

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER of the  
Consolidated Petition By Mountain  
Water Company for Declaratory  
Rulings and Application for Approval  
of Sale and Transfer of Stock in  
Park

REGULATORY DIVISION  
DOCKET NO. D2011.1.8

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**CITY OF MISSOULA'S POST HEARING MEMORANDUM**

**I. INTRODUCTION**

The City of Missoula ("City") submits this post hearing brief to address issues associated with Mountain Water Company's ("Mountain") Consolidated Petition for Declaratory Ruling and Application for Approval of Sale and Transfer of Stock ("Petition").

Mountain operates the public utility water system that serves the Missoula community. Pursuant to Mont. Const. art. IX, § 3 "all surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people." Mountain is subject to the jurisdiction of the Montana Public Service Commission ("Commission"). Mountain is a closely held Montana corporation, wholly owned by Park Water Company ("Park"). Park is a closely held California corporation subject to the jurisdiction of the California Public Utilities Commission ("California PUC").

On December 21, 2010, Park entered into a merger agreement pursuant to which a wholly-owned subsidiary of Western Water Holdings, LLC ("Western Water"), a Delaware limited liability company, controlled by

Carlyle Infrastructure Partners Western Water, L.P. ("Carlyle") will merge into Park. Carlyle agreed to purchase Park for approximately \$102 million and will assume approximately \$56 million of Park's debt that is estimated to be outstanding at the time of the merger. Robert Dove ("Dove") is managing director of Carlyle. Carlyle is a global alternative asset management company that invests money to create returns for investors. Hrg. Transcr. 28-29 (9/26/2011). Carlyle is not a public utility. The proposed sale of Park to Carlyle clearly causes consternation for many Missoula consumers and citizens who sent emails to the Commission as well as testified at the Commission's public hearings held in Missoula September 26 and 27, 2011. The proposed sale clearly has significant public interest and concern in Missoula as well as potential for future public consequences in Missoula.

## II. JURISDICTION

There is significant substantive basis for the Commission to be jurisdictionally involved in the Park sale, which includes Mountain as a wholly owned asset of Park. Mont. Const. art. IX, § 3 (3) mandates:

**Section 3. Water Rights. . . . (3) All surface, underground, flood, and atmospheric waters within the state are the property of the state for the use of its people and are subject to beneficial uses as provided by law.**  
(Emphasis added.)

Thus, with respect to privately owned public water utilities regulated by the Commission, such as Mountain, it is imperative and incumbent upon the Commission to always assert and assume jurisdiction involving any sale of privately owned public water utilities to another private owner. This legal principle should apply in all instances, whether the privately owned public water utility is itself being directly sold or it is being sold as an asset

of another corporation to another private owner. As is the case here with the sale of Park which wholly owns Mountain that is providing the Missoula public water utility services. The Commission has a duty and responsibility to be present and involved in ensuring that privately owned public water utility operations operate within the Montana Constitutional mandate in art. IX § 3 (3).

Mountain's filing requests the Commission issue declaratory rulings to the effect that there is no basis for the Commission to claim implied power to review the proposed sale and transfer. The Commission prudently and correctly declined to issue such a declaratory ruling. More importantly, the Commission correctly confirmed, asserted and exercised its ongoing jurisdiction over the Mountain public utility located in Montana even though Mountain is wholly owned by Park a California public utility. Mountain's privately owned public water utility operations, consumers, and assets are located, operated and utilized in Missoula. It is therefore imperative that the Commission on behalf of Mountain consumers ensure that Mountain's millions of dollars worth of assets are protected and preserved as well as provide reasonable finance and operation ring-fencing conditions to ensure Mountain consumers protection from potential upstream financial issues that may occur with respect to Park through expansive corporate policies, possible inter-corporate transactions and financing issues.

Pursuant to these factual circumstances, the Commission must pierce the Park corporate veil in order to address the sale and transfer of Mountain in order to ensure protection and preservation of Mountain's consumers, water rights, assets, etc.

If the Commission does not utilize its statutory authority and powers to pierce the Park corporate veil, public utilities serving Montana customers

would be able to circumvent Montana laws and public utility regulatory supervision and control to the potential adverse detriment of Montana consumers. This could lead to creation of corporate entities that would then argue they were not subject to Commission jurisdiction. Avoidance of Commission jurisdiction concerning Mountain in these factual circumstances clearly is not an acceptable course of action for Missoula consumers.

Montana law provisions provide the Commission with ample authority and power to exercise in these specific factual circumstances. The Commission may require a review of the Park sale potential impacts on Mountain. Title 69, chapter 3, Montana Code Annotated pertains to the Commission regulation of utilities. Title 69, chapter 3, part 1 pertains in part to the role of the Commission. Mont. Code Ann. § 69-3-101(1) (e) statutorily defines the meaning of "public utility" as including corporations, companies, associations, etc. "that own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state" of Montana that serves the public. Since the proposed sale of Park clearly has Missoula public interest as well as potential future public consequences in Montana that affect the Missoula community at large, the Commission should be asserting its review jurisdiction. The Missoula community public interest and potential public consequences affecting the Missoula community at large serve as ample justification as well as a sound legal basis for asserting Commission jurisdiction pursuant to Sherlock v. Greaves, 106 M 206, 76 P. 2d 87 (1938).

Pursuant to Montana law, it is clearly appropriate that the Commission assert its supervisory regulatory control and review the proposed sale from one private owner to another private owner. Mont.

Code Ann. § 69-3-102 provides the Commission with full power of supervision, regulation and control of the public utilities subject to Commission jurisdiction.

Pursuant to Mont. Code Ann. § 69-3-103 the Commission in addition "shall have power to prescribe rules of procedure and to do all things necessary and convenient in the exercise of the powers conferred by" Title 69, chapter 3 MCA. Quite importantly, Mont. Code Ann. § 69-3-106 entitled "supervision of management of public utilities" empowers the Commission with "authority to inquire into the management of the business of all public utilities, shall keep itself informed as to the manner and method in which the business is conducted, and has the right to obtain from any public utility all necessary information to enable the Commission the power to perform its duties." Further, pursuant to Mont. Code Ann. § 69-3-106 the Commission "has the right to inspect the books, account, papers, record, and memoranda of any public utility and to examine under oath, any office, agent, or employee of the public utility in relation to its business and affairs."

### **III. STRONG COMMISSION RING-FENCING CONDITIONS PROTECTING MOUNTAIN OPERATIONS AND DEBT FINANCING ARE APPROPRIATE**

The Montana Consumer Counsel ("Counsel") has requested that the Commission establish certain ring-fencing conditions as part of any Commission approval of the proposed sale of Park stock to Carlyle. A stipulation has been agreed upon and signed by the Counsel, Mountain, Carlyle and the City. The City agrees and supports and encourages the Commission impose any and all ring fencing conditions that it deems necessary in order to protect Mountain assets and consumers.

#### **IV. THE COMMISSION MUST ENSURE THAT MONTANA'S CONSTITUTIONAL MANDATE IS PRESERVED AND PROTECTED PURSUANT TO THE SALE OF PARK**

Pursuant to Mont. Const. art. IX, § 3(3) WATER RIGHTS the Montana Constitution declares and mandates that:

**Section 3. Water Rights. . . . (3) All surface, underground, flood, and atmospheric waters within the state are the property of the state for the use of its people and are subject to beneficial uses as provided by law.**  
(Emphasis added.)

It is important that the Commission implement protective safeguards to ensure that Mountain's water generated within the boundaries of the State of Montana as well as water rights are utilized for the people of the Missoula community as part of the Missoula community's public water system. While Commission public hearing, Carlyle exhibit 3, is a letter of agreement between the City of Missoula, the Clark Fork Coalition and Carlyle Infrastructure Partners.; Carlyle is not requesting that it be approved by the Commission. See Hrg. Trancr. 20-21 (9/26/2011). However, it is still important that the Commission ensure protections and safeguards are in place with respect to some of the topics addressed in the letter agreement, such as water and water rights protection for the Missoula community.

#### **V. LETTER OF AGREEMENT, CITY COUNCIL RESOLUTION AND MAYOR JOHN ENGEN'S TESTIMONY PRE-HEARING AS WELL AS AT THE HEARING AND DATA RESPONSES ALL SUPPORT THE PROPOSED PARK SALE TRANSACTION**

Mayor Engen's pre-filed testimony, Missoula City Council Resolution 7657, Mayor Engen's data responses and Mayor Engen's testimony at the hearing all set forth support for the proposed Park sale transaction.

At the Tuesday, September 27, 2011 PSC public hearing in response to a question from Carlyle attorney Thor Nelson concerning Mayor Engen's support for the proposed letter agreement, Mayor Engen explained his reasoning stating:

Mr. Nelson, I characterize this agreement as having a place along the continuum that I describe as—it starts at impossible and ends at probable. Before this agreement, in light of these proceedings, I believe that the eventual purchase of this water system by the City of Missoula was impossible. I believe that this document gets us somewhere between possible and probable.

See Hrg. Transcr. 204-205 (9/27/2011).

Pursuant to the eighth WHEREAS of Resolution 7657 (Exhibit #3) the Missoula City Council identifies provisions of the letter agreement pursuant to five bullet points and then expresses support for the letter agreement in the first and second BE IT FURTHER RESOLVED provisions of the resolution. The eighth WHEREAS five bullet points in the resolution are:

- The City shall be afforded the opportunity to meet any offer to purchase Mountain Water, the Missoula water system or stock in Mountain Water.
- The City shall be afforded the opportunity to purchase the Mountain Water system if Mountain Water, Park Water or Park Water's parent company or the stock of any of those companies is proposed to be sold.
- The Carlyle Group agrees to consider in good faith any offer from the City to purchase Mountain Water at any time.
- Rattlesnake Creek will be used by Mountain Water as a backup supply only, with 90 days notice and consultation of any change in use.
- Mountain Water's water rights will not be diverted outside the Missoula area for use elsewhere.

City council resolution 7657 then goes on to state:

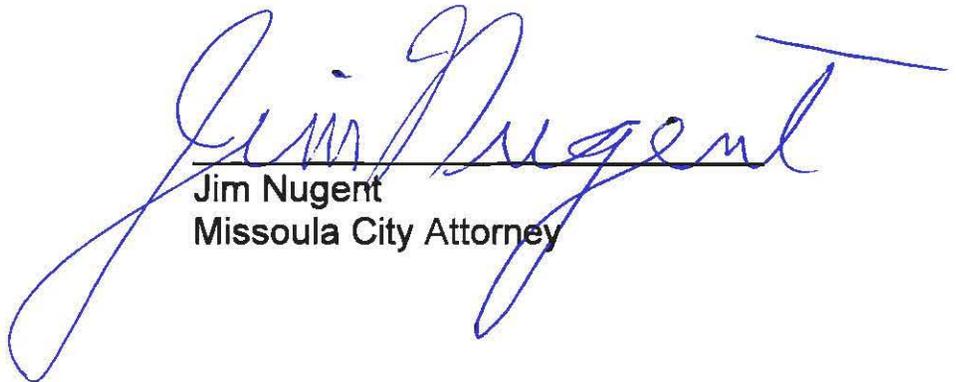
BE IT FURTHER RESOLVED that the City of Missoula City Council recognizes the Letter Agreement as an enforceable guarantee of a right of first refusal to purchase the water utility from the Carlyle Group; and

BE IT FURTHER RESOLVED that the Missoula City Council supports placing further stipulation, as requested by the Montana Consumer Counsel, on the sale of Mountain to the Carlyle Group to ensure clean, affordable and reliable drinking water for Missoula's residents.

## VI. CONCLUSION

Therefore, for all the reasons identified herein, including the documents referenced herein the City of Missoula supports the currently proposed sale of Mountain and urges the Commission to support the sale as well as the ring fencing stipulation along with all the necessary safe guards, protections and ring fencing that the Commission deems reasonably important for protecting the Missoula community's consumers and any and all of Mountain's assets located and/or utilized with respect to the operation of its Missoula community public water system.

RESPECTFULLY submitted this 1<sup>st</sup> day of November, 2011.



Jim Nugent  
Missoula City Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of November, 2011, I delivered a true and correct copy of the foregoing petition as follows:

Arvid Hiller  
Mountain Water Company  
PO Box 4826  
Missoula, MT 59806-4826

John Alke  
Hughes, Kellner, Sullivan & Alke  
[jalke@hkslaw.com](mailto:jalke@hkslaw.com)

Thorvald A. Nelson  
Holland & Hart LLP  
[tnelson@hollandhart.com](mailto:tnelson@hollandhart.com)

Kate Whitney  
Public Service Commission  
PO Box 202601  
Helena, MT 59620-2601  
(e-filed/original by mail)

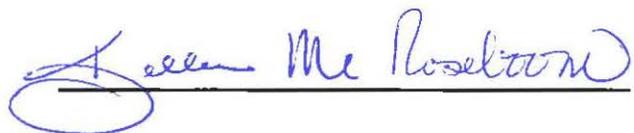
Robert A. Nelson  
Montana Consumer Counsel  
[robnelson@mt.gov](mailto:robnelson@mt.gov)

Bryan D. Lin  
The Carlyle Group  
[bryan.lin@carlyle.com](mailto:bryan.lin@carlyle.com)

Jim Larocque, CFA  
The Carlyle Group  
[jim.larocque@carlyle.com](mailto:jim.larocque@carlyle.com)

William Mercer  
Holland & Hart LLP  
[wwmerc@hollandhart.com](mailto:wwmerc@hollandhart.com)

Barbara Hall, Legal Director  
Clark Fork Coalition  
[barbara@clarkfork.org](mailto:barbara@clarkfork.org)

  
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