Decision No. R24-0477-I

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 23F-0418G

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ARM, LLC, and HEARTLAND INDUSTRIES, LLC

COMPLAINANTS,

V.

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

RESPONDENTS.

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# INTERIM DECISION DENYING MOTION CONTESTING INTERIM DECISION NOS. R24-0209-I AND R24-0296-I AND DENYING-AS-MOOT SECOND MOTION TO COMPEL

Mailed Date: July 3, 2024

## TABLE OF CONTENTS

## I. SUMMARY

1. The Motion Contesting Interim Decision Nos. R24-0209-I and R24-0296-I ("Motion to Certify") filed on May 24, 2024 by Colorado Natural Gas, Inc. ("CNG") and Wolf Creek Energy, LLC ("Wolf Creek") (collectively, "Respondents") and Summit Utilities, Inc. ("Summit Utilities") (collectively, "Movants") is denied. The Administrative Law Judge ("ALJ") has carefully considered the Motion to Certify and concludes that Movants have not carried their burden of establishing that the Motion should be granted. Decision Nos. R24-0209-I and R24-0296-I remain in effect and Movants must comply with them. Movants' recalcitrance must end.

2. The Motion to Certify relates to Requests for Production ("RFPs") served by Complainants and Subpoena Duces Tecum ("Subpoena") requested by the Office of the Utility Consumer Advocate ("UCA") served on December 22, 2023 and late January/early February 2024, respectively. Production of the documents responsive to the RFPs and Subpoena was originally due on January 23, 2024 and February 9, 2024, respectively.

3. However, Movants have continually sought to avoid production of the responsive documents. They filed a Motion to Quash the Subpoena and forced the Complainants to file a Motion to Compel production of documents responsive to the RFPs. After the ALJ largely denied the Motion to Quash in Decision No. R24-0209-I on April 5, 2024, Movants refused to produce approximately 4,000 pages of documents responsive to the Subpoena without first redacting both privileged and irrelevant information from the 4,000 pages. As a result, UCA filed a Motion to Compel. The ALJ granted that motion on May 2, 2024 in Decision No. R24-0296-I holding that Respondents had no basis for redacting anything from the documents based on relevance because Decision No. R24-0209-I held that Respondents had failed to carry their burden of establishing that the documents were irrelevant. The ALJ ordered Summit Utilities to produce the approximately 4,000 pages with redactions for legal privilege and a privilege log identifying the basis for the redactions by May 17, 2024, and then the same documents with highlighting identifying confidential and highly confidential material by May 24, 2024. Summit Utilities failed to comply with the first deadline, and then filed the Motion to Certify on the second deadline without requesting a stay of the orders in Decision Nos. R24-0209-I and/or R24-0296-I requiring production of the documents. As a result, Movants have violated Decision Nos. R24-0209-I and R24-0296-I.

4. The ALJ has extended the procedural schedule in this proceeding three times due to the delays caused by Movants' recalcitrance in discovery and refusal to comply with Commission decisions. The hearing, which was originally scheduled to take place June 11-14, 2024, is now scheduled to take place from November 18-21, 2024. The inevitable result of Movants' recalcitrance in complying with the Commission's decisions and their discovery obligations has been the substantial delay of this proceeding.

## II. PROCEDURAL BACKGROUND

5. The procedural history relevant to the resolution of the Motion to Certify is summarized below.

6. On August 16, 2023, ARM, LLC and Heartland Industries, LLC (collectively, "Complainants") filed the Formal Complaint ("Complaint") against Respondents that initiated this proceeding.

7. On August 30, 2023, the Commission referred the matter by minute entry to an ALJ. The proceeding was subsequently assigned to the undersigned ALJ.

8. 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 regarding a procedural schedule and for Complainants to file a report of the conferral by October 17, 2023.

9. On October 17, 2023, Complainants filed a Report of Conferral. 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 |

| Event | Deadline |
|---|---|
| Hearing Witness Matrix<br>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 |

10. On October 25, 2023, the ALJ issued Decision No. R23-0724-I that adopted the procedural schedule proposed by the parties, with one modification to the deadline for Complainants' direct testimony, which was changed to March 8, 2024.

11. On January 30, 2024, the ALJ signed the Subpoena requested by UCA and directed to Summit Utilities to produce documents at a deposition scheduled for February 9, 2024.

12. On February 8, 2024, Summit Utilities filed a Motion to Quash the Subpoena ("Motion to Quash"). On February 22, 2024, Complainants, Staff, and UCA filed responses in opposition to the Motion to Quash.

13. In their response to the Motion to Quash, Complainants repeatedly referenced a Motion to Compel that they contended had been filed on February 13, 2024. Because no such Motion to Compel appeared in the Commission's e-filing system, the ALJ sent an email to Complainants ("and copied counsel for the other parties") on February 23, 2024 stating that the referenced Motion to Compel did not appear to have been filed with the Commission.

14. On February 23, 2024, Complainants filed: (a) a Motion to Compel Discovery from Respondents ("Motion to Compel"); and (b) an Unopposed Motion to Amend Procedural Schedule and Motion to Waive Response Time ("Unopposed Motion") as follows:

| Event | Current Deadline | New Deadline |
|---|---|---|
| Complainants' Direct Testimony | March 8, 2024 | April 8, 2024 |
| Respondents' and Intervenors' Answer Testimony | April 15, 2024 | May 16, 2024 |
| Rebuttal/Cross-Answer Testimony | May 22, 2024 | June 24, 2024 |
| Prehearing Motions | May 27, 2024 | June 28, 2024 |
| Corrections to Testimony and Exhibits | May 31, 2024 | July 1, 2024 |
| Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s) | June 6, 2024 | July 8, 2024 |
| Remote Prehearing Conference | June 7, 2023 | July 9, 2024 |
| Hearing | June 11-14, 2024 | July 15-18, 2024 |
| Statements of Position | July 2, 2024 | August 5, 2024 |

15. Complainants stated that the Motions to Quash and Compel necessitated the amended schedule. Specifically, the resolution of both motions was necessary before the parties could move forward with discovery and preparation of direct testimony.[1]

16. After the ALJ issued Decision No. R24-0123-I shortening response time to the Motion to Compel to March 4, 2024, Respondents filed a Response to the Motion to Compel on that deadline.

17. On March 25, 2024, Complainants filed an Unopposed Second Motion to Amend Procedural Schedule and Motion to Waive Response Time requesting that the schedule be extended by approximately two months ("Unopposed Second Motion") as follows:

[1] Unopposed Motion at 3.

| Event | Current Deadline | New Deadline |
|---|---|---|
| Complainants' Direct Testimony | April 8, 2024 | June 10, 2024 |
| Respondents' and Intervenors' Answer Testimony | May 16, 2024 | July 18, 2024 |
| Rebuttal/Cross-Answer Testimony | June 24, 2024 | August 12, 2024 |
| Prehearing Motions | June 28, 2024 | August 26, 2024 |
| Corrections to Testimony and Exhibits | July 1, 2024 | September 2, 2024 |
| Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s) | July 8, 2024 | September 9, 2024 |
| Remote Prehearing Conference | July 9, 2024 | September 10, 2024 |
| Hearing | July 15-18, 2024 | September 16-18, 2024 |
| Statements of Position | August 5, 2024 | October 2, 2024 |

Again, Complainants stated that the requested extension of all deadlines was necessary because of the continuing discovery disputes.[2]

18. On April 5, 2024, the ALJ issued Decision No. R24-0209-I that granted-in-part and denied-in-part the Motion to Quash, granted the Motion to Compel, ordered Summit Utilities and Respondents to supplement their responses to the discovery addressed in the decision within two weeks, and granted the Unopposed Second Motion.

19. On April 17, 2024, Respondents filed a Motion for Extension to Respond to Certain Requests in Subpoena ("Motion for Extension").

[2] Unopposed Second Motion at 4.

20. On April 17, 2024: (a) the ALJ issued Decision No. R24-0248-I that denied without prejudice the Motion for Extension for failure to comply with Rule 1400(a) of the Commission's Rules of Practice and Procedure;[3] and (b) Respondents filed a First Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information for documents and categories of information that it planned to produce in response to the Motion to Quash and the Motion to Compel ("Motion for Extraordinary Protection").

21. On April 19, 2024: (a) the ALJ issued Decision No. R24-0249-I that shortened response time to the Motion for Extraordinary Protection to April 24, 2024; and (b) Respondents filed an Unopposed Revised Motion for Extension of Time to Respond to Certain Requests in the Colorado Office of the Utility Consumer Advocate's Subpoena ("Unopposed Motion") requesting a one-week extension, to and including April 26, 2024, to respond to requests 14, 22, and 23 in the Subpoena.

22. On April 24, 2024: (a) the ALJ issued Decision No. R24-0273 that granted the Unopposed Motion (the ALJ had sent an email to counsel for the parties on April 19, 2024 informing them that the Unopposed Motion would be granted, but it was unclear when the written decision granting the Unopposed Motion would be filed); (b) Complainants filed a response opposing the Motion for Extraordinary Protection; and (c) UCA filed a Motion to Compel and Request for Shortened Response Time ("Second Motion to Compel"). The subject of the Second Motion to Compel was approximately 4,000 pages of documents that are "the general SUI board minutes and materials for other utility company subsidiaries operating in other states, and general

[3] 4 *Code of Colorado Regulations* (CCR) 723-1.

company operations"[4] that are responsive to the Subpoena. Summit had informed UCA that it required three weeks to redact irrelevant information from the 4,000 pages.

23. On April 26, 2024, the ALJ issued Decision No. R24-0276-I that granted-in-part and denied-in-part the request to shorten response time in the Second Motion to Compel. As a result, response time to the Second Motion to Compel was shortened to April 29, 2024.

24. On April 29, 2024: (a) the ALJ issued Decision No. R24-0283-I granting the Motion for Extraordinary Protection; and (b) Respondents filed their response to the Second Motion to Compel.

25. On May 2, 2024, the ALJ issued Decision No. R24-0296-I that granted-in-part and denied-in-part the Second Motion to Compel. Decision No. R24-0296-I ordered:

> Respondents and/or Summit Utilities to produce the documents with redactions for legal privilege and a privilege log consistent with C.R.C.P. 26(b)(5) by May 17, 2024. To the extent Respondents and/or Summit Utilities do not assert that the entirety of the produced documents is highly confidential, Respondents and/or Summit Utilities should then take the requested three weeks to highlight the documents to identify confidential and/or highly confidential material contained therein. The highlighted documents will then be produced by May 24, 2024, and the parties possessing the produced documents must rely on the highlighted documents to determine what portions of those documents must be redacted if any of them are filed or presented at the hearing.[5]

26. On May 24, 2024, Movants filed the Motion to Certify requesting the ALJ to certify Decision Nos. R24-0209-I and R24-0296-I for interlocutory review by the Commission. UCA filed a response on June 7, 2024 ("Response"). Movants did not comply with the May 17, 2024 deadline to produce the documents with redactions and a privilege log providing the legal basis for the redactions, as ordered in Decision No. R24-0296-I.[6]

[4] Response to Second Motion to Compel at 4 (¶ 13) (filed by Respondents on April 29, 2024).
[5] Decision No. R24-0296-I at 5 (¶ 15).
[6] Unopposed Third Motion to Amend Procedural Schedule at 5 (filed by Complainants on May 30, 2024).

27. On May 30, 2024, Complainants filed an Unopposed Third Motion to Amend Procedural Schedule and Motion to Waive Response Time ("Unopposed Third Motion to Amend"). One of the bases of the Unopposed Third Motion is that the continuing refusal of Movants to produce the documents required by Decision Nos. R24-0209-I and R24-0296-I has denied Complainants the ability to prepare their direct testimony due on June 10, 2024. Complainants requested to amend the procedural schedule by extending all deadlines by approximately two months as follows:

| Event | Current Deadline | New Deadline |
|---|---|---|
| Complainants' Direct Testimony | June 10, 2024 | August 12, 2024 |
| Respondents' and Intervenors' Answer Testimony | July 18, 2024 | September 19, 2024 |
| Rebuttal/Cross-Answer Testimony | August 12, 2024 | October 14, 2024 |
| Prehearing Motions | August 26, 2024 | October 28, 2024 |
| Corrections to Testimony and Exhibits | September 2, 2024 | November 4, 2024 |
| Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s) | September 9, 2024 | November 11, 2024 |
| Remote Prehearing Conference | September 10, 2023 | November 12, 2024 |
| Hearing | September 16-18, 2024 | November 18-21, 2024 |
| Statements of Position | October 2, 2024 | December 4, 2024 |

28. On June 13, 2024, the ALJ issued Decision No. R24-0405-I that granted the Unopposed Third Motion to Amend.

29. On June 21, 2024, as the ALJ was finalizing this decision, the ALJ received the following email from counsel for Complainants with a carbon copy for all parties in this proceeding:

> As a courtesy, Complainants wanted to reach out to let you know that Complainants and Respondents have reached a settlement in principle in this matter. The settlement agreement is not finalized, and is contingent upon one outstanding item, but we are cautiously optimistic that we should be able to get there in the next week or two. We have notified UCA and Trial Staff of this development of well.

30. On June 24, 2024, UCA filed a Motion to Compel and Request for Shortened Response Time requesting the ALJ to compel production – yet again – of the approximately 4,000 pages that were the subject, in part, of Decision No. R24-0209-I and the exclusive focus of Decision No. R24-0296-I ("UCA's Second Motion to Compel").

## III. MOTION TO CERTIFY

### A. Arguments

#### 1. Movants

31. In support of their Motion to Certify, Respondents and Summit make four primary arguments. First, the Commission did not have the authority to issue the subpoena because Summit is not a public utility. According to Complainants and Summit, § 40-6.5-106(1)(e), C.R.S. confers the subpoena authority on the Commission and limits such power to the issuance and service of subpoenas on public utilities.[7]

32. Second, Decision No. R24-0209-I erred in denying the Motion to Quash by: (a) not properly balancing non-party Summit's interests, including its privacy interests, against the needs for discovery;[8] and (b) incorrectly holding that Respondents did not adequately support its

[7] Motion to Certify at 5.
[8] *Id*. at 5-6, 7-8.

argument that production of the documents sought would be unduly burdensome;[9] (c) rejecting their argument that they "can't unring the bell" once this information is disclosed.[10]

33. Third, § 42 U.S.C. § 16453 provides the Commission with the authority "to inspect books and records of a 'holding company or any associate company or affiliate' where the public utility subject to the commission's jurisdiction is 'in a holding company system.'"[11] It does not provide that authority to UCA. As support for this argument, Movants cite *Energy Harbor Corp.*, 186 FERC 61129 at ¶¶ 154-155 ("2024") and conclude that the subpoena requested by UCA had no legal basis.[12] Movants' relatedly argue that 42 U.S.C. § 16453(e) establishes that the "proper" venue for enforcing the subpoena is U.S. District Court, thus suggesting that the Commission does not have the jurisdiction to enforce its own subpoena.[13]

34. Fourth, the analysis in Decision No. R24-0209-I is "puzzling" and "deprives Wolf Creek and Summit of their due process rights to fair treatment by the Commission." As support, Respondents and Summit cite statements in Decision No. R24-0296-I that Wolf Creek was "attempting to have it both ways,"[14] and "[n]one of the information sought by Complainants has anything to do with Respondents' valuation of the claims asserted in the First Amended Complaint."[15] Respondents and Summit interpret the former statement as "Wolf Creek is asserting 'both' its status as an unregulated entity and its rights to confidentiality and other procedural protections when required to participate as a party in a Commission proceeding."[16] Movants

[9] *Id*. at 6-7.
[10] *Id*. at 7.
[11] *Id*. at 8.
[12] *Id*. at 8-9.
[13] *Id*. at 9.
[14] *Id*. at 10.
[15] *Id*. at 11.
[16] *Id*. at 10.

interpret the latter statement as an admission that the information sought in the subpoena is irrelevant to the dispute in this proceeding.[17]

**2. UCA**

35. UCA states that the Motion to Certify should be denied for three reasons. First, Respondents and Summit failed to carry their burden of establishing that the Motion to Certify should be granted. UCA argues that Respondents and Summit focus their argument on summarily stating that Decision Nos. R24-0209-I and R24-0296-I are incorrect.[18] According to UCA, "nowhere in the Motion does Respondent explain with legal authority why the ALJ should certify the Decisions as immediately appealable."[19]

36. Second, the ALJ properly signed and issued the subpoena pursuant to § 40-6-103(1), C.R.S.[20] According to UCA, while § 40-6.5-106(1)(e), C.R.S. "enhances UCA's ability to subpoena utilities, [it] does not prevent UCA from requesting the Commission issue a subpoena on non-utilities" under § 40-6-103(1), C.R.S.[21] UCA asserts that Summit is also obligated to produce documents in response to the subpoena under 42 U.S.C. § 16453(a).

37. Third, UCA asserts that *Energy Harbor Corp.* is distinguishable and does not support the conclusion that the subpoena was improperly issued.

[17] *Id*. at 11.
[18] Response at 8-10.
[19] *Id*. at 10.
[20] *Id*. at 5.
[21] *Id*.

## B. Legal Standard

### 1. Burden of Proof

38. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."[22] As the movants, Respondents and Summit Utilities bear the burden of proof.[23]

### 2. Rule 1502(d)

39. Rule 1502(d) states in relevant part: "[t]he Commission, hearing Commissioner or Administrative Law Judge may certify any interim decision as immediately appealable through the filing of a motion subject to review by the Commission en banc."[24] In recommending the adoption of Rule 1502(d), ALJ Kirkpatrick stated in Decision No. R05-0461-I:

> [Rule 1502(d)] should not encourage the appeal of interim orders, which would unnecessarily involve the Commission in ongoing proceedings that have been referred to ALJs. In addition, appeals of interim orders almost always unavoidably delay a proceeding. Nonetheless, there are certain circumstances where a significant ruling regulating the future course of the proceeding is made and a review would be appropriate. . . . Putting the presiding officer as the gatekeeper for interim order appeals seems to be a reasonable approach for allowing for some necessary interlocutory appeals but not encouraging practices that will result in unnecessary delay.[25]

In denying exceptions to Decision No. R05-0461-I, the Commission left to the "discretion of the ALJ and the Commission as to when interim orders may be appealed."[26] The Commission has subsequently stated that "[f]or purposes of administrative economy and efficiency, we strongly discourage appeals of interim ALJ decisions to the Commission."[27]

[22] § 24-4-105(7), C.R.S.
[23] Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.
[24] 4 *Code of Colorado Regulations* (CCR) 723-1.
[25] Decision No. R05-0461 issued in Proceeding No. 03R-528ALL on April 25, 2005 at 19 (¶ 60).
[26] Decision No. C05-1093 issued in Proceeding No. 03R-528ALL on September 13, 2005 at 38 (¶ 128).
[27] Decision No. C07-0707 issued in Proceeding No. 07A-003BP-EXT on August 20, 2007 at 2 (¶ 3).

### C. Analysis

40. The Motion to Certify will be denied. As noted, certification should be granted only under compelling circumstances. Respondents and Summit have not established that such circumstances exist justifying certification of Decision Nos. R24-0209-I and R24-0296-I.

#### 1. Alleged Violation of § 40-6.5-106(1)(e), C.R.S.

41. Respondents' and Summit's argument based on § 40-6.5-106(1)(e) overlooks § 40-6-103(1), C.R.S. While § 40-6.5-106(1)(e), C.R.S. addresses the authority of the Executive Director of the Commission to issue subpoenas and expressly states that such subpoenas can be issued on "public utilities," § 40-6-103(1), C.R.S. includes no such limitations. Instead, § 40-6-103(1), C.R.S. provides that "any administrative law judge as to matters referred to such judge have power to . . . issue subpoenas for the attendance of witnesses and the production of records, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state." UCA listed § 40-6-103, C.R.S. among the bases for the issuance of the subpoena in this proceeding. Accordingly, § 40-6.5-106(1)(e), C.R.S. did not preclude the issuance of the subpoena in this proceeding.

#### 2. Alleged Unduly Burdensomeness of Subpoena, Improper Application of Balancing Test, and Incurable Damage Resulting from Compliance with Subpoena

42. Movants' recycling of arguments previously considered and rejected – without providing any new reason why the rejection of those arguments was incorrect – also does not justify certification. Decision No. R24-0209-I considered and rejected Respondents' argument that production of the documents sought would be unduly burdensome, stating:

> Summit Utilities does not explain why it would be unduly burdensome for it to provide the final versions of minutes for meetings of the Board of Directors of Summit, Summit LDC, or CNG ("Requests 1-4"), or the

> presentations, project proposals, memorandums, studies, and other supplemental documents presented to the Board of Directors ("Request 5"). Is it because those documents are voluminous, or is it that they are not maintained in a central location and thus would require many hours for them to be collected? Summit Utilities does not say either in its brief or in an affidavit from a witness with knowledge.[28]

Instead, Movants concluded that production of the documents would be unduly burdensome based on their conclusory assertion that the documents are irrelevant.[29] Decision No. R29-0209-I rejected that argument with a detailed explanation.[30]

43. Decision No. R29-0209-I also balanced the interests of Summit Utilities and UCA, and concluded that the test "tips in UCA's favor."[31] While Movants disagree with this conclusion, they have not provided any new reason that the analysis requires a different result.

44. Finally, Decision No. R24-0209-I addressed and rejected Movants' argument that they "can't unring the bell" once the information sought is disclosed.[32] The ALJ also noted that Summit Utilities had not explained "why the protections for confidential or highly confidential information in Rules 1100-1103 of the Commission's Rules of Practice and Procedure are insufficient."[33] Significantly, since Decision No. R24-0209-I issued, the ALJ granted – over Complainants' objection – Respondents' Motion for Extraordinary Protection. Decision No. R24-0283-I imposes the stringent restrictions requested by Respondents on who can have access to highly confidential information and how such information can be used, and requires those with

[28] Decision No. R24-0209-I at 23-24 (¶ 49).

[29] Motion to Quash at 6 ("The Subpoena Seeks Irrelevant Information, is Unduly Burdensome, and Overbroad"), 7 ("SUI's minutes or the historic composition of its board have no relevancy to the claims asserted. This request is also unduly burdensome. It seeks SUI's minutes for a period of ten years, which predates the relationship between the parties."); 8 ("Summit LDC's minutes or the historic composition of its board have no relevancy to the claims asserted. As with requests 1 and 3, Requests 2 and 4 are also unduly burdensome."); 9 ("UCA does not need to impose burdens on a non-party for information readily and easily obtainable from a party to the action.")

[30] Decision No. R24-0209-I at 21-22 (¶¶ 44-46), 24 (¶¶ 50-51). The ALJ mistakenly cited § 40-6.5-103(1)(e), C.R.S. in paragraphs 46, 48 and footnote 74 in Decision No. R24-0209-I. The correct citation is § 40-6-103(1).

[31] *Id*. at 22-23 (¶¶ 47-48).

[32] *Id*. at 38-39 (¶¶ 85-87).

[33] *Id*. at 24 (¶ 51).

access to execute a nondisclosure agreement authored by Respondents.[34] In their Motion to Certify, Movants have not added anything of substance to their allegation that they will be incurably harmed by disclosure of the approximately 4,000 pages of documents, particularly in light of Decision No. R24-0283-I.[35] Accordingly, Movants have not carried their burden of establishing that compliance with the subpoena and Decision Nos. R24-0209-I and R24-0296-I would be unduly burdensome or cause incurable damage, or Decision No. R24-0209-I improperly balanced the interests of Summit against the policy of broad disclosure inherent in the discovery rules.

### 3. Alleged Violation of 42 U.S.C. § 16453

45. Movants' argument that 42 U.S.C. § 16453 limits the authority to issue subpoenas to the "State Commission" and thus does not "confer any inspection power on UCA" is correct as far as it goes. However, while UCA requested the issuance of the subpoena at issue here, the Commission issued the subpoena. Indeed, immediately above the ALJ's signature and date, the subpoena states: "BY ORDER OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, WITNESS MY HAND AND THE SEAL OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO." Accordingly, the fact that UCA requested the issuance of the subpoena does not alter the fact that the subpoena is an order of the Commission. As a result, the subpoena complies with 42 U.S.C. § 16453.

46. *Energy Harbor Corp.*, 186 FERC 61129, 2024 FERC LEXIS 177 (2024) does not mandate a different result, as argued by Movants. In that proceeding, FERC considered an application seeking approval of a transaction in which Energy Harbor Corp. ("and its public utility subsidiaries") would be acquired by, and become subsidiaries of, Vista Corp., which owns other

[34] Decision No. R24-0283-I
[35] 4 CCR 723-1.

public utilities. FERC reviewed the proposed transaction under its Merger Policy Statement, which states, in relevant part, that FERC "stood ready to evaluate the effect of a merger on retail competition if a state lacks authority under state law and asks us to do so."[36] The Ohio Energy Advocate, an office within the Public Utilities Commission of Ohio ("Ohio Commission"), "urge[d] FERC to carefully review the transaction and conduct an analysis of its potential effect on retail markets and competition in Ohio to determine if the transaction is in the public interest."[37]

47. However, FERC declined to take up the Ohio Energy Advocate's request to review the transaction's impact on retail competition. While it was undisputed that the Ohio Commission lacked the authority to review the proposed transaction,[38] FERC held that the Ohio Energy Advocate was not a "state" under FERC's Merger Policy Statement. Specifically, FERC reviewed the enabling statute of the Ohio Energy Advocate and held that it does not have the

> authority to regulate rates or charges and does not identify the Ohio Energy Advocate as a representative of the Ohio Commission's interests or otherwise empower the Ohio Energy Advocate to speak on behalf of the Ohio Commission. Instead, the Ohio Energy Advocate is charged with advocating on behalf of Ohio retail customers and monitoring federal proceedings.[39]

Because it was not a "state" or a "state commission" and did not have the authority to speak for either, FERC declined the Ohio Energy Advocate's request because it was not consistent with FERC's Merger Policy Statement.[40]

48. Here, in contrast, UCA is not requesting the Commission to do anything that is contrary to Commission policy or the law. Instead, UCA had the authority to request the

[36] 2024 FERC LEXIS 177, *128-29 (¶ 153).
[37] *Id*. at *123 (¶ 143).
[38] *Id*. at *130-131 (¶ 154).
[39] *Id*. at *132 (¶ 155).
[40] *Id*. at *133-34 (¶ 157).

Commission to issue a subpoena and the Commission had the authority to issue the requested subpoena. Accordingly, *Energy Harbor Corp.* is inapposite.

49. Movants' related argument that the "proper" venue for enforcing the subpoena is U.S. District Court is also unavailing. 42 U.S.C. § 16453(e) states that "[a]ny United States district court located in the State in which the State commission referred to in subsection ("a") is located shall have jurisdiction to enforce compliance with this section." It does not expressly state that the Federal courts have exclusive jurisdiction. Further, Movants have not cited any legislative history of 42 U.S.C. § 16453(e) unmistakably indicating that Congress intended to rebut the "deeply rooted presumption of concurrent state court jurisdiction" over this federal statute.[41] Nor have Movants argued that there is a "clear incompatibility between state-court jurisdiction and federal interests" in enforcing 42 U.S.C. § 16453.[42] This makes sense given that the statute confers on state public utilities Commissions the authority to inspect the documents of the entities in a holding company system that includes a public utility subject to the jurisdiction of the Commissions. As a result, exclusive jurisdiction over 42 U.S.C. § 16453 in the Federal courts cannot be implied.[43] Accordingly, Movants' argument that the proper venue for the dispute over the subpoena in this proceeding is in Federal court is incorrect.

**4. Alleged Deprivation of Due Process Rights.**

50. In support of their contentions that the analysis in Decision No. R24-0209-I is "puzzling" and "deprives Wolf Creek and Summit of their due process rights to fair treatment by

[41] *Tafflin v. Levitt*, 493 U.S. 455, 459 (1999).
[42] *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1990).
[43] *See id*. ("In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.") (citations omitted).

the Commission," Movants cite two statements from Decision No. R24-0209-I. Those statements are that: (a) Wolf Creek was "attempting to have it both ways;"[44] and (b) "[n]one of the information sought by Complainants has anything to do with Respondents' valuation of the claims asserted in the First Amended Complaint."[45] A review of both statements in context reveals that Movants have mischaracterized them.

**a. Movants' First Mischaracterization**

51. Movants' interpret the first statement from Decision No. R24-0296-I – that Wolf Creek was "attempting to have it both ways" – as meaning that "Wolf Creek is asserting 'both' its status as an unregulated entity and its rights to confidentiality and other procedural protections when required to participate as a party in a Commission proceeding."[46] Movants then characterize the holding as a "form-over-substance approach [that] leaves the Respondents (and Summit) without any resource, remedy, or avenue to protect their privacy rights here."[47]

52. There are two problems with Movants' interpretation of the holding. First, it leaves out important context and thereby mischaracterizes the holding and its scope. The cited holding applied to Movants' objections to Complainants' Requests for Production 15 and 16 served upon Wolf Creek that requested certain invoices and bills and documents supporting the information contained in the invoices or bills. In response to Complainants' Motion to Compel, Wolf Creek argued that Commission Rules 1004(w), 1105, and 4027 prohibited it from providing the requested information because it contained "customer information." Decision No. R24-0209-I rejected Wolf Creek's argument, holding first that the documents sought in RFPs 15 and 16 are relevant to the

[44] *Id*. at 10.
[45] *Id*. at 11.
[46] Motion to Certify at 10.
[47] *Id*. at 11.

dispute in this proceeding.[48] Decision No. R24-0209-I then addressed Wolf Creek's argument based on Commission Rules 1004(w), 1105, and 4027 as follows:

> 68. As to the question of whether Respondents can produce the requested information under the Commission's rules, Respondents are attempting to have it both ways. On the one hand, they deny in their Answer that Wolf Creek is a utility. On the other hand, in its Response to the Motion to Compel, Respondents contend that Commission Rules 1004(w), 1105, and 4027 prohibit Wolf Creek from disclosing any further information in response to RFPs 15 and 16. Commission Rules 1004(w), 1105, and 4027 apply solely to public utilities. As a result, Respondents' reliance on Commission Rules 1004(w), 1105, and 4027 is valid only if Wolf Creek is a public utility.
>
> 69. There is no dispute that, to date, Wolf Creek has not been treated as a public utility in Colorado. As noted, Respondents contend that Wolf Creek is not a public utility. For their part, Complainants are requesting that the Commission change course by treating Wolf Creek as a public utility going forward.
>
> 70. Based on the foregoing, the ALJ also finds and concludes that Wolf Creek has not been deemed a public utility that is subject to Commission Rules 1105 and 4027. No Recommended Decision or Commission Decision has issued treating Wolf Creek as a public utility. As a result, the ALJ will not adopt Wolf Creek's argument that Commission Rules 1004(w), 1105, and 4027 prohibit it from providing further information to Complainants in response to RFPs 15 and 16.
>
> 71. Even if those rules did apply to Wolf Creek, the ALJ would grant the Motion to Compel with respect to RFPs 15 and 16. Rule 1105 states in relevant part that "[a] utility may only disclose personal information as permitted by Commission rule or as compelled by state or federal law." Similarly, Rule 4027(b) states that "[a] utility shall not disclose customer data unless such disclosure conforms to these rules, except as required by law or to comply with Commission rule. Illustratively, this includes responses to requests of the Commission, warrants, subpoenas, court orders, or as authorized by § 16-15.5-102, C.R.S." 109
>
> 72. Here, the ALJ finds and concludes that the information sought in RFPs 15 and 16 to Wolf Creek is relevant and discoverable under the 2012 Colorado Rules of Civil Procedure and the Commission's Rules of Practice and Procedure, which have the force and effect of Colorado law. In addition,

[48] Decision No. R24-0209-I at 31 (¶ 67).

> Commission Rules 1100 and 1101 provide adequate protections for confidential and highly confidential information produced in discovery in Commission proceedings. As a result, production of the information and documents sought by RFPs 15 and 16 is required by Colorado law and permitted by Commission Rule. As a result, Rules 1105 and 4027 do not prohibit the disclosure of the information sought by RFPs 15 and 16.[49]

53. The cited holding read in full context, therefore, establishes that Wolf Creek asserted inconsistently that it is both a public utility, and not a public utility, depending on the outcome it sought. That is the only reasonable interpretation of the reference to Wolf Creek "having it both ways." The cited reference did not appear in a holding denying Wolf Creek "its rights to confidentiality and other procedural protections when required to participate as a party in a Commission proceeding."[50] Movants' characterization to the contrary is wrong.

54. Second, Movants' argument creates the impression that the Commission is forcing them to produce documents without any protections for confidential or highly confidential information. This is also incorrect. As shown above, the cited holding in Decision No. R24-0209-I stated that Wolf Creek could take advantage of the protections for confidential and highly confidential information afforded by Commission Rules 1100 and 1101. Respondents subsequently did just that. They filed a Motion for Extraordinary Protection and Decision No. R24-0283-I granted it over the opposition of Complainants. Decision No. R24-0283-I imposed stringent restrictions requested by Respondents on who can have access to their highly confidential information, how such information can be used in this proceeding, and required those permitted to have access to the documents to execute a nondisclosure agreement authored by Respondents.[51] Decision No. R24-0283-I did not reject or modify any of the restrictions requested by Complainants. As a result, Movants can produce the documents with the protections for highly

[49] *Id*. at 31-33 (¶¶ 68-72).
[50] Motion to Certify at 10.
[51] Decision No. R24-0283-I

confidential information they requested in the Motion for Extraordinary Protection. Movants' statements to the contrary are inaccurate.

**b. Movants' Second Mischaracterization**

55. Movants also state that:

> [i]n rejecting Respondents' arguments regarding the protection of commercially sensitive business information, the ALJ concedes that much of the confidential information sought is not relevant to the claims at issue in the case, stating: "[n]one of the information sought by Complainants has anything to do with Respondents' valuation of the claims asserted in the First Amended Complaint…" This begs the question of why Respondents should be required to produce such information, especially when it is irrelevant to the claims asserted and highly confidential and commercially sensitive?[52]

Movants thus characterize the quoted statement as an admission that the information sought in the subpoena is irrelevant to the dispute in this proceeding.[53]

56. Again, a review of the statement in context reveals its mischaracterization. The cited statement was part of the ruling on Complainants' request to compel production of documents in response to RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek. Complainants argued that the responsive documents were relevant to the analysis required to pierce the corporate veil of Wolf Creek. In response, CNG and Wolf Creek cited *Silva v. Basin Western, Inc.*, 47 P.3d 1184 (Colo. 2002) for the proposition that they would be incurably damaged if the Motion to Compel was granted. Decision No. R24-0209-I rejected the Respondents' argument regarding *Silva* as follows:

> 85. Finally, the decision in *Silva* does not support Respondents' argument. Silva addressed whether a plaintiff pursuing a third-party personal injury tort claim can obtain discovery concerning the defendant's insurer's reserves, which are the funds insurance companies set aside to

[52] Motion to Certify at 11 (footnotes omitted).
[53] *Id*. at 11.

> cover future expenses, losses, claims, or liabilities, and settlement authority for the case. The trial court granted the plaintiff's motion to compel production of information concerning the defendant's insurer's reserves and settlement authority.
>
> 86. The Colorado Supreme Court reversed the trial court's decision. In so doing, the Supreme Court first noted that discovery rulings typically are not subject to interlocutory review by the Supreme Court. However, the Supreme Court does review discovery decisions on an interlocutory basis when they would cause "unwarranted damage to a litigant" that "will not be curable on appeal." The Colorado Supreme Court held that the defendant in *Silva* would be so damaged by the trial court's decision, but did not expressly state why. However, the Colorado Supreme Court appeared to believe that the disclosure of the defendant's insurer's reserves and settlement authority would unfairly impact the subsequent course of the case because the plaintiffs would be unlikely to settle the case for anything below the disclosed numbers. This would be unfair because the Supreme Court believed that an insurer's reserves and settlement authority do not reflect an accurate valuation of the plaintiff's damages in a case. Instead, they are "appropriate business decision[s] justified by the [insurer's] need to preserve financial stability given the unpredictability of future liabilities." As a result, a defendant's insurer's reserves and settlement authority are irrelevant and thus not discoverable because of "the tenuous relationship between reserve amounts or settlement authority and an insurer's evaluation of a claim."
>
> 87. Here, in contrast, the Respondents will not be incurably damaged by an order granting the Motion to Compel. As held above, the information sought by Complainants is relevant to the allegations in the First Amended Complaint. Further, its disclosure to Complainants will not unfairly impact the subsequent course of this proceeding. None of the information sought by Complainants has anything to do with Respondents' valuation of the claims asserted in the First Amended Complaint, and Respondents have not specified how else they will be incurably damaged by the disclosure of the information, particularly in light of their ability to protect the information as confidential and/or highly confidential under Commission Rules 1100-1103. Accordingly, the Colorado Supreme Court's decision in *Silva* does not require the Motion to Compel to be denied.[54]

57. As the foregoing analysis makes clear, the statement in Decision No. R24-0209-I cited by Respondents was not part of a holding that the documents responsive to RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek are irrelevant to the dispute in this

[54] Decision No. R24-0209-I at 38-39.

proceeding. Instead, the cited holding merely established that *Silva* did not justify Respondents' refusal to produce documents in response to the cited RFPs. In fact, the only reasonable interpretation of the entirety of the ruling in Decision No. R24-0209-I is that documents responsive to the cited RFPs are relevant to the allegations that Wolf Creek is an alter ego of CNG, Summit Utilities, and/or Summit LDC.

**D. Conclusion**

58. Based on the foregoing, Movants have not provided any new basis for quashing the subpoena sought by UCA or denying the Motion to Compel filed by Complainants. Nor have they established that any part of Decision Nos. R24-0209-I and R24-0296-I is incorrect or that certification is otherwise necessary. There are adequate protections in place for the information that Decision No. R24-0209-I and R24-0296-I ordered Movants to produce. In fact, as noted, the Commission granted the protections for that information requested by Movants. Moreover, Movants can appeal Decision No. R24-0209-I after the Recommended Decision that will be issued in this proceeding. Accordingly, Movants have not carried their burden of establishing that the Motion to Certify should be granted.

59. Movants' disregard for Decision Nos. R24-0209-I and R24-0296-I is troubling. As noted, Movants ignored the May 17, 2024 deadline in Decision No. R24-0296-I to produce the 4,000 pages of documents with redactions for privilege only and a privilege log, and then filed the Motion to Certify on the May 24, 2024 deadline to produce the same documents with highlighting identifying confidential and highly confidential information. Movants have not requested to stay, or otherwise sought relief from compliance with, Decision Nos. R24-0209-I or R24-0296-I during the pendency of the Motion to Certify. As a result, Movants are in violation of both decisions.

60. Movants' conduct since the issuance of Decision No. R24-0209-I is also strongly suggestive of a strategy of delay. Movants could have – and should have – filed the Motion to Certify much earlier than over 1.5 months after Decision No. R24-0209-I issued. In the interim, Movants produced some documents required by that decision, but held back the approximately 4,000 pages of documents referenced above, claiming that they needed to redact irrelevant information even though Decision No. R24-0209-I gave them no authority to do so, and the ALJ granted the protective order they requested in its entirety.

61. Movants cannot argue that they waited to file the Motion to Certify until after Decision No. R24-0296-I because they did not believe they had a basis for such a motion based solely on Decision No. R24-0209-I. Movants' arguments for certification in the Motion to Certify focus almost exclusively on Decision No. R24-0209-I. Movants' delay in filing the Motion to Certify supports the conclusion that Movants' strategy has been to delay, and hopefully avoid, full compliance with Decision No. R24-0209-I.

62. The delay must end. Movants must fully comply with Decision No. R24-0209-I within three business days of the issuance of this Decision. If Movants do not, the ALJ will entertain an appropriate motion for sanctions.

## IV. UCA'S SECOND MOTION TO COMPEL

63. In light of the decision regarding the Motion to Certify, UCA's Second Motion to Compel will be denied as moot.

## V. ORDER

### A. It Is Ordered That:

1. The Motion Contesting Interim Decision Nos. R24-0209-I and R24-0296-I filed by Colorado Natural Gas, Inc. and Wolf Creek Energy, LLC (collectively, "Respondents") and Summit Utilities, Inc. ("Summit Utilities") on May 24, 2024 is denied.

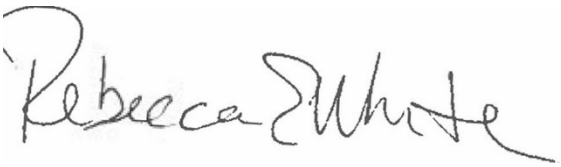
2. Respondents and Summit Utilities will comply with Decision Nos. R24-0209-I and R24-0296-I and this Decision within three business days of the issuance of this Decision.

3. The Motion to Compel and Request for Shortened Response Time filed by the Office of Utility Consumer Advocate on June 24, 2024 is denied as moot.

4. 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