

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21N-0634GPS

IN THE MATTER OF THE NOTICE OF PROBABLE VIOLATION ISSUED TO AUDUBON
GARDEN APARTMENTS ON DECEMBER 30, 2021.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
FINDING AUDUBON GARDEN APARTMENTS
HAS SATISFIED THE ALTERNATIVE ENFORCEMENT
REQUIREMENTS,
ORDERING PAYMENT OF \$5,000 IN PENALTIES,
AND CLOSING PROCEEDING**

Mailed Date: February 14, 2024

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I. STATEMENT

1. On December 30, 2021, the Trial Staff (Staff) of the Public Utilities Commission (PUC or Commission) initiated this matter by issuing its Notice of Probable Violation (NPV) to

The Centre Apartment Homes.¹ The NPV was addressed to the attention of Wesley Gingher.² The civil penalties, calculated in accordance with § 40-7-117 C.R.S. and Rule 11501 of the COPUC Gas Pipeline Safety Rules, 4 *Code of Colorado Regulations* (CCR) 723-11, included a total civil penalty of \$450,000 for 13 enumerated violations.

2. On March 30, 2022, the Commission's Pipeline Safety Program (PSP) sent an Amended NPV to PLC Centre Apartments, LLC, Centre Colorado Springs, LLC, doing business as Audubon Garden Apartments (Audubon Garden or Respondent) at an address in Newport Beach, California.³ At the same time, Staff filed a Notice of Defective Service and Refiling of Amended NPV.⁴ Staff noted that its original NPV, mailed on December 30, 2021, was returned as undeliverable.⁵ After researching Respondent's address, Staff served the Amended NPV to an alternative address via certified mail.⁶ The Amended NPV also asserted thirteen violations and sought to impose a total civil penalty of \$450,000.

3. The violations asserted in the Amended NPV are set out below. Violation 1 alleged a violation of Rule 4953, 4 CCR 723-11⁷ (no or inadequate record provided for annual review for O&M, DIMP, OQ, or Emergency Plan) and assessed \$50,000 in civil penalties. The remaining 12 violations asserted noncompliance with the following provisions of the *Code of Federal Regulations*:

- Violation 2: 49 *Code of Federal Regulations* (CFR) 192.465 (no or inadequate record provided for immediate leak repairs), assessing \$10,000 in civil penalties;
- Violation 3: 49 CFR 192.605 (no or inadequate record provided for annual equipment calibrations), assessing \$50,000 in civil penalties;

¹ Notice of Probable Violation to The Centre Apartment Homes, Dec. 30, 2021.

² *Id.*

³ Amended Notice of Probable Violation (NPV) to PLC Centre Apartments, LLC, Centre Colorado Springs, LLC, DBA Audubon Garden Apartments, Mar. 30, 2022.

⁴ Notice of Defective Service and Refiling of Amended NPV, Mar. 30, 2022.

⁵ *Id.* at ¶ 2, p. 1.

⁶ *Id.* at ¶ 3, p. 1.

⁷ This provision was in effect at the time of the alleged violation but has since been recodified.

- Violation 4: 49 CFR 192.605 (no or inadequate record provided for system map(s)), assessing \$10,000 in civil penalties;
- Violation 5: 49 CFR 192.605(a) (no or inadequate record provided for annual O&M review and update), assessing \$50,000 in civil penalties;
- Violation 6: 49 CFR 192.615 (no or inadequate record provided for annual Emergency Plan review), assessing \$50,000 in civil penalties;
- Violation 7: 49 CFR 192.625 (no or inadequate record provided for annual odor testing), assessing \$50,000 in civil penalties;
- Violation 8: 49 CFR 192.646 (no or inadequate record provided for public awareness flyers), assessing \$10,000 in civil penalties;
- Violation 9: 49 CFR 192.723 (no or inadequate record provided for Leak Surveys (5 years or less)), assessing \$10,000 in civil penalties;
- Violation 10: 49 CFR 192.739 & 743 (no or inadequate record provided for the annual regulators and reliefs inspection and maintenance), assessing \$50,000 in civil penalties;
- Violation 11: 49 CFR 192.747 (no or inadequate record provided for the annual emergency valve operation and maintenance), assessing \$50,000 in civil penalties;
- Violation 12: 49 CFR 192.801 (no or inadequate record provided for the staff and contractor OQ certifications), assessing \$10,000 in civil penalties;
- Violation 13: 49 CFR 192.1015 (no or inadequate record provided for annual MMO DIMP updates), assessing \$40,000 in civil penalties.⁸

When added, these assessed penalties result in a Total Calculated Penalty of \$440,000.

4. In lieu of incurring the civil penalty, the Amended NPV offered Audubon Garden the option of pursuing “alternative enforcement” to address the alleged violations. Under the “alternative enforcement” provisions, Audubon Garden could

Utilize the services of Qualified Contractors or Qualified personnel on Your staff to remedy the violations in accordance with the Compliance Directive

⁸ Amended Notice of Probable Violation (NPV), Mar. 30, 2022, p. 2. Note: The Amended NPV appears to miscalculate the total Recommended Civil Penalty for Violation 13. The Amended NPV indicates that the base penalty for violations of 49 CFR 192.1015 is \$10,000 and multiplies the \$10,000 by an impact factor of 4. Although the Recommended Civil Penalty column states that the total penalty for Violation 13 is \$500,000, the ALJ believes this is an error and should have read \$40,000. The ALJ further notes that if the totals in the Recommended Civil Penalty column for all of the violations are added together, and \$40,000 is substituted for Violation 13 instead of the stated \$500,000, the total calculated penalty equals \$440,000. This amount is \$10,000 less than the amount listed in the Amended NPV as the Total Calculated Penalty assessed against Audubon Garden of \$450,000. The ALJ believes that this amount, too, is in error, likely the result of the inclusion of \$500,000 in the Recommended Civil Penalty column instead of \$40,000. However, as discussed later in the Decision, because Audubon Garden has corrected the violations in lieu of payment of all but \$5,000 of the penalty, these errors in calculation are of no consequence. Therefore, for purposes of the discussion in this Decision, the ALJ will assume that the assessed penalty for Violation 13 was \$40,000, and that the Total Calculated Penalty was \$440,000.

requirements and deadlines set forth below. Failure to comply with the Compliance Directive using services of Qualified Contractors or Qualified personnel on Your staff may result in civil penalties being assessed against You.⁹

5. The Amended NPV also issued Audubon Garden a Compliance Directive, requiring Audubon Garden to “take the following remedial action(s)”:

1. Perform inspections on a no more than a 12-month period on all 13 items listed above;
2. Any additional areas of noncompliance must be repaired or addressed within 12 months of discovery;
3. Submit Annual Report as per COPUC Gas Pipeline Safety Rule 4 CCR 723-11103; and
4. Annual Report must include updates on all 1[3] items listed above.¹⁰

6. On April 28, 2022, PLC Communities filed a letter and response to the NPV on behalf of Audubon Garden.¹¹ The letter stated that PLC Communities is the “new owner[] of the property in question . . . and that it was its “intent to be in full compliance moving forward.”¹²

7. In its Response to each of the asserted violations, Audubon Garden selected “Admit and Elect Alternative Enforcement” for each of the thirteen alleged violations.¹³ Audubon Garden’s Response to the NPV also incorporated the inspection report detailing the violations Staff found.¹⁴

8. On August 31, 2022, the Commission referred this proceeding to an Administrative Law Judge (ALJ) by minute entry. The Proceeding was subsequently assigned to the undersigned ALJ.

⁹ Amended NPV, p. 3; *see also* Rule 11504(a)(VI), 4 *Colorado Code of Regulations* (CCR) 723-11.

¹⁰ Amended NPV, p. 3.

¹¹ PLC Communities letter and response to Amended NPV filed on behalf of PLC Centre Apartments, LLC, d/b/a Audubon Garden Apartments, dated Apr. 27, 2022, filed Apr. 28, 2022.

¹² *Id.*

¹³ Operator’s Response to NPV, pp. 13-19, filed Apr. 28, 2022.

¹⁴ *Id.* at pp. 1-31.

9. On November 28, 2022, Staff filed a Notice of Conferral, Statement of Alternative Enforcement Terms, and Status Report (Notice of Conferral). In it, Staff noted that by choosing to admit the violations and “elect alternative enforcement,” Audubon Garden had agreed to comply with the alternative enforcement guidelines set out in the NPV (and quoted in ¶ 4 above), as well as the four mandated Compliance Directives.¹⁵ Staff reported, though, that despite being contacted by the Pipeline Safety Chief and Staff Counsel on November 11 and 21, 2022, and reminded of its obligation to provide requested documentation, Audubon Garden had not done so by the filing of the Notice of Conferral. Staff reiterated that, under the alternative enforcement offer, Audubon Garden was obligated “to remedy all violations” within 12 months.¹⁶ Finally, Staff expressed hope that Respondent was addressing the violations, and, if an inspection revealed that the issue had been resolved, would then file a motion to dismiss this matter.¹⁷

10. In the following months, Staff filed four more Status Reports updating the Commission on Audubon Garden’s progress toward addressing the violations. Staff filed Status Reports on December 22, 2022; February 24, 2023; May 24, 2023; and August 24, 2023.

11. Staff’s Second Notice of Conferral, Statement of Alternative Enforcement Terms, and Status Report, filed December 22, 2022, reported that the prior day, December 21, 2022, Audubon Garden provided documentation supporting its work toward addressing the violations, including a copy of a test point location; confirmation that Black Hills Energy (BHE) conducts Respondent’s annual surveys; assurance that Respondent’s on-site DIMP manual addresses required items; and representations that work at Audubon Garden’s location to remedy the

¹⁵ Notice of Conferral, Statement of Alternative Enforcement Terms, and Status Report, pp. 1-2, filed Nov. 28, 2022.

¹⁶ *Id.* at p. 3.

¹⁷ *Id.*

violations was ongoing.¹⁸ Staff reiterated Audubon Garden’s obligation to remedy all violations within 12 months. Staff further reported that it planned to inspect Audubon Garden’s “property at the end of the second quarter of 2023.”¹⁹ As it had previously, Staff then indicated its intent to dismiss the matter if the inspection revealed that all issues had been addressed and resolved, but if “some items have not yet been fully addressed, Staff [would] work with the operator to determine whether granting it additional time to come into compliance is reasonable and in the public interest or whether this proceeding should be litigated.”²⁰

12. In its Third Status Report, submitted February 24, 2023, Staff reported that it had not received any additional documentation from Audubon Garden but that it did “not interpret this to be an indication that alternative enforcement compliance is not proceeding as planned.”²¹ Staff indicated that it intended to pursue an inspection of Respondent’s property before the expiration of the compliance period on June 15, 2023.²²

13. Staff’s Fourth Status Report, filed May 24, 2023, advised the Commission that Audubon Garden’s contractor, BHE, submitted documentation to Staff on May 23, 2023.²³ The documentation showed that work had been completed “on annual compliance requirements . . . [and] that only one issue remains that has not been resolved.”²⁴ Staff stated that it would advise Audubon Garden that the latter had “30 days to complete” work on the remaining issue in order

¹⁸ Second Notice of Conferral, Statement of Alternative Enforcement Terms, and Status Report, pp. 2-3, filed Dec. 22, 2022.

¹⁹ *Id.* at p. 3.

²⁰ *Id.*

²¹ Staff’s Third Status Report, p. 1, filed Feb. 24, 2023.

²² *Id.*

²³ Staff’s Fourth Status Report, p. 1, filed May 24, 2023.

²⁴ *Id.*

to address all violations identified in the NPV.²⁵ Staff then expressed optimism that it would be able to file a motion to close the proceeding “by late June or early July” 2023.²⁶

14. Staff filed a Fifth Status Report on August 24, 2023, advising that the remaining issue identified in Staff’s Fourth Status Report had been resolved and that Staff anticipated moving to close the proceeding shortly thereafter.²⁷

15. On December 29, 2023, Staff filed an Unopposed Motion for a Commission Order Finding that Audubon Garden Apartments Has Satisfied Its Alternative Enforcement Obligations Under Rule 11504, Ordering Payment of \$5,000 in Penalties, and Closing This Proceeding (Unopposed Motion to Close).²⁸ In the Unopposed Motion to Close, Staff represents that, on March 16, 2023, it conducted an inspection of Audubon Garden’s property and identified “six outstanding violations.”²⁹ Staff notes that between June, 2023, and August 2023, Audubon Garden “provided documentation showing remediation of violations and compliance with the Alternative Enforcement Agreement.”³⁰ Staff conducted a supplemental audit inspection on September 20, 2023.³¹ As a result of that audit inspection, Staff concluded that Audubon Garden had completed all the requirements of the Compliance Directive it reached with Staff.³² The Compliance Directive required Audubon Garden to:

- “Perform inspections on a no more than a 12-month period on all 11 items listed above;”
- Repair or address “[a]ny additional areas of noncompliance . . . within 12 months of discovery;”

²⁵ *Id.*

²⁶ *Id.*

²⁷ Staff’s Fifth Status Report, p. 1, filed Aug. 24, 2023.

²⁸ Unopposed Motion for a Commission Order Finding Audubon Garden Apartments Has Satisfied Its Alternative Enforcement Obligations Under Rule 11504, Ordering Payment of \$5,000 in Penalties, and Closing This Proceeding (Unopposed Motion to Close), Dec. 29, 2023

²⁹ *Id.* at ¶ 4, p. 1.

³⁰ *Id.* at ¶ 5, p. 2.

³¹ *Id.* at ¶ 6, p. 2.

³² *Id.* at ¶ 7, p. 2.

- Submit “the Annual Report as per COPUC Gas Pipeline Safety Rule 4 CCR 723-11103; and”
- Include in its “Annual Report . . . updates on all 11 items listed above.”³³

Based on Staff’s inspection of Audubon Garden’s records, Staff has now concluded that Audubon Garden “completed the requirements for alternative enforcement.”³⁴

16. Staff therefore requests that the Commission enter an order: (1) finding that Audubon Garden has completed the alternative enforcement in lieu of payment of \$435,000 of the \$440,000 civil penalty³⁵; (2) ordering Audubon Garden to pay a \$5,000 penalty to the State Treasury; and (3) closing this Proceeding.

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

II. FACTS

18. In its April 27, 2022 letter submitted in response to the NPV, which was filed with the Commission on April 28, 2022, Audubon Garden selected “Admit and Elect Alternative Enforcement” for each of 13 violations.³⁶

19. As described in the Affidavit of Casey Hensley, Pipeline Safety Chief for the PUC’s PSP, on September 20, 2023, PSP performed a supplemental audit inspection of Audubon Garden’s records pertaining to its natural gas system.³⁷

20. To conduct the inspection, an investigator used the PSP’s Standard Inspection Report of a Small Operator Unit form (Report) to determine whether Audubon Garden had remedied the violations identified in the December 30, 2021 NPV. The Report form used in

³³ *Id.* at ¶ 9, p. 2.

³⁴ *Id.* at ¶ 11, p. 3.

³⁵ See FN 8 above.

³⁶ Audubon Garden Apartment’s Response to NPV, dated Apr. 27, 2022, filed Apr. 28, 2022, pp. 13-19.

³⁷ See Affidavit of Pipeline Chief Casey Hensley, Dec. 15, 2023, Attachment A to Staff’s Unopposed Motion to Close, p. 1.

PSP's inspection of Audubon Garden is "one kept by the PSP in the ordinary course of the PSP's business."³⁸

21. In her Affidavit, PSP Chief Hensley represents that Audubon Garden received either "satisfactory" or "not applicable" remarks for every line item on the PUC's report during the September 20, 2023, audit inspection and no unsatisfactory items were discovered during this inspection.³⁹ A copy of the Report is attached to Ms. Hensley's Affidavit.⁴⁰

22. PSP Chief Hensley concludes that in her "professional opinion . . . [Audubon Garden] has remedied the violations contained in the December 30, 2021 NPV. As such, it has completed the Alternative Enforcement actions contained in the NPV."⁴¹ In conclusion, she opines that dismissal of "the proposed total calculated penalty and assessment of the statutory minimum penalty of \$5,000 is reasonable and in the public interest."⁴²

23. Having successfully passed the PSP inspection, Staff represents that Audubon Garden has completed the alternative enforcement requirements in lieu all but \$5,000 of the \$440,000 civil penalty.⁴³

III. FINDINGS, DISCUSSION, AND CONCLUSIONS

24. The requested relief being uncontested, the proceeding may now be processed under the modified procedure, pursuant to § 40-6-109(5), C.R.S., and Rule 1403, 4 CCR 723-1, without a formal hearing.

25. To provide consistency and specificity, civil penalties in the NPV are calculated in accordance with Rule 11501(d) 4 CCR 723-11. However, Rule 11504(a)(VI), 4 CCR 723-11,

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*, pp. 3-7.

⁴¹ *Id.*, p. 1.

⁴² *Id.*

⁴³ See FN 8 above.

permits the PSP Chief to “offer the operator a proposed alternative enforcement in lieu of the civil penalties, in whole or in part.”

26. § 40-7-117(2), C.R.S., authorizes the Commission to reduce a civil penalty “based on consideration of objective metrics and factors set forth in the rules.” However, even when the PSP Chief authorizes a reduction in the civil penalty, “the amount of the penalty payable to the [C]ommission shall be no less than five thousand dollars.”⁴⁴

27. Here, PSP Chief Hensley offered Audubon Garden the opportunity to remedy its violations and take corrective actions in lieu of paying the full civil penalty.⁴⁵ As explained in footnote 8 above, the Amended NPV erroneously calculated the full civil penalty to be \$450,000. The undersigned ALJ calculated and added the amount of each violation and concluded that the correct amount of the total calculated penalty is \$440,000. The ALJ finds and concludes that this error is of no consequence, however, because all but \$5,000 has been dismissed by the PSP based upon Audubon Garden’s successful remediation of all thirteen asserted violations.

28. Audubon Garden admitted all 13 violations and elected to seek Alternative Enforcement from Staff to address and correct the 13 alleged violations listed in the NPV.⁴⁶

29. It is found that Audubon Garden successfully completed the alternative enforcement and remedied all of the violations identified in the NPV. As alternative enforcement was offered in lieu of the civil penalty, the undersigned ALJ finds that Audubon Garden is not liable for \$435,000 of the \$440,000 civil penalty calculated in the NPV.⁴⁷

30. In accordance with § 40-7-117(2)(c), Audubon Garden must pay the minimum penalty amount of \$5,000.

⁴⁴ § 40-7-117(2)(c), C.R.S.

⁴⁵ See NPV, p. 2.; *see also* FN 8 above.

⁴⁶ See Audubon Garden’s response to NPV, pp. 13—19.

⁴⁷ See FN 8 above.

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

IV. ORDER

A. It Is Ordered That:

1. Trial Staff's Unopposed Motion for a Commission Order Finding Audubon Garden Apartments (Audubon Garden) 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. A civil penalty in the amount of five thousand dollars (\$5,000) is assessed against Audubon Garden for violations identified in the March 30, 2022, Amended Notice of Probable Violation.

3. Audubon Garden shall pay the five thousand dollars (\$5,000) civil penalty into the State Treasury within thirty (30) days of this decision becoming a final decision of the Commission.

4. Proceeding No. 21N-0634GPS is closed.

5. 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.

6. 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, 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.

7. 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)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

Rebecca E. White,
Director