

Decision No. C14-0852

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0698W

IN THE MATTER OF THE APPLICATION OF PROSPECT MOUNTAIN WATER COMPANY, INC., AND NORTH WELD COUNTY WATER DISTRICT FOR APPROVAL OF TRANSFER OF ASSETS.

**ORDER GRANTING JOINT APPLICATION
FOR SALE OF 40 COLORADO-BIG THOMPSON WATER
RIGHTS FROM PROSPECT MOUNTAIN WATER
COMPANY TO NORTH WELD COUNTY WATER
DISTRICT AND ORDERING STAFF TO
AUDIT THE STATUS OF PROMISSORY NOTES**

Mailed Date: July 18, 2014
Adopted Date: July 17, 2014

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

1. This matter comes before the Commission for consideration of a Joint Application filed on June 25, 2014, by Prospect Mountain Water Company, Inc. (Prospect Mountain or Company) and North Weld County Water District (NWCWD) for the sale of 40 Colorado-Big Thompson (C-BT) water rights from Prospect Mountain to NWCWD.¹ Consistent with the discussion below, we grant the Joint Application subject to conditions. In addition, we order Staff of the Commission (Staff) to audit the status of the promissory notes previously issued by the Company to its president and report its findings to the Commission within 30 days of the effective date of this Decision.

B. Background

2. The Company owns 40 C-BT water rights subject to the jurisdiction of the Commission. In Proceeding No. 13A-0291W, Prospect Mountain proposed to sell the C-BT water rights and to distribute the proceeds. Prospect Mountain claimed it no longer needed these water rights to provide water service to its customers after it received a certificate of Public convenience and necessity (CPCN) for a permanent connection to the Town of Estes Park's treated water system.²

3. The Commission directed Prospect Mountain to file a separate application and found the proceeds of the sale should be distributed as follows: repayment of the Bank of Estes Park loan in the amount of \$75,000; payment of taxes resulting from the sale; payment of the

¹ NWCWD is a Colorado special district and is not subject to the jurisdiction of the Commission.

² Decision No. C13-1495, fn. 1; In Proceeding No. 12A-1050W, the Commission granted the Company a CPCN for a permanent connection to the Town of Estes Park's water system. Further, the Commission approved a \$75,000 loan with the Bank of Estes Park to finance the project.

engineering report of the water system, and the remainder deposited in the Capital Improvement Fund (CIF).³ The Commission also found the CIF should not be used for additional legal expenses.⁴ Further, the Commission directed the Company, as part of its application for approval of sale of water rights, to present a proposal to refund or credit customers for the total amount the customers paid through the CIF Surcharge for the permanent connection with Estes Park's treated water system.⁵

C. Joint Application

4. Prospect Mountain and NWCWD filed the Joint Application requesting Commission approval of the transfer of the 40 C-BT units upon a finding that the proposed sale to NWCWD is in the public interest. The purchase price is \$25,000 per unit, for a total of \$1,000,000 in gross proceeds, which the Company represents as fair market value. The Company also states Staff supports the Joint Application.

5. 4. Prospect Mountain proposes the following distribution of gross proceeds:

- \$40,000 broker fee to Selling Colorado Water, LLC;
- \$462.72 in administrative fees;
- Not to exceed \$7,500 for legal expenses directly related to the transaction;
- Not to exceed \$2,500 for tax consulting services;
- \$50,000 for an engineering study of the water system. Prospect Mountain requests authorization to issue a request for proposals and retain a firm to conduct this study. Prospect Mountain states it will work with Staff on the scope of work and selection of the firm.

³ Decision Nos. R13-1226, ¶¶ 151-152 and C14-0091, ¶ 7.

⁴ Decision No. C13-1495, ¶ 23. As a part of the general rate case the Commission established an additional annual legal budget at \$4,500. *Id.*, ¶ 18.

⁵ Decision No. C13-1495, ¶ 23; Decision No. R13-1226, ¶ 53.

- \$75,000 to repay the Bank of Estes Park loan. The Company will provide Staff with documentation before and after the loan is paid.
- The remaining proceeds to be distributed into the CIF.

6. In addition, Prospect Mountain seeks a Commission order requiring the filing of an advice letter to adjust the CIF surcharge to \$0.00 upon repayment of the Bank of Estes Park loan. Finally, Prospect Mountain proposes to calculate the refunds due to its customers for prior CIF payments and to provide that calculation to Staff with all supporting details before issuance. The Company seeks a waiver of Rule 5410, which requires the filing of an application for approval of a refund plan. Instead, the Company requests an authorization for the escrow agent to pay the Company for the bill credits.

7. By Decision No. C14-0755, mailed July 2, 2014, the Commission shortened the notice period to July 14, 2014.⁶ The Commission also cited its prior finding that selling the C-BT water rights before entering into a final water supply agreement with the Town of Estes Park may place Prospect Mountain's customers at risk of not having a sufficient water supply.⁷ The Commission therefore ordered the Company to file the permanent agreement or explain fully why it has not been completed and provide a definitive timetable for completion by July 14, 2014.

8. In the status report filed on July 14, 2014, Prospect Mountain states it engaged in negotiations for a permanent agreement in February 2013, but the Company and Estes Park decided it was premature to execute an agreement before a final decision in Proceeding No. 13A-0291W. Until recently, Estes Park was unable to resume negotiations due to the floods

⁶ The Commission also ordered Prospect Mountain to mail this notice to all customers by first class mail. Prospect Mountain filed an affidavit that it mailed a notice of the Joint Application to all 128 customers on June 27, 2014. Prospect Mountain states no customer notices have been returned.

⁷ Decision No. C13-1495, ¶ 14.

that occurred in September 2013. Prospect Mountain states it expects to receive a revised draft agreement from Estes Park for review by July 18, 2014. This revised draft, according to counsel for Estes Park, contains at least one substantive change concerning the rate structure. Prospect Mountain states the parties continue to negotiate in good faith, but it cannot provide a definitive timeline when a permanent agreement will be executed.

9. No interventions were filed. Therefore, this proceeding is uncontested. We will determine this matter upon the record, without a formal hearing under § 40-6-109(5), C.R.S., and Rule 1403, 4 *Code of Colorado Regulations* (CCR) 723-1.

D. Discussion

10. Section 40-5-105(1), C.R.S., requires public utilities to seek prior Commission approval of all sales, assignments, or leases of public utility assets outside the normal course of business. The standard for approval is whether the proposed transaction is in the public interest. *Mountain States Tel. & Tel. v. Pub. Utils. Comm'n*, 763 P.2d 1020 (Colo. 1988). In previous proceedings, the Commission considered reliability of service and potential need to replace the assets,⁸ as well as return of the gain on the sale to ratepayers,⁹ in determining whether a sale or a transfer of public utility assets is in the public interest.

11. Section 40-3-104.4, C.R.S., requires the Commission to grant less comprehensive regulatory treatment to privately owned water companies serving fewer than 1,500 customers. Prospect Mountain presently serves 128 customers. Consistent with § 40-3-104.4, C.R.S., we have relied on Staff to work with Prospect Mountain to minimize litigation expenses associated with traditional proceedings, and we continue to do so in this proceeding.

⁸ Decision No. C13-1550, Proceeding No. 13D-0498E, ¶ 19.

⁹ Decision No. C09-0229, Proceeding No. 08A-497EG, ¶ 19.

12. The price of \$25,000 per unit, for a total \$1,000,000 in gross proceeds, is within the fair market value range for the C-BT units.¹⁰ Further, Prospect Mountain worked with both Staff and a broker in implementing the sale. The broker assisted Prospect Mountain in finding a purchaser willing to pay several thousand dollars more per unit than offers made to the Company directly. We find the price of \$25,000 per unit will benefit the ratepayers.

13. Further, Prospect Mountain at present cannot use the C-BT water rights after the U.S. Bureau of Reclamation terminated the connection in 2012. Thus, the sale will not affect the reliability of service. Finally, it is important to proceed with the sale to pay for the engineering study of the water system, which is the first step in improving the quality of water and reducing high water loss.¹¹

14. Prospect Mountain has already built and paid for a permanent connection to Estes Park, which has been placed into service.¹² In addition, Prospect Mountain represents that the draft permanent agreement is modeled after the temporary agreement that has been in place since 2012. All parties represent that they have been working in good faith to reach a permanent agreement. Thus, while the Commission would have preferred if Prospect Mountain had entered into a permanent agreement with Estes Park before the sale of the C-BT water rights, we approve the sale at this time. We grant all requests for relief contained in the application not discussed below.

¹⁰ In Proceeding No. 13A-0291W, Staff estimated the value of the 40 C-BT units to be in the range of \$12,000 to \$15,000 per unit in June 2013. Answer Testimony of Kelly DiNatale, filed June 25, 2013 in Proceeding No. 13A-0291W, p. 9, lines 6-7, and Exhibit KND-3. The Company provided an estimate of \$18,000 per unit in August 2013. Rebuttal Testimony of Robert Lawrence, filed August 12, 2013 in Proceeding No. 13A-0291W, p. 14, lines 18-19, and Exhibit RL-16.

¹¹ Decision No. R13-1226, ¶¶ 154-157.

¹² Application filed by Prospect Mountain on April 2, 2013 in Proceeding No. 13A-0321W, p. 7, line 8.

15. We grant the recovery of \$40,000 in broker fees from the sale proceeds. While we did not discuss broker fees in Proceeding No. 13A-0291W, we find these fees are reasonable and benefitted the utility. The broker assisted the Company in finding a purchaser willing to pay several thousand dollars more per unit than prior offers made to the Company directly. This led to greater proceeds even after the broker fee is paid. We authorize the transaction escrow agent to disburse \$40,000 to the broker as part of closing the transaction.

16. We also permit recovery of up to \$2,500 in tax consulting fees from the CIF, subject to Staff oversight. The Company shall work with Staff to select an independent tax consultant and involve Staff in all discussions with that firm. We require Staff to review actual invoices to verify the billed amounts are reasonable and directly related to tax issues associated with the C-BT units. The CIF escrow agent is authorized to pay invoices after receiving notification from Staff that Staff has reviewed and approved such invoices.

17. While the Commission disallowed additional legal fees in Proceeding No. 13A-0291W, we find that this transaction is a special transaction outside the normal course of the utility's business, and that \$7,500 in attorney fees is reasonably necessary to facilitate the sale. In addition, Staff does not contest the recovery. However, while \$7,500 in attorney fees appears to be reasonable, Prospect Mountain provided no bills that would allow the Commission to verify the reasonableness of fees. Therefore, we grant recovery of up to \$7,500 in attorney fees, but require Staff to review actual invoices to verify the billed amounts are reasonable and directly related to facilitating the sale of C-BT units. We authorize the CIF escrow agent to pay up to \$7,500 from the CIF after receiving notification from Staff that Staff has reviewed and approved such invoices.

18. Prospect Mountain seeks a waiver of Rule 5410, 4 *Code of Colorado Regulations* (CCR) 723-5, which requires filing of an application for approval of a refund plan to customers. The Company urges the Commission to authorize the CIF escrow agent to “pay the Company the total sum of bill credits which the Company has remitted to customers from the CIF after the net proceeds are deposited.” We find a waiver of Rule 5410 is reasonable and consistent with § 40-3-104.4, C.R.S. However, we require Staff to verify the amounts to be refunded to customers before the money is released from the CIF.

E. Promissory Notes

19. In Proceeding No. 13A-0291W, the Commission voided purported encumbrances on the C-BT units intended to secure promissory notes issued by the Company to its president, Mr. John Heron.¹³ The Commission also stated:

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.¹⁴

20. The present status, validity, and enforceability of these promissory notes are unknown. Therefore, we direct Staff to audit the status of these promissory notes and report its findings within 30 days. If the promissory notes are still in force, we will determine future actions upon the receipt of Staff’s audit report.

¹³ Decision No. C13-1495, ¶ 10.

¹⁴ *Id.*, ¶ 11.

II. ORDER:**A. The Commission Orders That:**

1. The Joint Application filed on June 25, 2014, by Prospect Mountain Water Company, Inc. (Prospect Mountain or the Company) and North Weld County Water District for the sale of 40 Colorado-Big Thompson (C-BT) water rights is granted, consistent with discussion above.

2. Prospect Mountain shall file an advice letter to adjust the Capital Improvement Fund (CIF) surcharge to \$0.00 upon repayment of the Bank of Estes Park loan.

3. Prospect Mountain shall continue to negotiate in good faith with the Town of Estes Park (Estes Park) for a permanent agreement to Estes Park's water system.

4. Prospect Mountain's request for waiver of Rule 5410, 4 *Code of Colorado Regulations* (CCR) 723-5, is granted. The Company shall work with Staff to calculate the refunds from CIF due to customers.

5. Staff shall review actual invoices for attorney fees and tax consulting fees to verify the amounts up to \$7,500 and \$2,500, respectively, are reasonable and directly related to facilitating the sale of C-BT units, and shall notify the CIF escrow agent that it has reviewed and approved such invoices.

6. Staff shall audit the status of promissory notes issued by Prospect Mountain to its president and report its findings to the Commission within 30 days of the effective date of this Decision.

7. The 20-day period provided in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

8. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 17, 2014.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

Commissioners

COMMISSIONER GLENN A. VAAD ABSENT.