

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0140G

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR AUTHORIZATION PURSUANT TO COMMISSION RILES 4103 AND
4104 TO ABANDON FOUR GAS GATHERING SYSTEMS IN GARFIELD, MESA, AND RIO
BLANCO COUNTIES, COLORADO, AND SELL THEM TO UGC MIDSTREAM LTD, LLC.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
GRANTING-IN-PART AND DENYING-IN-PART MOTION
FOR LEAVE TO FILE REPLY BRIEF, DENYING MOTION
FOR SUMMARY JUDGMENT, AND EXTENDING
STATUTORY DEADLINE**

Mailed Date: August 29, 2022

TABLE OF CONTENTS

I. STATEMENT.....	2
A. Background.....	2
B. Motion for Leave.....	4
C. Motion for Summary Judgment.....	5
1. Legal Standard.....	5
2. Facts	5
a. Undisputed	5
b. Disputed	8
3. Arguments	8
a. UCA	8
b. Public Service	9
4. Analysis	9
D. Extension of Statutory Deadline.....	13
II. ORDER.....	13
A. It Is Ordered That:	13

I. STATEMENT

A. Background

1. On March 30, 2022, Public Service Company of Colorado (Public Service) filed a Verified Application (Application) seeking authorization to abandon and permanently retire from public utility service four gas gathering systems and related assets located in the Colorado counties of Garfield, Mesa, and Rio Blanco, as described in more detail below (“Gas Gathering Assets”) and, to the extent deemed necessary, further authorization consistent with C.R.S. § 40-5-105 and Gas Rules 4002(a)(V) and 4104,¹ to sell the Gas Gathering Assets to UGC Midstream Ltd, LLC pursuant to the terms and conditions of a Gas Gathering Assets Purchase and Sale Agreement entered into between Public Service. With the Application, Public Service filed the direct testimony and attachments of Alexander G. Trowbridge, Laura L. Roberts, and Laurie J. Wold.

2. On March 31, 2022, the Commission issued a notice of the Application.

3. On April 21 and 28, 2022, Trial Staff of the Commission and the Office of the Utility Consumer Advocate filed notices of intervention by right, respectively.

4. On May 4, 2022, the Commission deemed the Application complete and referred the proceeding to an Administrative Law Judge (ALJ) by minute entry. The proceeding was subsequently assigned to the undersigned ALJ.

5. On June 27, 2022, the ALJ issued Decision No. R22-0389-I that scheduled a remote prehearing conference for July 13, 2022, required the parties to confer regarding a

¹ 4 *Colorado Code Regulations* (CCR) 723-4.

procedural schedule and discovery procedures, and instructed Public Service to file a report of the conferral by July 1, 2022.

6. On July 1, 2022, Public Service and UCA filed reports of the conferral between the parties. All parties agreed that the hearing should be conducted remotely, workpapers will be provided two business days after the filing of testimony, and that Rule 1405 of the Commission's Rules of Practice and Procedure² will govern discovery. However, Public Service and Staff, on the one hand, and UCA, on the other hand, proposed different procedural schedules.

7. On July 13, 2022, the remote prehearing conference took place at which the parties agreed to a schedule for the proceeding.

8. On July 15, 2022, UCA filed a Motion for Summary Judgment (MSJ).

9. On July 18, 2022, the ALJ issued Decision No. R22-0415-I that established the agreed-upon procedural schedule and scheduled the remote hearing for September 1-2, 2022.

10. On July 25, 2022, Staff filed the answer testimony of Fiona Sigalla and Marianne Wills Ramos, and the UCA filed the answer testimony of Cory Skluzak.

11. On July 29, 2022, Public Service filed a Response to the Motion (Response to MSJ).

12. On August 12, 2022, the UCA filed a Motion for Leave to File a Reply Brief in Support of its MSJ (Motion for Leave). The UCA filed its proffered Reply Brief with its Motion (Reply in Support of MSJ).

13. On August 19, 2022, Public Service filed the rebuttal testimony of Mr. Trowbridge, Ms. Roberts, and Mark P. Moeller.

14. On August 26, 2022, Public Service filed a Response to UCA's Motion for Leave.

² 4 *Code of Colorado Regulations* 723-1.

B. Motion for Leave

15. The UCA asserts that “[a] reply is warranted here under Commission Rules because the Company’s Response relies upon erroneous statements of law and material misrepresentations of fact.” Specifically, the UCA argues that Public Service made incorrect statements of law in its Response to MSJ by: (a) arguing that Decision Nos. R18-0057³ and C20-0840⁴ “do not apply here;”⁵ (b) mischaracterizing legal arguments as genuine issues of material fact;⁶ (c) arguing that all of its assets are public utility assets because Public Service is a public utility;⁷ and (d) mischaracterizing the decision in *Mountain States Tel. & Tel. Co. v. PUC*, 763 P.2d 1020 (Colo. 1988).⁸ The UCA concludes that there is good cause to grant its Motion for Leave.

16. Under Commission Rule 1400, reply briefs are not permitted unless a movant for leave to file a reply brief establishes: (a) a material misrepresentation of fact; (b) accident or surprise, which ordinary prudence could not have guarded against; (c) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or (d) an incorrect statement or error of law.⁹ Here, the UCA has not established any of these requirements. Further, the UCA did not comply with Rule 1400(a).¹⁰ Nevertheless, the ALJ will accept and review the section of the proffered reply brief addressing *Mountain States*, as the UCA did not address that decision in its MSJ.

³ Issued in Proceeding No. 17F-0599G on January 25, 2018.

⁴ Issued in Proceeding No. 20F-0077G on December 4, 2020.

⁵ Motion for Leave at 2 (¶ 5).

⁶ *Id.* at 3 (¶ 6).

⁷ *Id.* at 3 (¶ 7).

⁸ *Id.* at 3-4 (¶ 8).

⁹ 4 CCR 723-1.

¹⁰ *Id.*

C. Motion for Summary Judgment

1. Legal Standard

17. Colorado Rule of Civil Procedure 56 allows summary judgment to be entered before a hearing when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”¹¹ The movant bears the burden of establishing the absence of any genuine issue of material fact. In determining whether summary judgment is proper, the Commission must grant the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolve all doubts against the moving party.¹² Summary judgment is a drastic remedy, and is appropriate only when the moving party carries its burden and the nonmoving party fails to establish that a hearing is necessary.¹³ If the movant does not satisfy its burden, summary judgment is inappropriate.¹⁴

2. Facts

a. Undisputed

18. The Gas Gathering Assets that are the subject of the Application are: (a) the Baxter Gas Gathering System located in Garfield County (Baxter System), including the separate products extraction and compression facilities located at Baxter Station; (b) the Hunter Canyon Gas Gathering System located in Mesa County (Hunter Canyon System), including the separate dehydration and compression facilities located at Hunter Canyon Station; (c) the Indian Valley

¹¹ Colorado Rule of Civil Procedure 56(c).

¹² *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999).

¹³ *Id.*

¹⁴ See *Ginter v. Palmer & Co.*, 196 Colo. 203 (Colo. 1978) (reversing trial court’s grant of the defendant’s motion for summary judgment even though the plaintiff did not respond to the motion; citing Colorado Rule of Civil Procedure 56(e), which states in relevant part that “[i]f there is no response, summary judgment, **if appropriate**, shall be entered” (emphasis added), in support of its holding that summary judgment was inappropriate because the defendant failed to carry its burden).

Gas Gathering System located in Rio Blanco County (Indian Valley System); and (d) the North Douglas Gas Gathering System located in Rio Blanco County (North Douglas System).¹⁵

19. Western Slope Gas Company (WestGas), Public Service's former intrastate pipeline subsidiary, constructed these four gas gathering systems decades ago.¹⁶ In 1992, Public Service and WestGas filed a joint application requesting Commission authorization to, among other things, merge WestGas into Public Service and transfer certain gas gathering assets from WestGas to Public Service and vice versa pursuant to § 40-5-105 C.R.S. The intervenors, which included Staff and the predecessor to the UCA, raised the question of "whether the Public Utilities Commission has jurisdiction over the gathering assets proposed to be transferred."¹⁷ The parties entered into a Stipulation and Agreement in which they agreed that the Commission had jurisdiction over one of the gathering systems (the Tiffany Gathering System) "because the system is currently owned by WestGas, a regulated public utility, and is included in WestGas' rate base."¹⁸ However, the parties also preserved their rights to argue later that "[gas] gathering is or is not subject to the jurisdiction of the Colorado Public Utilities Commission."¹⁹ The Commission approved the merger, which led to Public Service's ownership of the four gas gathering systems at issue in this proceeding.²⁰ In so ruling, the Commission stated that "[t]he Commission's jurisdiction over the Ignacio Gathering System assets [including the Tiffany Gathering System assets] shall be as set forth in the Stipulation and Agreement."²¹

¹⁵ MSJ at 4, 6-11; Hearing Exhibit 100 at 2 (Application).

¹⁶ MSJ at 4; Hearing Exhibit 100 at 2-3 (Application).

¹⁷ MSJ, Attach. UCA-3 at 4 (¶ 6(c)).

¹⁸ *Id.* at 5 (¶ 8(a)).

¹⁹ *Id.* at 11 (¶ 13).

²⁰ *Id.* See also MSJ at 4; Hearing Exhibit 101 at 15:15-19 (Direct Testimony of Mr. Trowbridge).

²¹ MSJ, Attach. UCA-3 at 6 (¶ 19).

20. Public Service has booked the assets in the Hunter Canyon, North Douglas, and Indian Valley Systems to FERC gas plant accounts within the “Production and Gathering” functional category under the Uniform System of Accounts.²² While the Baxter System also includes assets booked to the “Production and Gathering” functional category, it also includes processing and compression facilities that Public Service has recorded to the “Products Extraction” and “Transmission” functional categories, respectively, in the FERC gas plant accounts.

21. The Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems transport raw and unprocessed gas. Public Service “does not purchase any gas from the production wells connected to these systems for the purpose of gas supply.”²³ As a result, they “are not a source of gas supply for the Company in providing gas sales service to its customers.”²⁴ Put differently, Public Service “does not directly provide end-use customers gas deliveries from the” Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems.²⁵

22. However, Public Service provides “gas transportation services over these systems pursuant to its jurisdictional Commission tariff” and “stands ready to serve” any member of the public that requests such services.²⁶ Moreover, all of the assets of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems “have been in [Public Service’s] rate base approved by the Commission for the entirety of [Public Service’s] ownership of the assets.”²⁷

23. At all relevant times, Public Service has been a public utility under Colorado law.

²² MSJ at 7-11; Response to MSJ at 8-9.

²³ MSJ at 17 (quoting Hearing Exhibit 101 at 9:22-10:1 (Direct Testimony of Mr. Trowbridge)).

²⁴ *Id.* at 17 (quoting Hearing Exhibit 101 at 22:20-23 (Direct Testimony of Mr. Trowbridge)).

²⁵ Response to MSJ at 5.

²⁶ Response to MSJ at 5.

²⁷ Response to MSJ at 2.

b. Disputed

24. Public Service “operates . . . an integrated pipeline system into which shippers can deliver gas and have [Public Service] transport that gas across its system and deliver it to end users on other parts of its system”²⁸ The Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems are part of that integrated pipeline system. While their use has changed over time (from the provision of bundled gas sales service to gas transportation service), those systems “have continued to operate as integral parts of [Public Service’s] Colorado pipeline system and have never changed their status as jurisdictional public utility assets.”²⁹ “Public Service does not and has never held itself out as providing stand-alone gas gathering services” separate from its gas transportation services.³⁰

3. Arguments**a. UCA**

25. The UCA argues that the Commission does not have jurisdiction over the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems because they are not public utility assets under §§ 40-3-103(1)(a)(I), 40-3-105, C.R.S. Specifically, UCA contends that public utility assets are limited to those that are “used for the purpose of supplying the public for domestic, mechanical, or public uses.”³¹ Because Public Service does not use the gas from the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems to “supply the public for domestic, mechanical, or public uses,” the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems are not public utility assets over which the Commission has jurisdiction.

²⁸ Response to MSJ at 11-12 (citing Hearing Exhibit 102 at 12:2-3, 8-18 (Direct Testimony of Ms. Roberts); Hearing Exhibit 101 at 23:7-18 (Direct Testimony of Mr. Trowbridge)).

²⁹ Response to MSJ at 10-11 (citing Hearing Exhibit 102 at 10:4-11:2; 11:20-12:18 (Direct Testimony of Ms. Roberts)).

³⁰ *Id.* at 11.

³¹ MSJ at 12.

b. Public Service

26. Public Service counters that it is a public utility and that the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems have been in its “rate base approved by the Commission for the entirety of [Public Service’s] ownership of the assets.”³² In addition, the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems are currently used in providing “jurisdictional transportation service” to the public.³³ Because the sale of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems are not in the normal course of business, Public Service concludes that the Commission has jurisdiction over the sale of the assets pursuant to § 40-5-105, C.R.S.

4. Analysis

27. The ALJ will deny the Motion. The record in this proceeding will benefit from a hearing that provides further evidence concerning the disputed issues of fact, as well as the significance of certain undisputed facts. Those facts include: (a) the inclusion of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems in Public Service’s rate base; (b) Public Service’s provision of transportation services over those systems pursuant to its transportation tariff; (c) the inclusion of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems in Public Service’s integrated pipeline system into which shippers can deliver gas and have Public Service transport that gas across its system and deliver it to end users on other parts of its system; and (d) Public Service’s non-offering of stand-alone gas gathering services. Construing these facts in the light most favorable to Public Service, the ALJ concludes that summary judgment is inappropriate.

³² Response to MSJ at 2.

³³ *Id.* at 5.

28. The Commission decisions in *HRM Resources II, LLC v. Anadarko Petroleum Corp. (Anadarko)*³⁴ and *William C. Danks v. DCP Operating Company, LP (Danks)*,³⁵ the latter of which was recently upheld by the Colorado Supreme Court, do not mandate a different result. In both proceedings, the Commission addressed whether the midstream operator respondents met the definition of “public utility” under § 40-1-103, C.R.S. The Commission decided that they did not and, consequently, that the Commission did not have jurisdiction over them.

29. In so concluding, the Commission determined that the gas gathering systems owned by the midstream operators did not make those companies public utilities. The fact that the pipelines in those proceedings transported raw and unprocessed gas that the Respondents did not offer or sell to the public was significant to the Commission’s conclusions concerning the application of § 40-1-103, C.R.S. to the midstream operators in *Anadarko* and *Danks*.³⁶ However, the Commission did not address in either decision the separate question of whether the sale of such systems by an undisputed public utility requires the approval of the Commission pursuant to § 40-5-105, C.R.S., which is the relevant question in this proceeding. Accordingly, the ALJ concludes that the Commission’s decisions in *Anadarko* and *Danks* does not require UCA’s Motion for Summary Judgment to be granted.

30. The Colorado Supreme Court’s decision in *Mountain States Tel. & Tel. Co. v. PUC*, 763 P.2d 1020 (Colo. 1988) also supports the denial of UCA’s Motion. There, the Commission invalidated the transfer of Mountain Bell’s directory publishing assets to one of its subsidiaries. While not directly used in the provision of utility service, Mountain Bell included the depreciated Yellow Pages assets in its rate base and credited the associated revenues for

³⁴ Decision No. R18-0057 issued in Proceeding No. 17F-0599G on January 25, 2018.

³⁵ Decision No. C20-0840 issued in Proceeding No. 20F-0077G on December 4, 2020.

³⁶ Decision No. C20-0840 at 17 (¶ 47); *Danks*, 512 P.3d at 699-700; Decision No. R18-0057 at 15 (¶ 64)

ratemaking purposes.³⁷ Nevertheless, Mountain Bell argued that Commission jurisdiction did not extend to its Yellow Pages business because it was a private venture,³⁸ and, on judicial review, urged the Court to limit the phrase “assets of any public utility” in § 40-5-105, C.R.S. to those assets that are “essential” to providing the utility service in question.³⁹

31. In its decision upholding the Commission’s decision, the Colorado Supreme Court declined to so limit § 40-5-105, C.R.S. In so doing, the Colorado Supreme Court first held that “the PUC’s authority under article XXV is not narrowly confined but extends to incidental powers which are necessary to enable it to regulate public utilities.”⁴⁰ The Colorado Supreme Court then stated that § 40-5-105:

applies to assets transfers which are not in the ordinary course of business. It is undisputed that the publishing assets were assets of Mountain Bell and we will not read into the statute the qualifying language proposed by Mountain Bell. To take the position urged by Mountain Bell would restrict unreasonably the PUC’s ability to oversee assets transfers and would place the PUC in the untenable position of relying on the truth of a utility’s representation that the assets in question do not affect its provision of services or the rates charged to ratepayers. Our statutory scheme does not cast the PUC in such a restricted role. Section 40-5-105 requires the PUC to review *any* proposed transfer of public utility assets not done in the ordinary course of business and allows a transfer to proceed only if the PUC so authorizes and on the terms which the PUC may impose.⁴¹

The Colorado Supreme Court concluded that the Commission had jurisdiction over the transfer under § 40-5-105, C.R.S.

32. Here, as in *Mountain States*, there is no dispute that Public Service is a public utility. In addition, the depreciated assets of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems have been included in Public Service’s rate base since Public Service took

³⁷ 763 P.2d at 1026.

³⁸ *Id.* at 1024-1025.

³⁹ *Id.*

⁴⁰ *Id.* at 1025.

⁴¹ *Id.* at 1026 (emphasis added) (footnotes omitted).

ownership of them. Finally, Public Service contends that it uses the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems to provide jurisdictional transportation service. As a result, *Mountain States* strongly suggests that the Commission has jurisdiction over the transfer of the Baxter, Hunter Canyon, North Douglas, and Indian Valley Systems.

33. UCA's attempts to distinguish *Mountain States* are unavailing at this stage of the proceeding. Specifically, UCA asserts that:

Mountain States is distinguishable from this case on several key grounds: (1) it did not involve natural gas company gas gathering facilities, which are subject to unique rules and case law here in Colorado; (2) it preceded (by 32 years) the narrow analysis that has now been adopted by Colorado's Supreme Court to determine whether gas gathering assets are subject to Commission jurisdiction under §40-1-103, C.R.S.; (3) the directories sold by US West Direct were an essential part of Mountain States' basic local service product (a "public utility" product) and were provided free to Mountain West's end users who subscribed to its basic local exchange service.⁴²

However, there is nothing in *Mountain States* suggesting that its holding is limited to either non-natural gas public utilities or "essential" public utility assets. In fact, while the Colorado Supreme Court noted that Mountain States stipulated earlier in the proceeding that the Yellow Pages assets were "essential" to the provision of telephone service, the Colorado Supreme Court stated that "this case illustrates that . . . 'essential' utility assets [are not] easily separated from the 'non-essential.'"⁴³ Similarly, there is nothing in the Supreme Court's recent *Danks* decision indicating that its holding in *Mountain States* has been overturned, limited, or modified in any way. Accordingly, the ALJ concludes that the UCA's attempt to distinguish *Mountain States* is unpersuasive.

34. For the foregoing reasons, the MSJ shall be denied.

⁴² Reply in Support of MSJ at 3-4.

⁴³ 763 P.2d at 1026.

D. Extension of Statutory Deadline

35. As stated in the Notice, because Public Service filed testimony with the Application, the Commission is required by § 40-6-109.5(1), C.R.S., to issue its decision within 120 days of the Application being deemed complete by the Commission. Thus, the Commission's decision in this proceeding must issue by September 1, 2022. However, § 40-6-109.5(1), C.R.S., also provides that the Commission may, in its discretion and by a separate decision, extend the time for a decision by an additional 130 days.

36. Here, considering the schedule agreed to by the parties, the time available, the time necessary to address other pending matters, and the need for the Commission to have adequate time to deliberate on the issues presented in this matter, it is not feasible for a final Commission decision to issue by September 1, 2022. Accordingly, pursuant to § 40-6-109.5(1), C.R.S., it is necessary to extend the deadline for an additional 130 days to January 9, 2023.

II. ORDER**A. It Is Ordered That:**

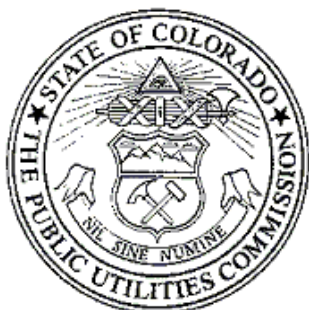
1. The Motion for Leave to File a Reply Brief in Support of its MSJ filed by the Office of the Utility Consumer Advocate (UCA) is granted-in-part and denied-in-part consistent with the discussion above.

2. For the reasons stated above, the Motion for Summary Judgment filed by the UCA on July 15, 2022 is denied.

3. The deadline for a Commission decision on the Application filed in this proceeding is extended to January 9, 2023.

4. This Decision is effective immediately.

(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

CONOR F. FARLEY

Administrative Law Judge