

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 12A-1267G

IN THE MATTER OF THE APPLICATION OF DURANGO MOUNTAIN UTILITIES, LLC,
FOR (1) ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY;
(2) APPROVAL OF A COST ALLOCATION AND ASSIGNMENT MANUAL; (3) APPROVAL
OF TARIFF AND RULES AND REGULATION; AND (4) WAIVER OF CERTAIN
COMMISSION RULES.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
CONSIDERING APPLICATION PURSUANT TO
MODIFIED PROCEDURES; GRANTING APPLICATION,
IN PART, SUBJECT TO CONDITIONS; GRANTING
CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY FOR SERVICE TERRITORY, SUBJECT
TO CONDITIONS; DENYING APPLICATION
WITH RESPECT TO APPROVAL OF COST
ASSIGNMENT AND ALLOCATION MANUAL; AND
GRANTING, IN PART, APPLICATION WITH RESPECT
TO WAIVERS OF COMMISSION RULES**

Mailed Date: August 28, 2013

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I. STATEMENT

1. On December 13, 2012, Durango Mountain Utilities, LLC (DMU, the Company, or Applicant), filed a verified Application (December 13, 2012 Filing¹) that: (a) requested a Certificate of Public Convenience and Necessity (CPCN) to provide propane gas service within the proposed geographic service territory described in the December 13, 2012 Filing at Exhibit A; (b) requested approval of DMU's proposed tariffs containing the terms and conditions of service and the rates and charges for service (*id.* at Exhibit C); (c) requested approval of DMU's Cost Assignment and Allocation Manual (CAAM) (*id.* at Exhibit E); and (d) requested waivers of numerous Rules Regulating Gas Utilities and Pipeline Operators (Gas Rules²) (*id.* at ¶ 6). The December 13, 2012 Filing commenced this proceeding.

2. On December 14, 2012, the Commission issued its Notice of Application Filed (Notice). That Notice established an intervention period and a procedural schedule. On January 18, 2013, Decision No. R13-0102-I vacated that procedural schedule.

3. On December 20, 2012, Applicant filed its Affidavit of Completed Notice. On January 23, 2013, Applicant filed a Supplement to Affidavit of Completed Notice. These filings establish that Applicant gave notice of the Application to the Company's customers.

4. On January 16, 2013, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

5. On December 21, 2012, Atmos Energy Corporation (Atmos) filed, in one document, a Motion to Intervene and Request for Hearing. Applicant opposed Atmos's

¹ Seven exhibits were attached to the December 13, 2012 Filing; portions of Exhibit B and of Exhibit E were filed under seal as they contain information claimed to be confidential.

² The Gas Rules are found in Part 4 of 4 *Code of Colorado Regulations* 723.

intervention. On February 5, 2013, by Decision No. R13-0171-I, the ALJ granted the motion and permitted Atmos to intervene as a party in this proceeding.

6. On January 14, 2013, Trial Staff of the Commission (Staff) intervened as of right and is a party in this proceeding.

7. Atmos and Staff, collectively, are the Intervenors. Applicant and the Intervenors, collectively, are the Parties.

8. On January 16, 2013, by Minute Order, the Commission deemed the Application to be complete within the meaning of § 40-6-109.5, C.R.S. Applicant subsequently waived the applicability of § 40-6-109.5, C.R.S., to this proceeding. Decision No. R13-0171-I at ¶ 26 and Ordering Paragraph No. 3.

9. Pursuant to Decision No. R12-0102-I, the ALJ held a January 30, 2013 prehearing conference in this matter. The Parties were present, were represented, and participated. By Decision No. R13-0171-I, as pertinent here, the ALJ adopted a procedural schedule; scheduled a June 10, 2013 prehearing conference; and scheduled a June 12 through 14, 2013 evidentiary hearing in this proceeding. By subsequent interim decisions, the ALJ modified the procedural schedule but maintained the scheduled prehearing conference date and evidentiary hearing dates. On May 6, 2013, by Decision No. R13-0527-I and upon motion, the ALJ vacated the procedural schedule; vacated the prehearing conference; and vacated the evidentiary hearing.

10. On March 26, 2013, Applicant filed a Motion to Amend Application to Withdraw Request for Approval of Initial Tariffs, Rules, and Regulations of Durango Mountain Utilities, LLC. No intervenor responded. On April 2, 2013, by Decision No. R13-0380-I, the ALJ granted the unopposed motion and permitted the December 13, 2012 Filing to be amended.

11. Reference in this Decision to the Application is to the December 13, 2012 Filing as amended by the March 26, 2013 motion.

12. In the Application, the Company: (a) requests a CPCN to provide propane gas service within the proposed geographic service territory described in the December 13, 2012 Filing at Exhibit A; (b) requests approval of its CAAM (Application at Exhibit E); and (c) requests a waiver of the Commission rules discussed in the Application at ¶ 6. The Company has withdrawn its request for approval of the proposed tariff sheets that contain the terms and conditions of service and the rates for service (December 13, 2012 Filing at Exhibit C).

13. On March 1, 2013, Applicant filed the Direct Testimony of Jay Eagen³ and the Direct Testimony of Mark S. Seiter.⁴

14. As a condition of granting the requested amendment to the December 13, 2012 Filing, the ALJ directed Applicant to file, no later than April 8, 2013, the direct testimony and exhibits of Messrs. Eagen and Seiter with the portions that discuss or pertain to the proposed DMU tariffs lined through by strike-outs. The ALJ permitted no other changes to the previously-filed testimonies and exhibits to be made in the April 8, 2013 filing.

15. On April 8, 2013, DMU filed the direct testimony of Mr. Seiter with some of the portions that discuss or pertain to the proposed DMU tariffs struck.⁵ The April 8, 2013 direct testimony supersedes the direct testimony filed on March 1, 2013, as corrected on March 6, 2013.

³ Mr. Eagen's testimony has six exhibits (Exhibit JE-1 through Exhibit JE-6). None of the exhibits contains information claimed to be confidential. This testimony is verified by an affidavit dated May 2, 2013.

⁴ Mr. Seiter's March 1, 2013 testimony, which was corrected on March 6, 2013, has 12 exhibits (Exhibit MSS-1 through Exhibit MSS-12). A portion of Exhibit MSS-7 is filed under seal as it contains information claimed to be confidential.

⁵ Mr. Seiter's April 8, 2013 testimony is verified by an affidavit dated May 1, 2013.

16. On April 23, 2013, Atmos filed a Notice of Withdrawal of Intervention. Atmos is no longer a party in this proceeding.

17. On May 1, 2013, Staff filed a Notice of Withdrawal of Intervention. Staff is no longer a party in this proceeding.

18. On May 3, 2013, DMU filed (in one document) a Motion to Vacate Procedural Schedule, Motion to Vacate the Evidentiary Hearing, and Motion to Treat the Instant Application as Uncontested. On May 6, 2013, by Decision No. R13, 0527-I, the ALJ granted that motion and vacated the evidentiary hearing and procedural schedule.

19. As a result of the filings by Atmos and by Staff, the only party remaining in this proceeding is DMU. The Application is neither contested nor opposed. As a result of the withdrawal of the interventions, there is no request for an evidentiary hearing.

20. Pursuant to § 40-6-109(5), C.R.S., and Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1403,⁶ an uncontested and unopposed application may be considered under the Commission's modified procedure and without a formal hearing. The ALJ finds that the Application should be considered, and will be considered, under the Commission's modified procedure and without a formal hearing.

21. The ALJ will decide this matter based on the evidentiary record. The record consists of the verified Application, including exhibits; the verified March 1, 2013 Eagen Testimony, including exhibits; and the verified April 8, 2013 Seiter Testimony, including exhibits.

⁶ This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

22. In this proceeding, the Commission received a total of eight written comments from six individuals who are DMU customers. Of these eight comments, five addressed only DMU's proposed rates; two addressed both DMU's request for a CPCN and DMU's proposed rates; and one addressed only DMU's request for a CPCN. Although these written comments are not evidence, the Commission practice is to consider written comments received from members of the public. In accordance with Commission practice, the ALJ considered the three comments (or portions of comments) that addressed DMU's request for a CPCN.⁷

23. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

24. Applicant is a Colorado limited liability company organized in 2006. Applicant's principal place of business is located in Durango, Colorado.

25. Applicant is a wholly-owned subsidiary of DSC/Purgatory, LLC, doing business as Durango Mountain Resort (DSC/Purgatory). DSC/Purgatory operates a destination ski area and summer recreation area approximately 25 miles north of Durango, Colorado; this geographic area is known as the Durango Mountain Resort (Resort or DMR). Applicant is one of six wholly-owned subsidiaries of DSC/Purgatory. DSC/Purgatory is an affiliate, as that term is defined in Rule 4 CCR 723-4-4001(a) and is used throughout the Gas Rules, of DMU because DSC/Purgatory is DMU's parent corporation. DMU has numerous other affiliates. Seiter Testimony at Exhibit 7 at Exhibit A.

⁷ The ALJ did not consider the five comments (or portions of comments) that addressed DMU's proposed rates because the Application does not seek Commission approval of rates.

26. DMU provides cable television service, broadband internet service, propane gas retail service, and telephone service to DSC/Purgatory, other businesses, homeowners, and guests within the Resort. Thus, DMU provides both services that are regulated by the Commission (*e.g.*, propane gas retail service) and services that are not regulated by the Commission (*e.g.*, television service).

27. DMU seeks a CPCN to provide propane gas retail service to the Resort. Exhibit A to the Application and Exhibit MSS-3 to the Seibert Testimony contain a map of the proposed service area, which is the Resort Master Plan area, and the legal description of the proposed service area. The proposed service area is located in two Colorado counties; the legal description is: (a) San Juan County, Colorado, Section 13, Township 39 North, Range 9 West, N.M.P.M.; and (b) La Plata County, Colorado, Sections 24 and 25, Township 39 North, Range 9 West, N.M.P.M. The Resort is in mountainous terrain.

28. The proposed service territory does not abut the certificated service territory of any natural gas or propane gas public utility. Atmos has the certificated service territory, and operates the natural gas distribution system, in closest proximity to DMU's proposed service territory. The distance between the existing DMU distribution system and the Atmos natural gas distribution system is approximately ten miles.

29. At present there is no public utility that has a CPCN to provide natural gas service in the proposed service area. In addition, there are no natural gas facilities suitable for use as a distribution system within the proposed service territory.

30. At present there is no public utility that has a CPCN to provide propane gas service in the proposed service area. In addition, at present, DMU owns and operates the only facilities suitable for use as a propane gas distribution system within the proposed service territory.

31. DMU owns no Commission-issued CPCN. If the request for a CPCN is granted, then by virtue of the CPCN, DMU will have the exclusive right to provide propane gas service within the geographic area of the Resort and will have the concomitant obligation to provide, at just and reasonable rates and charges, propane gas service to those requesting service within the certificated service territory. DMU also will be able to operate the existing propane gas storage and distribution facilities within the certificated service territory.

32. Since 2006, DMU has provided retail propane gas service to residential and commercial customers in the developed portion of the Resort.⁸ At present, DMU provides propane gas service to 250 existing units and approximately 150 approved, but vacant, lots in the Resort.

33. Consistent with the approved DMR Master Plan, at maximum build-out, the Resort is authorized to have 2,000 residential units⁹ and 400,000 square feet of commercial space.¹⁰ It is not clear when the Resort will reach maximum build-out.

34. To serve the existing customers and at least some of the anticipated growth at the Resort, DMU has constructed, leased, or purchased propane gas storage and central distribution facilities.¹¹ The existing system is located in the southern end of the Resort; serves the 250 existing units; and is built “to serve approximately 150 existing vacant lots on both sides of [U.S. Highway 50] as well as hundreds of conceptually approved residential and commercial units in close proximity to existing developments.” Eagen Testimony at 4:16-18.¹² The existing

⁸ The Resort will be developed (*i.e.*, built) in accordance with the approved Master Plan and over time.

⁹ The residential units include condominiums, townhouses, and single-family residences.

¹⁰ The evidentiary record is not clear as to how many commercial units there will be at full build-out.

¹¹ Exhibits JE-2 and JE-3 to the Eagen Testimony are maps of the DMU propane gas storage and distribution infrastructure as of 2010. Exhibit MSS-5 at 6-8 to the Seiter Testimony contains a list of facilities in DMU’s infrastructure as of December 31, 2009.

¹² Citation to testimony is to the witness testimony at page number:line number.

facilities are owned in part and leased in part by DMU. DMU owns: (a) over 13,000 feet (approximately 2.5 miles) of constructed distribution lines with valves and related equipment; (b) one 18,000 gallon tank; and (c) 120 customer meters. DMU leases: (a) one 18,000 gallon tank; and (b) eight smaller tanks (capacity unknown).

35. Neither the total number of units that the existing infrastructure is capable of serving nor the specific location of those units within the Resort is clear from the record. It is clear, however, that the existing infrastructure is not sufficient to provide propane gas service to the entire Resort. DMU “envision[s] expansion of the system via underground piping to additional villages within the resort and installation of multiple 30,000 gallon underground gas storage tanks.” Eagen Testimony at 5:8-10.

36. To provide propane gas service to its customers, DMU purchases liquid propane from third party suppliers. At present, the existing storage capacity is sufficient for DMU to have on-site 10 to 20 days’ supply of propane during the winter peak demand period.

37. DSC/Purgatory employs 80 to 100 persons as year-round staff and more than 750 seasonal employees. Insofar as the evidentiary record shows, DMU has no employees that are solely employees of DMU.

38. The DMU group consists of: (a) a general manager; and (b) two technicians who are operator-qualified and propane-certified. On an as-needed basis, DMU retains outside consultants for propane-specific technical requirements. DMU has access to, and uses, DSC/Purgatory’s business team; executive management group; and resources.

39. DSC/Purgatory “manages and provides billing, collection, professional, and back-of-the-house services to DMU.” Seiter Testimony at 2:11-12. More particularly, DSC/Purgatory provides to DMU services that include “accounting, finance, human resources, information technology, risk management, regulatory affairs, governance, legal services, and

other corporate services[.]” *Id.* at 23:1-3. It appears that this arrangement will continue if the CPCN is granted. Insofar as the evidentiary record shows, there is no written agreement or memorandum of understanding between DSC/Purgatory and its subsidiary DMU with respect to either the services that DSC/Purgatory provides to DMU or the rates at which DSC/Purgatory provides services to its subsidiary DMU, or both.

40. DMU has an Operations and Maintenance Manual (Eagen Testimony at Exhibit JE-4) that contains its safety and inspections protocols. The technicians that perform inspections are trained and certified.

41. DMU has offices in two locations and provides customer service at those locations and by telephone. Using a combination of DSC/Purgatory’s hotel personnel and DMU’s office staff, DMU has personnel available 24 hours per day, 7 days per week, and 365 days per year to take telephone calls and to contact personnel to respond to emergency situations. At present, DMU has no tariffs on file with the Commission. DMU informs customers and prospective customers of its terms, conditions, rates, and charges for service using written customer order forms. DMU also maintains a website that contains that information.

42. As noted, DMU has provided since 2006, and continues to provide, propane gas service to the Resort. In addition, the DSC/Purgatory “majority ownership group has owned [Durango Mountain Resort] for 12 years, and until recently owned Kirkwood Mountain Resort in California, which also ran its own California Public Utilities Commission regulated propane utility[.]” Seiter Testimony at 15:7-10. Finally, “DMU has consistently informed and worked with Commission Staff in forming and operating its [propane] gas utility.” *Id.* at 11:23-12:1.

43. The record establishes that DMU has the requisite managerial fitness and operational fitness to serve the proposed service area.

44. DMU provided its total company (*i.e.*, regulated and non-regulated) Statement of Cash Flow Year Ending (YE) April 30, 2012 and Statement of Equity YE April 30, 2012. Application at Exhibit B; Seiter Testimony at Exhibit MSS-6. In addition, DMU provided the Report of Independent Auditors and Consolidated Financial Statements with Supplementary Information, prepared for DSC/Purgatory, LLC dba Durango Mountain Resort and Subsidiaries for the period April 30, 2012 and 2011. Application at Confidential Exhibit B; Seiter Testimony at Confidential Exhibit MSS-7. These documents show that DMU is adequately capitalized.¹³ In addition, DSC/Purgatory financially backs DMU; but, the extent of that backing is unknown.

45. With respect to future construction of infrastructure necessary to provide propane gas service to the service territory, Applicant, DSC/Purgatory, and others have entered into an Infrastructure Acquisition Agreement.¹⁴ The Infrastructure Acquisition Agreement “governs how [DSC/Purgatory and others] will install, finance, and dedicate propane infrastructure as development is expanded in the [Resort] area and how DMU will reimburse [DSC/Purgatory and others] for these costs as residential and commercial customers come on line and pay system ‘tap fees,’ thus limiting the cost of expansion to DMU until such time as the money is available.” Seiter Testimony at 13:10-14.

46. The record establishes that DMU has the wherewithal to serve the proposed service area.

47. DMU is a public utility and is subject to regulation by the Commission.

48. Additional facts are found throughout this Decision.

¹³ Although details are not provided, Mr. Seiter states that “DMU has received an independent \$ 750,000 loan from Alpine Bank.” Seiter Testimony at 14:9-10.

¹⁴ This agreement is found in the Seiter Testimony at Exhibit MSS-5 and is discussed in detail below.

III. DISCUSSION AND CONCLUSION

49. The Commission has jurisdiction over the subject matter of this proceeding and over the Company.

50. As the moving party, DMU bears the burden of proof by a preponderance of the evidence with respect to each request contained in the Application. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500.

51. In the Application, DMU requests: (a) a CPCN to serve an at-present uncertificated geographic area located in La Plata and San Juan Counties in Colorado (if the Application is granted, DMU will hold exclusive authority to provide propane gas service within the designated service territory); (b) Commission approval of DMU's Cost Assignment and Allocation Manual; and (c) waivers of numerous Gas Rules (the specific Rules are identified in the Application at ¶ 6). The ALJ discusses each of these requests below.

A. Certificate of Public Convenience and Necessity.

52. 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 such certificate for ... an extension into territory ... contiguous to its facility, line, plant, or system and not theretofore served by a public utility providing the same commodity or service, ... necessary in the ordinary course of its business.

53. The Colorado Supreme Court has held that § 115-5-1, C.R.S. (the predecessor to, and identical to, § 40-5-101, C.R.S.), is the bedrock of the doctrine of regulated monopoly in Colorado. *Western Colorado Power Company v. Public Utilities Commission*, 163 Colo. 61, 428 P.2d 922 (1967). To advance the doctrine of regulated monopoly and to avoid duplication of facilities and the inefficiencies that accompany duplication, the Colorado Supreme Court has

determined that it is the Commission's responsibility and obligation to grant to a public utility the exclusive authority to provide a specific type of utility service within a defined geographic service territory that does not overlap with the geographic service territory granted to another public utility providing the same type of utility service.

54. There is, however, no requirement that, when requested to do so, the Commission either must grant a CPCN for a geographic service territory or, if a CPCN is granted, must grant all the service territory that the utility seeks to have certificated to it. 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 Commission has the discretion not to include certificated territory areas that require no present service and areas that are receiving all necessary service from other sources. *Id.*, 163 Colo. at 79, 428 P.2d at 932.

55. In short, decisions with respect to where to draw the line for a CPCN and the conditions attached to a CPCN are within the sound and informed discretion of the Commission.

56. In carrying out its statutory functions and weighing the evidence to determine whether a CPCN should be granted because the criteria of the public interest and the public convenience and necessity have been met, the Commission has described its responsibilities as follows:

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.

Decision No. 62653 at 26.¹⁵

57. In reviewing an application for a CPCN to serve a new service territory, the Commission looks at, and considers, these factors and data: “For each area, data [are] required showing the time frame in which this service will be provided, number of customers, facilities required, costs, and overall economics.” Decision No. C97-71 at 6.¹⁶ The Commission also looks to a feasibility study (or its equivalent), which includes

1) the number of customers to be served in each subdivision or defined area where end-use distribution facilities are to be installed; 2) drawings showing proposed piping and design throughput; 3) overall project economics; and 4) in-service dates for each subdivision or defined area where end-use distribution facilities are to be installed.

Decision No. C97-648 at 8-9.¹⁷

58. Applying these principles and considering this guidance in this proceeding, the ALJ finds: (a) DMU has met its burden of proof in this case with respect to its request for issuance of a CPCN to provide propane gas service to the Resort; (b) insofar as it seeks issuance

¹⁵ This Decision was issued on April 22, 1964 in consolidated Proceedings No. Application No. 19574-Amended (*In the Matter of the Application of Poudre Valley Rural Electric Association, Inc., 220 East Olive Street, Fort Collins, Colorado, for a Certificate of Public Convenience and Necessity to Operate as a Public Utility Distributing Electric Energy in Portions of the Counties of Larimer, Weld, and Boulder, State of Colorado*); No. Application No. 19606-Amended (*In the Matter of the Application of Home Light and Power Company, a Corporation, 810 Ninth Street, Greeley, Colorado, for a Certificate of Public Convenience and Necessity to Operate as a Public Utility, in the Distribution of Electrical Energy in the County of Weld, State of Colorado*); No. Application No. 20356 (*In the Matter of the Application of Public Service Company of Colorado, a Corporation, 550 Fifteenth Street, Denver, Colorado, for a Certificate of Public Convenience and Necessity to Operate as a Public Utility in the Distribution of Electrical Energy in Portions of the Counties of Larimer, Weld, and Boulder, State of Colorado*); and Case No. 5234 (*Poudre Valley Rural Electric Association, Inc. v. Home Light and Power Company and Public Service Company of Colorado*).

¹⁶ This Decision was issued on January 22, 1997 in consolidated Proceedings No. 96A-155G (*The Application of Four Corners Gas Company for a Certificate of Public Convenience and Necessity to Construct and Operate a Natural Gas Distribution System in La Plata County, Colorado*); No. 96A-208G (*The Application of Citizens Utilities Company, La Junta, Colorado, to Obtain a Certificate of Public Convenience and Necessity (CPCN) to Provide Natural Gas Service in Certain Areas of La Plata County, Colorado*); and No. 96F-256G (*Citizens Utilities Company v. Greeley Gas Company, a Division of Atmos Energy Corporation*).

¹⁷ This Decision was issued on June 26, 1977 in consolidated Proceedings No. 96A-155G, No. 96A-208G, and No. 96F-256G. See note 16.

of a CPCN and subject to conditions, the Application should be granted; and (c) DMU should be granted a CPCN, subject to conditions, to provide propane gas service to the Resort.

59. The evidence establishes that the present or future public convenience and necessity require the new service territory requested by DMU. The evidence establishes that the public interest will be served if the Application for a CPCN is granted, subject to conditions, and if DMU is certificated to provide propane gas retail service within the Resort.

60. At present, DMU owns the only propane gas distribution facilities in the proposed service territory. There is no certificated utility providing gas service -- either natural gas or propane gas -- in the area.

61. At present, there are propane gas retail service customers (residential and commercial) that receive propane gas service from DMU. Although concentrated in the southern end of the Resort at present, the Resort Master Plan establishes that, in the future, DMU will have customers (residential and commercial) throughout the service territory.

62. Applicant has demonstrated its financial fitness, managerial fitness, operational fitness, suitability, and readiness to serve within the proposed service area. Applicant has a definite and economically feasible plan to provide propane gas retail service, and has provided propane gas retail service since 2006, to the Resort. Applicant has shown that it has adequate sources of propane gas supply and has the propane storage and distribution infrastructure to provide propane gas service to at least the residential and commercial customers now receiving service and the 150 existing vacant lots in the Resort. Applicant has demonstrated that it has a sufficient and feasible plan for providing propane gas service. Applicant is ready, willing, and able to provide propane gas service in the Resort.

63. Applicant has shown that it has a plan to provide propane gas service to the Resort over the longer term. This plan is the Infrastructure Acquisition Agreement (IAA) dated

February 1, 2006 and entered into between Applicant, DSC/Purgatory, Purgatory Village Land, LLC, and Durango Mountain Land Company, LLC.¹⁸ Seiter Testimony at Exhibit MSS-5. The IAA covers Infrastructure, which is defined as: “propane, phone, cable and internet improvements and facilities, within and without the boundaries of Durango Mountain Resort[.]” *Id.* at 1.

64. The IAA is an agreement between the Land Developer, which “is the owner of, and/or desires to develop, certain property within” the Resort (Seiter Testimony at Exhibit MSS-5 at 1), and DMU, which “desires to acquire certain *Infrastructure improvements already or to be constructed*, and wishes to formalize its intent to repay the related Infrastructure costs over a long-term period” (*id.*; emphasis supplied). The IAA covers “infrastructure improvements which DMU is authorized to furnish and which are necessary for the development of the Developer’s property and the servicing of [DSC/Purgatory’s] patrons[.]” *Id.*

65. Pursuant to the IAA,

Purchase of Completed Infrastructure Improvements. Within thirty (30) days of any phase or phases of completed Infrastructure by Developer to the satisfaction of DMU’s engineers and a receipt of “as built” drawings and any necessary approvals and receipt of the required warranties from Developer, and sufficient funds for payment pursuant to the terms and conditions described in [the IAA], *DMU will purchase the Infrastructure, including all easements and other necessary facilities, as described in [the IAA], for an amount equal to one hundred percent (100%) of the actual costs, including soft and hard costs.*

Seiter Testimony at Exhibit MSS-5 at 3 (emphasis supplied). As pertinent here, the referenced payment terms and conditions provide: (a) “Developer or [DSC/Purgatory] shall be eligible for reimbursement of all direct costs incurred and advances toward the services and improvements that are the subject” of the IAA (*id.* at 2); and (b) “DMU’s obligation to reimburse Developer or [DSC/Purgatory] under [the IAA] shall be contingent solely upon DMU’s reasonable ability to

¹⁸ Purgatory Village Land, LLC, and Durango Mountain Land Company, LLC, collectively, are referred to as the Land Developer.

pay Developer based on tap fees actually collected, and *DMU shall reimburse Developer, on a monthly basis, no less than 75% of the tap fees actually collected*” (*id.*; emphasis supplied).

66. While the ALJ discusses the IAA because it demonstrates that DMU has a plan for future infrastructure construction, approval of the Application is not -- and is not intended to be -- approval of the IAA. The ALJ will not approve the IAA for these reasons: (a) there is no clearly-stated requirement that DMU, a regulated utility, obtain from the Commission a CPCN or a Commission determination that no CPCN is required for additional propane gas storage and distribution facilities that are built or are acquired by DMU;¹⁹ (b) the ALJ does not wish to leave the impression that DMU’s agreement to purchase infrastructure for “an amount equal to one hundred percent (100%) of the actual costs, including soft and hard costs” (Seiter Testimony at Exhibit MSS-5 at 3) is approved by the Commission and, thus, may serve as a finding that such costs are prudent or are prudently incurred;²⁰ (c) as shown on the Durango Mountain Resort Organization Chart (Seiter Testimony at Exhibit MSS-7 at Exhibit A), all parties to the IAA appear to be affiliated; and there is no evidence that the IAA is an arm’s-length transaction between the affiliated entities; (d) the requirement that “DMU *shall* reimburse Developer, on a monthly basis, *no less than 75% of the tap fees actually collected*” (Seiter Testimony at Exhibit MSS-5 at 2; emphasis supplied) raises issues that, in the normal course, are addressed in an Advice Letter proceeding in which a utility’s revenue requirements, rates, and charges are at

¹⁹ With respect to a CPCN for extension of facilities, the Colorado Supreme Court has held:

Certainly section 40-5-101 requires a utility to file for a CPCN prior to initiating a facility extension if the utility wants assurance that its investment will be recoverable through rates and charges. If ... a utility does not obtain prior [Commission] approval, [the utility] has no vested right to recover for the cost of expanded facilities or service areas and therefore proceeds at its own risk.

City of Boulder v. Colorado Public Utilities Commission, 996 P.2d 1270, 1278 (Colo. 2000).

²⁰ This is especially true where, as here, the utility agrees to pay “soft and hard costs,” a term that is not defined and the definition of which cannot be discerned from the IAA.

issue;²¹ and (e) the IAA provision that allows “DMU, at its sole option, [to] waive any of the conditions set forth in [the IAA at ¶ 1] by written notification to Developer or” DSC/Purgatory²² (Seiter Testimony at Exhibit MSS-5 at 3) raises issues concerning the circumstances under which DMU might exercise that option, particularly given that the IAA pertains to affiliate transactions.

67. Applicant has met its burden under § 40-5-101(1), C.R.S., with respect to the proposed service territory. The ALJ will grant the requested CPCN for service territory. The ALJ also finds that DMU may operate the existing propane storage and distribution system for the purpose of providing propane gas service in its service territory.

68. The ALJ notes that, with respect to the existing propane storage and distribution system, granting the Application for a service territory is not -- and is not intended to be -- a determination that the existing system is appropriately sized or that the costs of the system are prudent or prudently incurred (or any of the foregoing). Given that DMU either built or acquired the existing system without a Commission-issued CPCN for facilities or a Commission-approved lease (for the leased facilities), DMU has no vested right to recover from its ratepayers the costs of those facilities. See note 19, above. DMU must prove, in another proceeding, that it may recover the costs of the existing infrastructure facilities from its propane gas ratepayers.

69. The Commission may attach to the grant of a CPCN those conditions that, in the Commission’s judgment, are necessary and in the public interest. It remains for the ALJ to determine whether conditions should be attached to the CPCN granted by this Decision.

²¹ In this regard, Mr. Seiter states that the IAA “provides an economically reasonable method for DMU to absorb the costs of extension of its system without having to raise rates on its existing customers to finance the same.” Seiter Testimony at 14:3-5. Which customers pay, and how much is paid, for a system extension are Advice Letter proceeding issues. In addition, the issue of whether DMU’s paying 75 percent of collected tap fees is reasonable (*e.g.*, whether the required payments impact -- and, they do, in what way -- DMU’s ability to continue to provide propane gas service and to provide that service are just and reasonable rates) should be addressed in the context of a DMU rate case.

²² The referenced IAA ¶ 1, generally speaking, contains the standards or conditions that apply when Developer or DSC/Purgatory does infrastructure construction covered by the IAA.

70. Based on the record, the ALJ finds that the following conditions are reasonable, are necessary, are in the public interest, and should be placed on the CPCN:

(a) For the reasons discussed above, granting the CPCN is not approval of the IAA and creates no presumption with respect to the IAA.

(b) For the reasons discussed above, granting the CPCN does not include a finding of prudence with respect to the existing propane gas storage and distribution infrastructure; and granting the CPCN creates no presumption of prudence with respect to the existing infrastructure as shown on Exhibits JE-2 and JE-3 to the Eagen Testimony or as listed in Exhibit MSS-5 at 6-8 to the Seiter Testimony (or both).

(c) No later than October 31, 2013 or 30 days following the effective date of a final Commission order approving the Application for a CPCN, whichever is later, DMU must file, on 30 days' notice, an advice letter and proposed tariff sheets containing the terms, conditions, rates, and charges applicable to the provision of propane gas retail service within its service territory.

(d) As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU must file a report with the Commission that identifies all then-existing encumbrances²³ on DMU's propane gas utility assets (encumbered assets). For each encumbered asset, the report must include at least the following information: (1) the identification of the asset encumbered; (2) the identity of the person (as that term is defined in § 40-1-102(10), C.R.S.) that holds the encumbrance; (3) the reason the encumbrance was incurred; (4) the date on which the encumbrance was incurred; (5) the amount of the

²³ As used in this Decision, encumbrance includes (without limitation) mortgage, lien, and any other type of security interest.

encumbrance; (6) the terms of the encumbrance; and (7) the date on which the encumbrance will be paid off in its entirety.²⁴

(e) As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU must file a report with the Commission that identifies all then-existing leases pertaining to DMU's propane gas utility assets (leased assets). For each leased asset, the report must include at least the following information: (1) the asset leased; (2) the identity of the lessor; (3) the reason for the lease; (4) the date on which the lease was entered into; (5) the terms of the lease, including the amount of any periodic payment; (6) the date on which the lease will terminate; and (7) the disposition to be made of the leased asset at the conclusion of the lease.²⁵

(f) No later than the filing of DMU's next rate case or October 31, 2013, whichever is earlier, DMU must separate, in its property records and in its accounting records, the assets used to provide regulated propane gas utility service from the assets used to provide other services. As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU must make a compliance filing that informs the Commission that DMU has met this condition.

(g) No later than the filing of DMU's next rate case or October 31, 2013, whichever is earlier, DMU must enter into a written contract, written memorandum of understanding, or other formal written agreement with DSC/Purgatory that meets these criteria: (1) is negotiated at arm's-length; (2) addresses and covers the accounting, finance, governance,

²⁴ In lieu of the requested information, DMU may provide a copy of the written agreement pertaining to the encumbrance, provided that document contains the requested information.

²⁵ In lieu of the requested information, DMU may provide a copy of the lease.

human resources, information technology, legal, regulatory affairs, risk management, and other services (corporate and otherwise) that DSC/Purgatory provides to DMU; the terms and conditions under which DSC/Purgatory provides those services to DMU; and the rates at which DSC/Purgatory provides those services to DMU; and (3) is the document pursuant to which DMU will conduct business with, and will engage in transactions with, DSC/Purgatory. As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU must file, as a compliance filing, the written document that complies with this condition.

(h) Except as a waiver or variance is granted by this Decision or other Commission decision, DMU must comply with the Gas Rules.

(i) As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU must file, as a compliance filing, the Rule 4 CCR 723-4-4505 disclosure that appears on the documents that are listed in that Rule and that DMU uses.

(j) Additional conditions on the CPCN are discussed below.

71. Granting the Application, subject to conditions, is in the public interest. The present or future public interest requires or will require the service territory. Granting the Application with conditions is consistent with, and advances the principles of, regulated monopoly. The ALJ will grant, subject to conditions, the Application for a CPCN for service territory; will certify the Resort as DMU's service territory for providing propane gas retail service; and will authorize DMU to operate, within the certificated service territory, the storage system and distribution system shown on Exhibits JE-2 and JE-3 to the Eagen Testimony or listed in Exhibit MSS-5 at 6-8 to the Seiter Testimony (or both).

B. Cost Assignment and Allocation Manual.

72. Rule 4 CCR 723-4-4503(a) requires a gas utility, such as DMU,²⁶ to have on file with the Commission

an approved indexed cost assignment and allocation manual which describes and explains the calculation methods the utility uses to segregate and [to] account for revenues, expenses, assets, liabilities, and rate base cost components assigned or allocated to Colorado jurisdictional activities. It includes the calculation methods to segregate and [to] account for costs between and among jurisdictions, between regulated and non-regulated activities, and between and among utility divisions.

73. Rule 4 CCR 723-4-4503(b) specifies the information that a CAAM must include.

Rule 4 CCR 723-4-4503(b)(V) requires that the CAAM include

A detailed description showing how the revenues, expenses, assets, liabilities and rate base items *by account and sub-account* are assigned and/or allocated to the Colorado utility's non-regulated activities, along with a description of the methods used to perform the assignment and allocations.

(Emphasis supplied.) Rule 4 CCR 723-4-4503(b)(IX) requires that the CAAM include “[a]ny additional information specifically required by Commission order.”

74. In light of the services provided by DSC/Purgatory to DMU, Rule 4 CCR 723-4-4503(b)(VI) is of interest. That Rule requires a

description of each transaction between the Colorado utility and a non-regulated activity which occurred *since the Colorado utility's prior CAAM was filed* and, for each transaction, a statement as to whether, for this Commission's jurisdictional cost assignment and allocation purposes, the value of the transactions is at cost or market as applicable.

(Emphasis supplied.)²⁷

²⁶ Rule 4 CCR 723-4-4001(l) defines gas, as that term is used throughout the Gas Rules, to include propane. Thus, DMU is a gas utility.

²⁷ Rule 4 CCR 723-4-4501(k) defines non-regulated activity as “any activity that is not offered as a public utility service ... and [that] is not regulated by this Commission or another state utility commission or the” Federal Energy Regulatory Commission. As pertinent here, Rule 4 CCR 723-4-4501(a) defines activity as “a business activity, product or service ... offered by ... an affiliate of a Colorado utility.” As DMU's parent corporation, DSC/Purgatory is an affiliate of DMU. Other entities also are affiliates of DMU.

75. Finally, Rule 4 CCR 723-4-4502(e) establishes, for “cost assignment and allocation purposes, the method to be used to determine the value of all transactions from a non-regulated activity to the utility[.]” Rule 4 CCR 723-4-4502(e)(I) addresses valuation of a product or service provided to the utility that is not provided pursuant to tariff. Rule 4 CCR 723-4-4502(e)(II) addresses valuation of the sale of an asset to the utility and the valuation of the use of an asset by the utility.

76. DMU’s CAAM is found at Exhibit E to the Application and Exhibit MSS-7 to the Seiter Testimony. Seiter Testimony at 22-23 supports the requested approval of the CAAM.

77. Review of the CAAM establishes that it includes only a general discussion of DMU’s assignment and allocation procedures. The CAM contains no discussion, let alone the detailed discussion required by Rule 4 CCR 723-4-4503(b)(V), “showing how the revenues, expenses, assets, liabilities and rate base items by account and sub-account are assigned and/or allocated to the Colorado utility’s non-regulated activities[.]” Because the submitted CAAM does not comply with Rule 4 CCR 723-4-4503(b), the ALJ will deny the Application insofar as it requests approval of the CAAM and will not approve the CAAM submitted with the Application.

78. DMU must have a Commission-approved CAAM. As a condition on the CPCN granted by this Decision, the ALJ will order DMU to make, not later than the filing of DMU’s rate case or October 31, 2013, whichever is earlier, a filing for Commission approval of a DMU CAAM.²⁸

79. As a condition on the CPCN granted by this Decision and to assure that the CAAM contains information about affiliate transactions between DSC/Purgatory and DMU, the ALJ will order DMU to include, pursuant to Rule 4 CCR 723-4-4503(b)(IX), the following

²⁸ The filing may be a stand-alone application for approval of the CAAM or may be combined with another filing (*e.g.*, a rate case).

information in its next-filed-for-approval CAAM: (a) a description of each transaction (*i.e.*, business activity, service, product, or asset) provided by, or sold by, DSC/Purgatory to DMU since May 1, 2012;²⁹ and (b) for each transaction, a statement as to whether, for Commission jurisdictional cost assignment and allocation purposes, the transaction is provided pursuant to tariff (with identification of the tariff), is valued at cost, or is valued at market.

80. As a condition on the CPCN granted by this Decision and to assure that the CAAM contains information about affiliate transactions between DMU and affiliates of DMU *other than* DSC/Purgatory, the ALJ will order DMU to include, pursuant to Rule 4 CCR 723-4-4503(b)(IX), the following information in its next-filed-for-approval CAAM: (a) a description of each transaction (*i.e.*, business activity, service, product, or asset) provided by, or sold by, a DMU affiliate other than DSC/Purgatory to DMU since May 1, 2012; and (b) for each transaction: (1) the identity of the affiliate; and (2) a statement as to whether, for Commission jurisdictional cost assignment and allocation purposes, the transaction is provided pursuant to tariff (with identification of the tariff), is valued at cost, or is valued at market.

81. Consistent with the discussion above, the Application insofar as it seeks approval of DMU's CAAM will be denied. As a condition of the CPCN granted by this Decision, the ALJ will order DMU to make, not later than the filing of DMU's rate case or October 31, 2013, whichever is earlier, a filing for Commission approval of a CAAM for DMU; that filing must contain the information discussed in ¶¶ 79 and 80, above.

²⁹ This date is the beginning of DMU's 2012-13 fiscal year. Given that the ALJ is ordering a rate case filing to be made, the 2012-13 fiscal year is the period most likely to be used as the test year for the rate case.

C. Waivers of, and Variances from, Commission Rules.

82. Rule 4 CCR 723-1-1003 governs requests for waivers and variances of rules. As relevant here, that Rule contains the standard the Commission applies when considering a request for waiver or variance:

The Commission may, for good cause shown, grant waivers or variances from tariffs, Commission rules, and substantive requirements contained in Commission decisions. In making its determination the Commission may take into account, but is not limited to, considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. The Commission may subject any waiver or variance granted to such terms and conditions as it may deem appropriate.

83. Applicant requests that the Commission grant it waivers of numerous Gas Rules. The Application at 4-5 and the Seiter Testimony at 28-31 provide information in support of the waiver requests. Each request is discussed separately.

84. *Rule 4 CCR 723-4-4404(a)* provides: “In its tariffs, a utility shall have a budget or level payment plan available for its customers.” The remainder of Rule 4 CCR 723-4-4404 contains requirements and processes. Applicant seeks a waiver of Rule 4 CCR 723-4-4404 in its entirety.

85. At the time this waiver request was filed on December 13, 2012, DMU’s proposed tariffs were before the Commission in this proceeding. Since that time, DMU has withdrawn its request that the Commission approve its proposed tariffs. The ALJ finds that DMU’s withdrawing its proposed tariffs renders its request for waiver of Rule 4 CCR 723-4-4404 moot in this proceeding. The ALJ also finds that, if the request is not moot, the waiver request relates to tariffs that contain terms and conditions of service and, thus, should be considered in a proceeding in which such tariffs are at issue. For these reasons, the ALJ will deny this request.

86. *Rule 4 CCR 723-4-4412(a)(I)* requires investor-owned, rate-regulated gas utilities with Colorado retail customers [to] file with the Commission a proposal to provide low-income

energy assistance by offering rates, charges, and services that grant a reasonable preference or advantage to residential low-income customers, as permitted by § 40-3-106, C.R.S.

The remainder of Rule 4 CCR 723-4-4412 contains specific requirements and processes. Applicant seeks a waiver of Rule 4 CCR 723-4-4412 in its entirety.

87. At the time this waiver request was filed on December 13, 2012, DMU's proposed tariffs were before the Commission in this proceeding. Since that time, DMU has withdrawn its request that the Commission approve its proposed tariffs. The ALJ finds that DMU's withdrawing its proposed tariffs renders its request for waiver of Rule 4 CCR 723-4-4412 moot in this proceeding. The ALJ also finds that, if the request is not moot, the waiver request relates to tariffs that contain terms, conditions, rates, and charges for service and, thus, should be considered in a proceeding in which tariffs are at issue. For these reasons, the ALJ will deny this request.

88. *Rules 4 CCR 723-4-4600 through 723-4-4699 (Gas Cost Adjustment Rules)* contain references to gas measurements stated in Mcf (1,000 standard cubic feet) or Dth (Dekatherm).³⁰ DMU seeks a variance³¹ from these rules to allow DMU to replace those referenced gas measurements with liquid propane measurements stated in gallons.

89. As support for granting its request, DMU states that it: (a) purchases from its suppliers the propane gas commodity in liquid form; (b) converts the liquid propane to gas at the customer meter; and (c) re-converts the propane "back to gallons ... at the time of billing in order to track the commodity purchased with the commodity distributed to [DMU's] end-users." Seiter

³⁰ Rule 4 CCR 723-4-4001(i) defines Dekatherm as "a measurement of gas commodity heat content. One Dekatherm is the energy equivalent of 1,000,000 British Thermal Units (1 MMBtu)."

³¹ DMU refers to this request as a waiver. In fact, the request is for a variance from the Gas Cost Adjustment Rules to permit DMU to substitute measurements stated in gallons for measurements stated in Mcf or Dth.

Testimony at 30:15-16. DMU asserts that “[b]illing, auditing, and reconciling in gallons will aid the Company and the Commission staff in the Gas Cost Adjustment process and is consistent with DMU’s historical billing practices.” *Id.* at 30:17-19.

90. In the 11 pages of the Gas Rules that contain the Gas Cost Adjustment Rules, there are at least ten references to Mcf and to Dth; these references occur in different contexts. From reading the Gas Cost Adjustment Rules, the ALJ cannot determine the effect (if any) that changing each Mcf reference and each Dth reference to a reference to gallons may or will have on the reporting and calculations required by those rules. DMU does not address this point in its Application or in the Seiter Testimony. In fact, DMU provides virtually no support for, and no specifics concerning, its assertion that “[b]illing, auditing, and reconciling in gallons will aid the Company and the Commission staff in the Gas Cost Adjustment process[.]” Seiter Testimony at 30:17-18. The record contains only DMU’s bare, unsubstantiated assertion.

91. In addition, the process by which DMU converts the liquid propane that it receives from its suppliers to the propane gas that it delivers to retail customers is unexplained. Likewise, the process by which DMU “re-converts” the quantity of propane gas delivered to a customer to an amount of liquid propane for the purpose of customer billing is unexplained. Further, DMU does not explain or discuss whether a gallon of liquid propane has a standard equivalent amount of propane gas stated in Mcf or Dth; and, if it does, why DMU elects not to use that equivalent for billing and reconciliation purposes.

92. Given the absence of an explanation of the impact that granting the waiver may or will have on DMU’s obligations under the Gas Cost Adjustment Rules and the absence of an explanation of the conversion-reconversion process and its impact (if any) on determining the amount of propane gas delivered and billed to end-users, the ALJ finds that DMU has not met its

burden of proof with respect to the requested variance of the Gas Cost Adjustment Rules. The ALJ will deny this requested variance in this proceeding and without prejudice.³²

93. Review of the Gas Cost Adjustment Rules, principally Rule 4 CCR 723-4-4602, reveals that the rules do not specify when DMU must make its annual Gas Cost Adjustment filing with the Commission. As a condition on the CPCN granted by this Decision and to assure that DMU makes an annual Gas Cost Adjustment filing, the ALJ will order DMU to make the required filings in accordance with Rule 4 CCR 723-4-4602(b) (the November 1 filing schedule).

94. Rules 4 CCR 723-4-4605 through 723-4-4608, found in the Gas Cost Adjustment Rules, are the Gas Purchase Plans (GPP) and Gas Purchase Reports (GPR) Rules. Applicant seeks a waiver of the GPP and GPR Rules in their entirety and for an indefinite period.

95. As support for granting its request, DMU states: (a) it serves 250 connections at present and, at full build-out in the service territory for which a CPCN is granted by this Decision, will serve at least 2,000 retail connections; thus, DMU's propane gas acquisitions from its suppliers are limited; (b) the "service territory is finite and limited to over-the-road supplier deliveries" (Seiter Testimony at 31:2-3); and (c) DMU's annual Gas Cost Adjustment filings will allow Staff to monitor DMU's propane gas purchases and "will allow the Commission to question and not [to] approve [DMU's] annual" Gas Cost Adjustment (*id.* at 30:21-22).

96. The ALJ finds that DMU has met its burden of proof with respect to the requested waiver of the GPP and GPR rules insofar as DMU requests a waiver of those rules in their entirety. The ALJ finds, however, that the request for a waiver extending over an indefinite period is too broad. The ALJ will grant the requested waiver subject to the requirement that, unless extended by a subsequent Commission decision, the waiver granted by this Decision will expire on **December 31, 2016**.

³² DMU may seek the requested variance in another proceeding (*e.g.*, the to-be-filed rate case.)

97. Rules 4 CCR 723-4-4750 through 723-4-4799 require rate-regulated gas utilities to file gas Demand Side Management (DSM) plans. Applicant seeks a waiver of these Rules in their entirety and for an indefinite period.

98. As support for granting its request, DMU states: (a) “Colorado Statutes state that these requirements are specifically intended for natural gas and electric utilities” (Seiter Testimony at 31:7-9); and (b) Rule 4 CCR 723-4-4751 “defines demand side management as ‘... the implementation of programs or measures which serve to shift or [to] reduce the consumption of, or demand for, natural gas’” (*id.* at 31:9-11; italics and underlining in original).

99. The ALJ finds that, in light of Rule 4 CCR 723-4-4751’s definition of DSM, DMU has met its burden of proof with respect to the requested waiver of the DSM rules insofar as DMU requests a waiver of those rules in their entirety. The ALJ finds, however, that the request for a waiver extending over an indefinite period is too broad. The ALJ will order that the waiver granted by this Decision will expire if and when the Commission amends the gas DSM rules to include propane gas within the definition of DSM.

100. Consistent with the discussion above, the Application insofar as it requests waivers of Gas Rules will be granted, in part.

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

IV. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above and subject to the conditions below, the Application filed by Durango Mountain Utilities LLC (DMU) on December 13, 2012, as amended, is granted, in part.

2. Consistent with the discussion above and subject to the conditions stated below, DMU is granted a certificate of public convenience and necessity to provide propane gas service in accordance with tariffs to be filed with the Commission, as those tariffs may change over time, in the geographic service territory (service territory) described as: San Juan County, Colorado, Section 13, Township 39 North, Range 9 West, N.M.P.M. and La Plata County, Colorado, Sections 24 and 25, Township 39 North, Range 9 West, N.M.P.M.

3. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: no later than October 31, 2013 or 30 days following the effective date of a final Commission decision approving the Application for a certificate of public convenience and necessity, whichever is later, DMU shall file, on 30 days' notice, an advice letter and proposed tariff sheets containing the terms, conditions, rates, and charges applicable to the provision of propane gas retail service within its service territory.

4. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: granting the certificate of public convenience and necessity is not approval of, and creates no presumption with respect to, the Infrastructure Acquisition Agreement dated February 1, 2006 that is appended to the Direct Testimony of Mark S. Seiter filed in this proceeding.

5. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: granting the certificate of public convenience and necessity is not a finding, and does not include a finding, of prudence with respect to the existing propane gas storage and distribution infrastructure; and granting the certificate of public convenience and necessity creates no presumption of prudence with respect to the infrastructure shown on Exhibits JE-2 and JE-3 to the Direct Testimony of Jay Eagen or listed in Exhibit MSS-5 at 6-8 to the Direct Testimony of Mark S. Seiter (or both) filed in this proceeding.

6. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: as a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU shall file a report with the Commission that identifies all then-existing encumbrances (as defined in the discussion above) on DMU's propane gas utility assets (encumbered assets). For each encumbered asset, the report shall include at least the following information: (a) the identification of the asset encumbered; (b) the identity of the person (as that term is defined in § 40-1-102(10), C.R.S.) that holds the encumbrance; (c) the reason the encumbrance was incurred; (d) the date on which the encumbrance was incurred; (e) the amount of the encumbrance; (f) the terms of the encumbrance; and (g) the date on which the encumbrance will be paid off in its entirety. In lieu of the requested information, DMU may provide a copy of the written agreement pertaining to the encumbrance, provided that document contains the requested information.

7. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: as a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU shall file a report with the Commission that identifies all then-existing leases pertaining to DMU's propane gas utility assets (leased assets). For each leased asset, the report shall include at least the following information: (a) the asset leased; (b) the identity of the lessor; (c) the reason for the lease; (d) the date on which the lease was entered into; (e) the terms of the lease, including the amount of any periodic payment; (f) the date on which the lease will terminate; and (g) the disposition to be made of the leased asset at the conclusion of the lease. In lieu of the requested information, DMU may provide a copy of the lease.

8. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: no later than the filing of DMU's next rate case or

October 31, 2013, whichever is earlier, DMU shall separate, in its property records and in its accounting records, the assets used to provide regulated propane gas utility service from the assets used to provide other services. As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU shall make a compliance filing that informs the Commission that DMU has met this condition.

9. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: no later than the filing of DMU's next rate case or October 31, 2013, whichever is earlier, DMU shall enter into a written contract, written memorandum of understanding, or other formal written agreement with DSC/Purgatory, LLC, doing business as Durango Mountain Resort (DSC/Purgatory) that meets these requirements: (a) is negotiated at arm's-length; (b) addresses and covers (1) the accounting, finance, governance, human resources, information technology, legal, regulatory affairs, risk management, and other services (corporate and otherwise) that DSC/Purgatory provides to DMU; (2) the terms and conditions under which DSC/Purgatory provides to those services to DMU; and (3) the rates at which DSC/Purgatory provides those services to DMU; and (c) is the document pursuant to which DMU will conduct business with, and will engage in transactions with, DSC/Purgatory. As a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU shall file, as a compliance filing, the written document that complies with this condition.

10. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: except as a waiver or variance is granted by this Decision or other Commission decision, DMU must comply with the Rules Regulating Gas Utilities and Pipeline Operators, Part 4 of 4 *Code of Colorado Regulations* 723.

11. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: as a filing in conjunction with DMU's next rate case or no later than October 31, 2013, whichever is earlier, DMU shall file, as a compliance filing, the Rule 4 *Code of Colorado Regulations* 723-4-4505 disclosure that appears on the documents that are listed in that Rule and that DMU uses.

12. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: DMU shall make its annual Gas Cost Adjustment filing in accordance with Rule 4 *Code of Colorado Regulations* 723-4-4602(b) (the November 1 filing schedule).

13. Consistent with the discussion above, the Application is denied insofar as it requests approval of the Cost Assignment and Allocation Manual appended as Exhibit E to the Application filed by DMU on December 13, 2012.

14. The certificate of public convenience and necessity granted by Ordering Paragraph No. 2 is conditioned as follows: DMU shall make, not later than the filing of DMU's next rate case or October 31, 2013, whichever is earlier, a filing for Commission approval of a Cost Assignment and Allocation Manual for DMU.

15. Consistent with the discussion above, the Cost Assignment and Allocation Manual filed pursuant to Ordering Paragraph No. 14 shall include the information discussed in ¶¶ 79 and 80, above.

16. Consistent with the discussion above, the Application is granted, in part, insofar as it requests waivers of Commission rules.

17. Consistent with the discussion above, the requested waiver of Rule 4 *Code of Colorado Regulations* 723-4-4404 is denied.

18. Consistent with the discussion above, the requested waiver of Rule 4 *Code of Colorado Regulations* 723-4-4412 is denied.

19. Consistent with the discussion above, the requested variance in the language of Rules 4 *Code of Colorado Regulations* 723-4-4600 through 723-4-4699 is denied without prejudice.

20. Consistent with the discussion above, the requested waiver of Rules 4 *Code of Colorado Regulations* 723-4-4605 through 723-4-4608 is granted; unless extended by a subsequent Commission decision, this waiver expires on December 31, 2016.

21. Consistent with the discussion above, the requested waiver of Rules 4 *Code of Colorado Regulations* 723-4-4750 through 723-4-4799 is granted and shall continue in effect until such time as the Commission amends the definition of demand side management in Rule 4 *Code of Colorado Regulations* 723-4-4751 to include propane gas.

22. The Commission shall retain jurisdiction of this proceeding and shall take such action and shall enter such orders as may be necessary to effectuate this Decision.

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 § 40-6-106, 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 recommended 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 a basic finding 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 Recommended 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)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge