Decision No. R23-0724-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0418G

ARM, LLC, and HEARTLAND INDUSTRIES, LLC

COMPLAINANTS,

V.

COLORADO NATURAL GAS, INC. and WOLF CREEK ENERGY, LLC,

RESPONDENTS.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE CONOR F. FARLEY GRANTING MOTION TO AMEND, DENYING MOTION TO DISMISS, DENYING MOTION FOR LEAVE TO FILE REPLY, ADOPTING PROCEDURAL SCHEDULE, VACATING AND RESCHEDULING REMOTE PREHEARING CONFERENCE, SCHEDULING HYBRID HEARING, AND PROVIDING INSTRUCTIONS CONCERNING EXHIBITS AND FOR PARTICIPATING IN HYBRID HEARING

Mailed Date: October 25, 2023

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I. BACKGROUND

A. Procedural Background

1. On August 16, 2023, Arm, LLC (Arm) and Heartland Industries, LLC (Heartland) (collectively, Complainants) filed a Formal Complaint (Complaint) against Colorado Natural Gas, Inc. (CNG) and Wolf Creek Energy, LLC (Wolf Creek) (collectively, Respondents). In the

Complaint, Complainants allege ten claims for relief (six against CNG, one against Wolf Creek), and three against both CNG and Wolf Creek) and request the following relief:

> a full accounting and itemization, under oath, . . .; for damages in amounts to be determined at hearing; for pre-judgment and post-judgment interest at the highest lawful rate; for civil penalties in amounts to be determined at hearing; mandating Colorado Natural Gas to be ring-fenced from Wolf Creek Energy, such that the two entities' finances may not be commingled in any way going forward; for attorney fees and costs; and for such other and further relief the Commission deems just and proper.[1]

2. On August 18, 2023, the Commission entered its Order to Satisfy or Answer and issued an Order Setting Hearing and Notice of Hearing. The Commission served Respondents with the Orders and Notice (including a copy of the Complaint) and an Order to Satisfy or Answer within 20 days from service of the Orders and Notice. The Commission also set an evidentiary hearing for October 30, 2023.

3. On August 30, 2023, the Commission referred the matter to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

4. On September 7, 2023, Respondents filed a Motion to Dismiss the Complaint (Motion to Dismiss).

5. On September 15, 2023, Trial Staff of the Colorado Public Utilities Commission (Trial Staff), filed its Notice of Intervention as of Right by Trial Staff of the Commission, Entry of Appearance, and Notice Pursuant to Rule 1007(a) and Rule 1401.

6. On September 21, 2023, Complainants filed their Response in Opposition to the Motion to Dismiss (Response to Motion to Dismiss).

[1] First Amended Complaint at 40 (prayer for relief).

7. On September 26, 2023, Complainants filed a Motion to Amend the Complaint and its proffered First Amended Formal Complaint (Motion to Amend).

8. On October 5, 2023, the Office of the Utility Consumer Advocate filed a Notice of Intervention as a Matter of Right and Entry of Appearances.

9. On October 10, 2023, Respondents filed their response to the Motion to Amend (Response to Motion to Amend).

10. On October 11, 2023, the ALJ issued Decision No. R23-0679-I that scheduled a remote prehearing conference for October 19, 2023, and required the parties to confer about a procedural schedule and Complainants to file a report of the conferral by October 17, 2023.

11. On October 17, 2023, Complainants filed the Conferral Report. In it, Complainants reported that the parties had agreed to the following procedural schedule (Consensus Schedule):

Event	**Deadline**
Answer to Amended Complaint Discovery Commences	November 10, 2023
Complainants' Direct Testimony	March 4, 2024
Respondents' and Intervenors' Answer Testimony	April 15, 2024
Rebuttal/Cross-Answer Testimony	May 22, 2024
Prehearing Motions	May 27, 2024
Corrections to Testimony and Exhibits	May 31, 2024
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	June 6, 2024
Prehearing Conference	June 7, 2023
Hearing	June 11-14, 2024

Statements of Position	July 2, 2024

Complainants also reported that the parties agree that: (a) response time to discovery requests will be ten business days from the date of service, except that responses to rebuttal and cross-answer testimony will be seven business days from the date of service; (b) otherwise, Commission Rule 1405 will govern discovery; and (c) the hearing should be conducted as a hybrid hearing.

12. On October 19, 2023, Complainants filed a Motion for Leave to File a Reply in Support of the Motion to Amend (Motion for Leave to File Reply). With the Motion to Amend, Complainants proffered their Reply brief.

B. First Amended Complaint

13. The First Amended Complaint alleges the following facts that are material to the Motion to Dismiss.

1. Proceeding No. 05A-0225G

14. In 2005, CNG filed an application with the Commission to transfer its equity to CNG Holdings, Inc., which commenced Proceeding No. 05A-225G.[2] Staff intervened in the proceeding and then reached a settlement agreement with CNG. In the Settlement Agreement, "CNG agreed to 'ensure that no cross-subsidies occur among or between subsidiaries of CNG Holdings, Inc. after the date stock was transferred.'"[3]

15. At some point thereafter, CNG Holdings, Inc. was renamed Summit Utilities, Inc. (Summit). In 2019, CNG's direct parent company became Summit LDC Holding, LLC (Summit

[2] First Amended Complaint at 5 (¶ 12).

[3] *Id*. (citing Decision No. R05-1109 issued in Proceeding No. 05A-225G on September 14, 2005).

Holdings), which lies between CNG and Summit in the corporate hierarchy.[4] Summit Holdings and Wolf Creek lie at the same level within the corporate hierarchy insofar as their direct corporate parent is Summit. While CNG is a regulated utility, Summit, Summit Holdings, and Wolf Creek are not regulated.[5]

16. In the Complaint, Complainants allege that CNG and Wolf Creek "regularly operate as a single entity, commingling financial resources, in clear violation of the Commission's rules, CNG's Tariff, CNG's firm natural gas transportation contract with ARM, and Orders of the Commission."[6] Complainants also allege that "CNG is cross-subsidizing the business operations of Wolf Creek."[7]

2. Relationship Between Complainants and Respondents

17. ARM owns real property located at 9000 South Interstate 25, Pueblo, CO 81004 (Premises), including a 90,000 square-foot (approximately 2-acre) greenhouse and a 15,000 square-foot warehouse located at the Premises (together, the Facilities).[8] ARM leases the Premises, including the Facilities, to Heartland, which operates the Facilities to grow and sell cannabis products.[9]

18. ARM takes natural gas service from CNG and Wolf Creek, pursuant to two contracts and CNG's tariffs.[10] ARM and Wolf Creek entered into the first contract entitled "Base Contract for Sale and Purchase of Natural Gas" on February 12, 2015 (Wolf Creek Contract I).[11]

[4] *Id*. at 4 (¶ 7).
[5] *Id*. at 4 (graphic).
[6] *Id*. at 2.
[7] *Id*. at 28 (¶ 168).
[8] First Amended Complaint at 8 (¶ 22).
[9] *Id*. at 8 (¶ 23).
[10] *Id*. at 8 (¶ 25).
[11] *Id*. at 10 (¶ 40).

According to Complainants, Wolf Creek Contract I "required Wolf Creek to deliver specific 'Base Load' quantities of gas per day for each month of the year, which could be adjusted upward or downward, at specific contract prices."[12] ARM and Wolf Creek entered into a second contract on November 1, 2022 (Wolf Creek Contract II) that superseded Wolf Creek Contract I.[13]

19. ARM entered into the second contract with CNG on March 9, 2015, which is entitled "Firm Gas Transportation Service Agreement" (CNG Contract).[14] Pursuant to the CNG Contract, CNG "agree[d] to receive and transport [ARM's] Gas from [certain] Receipt Point to [certain] Delivery Point(s) . . . on a firm capacity basis up to [a certain] Firm Capacity Peak Day Quantity."[15] Wolf Creek Contract I specified that Wolf Creek "will act as Agent for [ARM] regarding all aspects of [ARM's] natural gas transportation agreement with Colorado Natural Gas (CNG) except for payment of invoices to CNG."[16]

20. On September 21, 2020, CNG issued an invoice to ARM for alleged underbilling from September 2018 through April 2020 in the amount of $213,267.29 (2018-2020 Billing Dispute).[17] The alleged underbilling resulted from an error by CNG in the programming of a flow computer installed at the Premises.[18] Complainants allege that CNG issued the invoice, which did not mention or otherwise state that Complainants owed any portion of the alleged underbilling to Wolf Creek. Complainants further allege that "Wolf Creek never charged ARM for under-billing related to the 2018-2020 Billing Dispute."[19] However, "ARM/Heartland would later learn that

[12] *Id*. (¶ 41).
[13] *Id*. at 19 (¶¶ 100-101), Ex. 10 at 3 (§ 12).
[14] *Id*. at 13 (¶ 57).
[15] First Amended Complaint, Ex. 3 at 1.
[16] First Amended Complaint at 11 (¶ 46).
[17] *Id*. at 17 (¶ 90).
[18] *Id*. at 17 (¶ 89).
[19] *Id*. at 18 (¶ 91).

approximately $124,000 of the total $213,267.80 alleged under-billing claimed by CNG was attributable to Wolf Creek."[20]

21. Complainants and CNG engaged in unsuccessful mediation of the 2018-2020 Billing Dispute in November 2022.[21] CNG then issued two disconnect notices to ARM, the second of which stated that service would be disconnected on January 24, 2023 if CNG did not receive payment for the amount stated in the September 21, 2020 invoice.[22] The disconnect notices stated that "[t]he past-due amount owed to Colorado Natural Gas, Inc. for utility service rendered is $213,267.80 (without late fees)." According to Complainants, "Wolf Creek is not mentioned in the Disconnect Notice."[23]

22. On January 17, 2023, CNG filed a lawsuit against Complainants in Denver District Court, alleging claims for breach of contract and unjust enrichment based on the 2018-2020 Billing Dispute. According to Complainants, "Wolf Creek was not a named party, nor even mentioned in CNG's Complaint."[24] Complainants allege that CNG's disconnection on January 24, 2023 "would have resulted in the loss of a $2 million crop and bankruptcy."

23. As a result, "ARM/Heartland under duress, executed on January 23, 2023 a 'Settlement Agreement' with CNG, which included the $150,000 payment to CNG, $50,000 of which had to be paid immediately."[25] Complainants allege that "Wolf Creek was not a party to the Settlement Agreement between ARM/Heartland, nor even referenced therein."[26] Pursuant to the

[20] *Id*. at 18 (¶ 92),
[21] *Id*. at 20 (¶ 109).
[22] *Id*. (¶ 111).
[23] *Id*. at 21 (¶ 112).
[24] *Id*. (¶ 117).
[25] *Id*. at 22 (¶ 122).
[26] *Id*. (¶ 123).

Settlement Agreement, Complainants released "CNG from any all claims . . . which arise directly or indirectly out of, or based in whole or in part on the Miscalibration Incident, the Undercharge, the Disconnect Notice, and the Litigation."[27] "CNG" is defined in the Settlement Agreement as "Colorado Natural Gas, Inc."[28]

24. Following the execution of the Settlement Agreement, the parties continued to have disputes regarding billing, a gas leak on CNG's side of the meter, whether the gas leak caused the high consumption claimed by Respondents and that was at least part of the billing disputes between the parties, and Respondents' responses to requests for information from Complainants.[29] Complainants requested mediation on May 13, 2023, but CNG did not respond within two months.[30] As a result, Complainants filed the Complaint on August 16, 2023.

3. Claims for Relief

25. The Complaint asserts the following claims: (1) Violation of Commission Decisions Requiring CNG and Wolf Creek to Operate as Separate Businesses (against by CNG and Wolf Creek); (2) Violations of Commission Transportation Rule 4208: Anticompetitive Conduct Prohibited (against CNG); (3) Violation of Commission Transportation Rule 4206: Failure to Require an Agency Agreement Between ARM and Wolf Creek (Against CNG); (4) Violation of Commission Rule 4403(l): Return of Utility Customer Deposit (Against CNG); (5) Violations of CNG's Firm Transportation Tariff (Against CNG and Wolf Creek); (6) Breach of Firm Gas Transportation Agreement (Against CNG); (7) Breach of Wolf Creek Agreements (Against Wolf Creek); (8) Excessive Charges as a Result of 2018-2020 Bill Dispute (Against

[27] *Id*., Ex. 1 at 2 (§ II.2).
[28] *Id*., Ex. 1 at 1.
[29] *Id*. at 22-26 (¶¶ 124-154).
[30] *Id*. at 27 (¶¶ 159-160).

CNG); (9) Negligent and/or Fraudulent Misrepresentation (Against CNG); and (10) Excessive Charges in Winter 2023 (Against CNG and Wolf Creek). In its prayer for relief, Complaints request:

> that the Commission issue orders against Colorado Natural Gas, Inc. and Wolf Creek Energy, LLC requiring a full accounting and itemization, under oath, as set forth above; for damages in amounts to be determined at hearing; for pre-judgment and post-judgment interest at the highest lawful rate; for civil penalties in amounts to be determined at hearing; mandating Colorado Natural Gas to be ring-fenced from Wolf Creek Energy, such that the two entities' finances may not be commingled in any way going forward; for attorney fees and costs; and for such other and further relief the Commission deems just and proper.[31]

II. MOTION TO AMEND COMPLAINT PURSUANT TO C.R.C.P. 15(A)

A. Arguments

1. Complainants

26. In the Motion to Amend, Complainants concede that "alter ego" and "pierce the corporate veil" do not appear in the Complaint. However, Complainants note that the Complaint repeatedly alleges that CNG and Wolf Creek have operated as a "single entity" for an extended period.[32] Complainants contend that these allegations "are tantamount to a request to the Commission to acknowledge that CNG and Wolf Creek have an alter ego relationship" justifying piercing the corporate veil(s) between the two entities and thereby concluding that Wolf Creek is a public utility subject to the jurisdiction of the Commission.[33] Complainants thus seek to amend

[31] *Id*. at 40.

[32] Motion to Amend at 2-3 (citing Complaint at 9 (¶ 33), 34 (¶ 215)).

[33] *Id*. at 3.

the Complaint to add specific allegations that CNG and Wolf Creek are alter egos "out of an abundance of caution."[34]

27. Complainants also argue that they seek to amend the Complaint to change allegations contained therein that "an agency agreement was never required by CNG nor signed by ARM and Wolf Creek." In the Motion to Dismiss, Respondents stated that such an agency agreement was executed by ARM and Wolf Creek and attached it to the motion. Complainants thus seek to amend the Complaint to correct the allegations that they state were made in good faith.[35]

2. Respondents

28. Respondents assert that the Motion to Amend should be denied because the proposed amendment is futile. Citing *Dill v. Rembrandt Grp., Inc.*, 474 P.3d 176 (Colo. App. 2020), Respondents assert that for Complainants to succeed on their alter ego-based piercing of the corporate veil theory, they must allege that Wolf Creek and CNG are alter egos of a common parent company.[36] According to Respondents, the common parent of CNG and Wolf Creek is Summit Utilities, Inc. (Summit Utilities), which is the immediate parent of Wolf Creek. CNG's immediate parent is Summit LDC Holdings, LLC (Summit LDC Holdings), whose immediate parent is Summit Utilities.[37] As a result, Respondents assert that Complainants must allege facts supporting a plausible conclusion that Wolf Creek is an alter ego of Summit Utilities, and that CNG is the alter ego of Summit LDC Holdings, which, in turn, is the alter ego of Summit

[34] *Id*.
[35] *Id*. at 4
[36] Response to Motion to Amend at 5.
[37] *Id*. at 5-6.

Utilities.[38] Because no such specific allegations are made in the Complaint, Respondents conclude that Complainants proposed amendment is futile and thus should be denied.

B. Legal Standard

29. Commission Rule 1309(a) requires Complainants to "obtain leave of the Commission to amend or supplement."[39] Under C.R.C.P. 15(a), "where leave . . . is required to amend a pleading, 'leave shall be freely given when justice so requires.'"[40] In determining whether to grant leave, the court should consider the totality of the circumstances.[41] Some grounds for denying a motion to amend include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, undue prejudice to the opposing party, and futility of amendment."[42] A proposed amendment is futile when the amended complaint would not survive a motion to dismiss.[43]

C. Analysis

30. The ALJ concludes that Complainants have satisfied their burden of establishing good cause to grant the Motion to Amend. Respondents have not argued, let alone established, "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, [or] undue prejudice" resulting from the proposed amendment.[44] As a result, none of those reasons serve as a basis for denying the Motion to Amend.

[38] *Id*.
[39] 4 *Code of Colorado Regulations* (CCR) 723-1.
[40] *Civil Serv. Comm'n v. Carney*, 97 P.3d 961, 966 (Colo. 2004) (quoting C.R.C.P. 15(a)).
[41] *Id*.
[42] *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002).
[43] *Bristol Co., Ltd. Partnership v. Osman*, 190 P.3d 752, 759 (Colo. App. 2007).
[44] *Benton*, 56 P.3d at 86.

31. Instead, Respondents' sole basis for denying the Motion to Amend is that the proposed amendment is futile. However, as explained below, the ALJ will deny Respondents' Motion to Dismiss. As a result, the ALJ declines to adopt Respondents' futility argument and thereby deny the Motion to Amend.

32. Respondents' argument that Complainants have not pled comprehensive facts proving their theory of piercing the corporate veil is unpersuasive. As noted above, Complainants need not prove their allegations in their Complaint. Instead, the primary purpose of the Complaint is to give notice to Respondents of the claims and the bases therefor. The lengthy and detailed Complaint satisfies that relatively low bar and the amendment will add further detail to the allegations in the Complaint.

33. Based on the foregoing, the ALJ concludes that Complainants have carried their burden of establishing good cause to grant the Motion to Amend. The First Amended Complaint will be the operative Complaint in this proceeding.

III. MOTION TO DISMISS

A. Arguments

1. Respondents

34. Respondents assert that the Settlement Agreement precludes Complainants from bringing the claims in the Complaint.[45] Respondents further contend that Complainants' allegations in the Complaint that they entered into the Settlement Agreement under duress are unavailing because they were represented by counsel and had the opportunity to reflect on the

[45] Motion at 2-3.

settlement prior to entering into it.[46] To the extent the ALJ does not agree that the Settlement Agreement precludes all of the claims, Respondents contend that there is no credible dispute that Complainants released the eighth claim for relief by executing the Settlement Agreement. Accordingly, at a minimum, the eighth claim for relief must be dismissed based on the Settlement Agreement.[47]

35. Respondents also argue that Wolf Creek must be dismissed from this proceeding because it is not a public utility and, consequently, the Commission does not have jurisdiction over it. Instead, CNG states that Wolf Creek is "a private entity providing services to individual customers pursuant to contract."[48] For this reason, Wolf Creek must be dismissed "for lack of jurisdiction over the person."[49]

36. Finally, Respondents assert that the second claim based on alleged violations of Commission Transportation Rules 4208 must be dismissed.[50] As support, Respondents cite Complainants' allegations concerning alleged violations of Rule 4208(b)(IX), (XI), (XIII), and argue that Complainants "offer[ed] no evidence" in support of those allegations.[51] Respondents further assert that "[t]he remaining allegations set forth in the Second Claim for Relief are unsupported by evidence."[52] Respondents conclude that the second claim must be dismissed.[53] Respondents also attach an "Agency Delegation" signed by ARM and Wolf Creek to the Motion,[54] but do not argue or otherwise explain why the Agency Delegation justifies dismissal of any clam.

[46] *Id*. at 3-5.
[47] *Id*. at 5-6.
[48] *Id*. at 6.
[49] *Id*. at 2
[50] *Id*. at 7-9.
[51] *Id*. at 8-9.
[52] *Id*. at 9.
[53] *Id*. (citing only the second claim for relief).
[54] *Id*., Ex. 2.

2. Complainants

37. Complainants offer three relevant arguments in response to the Motion. First, Complainants argue that "the Settlement Agreement at issue is entirely unrelated to all but perhaps one of the ten claims . . . in the Complaint."[55] Complainants concede that the one claim to which the Settlement Agreement is "related" is the eighth claim against CNG for "Excessive Charges as a Result of 2018-2020 Bill Dispute" in violation of § 40-6-119(1) and Commission Rule 4402(a)(IV).[56] However, Complainants argue that they have alleged sufficient facts from which it can be concluded that the Settlement Agreement is "void and unenforceable."[57] The alleged facts are that they entered into the Settlement Agreement "under duress, contrary to Commission rules, and based on misrepresentation of CNG."[58] For this reason, the Settlement Agreement does not warrant dismissal of any claims of the Complaint.[59]

38. Second, the Commission has jurisdiction over Wolf Creek at this stage because Complainants have alleged sufficient facts from which it can be concluded that CNG and Wolf Creek are alter egos, and, consequently, Wolf Creek is a public utility as defined by § 40-1-103(1)(a)(I). C.R.S. As support, Complainants cite allegations in the Complaint that: (a) CNG and Wolf Creek "have regularly acted as a single entity;"[60] (b) "CNG and Wolf Creek have provided one account representative to ARM since 2015;"[61] (c) CNG has collected money from Complainants that was allegedly owed to Wolf Creek;[62] (d) CNG was the sole plaintiff in the

[55] Response at 2.
[56] *Id*. at 6.
[57] *Id*.
[58] *Id*.
[59] *Id*. at 5-10.
[60] First Amended Complaint at 28 (¶ 162).
[61] *Id*. at 28 (¶ 164).
[62] *Id*. at 28 (¶ 165).

lawsuit filed in Denver District Court and the sole party to the Settlement Agreement on the CNG/Wolf Creek side, even though some of the monies sought were allegedly due and owing to Wolf Creek;[63] and (e) "CNG is cross-subsidizing the business operations of Wolf Creek."[64] Because they did not expressly allege in the Complaint that CNG and Wolf Creek are alter egos, Complainants stated in their Response that they planned to file a Motion to Amend the Complaint to include such allegations. As noted above, Complainants have since done so.

39. Third, the Agency Agreement attached to the Motion does not justify dismissal of any claim in the Complaint, and in particular the second and third claims. As an initial matter, Complainants assert that Respondents' submission of the Agency Agreement with their Response "violate[s] the procedural norms of C.R.C.P. 12, the foundational basis for Commission Rule 1308(e),"[65] which does not allow the Commission to consider matters outside of the Complaint without converting the Motion to a motion for summary judgment and providing Complainants "reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56."[66] Regardless of whether the Motion is converted to a motion for summary judgment, the Agency Agreement attached to the Response "is not the standard form Agency Agreement required at Sheets T34-T37 of CNG's Tariff (in effect since November 1, 2013)" and does not include important terms included in the required standard form.[67] Further, Respondents' argument in the Motion that the second claim must be dismissed for failure to provide evidence proving the allegations supporting the second claim is incorrect because Rule 12(b)(5) requires all well-pled

[63] *Id*. at 28 (¶ 166).
[64] *Id*. at 28 (¶ 168).
[65] Response to Motion to Dismiss at 13.
[66] C.R.C.P. 12(b).
[67] Response to Motion to Dismiss at 14.

allegations of material facts to be accepted as true.[68] Complainants conclude that there is no basis for dismissing the second and third claims asserted in the Complaint.

B. Legal Standard

40. In the Motion, Respondents assert that their argument to dismiss Wolf Creek is based on personal jurisdiction.[69] "The exercise of personal jurisdiction over a defendant is proper 'if fair and adequate notice is provided to the defendant, and if the defendant has sufficient minimum contacts with the state seeking jurisdiction.'"[70] Even if adequate notice has been provided and the defendant has sufficient minimum contacts with Colorado, a defendant can be dismissed if the exercise of personal jurisdiction over the defendant does not "comport with fair play and substantial justice."[71] "These 'fairness factors' include the burden on the defendant, the forum State's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief.

41. In contrast, the concept of "subject matter jurisdiction" refers to the "type of cases that the [tribunal] has been empowered to entertain by the sovereign from which the court derives its authority."[72] Put differently, "subject matter jurisdiction" addresses whether the tribunal has been provided the authority to adjudicate "the subject matter of the issue to be decided."[73]

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[68] *Id*. at 14-15.

[69] Motion at 2 ("With respect to Wolf Creek, the Motion to Dismiss as to Wolf Creek is based upon a lack of Commission jurisdiction over the person as set forth in Rule 1308(e)."). *See also* Rule 1308, 4 CCR 723-1 ("A motion to dismiss may be made on any of the following grounds: lack of jurisdiction over the subject matter; lack of jurisdiction over the person; . . . ").

[70] *Currier v. Sutherland*, 218 P.3d 709, 714-715 (Colo. 2009) (quoting *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113 (Colo. 1991)).

[71] *Youngquist Bros. Oil & Gas, Inc. v. Miner*, 390 P.3d 389, 392 (Colo. 2017) (*quoting Keefe v. Kirschenbaum & Kirschenbaum, P.C.*, 40 P.3d 1267, 1271 (Colo. 2002)).

[72] *People ex rel. J.W. v. C.O.*, 406 P.3d 853, 858 (Colo. 2017) (quoting *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986)).

[73] *Id*.

Accordingly, whereas personal jurisdiction addresses the fairness of forcing a defendant to defend itself in a particular forum based on the defendant's contacts with the forum, subject matter jurisdiction concerns a tribunal's authority to address the subject matter of the claim(s) asserted against the defendant.

42. Here, the ALJ concludes that Respondents' jurisdictional argument challenges the Commission's subject matter jurisdiction over the dispute alleged in the Complaint against Wolf Creek, not the Commission's personal jurisdiction over Wolf Creek. Respondents do not argue that it would be unfair to force Wolf Creek to participate in this proceeding because it has limited contacts in Colorado or for any other reason. Instead, Respondents are asserting that the Commission has not been empowered to entertain the dispute alleged in the Complaint because Wolf Creek is not a public utility. Accordingly, the ALJ will analyze Respondents' jurisdictional argument under C.R.C.P. 12(b)(1), not C.R.C.P. 12(b)(2).

1. C.R.C.P. 12(b)(1)

43. The Complainants have the burden of proving that the Commission has subject matter jurisdiction.[74] Unlike a motion to dismiss based on C.R.C.P. 12(b)(5), the facts in the Complaint need not be taken as true under C.R.C.P. 12(b)(1).[75] If the jurisdictional facts are disputed, an evidentiary hearing should be held to resolve the dispute(s).[76] However, the ALJ may determine the jurisdictional issue without an evidentiary hearing if the Complainants' assertions of fact are accepted as true.[77]

[74] *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996).
[75] *Medina v. State*, 35 P.3d 443, 452 (Colo. App. 2001).
[76] *Werth v. Heritage Int'l Holdings*, 70 P.3d 627, 629 (Colo. App. 2003).
[77] *Danks v. Colo. PUC*, 512 P.3d 692, 701 (Colo. 2022).

2. C.R.C.P. 12(b)(5)

44. C.R.C.P. 12(b)(5) allows a respondent to file a motion seeking to dismiss a complaint for "failure to state a claim upon which relied can be granted." In ruling on such a motion, the Complainant's allegations of material fact must be accepted as true. However, this tenet is inapplicable to legal conclusions.[78] The Commission "may consider only matters stated in the complaint and must not go beyond the confines of the pleadings,"[79] except for documents that are referenced in, and central to, the complaint.[80] The ALJ may also consider documents that are subject to administrative notice.[81] If matters outside of the complaint are included with the motion to dismiss and not excluded by the ALJ, the motion must be converted to one for summary judgment and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56."[82]

45. To survive a C.R.C.P. 12(b)(5) motion to dismiss, a complaint must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face."[83] A claim has facial plausibility when the complainant pleads factual content that allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged.[84] The plausibility standard is not akin to a "probability requirement." Indeed, it asks for more than a sheer possibility that a respondent has acted unlawfully.[85] Where a complaint pleads facts that

[78] *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (adopting the standard for review of motions to dismiss for failure to state a claim enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[79] *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004).

[80] *Prospect Dev. Co. v. Holland & Knight*, 433 P.3d 146, 149 (Colo. App. 2018).

[81] *Walker v. Van Laningham*, 148 P.3d 391, 397-398 (Colo. App. 2006).

[82] C.R.C.P. 12(b).

[83] *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016).

[84] *Twombly*, 550 U.S. at 556 (2007).

[85] *Id*.

are "merely consistent with" a respondent's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[86] Put differently, a complaint that alleges facts that are equally consistent with both legal and illegal conduct has not alleged a plausible claim and must be dismissed.[87]

46. "The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff's claims."[88] As a result, motions to dismiss "are viewed with disfavor."[89] Nevertheless, "only a complaint that states a plausible claim for relief will survive a motion to dismiss."[90]

C. Analysis

1. C.R.C.P. 12(b)(1)

47. The ALJ will not hold an evidentiary hearing to determine the jurisdictional facts at this stage of the proceeding. The jurisdictional facts and the other facts alleged in the First Amended Complaint are substantially intertwined. It would be a more efficient use of the parties' and Commission's resources, therefore, to address all of the allegations in the First Amended Complaint at one hearing. For this reason, the ALJ declines to hold a hearing now limited to determining the jurisdictional facts, and instead treats the jurisdictional facts alleged in the First Amended Complaint as true.[91]

[86] *Id*. at 557.
[87] *See Warne*, 373 P.3d at 596-597 (citing *Twombly* and *Iqbal*).
[88] *Rosenthal v. Dean Witter Reynolds*, 908 P.2d 1095, 1099-1100 (Colo. 1995). (Internal citations omitted)
[89] *Hirsch Trust v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017)
[90] *Warne*, 373 P.3d at 591 (quoting *Iqbal*, 556 U.S. at 679).
[91] *See Trinity Broad. of Denver*, 848 P.2d at 925.

48. Based on those alleged facts, the ALJ concludes that the Commission has jurisdiction over the claims in the First Amended Complaint. While the ALJ is unaware of any Commission, Colorado District Court, or Supreme Court holding that Wolf Creek is a public utility subject to the jurisdiction of the Commission, Complainants have alleged detailed facts in the First Amended Complaint that CNG and Wolf Creek have operated as a single entity pursuant to an alter ego relationship for an extended period. Because there is no dispute that CNG is a public utility, Complainants contend that a finding that CNG and Wolf Creek have operated in an alter ego relationship means that Wolf Creek has been operating as a public utility and is thus subject to the jurisdiction of the Commission.[92]

49. Under Colorado law, a duly formed corporation is treated as a separate legal entity, unique from its officers, directors, and shareholders.[93] As a result, the "corporate veil" isolates the actions, profits, debts, and liabilities of the corporation from the individuals and/or the entity that invest in and run the entity.[94] However, when a Court "pierces the corporate veil," it allows the liabilities of the corporation (including limited liability corporations) to be imposed on the shareholders/members of the corporation.[95] Horizontal veil piercing is permissible "between entities that do not share direct common owners, but that indirectly share common owners through another entity in an ownership chain. However, the veils between the separate entities and their owners in the ownership chain must first be pierced."[96]

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[92] Response to Motion to Dismiss at 10-13.

[93] *In re Phillips*, 139 P.3d 639, 643 (Colo. 2006).

[94] *Id*.

[95] *Id*.

[96] *Dill v. Rembrandt Grp., Inc.*, 474 P.3d 176, 183 (Colo. App. 2020). *See also id*. at 184 ("Entities that share common shareholders, owners, or parents are sister companies.") (citing Black's Law Dictionary 418 (10th ed. 2014)); 185 ("horizontal veil piercing between sister entities may occur only if (1) the entities share a parent or common owners in the ownership chain and (2) the veils separating each entity from the parent or common owners are first pierced to find that each sister entity is the alter ego of its owners.").

50. To "pierce the corporate veil," a three-part test must be satisfied. First, the ALJ must determine whether the corporate entity is the alter ego of the person or entity in issue. Id. An alter ego relationship exists "when a corporation or LLC is merely an instrumentality for the transaction of the shareholders' or members' affairs and 'there is such unity of interest in ownership that the separate personalities of the corporation [or LLC] and the owners no longer exist.'"[97] Several factors must be considered in determining whether a unity of interest exists, including whether: (a) the corporation is operated as a distinct business entity; (b) funds and assets are commingled; (c) adequate corporate records are maintained; (d) the nature and form of the entity's ownership and control facilitate misuse by an insider; (e) the business is thinly capitalized; (f) the corporation is used as a "mere shell"; (g) legal formalities are disregarded; and (h) corporate funds or assets are used for noncorporate purposes.[98] There is no bright line rule for how many of the factors must be established to support an alter ego finding. Instead, the analysis turns on the specific facts of each case and whether the Respondents have disregarded the corporate form/separateness of the two entities.[99]

51. Second, the ALJ must determine whether justice requires piercing the corporate veil. Justice may require veil piercing "where the corporate entity has been used to defeat public convenience, or to justify or protect wrong, fraud, or crime, or in other similar situations where equity requires."[100]

52. Third, the ALJ must consider whether an equitable result will be achieved by disregarding the corporate form.[101] Indeed, "[p]iercing the corporate veil is an equitable remedy,

[97] *Id*.
[98] *Id*.
[99] *Id*. at 183-84.
[100] *Reader v. Dertina & Associates Marketing, Inc.*, 693 P.2d 398, 399 (Colo. App. 1984).
[101] *Phillips*, 139 P.3d at 644

requiring balancing of the equities in each particular case."[102] "The paramount goal of piercing the corporate veil is to achieve an equitable result."[103]

53. Here, the ALJ concludes that Complainants have alleged sufficient facts to establish the Commission's jurisdiction over the dispute concerning Wolf Creek at this stage. As noted, there is no dispute that CNG is a public utility subject to the jurisdiction of the Commission, and Complainants allege that CNG and Wolf Creek have operated as a single entity for some time.[104] Further, the Articles of Organization filed as an exhibit to the First Amended Complaint indicates that CNG is the sole member and manager of Wolf Creek, but the organizational chart reproduced in the First Amended Complaint from Decision No. R22-0608 issued in Proceeding No. 22A-0153SG suggests that the relationship between the two is more remote, thus arguably requiring multiple veil piercings.[105] Regardless, Complainants have alleged sufficient facts in their 40-page, 264-paragraph First Amended Complaint to support their conclusion that Wolf Creek has been operating as a public utility, either due to piercing the corporate veil(s) separating CNG and Wolf Creek or otherwise.[106] While the First Amended Complaint does not include detailed allegations regarding the piercing of the corporate veils of Summit LDC Holdings, LLC and Summit Utilities, Inc. pursuant to a horizontal veil piercing theory, "the [plausibility] standard doesn't require a plaintiff to 'set forth a prima facie case for each element'" of a claim.[107]

[102] *Great Neck Plaza*, 37 P.3d at 490.

[103] *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 74 (Colo. App. 2009).

[104] *See* First Amended Complaint at 2, 9 (¶ 33), 28 (¶ 162), 29 (¶ 172), 34 (¶ 215), and 39 (¶ 260).

[105] First Amended Complaint at 3-4 (¶ 6).

[106] *See* First Amended Complaint at 9 (¶¶ 29-35). *See also* § 40-3-103(1) ("every corporation, or person declared by law to be affected with a public interest . . .is hereby declared to be a public utility.").

[107] *Adams Cnty. Hous. Auth. v. Panzlau*, 527 P.3d 440, 449 (Colo. App. 2022) (quoting *George v. Urb. Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016)).

54. In addition, Complainants have alleged that CNG and Wolf Creek have violated Decision Nos. R05-1109 and R06-0194 in which CNG agreed to: (a) "ensure that no cross-subsidies occur among or between subsidiaries of CNG Holdings, Inc.;"[108] and (b) "remind the end-use transportation customers of CNG that Wolf Creek and CNG are not one and the same entity" and to otherwise operate independently.[109] Specifically, Complainants have alleged that CNG and Wolf Creek are subsidiaries of Summit, which is alleged to be the successor-in-interest to CNG Holdings, Inc., CNG has cross-subsidized Wolf Creek, and CNG never told Complainants that CNG and Wolf Creek are not one and the same. These allegations plausibly support the conclusion that CNG and Wolf Creek have jointly violated Decision Nos. R05-1109 and R06-0194, which the Commission has continuing jurisdiction to enforce.

55. Accordingly, based on the foregoing, the ALJ concludes that the allegations in the First Amended Complaint, taken as whole, warrant the exercise of jurisdiction over Wolf Creek at this stage of the proceeding. The Motion to Dismiss based on C.R.C.P. 12(b)(1) will be denied without prejudice so that the issue can be raised again if the facts, as they develop during the course of this proceeding, support it.

2. C.R.C.P. 12(b)(5)

56. The ALJ has not considered the Agency Delegation attached as Exhibit 2 to the Motion to Dismiss. As a result, the Motion to Dismiss will not be converted to a motion for summary judgment.

57. Based on a review of the First Amended Complaint, the Motion to Dismiss, and the response to the Motion to Dismiss, the ALJ concludes that Complainants have pled sufficient facts

[108] Decision No. R05-1109 that issued in Proceeding No. 05A-225G on September 14, 2005, at 4 (¶ 13(b)).
[109] Decision No. R06-0194 that issued in Proceeding No. 06S-412G on March 1, 2006, at 20 (¶ 68(c)).

supporting the claims alleged in the First Amended Complaint. Specifically, the First Amended Complaint's detailed allegations summarized above, taken as true, support the reasonable inference that the respondent is liable for the alleged claims.[110] Complainants' claims are thus plausible on their face and will not be dismissed.

58. The Settlement Agreement does not require dismissal of the claims at this stage of the proceeding, as Respondents contend. Complainants have alleged that the Settlement is unenforceable because they signed it under duress. Based on the facts alleged in the First Amended Complaint, the ALJ concludes that Complainants' duress defense to enforcement of the Settlement Agreement is plausible on its face.

59. In addition, the release signed in the Settlement Agreement applies to claims that "arise directly or indirectly out of, or based in whole or in part on the Miscalibration Incident, the Undercharge, the Disconnect Notice, and the Litigation."[111] "The Miscalibration Incident" is defined as a July 2020 inspection by CNG that "revealed the total flow device had been miscalibrated, effectively masking Customers'' natural gas usage for the time period September 2018 through May 2020," the "Undercharge" is defined as the alleged undercharge resulting from the Miscalibration Incident, the "Disconnect Notice" is defined as the notice sent to Complainants on January 6, 2023 with a disconnect date of January 24, 2023 unless Complainants paid for the Undercharge before that date, and "the Litigation" is defined as the First Amended Complaint filed by Respondents against Complainants on January 24, 2023 in Denver District Court alleging claims for breach of contract and unjust enrichment based on the Miscalibration Incident. Claims 3-7, and 9-10 do not mention or otherwise reference the Miscalibration Incident,

[110] *Twombly*, 550 U.S. at 556 (2007).
[111] First Amended Complaint, Ex. 4 at 2.

the Undercharge, the Disconnect Notice, or the Litigation. Thus, even if the ALJ concluded that Complainants' duress defense to the enforcement of the Settlement Agreement was not plausible on its face, the ALJ would deny the Motion at least as to those claims.

60. For the foregoing reasons, the ALJ concludes that Respondents have not carried their burden of establishing that the First Amended Complaint must be dismissed pursuant to C.R.C.P. 12(b)(5).

IV. MOTION FOR LEAVE TO FILE REPLY

A. Argument

61. Complainants assert that in their Response to the Motion to Amend Respondents "misstate[d] that extensively pleading and proving 'horizontal veil piercing' is necessary to survive their Motion to Dismiss."[112] Complainants also argue that Respondents "mischaracterize the alter ego amendments to the Complaint as a 'new' argument." However, Respondents also state "[t]he Motion and original Complaint sufficiently address how the original allegations of commingling resources and operating as a single entity were tantamount to alleging an alter ego relationship, without using the term of art."[113]

B. Legal Standard

62. Complainants are not permitted to file a reply brief in support of its Motion for Leave to File Reply unless the ALJ orders otherwise. To obtain permission, a motion for leave to file a reply "must demonstrate:" (a) a material misrepresentation of a fact by Respondents; (b) accident or surprise, which ordinary prudence could not have guarded against; (c) newly

[112] Motion for Leave to File Reply at 2.
[113] *Id*.

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 by Respondents.[114]

C. Analysis

63. Complainants have not established good cause to grant the Motion for Leave to File Reply. Specifically, Complainants have not established any of the factors that must be demonstrated in order to approve a request to file a reply brief. While they contend Respondents "misstate[d] that extensively pleading and proving 'horizontal veil piercing' is necessary to survive their Motion to Dismiss,"[115] Complainants' argument on this issue does not materially aid the ALJ. Similarly, Complainants assert that Respondents "mischaracterize the alter ego amendments to the Complaint as a 'new' argument," such a mischaracterization does not qualify as any of the factors listed in Rule 1400(e). Accordingly, the Motion for Leave to File Reply will be denied.

V. SCHEDULE

64. The Consensus Schedule and the parties' proposal regarding discovery as described above will be accepted with a modification. Specifically, the parties state that their intent is to establish a schedule that establishes a deadline for a final Commission decision of October 4, 2024, pursuant to § 40-6-108(4), C.R.S. However, the deadline established by the Consensus Schedule is September 30, 2024, which is 210 days after the March 4, 2024 proposed deadline for Complainants to file direct testimony. As a result, the ALJ will change the deadline for direct testimony to March 8, 2024, to maintain the statutory deadline of October 4, 2024.

65. Accordingly, the schedule for the proceeding is as follows:

[114] Rule 1400(e), 4 CCR 723-1.
[115] Motion for Leave to File Reply at 2.

Event	Deadline
Answer to Amended Complaint Discovery Commences	November 10, 2023
Complainants' Direct Testimony	March 8, 2024
Respondents' and Intervenors' Answer Testimony	April 15, 2024
Rebuttal/Cross-Answer Testimony	May 22, 2024
Prehearing Motions	May 27, 2024
Corrections to Testimony and Exhibits	May 31, 2024
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	June 6, 2024
Remote Prehearing Conference	June 7, 2023
Hearing	June 11-14, 2024
Statements of Position	July 2, 2024

66. To efficiently organize the numbering and preparation of exhibits for the hearing, all parties must use a unified numbering system for all hearing exhibits. Blocks of hearing exhibit numbers are assigned as follows:

- ARM is assigned hearing exhibit numbers 100 to 199;
- Heartland is assigned hearing exhibit numbers 200 to 299;
- CNG is assigned hearing exhibit numbers 300 to 399;
- Wolf Creek is assigned hearing exhibit numbers 400 to 499;
- Staff is assigned hearing exhibit numbers 500 to 599; and
- UCA is assigned hearing exhibit numbers 600 to 699.

VI. HYBRID EVIDENTIARY HEARING

67. As agreed to by the parties, the evidentiary hearing shall be scheduled for June 11-14, 2024. Based on the input of the parties, the hearing will be conducted as a hybrid hearing. This Decision and Attachments A and B provide critical information and instructions to facilitate holding the hybrid hearing, which all parties must follow.

68. To minimize the potential that the hybrid hearing may be disrupted by non-participants, the link, meeting ID code, and passcode to attend the hearing will be provided to the participants by email before the hearing, and the participants will be prohibited from distributing that information to anyone not participating in the hearing.

69. Attachment A to this Decision provides the information addressing how to use the Zoom platform for remotely participating in the hearing. Attachment B outlines procedures and requirements for marking and formatting exhibits to facilitate the efficient and smooth electronic evidence presentations at the hybrid hearing. It is extremely important that the parties carefully review and follow all requirements in this Decision and Attachments A and B.

VII. REMOTE PREHEARING CONFERENCE

70. The Conferral Report comprehensively addressed the issues the ALJ intended to address at the remote prehearing conference. Accordingly, the remote prehearing conference scheduled for October 19, 2023, is vacated.

VIII. ORDER

A. It Is Ordered That:

1. The Motion to Dismiss filed by Colorado Natural Gas, Inc. and Wolf Creek Energy, LLC on September 7, 2023, is denied for the reasons stated above.

2. The Motion to Amend filed by Arm, LLC and Heartland Industries, LLC (collectively, Complainants) on September 26, 2023, is granted for the reasons stated above.

3. The Motion for Leave to File a Reply in Support of the Motion to Amend filed by Complainants on October 19, 2023, is denied.

4. The remote prehearing conference scheduled for October 19, 2023, at 1:30 p.m., is vacated.

5. The schedule outlined in paragraph 65 above is accepted.

6. A remote prehearing conference in this proceeding is scheduled as follows:

DATE: June 7, 2024

TIME: 1:30 p.m.

WEBCAST: Commission Hearing Room

METHOD: Join by video conference using Zoom at the link to be provided in an email from the Administrative Law Judge[116]

7. Nobody should appear in-person for the remote prehearing conference.

8. The hearing scheduled for October 30, 2023, is vacated, and rescheduled as a hybrid hearing as follows:

DATE: June 11-14, 2024

TIME: 9:00 a.m. to 5:00 p.m.

PLACE: In-person: Commission Hearing Room, Suite 250, 1560 Broadway, Denver, Colorado

By video conference: using the Zoom web conferencing platform at a link be provided to the participants by email.[117]

[116] Additional information about the Zoom platform and how to use the platform are available at: https://zoom.us/. All are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See https://zoom.us/test.

[117] Additional information about the Zoom platform and how to use the platform are available at: https://zoom.us/. All participants are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See https://zoom.us/test.

9. This Decision is effective immediately.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge