

Decision No. R23-0734

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21N-0641GPS

IN THE MATTER OF THE NOTICE OF PROBABLE VIOLATION ISSUED TO CIRCLE
DRIVE MOBILE HOME PARK ON JANUARY 4, 2022.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
FINDING THAT CIRCLE DRIVE MOBILE HOME PARK HAS
SATISFIED ITS ALTERNATIVE ENFORCEMENT OBLIGATIONS,
ASSESSING CIVIL PENALTY, AND CLOSING PROCEEDING**

Mailed Date: October 27,2023

I. PROCEDURAL BACKGROUND

1. On January 4, 2022, the Staff of the Public Utilities Commission (Staff) initiated this proceeding by issuing its Notice of Probable Violation (NPV) to Circle Drive Mobile Home Park (Respondent). The NPV assesses civil penalties, calculated in accordance with § 40-7-117 C.R.S. and Rule 11501 of the Rules Regulating Pipeline Operators and Gas Pipeline Safety, 4 *Code of Colorado Regulations* (CCR) 723-11, totaling \$500,000.00.¹ The NPV enumerates 14 violations, including one violation of 4 CCR 723-4953² and thirteen violations of the Code of Federal Regulations (CFR) of the following provisions: 49 CFR 192.463 & 192.465, 49 CFR 192.465, 49 CFR 192.605, 49 CFR 192.605(a), 49 CFR 192.615, 49 CFR 192.625, 49 CFR

¹ See NPV at 1-3.

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

192.646, 49 CFR 192.723, 49 CFR 192.739 & 192.743, 49 CFR 192.747, 49 CFR 192.801, and 49 CFR 192.1015.³

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

3. On March 14, 2022, Circle Drive Mobile Home Park’s Response to Notice of Violation (Response) was filed by Respondent. Respondent opted to “Request Offer in Compromise” for each violation in the NPV, except violation number four, which was left blank.⁵

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

5. On June 3, 2022, Staff filed an Unopposed Motion for Variance and Acceptance of Response Filed Out of Time (Motion for Variance). In the Motion for Variance, both Staff and Respondent agreed and requested that Respondent’s response to the NPV be deemed timely by waiving Rule 11504, 4 CCR 723-11, and sought additional time to reach an amicable resolution in this proceeding before scheduling a hearing. The parties stated that granting the Motion for Variance would be in the best interest of the public.

6. On June 8, 2022, the Commission referred this proceeding to an Administrative Law Judge (ALJ) by minute entry.

³ See NPV at 2-3.

⁴ *Id.* at 3.

⁵ See Response at 3-9.

7. By Decision No. R22-0362-I, issued June 14, 2022, the Motion for Variance was granted. Respondent's Response was deemed timely by waiving Rule 11504, 4 CCR 723-11 and additional time was accommodated to reach an amicable resolution in this proceeding. The parties were required to file a status report by July 28, 2022.

8. On July 28, 2022, Trial Staff's Status Report (First Status Report) was filed. Staff indicated that Respondent's responses to the NPV were not satisfactory and that the parties would move forward with the Alternative Enforcement directives outlined in the NPV issued on January 4, 2022. Staff also stated that it was expecting written documentation from Respondent documenting its progress toward resolving the violations listed in the NPV by October 26, 2022. Should they not receive said written documentation, Staff stated that they would request the Commission set this matter for a hearing.

9. By Decision No. R22-0693-I, issued November 7, 2022, Staff was ordered to confer with Respondent and file a second status report on or before December 28, 2022. Thereafter, Staff was ordered to hold quarterly conferrals and file quarterly reports, beginning March 28, 2023, until the NPV has been resolved.

10. On December 28, 2022, Notice of Conferral, Statement of Alternative Enforcement Terms, and Status Report was filed by Staff (Notice of Conferral). In the Notice of Conferral, Staff indicated that the compliance directive required the Respondent to take the following remedial actions:

1. Perform inspections on a no more than 12-month period on all 14 items listed in the NPV;
2. Any additional areas of noncompliance must be repaired or addressed within 12 months of discovery;
3. Submission of the Annual Report as per COPUC Gas Pipeline Safety Rule 4 CCR 723-11103; and

4. Annual Report must include updates on all 14 items listed in the NPV.⁶

11. Staff indicated that timely satisfaction of the terms of both the alternative enforcement and compliance directive provisions will constitute a satisfactory resolution of the NPV.⁷ However, Staff further reported that as of the date of their filing of the Notice of Conferral, Staff had not received any documentation from Respondent regarding progress towards resolution, despite several deadlines passing.⁸ Staff indicated that it and Staff Counsel would “push Respondent hard in the next week” to provide evidence of progress made on the alternative enforcement.⁹ However, if Staff did not receive the required documentation or the provided documentation indicated that progress had not been made, Staff would file a Motion to Set for Hearing no later than January 5, 2023.¹⁰

12. On January 5, 2023, Staff’s Second Alternative Enforcement Status Report (Second Status Report) was filed. Staff indicated that it had reviewed documentation provided by Respondent and Respondent’s contractor, M&M Cathodic, and was satisfied that significant progress had been made.¹¹ Staff also reported that they planned to inspect Respondent’s premises this quarter and had a “reasonable, good faith basis to believe that Respondent will have remedied all probable violations.”¹²

13. On March 28, 2023, Staff’s Third Quarterly Report (Third Status Report) was filed by Staff. In the Third Status Report, Staff states that it inspected Respondent, and no unsatisfactory

⁶ Notice of Conferral at 1-2.

⁷ *Id.* at 2.

⁸ *Id.* at 3-4.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ Second Status Report at 4.

¹² *Id.*

remarks were recorded; therefore, Staff planned to file a Motion to Close with supporting Affidavit that same week.¹³

14. On March 30, 2023, Trial Staff's Motion for a Commission Order Finding Circle Drive Mobile Home Park has Satisfied its Alternative Enforcement obligations under Rule 11504 and Closing this Proceeding was filed by Staff (Motion for Commission Order). In the Motion for Commission Order, Staff stated that the Pipeline Safety Program had performed an inspection of Respondent on March 9, 2023, and Staff concluded that Respondent had fulfilled its obligations and completed the Alternative Enforcement.¹⁴ Staff thus requested that the Commission enter an order finding that Respondent had completed the alternative enforcement requirements in lieu of the \$500,000 penalty and that the proceeding be closed.¹⁵

15. On April 11, 2023, the Notice of Withdrawal of Staff's Motion to Close Proceeding Dated March 30, 2023, Pursuant to Rule 1309 (Withdrawal) was filed by Staff. The Withdrawal states that Staff was withdrawing the Motion for Commission Order "so that it may evaluate newly discovered facts and issues related to this proceeding."¹⁶

16. On September 20, 2023, Trial Staff's Unopposed Motion for a Commission Order Finding Circle Drive Mobile Home Park Has Satisfied Its Alternative Enforcement Obligations Under Rule 11504, Ordering Payment of \$5,000 in Penalties, and Closing This Proceeding (Second Motion for Commission Order) was filed by Staff. In the Second Motion for Commission Order, Staff states that Respondent has completed the requirements for alternative enforcement and Staff accepts this as a compromise position and proposes to dismiss all penalties except for the statutory

¹³ Third Status Report at 1.

¹⁴ Motion for Commission Order at 3.

¹⁵ *Id.*

¹⁶ Withdrawal of Motion to Close at 1.

minimum.¹⁷ Staff states that their original intent was to waive penalties in whole, but § 40-7-117, C.R.S., which was passed after the Commission enacted Rule 11504(a)(VI), mandates that an operator who completes alternative enforcement remains subject to a mandatory minimum penalty of \$5,000.¹⁸ Therefore, the Commission cannot waive statutory requirements, and Staff has notified Respondent that it considers completion of alternative enforcement and payment of \$5,000 to satisfy the alternative enforcement provision of Rule 11504.¹⁹ Finally, Staff states that the Motion is unopposed and requests a waiver of response time and an order ordering Respondent to pay \$5,000 to the state treasury and closing this proceeding.²⁰

II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

17. Rule 11504(a)(VI), 4 CCR 723-11, permits the Commission's Pipeline Safety Program (PSP) Chief (PSP Chief) to "offer the operator a proposed alternative enforcement in lieu of the civil penalties, in whole or in part." Here, the NPV, which was issued by the Pipeline Safety Program, offered Respondent the opportunity to admit the alleged violations and pursue alternative enforcement in lieu of admitting and paying the civil penalty associated with each alleged violation.²¹

18. Respondent initially elected to request an offer in compromise for each violation, except Violation no. four, which was left blank by Respondent.²² However, Staff and Respondent ultimately agreed to move forward with the Alternative Enforcement directives outlined in the NPV.²³

¹⁷ Second Motion for Commission Order at 3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* NPV at 3.

²² *See* Response at 3-9.

²³ *See* First Status Report, Second Status Report, and Third Status Report.

19. On March 9, 2023, the PSP inspected Respondent’s records pertaining to its natural gas system. In conducting the inspection, PSP Chief used the PSP’s Standard Inspection Report of a Small Operator Unit form (Report) to determine whether Respondent remedied the violations identified in the NPV. The report form used in PSP’s inspection of Respondent is kept by the PSP in its ordinary course of business.²⁴ Respondent received “ ‘satisfactory’ or ‘not applicable’ remarks on every line item...[t]here were no unsatisfactory items identified during the inspection.”²⁵ Thus, Respondent has remedied all of the violations noted in the NPV and Staff concluded that Respondent fulfilled its obligations and completed the Alternative Enforcement.²⁶

20. The ALJ finds and concludes that Respondent has satisfactorily completed the PSP Chief’s alternative enforcement requirements.

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

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

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

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

- I. the nature, circumstances, and gravity of the violation;
- II. the degree of the respondent’s culpability;
- III. the respondent’s history of prior offenses;
- IV. the respondent’s ability to pay;

²⁴ See Affidavit of Pipeline Safety Chief Casey Hensley, attached as Attachment A to the Second Motion for Commission Order at 1.

²⁵ *Id.*

²⁶ Second Motion for Commission Order at 3-4.

- V. any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- VI. the effect on the respondent's ability to continue in business;
- VII. the size of the respondent's business; and
- VIII. such other factors as equity and fairness may require.

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

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

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

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

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

III. ORDER

A. The Commission Orders That:

1. Trial Staff's Unopposed Motion for a Commission Order Finding Circle Drive Mobile Home Park 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. Trial Staff's Unopposed Motion for a Commission Order Finding Circle Drive Mobile Home Park 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.

3. Respondent, Circle Drive Mobile Home Park, is assessed a civil penalty of \$5,000, inclusive of any applicable surcharge.

4. Not later than 30 days following the date of the entry of a final Commission decision in this Proceeding (due date), Respondent shall pay the civil penalty assessed herein to the Commission.

5. If Respondent submits a payment by U.S. mail, the payment must be made by money order or check and must be received by the Commission not later than the due date.

6. Proceeding No. 21N-0641GPS is closed.

7. 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.

8. 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.

9. 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.

10. 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.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director