

Decision No. R24-0044

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0248G

SYMMETRY ENERGY SOLUTIONS, LLC

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
GRANTING MOTION TO DISMISS**

Mailed Date: January 22, 2024

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I. STATEMENT AND PROCEDURAL BACKGROUND

1. On May 17, 2023, Symmetry Energy Solutions LLC (Complainant or Symmetry) filed the above-captioned Complaint against Public Service Company of Colorado (Public Service or Respondent). Symmetry asserts, among other claims, that Public Service is improperly seeking to collect “over \$2.5 million in Operational Flow Order (OFO) penalties.”¹

2. Symmetry’s Formal Complaint alleges that it has sustained and will continue to sustain damages stemming from Commission Decision No. C22-0512, issued September 1, 2022, in Proceeding No. 21A-0192EG (the Storm Uri Proceeding). Symmetry asserts that under the Commission’s Decision, it has been and will be required to pay Public Service penalties in excess of \$2.5 million. The crux of Symmetry’s claims is that it “was never provided notice of the Uri Proceeding.” Consequently, it did not participate in the Storm Uri Proceeding and missed the opportunity to challenge and defend against the arguments Public Service asserted in that case.

3. On May 18, 2023, the Commission issued an Order to Satisfy or Answer advising Respondent of the Complaint filed against it and Public Service’s opportunity to either satisfy the allegations in the Complaint or answer it. Contemporaneously with the Order to Satisfy or Answer, the Commission also issued its Order Setting Hearing and Notice of Hearing which set a hearing in this matter for July 31, 2023, at 9:00 a.m., and advised the parties of the same.

4. On May 24, 2023, the Commission referred this proceeding to an Administrative Law Judge (ALJ) by minute entry for disposition. The Proceeding was subsequently assigned to the undersigned ALJ.

¹ Formal Complaint of Symmetry Energy Solutions, LLC, filed May 17, 2023, ¶ 1.

5. By Decision No. R23-0401-I, issued June 12, 2023, the undersigned ALJ established the format for the evidentiary hearing and set deadlines for procedural matters in the Proceeding.

6. On June 7, 2023, Public Service filed a Motion to Dismiss the Formal Complaint with Prejudice. In its Motion, Public Service contends that Symmetry’s Complaint should be dismissed because (1) Symmetry cannot assert a due process violation against Public Service; (2) the Commission lacks jurisdiction to address Symmetry’s contract claim; and (3) Symmetry’s remaining claims are “impermissible collateral attacks” on the Commission’s final decision in Proceeding No. 21A-0192EG (the Storm Uri Proceeding), Decision No. C22-0512, issued September 1, 2022.

7. By Decision No. R23-0411-I, issued June 16, 2023, the undersigned ALJ granted Symmetry additional time to file its response to Public Service’s Motion to Dismiss and vacated the hearing date. The parties requested that an evidentiary hearing in this matter be held in abeyance until the ALJ ruled on the pending Motion to Dismiss.

8. As discussed below, the ALJ now grants Public Service’s Motion to Dismiss.

II. ALLEGATIONS OF COMPLAINT

9. As detailed in its Formal Complaint, Symmetry “works with” natural gas producers, suppliers, and related infrastructure owners “to facilitate the efficient and economic supply of natural gas to its retail customers in Colorado.”²

² Formal Complaint, ¶ 2, p. 2.

10. Public Service and its relative corporation, Xcel Energy, provide a “gas transportation service” by which shippers like Symmetry may use “Xcel mains to transport” natural gas to customers.³

11. Public Service and Symmetry are parties “to various ‘Transportation Service Agreements’” which are subject to the terms and conditions “of the applicable gas transportation tariff . . . in effect and on file” with the Commission.⁴ Pursuant to the applicable tariff (Tariff Sheet No. 29A), if Public Service issues an OFO, it may charge Symmetry an “Unauthorized Overrun Penalty.”⁵

12. Under the exemplar Agreements Symmetry attached to its Formal Complaint, the parties to the Agreement stipulate that “[i]n the event that any party to this agreement requests the Commission to take any action which could cause a modification in the conditions of this agreement, the party shall provide written notice to the other parties at the time of filing the request with the Commission.”⁶

13. In May 2021, Public Service commenced Proceeding No. 21A-0192EG, in which it sought to recover costs “incurred by both its Electric and Gas utilities during the February, 2021 extreme weather event known as Winter Storm Uri” (the Storm Uri Proceeding).⁷ Among the relief Public Service sought was “Approval of a variance to collect a market-price plus \$25 per Dekatherm (DTh) penalty for non-compliance with the OFO.”⁸

³ *Id.* at ¶ 4, p. 2.

⁴ *Id.* at ¶ 7, p. 2.

⁵ *Id.* at ¶ 8, p. 2.

⁶ *Id.* at ¶ 9, p. 3; Exhibit 1 to Formal Complaint, ¶ 1(b), p. 1; and Exhibit 2 to Formal Complaint, ¶ 1(b), p. 1.

⁷ Verified Application of Public Service Company of Colorado, in Proceeding No. 21A-0192EG, p. 1, filed May 17, 2021.

⁸ *Id.* at p. 12.

14. Decision No. C22-0512 partially granted Public Service’s “request for a variance to allow it to charge the market price per Dth (CIG daily market price) for noncompliance with the OFO orders and order the Company to flow back these OFO penalties to customers subject to a true-up.”⁹

15. Symmetry alleges that it had no notice of Public Service’s Storm Uri Proceeding Application until June 7, 2022, when it received a letter from Public Service advising it that it would be billed \$2,581,253.92 in OFO penalties based on Xcel’s request for a variance in the tariff language and instructing Symmetry that its security was at risk.¹⁰

16. It asserts that although Public Service provided public notice of the Storm Uri Proceeding “by publication” — with Public Service posting at least one notice “in the Denver Post, issuing a press release, posting on social media, and emailing certain customers”¹¹ — Public Service never notified Symmetry directly, via email or otherwise, about the Storm Uri Proceeding despite being “in constant communication.”¹²

17. Likewise, Symmetry points out, Public Service did not “issue any notice on billing statements to shippers about any pending penalties.”¹³ Thus, Symmetry’s billing statement did not alert it to the pending litigation.

18. Because it did not know about the Storm Uri Proceeding, Symmetry did not participate in it and “did not have the opportunity to challenge the accuracy of Xcel’s gas volumes or compare the amount of extra gas Symmetry provided to Xcel with the amount of gas against

⁹ Decision No. C22-0512, in Proceeding No. 21A-0192EG, ¶ 16, p. 6, issued Sept. 1, 2022.

¹⁰ Formal Complaint, ¶ 15, p. 4.

¹¹ Formal Complaint, ¶ 17, pp. 4-5.

¹² *Id.* at ¶ 6, p. 2.

¹³ *Id.* at ¶ 18, p. 5.

which Xcel charged an OFO penalty.”¹⁴ It states that it participated in similar proceedings “adjudicating Uri costs in Kansas and Missouri”¹⁵ and would have done so in Colorado, too, had it received any direct notice of the Proceeding. Symmetry consequently complains that it will be penalized over \$2 million without the opportunity to fully contest the charges or offer the Commission facts unique to it “that would mitigate against such harsh penalties.”¹⁶

19. Symmetry asserts that because it was absent from the Storm Uri Proceeding, it estimates that it is now responsible for “24% of the entire penalty attributed to shippers.”¹⁷

20. Symmetry initially filed a complaint against Public Service in Denver District Court, but the complaint was dismissed for lack of subject matter jurisdiction.¹⁸ Symmetry is now seeking to pursue many of the claims it first asserted in Denver District Court before the Commission.

21. Symmetry asserts the following claims for relief in this Proceeding:

- a) **Claim 1: Due Process Violation.** Symmetry alleges that Public Service violated the Due Process clause of the Fourteenth Amendment by failing to provide Symmetry adequate notice of the Storm Uri Proceeding, in violation of the parties’ Agreements.
- b) **Claim 2: Breach of Contract.** Symmetry alleges that Public Service violated its contractual obligations with Symmetry by failing to provide Symmetry with direct written notice of the Storm Uri Proceeding.
- c) **Claim 3: Unjust and Unreasonable Charge.** Symmetry alleges that Public Service violated § 40-3-101(1), C.R.S., by charging the latter an “unjust or unreasonable charge” for a “rate, fare, product or commodity, or service” by

¹⁴ *Id.* at ¶ 13, p. 4.

¹⁵ *Id.* at ¶ 20, p.5.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 22, p. 6. Symmetry asserts that Decision No. R22-0279, issued May 11, 2022, in Proceeding No. 21A-0192EG, “appears” to impose penalties totaling \$10,670,776 on shippers. It calculates that its bill for \$2,581,253.93 is 24% of the total imposed.

¹⁸ *See*, Public Service Company of Colorado’s Motion to Dismiss Symmetry Energy Solutions, LLC’s Formal Complaint with Prejudice (Motion to Dismiss), Attachment A, Order: Motion to Dismiss, Denver Dist. Ct. Case No. 2022-CV-32751, issued Jan. 20, 2022.

charging it a penalty without adequate notice of the pending Storm Uri Proceeding.

- d) **Claim 4: Unjust and Unreasonable Charge.** Symmetry asserts that Public Service has also violated § 40-3-101(1) because it has not yet “revisit[ed] the billed gas amounts . . . [making it] likely that the billed amounts are incorrect.”

22. On June 7, 2023, Public Service moved to dismiss Symmetry’s Formal Complaint.

As discussed more fully below, Public Service argues that the Formal Complaint should be dismissed on the grounds that:

- a) Because Public Service is not a state actor, no due process claim can be pursued against it.¹⁹
- b) The Commission lacks jurisdiction over claims Symmetry asserts against Xcel Energy Services, Inc., which “is a wholly-owned subsidiary of Xcel Energy, Inc.”²⁰
- c) The Commission lacks jurisdiction to adjudicate Symmetry’s breach-of-contract claims.²¹
- d) Even if the Commission considers Symmetry’s breach of contract claims, such claims are baseless because Symmetry has failed to establish which provision of the parties’ service agreements, if any, was “modified” by the Storm Uri Proceeding, decisions, and penalties.²²
- e) Symmetry is collaterally estopped from challenging the imposition of penalties in the Storm Uri Proceeding.²³
- f) The Commission lacks Constitutional authority to award Symmetry some of the remedies it seeks, including actual damages and attorney fees, or enjoining Public Service from collecting security deposits or the penalties permitted by the decisions in the Storm Uri Proceeding.

23. Public Service’s arguments will be addressed below.

¹⁹ Motion to Dismiss, ¶¶ 30-32, pp. 13-14, filed June 7, 2023.

²⁰ *Id.* at ¶ 33, p. 14.

²¹ *Id.* at ¶¶ 34-35, pp. 14-15.

²² *Id.* at ¶¶ 37-38, pp. 15-16.

²³ *Id.* at ¶¶ 40-41, pp. 16-17.

III. PUBLIC SERVICE'S MOTION TO DISMISS

A. Standard of Review

24. A party responding to a complaint filed with the Commission may file a motion to dismiss the complaint under Rule 1308(e) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Rule 1308(e) provides in pertinent part:

A respondent may file a motion to dismiss a complaint . . . prior to filing an answer. . . . 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; insufficiency of process; insufficiency of service of process; insufficiency of signatures; failure to state a claim upon which relief can be granted; or failure to join a party.

Public Service has filed its Motion to Dismiss on grounds of both failure to state a claim, and lack of subject-matter jurisdiction. As the moving party, Public Service has the burden to establish that the Motion to Dismiss for failure to state a claim should be granted.

25. In relevant part, Rule 1001, 4 CCR 723-1, states: “Where not otherwise inconsistent with Title 40 or these rules, . . . an Administrative Law Judge . . . may employ the Colorado Rules of Civil Procedure.” Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(5) permits a party to file a motion to dismiss for failure to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim is simply a vehicle “to test the formal sufficiency of the complaint.”²⁴ As a result, in Colorado, a C.R.C.P. 12(b)(5) motion to dismiss is disfavored; is difficult to sustain and is rarely granted under notice pleadings.²⁵

26. In ruling on a motion to dismiss based on failure to state a claim, these principles apply. First, the motion is decided by looking only at the complaint and documents incorporated

²⁴ *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996).

²⁵ *Berenergy Corp. v. ZAB, Inc.*, 94 P.3d 1232, 1236 (Colo. App. 2004).

into the complaint.²⁶ Second, in deciding a C.R.C.P. 12(b)(5) motion to dismiss, the Commission may exclude (i.e., not consider) matters outside the complaint and its supporting documents that are presented in the motion. Third, allegations in the complaint are viewed in the light most favorable to the complainant.²⁷ Fourth, all assertions of material fact in the complaint must be accepted as true²⁸.

27. A motion to dismiss based on failure to state a claim must be denied “unless it appears beyond doubt that the [complainant] cannot prove facts in support of the claim that would entitle [complainant] to relief.”²⁹ Thus, when ruling on a C.R.C.P. 12(b)(5) motion to dismiss, the relevant question is whether the complainant has stated facts showing that it is entitled to relief, not whether it has asked for the proper relief. Consequently, the prayer for relief is not considered a component of the claim.³⁰

28. When considering a motion to dismiss based on lack of subject matter jurisdiction, the following principles apply: Once subject matter jurisdiction is raised, the complainant bears the burden of proving the existence of the Commission's jurisdiction to decide the case or claim.³¹ A complainant may meet this burden by a prima facie showing of threshold jurisdiction.³² The complaint’s “allegations have no presumptive truthfulness.”³³ If necessary to resolve a motion, the Commission may consider evidence outside the complaint.³⁴ The Commission may weigh the

²⁶ *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004) (decider “must not go beyond the confines of” complaint); *Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766 (Colo. App. 2000).

²⁷ *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

²⁸ *Id.*

²⁹ *Dorman*, 914 P.2d at 911; *see also Schoen v. Morris*, 15 P.3d 1094, 1096 (Colo. 2000).

³⁰ *Fleming v. Bd. of Educ.*, 157 Colo. 45, 52, 400 P.2d 932, 935 (1965).

³¹ *Medina*, 35 P.3d at 452; *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000); *see also City of Boulder v. Pub. Serv. Co. of Colo.*, 420 P.3d 289, 293, (Colo. 2018) (“The plaintiff bears the burden of proving jurisdiction.”)

³² *Pioneer Astro Indus., Inc. v. Dist. Ct.*, 566 P.2d 1067, 1068 (Colo. 1977).

³³ *Medina*, 35 P.3d at 452.

³⁴ *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996).

evidence, whether adduced at a hearing or provided in writing, to “satisfy itself as to the existence of its power to hear the case.”³⁵ Finally, if a complainant fails to establish that the Commission has subject-matter jurisdiction, the Commission must dismiss the complaint or claim.³⁶

B. Claim 1: Due Process Violation

29. Public Service first argues that Symmetry cannot pursue a due process claim against Public Service because the latter is a private entity and not a state actor.³⁷ Public Service points out that it is a well-established legal principle “that a constitutional due process violation can only occur by way of a state actor.”³⁸

30. Public Service also notes that it provided notice of the Storm Uri Proceeding in compliance with No. C21-0325-I, issued June 4, 2021, in that Proceeding. Consequently, Public Service contends, any dispute Symmetry may have with the notification methods employed should be directed at the Commission rather than Public Service.³⁹

31. As set out in Decision No.C21-0325-I, Public Service initially requested that notice of the Storm Uri Proceeding be published in the *Denver Post*. However, the Commission was persuaded by the Office of Consumer Counsel’s⁴⁰ contention that mere publication in the newspaper would be inadequate. The Commission therefore ordered Public Service “to issue a press release regarding the [Storm Uri Proceeding] Application filing, provide notice of the filing

³⁵ *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993) (quoting *Boyle v. Governor’s Veterans Outreach & Assistance Center*, 925 F.2d 71, 74 (3d Cir. 1991)).

³⁶ *City of Boulder*, 996 P.2d at 203.

³⁷ Motion to Dismiss, ¶ 30, p. 13.

³⁸ *People v. Ramadan*, 314 P.3d 836, 843 n.2 (Colo. 2013).

³⁹ Motion to Dismiss, ¶ 31, p. 13.

⁴⁰ The Office of Consumer Counsel is now identified as the Office of the Utility Consumer Advocate.

on its social media accounts, and provide email and text notices to all customers who have signed up to receive notifications via email and/or text.”⁴¹

32. In response, Symmetry does not suggest that Public Service is a governmental entity or state actor. Rather, Symmetry counters that Public Service “was acting in concert with the Commission,” thereby converting Public Service’s actions into those of a state actor.⁴² Citing to *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974), Symmetry argues that the United States Supreme Court has “recognized that private and public parties may act in symbiotic relationships in such a way that they are both joint participants in a disputed action.”⁴³ In Symmetry’s interpretation, Public Service’s “decision not to provide personal notice to Symmetry . . . clearly constitutes a state action because the Commission put its weight behind the proposed notice strategy in Decision No. C-21-0325-I, such that it constituted a state action.”⁴⁴

33. Symmetry has correctly laid out the applicable law. In *Zartman v. Shapiro & Meinhold*, 811 P.2d 409 (Colo. Ct. App. 1990), the Colorado Court of Appeals summarized the constitutional test for determining whether a private actor’s actions have become so intertwined with those of the state that the actions essentially become state acts:

“The Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property, without due process of law; but it adds nothing to the rights of one citizen as against another.” *United States v. Cruikshank*, 92 U.S. 542, [554] (1875). Therefore, the question is whether “there is a sufficiently close nexus between the state and the challenged action . . . so that the action . . . may be fairly treated as that of the State itself.” *Jackson*, 419 U.S. 345, [351] (1974).

In making this determination, the court must consider whether the right in question had its “source in state authority” or whether the persons involved could be characterized as “state actors.” *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, [939] (1982). “Misuse of power, possessed by virtue of state law and made possible only

⁴¹ Decision No. C21-0325-I, issued June 4, 2021, in Proceeding No. 21A-0192EG (the Storm Uri Proceeding).

⁴² Response to Motion to Dismiss, ¶ 11, p. 6, filed July 10, 2023.

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 9, pp. 5-6.

because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law.” *United States v. Classic*, 313 U.S. 299, [326] (1941).⁴⁵

34. The question, then, is whether Public Service’s actions were so intertwined with those of the State — here, the Commission — that Public Service became a state actor capable of depriving Symmetry of its right to due process.

35. In *Jackson*, the United States Supreme Court rejected a claim that a utility terminating a customer’s service for non-payment pursuant to its tariff acted as a state actor. In other words, the Supreme Court held that while engaged in its normal business, the utility was *not* a state actor. As the Supreme Court held, the “mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. . . . Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.”⁴⁶

36. Similarly here, Public Service was engaged in its normal business practice, in compliance with Commission Rules and Regulations, of obtaining Commission approval for its notification process. It was merely seeking Commission approval of its actions.

37. Moreover, the Commission did not simply “rubber stamp” Public Service’s proposed notification methods. To the contrary, Decision No. No.C21-0325-I ordered Public Service to notify its customers by social media, press release, and email and text messages to those customers who had signed up for the latter notification method, in addition to publishing notice of the Storm Uri Proceeding in the newspaper as Public Service proposed. Thus, rather than being

⁴⁵ *Zartman v. Shapiro & Meinhold*, 811 P.2d 409, 414 (Colo. Ct. App. 1990)

⁴⁶ *Jackson*, 419 U.S. at 350.

“intertwined” with the Commission, Public Service was, in fact, admonished by the Commission to take more steps than Public Service had proposed or intended.

38. The ALJ finds and concludes that Public Service’s actions do not rise to the level of state action. Public Service was acting as a litigant in a proceeding before the Commission. It sought the Commission’s approval of its notification methods as part of the Storm Uri Proceeding. Apart from filing its brief or motion setting forth its position, Public Service did not interact with the Commission. The Commission reached its decision approving certain of Public Service’s proposed notification methods independently. Symmetry therefore has not, and cannot, establish a “sufficiently close nexus” between Public Service and the Commission to elevate Public Service’s actions to those of a state actor.

39. The ALJ therefore finds and concludes that Symmetry has not asserted a cognizable claim for due process violation against Public Service. Its first claim for relief asserting a violation of its due process rights will therefore be dismissed.

C. Claim 2: Breach of Contract

40. Symmetry next asserts that Public Service was contractually obligated to provide the former with written notice of any request made of the Commission “that could lead to a modification of tariffs affecting Symmetry.”⁴⁷ Symmetry cites to language in its contracts with Public Service that state:

In the event that any party to this agreement requests the Commission to take any action which could cause a medication in the conditions of this agreement, the party

⁴⁷ Formal Complaint, ¶ 48, p. 11.

shall provide written notice to the other parties at the time of filing the request with the Commission.⁴⁸

It argues that Public Service violated this contractual provision when it commenced the Storm Uri Proceeding without providing Symmetry with express notice that the Proceeding had been initiated.

41. In response, Public Service argues that the Commission lacks jurisdiction to consider Symmetry's breach of contract claim for two reasons: (1) Public Service contends that Symmetry's claim is propounded against Xcel Energy Services, Inc.(XES), which is a "wholly-owned subsidiary of Xcel Energy, Inc., and . . . an affiliate entity of Public Service," but that XES "does not provide regulated utility services in Colorado and is therefore not subject to the Commission's jurisdiction;⁴⁹ and (2) The Commission lacks authority to adjudicate "traditional claims of breaches of contract."⁵⁰ In the alternative, Public Service raises a third contention: that even if the Commission can consider Symmetry's breach of contract claim, Symmetry has failed to allege a modification to the existing contract which would have triggered the notice provision, and, in fact, has not identified which contractual provision was modified.⁵¹

42. Public Service's first and third arguments both require factual context and evidence before a decision on the merits of those contentions can be reached. However, because Symmetry's breach of contract claim can be resolved under Public Service's second contention, the ALJ need not address either of Public Service's other arguments that XES is not a regulated utility in Colorado or that Symmetry has failed to allege a requisite element of its claim.

⁴⁸ Formal Complaint, Exhibit 2, Interruptible Gas Transportation Service Agreement dated July 1, 2007, between Public Service and Asgard Energy, LLC, ¶ 1(b), p. 1; Formal Complaint, Exhibit 3, Firm Gas Transportation Service Agreement dated July 1, 2007, between Public Service and Asgard Energy, LLC, ¶ 1(b), p. 1.

⁴⁹*Id.* at ¶ 24, p. 14.

⁵⁰ *Id.* at ¶¶ 37-38, pp. 15-16.

⁵¹ *Id.* at ¶¶ 37-38, pp. 15-16.

43. The Commission’s authority is limited to that granted it by the General Assembly.

Its statutorily-created authority grants the Commission:

The power and authority . . . to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction . . .⁵²

44. “The Public Utilities Commission is a legally-constituted administrative body with exclusive jurisdiction in its constituted field.”⁵³

The Public Utilities Commission is not a court; but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The legislature did not give the commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts. . . . Because it is of a judicial nature or the exercise of quasi judicial functions does not contravene the Constitution. . . . The exercise of judgment and discretion as an incident to such power is not the exercise of judicial power within the meaning of the Constitution. The authority delegated to the Commission relates to the administration of the law and not to the exercise of judicial remedies.⁵⁴

45. As such, the Commission is not the functional equivalent of a Colorado Constitution Article III court. Article III courts have general jurisdiction over common-law claims such as property, tort and breach of contract claims, but the Commission does not.⁵⁵ Indeed, the Commission has expressly held that it lacks jurisdiction to consider breach of contract claims.⁵⁶

⁵² § 40-3-102, C.R.S.

⁵³ *Intermountain Rural Elec. Ass’n v. Colo. Cent. Power Co.*, 135 Colo. 42, 48, 307 P.2d 1101, 1104 (1957).

⁵⁴ *People ex rel. Hubbard v. Colo. Title & Trust Co.*, 65 Colo. 472, 480-481, 178 P. 6, 10, (1918).

⁵⁵ *See, e.g., Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001) (“PUC does not have, and was never given, any authority to adjudicate property rights.”).

⁵⁶ *See, Tiger Natural Gas, Inc. v. Pub. Serv. Co.*, Dec. No. R21-0696-I, Proc. No. 21F-0290G, issued Nov. 5, 2021 (dismissing breach of contract claim for lack of Commission jurisdiction).

46. Symmetry counters that Public Service’s argument is “disingenuous.”⁵⁷ It points out that it tried to bring its claims in Denver District Court, but Public Service successfully moved for the dismissal of Symmetry’s District Court complaint. It suggests that Public Service “does not think Symmetry should have any forum to challenge Xcel’s failure to comply with the parties’ contract.”⁵⁸

47. However, as Symmetry all but admits, it asserted claims for declaratory judgment, due process, and misrepresentation, but not for breach of contract, in District Court.⁵⁹ Nevertheless, it argues that “the prior declaratory judgment claim has ripened into a straight breach of contract claim.”⁶⁰ While that may be true, it does not alter the fact that Symmetry did not assert a breach of contract claim in District Court. Consequently, the District Court never considered the merits of a breach of contract claim. Thus, contrary to Symmetry’s suggestion, it was not advised by the District Court that the Commission had jurisdiction over a breach of contract claim.

48. Having failed to assert a breach of contract claim in District Court does not create an opportunity for Symmetry to pursue such a claim before the Commission. Although Symmetry’s claims for due process and penalties may be intertwined with its breach-of-contract claim, the existence of such a connection cannot simply expand the Commission’s jurisdiction. Indeed, claims arising out of the same set of facts are often intertwined, but the Commission can only address those falling within its purview.

⁵⁷ Response to Motion to Dismiss, p. 9, ¶ 2.

⁵⁸ *Id.*

⁵⁹ See, Motion to Dismiss, Attachment A, Order: Motion to Dismiss (referencing claims for due process, declaratory judgment, and misrepresentation; and dismissing the declaratory judgment and due process claims as falling within the Commission’s purview).

⁶⁰ Response to Motion to Dismiss, p. 9, ¶ 3.

49. Accordingly, the ALJ finds and concludes that the Commission lacks jurisdiction to address Symmetry's breach of contract claim. Its second claim for relief asserting breach of contract will therefore be dismissed.

D. Claims 3 and 4: Unjust and Unreasonable Charge

50. Symmetry's final two claims assert that "it would be unjust and unreasonable to apply the penalties" stemming from the Storm Uri Proceeding on it because it did not have personal and specific notice of the Storm Uri Proceeding⁶¹ and because the billed gas amounts it was charged by Public Service have not been "revisited" and therefore are "likely" to contain errors.⁶²

51. Public Service argues that these two claims constitute "impermissible collateral attacks" on a final Commission decision.⁶³ Public Service points out that Symmetry "had the opportunity to raise and to litigate those factual and legal concerns fully in the Storm Uri Proceeding" but did not do so.⁶⁴

52. Public Service's argument speaks to the crux of Symmetry's contention, though: that Symmetry was denied the opportunity to litigate and challenge the fees and penalties Public Service sought in the Storm Uri Proceeding because Public Service allegedly failed to properly advise Symmetry about the Storm Uri Proceeding.

53. Symmetry argues that it should be permitted to collaterally attack the Storm Uri judgment because it "is always entitled to challenge a judgment that is void on due process grounds."⁶⁵ It contends that because it has asserted valid claims for due process violations and

⁶¹ Formal Complaint, ¶ 59, p. 13.

⁶² *Id.* at ¶ 63, p. 13.

⁶³ Motion to Dismiss, ¶¶ 40-41, pp. 16-17.

⁶⁴ *Id.* ¶ 41, p. 17.

⁶⁵ Response to Motion to Dismiss, p. 13, ¶ 2.

breach of contract, “it can proceed with its challenge to the outcome of the Uri Proceeding as it applies to Symmetry.”⁶⁶

54. However, as has been found above, Symmetry has not asserted cognizable claims for due process or breach of contract before the Commission.

55. It also asserts that “such challenges” — presumably collateral attacks on a final judgment — have been “permitted when a person has been deprived of the opportunity to defend the action when he has a meritorious defense.”⁶⁷ In support of its position, Symmetry refers to a doctrine articulated by the Colorado Supreme Court in *Fahrenbruch v. People*, 169 Colo. 70, 453 P.2d 601 (1969), which holds that in cases of “extrinsic fraud” a judgment may be “impeached.”⁶⁸

The Court explained that:

Extrinsic fraud, sometimes called collateral fraud, has been defined as that which goes to the jurisdiction of the court, or constitutes a fraud upon the law of the forum, or which operates to deprive the person against whom the judgment was rendered of an opportunity to defend the action when he has a meritorious defense. It is such as prevents the party complaining from making a full and fair defense.⁶⁹

56. However, in giving an example of “extrinsic fraud,” *Fahrenbruch* cites to another case — *Devereux v. Sperry*, 104 Colo. 158, 89 P.2d 532 (1939) — in which “the party attacking the judgment was deceived into signing a waiver of summons, and jurisdiction was thereby fraudulently obtained over him.”⁷⁰ *Fahrenbruch*, in contrast, reached the opposite result. *Fahrenbruch* rejected the petitioner’s attempt to challenge the decision of a Nebraska court in a

⁶⁶ *Id.* at p. 13, ¶ 4.

⁶⁷ *Id.* at p. 13, ¶ 5.

⁶⁸ *Fahrenbruch v. People*, 169 Colo. 70, 76, 453 P.2d 601, 605 (1969).

⁶⁹ *Id.*

⁷⁰ *Id.*

subsequent Colorado proceeding, holding that the petitioning mother could not attack the Nebraska court's divorce decree.⁷¹

57. Symmetry does not allege that Public Service committed “extrinsic fraud” to prevent it from learning about the Storm Uri Proceeding. Indeed, it does not contend that Public Service acted deceptively. Public Service did not engage in “extrinsic fraud” that might otherwise justify collaterally attacking a final judgment. Rather, it contends that Public Service should have taken the additional step of notifying it specifically and personally about the Storm Uri litigation. Consequently, the “extrinsic fraud” doctrine articulated in *Fahrenbruch* and exemplified by *Devereux* is inapplicable here. Symmetry simply cannot show that extrinsic fraud exists permitting it to collaterally attack the Commission's final judgment in the Storm Uri Proceeding.

58. Once stripped of these contentions, what remains is Symmetry's collateral attack on a final Commission decision. Once final, a Commission's decision can no longer be challenged. A party may challenge a decision of the Commission in District Court within “thirty days after a final decision by the [C]ommission in any proceeding.”⁷² If the window to challenge a final Commission decision is missed, the District Court is jurisdictionally barred from considering the appeal.⁷³

⁷¹ *Id.*, 169 Colo. at 77, 453 P.2d at 605 (“The fraud, if it existed, in the procurement of the agreement could have been raised as a defense in the Nebraska court and would, if established, have avoided the agreement relating to custody. However, the mother chose not to contest the action nor to assert her defense to the agreement. Under these circumstances, relief therefrom must be sought in the court which rendered the judgment. . . . We hold that where, as here, the Nebraska court had jurisdiction over the parties and the subject matter, its divorce decree embodying an award of custody may not be collaterally attacked on the grounds of intrinsic fraud.”).

⁷² § 40-6-114, C.R.S.

⁷³ See *Archibold v. Pub. Utils. Comm'n*, 933 P.2d 1323, 1326-1327 (Colo.1997) (“Because the plaintiffs' request for judicial review did not come within the thirty-day deadline set forth in section 40-6-115(1), their cause of action is time barred. Therefore, the district court was without jurisdiction to consider the plaintiffs' cause of action.”).

59. The Commission issued its final decision in the Storm Uri Proceeding, Decision No. C22-0512, on September 1, 2022. Symmetry had until October 30, 2022, to seek further review of the Storm Uri Proceeding Decision. It did not do so. Because Decision No. C22-0512 is now final and unappealable, Symmetry cannot attack in this Proceeding.

60. The ALJ also notes that, as pertinent here, a final Commission decision cannot be challenged in a subsequent proceeding. The doctrine of claim preclusion prohibits such collateral attacks on final judgments.

In the broadest sense, claim preclusion prevents the perpetual re-litigation of the same claim or cause of action. The goal of the doctrine is to promote judicial economy by barring a claim litigated in a prior proceeding from being litigated again in a second proceeding. See *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999). As a matter of policy, the doctrine serves to “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1163 (Colo. 1987). We have previously stated that claim preclusion bars a claim in a current proceeding if four elements are met: (1) “the judgment in the prior proceeding was final”; (2) “the prior and current proceeding involved identical subject matter”; (3) “the prior and current proceeding involved identical claims for relief”; and (4) “the parties to both proceedings were identical or in privity with one another.” *Meridian Serv. Metro. Dist. v. Grand Water Comm’n*, 2015 CO 64, ¶ 36, 361 P.3d 392, 398; accord *Cruz*, 984 P.2d at 1176. The fourth element is often referred to as the mutuality requirement.⁷⁴

61. Here, Symmetry challenges the penalties flowing from Decision No. C22-0512, the Storm Uri Proceeding decision. It essentially seeks to revisit the Storm Uri litigation to contest the Decision and raise the defenses it would have raised in the Storm Uri Proceeding, long after the Decision became final. Claim preclusion bars Symmetry from doing so. All the elements of claim preclusion are met: the Storm Uri Decision (Decision No. C22-0512), is final; Symmetry seeks to raise the identical subject matter that was at issue in the Storm Uri Proceeding; it seeks to assert defenses identical to those it would have raised in the Storm Uri Proceeding; and it is in

⁷⁴ *Foster v. Plock*, 2017 CO 39, p.12, 394 P.3d 1119, 1122-1123.

privity with Public Service and subject to the Storm Uri Decision by virtue of the contracts affected by that Decision.⁷⁵ It therefore is barred from collaterally attacking the Decision in the Storm Uri Proceeding on claim preclusion grounds, as well.

62. Finally, to the extent Symmetry challenges the method by which Public Service notified it and/or other customers about the Storm Uri Proceeding, the ALJ notes that Decision No. C21-0325-I — which ordered Public Service to provide several methods of notification — likewise became a final, unappealable decision when the Storm Uri Decision (Decision No. C22-0512) became final. Any claims challenging the notification method are therefore likewise barred and cannot now be raised.

63. Accordingly, the ALJ finds and concludes that Symmetry has not articulated justiciable claims for unjust and unreasonable charges. Symmetry's third and fourth claims asserting unjust and unreasonable charge will therefore also be dismissed.

IV. CONCLUSION

64. For the foregoing reasons, the ALJ finds and concludes that Symmetry's Formal Complaint against Public Service will be dismissed. There being no claims upon which relief can be granted, the ALJ need not reach Public Service's contention that the Commission lacks jurisdiction to grant Symmetry certain remedies it seeks.

⁷⁵ See *id.* and *Meridian*, ¶ 36, 361 P.3d at 398.

V. ORDER**A. It Is Ordered That:**

1. The Motion to Dismiss Symmetry Energy Solutions, LLC's Formal Complaint with Prejudice, filed by Public Service Company of Colorado (Public Service) on June 7, 2023, is granted, consistent with the foregoing discussion, findings, and conclusions.

2. Symmetry Energy Solutions, LLC's Claims 1 through 4 are dismissed.

3. 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.

4. 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.

- a. 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.
 - b. 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.
5. Proceeding No. 23F-0248G is closed.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director