City, the Employees would be spread among 13 different supervisors. The Mountain Water employee in charge of safety, Ross Miller, would no longer be involved in safety under the City plan. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2692-2693. The City's accident rating is significantly worse than that of Mountain Water. *Testimony of John Kappes, Trial Transcript, Vol. 10, pp. 2956-2957; Deposition of Dale Bickell, pp. 213 -214.*

Michelle Halley reviewed the cost of living adjustments, merit increases and market based wage adjustments provided by Mountain Water. Mountain Water also provides retirees with health insurance and has a retirement plan. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2695-2698. In contrast, the two time-limited pretrial offers of the City are summarized on Exhibit 4021, Appendix **Tab G**. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, p. 2707-2708 and *Trial Exhibit 4017*, Appendix **Tab F**. The two pretrial offers expired by their own terms. Neither offer extended permanent employment to all Employees under equal terms and conditions.

Michelle Halley compared wages and benefits under the City's plan to those presently earned by the Employees/Intervenors under Mountain Water Company. The wage and benefits proposed by the City, contrary to the finding by the District Court, were not "comparable":

CITY'S FIRST OFFER

- Employment offer excluded three employees. They would have to reapply for their positions.
- Employment offer for remaining employees did not guarantee there would not be a reduction in force.
- Wages were frozen as of the lawsuit filing date April 2, 2014 which failed to recognized cost of living adjustments, merit increases and market based adjustments that the Employees presently earn.
- Employee benefits were evaluated and frozen as of April 2, 2014 and the City proposed the monetary difference paid for up to five years or end of employment which ever occurred first, therefore, it was at most a five year compensation.
- The offer did not protect retiree health benefits.
- The offer did not address job descriptions, working conditions or organizational structure.

CITY'S SECOND OFFER

- Employment terms for three employees were for twelve months maximum.
- The remainder Employees were offered terms of up to five years.
- Wages and benefits were determined as of February 9, 2015 and did not address pay increases after that date nor after acquisition.
- Employee benefits were evaluated as of February 9, 2015. The monetary difference for certain benefits for up to five years or end of employment which ever occurred first – or in other words for a maximum of five years.
- Post-retirement health benefits and credit for years of service for retirement purposes were not addressed.

Testimony of Michelle Halley, Trial Transcript, Vol. 9, pp. 2703-2714 and Exhibit 4017, **Tab F.**

The evidence, in summary, established that under City ownership three of the employees would have to reapply or renegotiate after 12 months and therefore **had no job security after 12 months as admitted by the Mayor**, the remainder of the employees **would have to renegotiate after five years and therefore would not have job security beyond five years as admitted by the Mayor**. The City would not give credit for retirement vesting and the Employees would have to start over. The City would not fully adopt the pay matrix which included merit increases and market based

adjustments. Under City ownership, the Employees would lose retiree health benefits, endure another vesting period for retirement of five years under PERS and those employees within five years of retirement would lose retirement benefits.

STANDARDS OF REVIEW

The Supreme Court reviews a District Court's Findings of Fact to determine whether substantial evidence supports the Findings. ***Wareing v. Schreckendgust***, 280 Mont. 196, 930 P.2d 37, 41 (1996).

The standard of review for the District Court's Conclusions of law is whether the District Court's interpretation of the law is correct. ***Wareing v. Schreckendgust***, 280 Mont. 196, 930 P.2d 37, 41 (1996).

The standard of review for a mixed determination of fact and law, as in this case the application of facts to controlling law, is *de novo*. ***BNSF Ry. Co. v. Cringle***, 365 Mont. 304, 309 (Mont. 2012)

ARGUMENT

SUMMARY OF ARGUMENT

The Findings of the District Court did not correctly analyze the evidence and the District Court erroneously found that the employment terms proposed by the City were "fair", "reasonable", "comparable" and "more secure". *Findings of Fact, Conclusions of Law,* ***Tab B,*** ¶ 182, 196 and197. The overwhelming evidence, and in fact

undisputed evidence, was that the City would not match the wages, benefits and terms of employment of the Employees.

The District Court also misapplied the controlling law from the first condemnation suit by concluding that the Employment terms of the City were "reasonable" or "fair". The standard is not "reasonable" or "fair". The Employees are entitled to be made whole and not harmed by a forced takeover by the government. They deserve the same protection as the condemned chattels: to be made whole.

The City has previously balanced its budget problems on the backs of its employees. The District Court erroneously found that if the company is sold to Liberty Utilities, that the acquisition cost would result in increased rates, a finding contrary to the undisputed evidence and the law of regulated utilities. Nevertheless, a City acquisition at too high of a cost may lead to further harm to the Employees by wage and benefits cuts or freezes.

I. THE DISTRICT COURT'S FINDINGS THAT THERE WOULD BE NO HARM TO THE EMPLOYEES WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Controlling Law Protects The Employees As Well As Physical Assets.

The decision by the District Court and the position of the City of Missoula are founded upon the erroneous premise that Employees are not entitled to the same protection as the physical assets when a governmental entity seeks to take by force of

law an ongoing business. Public policy affords the Employees the same protection as the physical assets. Physical assets are protected by requiring the governmental entity to pay just compensation in order to acquire them by force. The Employees ought to be similarly protected, and in fact, this Court's prior decision did afford similar protection to the Mountain Water employees in the 1980s. ***City of Missoula v. Mountain Water Company***, 236 Mont. 442, 771 P.2d 103 (Mont. 1989). The City's attempt to condemn Mountain Water in the previous action was denied in part due to the harm that would have been suffered by the employees.

If employees of a business under condemnation by a government had no rights, then this Court, in the prior action, would not have granted the Writ of Supervisory Control directing that they be allowed to intervene. The Supreme Court cited the findings of the district court with approval that the City's takeover of Mountain Water would harm the employees and the "detrimental impact" was against the public interest. ***City of Missoula v. Mountain Water Company***, 236 Mont. 442, 447, 771 P.2d 103, 106 (Mont. 1989). The Employees face the same harms today. The evidence of that harm was substantially undisputed at trial.

The Supreme Court also affirmed the Findings of the District Court with respect to the hard working, loyal employees of Mountain Water Company:

> 8. Twenty-six people are employed by Mountain Water for the purpose of operating its system. **If the City acquired the system,**

at least seven such employees would lose their jobs. Those employees remaining would suffer salary reductions which would work an extreme hardship upon them. The severe hardship of the employees resulting from the City's acquisition of the system is one factor which must be considered in determining whether the taking is necessary... .

9. City claims there will be substantial savings to the City resulting from the reduction in the employees' salaries and the termination of certain other employees... On the other hand, these proposals would work substantial and severe hardship upon the employees for no real gains. **The employees are loyal to Mountain Water and their morale is high. They provide water to the consumers in an exemplary and economical fashion. Rather than being overpaid, the salaries that the employees now receive provide them with a reasonable standard of living. The public interest would not be served by such a detrimental impact upon these employees.**

10. Mountain Water employees have a substantial amount of experience in operating this water system; whereas, no city employees have any significant experience in operating the system. **Were the City to acquire the system and begin operating it, there would be at least a temporary decrease in the present efficiency in operation of the system. This factor, together with a lesser number of employees operating the system, would impair the availability and quality of the water service to the consumer. This result would not be in the public interest.**

See: **Appendix Tab I,** *District Court's Additional Findings of Fact, Conclusions of Law After Remand*, Cause No. 60539. (emphasis supplied).

The City concedes that the present Employees do a great job of delivering a safe, reliable and plentiful supply of water and that the City could not operate the system without them. *Deposition of John Engen*, pp. 238-239; *Deposition of Dale Bickell*, p.

80, lines 10-14.

The Employees have protected rights in their jobs, wages and benefits. ***Langager v. Crazy Creek Products***, 1989 MT 44, 287 Mont. 445, 954 P.2d 1169. The law protects them from wrongful discharge and from constructive discharge. 39-2-901 et. seq. M.C.A. Public employees also have a protected property right in their jobs. *See*: ***Welsh v. City of Great Falls***, 212 Mont. 403, 690 P.2d 406 (Mont. 1984), ***Boreen v. Christensen and State of Montana***, 267 Mont. 405, 884 P.2d 761 (1994).

The Mayor ***admitted*** however that the City will not protect their vested rights in their retirement and benefits. *Trial Transcript, Vol. 1,* pp. 214- 224. The Mayor has recently proclaimed that the City is already the "constructive owner" of Mountain Water Company. http://missoulian.com/news/local/article_e0c2e65f-623b-55f3-88bb-24f14f17a1e3.html. While the Employees disagree, if the City is the constructive owner then the Employees absolutely have property protections in their jobs under the Wrongful Discharge Act, ***Welsh*** and ***Boreen***, *supra.* Employees of a private business are protected from discharge without cause, from unilaterally imposed terms that require them to re-apply or renegotiate and from constructive discharge by altering their pay, benefits and terms of employment to their disadvantage. 39-2-901 et. seq. M.C.A. The City, as a public employer, cannot force less favorable pay, benefits and terms of employment upon its employees. It should not be allowed by force of

condemnation.

A condemnation is a forced taking. The condemnor should suffer the burden or cost of the forced taking rather than the innocent party. In ***Bierman v. New York***, 60 Misc.2d 479, 320 NYS.2d 696 (NY.Supp. 1969) a homeowner sued the City alleging inverse condemnation when a water line ruptured and damaged her small home. She sued the City but failed to prove negligence. On appeal, Judge Irving Younger reversed the judgment and held that substantial justice demanded a rule of strict liability when there has been a taking. Judge Younger reasoned that the harm or cost should fall upon the government: "When the task is the allocation of burdens between a plaintiff who is little more than a bystander in his own society and government itself, talk of negligence leaves the high road to justice in darkness." ***Bierman v. New York***, 60 Misc.2d at 498, 32 NY.Supp.2d at 687.

The Missoula based employees of Mountain Water deserve to be made whole. The government should not harm them in the process. The government cannot reduce job security, wages and benefits, and still expect 39 local employees to remain loyal, have high morale and provide exemplary service to the community as these Employees have done for decades.

B. <u>The Broken Promises.</u>

The Mayor proclaimed under oath that he is a "friend of labor." *Deposition of*

John Engen, October 31, 2014, pp. 12-13. The City filed its First Amended Complaint for Condemnation in which it alleged, under the penalties of Rule 11, M.R.Civ.P., that:

- "The City's better positioned for the long term to take care of the current Missoula-based employees of Mountain Water Company . . ." *First Amended Complaint for Order of Condemnation*, ¶ 91.

- "To alleviate any concern that might be felt by any Missoula-based employees of Mountain Water Company regarding the prospect of losing their jobs or their ability to earn a living, the City has stated that, upon its acquisition of the water system, the City intends to extend employment offers to all existing Mountain Water Company employees who reside in Montana, such offers to match their current wages and benefits unless the City's wages and benefits are consider superior, in which case the City permit the affected employee to choose whichever option is to his or her advantage." *First Amended Complaint for Order of Condemnation*, ¶ 93.

- "The employment of current Mountain Water Company workers will be more secure with the City than with their current employment. . . " *First Amended Complaint for Order of Condemnation*, ¶ 94.

- "Mountain Water Company employees are much more at risk today when larger, for profit investor owned companies own and operate Missoula's public water utility than they will be under municipal ownership." *First Amended Complaint for*

Order of Condemnation, ¶ 95.

However, these allegations were ***admitted to not be true*** by the Mayor at trial. The Mayor, who proclaimed himself to be a "friend of labor," testified at deposition about the allegations in the First Amended Complaint. At deposition Mayor Engen ***admitted*** that the allegations in the City's First Amended Complaint were not correct "today" and that the City would have to re-evaluate wages and benefits:

> Q: John, I'd next direct you to the next page, paragraph 93 of Exhibit 18, I'll read part of it.
>
> To alleviate any concern that might be felt by any Missoula-based employees of Mountain Water Company regarding the prospect of losing their jobs or their ability to earn a living, the City has stated that upon its acquisition of the water system the City intends to extend employment offers to all existing Mountain Water Company employees who reside in Montana, such offers to match their current wage and benefits unless the City's wages and benefits are considered superior, in which case the City will permit the affected employee to choose whichever option is to his or her advantage.
>
> Did I read that correctly?
>
> Q: **And was that a true statement by the City?**
>
> A: **At the time.**
>
> Q: Is it true today?
>
> A: I will tell you, Counselor that we have more information today by virtue of discovery than we had at that time, and the variation here would be, with the exception of officers and directors, we would have to reevaluate wages and benefits based on their roles.

Q: **And so this paragraph is not correct in that sense; correct?**

A: **It's not correct today.**

Q: And it hasn't been amended?

A: It has not.

Deposition of John Engen, October 31, 2014, p. 30, line 14 – p. 31, line 21. (emphasis added).

At trial Mayor Engen reaffirmed that the City would not and could not live up to the assurances made in the First Amended Complaint. *Testimony of John Engen, Trial Transcript, Vol. 1,* p. 228, ll. 17-25.

In reality, the City's two condemnation actions have been the only major threats to the Mountain Water Employees' jobs, wages, and benefits. This is in stark contrast to what utility employees' actual experience has been under private ownership, including Montana Power Company, Park Water Company, and its upstream owners, currently Carlyle, and as displayed in commitments made by Liberty Utilities.

The reference in the First Amended Complaint that the City has "extended offers" was a reference to Exhibit H attached thereto which was the City's pre-suit statutory offer. The City offered "at will" employment to the Missoula-based employees of Mountain Water which of course is prohibited under Montana law. The Mayor later retracted the "at will" offer upon learning it was prohibited, but

nevertheless the two time limited, pretrial offers extended employment to three of the employees for only 12 months and the rest for 5 years. The Mayor ***admitted*** that the Employees would have ***no protection*** beyond the 12 month and 5 year terms. *Testimony of John Engen, Trial Transcript Vol. 1,* pp. 214-224.

C. The Mayor Admitted That There Would Be Shortfalls To The Employees Under City Ownership.

At trial Mayor Engen ***admitted*** that:

- The City would not provide the same level of benefits including pension and stock purchase options. *Testimony of John Engen, Trial Transcript, Vol. 1,* pp. 221-226.

- The Mayor admitted that a twelve month offer had no job security beyond twelve months. *Id.*

- The Mayor admitted that a five year offer had no job security beyond five years. *Id.*

- The Mayor refused to commit to match merit raises presently in the benefit package of the private employer. *Testimony of John Engen, Trial Transcript, Vol. 1,* pp. p. 217, lines 7-16.

- The Mayor refused to match the market place adjustments currently in the benefit package of the in private employer for the long terms. *Testimony of John Engen, Trial Transcript, Vol. 1,* pp. 22, lines 1-14.

- The City's plan disburses The Employees under thirteen different supervisors. *City's Demonstrative Exhibit 1499A.*

- The City's plan is to cease payments to Park Water for such necessary services as software and IT support which is relied upon by the Employees to operate the system. The "plan" didn't address the necessary software and IT support. *Testimony of Dale Bickell, Trial Transcript, Vol. 3,* pp. 848-850.

- The City has zero experience operating a water system. *Trial Transcript Testimony of John Engen, Trial Transcript, Vol. 1,* p. 235, lines 9-14; *Testimony of Bruce Bender, Trial Transcript, Vol. 2,* p. 527.

- The water system, as demonstrated during the "necessity trial" depends upon the software and IT support for operation of the computer controlled pumps and storage facilities. *Testimony of John Kappes, Trial Transcript. Vol.* 10, pp. 2938-2944.

D. The City Did Not Challenge The Specific and Detailed Evidence of Harm To The Employees.

Michelle Halley, the Business Administration Manager of Mountain Water Company, testified in detail about the harms that will be suffered by the Employees by loss of wages, benefits, credit for years of service, post-retirement health benefits and less favorable working conditions. Michelle prepared a comparison between the City's two offers and the benefits of the Employees under private ownership. Exhibit 4021.

Michelle's testimony and Exhibit 4021 were unchallenged by the City. In fact, Counsel for the City did not cross-examine Michelle. *Trial Transcript, Vol. 9*, April 1, 2015, p. 2715.

Cross-examination of Mayor John Engen and Bruce Bender of the City, as reviewed above, confirmed that the City would not match the pay matrix of the Employees with respect to merit raises or market based adjustments, would not give credit for years of service for purposes of retirement, would not continue health insurance for retirees, could not match the stock purchase benefit, and extended offers to three employees that were for 12 months with no job security thereafter and other employees for 5 years with no job security thereafter.

The City did not undertake any specific comparison even though the City had the **burden of proof to show no harm**. Instead, the very limited testimony presented by the City with respect to the Employees' wages and benefits, job security, and working conditions was general, and was then contradicted by the specific testimony presented by the Employees. For example, with respect to wages, Mayor Engen simply proclaimed, without foundation or details:

> Q: Now, part of the problem is you have eight other unions, at least, at the City, right?
>
> A: Yes, sir.
>
> Q: And you haven't even checked with them on what will happen

if you bring Mountain Water people to work, right?

A: Correct.

Q: Do you think they are watching the news, watching this now and thinking, we're going to ask the Mayor and the City to match us all, bring us all up?

A: That assumes that your folks are up, Mr. Zadick, which is not an accurate assumption.

Q: Well, without naming names or getting into particulars, our folks, my clients, are paid more than City employees in most instances, correct?

A: In some instances their benefits may be better, but the wages generally are comparable. The rank-and-file folks compare pretty favorably.

Q: What about the three that you said—

A: The top two, there's a fairly remarkable disparity.

Q: How do they compare to people in private industry, the top two you are talking about? Have you done any analysis of that?

A: Not a great deal of analysis, no, sir.

Q: How would they compare to someone at NorthWest Energy?

A: I don't know.

Q: Howe about Energy West in Great Falls?

A: I don't know.

Q: How about somebody here at Washington Corporation who is an accountant or engineer, a lawyer, how would they compare

there?

A: I don't know.

Q: And so as in your First Amended Complaint where you say you are going to take care of all of us, in your opening remarks in response to Mr. Schneider, you want to make us whole, the bottom line is you cannot commit beyond five years to any of these?

A: I'm sorry, was that a question?

Q: I'm sorry. Is that correct?

A: Oh, that's correct.

Testimony of John Engen, Trial Transcript, Vol. 1, March 18, 2015, pp. 227, lines 6 – p. 228, line 25.

The Mayor ***admitted*** that he had not in fact performed a comparison. *Testimony of John Engen, Transcript Trial, Vol. 1*, March 18, 2015, p. 228, lines 17-25. There is no basis therefore for the District Court to have found that wages were "comparable".

The District Court's Findings of Fact, Paragraph 182 was not based upon "substantial evidence". The District Court ignored the admissions of the Mayor that he had not done comparisons and had not done any analysis to back up his singular comment that the wages, except for the managers, was comparable. The Mayor ***admitted*** that he had not done "a great deal of analysis, no, sir." *Testimony of John Engen, Trial Transcript, Vol. 1*, March 18, 2015, p. 228, line 7. The Mayor's testimony--his singular comment that the pay was "comparable" without any analysis--

was the ***only*** evidence presented by the City throughout the entire trial that City wages were "comparable". The District Court's Finding that the salaries are "comparable" was erroneous and was not supported by substantial evidence. The Finding is flat out wrong based upon the evidence presented at trial.

Next, the Employees presented testimony that the pending purchase by Liberty Utilities was even more favorable than their present wages and benefits. Greg Sorenson, President of Liberty Utilities, a Delaware Corporation, testified with respect to Liberty's safety practices, employee wages and benefits and philosophy. *Testimony of Greg Sorenson, Trial Transcript, Vol. 9*, April 1, 2014, pp. 2596-2599. Mr. Sorenson's testimony was undisputed that:

- Liberty intended to retain the local manager, appointing him state president and maintaining local authority and control. *Id.* at p. 2615.

- Liberty has made a commitment to retain all of Mountain Water's Missoula based employees. "That commitment is that we want the Mountain Water employees with us for the long term *Id.* at p. 2606, lines 3-5. "So we want them to be our employees until they choose to retire." *Id.* at p. 2606, lines 11-13.

- Liberty has also made a commitment that they would maintain all wages and benefits, there would be no freeze and in fact certain benefits would improve. *Id.* at pp. 2606-2707

- Medical coverage and premiums under the Liberty Health Plan is better than the Mountain Water employees enjoy presently. Sorenson testified the same was true as to dental coverage and Liberty offers a stock purchase program to its employees at a discounted price. *Id.* at p. 2608.

- Mr. Sorenson also explained that in the merger filing with the PSC there was an 18 month guarantee of employment but Liberty has stepped up and committed to keeping all Missoula based employees for the long term. *Id. at* pp. 2609-2610.

Sorenson's testimony was unrebutted. Nevertheless, the District Court found that the Merger Agreement filed for purposes of the PSC approval process months before the trial, trumped the live testimony of the President of Liberty Utilities. The reasoning of the District Court was flawed. The 18 month provision in the Merger Agreement between Carlyle and Liberty was a requirement by Carlyle that Liberty maintain all Park Water employees for a minimum of 18 months. Whereas, the Liberty commitment testified to by Greg Sorenson was a commitment made directly to the Employees of Mountain Water, and went well beyond 18 months, committing to the long term, until the employee retires and in years, guaranteeing equal or better wages and benefits for a minimum of 5 years to all Employees. *Order on Condemnation, Findings of Fact,* Paragraph 191. Clearly, the commitment at trial, under oath, by the President of Liberty Utilities was an undisputed expansion of the

Merger Agreement which Liberty was entitled to and did increase.

In spite of the unchallenged testimony, the District Court found that employment with a private corporation was less secure. *Id.* at Paragraph 193, 196. ***The District Court ignored the undisputed evidence that there had never been a layoff under private ownership, that there had never been a wage freeze under private ownership which the City has a history of doing, that employees commonly worked at Mountain Water until retirement and have enjoyed many years of stable employment under private ownership.*** Again, there was not substantial evidence to support these Findings. The Finding was contradicted by the Mayor's testimony with regard to the unpredictability of municipal ownership:

> A: For a five-year minimum.
>
> Q: Well, when you say it's for a five-year minimum but you won't go beyond five years, so it's really just five years, isn't it?
>
> A: Well, it allows me to make some choices along the way. There may be another mayor by that time.

Testimony of John Engen, Trial Transcript, Vol. 1, March 18, 2015, p. 219, lines 11-17.

> Q: Okay. So to be clear then, and to finish this area, you will not commit beyond five years?
>
> A: Correct.
>
> Q: And after five years, what, lay them off? Tell them they are

taking a cut in pay? They are gone?

A: I'm willing to-well, I can't really assume. No, that wouldn't be our intention, but things change.

Q: Sure. And if I offer you something for five years and said, "John, things could change," you wouldn't have any security beyond five years would you?

A: I don't have any security beyond four years.

Q: To get back to my question. If I said to you, "John, I'll give you a job for five years but beyond that things could change," you wouldn't have any security in five years, would you?

A: I would not.

Id. at p. 223, line 11 – p. 224, lines 5.

E. The District Court Also Erred When it Relied on Unknown Future Accommodations by the City to "Meet the Needs" of the Employees.

The District Court engaged in pure speculation that employment with the City would be better for the Employees in spite of the fact, as acknowledged by the District Court, that the City did not even have a plan in place on how to integrate the Employees, deal with the eight other unions, or compensate the Employees for their loss of vested benefits. *Order on Condemnation, Findings of Fact,* Paragraph 195: ". . . the plan can be further developed and refined to meet the needs of the City and Employees in operating the Water System." This Finding is ***pure speculation based upon some future plan not presented at trial.*** The District Court ***speculated*** that at

some unknown time in the future the City would eliminate the harms to the Employees, and this Finding is not legally sustainable. It is speculation. It is not evidence that can be relied upon by the District Court in its Findings of Fact nor in its Conclusions of Law.

The District Court essentially "hoped" that the Employees would go to work for the City even though the terms offered by the City substantially harm them. *Id.* at Paragraph 198. The District Court's "hope" is significantly outweighed by the facts before it: 100% of the Employees rejected the time limited offers by the City because they were substandard and in effect constituted regressive bargaining by the City. *Id.* at Paragraph 198. The District Court must have implicitly speculated that the Employees would opt to work for the City since the City admitted that it could not operate the Water System without them. There was ***absolutely no evidence*** that the Employees would accept City employment for substandard wages and benefits. Indeed the evidence was to the contrary. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2706-2707 and *Exhibit 4017* – Letter to the Mayor and City Council signed by 100% of the Missoula based employees declining to work for the City under its proposed terms.

The evidence is undisputed that the Employees under City ownership, will suffer losses in wages, benefits, terms of employment and employment conditions.

Therefore:

- The Findings of the District Court that the terms of employment would be "comparable" is clearly wrong.
- The Findings of the District Court that the Employees would accept inferior terms out of loyalty was pure speculation.
- The Findings of the District Court that the City's plan could be modified later to correct deficiencies was also pure speculation and contrary to the binding law that not harming the Employees was a part of the City's burden of proof that City ownership was "more necessary".

CONCLUSION ISSUE #1

The District Court's Findings with respect to the Employees were not supported by substantial evidence. The evidence of harm to the Employees is overwhelming.

II. THE DISTRICT COURT FAILED TO FOLLOW THE CONTROLLING LAW THAT CITY OWNERSHIP IS NOT "MORE NECESSARY" IF THE EMPLOYEES SUFFER HARM.

The District Court's Conclusions of Law fail to even address the harm to the Employees factor required to be considered in determining whether government ownership is "more necessary". The prior decision by this Court that harm to the Employees militates against condemnation is clearly controlling. The prior decision

involved the same parties, the same water system and has not been modified or repealed.

The statutory burden of proof upon the City was to show that its ownership is "a more necessary public use" than the present ownership. § 70-30-111, MCA; ***City of Missoula v. Mountain Water Co.***, 228 Mont. 404, 743 P.2d 590, 595, Mont. 1987. The issue of harm to the Employees is a mandatory factor which the Court had to address as a matter of law. However, the District Court ***did not address or even mention*** harm as a legal factor that must be considered as part of the legal conclusion that private ownership is "more necessary" in its Conclusions of Law.

Even if considered, however, the evidence of harm to the Employees was overwhelming and there is no factual support for the District Court's conclusion that City ownership is "more necessary". The City's witnesses that testified about terms of employment, Mayor John Engen and Dale Bickell, ***admitted*** that the Employees ***would not be made whole***. The Mayor ***admitted*** that he could not commit to make them whole. The Mayor ***admitted*** that the allegations in the First Amended Complaint that the City would make them all whole were not true today.

The Mayor ***admitted*** that when he used the term "comparable" that he had not analyzed the issue. *Testimony of John Engen, Trial Transcript, Vol. 1, March 18, 2015*, p. 227, lines 6 – p. 228, line 25. The City did not challenge the detailed

testimony of Michelle Halley which showed the short falls and harm to the Employees. Michelle was not cross-examined by counsel for the City on any of those points. *Testimony of Michelle Halley, Trial Transcript, Vol. 9*, pp. 2703-2714. Despite this evidence, the District Judge found that all aspects of employment were "comparable". *Findings of Fact, Conclusions of Law,* **Tab B,** ¶ 182.

The testimony of Greg Sorenson, the President of Liberty Utilities with respect to its commitment to the Employees that all Employees would be retained as permanent long term employees, that Liberty would maintain all wages and benefits, there would be no freeze and in fact certain benefits would be increased was also unchallenged. *Testimony of Greg Sorenson, Trial Transcript, Vol. 9*, pp. 2606-2615.

CONCLUSION ISSUE #2

The failure to correctly apply the facts to the controlling law is a mixed question of fact and law reviewed *de novo.* ***BNSF Ry.,*** *supra.* The District Court's legal conclusion is wrong. The District Court failed to apply the overwhelming evidence of harm to the determination of whether City ownership is "more necessary". The factual record militated against the legal conclusion that City ownership was "more necessary" which this Court previously directed the District Court to consider in the prior condemnation action. ***City of Missoula***, *supra.*

III. THE DISTRICT COURT'S FINDING THAT ACQUISITION COSTS MAY CAUSE FUTURE RATE INCREASES WAS ALSO BASED UPON SPECULATION, IS CONTRARY TO THE RECORD AND HARMS THE INTEREST OF THE EMPLOYEES.

A. The District Court Clearly Erred By Finding Acquisition Costs of Liberty Would Necessitate a Rate Increase.

The District Court's finding that Liberty's acquisition costs would "cause future rate increases" (*Findings of Fact, Conclusions of Law,* **Tab B** ¶125) blatantly ignores the PSC's Order approving Carlyle's acquisition of Mountain Water in 2011, which expressly ordered:

> "Rates will not increase as a result of the approval of this transaction. The ratepayers of Mountain will not pay, directly or indirectly, any transaction costs or other liabilities or obligations arising from the transaction. . . . The ratepayers of Mountain shall not incur financial obligations due to any premium paid by Carlyle for the acquisition of Park Water and Mountain."

Testimony of John Kappes, Trial Transcript, Vol. 11, reviewing Exhibit 2580 - PSC Order No. 7149d, Final Order, ¶73 (Dec. 14, 2011)). This finding also ignores Greg Sorenson's testimony, President of Liberty Utilities Company, that Liberty requested the same order from the PSC in its pending application for acquisition approval of Mountain Water. *Testimony of Greg Sorenson, Trial Transcript, Vol. 9*, p. 2612. This Finding is clearly erroneous and contrary to the uncontroverted evidence at trial.

In similar fashion, the District Court, with almost no explanation, found that it was not credible that "revenue requirements due to Liberty's acquisition costs will

have no effect on rates." *Findings of Fact, Conclusions of Law,* **Tab B** ¶123. This is not only factually and legally wrong, it also demonstrates again the District Court's speculation outside the record and failure to accept undisputed evidence in the record. The District Court's Findings on specific Employee issues reviewed above are also founded on speculation that the Employees issues can be solved in the future and that they would go to work for the City.

Greg Sorensen testified that Liberty's acquisition costs would not affect rates, and that it had requested the Montana PSC to include this condition in its order approving the acquisition. *Testimony of Greg Sorenson, Trial Transcript Vol. 9, p. 2605.* The Court's incredulity is also completely contrary to the law. Under Montana law, acquisition premiums cannot be passed on to the ratepayers through rates. *See:* ***Re NorthWestern Corp.***, 259 P.U.R.4th 493 (2007) ("It is a long held regulatory principle of this Commission that the value of plant in rate base is determined by original cost less depreciation. . . . The action of selling a utility, absent any compelling reason, is not sufficient to allow an adjustment in rate base to reflect acquisition costs."). *See also* MCA § 69-3-109 (prohibiting the PSC from increasing rate base over original cost). The Court's findings on the effect of acquisition costs on revenue requirements and rates are clearly erroneous.

B. Increased Revenue Requirements Under City Ownership Could Harm Employees as Demonstrated by City's Past Practices.

The City's history of correcting its financial problems on the backs of its employees would likely harm the Mountain Employees. While the District Court was correct in finding the ***City's*** acquisition costs may affect ***the City's revenue*** requirements, such increased requirements could very likely harm The Employees since the City previously made up for revenue shortfalls by freezing wages. The District Court clearly erred in finding that Liberty's acquisition costs would affect revenue requirements when it speculated that "acquisition costs may affect revenue requirements . . . regardless of the identity of the new owner" (*Findings of Fact, Conclusions of Law,* **Tab B** ¶125). The District Court also erred in its Finding "The Court does not find it credible that revenue requirements due to Liberty's acquisition costs will have no effect on rates." *Id.* ¶123. The law is clear as reviewed above that acquisition costs are not part of the rate base and ***cannot be used as a basis to raise rates as regulated by the PSC.*** Acquisition costs will affect the City's revenue requirements since the City will not be subject to PSC regulation and its lenders will have the ability to require the City to raise rates or cut expenses, which could again fall on the backs of the working men and women.

Due to financial problems in the General Fund, in 2011 the City implemented a wage freeze including employees of the sewer treatment department even though the

financial shortfall was unrelated to the separate "enterprise fund" of the sewer department. The City froze wages across the board. *Testimony of Bruce Bender, Trial Transcript, Vol. 2, pp. 523-525.* Mountain Water has never frozen the wages of its employees. If the City's acquisition costs increase ***its*** revenue requirements, which is very possible, the City will be faced with two choices (or a combination of the two): (1) increase rates, or (2) decrease expenses. Given the City's past history of freezing wages to make up for revenue shortfalls from unrelated areas of the budget, the idea of such harm to the Employees under City ownership is a real possibility.

CONCLUSION ISSUE #3

The Court's erroneous Finding that revenue requirements would be affected by Liberty's acquisition costs leading to a rate increase as a basis to approve condemnation contributes to the harm faced by The Employees. It is another example of the errors in the Findings that require reversal.

RELIEF REQUESTED

The decision of the District Court should be reversed.

DATED this 16th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Rule 11(4)(a) and of the Montana Rules of Appellate Procedure. I certify that this brief is printed with a proportionally space Times New Roman text typeface of 14 points and is doubled spaced. The total word count in the brief is 9,742 words, excluding the caption, Table of Contents, Table of Authorities, Table of Appendices, and Certificates of Service and Compliance. The undersigned relies on the word count of the Microsoft Word system which was used to prepare this brief.

DATED this 6 day of October, 2015.

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