

Decision No. R24-0645

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0418G

ARM, LLC, and HEARTLAND INDUSTRIES, LLC

COMPLAINANTS,

V.

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

RESPONDENTS.

**RECOMMENDED DECISION
ACKNOWLEDGING WITHDRAWAL OF AMENDED COMPLAINT
AND CLOSING PROCEEDING**

Issued Date: August 9, 2024

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I. PROCEDURAL BACKGROUND

1. On August 16, 2023, ARM, LLC and Heartland Industries, LLC (collectively, “Complainants”) filed the Formal Complaint (“Complaint”) against Colorado Natural Gas, Inc. and Wolf Creek Energy, LLC (collectively, “Respondents”) that initiated this proceeding.

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

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

4. On September 7, 2023, Respondents filed a Motion to Dismiss the Complaint (“Motion to Dismiss”). On September 21, 2023, Complainants filed their Response in Opposition to the Motion to Dismiss.

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

6. On September 26, 2023, Complainants filed a Motion to Amend the Complaint (“Motion to Amend”) and proffered a First Amended Formal Complaint (“Amended Complaint”). On October 10, 2023, Respondents filed their response to the Motion to Amend.

7. On October 5, 2023, the Office of the Utility Consumer Advocate (“UCA”) filed a Notice of Intervention as a Matter of Right and Entry of Appearances.

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”):

<u>Event</u>	<u>Deadline</u>
Answer to Amended Complaint Discovery Commences	November 10, 2023
Complainants’ Direct Testimony	March 4, 2024
Respondents’ and Intervenors’ Answer Testimony	April 15, 2024
Rebuttal/Cross-Answer Testimony	May 22, 2024
Prehearing Motions	May 27, 2024
Corrections to Testimony and Exhibits	May 31, 2024
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	June 6, 2024
Prehearing Conference	June 7, 2023
Hearing	June 11-14, 2024
Statements of Position	July 2, 2024

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

11. On October 25, 2023, the ALJ issued Decision No. R23-0724-I that: (a) denied the Motion to Dismiss; (b) denied the Motion for Leave to File Reply; (c) granted the Motion to Amend; and (d) 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.

12. On November 13, 2023, Respondents filed their Answer and Affirmative Defenses to the Amended Complaint.

13. On December 8, 2023, UCA filed a Request for Issuance of a Subpoena Duces Tecum ("First Request for SDT").

14. On January 3, 2024, the ALJ issued Decision No. R24-0004-I denying the First Request for SDT.

15. On January 26, 2024, UCA filed its second Request for Issuance of a Subpoena Duces Tecum ("Second Request for SDT").

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

17. 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.

18. 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.

19. 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:

<u>Event</u>	<u>Current Deadline</u>	<u>New Deadline</u>
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

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

20. After the ALJ issued Decision No. R24-0123-I on February 28, 2024 shortening the response time to the Motion to Compel to March 4, 2024, Respondents filed a Response to the Motion to Compel on that deadline.

¹ Unopposed Motion at 3.

21. 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:

<u>Event</u>	<u>Current Deadline</u>	<u>New Deadline</u>
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

22. 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

² Unopposed Second Motion at 4.

Respondents to supplement their responses to the discovery addressed in the decision within two weeks, and granted the Unopposed Second Motion.

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

24. On April 18, 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”).

25. 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 Revised Motion”) requesting a one-week extension, to and including April 26, 2024, to respond to requests 14, 22, and 23 in the Subpoena.

26. On April 24, 2024: (a) the ALJ issued Decision No. R24-0273 that granted the Unopposed Revised Motion (the ALJ had sent an email to counsel for the parties on April 19, 2024 informing them that the Unopposed Revised Motion would be granted, but it was unclear when the written decision 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”).

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

27. 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.

28. 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.

29. 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.

30. On May 24, 2024, Movants filed a Motion Contesting Interim Decision Nos. R24-0209-I and R24-0296-I (“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.

31. 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 had 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:

<u>Event</u>	<u>Current Deadline</u>	<u>New Deadline</u>
Complainants’ Direct Testimony	June 10, 2024	August 12, 2024
Respondents’ and Intervenors’ Answer Testimony	July 18, 2024	September 19, 2024

<u>Event</u>	<u>Current Deadline</u>	<u>New Deadline</u>
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

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

33. On June 21, 2024, the ALJ received the following email from counsel for Complainants with a carbon copy to 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.

34. On June 24, 2024, UCA filed a Motion to Compel and Request for Shortened Response Time requesting the ALJ to compel production 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”).

35. On July 3, 2024, the ALJ issued Decision No. R24-0477-I that denied the Motion to Certify, denied-as-moot the Second Motion to Compel, and ordered Respondents and Summit Utilities to comply with Decision Nos. R24-0209-I, R24-0296-I, and R24-0477-I within three business days of the issuance of Decision No. R24-0477-I.

36. On July 12, 2024, CNG filed a Joint Notice of Withdrawal of the Complaint and Dismissal with Prejudice (“Joint Notice”). In the Joint Notice, Complainants and Respondents provided notice that they had resolved their dispute, Complainants withdrew their Complaint, and Complainants and Respondents dismissed their claims and defenses with prejudice. Attorneys of record for Complainants and Respondents signed the Joint Notice.

37. On July 16, 2024, UCA filed its Response and Objection to the Joint Notice of Dismissal of Withdrawal of the Complaint and Dismissal with Prejudice (“UCA’s Response and Objection”). UCA objects to the dismissal of the Complaint. Specifically, UCA “cannot determine whether the complaint’s allegations regarding inappropriate cross-subsidization and commingling financial resources have been addressed in a manner consistent with the public interest.”⁴ UCA requests that the Commission reject the withdrawal of the Complaint and order Complainants and Respondents to produce “documents addressing the withdrawal of the complaint and proposed dismissal such as a settlement agreement” so UCA can make that determination.⁵

38. On July 23, 2024, Complainants and Respondents filed their Joint Reply to UCA’s Response and Objection (“Joint Reply”).

⁴ UCA’s Response and Objection, p. 1.

⁵ *Id.* at p. 3.

II. ANALYSIS

A. Joint Reply

39. Rule 1400(e) states that “[a] movant may not file a reply to a response unless the Commission orders otherwise” and then identifies the circumstances in which the Commission may so order.⁶ The circumstances are: (1) a material misrepresentation of a fact in a response brief; (2) accident or surprise, which ordinary prudence could not have guarded against; (3) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or (4) an incorrect statement or error of law in a response brief.⁷ The burden is on the party or parties seeking to file a reply brief to establish that one or more of the circumstances apply.

40. Here, in their Joint Reply, Complainants and Respondents do not request leave to file a reply brief and do not cite, much less present argument concerning, any of the circumstances identified in Rule 1400(e) that may justify the filing of a reply brief. For this reason, and because none of those circumstances appear to apply here, the ALJ will reject the Joint Reply. The Joint Reply has not been considered in rendering this Recommended Decision.

B. Joint Notice

41. The ALJ will deny UCA’s request to reject the withdrawal of the Complaint and order the production of documents relevant to the resolution of the dispute between Complainants and Respondents. This is a complaint case. Both the Complainants and the Respondents have resolved the dispute that gave rise to the Amended Complaint. In UCA’s Response and Objection, UCA fails to fully address these facts. The ALJ will not grant UCA’s request and thereby effectively force Complainants and Respondents to continue litigating this proceeding so that UCA

⁶ 4 *Code of Colorado Regulations* 723-1.

⁷ *Id.*

can use this proceeding to investigate issues raised in the Amended Complaint. Neither the Complainants nor the Respondents seek relief from the Commission, and UCA cannot step into the shoes of Complainants and continue to advance the Amended Complaint.

42. This outcome is consistent with Commission Rule 1408(a), which states that “[t]he Commission encourages settlement of contested proceedings.” While it also states that “any settlement agreement shall be reduced to writing and shall be filed along with a motion requesting relief with regard thereto,” Complainants and Respondents have not requested any relief from the Commission in their Joint Notice. As a result, they are not required to file any settlement agreement. Under these circumstances, not allowing Complainants and Respondents to withdraw their claims and defenses and thereby effectively force them to continue litigating this proceeding is not consistent with encouraging settlements.

43. Finally, this outcome is not inconsistent with the public interest. If the discovery UCA obtained in this proceeding provided it with a good-faith basis for believing that the cross-subsidization and improper commingling of financial resources between regulated and unregulated entities alleged in the Amended Complaint took place, UCA can take appropriate action outside of this proceeding, including by filing its own complaint. UCA cannot, however, advance an Amended Complaint that Complainants no longer endorse. Thus, accepting the withdrawal of the Amended Complaint and closing this proceeding does not prevent UCA from seeking to vindicate and protect the public interest.

44. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order.

III. ORDER**A. The Commission Orders That:**

1. The Joint Notice of Withdrawal of the Complaint and Dismissal with Prejudice filed on July 12, 2024 is acknowledged.

2. The remote prehearing conference scheduled for November 12, 2024 at 1:30 p.m. is vacated.

3. The hybrid hearing scheduled for November 18-21, 2024 is vacated.

4. The First Amended Formal Complaint filed on September 26, 2023 is dismissed with prejudice.

5. Proceeding No. 23F-0418G is closed.

6. 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.

7. 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.

a. 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.

b. 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.

8. 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

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director