

Decision No. R24-0031

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21N-0648GPS

IN THE MATTER OF THE NOTICE OF PROBABLE VIOLATION ISSUED TO CHEYENNE MOUNTAIN ESTATES MHC LLC ON JANUARY 5, 2022.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
FINDING THAT CHEYENNE MOUNTAIN ESTATES HAS
SATISFIED ITS ALTERNATIVE ENFORCEMENT
OBLIGATIONS, ASSESSING CIVIL PENALTY, AND
CLOSING PROCEEDING**

Mailed Date: January 16, 2023

I. PROCEDURAL BACKGROUND

1. On January 5, 2022, the Staff of the Public Utilities Commission (Staff) initiated this proceeding by issuing its Notice of Probable Violation (NPV) to Cheyenne Mountain Estates MHC LLC (Cheyenne or Respondent). The NPV assesses civil penalties, calculated in accordance with § 40-7-117 C.R.S. and Rule 11501 of the Rules Regulating Pipeline Operators and Gas Pipeline Safety, 4 *Code of Colorado Regulations* (CCR) 723-11, totaling \$500,000.00.¹ The NPV enumerates 12 violations, including one violation of 4 CCR 723-4953,² and 11 violations of the *Code of Federal Regulations* (CFR) of the following provisions: 49 CFR 192.11, 49 CFR 192.463, 49 CFR 192.465, 49 CFR 192.605, 49 CFR 192.605(a), 49 CFR 192.615, 49 CFR 192.739, 49 CFR 192.743, 49 CFR 192.747, 49 CFR 192.801, and 49 CFR 192.1015.³

¹ See NPV at 1-2.

² This statutory provision was in effect at the time of the alleged violation but has since been recodified.

³ See NPV at 2.

2. In lieu of civil penalties the NPV offers Respondent the option of pursuing “alternative enforcement” to address the alleged violations. Under the alternative enforcement provisions, Respondent could “[u]tilize the services of Qualified...Contractors or Qualified personnel on [its] staff to remedy the violations in accordance with the Compliance Directive requirements and deadlines set forth [in the NPV].”⁴

3. On February 7, 2022, Cheyenne Mountain Estate MHC LLC’s Response to Notice of Probable Violation (Response) was filed by Respondent. Respondent opted for “Settlement” and “Request Offer in Compromise” for each of the violations in the NPV.⁵

4. On March 24, 2022, Staff’s counsel filed its Entry of Appearance.

5. On August 31, 2022, the Commission referred this proceeding to an Administrative Law Judge (ALJ) by minute entry.

6. By Decision No. R22-0695-I, issued November 8, 2022, the ALJ ordered Staff to confer with Respondent, file the terms for Alternative Enforcement for Respondent, and file quarterly status reports until the NPV has been resolved.

7. On February 6, 2023, the Status Report and Notice of Offer in Compromise (Status Report) was filed by Staff. In the Status Report, Staff indicated that the compliance directive required the Respondent to take the following remedial actions:

1. Perform inspections on a no more than a 12-month period on all 12 items listed above;
2. Any additional areas of noncompliance must be repaired or addressed within 12 months of discovery;
3. Submission of the Annual Report as per COPUC Gas Pipeline Safety Rule 4 CCR 723-11103; and
4. Annual Report must include updates on all 12 items listed above.⁶

⁴ NPV at 3.

⁵ Response at 1.

⁶ Status Report at 1-2.

8. Staff indicated that as of January 10, 2023, Respondent had remedied all violations listed in the NPV, except for one.⁷ Staff further indicated that upon completion of the installation of the 250 cathodic protection anodes, Staff will conduct a formal inspection and if no unsatisfactory conditions are found, will file a motion to close this Proceeding.⁸

9. On May 4, 2023, Staff's Second Status Report (Second Status Report) was filed by Staff. In the Second Status Report, Staff states that Respondent began the installation of the 250 cathodic protection anodes, with completion of the project expected in the summer.⁹ Staff indicated that in order to comply with Decision No. R22-0695-1, it would update the Commission on August 4, 2023 if a motion to close has not yet been filed.¹⁰

10. On August 3, 2023, Staff's Third Status Report (Third Status Report) was filed by Staff. In the Third Status Report, Staff states that the installation of the component parts for the cathodic protection anodes is complete, and an Operator-Qualified contractor will be onsite soon to finalize installation and conduct an inspection of the new cathodic protection system.¹¹ Staff further states that it will conduct an inspection to confirm that all violations alleged in the NPV are remedied.¹² Upon passing this inspection, Staff will file a Motion to Close the Proceeding, deem the alternative enforcement complete and impose only the minimum statutory penalty of \$5,000.¹³

11. On November 13, 2023, Trial Staff's Unopposed Motion for a Commission Order Finding Cheyenne Mountain Estates has Satisfied its Alternative Enforcement Obligations under Rule 11504, Ordering Payment of \$5,000 in Penalties, and Closing this Proceeding (Unopposed Motion to Close Proceeding) and Attachment A, Affidavit of Pipeline Safety Chief

⁷ *Id.* at 2.

⁸ *Id.*

⁹ Second Status Report at 2.

¹⁰ *Id.*

¹¹ Third Status Report at 1.

¹² *Id.* at 2.

¹³ *Id.*

Casey Hensley (Affidavit) were filed by Staff. In the Unopposed Motion to Close Proceeding, Staff concludes that Respondent has fulfilled its obligations and completed the Alternative Enforcement including remedying the additional non-compliance by its installation of cathodic protection.¹⁴ The Unopposed Motion to Close Proceeding further states that Respondent has agreed to pay \$5,000 in penalties as a lump sum for its period of non-compliance prior to the issuance of the NPV.¹⁵ In the Affidavit, Pipeline Safety Chief Casey Hensley (PSP Chief) states that the dismissal of \$495,000 of the proposed total calculated penalty and assessment of the statutory minimum penalty of \$5,000 is reasonable and in the public interest.¹⁶

II. FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS

12. Rule 11504(a)(VI), 4 CCR 723-11, permits the Commission's Pipeline Safety Program (PSP) Chief (PSP Chief) to "offer the operator a proposed alternative enforcement in lieu of the civil penalties, in whole or in part." Here, the NPV, which was issued by the Pipeline Safety Program, offered Respondent the opportunity to admit the alleged violations and pursue alternative enforcement in lieu of admitting and paying the civil penalty associated with each alleged violation.¹⁷

13. Respondent elected to proceed with the alternative enforcement requirements that were offered by the PSP, rather than admitting each of the violations and paying each civil penalty, requesting an offer in compromise, or disputing Staff's allegations.¹⁸

14. On August 30, 2023, the PSP conducted an on-site inspection of Cheyenne's natural gas system and the installation of cathodic protection anodes. In conducting the inspection,

¹⁴ See Unopposed Motion to Close Proceeding at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 2-3.

¹⁷ NPV at 4.

¹⁸ See Response at 1.

PSP Chief used the PSP's Standard Inspection Report of a Small Operator Unit form (Report) to determine whether Respondent remedied the violations identified in the NPV. The Report form used in PSP's inspection of Respondent is kept by the PSP in its ordinary course of business.¹⁹ Respondent received "satisfactory" remarks on every line item, thus "remedied the violations contained in the NPV filed on January 5, 2022."²⁰ Staff concluded that Respondent fulfilled its obligations and completed the Alternative Enforcement actions.²¹

15. The ALJ concludes that Respondent has satisfactorily completed the PSP Chief's alternative enforcement requirements.

16. According to § 40-7-117(2)(2), C.R.S.:

The extent to which the violator agrees to spend, in lieu of payment of part of the civil penalty, a specified dollar amount on commission-approved measures to reduce the overall risk to pipeline system safety or integrity; except that the amount of the penalty payable to the commission shall be no less than five thousand dollars.

17. According to Rule 1302(b) of the Rules of Practice and Procedure, 4 CFR 723-1:

The Commission may impose a civil penalty, when provided by law. The Commission will consider any evidence concerning some or all of the following factors:

- I. the nature, circumstances, and gravity of the violation;
- II. the degree of the respondent's culpability;
- III. the respondent's history of prior offenses;
- IV. the respondent's ability to pay;
- V. any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- VI. the effect on respondent's ability to continue in business;
- VII. the size of the respondent's business; and
- VIII. such other factors as equity and fairness may require.

18. According to Rule 11501 (a)(VI) of the Rules Regulating Pipeline Operators and Gas Pipeline Safety, 4CCR 723-11:

¹⁹ See Affidavit at 1.

²⁰ *Id.*

²¹ *Id.*

as appropriate, the NPV will offer the operator a proposed alternative enforcement in lieu of the civil penalties, in whole or in part. The proposed alternative enforcement will describe the process in sufficient detail to explain how it will provide for the improvement of public safety...

19. The Unopposed Motion to Close Proceeding was filed with the approval of Respondent. Respondent admitted each of the violations enumerated in the NPV. Respondent expeditiously and satisfactorily adopted changes in response to the NPV and completed the alternative enforcement requirements as posed by Staff. Pursuant to § 40-7-117(2)(c), C.R.S., the minimum civil penalty amount that may be imposed on Respondent is \$5,000. Based on the above, and consistent with the factors enumerated in Rule 1302(b) of the Rules of Practice and Procedure, 4 CCR 723-1, the ALJ finds that a civil penalty in the amount of \$5,000 against Cheyenne is appropriate and reasonable. Therefore, a civil penalty of \$5,000 will be assessed against Respondent, as ordered below.

20. Pursuant to § 40-6-109(5), C.R.S., and Rule 1403, 4 CCR 723-1, this Proceeding may be processed under the modified procedure without a formal hearing.

21. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following Order.

III. ORDER

A. The Commission Orders That:

1. The Unopposed Motion for a Commission Order Finding Cheyenne Mountain Estates has Satisfied its Alternative Enforcement Obligations under Rule 11504, Ordering Payment of \$5,000 in Penalties, and Closing this Proceeding is granted, consistent with the discussion above.

2. Respondent, Cheyenne Mountain Estates MHC LLC (Cheyenne), is assessed a civil penalty of \$5,000.00 (Civil Penalty), inclusive of any applicable surcharge.

3. Not later than 30 days following the date of the issuance of a final Commission decision in this Proceeding, Cheyenne shall pay to the Commission the Civil Penalty assessed by this Recommended Decision.

4. Cheyenne may make payment to the Commission in person by the due date. If Respondent submits a payment by U.S. mail, the payment must be made by money order or check, and must be received by the Commission not later than the due date.

5. Proceeding No. 21N-0648GPS is closed.

6. 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.

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

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

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

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director