

**PUBLIC WORKS COMMITTEE REPORT**  
**August 10, 2011 1:05 PM**  
**City Council Chambers**

**Members Present:** Jason Wiener (chair), Ed Childers, Dick Haines, Lyn Hellegaard, Bob Jaffe, Renee Mitchell, Pam Walzer, Jon Wilkins, Cynthia Wolken

**Members Absent:** Marilyn Marler, Dave Strohmaier

**Others Present:** Mayor Engen, Steve King, Kevin Slovarp, Dan Jordan, Doug Harby, Gregg Wood, Graham Woolley, Jenna Cedarburg, Ross Keogh, Josh Nichols, Kim Lavell, Barbara Hall, Schilling, Ellie Hill, Derek Goldman, Arvid Hiller, John Kappes, Celeste River, Hermina Harold, Zack Porter, Rebecca Tim, Jack Meger, Bob Knowle, and Justin Kraske and Dennis Lopach via telephone

**I. ADMINISTRATIVE BUSINESS**

- A. Approval of the minutes of – [July 27, 2011](#) Approved as submitted
- B. Announcements – Jason Wiener noted Discussion item, number 4, regarding scope of work on corner lots in conjunction with lineal curb and sidewalks would be rescheduled for next week's Public Works Committee meeting, so the Pedestrian Connection subcommittee will have had their first meeting.
- C. Public Comment on Non-Agenda items – None

**II. CONSENT AGENDA ITEMS**

- 1. Resolution vacating a public utility easement over and across Lot A, of McWhirk Addition, Portions of Block 17 and 18. (memo) – Regular Agenda (Dan Jordan) (Referred to committee: 08/08/2011)  
**(REMOVE FROM AGENDA)**

**Motion: The committee recommends the City Council approve the resolution vacating that portion of the Public Utility Easement retained by Resolution No. 2252 and Resolution No. 4268 vacating the alley in Block 17 of McWhirk Addition over and across Lot A of McWhirk Addition, Portions of Block 17 and 18.**

Dan Jordan, GIS Manager gave a [power point presentation](#) to explain vacating the public utility easement over and across Lot A, of McWhirk Addition, which is McDonalds at 720 E. Broadway. On the building plans from 1983 the vacation utility easement was retained and for reasons unknown the building was allowed to encroach on this easement and the original McDonald's was built. The McDonalds Cooperation and city staff agree that this needs to be resolved before new construction can begin. All utility companies have verified they have no utilities in the easement and agreed to release any interest in the easement.

Ed Childers made the motion to recommend the City Council approve the resolution vacating that portion of the Public Utility Easement retained by Resolution No. 2252 and Resolution No. 4268 vacating the alley in Block 17 of McWhirk Addition over and across Lot A of McWhirk Addition, Portions of Block 17 and 18.

The motion was passed unanimously.

- 2. Resolution vacating a (public) utility easement 20 feet northeasterly of Lot 15B of Reserve Street Industrial Center Phase I Lots 14B & 15B. (memo) – Regular Agenda (Dan Jordan) (Referred to committee: 08/08/2011) **(REMOVE FROM AGENDA)**

**The committee recommends the City Council approve the resolution vacating that portion of the 20 foot Utility Easement over and across the northeasterly portion of Lot 15B as shown on Reserve Street Industrial Center - Phase I Lots 14B & 15B.**

Dan Jordan, GIS manager gave a [power point presentation](#) to explain vacating the public utility easement 20 feet northeasterly of Lot15B of the Reserve Street Industrial Center. The easement was originally created in 1984 and retained again in 1994. The easement has not been used by any utility since 1984 and is not needed or required for existing or future public utilities. All local public utilities have verified they have no utilities in the easement and agree to release any interest in the easement. Gull Boats at 2601 W. Broadway, would like to relocate their sign to a new location that would be encroaching on this easement. Their current sign is encroaching on the easement but the easement was created after the sign was built.

Jon Wilkins made the motion to recommend the City Council approve the resolution vacating that portion of the 20 foot Utility Easement over and across the northeasterly portion of Lot 15B as shown on Reserve Street Industrial Center - Phase I Lots 14B & 15B.

The motion was passed unanimously.

## **II. REGULAR AGENDA ITEMS**

1. Discuss Mountain Water parent company's acquisition by the Carlyle Group. (memo)—Regular Agenda (Jason Wiener) (Referred to committee: 07/11/11)(HELD IN COMMITTEE)

Jason Wiener said the structure for this portion of the meeting was to have via telephone, Justin Kraske, Public Service Commission Staff Attorney and Dennis Lopach, PSE Chief Legal Counsel to discuss the Commission's decision making process and what its involvement is in this case. Mayor Engen will also speak about the City's role thus far and there are representatives from Mountain Water and Clark Fork Coalition present.

Justin Kraske, Public Service Commission Staff Attorney, via phone stated they would discuss the PSC process and answer procedural questions. The PSC is an elected body of five Commissioners that regulate privately held investor owned utilities that serve the public, and what could be naturally occurring monopolies that regulate electricity, natural gas, water and transportation. Their responsibility is to ensure that public utilities in Montana provide adequate service to customers at a reasonable rate and to balance interest of rate payers who are concerned about utility costs with the utilities need to have the opportunity to earn a fair rate of return on their investment.

PSC is involved in the Mountain Water sale because they have jurisdiction over Mountain Water and they currently regulate Mountain Water Company; this involves the utility rate increases, service issues, etc. and serves approximately 23,000 Missoulians. The commission determined they have authority over transfers and sales of public utilities in Montana and it did assert its jurisdiction and set up a procedural schedule for this docket, the commissioner's act as decision makers in documents that come before them.

Once a proceeding is started a notice is sent with a notice of opportunity and intervention deadlines that is published in a newspaper so parties interested in the process can intervene and participate in the docket. These parties hire attorneys that represent the parties intervening in the case and participate in the discovery by testimony to the commission, a briefing following the hearing, and take part in the cross examination and in presenting their case in the hearing. The PSC receives expert testimony from witnesses, accountants, and economists that are hired by the individual parties and that record is built for the commission to rely on when it makes a decision, this is the evidentiary record. They receive public comment that is part of the administrative record that the commission reviews to help identify issues and concerns that parties and commissions will review as they go through the process.

So far in the transaction the Carlyle Group and Mountain Water have filed an application in January 2011, the commission noticed an application and received intervention from four parties, the City of Missoula, the Clark Fork Coalition, the Montana Consumer Council and the Carlyle Group. The PSC set up a procedural schedule of testimony and discovery deadlines and have received testimony from the applicant and from the interveners, they are completing discovery. The commission identified additional issues it wants further testimony on from the Carlyle Group and Mountain Water. A hearing has tentatively been set up for September 26<sup>th</sup> and 27<sup>th</sup>, 2011 at 9:00AM to 5:00PM. Public Comment will be taken during the hearing and the evenings; the commission will be receiving evidence and testimony from the applicant and the parties on these two days in the Missoula City Council Chambers. The commission and staff will cross examine the parties and they will take Public Comment.

The commission has submitted and requested questions to a variety of parties to further clarify the testimony they have received and to get more information on how the transaction was approved, how Carlyle would manage the utility, how the repairs would be impacted, what the City is proposing in their testimony about the right of first refusal, and more information on the financial analysis of the Carlyle Group; the remaining files don't reflect the purview of the Park Water, Water Mountain sales. The PSC process involves finishing the discovery process and testimony. The public can follow along with the commission's decision making process in work sessions in Helena and they are broadcast on the commission's website. Citizens can also direct their concerns to the City of Missoula and the Montana Consumer Council.

Mayor Engen asked what the commission can do.

Justin Kraske said the commission has an application from Mountain Water and the Carlyle Group to request approval of the sales transaction from Mountain Water to the Carlyle Group. The commission is taking testimony and evidence from the interveners and the parties and reviewing to determine whether that transaction is in the public interest. There are three standards of review the commission uses to determine to approve or deny the sale or put certain restrictions on it: 1. the net benefit consumer standard, whether this transaction would benefit the consumers, 2. a public interest standard, whether approving this transaction would be in the public interest, and 3. a no harm to consumer standard, whether if the commission does approve this sales transaction there would be no harm to the Mountain Water consumers. The commission has not made a determination at this point.

Mayor Engen asked from the PSC's perspective what role interveners play and what is their ability to present to the PSC a settlement agreement, how does the commission handle this. What is the time frame and are there regulated deadlines before a decision is reached.

Justin Kraske explained the interveners are parties in the docket; they will build the evidentiary record for the commission to consider when it makes a decision, they will provide and request to Mountain Water and the Carlyle Group and other parties involved, they will present testimony from their experts on their concerns or recommendations involving the transaction. There will be the opportunity for the other parties, the commissioners and their staff to cross examines those experts. The interveners can submit briefs after the hearing. When a stipulation or agreement is reached the parties will sign off on the stipulation or agreement and file it with the commission, the commission will hold a hearing on that and question the parties on the settlement or stipulation agreement to determine if that meets the requirements of the commission before they make a decision to approve or deny the stipulation or make changes to it.

Once the hearing is held a court transcript is made of the hearing, the parties set up a briefing schedule with consultation from the commission to file response and reply briefs and this usually takes one to two months; the commission deliberates to make a determination on what type of order it will issue and this decision would be discussed in a public meeting broadcast on the commission web site. There is no set time frame for a decision but the commission likes to get an order together within a month to a month and a half following the submission of briefs.

Mayor Engen spoke about what the City's involvement has been so far and what they expect to do going forward. He started with some basic assumptions from the time Park Water, Mountain Water and the Carlyle Group announced this proposed transaction. From the City's historical experience and the nature of this transaction in the way it came about it has been assumed that Park Water is not a willing seller to the City of Missoula of Mountain Water. There has been interest expressed in public ownership of this utility. There is a long history in Missoula of attempts to acquire the utility and to date we have been unsuccessful. The City has been paying attention to this transaction, Mayor Engen has met several times with the Carlyle Group and asked them many questions such as what they wanted with the water system in Missoula, what will they do about rates, are they going to do what they normally do with acquisitions- buy it and then sell it, who will be the next buyer, how do you plan to manage the utility in our community, what do you plan to do with the water rights, what do you plan to do with the water, etc. What Carlyle has told him over time is they intend to keep local management in place; they will not bottle the water or sell the water rights.

The Mayor has expressed to the Carlyle Group that he believes in public ownership of the municipal water supply and has asked them to sell the utility to Missoula; Carlyle's response was they did not own the utility and until they own it they cannot even entertain the thought of such a transaction. Based on the track record and the nature of their business at some point they will sell the utility and the Mayor wants the City of Missoula to be in the position to have the chance to buy it, to be first in line. The City intervened in this case before the PSC and the Mayor delivered an affidavit stating the City's interest in owning the utility and stating our concerns with ownership by a corporation with no roots in our community and whose responsibility is to their investors. In the affidavit the City states that based on preliminary models and using rough numbers the City feels it can buy the utility and bond it and they could pay for those bonds without increasing the rates. We believe the City's overhead would be considerably less than Mountain Water's and the City could use some of those savings to invest in their infrastructure. For this purchase to happen the utility needs to be for sale and City Council needs to approve the terms of the purchase. The PSC has clearly expressed interest on the part of the City of Missoula represented by the Mayor as the Chief Executive that we want to buy it, and believe we can run it and pay for it. The Mayor has received some questions from the PSC concerning his testimony and he will be answering those questions using all available resources to demonstrate to the PSC the City can do what it says it can do if they were to own the utility; Missoula is the only major City in Montana that does not own its water utility. The City has a clean aquifer that would not require a lot of treatment and that is a tremendous asset. The Mayor said the City has enjoyed a pretty good working relationship with Mountain Water; they have been able to work with them on a variety of issues. The fundamental question is whether the water utility should be owned by a global, private investment firm whose interest has everything to do mostly with profit and a lot less to do with our community. The Mayor thinks we need to remove the profit motive and run it as a public utility in the interest of the public that is served here.

Arvid Hiller, Vice President and General Manger of Mountain Water Company for the last twenty one years, thanked the City for inviting them to the meeting and said John Kappes has been the one involved in these transactions and turned this portion over to him.

John Kappes, Co- CEO of Mountain Water Company has been with the company for twenty years. He stated that they would answer any questions beyond the meeting and want to provide the City with any information that could help the City with their decision. There was a signed letter that identified if Mountain Water Company itself was ever sold the City has the right of first refusal; that letter will remain as a commitment to the City even under the new ownership. Mountain Water Company is not being sold by itself, the parent company Park Water Company (who owns Mountain Water, Apple Valley Ranch Hills in California and an operating division within Park Water Company) is being sold by the Wheeler family as a total package. Mountain Water will remain under the same ownership as it was, the letter to the City for the right of first refusal, does not play into this transaction because the whole parent company is being sold not just Mountain Water. The PSC website will have all the documentation from the company, the interveners, discovery requests and responses. As the applicant they will be providing rebuttal testimony.

Barbara Hall, Legal Director for the Clark Fork Coalition, commented that the coalition is fully supportive of the City's efforts. They are also open to questions and concerns from the public. The information they filed with the PSC is available on the web site.

Renee Mitchell stated that the big concern is that an outside group like Carlyle Group would not only own the water company but take control of the water rights and the aquifer, she asked Mr. Kappes and Mr. Hiller, as a water company do they make the water available to the consumers but do not own the aquifer? She requested some clarification on that.

John Kappes explained that in Montana the water is owned by the people of Montana but the water rights are given to parties to use that water. Mountain Water Company has the water rights that it needs to pull water from the aquifer and they also maintain a backup supply in the Rattlesnake. Those water rights are owned by Mountain Water Company. These water rights are a municipal use water right and the place of use for those water rights is the skyline of Missoula. If there were any changes to use those water rights outside of that place of use or changes from a municipal right to some other use such as an agriculture right, those changes would have to go through the Department of Natural Resources and Conservation (DNRC), the regulatory body that oversees the changes of use for water rights.

Jon Wilkins asked why this sale was not offered to the City of Missoula. If the City bought our part, Mountain Water, what kind of control would the City have?

John Kappes said this was the sale of the total California parent company Park Water and Mountain Water is owned by Park Water. To further clarify this he explained that Park Water is a California Corporation and Mountain Water is a Montana Corporation, Mountain Water Company's stock is owned by Park Water Company. Currently Mountain Water owns all the assets that are used to provide service to the community, and all the water rights. In order for the letter with the right of first refusal to come into play, it would be if Park Water Company were going sell Mountain Water Company out from under its ownership.

Mayor Engen replied that if the City of Missoula bought Mountain Water from Carlyle, the City would own and operate Mountain Water. If the Carlyle Group buys Park Water they own Mountain Water and they could resale it to anybody provided the PSC approves it.

John Kappes explained that under DNRC oversight and Montana law, any well drilled in the Clark Fork Basin with more than thirty five gallons per minute has to get a water right mitigated; so regardless of the entity, whether it is Mountain Water, the City or an individual they would have to buy water rights.

Ed Childers asked if Mountain Water as a separate, independent corporation could offer itself for sale or someone could offer to buy it independently from its current owner, Park Water.

John Kappes said Mountain Water Company's owners could offer Mountain Water for sale.

Public Comment:

Hermina Harold representing a small group of concerned citizens called Missoula Water Now, stated that they agreed with the Mayor's position on this situation but their main concern is they want a written agreement from the Carlyle Group before the sale went through, that they would promise to sell Mountain Water to the City of Missoula for a fair price and by a certain deadline so we would not be in the position again for the first right of refusal.

Derek Goldman from Ward Six, commented on some things he heard from Mountain Water; one of them being that Mountain Water would remain under the same ownership, while technically that may be true it will remain under Park Water, and the owners of Park Water will be different, it will be the Carlyle Group, that is a disingenuous statement and he disagrees with that. The letter from Mr.

Wheeler stating that Missoula has the right of first refusal from Mountain Water is an insincere pledge because the Mayor and the City Council were not aware of this sale until they read it in the paper in December, so clearly Mountain Water was not offered to the City when the decision to sell Park Water was made. A proposal for the City to purchase the utility was not on the table, the only thing before the PSC is a buy sell agreement from Park Water to the Carlyle Group and he has serious concerns about this multi-national private equity firm owning our water company. He urged City Council not to support the sell to Carlyle without some sort of written commitment and a process in place to transfer the ownership of Mountain Water to the City in the future.

Ross Keogh lives in the Rattlesnake and wanted to comment that what we need to remember is Mountain Water, Park Water, the Wheeler family and the Carlyle Group are in this to make money and owning utilities in today's environment is a pretty lucrative asset. The PSC laid down a clear standard for them to approve the deal, that we have to have some benefit flowing to the consumers with the Carlyle Group taking over and he thinks the City Council should oppose the deal until there is a settlement offer in place that gets the City an option to own this utility. Carlyle has suggested they have big plans for Missoula, they want to invest a lot of money to improve the asset, and the consumer will have to pay for those investments.

Bob Knowle as a private citizen stated that when a private enterprise gets into the City's municipals they are in it for a profit and the consumer will pay a lot more for it. Park Water Company owns Mountain Water, who owns Park Water? How much do you know about the Carlyle Group, they are a big multi-millionaire outfit, he would not like to drink water that they own. It's not right and it belongs to the City of Missoula. We should work on buying the utility ourselves.

Celeste River from the Farviews / Pattee Canyon area has been worried about our water since the 1980's, she agrees with everything that has been said today questioning this deal. Why should we consider Carlyle, we should do everything we can to be first in line to purchase Mountain Water. She has written to the PSC begging them to save our precious water and all she hears about is economics. We know from the history of the Wild West that water rights belong to the people that live with the water.

Jason Wiener proposed the committee bring this discussion back next week, and at some point prior the Public Hearing he would like the City Council to adopt a resolution stating some policy making body of the City, where we stand with respect to the transaction.

2. Discussion on scope of work on corner lots in conjunction with lineal curb and sidewalk projects. (memo) – Regular Agenda (Doug Harby) (Referred to committee: 08/08/2011)(THIS ITEM NOT DISCUSSED (HELD IN COMMITTEE for next weeks meeting per Jason Wiener )

### III. HELD AND ONGOING AGENDA ITEMS

1. Discussion on the sizes of grease interceptors for the restaurant industry ([Grease Interceptor PowerPoint](#)) ([memo](#)).—Regular Agenda (Stacy Rye and Bob Jaffe) (Referred to committee: 04/21/08)
2. Review infrastructure conditions at the locations of serious and fatal traffic accidents: 2007-2009 ([memo](#)).—Regular Agenda (Jason Wiener) (Referred to committee: 01/25/10)
3. T4 America partner support ([memo](#)) – Regular Agenda (Stacy Rye) (Referred to committee: (Referred to committee: 08/16/10)
4. Presentation from Public Works staff regarding proposed process for finding contractors and awarding bids for reconstruction of Russell Street. ([memo](#))—Regular Agenda (Bob Jaffe) (Referred to committee: 11/15/2010)
5. Resolution to change the speed limit on Reserve Street between Brooks and 39<sup>th</sup> Street. ([memo](#))—Regular Agenda (Wayne Gravatt) (Referred to committee: 01/24/11)
6. Approve the agreement for consultant services with Eli & Associates, Inc. on Project 10-034 England Boulevard right turn lane improvements. ([memo](#)) - Regular Agenda (Kevin Slovarp) (Referred to committee 05/16/2011)

7. Infrastructure condition inventory and maintenance requirements. ([memo](#))—Regular Agenda (Ed Childers) (Referred to committee: 07/11/11)

#### **IV. ADJOURNMENT**

The meeting adjourned at 2:07 PM

Respectfully Submitted,  
Peggy Diamond, Program Specialist  
City Public Works Department