Decision No. C20-0840

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0077G

WILLIAM C. DANKS,

COMPLAINANT,

V.

DCP OPERATING COMPANY, LP,

RESPONDANT

COMMISSION DECISION CONSTRUING FILING AS EXCEPTIONS AND ADDRESSING EXCEPTIONS TO RECOMMENDED DECISION NO. R20-0549

Mailed Date: December 4, 2020
Adopted Date: October 28, 2020

I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission construes Mr. William C. Danks' Motion for Reconsideration filed August 14, 2020 (Exceptions), as Exceptions to Recommended Decision No. R20-0549 (Recommended Decision), and grants, in part, and denies, in part, those Exceptions. We agree with the conclusions of the assigned Administrative Law Judge (ALJ) in her Recommended Decision that many of the concerns raised in his complaint are not redressable by this Commission. Further, we find that Mr. Danks' arguments in his Exceptions are not compelling grounds to move this matter to an evidentiary hearing.

2. Nevertheless, this Commission has a regulatory duty in ensuring public utilities comply with applicable Colorado statutes and rules, including the requirement to obtain a

certificate of public convenience and necessity (CPCN) if required by law. We therefore find it appropriate to review the record of this proceeding to determine if there is merit to the claim that a public utility is operating without a CPCN. Based on the facts alleged in Mr. Danks' complaint, as amended, we determine that DCP Operating Company, LP (DCP) is not a "public utility" upstream from the processing plant as that term is defined in § 40-1-103(1)(a)(I), C.R.S., and therefore no CPCN is required for these operations.

3. In addition, through this Decision we clarify Commission processes that ensure regulatory compliance with applicable Colorado law statute and rule. These processes include the regular and ongoing role of Staff of the Colorado Public Utilities Commission (Staff) to ensure compliance by public utilities operating in this state within the Public Utilities Law, comprising Articles 1 to 7 of Title 40 of the Colorado Revised Statutes. Allegations, if any, downstream from DCP's processing plant are dismissed, without prejudice. Through our deliberations and this Decision, Staff is put on notice of the potential pipeline operating authority questions such that it can review and initiate a show cause pursuant to Rule 1302(g), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure, if it deems necessary. Finally, we reiterate that Mr. Danks and other members of the public may, as always, provide information to Staff via the Commission's Informal Complaint processes outlined in Rule 1302, 4 CCR 723-1.[1]

B. Background

1. Complaint as Amended

4. In his original complaint, filed February 25, 2020, Mr. Danks argued that DCP is a "public utility" under § 40-1-103(1)(a)(1), C.R.S., and that DCP failed to obtain a CPCN for its 62

[1] Although future formal filings are not precluded by this decision, the facts and issues in any future filings will necessarily be addressed in the context of the proceeding, if any, including any determination on standing.

mile Grand Parkway pipeline project in Weld County, Colorado, and two subsequent additions to that pipeline, the Red Cloud and Lindsey pipelines, as required by § 40-5-101, C.R.S.[2]

5. In response to the initial complaint, on March 19, 2020, DCP filed its first motion to dismiss the complaint, alleging Mr. Danks lacks standing and the Commission lacks subject matter jurisdiction (First Motion to Dismiss). In response, Mr. Danks made filings on March 31, 2020, purporting to amend and supplement the complaint.[3] The assigned ALJ rejected Mr. Danks' March 31, 2020, filings, informing Mr. Danks that if he wished to amend his complaint he must file a motion consistent with Rule 1309(a), 4 CCR 723-1.[4] Subsequent to the ALJ's direction, on May 1, 2020, Mr. Danks filed a Motion to Amend Complaint and the proposed Amended Complaint (First Motion to Amend). DCP responded that it did not object to the Motion to Amend, and the ALJ subsequently granted the First Motion to Amend on May 19, 2020,[5] resulting in the "Amended Complaint" as referred to in this Decision.

6. On May 21, 2020, Mr. Danks filed a Second Motion to Amend Complaint (Second Motion to Amend) and a proposed Second Amendment. Immediately following DCP's Motion to Dismiss the Amended Complaint (Second Motion to Dismiss) and supporting documents provided on May 28, 2020, Mr. Danks filed a Third Motion to Amend (Third Motion to Amend) on June 1, 2020. Throughout the course of this proceeding, the ALJ denied both the Second and Third Motions to Amend, affirmed that DCP is the only respondent in this proceeding, and denied the

[2] More robust procedural filings and history is provided in prior ALJ decisions. *See, e.g.*, Recommended Decision at ¶¶ 2-18.

[3] *See* Amendment to Formal Complaint and Addendums 1 and 2 to the Formal Complaint.

[4] Decision No. R20-0283-I, issued April 24, 2020. The order further addressed DCP's April 15, 2020, Motion to Strike and subsequent reply filings, in addition to ordering a remote prehearing conference with the parties for June 4, 2020.

[5] Decision No. R20-0376-I, issued May 19, 2020.

First Motion to Dismiss as moot.[6] Mr. Danks' Exceptions do not allege that the denial of these amendments was in error. We therefore focus our immediate considerations on the facts alleged in the Amended Complaint as they pertain to DCP.

7. The Amended Complaint adds that the Grand Parkway pipeline project includes processing plants and compression stations in Weld County. The Amended Complaint further includes that DCP owns 98.7 percent of the gas transported in the DCP pipelines to the DCP processing plants in the Grand Parkway projects and after that raw gas is processed, DCP sells the residue gas and natural gas liquids (NGLs) to the public. The Amended Complaint concludes that these pipelines and processing plants comprise the "DCP Public Utility," and that DCP failed to obtain the required CPCN prior to constructing this "DCP Public Utility."

8. The Amended Complaint asks the Commission to "take appropriate action as required by CRS 40-5-101" for DCP's failure to obtain CPCNs before beginning construction.

9. The Amended Complaint also adds a response to the standing arguments raised in DCP's motion to dismiss, stating that Mr. Danks' right to property has been damaged by DCP's Grand Parkway project, including that DCP has four different pipelines on Mr. Danks' property and that he has suffered damage to his property rights from those pipelines and from wells drilled by other companies near the Grand Parkway pipeline.

10. The Amended Complaint alleges that DCP caused Mr. Danks direct damage through its efforts "to run the main line of the Grand Parkway through the middle of [the Danks'] farm and DCP efforts to build a 'compression' plant [one-half] mile to the east of [the Danks'] farm and farm house." The Amended Complaint states Mr. Danks spent hundreds of hours to

[6] *See* Decision No. R20-0430-I, issued June 10, 2020; Recommended Decision, at ¶16.

protect his property from a spot zoning application that would have allowed DCP to build an industrial plant one-half mile west of his property.

11. In addition, the Amended Complaint alleges Mr. Danks suffers damage to property rights based on injection wells that are needed near the Grand Parkway. It asserts the fair market value of three "legal lots" on Mr. Danks' property have decreased, and the decreased value is a result of DCP building the Grand Parkway which attached the well drilling and injection well near the DCP pipeline. The Amended Complaint alleges the PDCE Drilling Company's four planned drilling sites are "across from and just north of" Mr. Danks' property.

2. Motion to Dismiss the Amended Complaint

12. On May 28, 2020, DCP filed a motion to dismiss the Amended Complaint (Motion to Dismiss the Amended Complaint) with Attachment A, an Affidavit of John R. Cochran, and a Combined Response to Complainant's Motion to Amend Complaint.[7] DCP argued the Amended Complaint should be dismissed because Mr. Danks lacks standing to pursue the Amended Complaint, and because the Commission lacks subject matter jurisdiction over DCP because it is not a public utility.

13. Through its Motion to Dismiss the Amended Complaint, DCP further stated that it operates an extensive gas gathering and processing system in Weld County. DCP explained that, beginning at various wellhead delivery points, DCP's gathering system is comprised of a series of pipelines which vary in diameter as they collect and move raw gas from the wellheads to processing facilities (which DCP calls, "the Gathering System"). DCP stated the Gathering System includes smaller well connection pipelines, like the Red Cloud and Lindsey pipelines, which are

[7] DCP further included a Motion for Attorney's Fees, which was subsequently denied and is not at issue in the Exceptions and DCP has filed no exceptions seeking Commission consideration on the ALJ's determination. *See* Decision No. R20-0430-I, issued June 10, 2020.

under construction, and larger gathering pipelines, like the Grand Parkway pipeline (the largest pipeline in the Gathering System). DCP stated that, as a network, the Gathering System collects and delivers raw natural gas produced from individual wellheads to natural gas processing facilities, and primarily to processing facilities operated by or for DCP (which DCP calls, the "Gathering and Processing Network").

14. DCP explained that raw gas is not in usable form. DCP explained the processing facilities remove impurities and separate the raw gas into processed dry gas or "residue gas" and NGLs like propane and butane. DCP stated the residue gas and NGLs are then marketed and sold into competitive markets by DCP's affiliates. DCP stated all the processed gas and NGLs sold by DCP must be transported via other inter- and intrastate transportation pipelines or trucks prior to being delivered to the ultimate purchaser. DCP stated that no end-use consumers are served directly from the Gathering and Processing Network.

15. DCP argued Mr. Danks alleges no injury connected to DCP's gathering and processing activities or any other injury that would be cured by the Commission awarding CPCNs to DCP retroactively. DCP responded the four well-connection pipelines identified by Mr. Danks are either permitted by easement or pursuant to rights conferred under a mineral lease. DCP responded that any issues with DCP's rights to operate these lines would be properly brought in a court of law, rather than before this Commission. DCP added the Amended Complaint does not allege injury caused by these well connection pipelines other than that they exist. DCP added that nothing has changed in connection with these pipelines as a result of the construction of the downstream Grand Parkway that is sufficient to confer standing upon Mr. Danks for purposes of prosecuting his Amended Complaint before the Commission, alleging DCP is a public utility.

16. DCP further argued Mr. Danks has no legally protected right or interest in any CPCN proceeding. DCP argues the CPCN statute relied upon by Mr. Danks for remedy does not confer upon him a legally protected right or interest. DCP stated that requiring utilities to obtain CPCNs under public utilities law is intended to protect ratepayers within a regulated monopoly from duplication of services and competition between utilities. DCP states Mr. Danks is not a customer or ratepayer of DCP nor is he a competitor concerned with infringement of service territory or duplication of services.

17. In addition, DCP argued that the Commission lacks subject matter jurisdiction over Mr. Danks' claims because DCP is not providing a public utility service under § 40-1-103, C.R.S. Citing § 40-1-103, C.R.S., DCP argued that for a gas gathering or processing system to be considered a public utility, it either must: (1) operate for the purpose of supplying the public; or (2) be declared by law to be affected with the public interest. DCP argued that, under the Commission's precedent, gathering systems are inherently private systems which collect raw gas that cannot be consumed by end users. DCP explained that only after this raw gas is processed does it move further downstream into competitive commodities market and the regulated transportation and distribution pipeline system. For support, DCP cites *HRM Resources II, LLC. v. Anadarko Petroleum Corp.*, Decision No. R18-0057 (Colo. PUC. Jan. 25, 2018). In that case, the Commission found that transporting raw gas before it is processed is not a public utility service because it was not yet a marketable product that could be supplied to the public.

18. In response to the Motion to Dismiss the Amended Complaint, Mr. Danks attempted to amend his complaint a second and third time to add new facts particularly regarding standing.

While the ALJ denied the subsequent requests to further amend the complaint,[8] the ALJ notes that the arguments and responses regarding standing "has been heard."[9]

3. Recommended Decision

19. The Recommended Decision concludes that Mr. Danks lacks standing to prosecute the Amended Complaint and therefore grants DCP's Motion to Dismiss the Amended Complaint.

20. The ALJ finds that § 40-5-101, C.R.S., contemplates complaints seeking to prevent duplication or interference with public utility services, but includes no language allowing for complaints such as Mr. Danks' that have no connection to the statutory intent of preventing competition and avoiding duplication and interference with public utility service.

21. The ALJ finds the Amended Complaint asserts a legally protected interest in the requested CPCN proceeding based on alleged property damage, land use or siting issues, or other tortious conduct. The ALJ concludes these alleged legally protected interests have no connection with a CPCN proceeding under § 40-5-101, C.R.S. The ALJ notes that this lack of standing is highlighted by the alleged injuries to Mr. Danks. She concludes that whether in this complaint proceeding or a CPCN proceeding, the Commission lacks authority to provide relief for Mr. Danks' alleged injuries. She notes these issues are under the jurisdiction of local government's land use regulation or are founded in tort, relate to property rights, or are equitable in nature.

22. The ALJ's Recommended Decision lists a series of undisputed facts in the proceeding,[10] including that the pipelines at issue transport raw and unprocessed gas.[11] However, because she concludes that Mr. Danks lacks standing to pursue the Amended Complaint, the ALJ

[8] See Decision No. R20-0430-I, issued June 10, 2020, at ¶¶ 23-30.
[9] *Id.* at ¶ 30.
[10] Recommended Decision, at ¶¶ 37-55.
[11] *Id.* at ¶ 51.

does not address whether DCP is operating for the purpose of supplying the public under § 40-1-103, C.R.S.[12]

C. Motion for Reconsideration and Response

23. On August 14, 2020, Mr. Danks filed a "Motion for Reconsideration" of the ALJ's Decision. Mr. Danks claims that the ALJ's decision based on standing is in error and that the ALJ should, instead, deny DCP's Motion to Dismiss based on standing and the merits, and set the matter for an evidentiary hearing. In this Exceptions, Mr. Danks argues that whether DCP is a public utility is a question of fact requiring a hearing, and that: (1) the doctrine of standing does not apply to the case; (2) if it does apply, the ALJ used an incorrect standard and the question of whether DCP was required to get a CPCN must be resolved; and (3) that Mr. Danks alleges injuries that can be remedied by the PUC under its rate authority. Mr. Danks further adds information to the record regarding issues after the processing plant that could be attributed to entities other than DCP.

24. On August 28, 2020, DCP responded in support of the ALJ's determination dismissing the Amended Complaint. DCP argues that, because the arguments are raised for the first time on exceptions, they should not be considered, and act to further amend the Amended Complaint (which Mr. Danks already attempted to revise twice before the ALJ). Even if the arguments are considered, DCP claims the Commission should reject each argument in turn.

25. For example, DCP points out that Mr. Danks' first claim that standing "can only be raised by Government" is unsupported. DCP correctly responds that, under Colorado law, standing

[12] *Id.* at ¶ 92.

is a requirement of subject matter jurisdiction and can be raised at any time.[13] In addition, within its arguments, DCP points out that Mr. Danks' alleged injury based on the rate at which he is compensated by drilling companies for gas extracted from his property cannot be remedied by the Commission's rate authority. DCP therefore requests that the Commission deny Mr. Danks' requests in the Exceptions.

D. Findings and Conclusions

26. Mr. Danks' filings from August, 14, 2020, are appropriately construed as exceptions pursuant to § 40-6-109(2), C.R.S., and we therefore consider those Exceptions in accordance with Rule 1505, 4 CCR 723-1. Although we agree with the ALJ that Mr. Danks' alleged injuries are not redressable by this Commission, and we further agree with DCP that Mr. Danks' arguments in the Exceptions are unconvincing to move this proceeding to evidentiary hearing, we nevertheless find the interests of justice[14] compel our review of the record to determine whether there is unlawful public utility operations occurring.

27. Reviewing the facts alleged in the Amended Complaint, as discussed in more detail below, we find that the respondent, DCP, is not a public utility as defined by § 40-1-103, C.R.S., and therefore no CPCN is or would have been required for the gathering lines at issue, including the Grand Parkway, Red Cloud, and Lindsey pipelines, up through the processing plant.

28. We further find it appropriate to alert the public to the regular duties of Staff in ensuring compliance with the Public Utility Law. Through this Decision, we notify Staff of Mr.

[13] *Pueblo School Dist. No. 60 v. Colorado High School Activities Ass'n*, 30 P.3d 752, 753 (Colo. App. 2000) (recognizing a "court does not have subject matter jurisdiction if a plaintiff lacks standing to invoke its judicial power").

[14] *See* § 40-6-101(1), C.R.S.

Danks' regulatory concerns, as evidenced through his pleadings in this case including his multiple requests to further amend the Amended Complaint.[15]

1. Redressability by this Commission

29. The arguments raised by Mr. Danks through the Exceptions are not compelling reasons to overturn the ALJ's Recommended Decision granting DCP's Motion to Dismiss the Amended Complaint. We agree with the ALJ's conclusions that Mr. Danks' alleged harms are appropriately addressed before a court of competent jurisdiction, not this Commission. While the Commission has broad authority, its focus is necessarily limited to those issues pertinent to public utility operations. The harms alleged by Mr. Danks do not compel Commission jurisdiction over requirements to obtain a CPCN.

30. Standing is a threshold question of law.[16] The question involves the fundamental consideration of whether a party has asserted a legal basis upon which a claim for relief can be grounded.[17] To establish standing, the complainant must demonstrate injury-in-fact to a legally protected interest as contemplated by statutory or constitutional provisions, and that the action is due to the action of the respondent.[18]

31. In this case, the ALJ found pertinent that standing requires injury due to a legally protected interest "as contemplated by statutory or constitutional provisions" and, in particular here, the Public Utilities Law, to demonstrate the Commission was the appropriate forum for Mr. Danks to raise his complaint. The Amended Complaint is filed under § 40-6-108, C.R.S.,

[15] Amended facts and issues are not before this Commission at this time.

[16] *Bd. Of County Comm'rs of La Plata County et al. v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003).

[17] *O'Bryant v. Pub. Utils. Comm'n*, 778 P.2d 648, 652 (Colo. 1989).

[18] *Douglas County Bd. of Comm'rs v. Pub. Utils. Comm'n*, 829 P.2d 1303, 1309 (Colo. 1992); *O'Bryant, at 652; Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1055-56 (Colo. 1980).

(permitting persons to file a complaint due to an alleged violation of law, or Commission rule or order), and it seeks a finding that DCP violated § 40-5-101, C.R.S., by not obtaining a CPCN before constructing the Grant Parkway, Red Cloud, and Lindsay pipelines.[19]

32. The ALJ reads these statutes together and finds Mr. Danks asserts no interest in the statutory intent of § 40-5-101, C.R.S., to prevent competition and avoid duplication and interference with a public utility service. The ALJ finds that, instead, the Amended Complaint asserts a legally protected interest in the requested CPCN proceeding based on alleged property damage, land use or siting issues, or other tortious conduct.

33. The ALJ is correct that Mr. Danks' concerns regarding property damage, land use or siting issues, or other tortious conduct have no bearing on the statutory requirements in § 40-5-101, C.R.S., and are therefore more appropriate actions for litigation in court. The ALJ is also correct that the "controversy" as characterized by these alleged harms cannot be resolved by the Commission, whether in this proceeding or a follow on CPCN proceeding.

34. Mr. Danks' arguments in his Exceptions aim to further amend his Amended Complaint and, in any event, are not compelling reasons to move the matter to hearing. DCP is correct that the Commission disfavors arguments raised for the first time on exceptions.[20] Mr. Danks has continued his attempts to amend his complaint throughout the proceeding and attempting to again do so on exceptions is inappropriate because it creates a "moving target" that is, quite simply, unfair to the responding party.

[19] Amended Complaint, pp. 3-4.

[20] Guided by the Colorado Supreme Court, the Commission disfavors novel issues raised in exceptions similar to trail court considerations that provides "issues… not presented at trial and considered or ruled upon by a trial court are deemed waived and cannot be raised for the first time on appeal." Decision No. C06-0340, p. 7 (issued Apr. 11, 2006) (citing *In re Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 (Colo.1992)).

35. In any event, we find unavailing Mr. Danks' arguments in the Exceptions regarding standing. First, Mr. Danks incorrectly claims that standing "can only be raised by Government."[21] The doctrine of standing, whether a litigant has the right to raise legal arguments or claims, is not so restricted under Colorado law. Standing is a requirement of subject matter jurisdiction.[22] Second, Mr. Danks incorrectly claims that his alleged injuries can be remedied through a Commission order requiring DCP to obtain a CPCN.[23] Mr. Danks' alleged injury of reduced royalty payments under mineral leases is, at best, indirect to DCP. DCP is correct that this assertion also goes beyond the findings in the Recommended Decision, adding new consideration of the Commission's ratemaking authority under § 40-3-102, C.R.S. Not only is this new allegation outside of the scope of the Amended Complaint that was brought under the CPCN authority through § 40-5-101, C.R.S., but the Commission does not regulate wholesale purchases of natural gas under § 40-3-102, C.R.S. Royalty payments accruing to Mr. Danks are unrelated to whether a CPCN is required for the Grand Parkway, Red Cloud, or Lindsay pipelines. Third, Mr. Danks improperly attempts to add new factual information regarding potential subsurface leaks allegedly caused by the Noble and Bonanza Drilling companies.[24] These claims are not caused by DCP and could not be remedied through a CPCN proceeding before the Commission.

36. In making these determinations, we emphasize that, because the Commission is not a court of general jurisdiction, the Commission cannot decide or address the alleged tortious

[21] Exceptions at 2.

[22] *Bd. of Cty. Comm'rs, LaPlata Cty. v. Colorado Oil & Gas Conservation Comm'n,* 81 P.3d 1119, 1122 (Colo. App. 2003) (finding standing is a threshold question of law).

[23] Exceptions at 11.

[24] Exceptions at 11.

conduct raised by Mr. Danks, including those that are equitable in nature.[25] We find the ALJ correctly opined that the Amended Complaint cannot redress any of Mr. Danks' alleged injuries.

2. Record Review

37. While we are neither compelled to accept, nor persuaded by, the arguments in the Exceptions, we note that § 40-6-108, C.R.S., authorizes this Commission to determine whether a utility has violated a provision of law, Commission rule, or order. We further note this Commission has statutory authority and discretion to conduct its processes in a manner that can "best conduce the proper dispatch of business and the ends of justice."[26]

38. Notably, Mr. Danks argues in his Exceptions that other administrative agencies accept complaints from any person and "to [his] knowledge" none have been dismissed for standing. Although this argument is unsupported,[27] Mr. Danks' point is well-taken. The Commission and other administrative agencies do have an independent regulatory duty in ensuring state law, including licensure, and in this case, CPCN requirements, are followed.

39. Although we agree with the ALJ that standing is generally a prerequisite to prosecute a complaint at the Commission, the Commission maintains jurisdiction to review the undisputed facts set forth in the pleadings in this proceeding. As permitted in § 40-6-109(2), C.R.S., we therefore find it appropriate to review the record and provide further clarity regarding Commission processes.

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[25] Recommended Decision, at ¶ 90 (citation omitted).

[26] § 40-6-101(1), C.R.S.

[27] The Commission frequently considers and decides standing in complaint cases as a prerequisite to deciding an issue. See e.g., *Delta-Montrose Electric Ass'n for Tri-State Generation and Transmission Ass'n Inc.,* Decision No. C19-0297-I issued February 14, 2019 in Proceeding No. 18F-0866E; *Home Builders Ass'n v. Public Service Co. of Colo.*, Decision No. C03-1093 issued September 24, 2003 in Proceeding No. 01F-071G; *Roszell v. Union Pacific Railroad Co.,* Decision No. R12-1481 issued December 31, 2012 in Proceeding No. 12F-1030R; *Bass v. Public Service Co. of Colo.,* Decision No. R08-1188 issued November 13, 2008 in Proceeding No. R08-1188 (hereinafter Bass, Decision No. R08-1188); and *Roehling and Rainville v. Public Service Co. of Colo*., Decision No. R08-1299 issued December 19, 2008 in Proceeding No. 08F-400EG.

40. In this case, accepting the facts presented as true in the Amended Complaint, and viewing these allegations in the light most favorable to Mr. Danks, we are compelled to conclude that, up to the processing plant DCP is not a "public utility" supplying natural gas to the public.

41. Pursuant to § 40-1-103(a)(I), C.R.S., for an entity to be a regulated pipeline utility, all of the following elements are required: (a) the entity is a pipeline corporation or gas corporation; (b) operating for the purpose of supplying the public; and (c) for domestic, mechanical or public uses.

42. In *Denver Water Board,* the Colorado Supreme Court examined the definition provided in § 40-1-103, C.R.S., and found particularly important the phrase, "for the purpose of supplying the public."[28] The Commission has followed this precedent and consistently found service to the public is essential for an entity to be considered a public utility.[29] We therefore review the facts as alleged in the Amended Complaint to consider whether these elements are present, and in particular, whether DCP is "supplying the public" through its pipeline.

43. In the Amended Complaint, Mr. Danks claims that DCP failed to obtain a CPCN before building the Grand Parkway, Red Cloud, and Lindsay pipelines. The Amended Complaint refers to the Grand Parkway as DCP's "62 mile pipeline project including processing plants, compression stations, etc. in Weld County."[30] Mr. Danks specifically states that DCP does not market the raw gas that it gathers in its "Colorado gas gathering system" but markets the residue gas and NGLs after it is processed.[31] The purpose of the 62-mile pipeline loop that DCP named

[28] *Bd. of County Comm'rs of Arapahoe Cty. v. Denver Bd. of Water Comm'rs,* 718 P.2d 235, 242 (Colo. 1986) (Denver Water Board).

[29] *See* Proceeding No. 97F-241G, *Public Service Co. of Colo. V. Trigen-Nations Energy Company L.L.L.P* (*Trigen*), Decision No. C98-687 at pp. 3-5; Proceeding No. 98C-414G, K N G Gas Gathering; Proceeding No. 17F-0599G, *HRM Resources II, LLC. v. Anadarko Petroleum Corp.*, Decision No. R18-0057 (Colo. PUC. Jan. 25, 2018)

[30] Amended Complaint, 2.

[31] Amended Complaint, 3.

"Grand Parkway" "was to serve as a 'gathering line' for the natural gas that would be produced by the wells drilled by separate 'Drilling Companies' inside and outside of this loop."[32] The Amended Complaint includes that DCP purchases raw gas from the drilling sites and then transports the gas via pipeline to the Grand Parkway pipeline and from there to DCP's processing plant,[33] and that it owns 98.7 percent of the gas transported in the DCP pipelines to the DCP processing plants in the Grand Parkway projects."[34]

44. Although Mr. Danks defines Grand Parkway to include "processing plants, compression stations, etc.," his own statements in the Amended Complaint show that, upstream of the processing plant, the gas in the Grand Parkway, Red Cloud, and Lindsay pipelines is not a product that the public can use. According to allegations in the Amended Complaint, the pipeline system upstream of the processing plant contains unprocessed gas that cannot be supplied to the public. Therefore, the portion of DCP's operations upstream of the processing plant is not a public utility that is jurisdictional to the Commission under § 40-1-103, C.R.S., and therefore does not require a CPCN.

45. Similar to Mr. Danks, the complainants in *HRM Resources II, LLC. v. Anadarko Petroleum Corp.*, Decision No. R18-0057 (Colo. PUC. Jan. 25, 2018) argued that the gas gathering system that respondents owned was a public utility because the gas "eventually ends up being supplied to the public." However, the ALJ found this argument to be meritless: "It is uncontested that the gas that is purchased by the Respondents is not in a form that is passed on to the public. The Respondents refine the gas making new products." Proceeding No. 17F-0599G, Decision No. R18-0057, at page 15.

[32] Amended Complaint, 5.
[33] Amended Complaint, 10-11.
[34] Amended Complaint, 3.

46. As in *HRM Resources*, the statements in the Amended Complaint establish that the gas that passes through the Grand Parkway, Red Cloud, and Lindsay pipelines upstream of the processing plant is not in a form that is passed on to the public. It is not until after the processing plant that the new product—the refined gas—can be consumed by the public. The fact that the Grand Parkway connects to a processing plant does not mean the Grand Parkway, Red Cloud, and Lindsay pipelines transport gas the public can use.

47. Moreover, even though DCP does not own 1.3 percent of the gas that it transports through the Grand Parkway, Red Cloud, and Lindsay pipelines, transporting *raw* gas for third parties does not convert DCP into a public utility. In Proceeding No. 97F-241G, *Public Service Company of Colorado v. Trigen-Nations Energy Company L.L.L.P*, the Commission found that a pipeline owner was a public utility where the owner transported *processed* gas for a number of third parties.[35] Part of the Commission's rationale was that the unregulated pipeline owner could—within the service territory of Public Service Company, a regulated utility—choose to serve only large volume industrial customers and thus "'skim the cream' off the gas transportation market."[36] Removing such large volume industrial customers from Public Service Company's customer base would ultimately harm smaller residential and commercial customers.[37]

48. The rationale in *Trigen* illustrates why the transportation of raw gas, even on behalf of third parties, does not require a CPCN. In contrast to *Trigen*, the raw gas in the Grand Parkway, Red Cloud, and Lindsay pipelines cannot be sold as-is to customers who otherwise would have purchased gas from a regulated utility. In other words, DCP is not competing against or duplicating

[35] Decision C98-0687 at 5, 12-13; *see also* Proceeding No. 98C-414G, Decision No. C99-1330 at 21.
[36] Decision C98-0687 at 12.
[37] *Id.*

the efforts of regulated utilities by gathering raw gas from various oil and gas wells and transporting the raw gas to a processing plant.

49. Thus, Mr. Danks' own statements in the Amended Complaint show that DCP does not need a CPCN to gather and transport to a processing plant either the raw gas it owns or the 1.3 percent of raw gas that third parties own.

50. We find no grounds in the facts alleged in Mr. Danks' pleadings to find that DCP is a regulated public utility requiring a CPCN for the pipelines at issue. We therefore find satisfied our regulatory duty to ensure that, based on these facts, DCP is not operating unlawfully as a public utility in this state.[38]

3. Procedural Guidance

51. With respect to the pipeline facilities downstream of the processing plant, we provide notice to Staff to investigate through its normal procedures whether show cause proceedings are appropriate.

52. Under our typical processes, Staff – not private citizens – are charged with reviewing to ensure regulated public utilities are complying with applicable statute and rule. In light of the facts alleged by Mr. Danks in his complaint and subsequent amendments, we find it appropriate to raise to Staff these allegations. Under its normal processes, Staff will review and bring a show cause if it deems appropriate for services offered from facilities downstream of the processing plant. Mr. Danks can assist by providing relevant information through the informal complaint processes, consistent with Commission rules.

[38] The Commission in effect, agrees with arguments raised in the Motion to Dismiss the Amended Complaint that argue DCP is not a regulated public utility based on the facts alleged.

53. Under the Commission's Rules of Practice and Procedure, 4 CCR 723-1, members of the public may provide additional information to Staff through informal complaint processes. To avoid further litigation costs, but also to more appropriately engage Staff with its duties to ensure regulatory compliance, supplemental information is often provided to Staff through the informal complaint processes.

54. Mr. Danks does not provide evidence or information[39] that allows this proceeding to move forward at this time, neither on standing grounds raised in his Exception arguments, nor on the merits based on the allegations in the Amended Complaint. The Complaint should be dismissed for each of these reasons. Future pleadings, including regarding show cause if Staff should find such a proceeding appropriate to pursue, will of course rest on the facts and issues presented to Staff. While appropriate future formal or informal pleadings are not precluded, determinations, including without limitation standing considerations with respect to any future complainant, would necessarily be addressed on the basis of the pleading at issue.

II. ORDER

A. It is Ordered That:

1. Mr. William C. Danks' Motion for Reconsideration filed August 14, 2020, is construed as exceptions to Recommended Decision R20-0549, consistent with § 40-6-109(2), C.R.S., and Rule 1505, 4 *Code of Colorado Regulations* 723-1, consistent with the above discussion.

[39] Mr. Danks submitted no testimony despite his frequent attempts to amend the complaint. We note that this may be indicative that, practically speaking, private citizens are not expected – and may not have access to necessary information – to pursue complaints to uphold Public Utilities Law against regulated utilities. Staff is expressly resourced to review and pursue an appropriate show cause if facts are found, including through the Commission's audit authority, that indicate a public utility is incompliant with applicable Commission rules or statutes. In addition, the Office of Consumer Counsel is also tasked with representing residential, small business, and agricultural energy consumers before the Commission. *See, generally*, § 40-6.5-102, C.R.S.

2. The exceptions are granted in part, denied, in part, consistent with the above discussion.

3. Staff of the Commission is on notice of the concerns raised in this proceeding.

4. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

5. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 28, 2020.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director