

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 08A-373W

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IN THE MATTER OF THE APPLICATION OF GRIZZLY PEAK WATER SALES AND DISTRIBUTION, LLC, REQUESTING, AMONG OTHER THINGS, AN ORDER GRANTING GRIZZLY PEAK WATER SALES AND DISTRIBUTION, LLC: (1) A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE SEWER SERVICE IN DESIGNATED AREAS WITHIN SAN JUAN COUNTY, COLORADO; (2) A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONTRACT, MAINTAIN, OWN AND OPERATE SEWER FACILITIES NECESSARY TO PROVIDE SEWER SERVICE IN AND TO SUCH AREAS; AND (3) APPROVAL OF INITIAL RATES AND TERMS AND CONDITIONS OF SERVICE TO SUCH AREAS PURSUANT TO THE COMMISSION'S PROCEDURES FOR SIMPLIFIED REGULATORY TREATMENT.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
GRANTING MOTION TO SUBSTITUTE APPLICANT;  
DISMISSING MILL CREEK AS A PARTY; CHANGING  
NAME OF DOCKET; GRANTING APPLICATION IN PART  
AND SUBJECT TO CONDITIONS; GRANTING  
CERTIFICATE OF PUBLIC CONVENIENCE AND  
NECESSITY, SUBJECT TO CONDITIONS; REQUIRING  
APPLICANT TO FILE ADVICE LETTER;  
PERMITTING COUNSEL TO WITHDRAW; AND  
ADDRESSING OTHER MOTIONS AND REQUESTS**

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Mailed Date: July 12, 2011

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## **I. STATEMENT**

### **A. Procedural History.**

1. On August 13, 2008, Mill Creek Water Sales and Distribution, LLC (Mill Creek), filed a Verified Application. In that filing, Mill Creek asked the Commission: (a) to grant it a Certificate of Public Convenience and Necessity (CPCN) to provide sewer service within a designated area in San Juan County, Colorado; (b) to grant it a CPCN to construct, to own, to operate, and to maintain facilities necessary to provide that sewer service; (c) to approve proposed tariff sheets containing terms, conditions, and rates for sewer service; and (d) to waive Commission rules.<sup>1</sup> That filing commenced this proceeding.

2. On August 14, 2008, the Commission issued a Notice of Application Filed (Notice). The Notice established an intervention period. The Notice also established a procedural schedule, which was vacated by Decision No. R08-1005-I.

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<sup>1</sup> The Application (including exhibits) is Hearing Exhibit No. 1.

3. The following parties intervened in this proceeding: Breeze Energy LLC, Breeze Investments LLC, Bush Mountain LLC, and James A. Bush Living Trust (collectively, Bush Mountain *et al.*);<sup>2</sup> Cascade Village Condominium Association-2004 and Robert Oppenheimer (collectively, Cascade Village);<sup>3</sup> and Staff of the Commission (Staff).<sup>4</sup>

4. Bush Mountain *et al.*, Cascade Village, and Staff, collectively, are the Intervenors.

5. By Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

6. By Decision No. R08-1091-I, the ALJ scheduled a prehearing conference, the evidentiary hearing, and a hearing to take public comment in this matter. In that Order, the ALJ also established the procedural schedule for this case and the procedures for the hearing to take public comment.

7. On October 6, 2008, Mill Creek filed a Verified Emergency Application. By Decision No. R08-1196-I, the ALJ treated that filing as a motion for interim relief and granted, in part and subject to conditions, the interim relief sought. This is discussed in detail below.

8. The hearing to take public comment (public comment hearing) was held at the time and in the location scheduled. Although the public comment hearing was publicized, no member of the public appeared to present testimony.

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<sup>2</sup> Bush Mountain *et al.* are intervenors by right. Decision No. R08-1005-I.

<sup>3</sup> Cascade Village and Mr. Oppenheimer are intervenors by right. Decision No. R08-1005-I.

<sup>4</sup> Staff is an intervenor by right.

9. The evidentiary hearing was held as scheduled. The ALJ heard the testimony of five witnesses. Mill Creek presented the testimony of Mr. Terry J. Westemeir<sup>5</sup> and Ms. Karla M. Hanlon.<sup>6</sup> Cascade Village presented the testimony of Dr. Cornelius W. Corssmit.<sup>7</sup> Staff presented the testimony of Ms. Pamela M. Fischhaber<sup>8</sup> and Mr. Randy Garrouette.<sup>9</sup> By written testimony admitted by stipulation, Bush Mountain *et al.* presented the testimony of Mr. James A. Bush.<sup>10</sup> None of the testimony is confidential.

10. Hearing Exhibits No. 1 through No. 4, No. 10, No. 14, No. 19, and No. 21 through No. 59 were identified, offered, and admitted into evidence.<sup>11</sup> None of the exhibits is confidential.

11. At the conclusion of the evidentiary hearing, the ALJ took the matter under advisement.

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<sup>5</sup> Mr. Westemeir is a partner with Woodrum, Kemendo, Tate & Westemeir, PLLC (an accounting firm), and an owner/member of The Analytics Group, LLC. He provides contract management services to Mill Creek, and his title at Mill Creek is Manager/Chief Operating Officer. His direct testimony and exhibits are Hearing Exhibit No. 10. His rebuttal testimony and exhibits are Hearing Exhibit No. 19.

<sup>6</sup> Ms. Hanlon provides contract services to Mill Creek as its Chief Financial Officer. Her direct testimony and exhibits are Hearing Exhibit No. 21.

<sup>7</sup> Dr. Corssmit is Vice President of Malcolm Pirnie, Inc., a multidisciplinary environmental engineering and consulting firm, the clients of which are water, wastewater, and storm water utilities. Within Malcolm Pirnie, Inc., Dr. Corssmit works in the Red Oak Consulting division in the Financial Services Group. That group specializes in rate studies, financial planning, and management consulting services for municipal utilities and special districts. His testimony and schedules are Hearing Exhibit No. 23.

<sup>8</sup> Ms. Fischhaber is employed by the Commission as Chief of the Rail/Transit Safety Section and Senior Professional Engineer. At the time of the hearing, Ms. Fischhaber was also Chief of the Commission's Water Section. Her testimony and exhibits are Hearing Exhibit No. 24.

<sup>9</sup> At the time of the hearing, Mr. Garrouette was employed by the Commission as a Financial Analyst. (Mr. Garrouette subsequently left the Commission's employ.) His testimony and exhibits are Hearing Exhibit No. 25.

<sup>10</sup> Mr. Bush is the manager of the entities that comprise Bush Mountain *et al.* His testimony is Hearing Exhibit No. 22. Mr. Bush did not present oral testimony.

<sup>11</sup> Hearing Exhibits No. 5 through No. 9, No. 11 through No. 13, No. 15 through No. 18, and No. 20 were marked, were offered, and were not admitted.

12. Mill Creek, Bush Mountain *et al.*, Cascade Village, and Staff each filed a statement of position. Mill Creek and Staff each filed a response statement of position.

13. By Decision No. R09-0509, the ALJ dismissed the Application without prejudice for lack of subject matter jurisdiction. By Decision No. C09-0734, the Commission found that the Commission has subject matter jurisdiction; reversed Decision No. R09-0509; and remanded this case to the ALJ for a determination on the merits.

14. On August 7, 2009, Bush Mountain *et al.* filed a Notice of Appointment of Receiver. Appended to that filing was the Order entered on July 30, 2009 by the District Court, San Juan County (San Juan County District Court) in Case No. 2009 CV 7. In that Order, as pertinent here, the San Juan County District Court ordered:

Defendants [Mill Creek Lodge Estates, Mill Creek Water Sales and Distribution, LLC,] and J. Randall Miller shall immediately and upon the execution of this Order turn over possession and control of all bank accounts and any other accounts, cash assets, accounts receivable and payable, ... contracts, agreements, billings, records, invoices, operation of the sewer plant located on Tract F, operation of any water plants or water services, and any and all other collateral to

Legacy Real Estate Investments LLC, which was the plaintiff in that action, and to Paul Williams, who is the Court-appointed Receiver.<sup>12</sup> Order dated July 30, 2009 at Ordering Paragraph No. 2.

15. As a result of the Bush Mountain *et al.* filing, the ALJ issued Decision No. R09-0890-I, in which she ordered Mill Creek, Bush Mountain *et al.*, Cascade Village, and Staff to make filings to explain the circumstances that led to the appointment of the receiver in Case Number 09 CV 7 in San Juan County District Court. In addition, the ALJ requested legal briefs addressing: (a) the Commission's jurisdiction in light of the appointment of a receiver;

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<sup>12</sup> Mr. Williams was appointed pursuant to Colorado Rule of Civil Procedure 66.

(b) whether, in light of the appointment of a receiver, Mill Creek is the owner of the facilities and records pertaining to providing sewer service; (c) whether, in light of the appointment of a receiver, either the receiver or Legacy Real Estate Investments LLC, or both, are necessary parties in the instant Commission docket; and (d) any other receivership-related issue that, in the opinion of the filing party, ought to be considered in this proceeding.

16. Mill Creek and Bush Mountain *et al.* each filed an explanation of the circumstances surrounding the appointment of the receiver and documents pertaining to those circumstances and the receiver's appointment.<sup>13</sup> In addition, Mill Creek, Bush Mountain *et al.*, Cascade Village, and Staff each filed a legal brief addressing the issues identified in Decision No. R09-0890-I. Mill Creek, Bush Mountain *et al.*, and Staff each filed a response legal brief on these issues.

17. For the reasons discussed below, the ALJ will grant the Motion to Substitute Grizzly Peak Water Sales and Distribution, LLC, for Mill Creek. Granting that motion renders moot the issues raised in Decision No. R09-0890-I. Consequently, the ALJ will not discuss the filings made in response to Decision No. R09-0890-I and will make no determinations with respect to those identified issues.

18. By Decision No. R09-0972-I, the ALJ permitted Joy L. Frame, Esquire, to withdraw as counsel for Mill Creek and informed Mill Creek that it must be represented by counsel in this matter. Subsequently, Lloyd W. Landreth, Esquire, entered his appearance on behalf of Mill Creek.

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<sup>13</sup> Attached as exhibits to these filings, among other documents, were: (a) the \$ 2,000,000 Secured Term Loan Agreement dated April 25, 2006 and related documents dated April 25 and 26, 2006; (b) the First Amendment to \$ 2,000,000 Secured Term Loan Agreement dated February 21, 2007 and related documents; (c) the Promissory Note for \$ 1,000,000 dated February 21, 2007; (d) the Foreclosure Agreement dated June 19, 2009; and (e) the Complaint for Judicial Foreclosure En Masse filed in District Court, San Juan County.

19. On April 14, 2011, Jeffrey G. Pearson, Esquire, and Mark D. Detsky, Esquire, filed, in one document, a Notice of Withdrawal of Counsel and Entry of Appearance and Substitution of New Counsel (April 14 Notice). In that filing, pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 734-1-1201, Mr. Pearson gives notice that he withdraws as counsel for Cascade Village. In that filing, Mr. Detsky enters his appearance for Cascade Village. In accordance with Rule 4 CCR 723-1-1201(d), both Mr. Pearson and Mr. Detsky state that

they have properly notified and received the consent of [Cascade Village] to effectuate [the] withdrawal by Mr. Pearson, the entry of appearance by Mr. Detsky, and Mr. Detsky's substitution for Mr. Pearson.

April 14 Notice at 1. Counsel for Cascade Village served the April 14 Notice on all parties. No response was filed.

20. The client has consented to the withdrawal and substitution, the client has new legal counsel in this matter, and the Rule 4 CCR 723-1-1201(d) requirements have been met. Consequently, the ALJ will permit Mr. Pearson to withdraw as counsel. As of April 14, 2011, Mr. Pearson is no longer the counsel of record for Cascade Village. As of that date, Mr. Detsky is counsel of record for Cascade Village.

**B. Motion of Grizzly Peak to Substitute Parties.**

21. On March 16, 2011, Grizzly Peak Water Sales and Distribution, LLC (Grizzly Peak),<sup>14</sup> filed a Motion to Substitute Grizzly Peak Water Sales and Distribution, LLC, as the

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<sup>14</sup> Grizzly Peak is a Colorado limited liability company formed by Mr. James A. Bush. Mr. Bush manages the intervenors referred to as Bush Mountain *et al.* in the instant proceeding.

Moving Party (Motion to Substitute). In that filing, Grizzly Peak seeks to substitute itself for Mill Creek and, thus, to become the applicant in this proceeding.

22. As support for the Motion to Substitute, Grizzly Peak relies on Decision No. C11-0163,<sup>15</sup> issued on February 14, 2011 in Docket No. 10A-168W.<sup>16</sup> In Ordering Paragraph No. 4 of Decision No. C11-0163, the Commission ordered Grizzly Peak “to make the necessary filings in Docket No. 08A-373W to achieve a substitution of applicant[.]” The Commission found that Grizzly Peak needs to be substituted for Mill Creek as the applicant in the instant proceeding in order

for Grizzly Peak to carry out its promise under the [Stipulation and Settlement Agreement approved by Decision No. R10-1363] to “seek approval to have the interim sewer rates fixed as permanent as part of the pending proceeding in Docket No. 08A-373W” (quoting from Decision No. R10-1363, ¶ 49) and to make investments and to work with the Colorado Department of Public Health and Environment “to bring the Mill Creek wastewater treatment facilities into compliance with state requirements.”

Decision No. C11-0163 at ¶ 25.<sup>17</sup>

23. Grizzly Peak argues that Decision No. C11-0163 is administratively final and, pursuant to § 40-6-112(2), C.R.S., is “not subject to collateral attack or additional review in” the instant proceeding. Grizzly Peak’s April 18, 2011 Response to Filings by Mill Creek

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<sup>15</sup> Decision No. C11-0163 is a decision denying Mill Creek’s application for rehearing, reargument, or reconsideration of Decision No. R10-1363. Decision No. R10-1363 became a Commission decision by operation of law.

<sup>16</sup> Docket No. 10A-168W is *In the Matter of the Joint Application of Mill Creek Water Sales and Distribution, LLC, through its Receiver, and Grizzly Peak Water Sales and Distribution, LLC, for Approval of the Transfer of PUC Certificates of Public Convenience and Necessity and Related Assets and for Waiver of Certain Commission Rules*. This Decision refers to Docket No. 10A-168W as the Transfer Docket.

<sup>17</sup> The Stipulation and Settlement Agreement (Stipulation) approved in the Transfer Docket by Decision No. R10-1363 is filed in the instant proceeding as Exhibit 1 to Grizzly Peak’s April 11, 2011 Response to Decision No. R11-0294-I issued March 18, 2011. The ALJ discusses *infra* the substance of the Stipulation and the impact of the Stipulation on the issues in this proceeding. The Stipulation is appended to this Decision as Attachment 1.



(Grizzly Peak April 18 Response) at 2.<sup>18</sup> This is true, according to Grizzly Peak, notwithstanding the fact that Mill Creek has filed a complaint in the District Court, City and County of Denver (Denver District Court) seeking review of, and relief from, the Commission's decision in Docket No. 10A-163W.<sup>19</sup> Grizzly Peak April 18 Response at 2.

24. Cascade Village requests that the ALJ grant the Motion to Substitute as a step toward affirmation and implementation of the Stipulation approved in Docket No. 10A-168W. Cascade Village's April 18, 2011 Response to Decision No. R11-0294-I (Cascade Village April 18 Response) at 13 and 17.

25. Staff does not object to the Motion to Substitute given the Commission's "clear expectation that Grizzly Peak would be substituted for Mill Creek in this Docket in order to implement the terms of the Stipulation." Staff's April 18, 2011 Response to Decision No. R11-0294-I (Staff April 18 Response) at 1

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<sup>18</sup> On April 25, 2011, Mill Creek filed a Motion to Strike the Unsolicited and Misleading Response to Filings by Mill Creek Water Sales and Distribution, LLC of Grizzly Peak Water Sales & Distribution, LLC dated April 18, 2011 (Mill Creek Motion to Strike). On May 9, 2011, Grizzly Peak filed its response in opposition to the Mill Creek Motion to Strike.

The ALJ will deny the Mill Creek Motion to Strike because, as argued by Grizzly Peak, the ALJ specifically allowed Grizzly Peak to file, on or before April 18, 2011, a reply to responses filed to the Motion to Substitute. Decision No. R11-0332-I at ¶ 9 and Ordering Paragraph No. 5. The argument that the Grizzly Peak April 18 Response was unsolicited is unavailing. As additional grounds for denying the motion, the ALJ finds that the Mill Creek Motion to Strike goes beyond seeking to strike the Grizzly Peak April 18 Response when the motion: (a) restates the substantive arguments made by Mill Creek in its Response to the Motion to Substitute; (b) provides additional substantive arguments in support of its opposition to the Motion to Substitute (the ALJ notes that the facts underpinning these additional arguments were known to Mill Creek at the time it filed its response to the Motion to Substitute); and (c) replies to the Cascade Village April 18 Response and to the Staff April 18 Response.

<sup>19</sup> Grizzly Peak also argues that Docket No. 10A-163W is an administratively final docket.

26. In filings made on March 28, 2011<sup>20</sup> and April 11, 2011,<sup>21</sup> Mill Creek opposes the Motion to Substitute.<sup>22</sup> In those filings, Mill Creek provides extensive background material concerning, and argument based on, the events and legal proceedings, including the San Juan County Sheriff's Sale, that preceded the filing of the application in the Transfer Docket. Mill Creek also provides information concerning, and argument based on the decision in, an involuntary Chapter 7 bankruptcy proceeding brought against James Randall Miller in the United States Bankruptcy Court for the Northern District of Oklahoma. Finally, Mill Creek objects to the Stipulation approved by the Commission in the Transfer Docket.

27. Based on the exhibits and information it provides, Mill Creek asserts that it is the ONLY party with a cognizable interest in this proceeding and it is the ONLY party with a tangible and pecuniary interest in the assets which are the subject matter of this proceeding.

Mill Creek's March 28, 2011 Response to the Motion to Substitute (Mill Creek March 28 Response) at 2 (emphasis in original).

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<sup>20</sup> Although neither stated as a motion nor contained in a motion, in the March 28 2011 filing Mill Creek requests "an expedited public hearing on the standing of Joint Applicants, the status of Mill Creek as owner of the CPCN issued to it, an accounting of all ratepayer funds collected and expended and in the sole control of the Receiver and the effect on ratepayers as a result of the actions" of Legacy Real Estate Investments LLC; Grizzly Peak; and Paul Williams, as Trustee. Mill Creek March 28 Response at 16. The ALJ finds that the issues identified by Mill Creek as issues for hearing do not pertain to the instant proceeding and that a hearing on these issues would not assist in deciding either the Motion to Substitute or any issue in the instant proceeding. For these reasons, the ALJ will deny the Mill Creek request for a hearing.

<sup>21</sup> In the April 11, 2011 filing, Mill Creek restates the arguments made in the March 28 Response and provides an additional exhibit to support its opposition to the Motion to Substitute.

<sup>22</sup> On April 18, 2011, Mill Creek filed a Request for Leave to Provide Update on the Status of Related Matters in San Juan District Court and Supreme Court of Colorado Decision in Case No. 09 SA 374 (Request). The ALJ will deny this Request because, for the reasons discussed below with respect to Mill Creek's opposition to the Motion to Substitute, the information is irrelevant to this proceeding as Mill Creek seeks to use the updated status information in support of its collateral attack on Decision No. C11-0163, a decision that is administratively final and that, therefore, is not subject to collateral attack in this proceeding.

28. Mill Creek argues that the Commission decision in the Transfer Docket was based on misleading information provided by the joint applicants in that proceeding<sup>23</sup> and that the documents submitted as exhibits to the Mill Creek March 28 Response establish that the information in the Transfer Docket was misleading. Mill Creek asserts that it was denied its due process rights in the Transfer Docket. Mill Creek states that it has filed an appeal of the Transfer Docket decision in Denver District Court and that it has requested the Denver District Court to stay the Commission decision in the Transfer Docket.

29. In addition, Mill Creek asserts that, at a point in time subsequent to the Sheriff's Sale, the purchaser of the assets (*i.e.*, Legacy Real Estate Investments LLC) transferred the assets purchased at the Sheriff's Sale to Grizzly Peak Investments LLC, and that Grizzly Peak Investments LLC, then transferred the purchased assets to Grizzly Peak.<sup>24</sup> Mill Creek states that these transfers occurred without notice to the San Juan County District Court.

30. Further, Mill Creek asserts that it exists as a corporate entity and that it is the legal owner of the assets necessary to provide sewer service within the geographic area described in the Application.

31. Finally, Mill Creek objects to the Stipulation approved by the Commission in the Transfer Docket. Mill Creek objects because the Stipulation "is based upon misinformation and omissions of key material facts and ... Mill Creek and the owners of Mill Creek have been denied opportunity to participate" in the Transfer Docket. Mill Creek March 28 Response at 14.

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<sup>23</sup> Mill Creek asserts that the misleading information is that the assets sold at the Sheriff's Sale held on February 9, 2010 in San Juan County included all of the Mill Creek water public utility assets and all of the Mill Creek sewer utility assets. Mill Creek claims that the legal notice of the Sheriff's Sale and the Sheriff's Sale included only certain real property and water rights and were insufficient to allow Grizzly Peak to acquire title to all of the Mill Creek water utility assets and all of the Mill Creek sewer utility assets.

<sup>24</sup> Mr. James A. Bush owns and controls both Legacy Real Estate Investments LLC and Grizzly Peak Investments LLC. Application in the Transfer Docket at 9.

32. Based on these arguments, Mill Creek argues, and asks the ALJ to conclude, that Grizzly Peak

has acquired no legally cognizable interest in the assets that are the subject matter of this Docket and Docket 10A-168W and that JOINT APPLICANTS HAVE NO STANDING TO PROCEED IN THIS MATTER.

Mill Creek March 28 Response at 15 (emphasis in original). Mill Creek asks that the Motion to Substitute be denied and that

Docket [No. 08A-373W, the instant proceeding,] be closed, or in the alternative, [be] suspended or stayed subject to adjudication of a) Mill Creek's appeal of the Order in Docket 10A-168W in [Denver District Court], and/or b) Mill Creek's Verified Petition Pursuant to C.R.C.P. 105.1 For Order To Show Cause Why Documents Should Not Be Declared Invalid in the District Court of San Juan County, Colorado.

Mill Creek's April 11, 2011 Supplemental Response to the Motion to Substitute (Mill Creek Supplemental Response) at 6.

33. The ALJ has considered the Motion to Substitute, the responses filed, the reply filed, and the arguments presented. In addition, the ALJ has read and considered Decisions No. R10-1363 and No. C11-0163 entered in the Transfer Docket. Further, the ALJ has read and considered the Stipulation and Settlement Agreement approved by Decision No. R10-1363, including Exhibit A, which is the San Juan County District Court Order entered on July 27, 2010 in Case Number 2009 CV 7. Finally, the ALJ has considered the record in this proceeding. For the reasons discussed below, the ALJ will grant the Motion to Substitute.

34. The ALJ agrees with Grizzly Peak that Decisions No. R10-1363 and No. C11-0163 entered in the Transfer Docket are administratively final.<sup>25</sup> Thus, § 40-6-112(2), C.R.S., is applicable.

35. Section 40-6-112(2), C.R.S., provides: “In all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive.” The Commission has disallowed a collateral attack on an administratively-final decision based on its determination that § 40-6-112(2), C.R.S., “specifically prevents parties, other than the Commission itself, from re-opening and challenging matters the Commission already determined based on evidence, testimony, and general administrative procedures.” Decision No. C08-0955 at ¶ 16.

36. The ALJ finds that Mill Creek’s arguments are unpersuasive, and ultimately irrelevant, because they rest on the erroneous assumption that issues decided by the Commission in the Transfer Docket<sup>26</sup> may be challenged and re-litigated in this case. Pursuant to statute and Commission decision, the Transfer Docket decisions cannot be re-examined and cannot be challenged in this proceeding, even if (as argued by Mill Creek) there is new, additional, or supplemental evidence.<sup>27</sup>

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<sup>25</sup> Mill Creek states that it has asked the Denver District Court to stay these Decisions. There is no showing in this case that the Denver District Court has entered a stay. In addition, Mill Creek does not address -- and the ALJ does not reach -- the issue of whether a judicial stay might affect the applicability of § 40-6-112(2), C.R.S., in this case.

<sup>26</sup> Many, if not all, of the arguments advanced by Mill Creek in this proceeding were raised and addressed in the Transfer Docket. For example, Decision No. R10-1363, at ¶¶ 31-43, and Decision No. C11-0163, at ¶¶ 8-19, address Mill Creek’s attempt to intervene in the Transfer Docket. Decision No. R10-1363, at ¶¶ 66-68, addresses the assertion that the San Juan County District Court orders may not be final because Mill Creek has filed objections. Decision No. R10-1363, at ¶¶ 69-71, addresses the issue of the Sheriff’s Sale. Decision No. R10-1363, at ¶¶ 75-77, addresses the assertion that Mill Creek vendors may not be paid.

<sup>27</sup> Section 40-6-112(1), C.R.S., provides the mechanism by which a final Commission decision may be reopened.

37. The ALJ also finds, as did the Commission, that substituting Grizzly Peak for Mill Creek as the applicant in this docket is

necessary for Grizzly Peak to carry out its promise under the Stipulation to “seek approval to have the interim sewer rates fixed as permanent as part of the pending proceeding in Docket No. 08A-373W” (quoting from Decision No. R10-1363, ¶ 49) and to make investments and to work with the Colorado Department of Public Health and Environment “to bring the Mill Creek wastewater treatment facilities into compliance with state requirements.”

Decision No. C11-0163 at ¶ 25. The requested substitution is an essential precondition to implementation of the Stipulation. Denying the Motion to Substitute would thwart implementation of the Commission-approved Stipulation and would be contrary to the public interest. For example, denying the Motion to Substitute would delay, if not prevent entirely, bringing the wastewater treatment facilities into compliance with health-related requirements.

38. The ALJ further finds that Mill Creek’s arguments addressed to the validity of the San Juan County District Court orders and of the Sheriff’s Sale are made in the wrong forum. Mill Creek must present those arguments to the San Juan County District Court, not to this Commission.<sup>28</sup>

39. Finally, the ALJ finds persuasive ALJ Kirchubel’s reasoning concerning the need to proceed with Commission dockets in the face of Mill Creek’s challenges to the San Juan County District Court orders and the San Juan County Sheriff’s Sale:

The ALJ will accept the [July 27, 2010 *nunc pro tunc* Order of the San Juan County District Court] for what it is: the law of that case as it exists. While it is possible that the court might sustain the objections filed by [Mill Creek], the ALJ is in no position to speculate as to that result or when it may occur. Nor should the Commission delay determination in [the Transfer] Docket because of the pending litigation in [San Juan County] District Court. Counsel’s Objection clearly signals the intention of [Mill Creek] to pursue multiple legal

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<sup>28</sup> The Commission reached the same conclusion in the Transfer Docket with respect to arguments raised in that proceeding that were collateral attacks on the San Juan County District Court orders and the Sheriff’s Sale. Decision No. C11-0163 at ¶ 21.

actions related to the foreclosure and transfer. That process may occupy many months or years. In the meantime, the subject utilities must be operated so as to provide reliable service to the ratepayers. The ALJ has determined that Grizzly Peak can and will provide such service. If, at some point, the underlying legal findings of [the San Juan County District Court] change in a way that impacts the propriety of the transfer having been approved, the Commission certainly retains the authority to respond.

Decision No. R10-1363 at ¶ 68. The Commission agreed with ALJ Kirchubel and found that

the public interest is best served by the Commission approving the authority transfer as set forth in the Stipulation and Decision No. R10-1363. It is not in the public interest for the Commission to delay its proceedings because the existing law of the [San Juan County] District Court case might change at some indeterminate time in the future. Moreover, under the facts of this case it is not appropriate for the public utility to operate in a receivership situation indefinitely. Everything in the record of the instant Commission proceeding indicates that Grizzly Peak intends to use and [to] improve the water and sewer utility assets properly and, thus, there is little risk that the value of the transferred assets will decrease over the next several years due to the actions (or inactions) of the transferee[, Grizzly Peak]. Thus, as the ALJ concluded, in the event that at some point in the future the [San Juan County] District Court or an appellate court issues orders or decisions that undercut the approval of the transfer recommended here, the Commission retains the authority to respond.

Decision No. C11-0163 at ¶ 22. These reasons are equally applicable in the instant proceeding.

Pursuant to § 40-6-112(1), C.R.S., the Commission has the authority to respond in the event a subsequent San Juan County District Court decision or an appellate court decision calls into question, or undercuts, the decision in this case.

40. For these reasons, the ALJ finds Grizzly Peak's arguments supporting the Motion to Substitute to be persuasive and finds Mill Creek's arguments opposing the Motion to Substitute to be unpersuasive. The ALJ will grant the Motion to Substitute and will deny Mill Creek's request to dismiss this proceeding or to hold this proceeding in abeyance.

41. There is another issue that, while not a deciding factor in the ALJ's decision on the Motion to Substitute, is of concern to the ALJ: none of the Mill Creek filings made in 2011 was filed by Mill Creek, through its Court Appointed Receiver Mr. Paul Williams in his

official capacity (Receiver). It may be, therefore, that the Mill Creek filings made in 2011 were made at the request of Mr. J. Randall Miller or Mr. Terry J. Westemeir, or both, and without the knowledge of, and authorization from, the Receiver. The ALJ finds this possibility to be troubling in view of the July 27, 2010 *nunc pro tunc* Order of the San Juan County District Court<sup>29</sup> that states:

*The Receiver is to manage and control [Mill Creek Water Sales and Distribution, LLC], its business, facilities, employees, accounts, day-to-day business operations, billings, collect payment from the ratepayers of [Mill Creek Water Sales and Distribution, LLC,] for water and sewer services, and all matters of which it is required to do in compliance with its Certificate of Public Convenience and Necessity and the transfer matters presently pending before the Public Utilities Commission.*

*Mr. Miller and Mr. Westemeir are Ordered to cease and desist from any actions on behalf of [Mill Creek Water Sales and Distribution, LLC,] in the operation of its utility business.*

*Id.* at Ordering Paragraphs No. 3 and 4 (emphasis supplied). Given the San Juan County District Court's order, the ALJ questions whether either Mr. Miller or Mr. Westemeir is empowered to authorize any filing be made on behalf of Mill Creek in this proceeding.

42. Granting the Motion to Substitute has several ramifications. First, the ALJ will substitute Grizzly Peak for Mill Creek as the applicant in this proceeding.<sup>30</sup> Second, the ALJ will dismiss Mill Creek as a party as it no longer has an interest in this proceeding. Third and finally, the ALJ will order: (a) the caption of this docket to be amended to read as set out above; (b) any entity making a filing in this proceeding to use this amended caption; and (c) the administrative Staff of the Commission to change Commission files and records to reflect the amended caption.

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<sup>29</sup> The July 27, 2010 order is Exhibit A to the Stipulation approved in the Transfer Docket. See Attachment 1 to this Decision.

<sup>30</sup> Unless the context indicates otherwise, reference in the remainder of this Decision to Applicant is to Grizzly Peak.



43. In accordance with § 40-6-109, C.R.S., the ALJ transmits to the Commission the record and exhibits in this case along with a written recommended decision.

## **II. FINDINGS OF FACT**

44. Applicant Grizzly Peak is a Colorado Limited Liability Company. By virtue of the transfer authorized in the Transfer Docket, Grizzly Peak provides water utility service within a certificated service territory in San Juan County, Colorado. At present, Grizzly Peak provides sewer service in the area in which it provides water utility service. Grizzly Peak is a combined water and sewer entity.

45. Intervenor Breeze Investments LLC is an Oklahoma Limited Liability Company, and James A. Bush is its manager. Breeze Investments owns 25 percent of the undeveloped property in the Cascade Village development.

46. Intervenor Breeze Energy LLC is an Oklahoma Limited Liability Company, and James A. Bush is its manager. Breeze Energy owns 25 percent of the undeveloped property in the Cascade Village development.

47. Intervenor Bush Mountain LLC is a Colorado Limited Liability Company, and James A. Bush is its manager. Bush Mountain LLC owns 100 percent of Applicant Grizzly Peak.

48. Intervenor James A. Bush Living Trust is a trust formed in Oklahoma to hold personal assets for estate planning purposes. The Trust owns 25 percent of the undeveloped property in the Cascade Village development. The Trust also owns 100 percent of Intervenor Bush Mountain LLC.

49. Intervenor Cascade Village Condominium Association-2004 is a Colorado nonprofit corporation. Cascade Village serves as the homeowners association for the benefit of owners of property at Cascade Village, a real estate development in San Juan County, Colorado.

50. Intervenor Oppenheimer is an individual, is an owner of units at Cascade Village, and is an officer of Cascade Village Condominium Association-2004.

51. Intervenor Staff is Litigation Staff of the Commission as identified pursuant to Rule 4 CCR 723-1-1007(a).

52. Breeze Investments LLC, Breeze Energy LLC, James A. Bush Living Trust, Cascade Village Condominium Association-2004, Mr. Oppenheimer, and Staff, collectively, are the Intervenors. Applicant Grizzly Peak and Intervenors, collectively, are the Parties.

53. The general area for which Applicant seeks a CPCN is the Cascade Village Subdivision in San Juan County, Colorado.<sup>31</sup> Within the Cascade Village development, Applicant provides water service<sup>32</sup> and sewer service to approximately 134 residential customers and to one multi-tenant commercial building. In addition, Applicant provides water and sewer service to six single-family homes in the Twilight Meadows Development. Applicant provides sewer service, but not water service, to a Colorado Department of Transportation building.

54. Additional findings of fact are contained in the remainder of the Decision.

### **III. DISCUSSION**

55. No party disputes the Commission's jurisdiction. The record establishes, and the ALJ finds, that the Commission has jurisdiction over the subject matter of this proceeding and over Applicant. *See also* Decision No. C09-0734 (Commission has subject matter jurisdiction).

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<sup>31</sup> A map of this area is found in Hearing Exhibit No. 10 at Exhibit 1. The legal description of the proposed service territory is found in Hearing Exhibit No. 10 at Exhibit 2.

<sup>32</sup> In Docket No. 07A-317W by Decision No. R08-0611, the Commission granted Mill Creek a CPCN to provide water service and a CPCN to own, to operate, and to maintain facilities necessary to provide that water service in the Cascade Village Subdivision in San Juan County, Colorado. In the Transfer Docket, the Commission transferred the water service CPCN to Grizzly Peak.

56. Applicant asks the Commission: (a) to grant it a CPCN to provide sewer service within a designated geographic area in San Juan County, Colorado; (b) to grant it a CPCN to own, to operate, to maintain, and to construct facilities necessary to provide that sewer service; (c) to approve proposed tariff sheets containing terms, conditions, and rates for sewer service; and (d) to waive specific Commission rules.

**A. Burden of Proof and Related Principles.**

57. As the applicant, Grizzly Peak bears the burden of proof by a preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

The evidence must be substantial evidence, which the Colorado Supreme Court has defined as

adequate to support a reasonable conclusion. Substantial evidence is more than a scintilla . . . it must do more than create a suspicion of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

*City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

58. If an intervenor advocates that the Commission adopt a position that requires action by the applicant utility (*e.g.*, if an intervenor requests that a condition be imposed), then that intervenor is the proponent of a Commission order with respect to its advocated position.

As the proponent of a Commission order, the intervenor must meet the preponderance of the evidence burden of proof with respect to its advocated position.

59. Whether to grant a CPCN and the conditions (if any) to place on a CPCN are matters that are within the public interest. The Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984). As a result, the Commission is not bound by the proposals made by the parties before it; and the Commission may order the conditions that the Commission deems necessary to assure that the final result is just, is reasonable, and is in the public interest provided the evidentiary record supports the result and provided the reasons for the choices made are stated.

60. In reaching her decision in this matter, the ALJ is mindful of these principles and of the Commission's duty.

**B. Stipulation and Settlement Agreement from Docket No. 10A-168W.**

61. In the Transfer Docket the Commission authorized the transfer of utility assets from Mill Creek, through its court-appointed Receiver, to Grizzly Peak. The Commission approved the transfer subject to the Stipulation and Decision No. R10-1363.

62. As discussed above, the Commission ordered Grizzly Peak to make the necessary filing to effect a substitution of applicant in the instant docket. The Commission found this substitution necessary to allow Grizzly Peak to implement the terms of the Stipulation. Decision No. C11-0163 at ¶ 25 and Ordering Paragraph No. 4.

63. The Stipulation contains a number of provisions that resolve or affect, or that may resolve or may affect, issues in this docket.<sup>33</sup>

64. With respect to *operation of the sewer utility and quality of sewer service*, Grizzly Peak: (a) identifies individuals who will be in managerial positions; (b) states that it will have a local business office in San Juan County; (c) identifies the firm it will retain to engineer the Wastewater Plant Solution (as defined in the Stipulation at ¶ 15); (d) states that it “will strive to operate the utility systems in an efficient, transparent and cost-effective manner ... while delivering safe, reliable and reasonably priced ... wastewater service”; and (e) states that it will use “the services of one or more Colorado-based persons or companies appropriately licensed and certified by the [Colorado Department of Public Health and Environment] to manage, [to] test and [to] operate the class of systems involved.” Stipulation at ¶ 14. In addition, the Stipulation at ¶ 16 discusses the financing of the Wastewater Plant Solution.

65. With respect to *compliance with Colorado Department of Public Health and Environment (CDPHE) requirements*, Grizzly Peak agrees to “work diligently to develop and [to] implement a Wastewater Plant Solution that meets” CDPHE requirements. Stipulation at ¶ 15; *see also id.* at ¶¶ 12, 16, 17 (additional detail). As discussed in Decision No. R10-1363, the Wastewater Plant Solution will address the Compliance Advisory Notice of Significant Non-Compliance that CDPHE issued to Mill Creek on October 31, 2008.

66. With respect to *financial records*, Grizzly Peak agrees to establish and to maintain recordkeeping and accounting systems “to record accurate actual water and sewer operating cost and other information relevant to ratemaking.” Stipulation at ¶ 13.

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<sup>33</sup> The Commission-approved Stipulation is incorporated by reference and is appended as Attachment 1 to this Decision. In this Decision the ALJ does not provide extensive detail of the Stipulation.

67. With respect to *rates*, (a) the base rates for sewer service are the interim sewer rates authorized by Decision No. R08-1196-I, issued in this proceeding (Stipulation at ¶ 11);<sup>34</sup> (b) there is a 24-month Moratorium (or Moratorium Period) on increases to base rates for sewer service (*id.*);<sup>35</sup> and (c) base rates for sewer service may increase under the conditions stated in the Stipulation at ¶¶ 12, 13, 15, and 17.<sup>36</sup> The Stipulation at ¶ 19 reserves one issue for resolution in a future rate case proceeding.

68. Grizzly Peak and Cascade Village were signatories to the Stipulation. The majority of the intervenors in this proceeding<sup>37</sup> were not parties in the Transfer Docket and, thus, did not have an opportunity to review and to comment on the Stipulation during the course of the Transfer Docket.<sup>38</sup> In addition, the Parties had no previous opportunity to address the impact (if any) of the Stipulation on the issues in this proceeding.

69. By Decisions No. R11-0294-I and No. R11-0332-I, the ALJ asked Parties to explain the Stipulation's impact on the issues in this proceeding and to provide, as to each issue in this proceeding, a statement of the outcome that the filing party recommended in view of the Stipulation. Grizzly Peak,<sup>39</sup> Cascade Village,<sup>40</sup> and Staff<sup>41</sup> each made a filing in response to the

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<sup>34</sup> Grizzly Peak states that it will attempt, in the instant proceeding, to fix the interim sewer rates as the permanent rates in effect for the Moratorium Period. Stipulation at ¶ 11.

<sup>35</sup> The Moratorium runs from the date of the final Commission decision approving the Stipulation in the Transfer Docket. The Moratorium is subject to the partial exception found in the Stipulation at ¶ 12.

<sup>36</sup> The requirements include Commission authorization to increase base rates for sewer service.

<sup>37</sup> These intervenors are Breeze Energy LLC, Breeze Investments LLC, Bush Mountain LLC, James A. Bush Living Trust, and Staff.

<sup>38</sup> Bush Mountain LLC owns 100 percent of Grizzly Peak; thus, it may be that, through Grizzly Peak, Bush Mountain LLC had an opportunity to review and to comment on the Stipulation even if Bush Mountain LLC was not a party in the Transfer Docket. In addition, James A. Bush Living Trust owns 100 percent of Bush Mountain LLC; thus, it may be that, through Grizzly Peak, James A. Bush Living Trust had an opportunity to review and to comment on the Stipulation even if James A. Bush Living Trust was not a party in the Transfer Docket.

<sup>39</sup> Grizzly Peak filed on April 11, 2011. This Decision cites to the filing as the Grizzly Peak April Filing.

<sup>40</sup> Cascade Village filed on April 18, 2011. This Decision cites to the filing as the Cascade Village April Filing.

<sup>41</sup> Staff filed on April 18, 2011. This Decision cites to the filing as the Staff April Filing.

ALJ's request. Each agreed that the Stipulation has an effect on the issues in this proceeding. These responses are discussed below.

**C. Certificate of Public Convenience and Necessity.**

70. Grizzly Peak seeks a CPCN for a service territory to provide sewer (or wastewater) service and a CPCN to construct, to own, to operate, and to maintain facilities necessary to provide wastewater service within its certificated service area. These requests are addressed below.

**1. Applicable Law.**

71. As pertinent here and subject to exceptions that are not relevant to this case, article XXV of the Colorado Constitution vests in the Commission "all power to regulate the facilities, service and rates and charges ... of every corporation ... operating within the State of Colorado ... as a public utility, ... as defined by the laws of the State of Colorado[.]" Relying on this constitutional provision, the Commission and the Colorado Supreme Court, by decision, established regulated monopoly "as the state policy in the field of certificates of public convenience and necessity" for certificated service areas.<sup>42</sup> *Miller Bros., Inc. v. Public Utilities Commission*, 185 Colo. 414, 422, 525 P.2d 443, 446 (1974). Generally speaking, a CPCN for a service territory "creates a right to service the customers in the certificated region, unless the company is not ready, willing, and able to provide the service requested." *City of Greeley v. Poudre Valley Rural Electric Association, Inc.*, 744 P.2d 739, 745 (Colo. 1987), *appeal dismissed for want of properly-presented federal question*, 485 U.S. 949 (1988).

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<sup>42</sup> In fact, as the Colorado Supreme Court has observed, regulated monopoly predates article XXV and "has been the public policy of [Colorado] since the year 1913 when the Public Utilities Act of the State of Colorado was first adopted. The concept has never varied in a long line of decisions of this court." *Western Colorado Power Company v. Public Utilities Commission*, 159 Colo. 262, 271, 411 P.2d 785, 790 (1966).

72. Section 40-5-101(1), C.R.S., states, in pertinent part:

No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 40-5-101 to 40-5-104[, C.R.S.,] shall not be construed to require any corporation to secure [a CPCN] for ... an extension within ... or to territory already served by it, necessary in the ordinary course of its business.

The Colorado Supreme Court has pointed to this statutory provision as an additional basis for issuance of a CPCN for service territory because § 40-5-101(1), C.R.S., “was designed to prevent duplication of facilities and competition between utilities, and to authorize new utilities in a field only when existing ones are found to be inadequate.” *Western Colorado Power Company v. Public Utilities Commission*, 159 Colo. 262, 273, 411 P.2d 785, 791 (1966). In addition, § 40-3-102, C.R.S., vests in the Commission the power and authority, and imposes on the Commission the duty, “to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designed in articles 1 to 7 of [Title 40] or in addition thereto, which are necessary or convenient in the exercise of such power[,]” subject to restrictions that are not relevant to this proceeding.

73. Relying on its administrative expertise and using its informed discretion to determine what is best for the present and future public convenience and necessity and what is in the public interest, the Commission decides the geographic scope of each CPCN on its individual merits. *Public Utilities Commission v. Home Light and Power Company*, 163 Colo. 72, 78-79, 428 P.2d 928, 932 (1967). The scope of the geographic area to be certificated lies in the sound and informed discretion of the Commission.



74. In carrying out its statutory functions and weighing the evidence to determine whether the criteria of the public interest and the public convenience and necessity have been met and, thus, whether a CPCN should be granted, the Commission has these duties:

The primary responsibility of the Commission is to the public to insure and [to] provide adequate utility service at fair and reasonable costs. The Commission has a corollary or ancillary duty to the utilities involved to allow for and to provide reasonable rates and revenues in order that the financial integrity of such utilities be maintained and preserved, thus insuring adequate service to the public.

Commission Decision No. 62653, issued April 22, 1964, at 26.

75. In considering whether to grant a CPCN, the Commission considers whether it is necessary, in the public interest, to establish conditions to which the CPCN is subject. As the Colorado Supreme Court has observed, “[i]n the exercise of ... any ... power granted to [the Commission], the interest of the public should always be given first and paramount consideration.” *Public Service Company of Colorado v. Public Utilities Commission*, 142 Colo. 135, 147, 350 P.2d 543, 549, *cert. denied sub nom. Union Rural Electric Association, Inc. v. Public Service Company of Colorado*, 364 U.S. 820 (1960). The conditions, if any, on a CPCN lie in the sound and informed discretion of the Commission.

76. To secure a CPCN for a service territory, an applicant must provide the information required by Rule 4 CCR 723-5-5101(b). To prevail in this case, Grizzly Peak must establish that the public interest and “the present or future public convenience and necessity require or will require” (§ 40-5-101(1), C.R.S.) the creation of the new exclusive service area for sewer service and that Grizzly Peak possesses the qualifications to provide sewer service within the certificated service area. If Grizzly Peak establishes that a new service area should be established and that it is qualified to provide sewer service within that designated service area, Grizzly Peak also will establish that the Commission should authorize it to own, to operate, and

to maintain facilities necessary to provide wastewater service within its service territory. If this Application is granted, Grizzly Peak will have the exclusive right to provide sewer service in the geographic area of the certificated territory.

## **2. Discussion.**

77. The Application appears to seek two separate CPCNs: one that authorizes Applicant to provide sewer service within a specified service territory and one that authorizes Applicant to construct, to own, to operate, and to maintain facilities necessary to provide wastewater service within its certificated service area. The Commission's practice is to issue one CPCN that both establishes the service territory and authorizes the utility to own, to operate, and to maintain the facilities necessary to provide utility service within that certificated service area. *See, e.g.,* Decision No. R08-0611 (granting a CPCN to provide water service and to own facilities to provide that service); Decision No. R01-0360 (granting a CPCN to provide natural gas service and to own facilities to provide that service). To the extent that the Application seeks two separate CPCNs, the ALJ will deny that request.

78. Consistent with the discussion below, the ALJ finds that Applicant has met its burden of proof with respect to the request for a CPCN. The Commission should grant the Application, and should issue a CPCN, subject to the conditions discussed below.

79. The evidence establishes that the present or future public convenience and necessity require or will require this new service territory, the facilities, and the exclusive right to serve. The evidence establishes that granting the Application will serve the public interest.

80. At present, there is no utility that has a CPCN to provide sewer service in the area that Applicant seeks to serve. This is undisputed.

81. At present, there is no other system in the proposed service area from which sewer service is provided. At present, there is no other system in the proposed service area from which sewer service feasibly could be provided. This is undisputed.

82. Applicant has demonstrated its operational fitness, suitability, and readiness to serve within the proposed service area. In fact, at present Applicant is providing sewer service in the area for which it seeks a CPCN and has provided service in that area since the decisions in the Transfer Docket. Applicant has demonstrated that it has the financial wherewithal to own, to operate, and to maintain the necessary facilities. Applicant has a definite and feasible plan to correct the deficiencies that were identified in the Compliance Advisory Notice of Significant Non-Compliance issued to Mill Creek in October 2008 and that remain uncorrected. Applicant has demonstrated that it has a sufficient and feasible plan for owning, operating, and maintaining the sewer system infrastructure and for providing sewer service. This is undisputed.

83. The ALJ agrees with Staff that “defining the sewer service territory for Grizzly Peak ... will make clear that Grizzly Peak has an obligation to provide adequate sewer service to customers in this service territory.” Staff April 18 Filing at 2. In addition, defining the service territory will make it clear that Grizzly Peak has an exclusive right to provide sewer service in the designated service territory. Staff Statement of Position at 7. Providing this certainty to Grizzly Peak and its current and prospective customers benefits both Grizzly Peak and its customers and is in the public interest.

84. No party objected to granting to Grizzly Peak a CPCN for the designated service territory for sewer service.<sup>43</sup>

85. No party objected to the granting of the CPCN to own, to operate, and to maintain the facilities necessary to provide service within the service territory.

86. The Application seeks authorization *to construct* facilities necessary to provide wastewater service within its certificated service area. Staff objects to including the “to construct” phrase if that language gives Applicant *blanket* authorization to construct or to extend facilities without further Commission involvement. Staff asserts that § 40-5-101(1), C.R.S., and Rule 4 CCR 723-5-5102 establish the circumstances under which a water utility must obtain a CPCN for new construction or for extension of existing facilities, plant, or system. Staff argues that the statute and Rule are clear that Grizzly Peak must “obtain a CPCN from the Commission to construct or [to] extend its facilities, plant or system other than in the ordinary course of business.” Staff April 18 Filing at 2. Cascade Village concurs with Staff and recommends that “a CPCN should be granted ... to the extent necessary to authorize projects that are in the ordinary course of business only, and not for a wastewater treatment plant solution.” Cascade Village April 18 Filing at 13.

87. The ALJ agrees. To avoid confusion, the ALJ will not include the phrase “to construct” in the CPCN granted by this Decision. Removing this phrase has no impact on Grizzly Peak, which remains subject to § 40-5-101(1), C.R.S., and Rule 4 CCR 723-5-5102 with

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<sup>43</sup> In its Statement of Position at 7 through 9, and 17, Staff discussed its reservations about granting to Mill Creek a CPCN for service territory and proposed conditions that, in Staff’s opinion, should be imposed in view of those reservations. The ALJ finds that the subsequent transfer of ownership to Grizzly Peak and Grizzly Peak’s commitments as stated in the Stipulation render moot Staff’s concerns and the proposed conditions.

respect to the circumstances under which it must obtain a CPCN to construct new facilities, plant, or system or to extend its existing facilities, plant, or system.

88. Staff states that

it would be helpful if the Commission clearly states in its order in this proceeding that the *needed upgrade to or construction of a wastewater treatment facility is not considered to be in the ordinary course of business* and that *Grizzly Peak shall be required to file an application for a CPCN to upgrade or [to] construct a new wastewater treatment system.*

Staff April 18 Filing at 3 (emphasis supplied). The ALJ will not make these rulings in this proceeding because there is little in the record with respect to the scope or the cost of the Wastewater Plant Solution, as defined and discussed in the Stipulation. In the ALJ's opinion, the rulings that Staff seeks should be made in the future when the scope and the cost of the Wastewater Plant Solution are known or, at least, are clearer. While she will not make the rulings that Staff requests, the ALJ notes that, in the absence of a CPCN for construction or expansion of facilities, plant, or system, Grizzly Peak assumes the risk that the Commission will not allow the costs of the Wastewater Plant Solution to be recovered in rates. *City of Boulder v. Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000).

89. Having determined that a CPCN should be granted to Grizzly Peak, the ALJ now considers whether conditions ought to be placed on the CPCN and, if conditions ought to be placed on the CPCN, what those conditions are.

**D. Conditions on Certificate of Public Convenience and Necessity.**

90. Based on the record, the ALJ finds that it is necessary and in the public interest to place conditions on the CPCN. Each condition is discussed separately.

91. To obtain a CPCN for an exclusive service territory, Grizzly Peak must be a public utility. The definition of public utility is found in § 40-1-103(1)(a)(I), C.R.S., and, as

relevant here, includes a water corporation. As stated in § 40-1-103(1)(a)(II), C.R.S., the definition of water corporation includes “a *combined* water and sewer corporation, whether as a single entity or as different entities under common ownership” (emphasis supplied).

92. The record establishes that, as of the date of this Decision, Grizzly Peak is a combined water and sewer corporation;<sup>44</sup> meets the definition of water corporation; and, thus, is a public utility. In this proceeding, Grizzly Peak does not rely on any other portion of the definition of public utility. It is possible that, in the future, Grizzly Peak may sell the wastewater system to an unrelated entity while retaining the water system. If that should occur, the unrelated entity owning the sewer system would not be a water corporation; would not be a public utility; and would not be subject to the Commission’s jurisdiction.<sup>45</sup> To make it clear that the CPCN is valid only so long as it is held by a public utility, the ALJ will condition the CPCN granted in this proceeding on the owner of the CPCN being and remaining a water corporation, as defined in § 40-1-103(1)(a)(II), C.R.S.

93. A great many of the Stipulation’s provisions pertain to the CPCN sought in this proceeding. The Stipulation contains, among other things, Grizzly Peak’s commitments with respect to: (a) operation of the sewer utility and the quality of the wastewater service it will provide; (b) compliance with CDPHE requirements; (c) plans to address the Compliance Advisory Notice of Significant Non-Compliance issued by CDPHE on October 31, 2008; and (d) creating and maintaining of its recordkeeping and accounting systems. To assure that Grizzly Peak implements the commitments made in the Commission-approved Stipulation, the ALJ will

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<sup>44</sup> As a result of the Transfer Docket, Grizzly Peak owns a CPCN to provide water service in the same geographic territory as that for which it seeks a CPCN to provide sewer service in this proceeding.

<sup>45</sup> If Grizzly Peak were to sell the water system to an unrelated entity while retaining the wastewater system, Grizzly Peak would not be a water corporation; would not public utility; and would not be subject to the Commission’s jurisdiction.

condition the CPCN granted in this proceeding on Grizzly Peak's meeting its obligations and commitments as stated in the Stipulation.<sup>46</sup>

94. In its Statement of Position at 14-24, Cascade Village argued that Mill Creek engaged in self-dealing transactions and that the resulting expenses should not be recovered in rates; Cascade Village repeats these assertions in its April 18 Filing at 9 and 10. Based on Mill Creek's actions, Cascade Village states that the ALJ should place the following condition on the CPCN granted to Grizzly Peak in this proceeding: "self-dealing tactics between the multiple entities controlled or owned by Bush Investments *et al.* will not be tolerated."<sup>47</sup> Cascade Village April 18 Filing at 10.

95. The ALJ finds that Cascade Village has not met its burden of proof with respect to the proposed condition. First, there is no evidence in this proceeding to support the proposed condition because there is no evidence that Grizzly Peak has engaged in an affiliate transaction, let alone an affiliate transaction that could be characterized as self-dealing. Second, the Commission does not address affiliate transactions in a CPCN proceeding; the Commission addresses affiliate transactions in a rate case when the utility proposes to recover the investments, costs, and expenses of affiliate transactions in rates.<sup>48</sup> The Commission can disallow (that is, not allow recovery of) costs, investments, and expenses associated with an affiliate transaction where the Commission finds that the transaction was inappropriate (for example, constituted

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<sup>46</sup> The ALJ finds that this condition renders unnecessary the condition proposed by Cascade Village in its April 18 Filing at 12.

<sup>47</sup> Cascade Village defines Bush Investments *et al.* as the following entities: Breeze Energy LLC; Breeze Investments LLC; Bush Mountain LLC; Grizzly Peak Investments LLC; James A. Bush Living Trust; and Legacy Real Estate Investments LLC. Cascade Village April 18 Filing at 2 and note 2.

<sup>48</sup> The testimony in this docket substantiates this. Questions about Mill Creek's affiliate transactions arose in the context of the portion of the Application that requests approval of proposed rates and charges for sewer service and not in the context of the portion of the Application that requests a CPCN.

self-dealing). A rate case is the appropriate proceeding in which to raise and to address any concern with respect to asserted self-dealing. The ALJ will not place the requested condition on the CPCN.

96. Cascade Village also recommends that the Commission grant the requested CPCN to Grizzly Peak on a conditional and revocable basis, subject to these conditions: (a) review of Grizzly Peak's performance under the terms of the Stipulation; (b) a rate review report to be provided for calendar year 2011 and the two years following the granting of the CPCN; and (c) Grizzly Peak's general administrative and operational characteristics during the Moratorium Period. Cascade Village April 18 Filing at 13.

97. As discussed above, the ALJ will grant the CPCN subject to the condition that Grizzly Peak must meet its obligations and responsibilities under the Stipulation. In addition, any person may make a filing requesting that the Commission review Grizzly Peak's (or any other regulated entity's) compliance with a Commission order; and the Commission *sua sponte* may order such a review. Finally, following a review and if appropriate, the Commission can take action to assure that a public utility obeys Commission orders; the Commission has considerable discretion with respect to the action it takes to enforce its orders. This satisfies Cascade Village's request that the CPCN be conditional and revocable and that the CPCN be conditioned on compliance with the Stipulation.<sup>49</sup>

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<sup>49</sup> It also satisfies Cascade Village's request that "the ALJ should act to protect the interests of Colorado ratepayers by ... making clear that whichever entity is deemed the party in interest in this docket ... must immediately take action to resolve the inadequacies of the sewer system that remains in substantial non-compliance with the CDPHE[.]" Cascade Village April 18 Filing at 14.



98. The request for a condition requiring a rate review report (or a review of such a report) is discussed below.

99. The ALJ will not condition the CPCN on Grizzly Peak's general administrative and operational characteristics during the Moratorium Period (or on a review of those characteristics). First, the ALJ finds that Cascade Village has not met its burden of proof with respect to the proposed condition as there is no evidence to support the proposed condition. Second, to the extent that this proposed condition is a restatement of the affiliate transaction-based condition, the reasons for not adopting the proposed condition are set out above. Third, the proposed condition is vague and ambiguous and, if placed on the CPCN, could result in litigation concerning both the meaning of the condition and whether the condition has been met. The ALJ finds that placing this condition on the CPCN would not be in the public interest.

100. Additional conditions and proposed conditions are discussed in the remainder of this Decision.

**E. Proposed Tariff Sheets.**

101. Mill Creek filed proposed tariff sheets containing: (a) conditions and terms of, and rules and regulations governing, sewer service (terms and conditions);<sup>50</sup> and (b) rates and

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<sup>50</sup> The proposed tariff sheets containing the terms and conditions are found in the Application (Hearing Exhibit No. 1) at Exhibit 13 and Hearing Exhibit No. 10 at Exhibit 7 at Original Sheets No. 4, No. 8 (only the section on payment), and No. 9 (only the sections on service period, rules and regulations, and construction period); at Original Sheets No. R1 through No. R15; at Original Sheets No. S1 through No. S2; at Original Sheets No. SL1 through SL4; and at Original Sheets No. SA1 through No. SA5.

charges for sewer service.<sup>51</sup> Mill Creek initially requested that the Commission approve the proposed tariff sheets. The Intervenor's opposed this request.<sup>52</sup>

102. In its Statement of Position, Staff recommended that the Commission deny Mill Creek's request for approval of the proposed tariff sheets. Staff made two recommendations:

[First,] require Mill Creek to file an advice letter, on not less than ten days notice, for approval of initial rates and terms and conditions that reflect the final order in this docket. [Second,] adopt Staff's recommendation that tariff sheets be filed for Mill Creek that incorporate rates, terms and conditions for [water service and for sewer service] in one combined tariff.

Staff Statement of Position at 2 (footnote omitted). Mill Creek agreed with these Staff recommendations. Mill Creek Reply Statement of Position at 10. Mill Creek's agreement, in effect, withdrew the proposed tariff sheets from consideration in this proceeding.

103. Staff reiterated its recommendations, making them applicable to Grizzly Peak:

Staff [recommends] that the Commission not approve the tariff sheets provided with the Application in this Docket. Instead, Staff suggests the Commission require Grizzly Peak to file an advice letter, on not less than ten days notice, for approval of permanent rates and terms and conditions that reflect the final order in this Docket. In addition, Staff continues to support its recommendation that tariff sheets be filed for Grizzly Peak that incorporate rates, terms and conditions for sewer service [and for water service] in one

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<sup>51</sup> The proposed tariff sheets containing the rates and charges for sewer service are found in the Application (Hearing Exhibit No. 1) at Exhibit 13 and Hearing Exhibit No. 10 at Exhibit 7 at Original Sheets No. 5, No. 6, No. 7, No. 8 (only the sections on system development charge and special assessment), and No. 9 (only the first two paragraphs).

<sup>52</sup> In their post-hearing Statements of Position, Bush *et al.* and Cascade Village focused exclusively on Mill Creek's proposed revenue requirement, rates, and rate structure. Staff also addressed these issues in its post-hearing Statement of Position.

The Statements of Position were filed before the Stipulation was signed and before Grizzly Peak assumed ownership of the assets and operation of the sewer system. The ALJ finds that the change in ownership and operation renders moot Mill Creek's proposed revenue requirement. (As discussed above, the Stipulation addresses Grizzly Peak's rates and rate structure during the Moratorium Period and the partial exception to the Moratorium.) The ALJ finds that the Stipulation renders moot the revenue requirement, rates, and rate structure arguments presented in the Statements of Position.

combined tariff. Staff believes this will be administratively more efficient and [will] better reflect Grizzly Peak's status as a combined water and sewer company.

Staff April 18 Filing at 4. No other party addressed these recommendations.

104. It is unclear whether Grizzly Peak (a) adopts Mill Creek's request that the proposed tariff sheets *not* be approved in this case *or* (b) asks the Commission to approve, in this proceeding, the proposed tariff sheets filed in this docket, as amended by the Stipulation. Given this uncertainty, the ALJ will proceed on the assumption that Grizzly Peak seeks to have the Commission approve, in this docket, the proposed tariff sheets, as amended by the Stipulation.<sup>53</sup>

105. For the reasons discussed below, the ALJ will deny the request to approve, in this proceeding, the proposed tariff sheets found in the Application (Hearing Exhibit No. 1) at Exhibit 13 and Hearing Exhibit 10 at Exhibit 7. The ALJ will order Grizzly Peak to file an Advice Letter that complies with this Decision.

106. The ALJ will deny the request to approve the Mill Creek-proposed tariffs in their entirety because the ALJ finds Staff's argument concerning a combined water and sewer tariff to be persuasive. Grizzly Peak should file an Advice Letter with proposed tariff sheets that incorporate, in one combined tariff, the terms and conditions of, and the rates and charges for, water service and sewer service. The ALJ finds that a combined tariff will emphasize Grizzly Peak's status as a combined water and sewer provider. *See* discussion above with respect to condition that owner of the CPCN be and remain a water corporation, as defined in § 40-1-103(1)(a)(II), C.R.S.

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<sup>53</sup> If the ALJ's assumption is incorrect and Grizzly Peak has adopted Mill Creek's position that the Commission *not* approve the proposed tariff sheets in this proceeding, the effect is to withdraw the proposed tariff sheets from consideration in this case. In that event, discussion of the proposed tariff sheets is unnecessary.

107. The ALJ will deny the request to approve the *terms and conditions of sewer service* for the following reasons. First, the ALJ denied Mill Creek's request for interim authority to provide sewer service pursuant to the terms and conditions contained in the proposed tariff sheets. Decision No. R08-1196-I at Ordering Paragraph No. 5. Thus, unlike the rates for sewer service (discussed below), there are no interim terms and conditions tariffs that Grizzly Peak has agreed by Stipulation to adopt. Second, there is little evidence in this record that addresses whether the proposed tariff sheets that contain the terms and conditions comply with the Rules Regulating Water Utilities, 4 CCR Part 5, in effect at the time the Application was filed. There is no evidence in this record that addresses whether the proposed tariff sheets that contain the terms and conditions comply with the Rules Regulating Water [Utilities] and Combined Water and Sewer Utilities, 4 CCR Part 5, now in effect.<sup>54</sup> The ALJ finds that, given the dearth of analysis, the evidentiary record does not support approving, in this proceeding, the proposed tariff sheets that contain the terms and conditions. In addition, requiring Grizzly Peak to file an Advice Letter with the proposed tariff sheets that contain the terms and conditions will allow Staff and other interested persons to review the proposed terms and conditions in order to determine, among other things, whether they are consistent with applicable Commission rules. The ALJ finds that Applicant has not met its burden of proof with respect to this request.

108. The ALJ now turns to the request to approve the *rates for sewer service*. The Stipulation (*see, e.g.*, ¶¶ 11, 12, 17) addresses the rates for sewer service. In that document, as described by Grizzly Peak,

Grizzly Peak [commits] to maintain the interim rates in effect which were approved by Decision No. R08-1196-I for 24 months after the Commission

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<sup>54</sup> The current Rules Regulating Water [Utilities] and Combined Water and Sewer Utilities, 4 CCR Part 5, became effective in September 2010 and contain amendments adopted in Docket No. 09R-130W and Docket No. 09R-848W.

Decision [in the Transfer Docket] approving Grizzly Peak's acquisition of the Mill Creek assets. As described in [the Stipulation], Grizzly Peak intends to request that the Commission make permanent [those] interim rates ... until such time as Grizzly Peak files a rate case to modify those rates pursuant to the terms of the Stipulation[.]

Grizzly Peak April 11 Filing at 5.

109. The proposed tariff sheets filed by Mill Creek contained rates and charges (*i.e.*, a recurring (monthly) Service and Facility Charge for Stand-by Customers, a System Development Charge for Stand-by Customers, and non-recurring rates) that the ALJ did *not* authorize in Decision No. R08-1196-I. Ordering Paragraph 10 of that Order established the interim rates that Mill Creek put into effect. In addition, in its Statement of Position, Mill Creek withdrew from consideration some of its proposed rates and charges. Finally, in the Stipulation, Grizzly Peak agreed to retain, and to seek to make permanent, only the interim rates. Given these facts, Cascade Village asserts that, if the Motion to Substitute is approved, any request to approve a rate or charge other than an interim rate authorized by Decision No. R08-1196-I “should be dismissed as withdrawn and moot.” Cascade Village April 18 Filing at 13 and 14.

110. The ALJ agrees. The ALJ finds that, by the Stipulation, Grizzly Peak has withdrawn from consideration in this proceeding any Mill Creek-proposed rate or charge that was not ordered as an interim rate in Decision No. R08-1196-I.

111. Staff was not a signatory to the Stipulation. Staff nonetheless does not oppose the agreement to establish the Stipulated Rates (*i.e.*, the interim rates for sewer service that were approved by Decision No. R08-1196-I and that are now in effect) as the permanent rates within the context of the Stipulation. In support of its position, Staff asserts: (a) the record in this proceeding is sufficient to support a finding that the Stipulated Rates fall within “a range of reasonableness based on acceptable rate-making methodology [and, thus, that the

Stipulated Rates] can properly be established as permanent” (Staff April 18 Filing at 3); (b) Cascade Village’s agreement “to [the Stipulated Rates] indicates that the customers have a level of comfort that the rates are fair, just and reasonable and will continue to be so during the Moratorium Period” (*id.* at 3 and 4); and (c) resolving this proceeding by approving the Stipulated Rates as the permanent rates “provides a greater degree of certainty going forward that currently exists” because it will serve to address the issue of the true-up mechanism and refund of any over-collection ordered in Decision No. R08-1196-I (*id.* at 4).

112. Cascade Village was a signatory to the Stipulation and does not oppose the agreement to establish the Stipulated Rates as the permanent rates within the context of the Stipulation. Cascade Village flatly states: “[Cascade Village] supports the Stipulation ... . If the ALJ grants the Motion for Substitution, then [Cascade Village] will honor the Stipulation.” Cascade Village April 18 Filing at 3. Cascade Village also asserts that the Stipulation signatories “agreed that the [Stipulated Rates] are in compromise to resolve this lengthy process, while continuing to subject the [Stipulated Rates] to future prudence review once actual operating costs and expenses are developed as required by the Stipulation,” referencing ¶ 13 of the Stipulation. Cascade Village April 18 Filing at 4.

113. Notwithstanding its unequivocal support of the Stipulation, Cascade Village recommends that, if Grizzly Peak is substituted for Mill Creek as the applicant, the ALJ supplement the Stipulation by placing these conditions on approval of the Stipulated Rates:

*the ALJ should order that Grizzly Peak Utility’s rate structure be reviewed at a time certain, but after the expiration of the moratorium in the Stipulation, to establish the cost of water and sewer service that is just and reasonable for [Cascade Village] ratepayers -- based on cost accounting and financial record keeping consistent with the Stipulation.<sup>[8]</sup> [Cascade Village] has consulted with Staff ... and [Cascade Village] believes there is consensus for the Recommended Decision in this matter to require Grizzly Peak to file a rate report similar to that suggested in Staff’s ... Statement of Position by the end of the moratorium period*

described in the Stipulation. [Cascade Village] submits that the *suggested rate report should* fully comport with the Stipulation and *be used by the Commission in part to determine whether a refund should be granted under the terms of Decision No. R08-1196-I*.<sup>[9]</sup>

Note 8 reads: Stipulation, ¶¶ 11-12.

Note 9 reads: *See also*, Order in R08-1196-I at findings paragraph 63 and Order, paragraph 11. The Interim Rates [ordered in that Order] are subject to true-up and refund of over-collection based on a rate report to be filed. The passage of time since the hearing in this matter should not allow the intent of [Decision No. R08-1196-I] to grow stale. Rather, the wisdom of requiring future refund if over-payment has occurred is just and reasonable today as it was at that time. [Cascade Village] submits that it is reasonable to request that [Decision No. R08-1196-I's] terms and conditions remain in effect.

Cascade Village April 18 Filing at 5; *see also id.* at 7-9, 10-11, and 13 (same).

114. In addition, Cascade Village recommends that “the ALJ should act to protect the interest of Colorado ratepayers by ... making clear that no costs related to legal proceedings to determine ownership of the Commission-granted CPCNs should be included in rates payable by water and sewer customers of the ultimate holder of the CPCN[s] ... .” Cascade Village April 18 Filing at 14. The referenced legal proceedings are those between Mill Creek (and its owner and affiliates) and Grizzly Peak (and its predecessor, owners, and affiliates), some of which are detailed in filings made in this proceeding.

115. Finally, Cascade Village “commits to the base rates contained in the Stipulation as an absolute ceiling [on sewer rates] for a period [of] not less than two years” as provided in the Stipulation. Cascade Village April 18 Filing at 16. Cascade Village further states that it

is not the understanding of [Cascade Village] that the Stipulation provides the acquiescence of [Cascade Village] to making the [Stipulated Rates] “permanent.” In fact, [Cascade Village] maintains its case in chief that there was no good cause ever shown for the [Stipulated Rate] increase in terms of the actual balance sheet of [Mill Creek]. ... [T]he [Stipulated Rates] remain subject to review, for true-up and possible refund with interest if it is determined that over-payment has occurred. In that eventuality, such [Stipulated Rates] shall not be made permanent until the utility can provide a form of accounting and record keeping that conforms to basic principles of transparency and ratemaking principles

outlined in the Commission rules and regulations. [Cascade Village] does not support making the [Stipulated Rates] permanent, but will honor its commitment in the Stipulation.

Cascade Village April Filing at 15.

116. The ALJ will not adopt Cascade Village's recommendations. For the reasons discussed below, Cascade Village has not met its burden of proof with respect to its recommended conditions.

117. Cascade Village recommends that Grizzly Peak be ordered to file, by a date certain after the close of the Moratorium Period, a rate case. The ALJ finds that this issue should be raised and resolved in a subsequent proceeding (*e.g.*, when Grizzly Peak files its Advice Letter pursuant to this Decision). In addition, there is no evidence or information available in this docket on which the ALJ can determine what a reasonable rate case filing date might be. Finally, Grizzly Peak, the affected utility, has not weighed in on this proposed condition.

118. Cascade Village also recommends that Grizzly Peak be ordered to file, by the end of the Moratorium Period, a rate report similar to that suggested in the Staff Statement of Position. Based on consultation with Staff, Cascade Village represents that there is a consensus on this recommendation. The ALJ finds that ¶ 13 of the Stipulation addresses the issue of Grizzly Peak's recordkeeping and accounting systems. In addition, the ALJ finds that there is no evidence to support requiring a rate report from Grizzly Peak because the evidence in this proceeding was based on Mill Creek and not on Grizzly Peak. Finally, the ALJ notes that Grizzly Peak, the affected utility, appears not to have been part of the consensus referenced by Cascade Village.

119. Cascade Village further recommends or urges that, in this proceeding, the ALJ make clear that the Stipulation does not affect the true-up mechanism and the refund of



over-collection condition that Decision No. R08-1196-I placed on implementation of the Stipulated Rates.

120. Decision No. R08-1196-I granted Mill Creek interim relief in the form of interim recurring rates. *Id.* at Ordering Paragraph No. 10. The ALJ conditioned the interim relief on a true-up mechanism described in *id.* at ¶ 63 and Ordering Paragraph No. 11.<sup>55</sup> In addition, the ALJ required Mill Creek to file an Advice Letter and accompanying tariffs that contained the approved interim rates and the true-up mechanism. *Id.* at Ordering Paragraph No. 9.

121. The tariffs filed by Mill Creek are not in the record in this case. Nonetheless, it appears that Mill Creek made the required filing (including both the interim rates and the true-up mechanism); that the interim rates approved in Decision No. R08-1196-I went into effect, subject to true-up; that Mill Creek collected the interim rates for some period of time;<sup>56</sup> that Grizzly Peak

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<sup>55</sup> Ordering Paragraph No. 11 states:

[T]here shall be a true-up mechanism. In the event the permanent recurring rates (*i.e.*, Service and Facility Charges) for sewer service established by the Commission are lower than the interim recurring rates (*i.e.*, Service and Facility Charges) for sewer service authorized by this Order, Mill Creek shall refund (either through a bill credit or a check, at Mill Creek's option) to its customers the difference, with interest. The true-up mechanism shall consist of two parts: (a) determination of whether the interim recurring rates (*i.e.*, Service and Facility Charges) for sewer service resulted in over-recovery by Mill Creek; and (b) Mill Creek's refunding to a customer who over-paid under the interim recurring rates (*i.e.*, Service and Facility Charges) for sewer service the amount of the over-payment, with interest. The interest shall be calculated as simple interest and will use the following interest rates: (a) for customer payments in calendar year 2008, the interest rate will be 4.76 percent; and (b) for customer payments in calendar year 2009, the interest rate will be 2.48 percent. Mill Creek shall make the refund, with interest, within six months of the effective date of the tariff effectuating the final Commission Decision and Order in this docket. This true-up mechanism shall be in the tariff that Ordering Paragraph No. 9 requires Mill Creek to file.

<sup>56</sup> The record in this proceeding contains no evidence with respect to the date on which pre-receivership Mill Creek began to collect the interim rates and contains no evidence with respect to the date on which pre-receivership Mill Creek ceased collecting the interim rates. The record in this proceeding contains no evidence with respect to the date on which Mill Creek under receivership began to collect the interim rates and contains no evidence with respect to the date on which Mill Creek under receivership ceased collecting the interim rates, assuming that it has ceased collecting the interim rates.

began at some point to collect the interim rates;<sup>57</sup> and that, by the Stipulation, Grizzly Peak has agreed to use these interim rates as base rates during the Moratorium Period.

122. The ALJ agrees with Cascade Village that the true-up mechanism and the over-collection provision continue in effect until changed. Grizzly Peak has agreed to provide sewer service pursuant to, and to adopt, the interim Mill Creek rates. These interim rates are subject to the true-up mechanism and the over-collection provision, as discussed above.

123. For at least the following reasons, however, the ALJ finds that the true-up mechanism and the refund of over-collection provision may be limited. First, in light of the change in ownership of the assets and the transfer to Grizzly Peak, it appears that Mill Creek is no longer a public utility and, thus, is not subject to the Commission's jurisdiction.<sup>58</sup> Second, insofar as the record in this case shows, Grizzly Peak purchased the assets of Mill Creek but appears not to have assumed the liabilities of Mill Creek.<sup>59</sup> Third, even if Grizzly Peak assumed Mill Creek's liabilities, Mill Creek's financial records *either* are unaudited and likely to contain unreliable or inaccurate data regarding the revenues collected (and from whom) *or* likely are unavailable to Grizzly Peak as a result of on-going litigation with Mill Creek. Fourth, Grizzly Peak has agreed to adopt the Decision No. R08-1196-I interim rates, which include the true-up mechanism, but has collected the interim rates for a relatively short period of time. Fifth, and importantly, there is no provision in Decision No. R08-1196-I (or, presumably, in the tariff sheets containing the interim rates) that addresses the particular situation presented by the change in

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<sup>57</sup> The record in this proceeding contains no evidence with respect to the date on which Grizzly Peak began to collect the interim rates, assuming that it is collecting the interim rates.

<sup>58</sup> This raises the threshold question of whether Mill Creek continues to be bound by the tariffs. The ALJ does not address and does not decide that question.

<sup>59</sup> The liabilities of Mill Creek may include, arguably, a refund of any over-collection pursuant to the true-up mechanism.

ownership: (a) the interim rates were established based on the asserted-but-unproven investment, costs, and expenses of Mill Creek; but the permanent rates will be established based on the proven investment, costs, and expenses of Grizzly Peak, an entity that is not an affiliate of Mill Creek; and (b) Mill Creek collected the interim rate-based revenues beginning some time in 2008 or 2009, but Grizzly Peak, which assumed operation of the system in 2010, would have the responsibility of refunding any over-collection to ratepayers. Under these circumstances, it is unclear whether the true-up mechanism and the refund provision would apply to Grizzly Peak for the period before Grizzly Peak began to provide sewer service and to charge the interim rates.

124. Based on the information available, the ALJ finds that, at least from the date on which it began to collect the interim rates pursuant to tariffs containing the true-up mechanism, Grizzly Peak is subject to the true-up mechanism. The record does not allow the ALJ to make a determination, in this case, with respect to the period during which Mill Creek provided sewer service pursuant to the interim rates.

125. Cascade Village recommends that the ALJ should determine in this proceeding that “no costs related to legal proceedings to determine ownership of the Commission-granted CPCNs should be included in rates payable by water and sewer customers[.]” Cascade Water April 18 Filing at 14. The ALJ will not adopt this recommendation. First, this case is not the proceeding in which to address the referenced legal fees and costs. Whether an expense or a cost will be recovered in rates is an issue decided in a rate case, and this is not a rate case. Second, it is premature to address this issue now because Grizzly Peak may not seek to recover the referenced legal fees and costs. Third, Cascade Village will have an opportunity to object to Grizzly Peak’s recovering the referenced legal fees and costs if and when Grizzly Peak seeks to recover those fees and costs in rates.

126. Cascade Village makes a number of arguments addressing the issue of whether the Stipulated Rates ought to be made permanent. The ALJ has determined that, in this proceeding, there will be no approval of making permanent the Stipulated Rates. Accordingly, the ALJ finds that arguments addressed to whether the Stipulated Rates ought to be made permanent are premature and ought to be presented in another proceeding (*e.g.*, when Grizzly Peak files its Advice Letter pursuant to this Decision).

127. The ALJ will order Grizzly Peak to file an Advice Letter accompanied by proposed tariff sheets that, in one set of tariff sheets: (a) contain the terms and conditions of, and the rules and regulations governing, service for water service and sewer service; and (b) adopt as permanent rates the interim rates for sewer service filed by, and now in effect for, Mill Creek (*i.e.*, the rates ordered in Decision No. R08-1196-I).

128. Grizzly Peak must make the rates for sewer service filing in order to implement the Commission-approved Stipulation. To be clear, however, this Decision does not approve making permanent the interim rates. That decision will be made when Grizzly Peak files its Advice Letter and proposed tariff sheets.

**F. Waiver of Commission Rules.**

129. Rule 4 CCR 723-5-5002(b)(IX) requires the filing of the applicant's most recent audited financial information that provides Colorado-specific financial data. Rule 4 CCR 723-5-5101(b)(VII) requires the filing of either a feasibility study for the area proposed to be served or audited financial data in lieu of such a feasibility study. The Application seeks a waiver of these two Rules.

130. Grizzly Peak is a recently-formed LLC. At present, Grizzly Peak does not have audited financial data.

131. As the result of the Sheriff's Sale and the Transfer Docket, Grizzly Peak assumed ownership of the assets used to provide wastewater service and began providing that service in the territory for which it seeks a CPCN. Insofar as the record reveals, Grizzly Peak assumed ownership of the in-place operation without first having done a feasibility study.

132. Insofar as the record reveals, the financial records of Mill Creek, the previous owner, are unaudited and likely do not contain reliable and accurate data regarding the historical expenses of operating the wastewater system. On a going-forward basis, Grizzly Peak will establish and maintain accounting and recordkeeping systems as specified in the Stipulation at ¶ 13.

133. There is on-going contentious litigation about Grizzly Peak's assuming ownership of the utility assets previously owned by Mill Creek. Under these circumstances, the ALJ finds that it is unlikely that Mill Creek would provide Grizzly Peak with financial records for Mill Creek's operation of the sewer system.

134. The ALJ finds that the unique facts and circumstances of this case demonstrate good cause to grant, and that Applicant has met its burden of proof with respect to, the requested Rule waivers. The ALJ will grant a waiver of Rule 4 CCR 723-5-5002(b)(IX) and a waiver of Rule 4 CCR 723-5-5101(b)(VII). These waivers are for the purposes of this proceeding only.

**G. Recommendations and Arguments not Addressed.**

135. With respect to a recommendation (including a proposed condition) made by a party that is not addressed in this Decision, the ALJ considered but did not adopt the recommendation.

136. With respect to a party's argument that is not discussed in this Decision, the ALJ considered the argument and found it unpersuasive.

**H. Effect of Approval of the Stipulation.**

137. The Stipulation was a settlement of a controversy, was made only for settlement purposes, and did not represent the position that any party would take if the Transfer Docket had not been resolved by agreement. The signatories agreed that no binding precedential effect or other significance, except as may be necessary to enforce the Stipulation or a Commission Order concerning the Stipulation, attached to any principle or method contained in the Stipulation, except as expressly agreed. The Commission approved the Stipulation with that understanding, and this Decision references and incorporates the Stipulation with that understanding.

**IV. CONCLUSIONS WITH RESPECT TO THE APPLICATION**

138. The Commission has jurisdiction over the subject matter of this proceeding and over Applicant.

139. Consistent with the discussion above and subject to conditions, the Commission should grant the Application in part.

140. Consistent with the discussion above and subject to conditions, the Commission should grant to Grizzly Peak a CPCN that authorizes Grizzly Peak: (a) to provide sewer service within the territory described in this Decision; and (b) to own, to operate, and to maintain facilities necessary to provide sewer service within the certificated territory.

141. The following conditions should be placed on the CPCN granted to Grizzly Peak: (a) the owner of the CPCN must be and must remain a “water corporation,” as defined in § 40-1-103(1)(a)(II), C.R.S.; (b) Grizzly Peak must meet its obligations and responsibilities as established in the Commission-approved Stipulation that is appended to this Decision as Attachment 1; and (c) Grizzly Peak must file an Advice Letter and accompanying tariff sheets that comply with this Decision.

142. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

**V. ORDER**

**A. The Commission Orders That:**

1. The Motion to Substitute Grizzly Peak Water Sales and Distribution, LLC, for Mill Creek Water Sales and Distribution, LLC, as the Moving Party is granted.

2. Grizzly Peak Water Sales and Distribution, LLC, is substituted for Mill Creek Water Sales and Distribution, LLC, as the Applicant in this matter.

3. Mill Creek Water Sales and Distribution, LLC, is dismissed as a party in this proceeding.

4. The caption of Docket No. 08A-373W is amended as set out above.

5. Persons making filings in this proceeding shall use the amended caption set out above.

6. Administrative Staff of the Commission shall change Commission files and records to reflect the amended caption set out above.

7. Consistent with the discussion above and subject to the conditions contained in this Decision, the Application filed in this docket is granted in part.

8. Consistent with the discussion above and subject to the conditions contained in this Decision, Grizzly Peak Water Sales and Distribution, LLC, is granted a Certificate of Public Convenience and Necessity that: (a) grants Grizzly Peak Water Sales and Distribution, LLC, the exclusive right to provide sewer (wastewater) service in accordance with its tariffs on file with the Commission, as those tariffs may change over time, in a tract of land located in Sections 12

and 13, T 39 N, R 9 W, N.M.P.M., in San Juan County, Colorado and being more particularly described as follows:

The Southeast quarter of the Southwest Quarter (SE  $\frac{1}{4}$  SW  $\frac{1}{4}$ ) of said Section 12, one East One-Half of the Northwest quarter (E  $\frac{1}{2}$  NW  $\frac{1}{4}$ ) of said Section 13, and the Northeast Quarter of the Southwest Quarter (NE  $\frac{1}{4}$  SW  $\frac{1}{4}$ ) of said Section 13, less and except that portion of land contained within the right-of-way of U.S. Highway 550 and Tract D, as shown on the plat of Cascade Village. Vacation and Abandonment Plat, filed in the San Juan County, Colorado, Clerk and Recorder's Office under Reception Number 124690 in Book 222 at Page 728.

This tract contains 141 acres, more or less; and (b) authorizes Grizzly Peak Water Sales and Distribution, LLC, to own, to operate, and to maintain facilities necessary to provide sewer (wastewater) service within its service territory.

9. The authority granted by Ordering Paragraph No. 8 is conditioned upon the owner of that authority being and remaining a "water corporation," as defined in § 40-1-103(1)(a)(II), C.R.S.

10. The Stipulation and Settlement Agreement that was approved in Docket No. 10A-168W is appended to this Decision as Attachment 1 and is incorporated here as if fully set out.

11. The authority granted by Ordering Paragraph No. 8 is conditioned upon Grizzly Peak Water Sales and Distribution, LLC, meeting its obligations and responsibilities as established in the Stipulation and Settlement Agreement that was approved in Docket No. 10A-168W and that is appended to this Decision as Attachment 1.

12. The authority granted by Ordering Paragraph No. 8 is conditioned upon Grizzly Peak Water Sales and Distribution, LLC, filing an Advice Letter and proposed tariff sheets that, in one set of tariff sheets, (a) contain the terms and conditions of, and the rules and regulations



governing, water service and sewer service; and (b) adopt as permanent rates the interim rates for sewer service filed by, and now in effect for, Mill Creek Water Sales and Distribution, LLC (*i.e.*, the interim rates ordered in, and as conditioned by, Decision No. R08-1196-I). Grizzly Peak Water Sales and Distribution, LLC, shall make this Advice Letter filing within 30 days of the effective date of a final Commission Decision in this proceeding. Grizzly Peak Water Sales and Distribution, LLC, shall make this Advice Letter filing on not less than ten days' notice.

13. The terms and conditions of, and the rules and regulations governing, water service and sewer service shall comply with applicable Commission rules.

14. The request for approval in this proceeding of the proposed tariff sheets filed in this docket is denied.

15. Consistent with the discussion above, the request in the Verified Application for waiver of Commission rules is granted.

16. For purposes of this proceeding only, Rule 4 *Code of Colorado Regulations* 723-5-5002(b)(IX) is waived.

17. For purposes of this proceeding only, Rule 4 *Code of Colorado Regulations* 723-5-5101(b)(VII) is waived.

18. Permission to withdraw as counsel for Cascade Village Condominium Association-2004 and Mr. Robert Oppenheimer is granted.

19. Jeffrey G. Pearson, Esquire, is granted leave to withdraw as counsel for Cascade Village Condominium Association-2004 and Mr. Robert Oppenheimer in this matter. Leave to withdraw as counsel is granted *nunc pro tunc*, effective April 14, 2011.

20. Effective April 14, 2011, Jeffrey G. Pearson, Esquire, is no longer counsel for Cascade Village Condominium Association-2004 and Mr. Robert Oppenheimer in this matter.

21. The Motion to Strike the Unsolicited and Misleading Response to Filings by Mill Creek Water Sales and Distribution, LLC of Grizzly Peak Water Sales & Distribution, LLC dated April 18, 2011 is denied.

22. The Request for Leave to Provide Update on the Status of Related Matters in San Juan District Court and Supreme Court of Colorado Decision in Case No. 09 SA 374 is denied.

23. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

24. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

25. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

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Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,  
Director