



EXHIBIT 7
DATE 1-13-05
HB 75

MOUNTAIN WATER COMPANY

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Testimony of Mountain Water Company Local Government Committee 59th Session of 2005 Legislature OPPONENT OF House Bill No. 75

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A COUNTY, CONSOLIDATED GOVERNMENT, CITY, OR TOWN WITH A RIGHT OF FIRST REFUSAL FOR THE PURCHASE OF A PRIVATELY OWNED WATER SUPPLY SYSTEM; DEFINING TERMS, AMENDING SECTION 7-13-4403, MCA, AND PROVIDING AN EFFECTIVE DATE."

Dear Chairman Noennig and members of the Local Government Committee:

Introduction

For the record, my name is Arvid Hiller and I live at 2424 W. Kent St. in Missoula. I am the Vice President and General Manager of Mountain Water Company in Missoula and have served in that capacity since April 1, 1990. I have brought my testimony in written form and ask that it be distributed at this time to the members of the Committee.

Mountain Water Company is a regulated privately owned water utility that has provided water to the residents, businesses and institutions of Missoula for over 25 years. We currently serve a population of 60,000 plus residents inside and outside the City of Missoula area with very high quality water. I am here as an opponent of House Bill No. 75.

This bill is apparently not the initiative of the City of Missoula and Mountain Water has had a fine working relationship with the City of Missoula and the County of Missoula for so many years – and that we still enjoy today. Rather, this bill apparently represents a policy preference of Representative Buzzas. While I have known and respected Representative Buzzas for many years, I have to forcefully disagree with Rep. Buzzas that this bill in any way represents sound public policy.

I also want to confirm for you what you may already have assumed – which is that Mountain Water Company in Missoula is the only significant private water system in the entire State of Montana. Therefore, while there may be smaller systems that could be affected by this bill, the impact of this proposed legislation would unquestionably fall principally on Mountain Water.

To get to particulars, I have come over from Missoula to oppose HB 75 for the following several reasons:

1. **Constitutional Issue:** In the first place, our legal counsel has advised us that there is probably a constitutional problem with the bill. The Montana Constitution prohibits not only the taking, but also the damaging, or diminishing of private property for public use without just compensation. (Article II, Sec. 29)

The creation of a right of first refusal as proposed in this legislation constitutes an unfair taking or damaging of property and property rights without due process. This legislation would, in effect, obligate the owner of a private water company property to disclose to any prospective purchaser that a first right of refusal exists in favor of a local government. When that is divulged, a prospective purchaser will be reluctant to even commence the necessary due diligence process because all costs associated with its efforts will be wasted if the first refusal right is exercised by the governmental entity.

The ultimate effect is to give local government the ability to have due diligence and price determined by an interested third party buyer, likely causing an otherwise interested buyer to abandon pursuing a purchase in the first place. Anyone in business or familiar with the sale of a business can appreciate how a statutory right of first refusal would damage and diminish the value of a business – I mean who would want to initiate discussions to purchase the business? And frankly, the bill itself would actually work against its own purpose – the statutory right of first refusal would discourage buyers from even making an offer for the business in the first place, and so the chances that the city or county would ever have the opportunity to step in and pre-empt the private buyer are reduced.

2. **No Law Like It:** This type of legislation is extremely rare and unusual. My legal counsel advise me that this would be the only place in the entire Montana Code where government would be granting itself this kind of right

to private property. Why should a local government be able to grant itself by ordinance an automatic first right of refusal on any property? This type of legislation will set a dangerous precedent. It could be expanded to allow any local government to pass a first right of refusal ordinance if it believes it should own any property, piece of land or business for public use, thus encumbering the property and adversely affecting its value.

3. **Not Needed: Existing Condemnation Power Suffices:** I have yet to hear any valid reason why this legislation is needed. Through condemnation, local governments already have a mechanism to acquire property when it is in the public's best interest. The proposed legislation not only grants an ability to condemn, but also affects and determines price. Or, if a local government wanted to have an option or a right of first refusal on some private property, then it can purchase such a right just like any other party could.
4. **No Quid Pro Quo:** There is no quid-pro-quo in this proposed legislation. What consideration or value is given by the governmental entity to acquire such a right? In the day-to-day business world, people pay for an option to purchase, or for a right of first refusal. Under this bill, the government would pay nothing for the right of first refusal – it would just create one for itself.
5. **No Procedures:** In practical terms, the proposed legislation contains no specifics as to how the right of first refusal must be exercised or as to timing or notice requirements commonly included in right of first refusal agreements. Further, it leaves unresolved the extent to which, if any, the local government has any right to examine private due diligence documentation accumulated at the expense of a prospective purchaser to justify its offered price.
6. **Merger/Consolidation Not Considered:** By using the phrase “when the property becomes available” the bill creates the potential for confusion in the event of mergers, consolidations, internal reorganization or restructuring. Furthermore, what if Mountain Water were to sell off a small portion of its system? Would the statute be triggered?
7. **Confuses “Fair Market Value”:** The proposed legislation goes beyond a standard right of first refusal by allowing a local government to not only meet any other offer on a water system, but also to “have the first opportunity to purchase the property for not less than fair market value

when the property becomes available.” It appears that if a water system is listed for sale, the local government will be allowed to purchase it for fair market value, with no guidance as to how such value is to be determined, or what the seller is asking. This is mixing two concepts – an objective fair market value as opposed to a subjective value established by a willing seller and a willing buyer established after negotiations.

8. **Future Sale is Only Theoretical:** The proposed legislation addresses a situation that could only theoretically arise. Mountain Water has been actively involved in planning for the future of Missoula’s water supply – using 25-year, 50-year and 100-year planning horizons. We are integrated into the City’s emergency and fire suppression planning, and have no plans to go anywhere in the foreseeable future. This bill is not needed.

9. **City of Missoula Already Has Minimum 90-Day Notice To Buy:**

I spoke earlier about there being no need for this bill. In the particular case of the City of Missoula, there is clearly no need. This is because, back in 1997, Mountain Water basically granted the City of Missoula a 90-day right of first refusal – and it is in writing addressed directly to Mike Kadas, the Mayor of Missoula. I have copies of this correspondence for the committee members. As you will see from the letter on top, Mountain Water is not insensitive to the City of Missoula’s desire to be involved if Mountain Water ever had reason to sell the system.

That letter recites that, in the event that Mountain Water ever determines to sell the system, Mountain Water will notify the City and give the City 90 days to determine whether the City is interested in purchasing the system. Frankly I thought this was a very unique and generous commitment on the part of Mountain Water and HB75 is a heck of a way to pay us back. The same Mayor Kadas who received this letter is still Mayor Kadas of Missoula – and our relationship has remained solid as far as I know. The whole bill is out of sync with our relationship with the City of Missoula and is certainly not needed.

10. **Section 2 of Bill Is Inapplicable:** I need to comment briefly on Section 2 of the Bill – although it might just be some housekeeping by Legislative Staff to address cases of franchise or contract. But I need to emphasize that Section 7-13-4403, MCA, enacted in 1921, has no application to Mountain Water. There is no franchise or contract between Mountain Water and the City of Missoula – we are a private utility fully regulated by the Public

Service Commission and DEQ – and Section 7-13-4403 would not apply to Mountain Water.

Conclusion

In conclusion, this bill would establish a completely new and very disturbing precedent in Montana law by giving a governmental entity the right of first refusal to buy private property. This bill is limited to private water companies, but once this is open, will it extend to other kinds of businesses that provide service to a community? State condemnation laws already exist and they protect consumers and the public from governmental taking or damaging of private property by requiring that the government prove it is in the public's best interest and by requiring that the government pay fair market value. Moreover, as I have pointed out, Mountain Water has already stated that the City of Missoula will be getting advance notice of any sale of the company, in the unlikely event that Mountain Water were ever to be sold.

Thank you for your attention and I would be glad to answer any questions.

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