

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 ) REGULATORY DIVISION  
Petition by Mountain Water Company for )  
Declaratory Rulings and Application for ) DOCKET NO. D2011.1.8  
Approval of Sale and Transfer of Stock in )  
Park Water Company ) ORDER NO. 7149a

**ORDER GRANTING MOTION FOR PROTECTIVE ORDER**

**Background**

1. On May 19 and 20, 2011, the Montana Service Commission (Commission) staff, Montana Consumer Counsel (MCC), and the Clark Fork Coalition (CFC) sent data requests to Carlyle Infrastructure Partners, LP (Carlyle). The procedural order in this docket required Carlyle to object to discovery by May 31, 2011, or to respond by the same date.

2. Carlyle objected to PSC-009(e), PSC-010, PSC-020(d), CFC-014(a)-(e), and MCC-004.

3. On May 31, 2011, Carlyle responded to data requests and asserted that the information sought by the following data requests is confidential and would only be provided after entry of an appropriate protective order: PSC-014(a), PSC-014(d), PSC-020(d), CFC-002(a), CFC-002(b), CFC-002(c), CFC-003(a), CFC-013, CFC-019, MCC-001, and MCC-004.

4. On May 31, 2011, Carlyle filed a Motion for Protective Order (Motion) with the Commission. Carlyle sought protection for information requested by the Commission, MCC, and the CFC. Carlyle supported the motion with an Affidavit by Robert Dove (Dove Aff.). Carlyle asserted that the following items were trade secret and sought protection from public disclosure of:

- A. Carlyle's Private Placement Memorandum and Limited Partnership Agreements;

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- B. Carlyle's audited financial statements;
  - C. Carlyle's historic capital expenditures for Carlyle-acquired companies;
- and
- D. Carlyle's due diligence and financial analysis including the Investment Committee Memo regarding the proposed acquisition of Park Water.
5. The Commission noticed the motion in the Utility Division Agenda.
  6. No intervenor or member of the public commented on the motion.

### **Discussion, Analysis, Findings, and Conclusions**

7. A corporation seeking a protective order for materials filed with a regulating governmental agency must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 56. The claimant's showing must be more than conclusory. It must be specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the claims to the right of confidentiality. *Id.*

8. The Montana Supreme Court has ruled, "A non-human entity seeking protective orders or other protective measures for materials filed with a regulating governmental agency, such as the PSC, must support its claim of confidentiality by making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements." *Great Falls Tribune v. Public Serv. Comm'n*, 2003 MT 359, ¶ 56, 319 Mont. 38, ¶ 56, 82 P.3d 876, ¶ 56.

9. The Commission has implemented the Court's ruling through amendment or repeal of administrative rules concerning protective orders. *See* ARM 38.2.5001 – 5030.

10. If information is determined by a governmental agency or reviewing authority to qualify as a property right in the form of a trade secret which warrants due process protection, secrecy can be preserved by the agency through reasonable means, including a protective order. *Great Falls Tribune*, 319 Mont. 38, ¶62, 82 P.3d 876, ¶62.

11. "Trade secret" is defined by § 30-14-402, MCA, as "information or

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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."

12. A party requesting a protective order based on trade secret must demonstrate that "(i) prior to requesting a protective order, the [party] has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission's possession; (ii) the claimed trade secret material is information; (iii) the information is in fact secret; (iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (v) the secret information is not readily ascertainable by proper means; and (vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy." ARM 38.2.5007(4) (b).

13. In its motion, Carlyle stated that it "has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the PSC's possession." Motion at 2.

14. "'Information' 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 are attachments to such items, or in response to discovery, subpoena, order, audit, investigation, or other request." ARM 38.2.5001(3). For each of the items, Carlyle stated, "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..." Motion at 5.

15. Carlyle represented that each of the items is in fact secret. For each of the items, Carlyle stated, "Carlyle protects such information by whatever means available." Motion at 5. Carlyle represented that itself and its competitors operate in a highly competitive sector, and maintaining the secrecy of this information is crucial to Carlyle's success in the marketplace.

16. For the items, Carlyle stated, "Acting pursuant to normal industry practice,

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Carlyle protects the confidential information by whatever means available.” “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.” Motion at 6.

17. Carlyle stated, “Since the information to be protected is not within the public domain, it is not readily ascertainable by any other person or entity. . . . No one could reasonably ascertain this information through a public source.” Motion at 6.

18. The Commission determines that the requested items are information, they are secret, they are subject to reasonable efforts to maintain its secrecy, and they are generally not readily ascertainable.

19. The key factor at issue here in the trade secret analysis is whether the information that Carlyle is seeking to protect, derives independent economic value from its secrecy or that competitive advantage is derived from its secrecy. Motion at 7.

**Private Placement Memorandum, Subscription Documents and Partnership Agreements - PSC-014(a), CFC-002(a), CFC-002(b), and CFC-003(a)**

20. PSC-014(a) requests copies of the private placement or confidential offering memorandum, subscription documents, and partnership agreements, if any.” CFC-002(a) requests Carlyle’s private placement memorandum and any related supplements. CFC-002(b) requests Carlyle’s Main Fund Composite Limited Partnership Agreement. CFC-003a requests Carlyle Infrastructure Partners Western Water, LP Limited Partnership Agreement.

21. Carlyle argues that the Private Placement Memorandum, subscription documents, and partnership agreements derive independent economic value from its secrecy or a competitive advantage is derived from its secrecy. The Private Placement Memorandum and Limited Partnership Agreements were created through resource and time intensive work by Carlyle, its principals, and numerous legal and tax advisors. These documents contain sensitive information regarding investment management fees, performance incentives, and investment strategies. Carlyle and its investors are able to maximize their returns as a result of this diligent and costly decision-making process. This information constitutes the formula by which Carlyle manages its fund investments. If this data is revealed to Carlyle’s competitors, it will be easier for competitors to

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duplicate investment terms and strategies to obtain significant economic value for the firm and its clients. Disclosure of this information would thereby significantly disadvantage Carlyle's efforts to conduct business. It would also cause economic harm by causing Carlyle to possibly lose existing clients and have difficulty soliciting new investors. The Commission has previously granted trade secret protection for documents provided to prospective purchasers of a utility used as part of a strategic review of the investment opportunity. Joint Application of NorthWestern Corporation and Babcock & Brown Infrastructure Limited, Docket D2006.6.82, Order No. 6754a.

22. The Commission finds that Carlyle has made a *prima facie* showing that the private placement or confidential offering memorandum, subscription documents, and partnership agreements have independent economic value from not being generally known and are trade secrets subject to protection from disclosure.

**Audited Financial Statements – PSC-014(d), CFC-002(c), MCC-001**

23. PSC-014(d) requests copies of the most recent audited financial statements. CFC-002(c) requests Carlyle's most recent audited financial statements. MCC-001 requests the complete financial statements, including all footnotes, for Carlyle for the two most recent years available.

24. The alternative investment management sector, which Carlyle is involved in, is highly competitive. The information requested, if revealed to competitors, would disclose tax structuring, investment management fees, performance incentives and other key pieces in Carlyle's business plan through the information contained in the financial statements. This information and business strategies create Carlyle's unique fund investment product and establish its economic value and competitive role in the marketplace. All of Carlyle's entities are privately-held and the disclosure of audited financial statements is not required pursuant to securities regulations or other laws. While publicly traded companies are required pursuant to securities regulations to have audited financial statements available to the public and investors, private equity companies, like Carlyle, provide substantially less information to the public. While Carlyle does make available an annual report on its website, the report provides very little financial information about the company and its operations.

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25. The Commission finds that Carlyle has made a *prima facie* showing that Carlyle's audited financial statements, as a private equity company, have independent economic value from not being generally known and are trade secrets subject to protection from disclosure.

**Capital Expenditure Levels – PSC-020(d)**

26. PSC-20(d) requests that for each of the four Carlyle-acquired companies; please provide 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. Carlyle has since confirmed that the updated number of acquired companies is five. Carlyle argues that 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. Carlyle's portfolio companies are all unregulated and operate in a competitive business environment. These companies are not monopolies in their respective market, unlike Mountain Water. Public disclosure of non-regulated companies' capital spending activities would provide their business competitors with trade-secret information and thereby compromise Carlyle's competitive position at the benefit of its competitors.

27. The Commission finds that Carlyle has made a *prima facie* showing that the capital expenditure levels of Carlyle's five non-regulated portfolio companies have independent economic value from not being generally known and are trade secrets subject to protection from disclosure.

**Due Diligence and Valuation – CFC-013, CFC-019, MCC-004**

28. CFC-013 requested the 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

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request will consist of the Carlyle Investment Committee Memo regarding the acquisition of Park Water. CFC-019 requested 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. Finally, MCC-004 requested that Carlyle 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.

29. Carlyle argues that the Carlyle Investment Committee Memo contains information whose value is derived from not being generally known to the public, including Carlyle's competitors. The Investment Committee Memo and the associated discussion of the Carlyle due diligence process and valuation of Park Water are proprietary and highly confidential. It is commercially valuable because it contains information regarding Carlyle's investment approach, strategies, and other commercially sensitive information regarding the Park Water asset.

30. In particular, the Memo could be used by competitors and future acquisition targets to gain an economic advantage through the insights they could gain into how Carlyle views its investment options, the metrics Carlyle relies upon to decide whether or not to make an investment, the prices Carlyle is willing to pay for an investment, and the process Carlyle uses before making an investment. Carlyle relies on the secrecy of this information to prevent competitors and potential acquisition targets from gaining an unfair advantage in negotiations. The Commission has previously granted trade secret protection for an Acquisition Model to determine an appropriate purchase price for a target entity, but not the critical inputs and results of the model. Joint Application of NorthWestern Corporation and Babcock & Brown Infrastructure Limited, Docket D2006.6.82, Order No. 6754a.

31. The Commission finds that Carlyle has made a *prima facie* showing that the due diligence, analysis, and modeling conducted by Carlyle or any of its subsidiaries

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corroborating the decision to purchase Park have independent economic value from not being generally known and are trade secrets subject to protection from disclosure.

32. Carlyle has made a *prima facie* showing that information described in Items A through D, derives independent economic value from its secrecy, which as property rights, is protected under constitutional due process requirements.

**Order**

THEREFORE, based upon the foregoing, it is ORDERED that:

1. Carlyle's Motion for Protective Order covering: Information detailed in Paragraph 4, Items A, B, C, and D is GRANTED.
2. Carlyle must produce the information consistent with this Protective Order as soon as possible after the non-disclosure agreements are filed with the Commission. The parties requesting the confidential information must complete and file non-disclosure agreements as soon as possible after the protective order is issued.

Done and dated this 21st day of June 2011 by a vote of 4-1.

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BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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TRAVIS KAVULLA, Chairman

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GAIL GUTSCHE, Vice Chair

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BILL GALLAGHER, Commissioner

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BRAD MOLNAR, Commissioner (Dissenting)

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JOHN VINCENT, Commissioner

ATTEST:

Verna Stewart  
Commission Secretary

(SEAL)

NOTE: There is no reconsideration of the granting of a protective order. There is a procedure to challenge the provider's claim of confidentiality. See ARM 38.2.5008

Protective Orders and Protection of Confidential Information

**Nondisclosure Agreement**

ARM 38.2.5012

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Order Action Date: June 21, 2011

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

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Typed or Printed Name

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Signature

\_\_\_\_\_  
Date of Signature

Business Address:  
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\_\_\_\_\_  
Employer

\_\_\_\_\_  
Party Represented

