

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-0291W

IN THE MATTER OF THE APPLICATION OF PROSPECT MOUNTAIN WATER COMPANY, INC., REQUESTING AN ORDER GRANTING IT: 1) APPROVAL OF A PERMANENT RATE STRUCTURE AND TARIFFS INCLUDING LEGAL AND ACCOUNTING REGULATORY-RELATED EXPENSES; 2) APPROVAL OF ITS PLAN FOR SALE OF SURPLUS ASSETS AND DISTRIBUTION OF THE PROCEEDS THEREFROM, INCLUDING APPROVAL OF A SYSTEM IMPROVEMENT STUDY; 3) APPROVAL OF CHANGES TO ITS OPERATING RATIO AND ITS CAPITAL IMPROVEMENT FUND TARIFFS; AND 4) AUTHORIZATION TO ENTER INTO AN AGREEMENT FOR WATER SERVICE.

**DECISION: (1) GRANTING MOTION FOR LEAVE TO
RESPOND TO APPLICATIONS FOR REHEARING,
REARGUMENT, OR RECONSIDERATION;
(2) GRANTING APPLICATIONS FOR REHEARING,
REARGUMENT, OR RECONSIDERATION; AND
(3) REQUIRING FILING OF SOURCE DOCUMENTS
EVIDENCING REMOVAL OF ENCUMBRANCES ON THE
COLORADO-BIG THOMPSON WATER RIGHTS**

Mailed Date: January 23, 2014
Adopted Date: January 15, 2014

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I. BY THE COMMISSION**A. Statement**

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration (RRRs) to Decision No. C13-1495 (Decision) filed on December 24, 2013, by Staff of the Colorado Public Utilities Commission (Staff) and jointly by David Britton, Ken Lindeman, Paula Burr, and Austin Condon (ratepayers). On January 8, 2014, Prospect Mountain Water Company (Prospect Mountain or Company) filed a motion for leave to respond to these RRRs along with a proposed response. On January 8, 2014, Prospect Mountain filed a notice of removal of encumbrances from the Colorado-Big Thompson (C-BT) water shares. Consistent with the discussion below, we: (1) grant Prospect Mountain's motion for leave to respond; (2) grant the RRRs filed by Staff and the ratepayers; and (3) require Prospect Mountain to file copies of source documents evidencing the removal of the encumbrances on the 40 C-BT water shares.

B. Background

2. Prospect Mountain filed an application requesting approval of its proposals to sell surplus water rights valued at about \$680,000,¹ and for distribution of proceeds from that sale. Prospect Mountain proposed to use the sale proceeds to discharge a bank loan, pay for an engineering report of the water system, finance a cash reserve, repay alleged shareholder loans, and pay estimated taxes on the sale. The remaining proceeds, estimated to be about \$240,000,

¹ Prospect Mountain no longer needed the water rights after it was granted a certificate of public convenience and necessity for a permanent connection to the Town of Estes Park's water system.

would be distributed 40 percent to the individual shareholders and 60 percent to the Company's Capital Improvement Fund (CIF).²

3. The Administrative Law Judge (ALJ) ruled that the proceeds from the sale of water rights may not be used to pay back alleged shareholder loans. The ALJ also found that the sale proceeds, after payment of taxes and discharge of the bank loan, should be deposited only in the CIF.³ The purpose of the CIF is to fund major capital expenditures, subject to prior Commission approval.⁴

4. In its ruling on exceptions, the Commission acknowledged several potential irregularities with the purported shareholder loans. The Commission also found that the encumbrances upon the C-BT units violate § 40-5-105, C.R.S., and our prior Decision No. C12-0808 in Proceeding 12M-804W issued July 13, 2012, which rendered the encumbrances void. Paragraph 11 of the Decision then addressed additional proceedings and the distribution of proceeds, and it is the subject of the RRRs:

Once Prospect Mountain files an application for final Commission approval of the sale of assets, we will inquire further into the irregularities related to the shareholder loans, the promissory notes, and Mr. Heron's actions. This proceeding also will address whether voiding the promissory notes themselves is an appropriate remedy. Finally, it will also address whether the Company and its shareholders may be entitled to any proceeds from the sale of assets after the items listed in paragraph 152 of the Recommended Decision have been paid. At that time, we may reexamine whether paragraph 149 of the Recommended Decision—where the ALJ found that the plant and the water rights are customer assets, thus proceeds from the sale of assets shall be used to benefit only customer interests in the Company—comports with the applicable legal and regulatory principles.

² Recommended Decision No. R13-1226 issued October 2, 2013, ¶ 136.

³ *Id.*, ¶ 152.

⁴ Rule 5112(e)(IV) of the Commission's Rules Regulating Water, and Combined Water and Sewer Utilities, 4 *Code of Colorado Regulations* 723-5.

C. RRRs

5. Staff and the ratepayers object to the ruling to conduct further Commission proceedings to determine the allocation and distribution of the C-BT sale proceeds. The central issues in this proceeding have been: (1) Prospect Mountain's claim that its shareholders have made loans to the Company; (2) whether the sale proceeds should be allocated to discharge the bank loan, pay taxes, reimburse the shareholders for their purported loans, and fund the cash reserve; and (3) whether the remaining proceeds should be distributed to individual shareholders or entirely to the CIF. The Staff and ratepayers contend Prospect Mountain was afforded substantial due process in regards to all of these issues; the ALJ issued comprehensive, unchallenged rulings; and the parties should not be required to expend the resources necessary to re-litigate. The Staff and ratepayers request affirmance without further hearings of the ALJ's disposition of the proceeds as stated in paragraph 152 of the Recommended Decision, in which after the bank loan and taxes are paid, the remainder is deposited in the CIF.

D. Motion for Leave to Respond to RRRs

6. We find that a review of the Company's position on the issues raised in the RRRs may be helpful in ruling on the merits, particularly because the Company did not address these issues on exceptions. We therefore grant Prospect Mountain's motion for leave to respond to the RRRs and will consider the Company's response.

E. Discussion

7. Staff and the ratepayers interpret the Decision as deferring *all* issues related to distribution of sale proceeds, including whether the proceeds may be used to pay back alleged shareholder loans, which was not our intent. We therefore clarify our Decision to state our affirmance of the ALJ's rulings that: (1) the proceeds may be used to pay taxes, to pay for an

engineering report of the water system, and to discharge the bank loan; and (2) the proceeds may not be used to repay alleged shareholder loans.

8. The additional proceedings referenced in Paragraph 11 of the Decision were intended to address the allocation of the remaining proceeds to either the individual shareholders or the CIF, by deferring that issue until Prospect Mountain files an application for a final approval of the sale of assets. For the reasons stated below, we grant this aspect of the RRRs and affirm the ALJ's Recommended Decision requiring all remaining sale proceeds to be placed in the CIF and not allowing distributions to individual shareholders.

9. On the basis of Staff's and the ratepayers' presentation of evidence and arguments, the ALJ made several findings of fact demonstrating Prospect Mountain's history of insufficient infrastructure investments, operating deficiencies, and mismanagement.

10. Despite multiple warnings ten years in advance from the United States Bureau of Reclamation (Bureau) that the Company's water supply permit would not be extended past July 2012, Prospect Mountain "waiting until the last second" to negotiate an agreement with the Town of Estes Park for the replacement supply of water.⁵ Thus, the Company unnecessarily risked its customers' water supply.

11. Prospect Mountain performed little or no maintenance on the system that treated raw water from the Bureau or the Company's water filtration plant.⁶ Prospect Mountain failed to perform general maintenance on its meters.⁷ This lack of adequate maintenance resulted in a high rate of water loss, which in turn resulted in higher water rates.⁸ The Company did not take adequate steps to reduce water loss in light of the impending switch to purchasing more

⁵ Recommended Decision, ¶ 79, fn. 86.

⁶ *Id.*, ¶¶ 98, 99.

⁷ *Id.*, ¶ 100, fn. 23.

⁸ *Id.*, ¶¶ 79, 80.

expensive water from the Town of Estes Park.⁹ Consequently, the ALJ ordered the Company to consult with Staff and retain an engineering firm to recommend capital and operating upgrades to the infrastructure.¹⁰ The ALJ ruled that improvements to water loss and water quality should be made as soon as possible after the release of the engineering report.¹¹ In our ruling on exceptions, we also directed the Company to implement all reasonable measures to reduce unmetered water use and leaks without waiting for the results of the engineering study.¹²

12. Prospect Mountain did not maintain its financial records in accordance with Commission Rules. To justify bills or money spent towards any project, the Company presented accounting records that were “incomplete, not verified, or appeared to be made up.”¹³ Prospect Mountain sought recovery for alleged rate case expenses that it later admitted was improper.¹⁴ Prospect Mountain also did not document properly the alleged shareholder loans. The Company determined the amounts of these alleged loans by working backwards through subtraction of other known amounts.¹⁵ Finally, there are numerous irregularities regarding encumbrances and promissory notes involving the C-BT water rights.¹⁶

13. These findings raise important public interest issues regarding the adequacy of Prospect Mountain’s infrastructure, maintenance, administration, the quality of Prospect Mountain’s water service, and the welfare of the Company’s ratepayers. The Company has not disputed these findings in its exceptions or its response to the RRRs.

⁹ *Id.*

¹⁰ *Id.*, ¶¶ 155-56.

¹¹ *Id.*, ¶ 157.

¹² Decision No. C13-1495, ¶ 27.

¹³ Recommended Decision, ¶ 144.

¹⁴ *Id.*, ¶ 118.

¹⁵ *Id.*, ¶¶ 142-143.

¹⁶ Decision, ¶ 9.

14. Section 40-5-105(1), C.R.S., authorizes the Commission to prescribe the terms and conditions upon the sale of utility assets. The ALJ's undisputed findings of fact discussed above demonstrate that Prospect Mountain has failed to make needed investments. Given these findings, we agree with the ALJ that sale proceeds remaining after payment of taxes and discharge of the bank loan should be deposited into the CIF and not distributed to shareholders.¹⁷ The interests of the ratepayers in receiving safe and reliable water service and the need to finance capital improvements to provide that service override the interests of the shareholders to receive distributions from the proposed sale. Commission Rules require prior approval of expenditures from the CIF.

15. Additionally, we agree with Staff and the ratepayers that the parties had the opportunity and expended substantial resources to present evidence on all of these issues, the ALJ fully considered the evidence, and the Company received substantial due process; thus, the issues should not be re-litigated when the Company files for final Commission approval of the sale. For the foregoing reasons, we grant the RRRs filed by Staff and the ratepayers.

F. Evidence of Release of Encumbrances

16. The Decision found that encumbrances placed by Mr. John Heron, President of Prospect Mountain, on the C-BT water rights are void. The Commission therefore ordered Prospect Mountain to file evidence that the encumbrances have been removed within 30 days of the final decision in this proceeding.¹⁸

17. The Company filed a Notice attaching emails among Mr. Heron, the Company, and a representative of the Northern Colorado Water Conservancy District (District) discussing

¹⁷ We also agree with Staff that the customers paid for the C-BT water rights and will pay for replacement water supply through fees to Estes Park.

¹⁸ Decision, ¶ 10.

removal of the encumbrances. However, the Company did not file any source documents evidencing removal.

18. We clarify that the Decision requires the Company to file copies of the source documents evidencing removal of the encumbrances. This includes: (1) a notarized document signed by Mr. Heron and acknowledged by the Company, showing release of the encumbrances; and (2) records from the District evidencing the removal. The Company shall file these source documents within 30 days of the effective date of the final decision in this proceeding.

II. ORDER

A. The Commission Orders That:

1. The motion for leave to file a response to applications for rehearing, reargument, or reconsideration (RRR), submitted by Prospect Mountain Water Company (Prospect Mountain) on January 8, 2014, is granted.

2. The RRR filed by Staff of the Public Utilities Commission on December 24, 2013, is granted.

3. The RRR jointly filed by David Britton, Ken Lindeman, Paula Burr, and Austin Condon on December 24, 2013, is granted.

4. Prospect Mountain shall file with the Commission, copies of source documents evidencing the removal of the encumbrances on the 40 Colorado-Big Thompson water shares within 30 days of the effective date of the final decision in this proceeding, consistent with the discussion above.

5. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Decision.

6. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 15, 2014.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

Commissioners

COMMISSIONER GLENN A. VAAD NOT
PARTICIPATING.