

Ordinance Number 3509

An Ordinance of the City of Missoula, Missoula County, Montana, Providing Notice to The Carlyle Group that the City Desires to Purchase the Water System Owned by The Carlyle Group and Operated by Mountain Water Company; Authorizing the Mayor to Enter Into Negotiations to Acquire such Water System; Determining to Acquire such Water System Either by Purchase or by Eminent Domain; and Providing for Other Matters Properly Relating Thereto

**CITY OF MISSOULA
Missoula County, Montana**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MISSOULA, MISSOULA COUNTY, MONTANA, as follows:

WHEREAS, the City of Missoula, Missoula County, Montana (the "City"), is a municipality duly organized and existing under and by virtue of the Constitution and the laws of the State of Montana (the "State") now in force;

WHEREAS, the public water supply (including wells and Rattlesnake Creek), transmission and distribution system that provides water service to the City and its residents (the "System") is owned by Mountain Water Company (a Montana corporation and a wholly-owned subsidiary of Park Water Company, a California corporation), which was formed in 1979 to acquire the System from Montana Power Company;

WHEREAS, Park Water Company and Mountain Water Company were acquired in 2011 by The Carlyle Group, which is one of the largest hedge funds in the world, through its subsidiary Carlyle Infrastructure Partners LP, pursuant to Final Order No. 7149d of the Public Service Commission of the State (the "PSC") dated December 14, 2011 (the "Final PSC Order");

WHEREAS, in consideration of the agreement by the City and the Clark Fork Coalition to support the sale of Park Water Company and Mountain Water Company to The Carlyle Group in testimony to the PSC, the City, the Clark Fork Coalition and The Carlyle Group, entered into a letter agreement, dated September 22, 2011, which is attached to the Final PSC Order as Attachment A, wherein, among other things, The Carlyle Group agreed to consider in good faith any offer from the City to purchase the System in its entirety, or the stock in Mountain Water Company, at any time (the "Letter Agreement");

WHEREAS, MCA § 7-13-4402 provides that the City Council of the City (the "Council") has the power to adopt, enter into, and carry out the means for securing a supply of water for the use of the City or its inhabitants;

WHEREAS, pursuant to MCA § 7-13-4403, whenever a franchise has been granted to or a contract made with any person or persons, corporation, or corporations and such person or persons, corporation, or corporations, in pursuance thereof or otherwise, have established or maintained a system of water supply or have valuable water rights or a supply of water desired by a city for supplying the city with water, the city granting such franchise or entering in such contract or desiring such water supply shall, by the passage of an ordinance, give notice to such person or persons, corporation, or corporations that it desires to purchase the plant and franchise and water supply of such person or persons, corporation or corporations;

WHEREAS, MCA § 7-13-4403 further provides that the City shall have the right to so purchase the plant or water supply upon such terms as the parties agree;

WHEREAS, MCA § 7-13-4404 provides that if such agreement is not reached pursuant to MCA § 7-13-4403, then the City shall proceed to acquire the plant or water supply by eminent domain pursuant to Title 70, chapter 30 of the MCA;

WHEREAS, as stated in Mayor Engen's (the "Mayor") testimony to the PSC, as included in the Final PSC Order, clean, safe drinking water is a fundamental resource and should be provided by a municipally-owned public utility;

WHEREAS, City ownership and operation of the System would provide increased accountability and accessibility for customers of the System as rates would be established by the Council, which is elected by residents of the City;

WHEREAS, City ownership and operation of the System would provide increased accountability and accessibility for customers of the System as the compensation paid to System employees, like all City employees, would become public;

WHEREAS, as indicated in a 2005 Growth Policy Survey, maintaining or improving water quality is a high priority for City residents;

WHEREAS, the City has grown significantly over the past decades, including a 14.1 percent population increase from 2001 to 2011, and such population growth places a greater burden on the City's water resources;

WHEREAS, The Carlyle Group effectively charges the rate payers of the System for the expenses associated with its administrative and executive personnel in California, a state with significantly higher compensation, benefits and facility costs than the City;

WHEREAS, after decades of experience owning and operating its wastewater treatment facility efficiently, the City has the management capability and expertise to operate the System and plans to use its existing administrative infrastructure to provide administrative services at a reduced cost;

WHEREAS, the City, unlike the current owners of the System, would not be under an obligation to make a profit and divert System revenues to shareholders and would therefore be able to operate the System more efficiently and use System revenues to invest in capital improvements to the System;

WHEREAS, based on The Carlyle Group's testimony included in the Final PSC Order that The Carlyle Group's ownership of Mountain Water Company will be short term and that The Carlyle Group will attempt to recover an acquisition premium through its sale of the System, the City and its residents have continued uncertainty regarding the System as The Carlyle Group could be the first in a series of short-term, out-of-state owners of the System;

WHEREAS, hedge funds like The Carlyle Group derive much of their investment return through "financial engineering," including by leveraging their investments to the maximum extent possible, which undermine the stability of the System, the owners' ability to maintain the System and invest in improvements, and the solvency of the System in cyclical down turns, as illustrated by the recent bankruptcy of Synagro Technologies, a Baltimore-based waste recycler which was purchased by The Carlyle Group in 2007 with debt financing;

WHEREAS, the City has a greater interest in conservation and long-term access to water than an owner whose primary interest in the System is as a short-term investment;

WHEREAS, the City has determined that it is in the best interest of the City and its residents for the City to acquire the System, whether through purchase from The Carlyle Group or by eminent domain;

WHEREAS, pursuant to MCA §7-13-4403, the City has determined to provide notice to The Carlyle Group, as the owner of the entities that own and operate the System, that it desires to purchase the System;

WHEREAS, the City has determined to enter into negotiations with The Carlyle Group with respect to the purchase price for the System in order to present an offer to the Carlyle Group to purchase the System in its entirety, or the stock in Mountain Water Company which, pursuant to the Letter Agreement, The Carlyle Group has agreed to consider in good faith; and

WHEREAS, if such offer is not accepted by The Carlyle Group, and if the City and The Carlyle Group are not able to reach agreement on the terms of the sale of the System in its entirety, or the stock in Mountain Water Company, then the City has determined to proceed to acquire the System by eminent domain pursuant to Title 70, chapter 30 of the MCA, as provided by MCA §7-13-4404.

NOW, THEREFORE, IT IS HEREBY FOUND, DETERMINED AND ORDERED as follows:

Section 1: Notice of City desire to Purchase the System

The City hereby determines that it is in the best interest of the City and its residents for the City to acquire the System. The Mayor is hereby authorized and directed to give notice to The Carlyle Group of the City's desire to purchase the System.

Section 2: Offer to Purchase

The City hereby determines that it is in the best interest of the City and its residents that the City present an offer to the Carlyle Group to purchase the System in its entirety, or the stock in Mountain Water Company which, pursuant to the Letter Agreement, The Carlyle Group has agreed to consider in good faith. The Mayor is hereby authorized and directed to enter into negotiations with The Carlyle Group with respect to the purchase price for the System, and to present to the Council for its approval, an offer from the City to the Carlyle Group to purchase the System in its entirety, or the stock in Mountain Water Company.

Section 3: Authorization to Proceed with Eminent Domain

If the City is unable to reach an agreement with The Carlyle Group to purchase the System in its entirety, or the stock in Mountain Water Company, then the City shall proceed to acquire the System by eminent domain pursuant to Title 70, chapter 30 of the MCA.

Section 4: Professional Engagements

The City hereby determines that as part of its efforts to pursue the acquisition of the System in its entirety, or the stock in Mountain Water Company, it would be advisable to secure the advice and services of various legal, financial and engineering professionals that have the requisite expertise in such acquisitions. The City has been advised of the professionals who have indicated a willingness to assist the City on a contingent-fee basis, with no fees to be paid unless and until such acquisition is successful in whole or in part. Therefore, the Mayor is hereby authorized to negotiate and enter into engagement agreements with such professionals as he deems necessary, provided that with the exception of the engagement of Perkins Coie LLP (which firm shall be paid on an hourly-fee basis), and the payment of the ongoing costs of such other professionals (e.g. travel, telephone, etc.), no such agreement shall obligate the City to pay any professional fees unless and until the System has been acquired, as such acquisition may be defined in the relevant engagement agreements.

Section 5: Ratification

All actions not inconsistent with the provisions of this Ordinance heretofore taken by the Council and the City's officers, employees and agents in connection with the passage of this Ordinance and the acquisition of the System by the City are hereby and in all respects ratified, approved and confirmed.

Section 6: No Personal Recourse

No recourse shall be had for any claim based on this Ordinance against any Council member or the City, nor any officer or employee, past, present or future, of the City or of any successor body as such, either directly or through the City or any such successor body, under any constitutional provision, statute or rule of law or by the enforcement of any assessment or penalty or otherwise.

Section 7: Effective Date

This Ordinance shall be in full force and effect from and after 30 days after its date of passage.

PASSED by the City Council of the City of Missoula, Montana, at a regular meeting thereof, held this 21st day of October, 2013.

CITY OF MISSOULA
Missoula County, Montana

/s/ John Engen
John Engen,
Mayor

ATTEST:

/s/ Martha L. Rehbein
Martha L. Rehbein, CMC
City Clerk

(S E A L)

CERTIFICATE AS TO ORDINANCE AND ADOPTING VOTE

I, the undersigned, being the duly qualified and acting recording officer of the City of Missoula, Missoula County, Montana (the "City"), hereby certify that the attached ordinance is a true copy of an ordinance entitled: "An Ordinance of the City of Missoula, Missoula County, Montana, Providing Notice to The Carlyle Group that the City Desires to Purchase the Water System Owned by The Carlyle Group and Operated by Mountain Water Company; Authorizing the Mayor to Enter Into Negotiations to Acquire such Water System; Determining to Acquire such Water System Either by Purchase or by Eminent Domain; and Providing for Other Matters Properly Relating Thereto" (the "Ordinance"), on file in the original records of the City in my legal custody; that the Ordinance was duly adopted by the City Council of the City at a meeting on October 21, 2013, and that the meeting was duly held by the City Council and was attended throughout by a quorum, pursuant to call and notice of such meeting given as required by law; and that the Ordinance has not as of the date hereof been amended or repealed.

I further certify that, upon vote being taken on the Ordinance at such meeting, the Ordinance was adopted by the following vote:

AYES, and in favor thereof: Childers, Copple, Jaffe, Marler, O'Herron, Strohmaier, Taft, Wiener, Wilkins and Wolken

NAYS: Haines, Hertz,

ABSENT: None

ABSTAIN: None

WITNESS my hand officially this 21st day of October, 2013.

/s/ Martha L. Rehbein
Martha L. Rehbein, CMC
City Clerk

(S E A L)