



protection through an Order from this Commission.

Carlyle has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession. Mont. Admin. R. 38.2.5007(4)(b)(i). Carlyle understands it has the burden of demonstrating that the identified information is confidential information and that it must, within this Motion, establish a prima facie showing of confidentiality, factually and legally, and make clear the basis for the claim of confidentiality.

Carlyle fully appreciates the dilemma faced by the Commission in administering the state's broad right to access public information. Carlyle, in this Motion, respectfully represents that it has overcome the presumption that the public should have unrestricted access to documents and information. Carlyle provides herein a prima facie showing of confidentiality, both factually and legally, and explains the basis for the claim of confidentiality.

## **II. CONTACT PERSON**

As required by Mont. Admin. R. 38.2.5007(3)(a), the following person may receive communications regarding this Motion and regarding the items to be protected:

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Counsel for Carlyle Infrastructure Partners, LP

## **III. IDENTIFICATION OF CONFIDENTIAL INFORMATION**

Carlyle seeks a protective order for the following items requested in the Commission's data requests to Carlyle dated May 20, 2011:

- PSC-14a: “copies of the private placement or confidential offering memorandum, subscription documents, and partnership agreements, if any” (Item 14a).
- PSC-14d: “copies of the most recent audited financial statements” (Item 14d).
- PSC-20d: For each of the four Carlyle-acquired companies, “the levels of capital expenditures by category of expenditure for each year since Carlyle Infrastructure acquired the company and for the three years immediately preceding the acquisition” (Item 20d).

Carlyle also seeks a protective order for the following items requested in the Clark’s Fork Coalition’s data requests to Carlyle dated May 19, 2011:

- CFC-2a: Carlyle’s Private Placement Memorandum and any related supplements. (Item 2a).
- CFC-2b: Carlyle’s Main Fund Composite Limited Partnership Agreement. (Item 2b).
- CFC-2c: Carlyle’s most recent audited financial statements. (Item 2c).
- CFC-3a: Carlyle Infrastructure Partners Western Water, LP Limited Partnership Agreement. (Item 3a).
- CFC-13: Due diligence analysis or report or similar document which provides the due diligence and analysis conducted by Carlyle or any of its subsidiaries corroborating the decision to purchase Park. The response to this data request will consist of the Carlyle Investment Committee Memo regarding the acquisition of Park Water. (Item 13)
- CFC-19: Copies of a valuation, appraisal and any other document that was used to determine the purchase price offered to Park by Carlyle or any of its subsidiaries. The

response to this data request will consist of the Carlyle Investment Committee Memo regarding the acquisition of Park Water (Item 19).

Finally, Carlyle seeks a protective order for the following item requested in the Montana consumer Counsel's data requests to Carlyle dated May 20, 2011:

- MCC-4: "Please provide the financial analysis that was done in conjunction with Carlyle's due diligence pertaining to the acquisition of Park Water including but not limited to projected financial results (e.g., income statements, balance sheets, cash flow). If these due diligence analyses are in spreadsheet form, please provide them in an operating format with all formulas and links intact." (Item 4).

This list of items is a complete and specific, nonconfidential identification of the information for which protection is requested. Mont. Admin. R. 38.2.5007(3)(b). The information reflected in these items is hereafter referred to as the "Confidential Information."

#### **IV. FACTUAL AND LEGAL BASES FOR PROTECTION**

For each item listed above, a complete and specific factual basis, including thorough identification and explanation of specific facts, and a complete and specific legal basis and application of the law to facts supporting the claim of confidentiality follows. *See* Mont. Admin. R. 38.2.5007(3)(c) and (d). Further, the supporting affidavit of a qualified person, Robert Dove, is attached. *See id.* 38.2.5007(3)(c).

##### **A. The Confidential Information is "information."**

"Information," as defined by regulation, includes knowledge, observations, opinions,

data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request. Mont. Admin. R. 38.2.5001 (3). Each item for which protection is sought constitutes written data, including valuation, financial, due diligence, capital expenditure, and organizational data in the form of reports, work papers, or similar items, which have been requested through the discovery process in this proceeding. Each item, thereby, meets the definition of “information.” *See* Affidavit at p. 2-3.

**B. The Confidential Information is secret.**

Each item of Confidential Information for which protection is requested is, in fact, secret, and Carlyle protects such information by whatever means available. *See* Affidavit at p. 3.

In addition to being secret, the Confidential Information is trade secret information from which independent economic value is derived. Mont. Code Ann. § 69-3-105(2) (2009) provides “[t]he commission may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402, or other information that must be protected under law as required to carry out its regulatory functions.” “Trade secrets,” as defined by Mont. Code Ann. § 30-14-402(4),

means:

information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

As articulated in the remainder of this Motion, the secret Confidential Information is trade secret information, which is subject to efforts reasonable under the circumstances to

maintain its secrecy, not readily available by proper means, and derives independent economic value from its secrecy. Further, Carlyle maintains a competitive advantage by virtue of keeping the Confidential Information secret. The alternative investment management sector, in which Carlyle and its competitors operate, is a highly competitive sector, and maintaining the secrecy of this information regarding Carlyle's investment strategies is crucial to Carlyle's success in the marketplace.

**C. The Confidential Information is subject to efforts reasonable under the circumstances to maintain its secrecy.**

Acting pursuant to normal industry practice, Carlyle protects the Confidential Information by whatever means available. Affidavit at p. 3-4. Only persons with a "need to know" have access to the information, it is treated as confidential by Carlyle employees, and it is stored on protected electronic systems. *Id.* After issuance of a protective order from this Commission, Carlyle will continue to maintain the secrecy of the information provided. Because Carlyle maintains the secrecy of the Confidential Information, and will continue to do so after the issuance of a protective order in this Docket, the information maintains its status as a trade secret, as defined by Mont. Code. Ann. § 30-14-402(4).

**D. The Confidential Information is not readily ascertainable by proper means.**

Since the information to be protected is not within the public domain, it is not readily ascertainable by any other person or entity. No public documents exist which could reveal the information to be protected by any means whatsoever. No one could reasonably ascertain this information through a public source or any other proper means. *See* Affidavit at p. 4.

**E. The Confidential Information derives independent economic value from its secrecy or a competitive advantage is derived from its secrecy.**

Mont. Admin. R. 38.2.5007(4)(b)(vi) specifies that the secret information must derive independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. As discussed below, the Confidential Information derives independent economic value from its secrecy, and Carlyle derives a significant competitive advantage by maintaining its secrecy.

The Carlyle Investment Committee Memo (Items 13, 19, and 4), contains information whose value is derived from not being generally known to the public, including Carlyle's competitors. It is commercially valuable because it contains information regarding Carlyle's investment approach, strategies, and other commercially sensitive information regarding the Park Water asset. Revealing information about this asset to competitors would damage Carlyle's competitive position by providing the competitors a competitive edge to use for economic gain related to Park Water, or, due to the strategic nature of the information, provide an economic advantage regarding other projects.

Item 20d, the capital expenditures of Carlyle or its subsidiaries, is also information whose value is derived from not being generally known to the public. In particular, the amount and type of expenditure constitute a formula and pattern of expenditures, which if revealed to Carlyle's competitors, would disclose Carlyle's strategy and impair its competitive position in the marketplace. Disclosure of this information would make it easier for Carlyle's competitors to duplicate the investment terms employed by Carlyle, which would significantly disadvantage Carlyle's efforts to conduct business as well as to retain and solicit investors in future fundraising efforts.

Items 2a and 14a, the Private Placement Memorandum, Item 2b, and 3a, Limited Partnership Agreements, and Items 2c and 14d, audited financial statements, contain sensitive information regarding investment management fees, performance incentives, investment strategies, and tax structuring, and other information. This body of information constitutes the formula by which Carlyle manages its fund investments. If any of this data is revealed to Carlyle's competitors, it will be easier for competitors to duplicate the investment terms employed by Carlyle and obtain economic value. Disclosure of this information would thereby significantly disadvantage Carlyle's efforts to conduct business, and retain and solicit investors in the future.

In sum, the alternative investment management sector is highly competitive. The information requested, if revealed to competitors, would disclose investment strategies, tax structuring, investment management fees, performance incentives and other key pieces in Carlyle's business plan. It is these pieces and others that create Carlyle's fund investment product and which establish its competitive role in the marketplace. Public disclosure of capital expenditures and due diligence reports similarly reveals to Carlyle's competitors the company's strategy and trade secrets. In conclusion, the Confidential Information requested both derives its independent economic value by being secret, and provides Carlyle its competitive advantage by staying secret.

## **V. CONCLUSION**

For the reasons stated herein, Carlyle respectfully requests the Commission grant this Motion for Protective Order.

Respectfully submitted this 27th day of May, 2011.

By: s/ Thorvald A. Nelson

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**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 27th day of May, 2011, the foregoing MOTION FOR PROTECTIVE ORDER AND BRIEF IN SUPPORT was served via electronic mail and U.S. mail unless otherwise indicated to the following:

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