

Decision No. R25-0070

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NOS. 24F-0508E & 24F-0529E

PROCEEDING NO. 24F-0508E

PETER SIMMONS,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

PROCEEDING NO. 24F-0529E

PETER SIMMONS,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**RECOMMENDED DECISION CONSOLIDATING
PROCEEDINGS, GRANTING MOTIONS TO DISMISS,
VACATING EVIDENTIARY HEARINGS, AND CLOSING
PROCEEDINGS**

Issued Date: January 30, 2025

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I. STATEMENT

A. Background

1. Proceeding No. 24F-0336E (“First Proceeding”)

1. On August 7, 2024, Peter Simmons filed a Formal Complaint (“First Complaint”) against Public Service Company of Colorado (“Public Service”). In the First Complaint, Mr. Simmons alleged that he installed a solar array on his property on or around February 21, 2023, but had not executed a Distributed Energy Resource Interconnection Agreement (“DER Agreement”) with Public Service because the DER Agreement supplied by

Public Service allegedly had six deficiencies. In the First Complaint, Mr. Simmons further alleged that he chose not to sign the DER Agreement after Public Service refused to correct the alleged deficiencies. Mr. Simmons concluded that, based on the foregoing, that Public Service had improperly withheld compensation from him “for the electricity my DER has been providing to Xcel Energy.”¹

2. On September 3, 2024, Public Service filed a Motion to Dismiss Formal Complaint with Prejudice (“First Motion”) arguing that the Complaint failed to state a claim upon which relief could be granted. On September 10, 2024, Mr. Simmons filed a Response to the First Motion. In his Response, Mr. Simmons reiterated his allegations and requested the following relief:

<u>Allegation</u>	<u>Relief Requested</u>
Public Service failed to provide copy of “Safety, Interference and Interconnection Guidelines.”	Order Public Service to print a copy of the Guidelines and provide it to Mr. Simmons, even though Public Service had provided a link where the Guidelines could be downloaded. ²
Public Service failed to provide a “Description of DER” in Exhibit A to DER Agreement, even though Exhibit A thereto stated that the DER description provided by Mr. Simmons in his application was incorporated into Exhibit A.	Order Public Service to copy and paste the DER Description and Single-Line Diagram Mr. Simmons submitted with his online application into Exhibit A and provide the revised Exhibit A to Mr. Simmons for signature. ³
Public Service failed to fill out Exhibit C to the DER Agreement even though Exhibit C stated that it need not be filled out if the Applicant’s DER system was greater than 25 kW in size and Mr. Simmons’ DER system was less than 25 kW.	Order Public Service to copy and paste the DER Description Mr. Simmons submitted with his online application into Exhibit C and provide the revised Exhibit C to Mr. Simmons for signature. ⁴

¹ First Complaint at 3.

² Decision No. R24-0717 at p. 5 (¶ 8).

³ *Id.* at p. 6 (¶ 10).

⁴ *Id.* at p. 7 (¶ 13).

<u>Allegation</u>	<u>Relief Requested</u>
Public Service failed to fill out Exhibit E to the DER Agreement that is entitled “FORM OF HOST ACKNOWLEDGMENT” even though its express terms established that it need not be filled out based on the information provided by Mr. Simmons in his application.	Order Public Service to insert “N/A” or “DER owner/operator is host” into Exhibit E and provide the revised Exhibit E to Mr. Simmons for signature. ⁵
Public Service failed to fill out Exhibit D to the DER Agreement even though its express terms established that it need not be filled out based on the information provided by Mr. Simmons in his application.	Order Public Service to insert “N/A” into Exhibit D and provide the revised Exhibit D to Mr. Simmons for signature. ⁶

3. On October 4, 2024, the ALJ issued Decision No. R24-0717 granting the First Motion, dismissing the First Complaint, and closing Proceeding No. 24F-0336E.

2. Proceeding No. 24F-0508E

4. On November 21, 2024, Mr. Simmons filed a second complaint (“Second Complaint”) against Public Service alleging that Public Service violated §§ 40-2-135(2)(a) & (c)(1), C.R.S. by failing to “provide an executed interconnection agreement to [Mr. Simmons] until 10/7/2024” after Mr. Simmons paid the required interconnection fee on February 21, 2022.⁷ Mr. Simmons concludes that Public Service “never provided reasonable, good faith or timely service throughout the entire interconnection application process”⁸ and requests that the Commission fine Public Service \$2,000/day or \$1,160,000.

5. On December 11, 2024, Public Service filed a Motion to Dismiss the Second Complaint (“Second Motion”).

6. Mr. Simmons did not file a response to the Second Motion.

⁵ *Id.* at p. 8 (¶ 16).

⁶ *Id.* at p. 8-9 (¶ 18).

⁷ Second Complaint at 1.

⁸ *Id.* at 2.

7. On January 27, 2025, Public Service filed a Motion to Vacate and Reschedule Hearing.

8. On January 28, 2025, Mr. Simmons filed a response to the Motion to Vacate and Reschedule Hearing in which he states his opposition to the Motion.

3. Proceeding No. 24F-529E

9. On November 25, 2024, Mr. Simmons filed another complaint (“Third Complaint”) alleging that Public Service has received “over 17MWH of electricity” generated by Mr. Simmons without paying for it.⁹ Mr. Simmons reiterates his allegation that Public Service “never provided reasonable, good faith or timely service throughout the entire interconnection application process.”¹⁰ Mr. Simmons requests that the Commission fine Public Service \$2,000/day or \$1,088,000, which is \$72,000 less than the penalties requested in the Second Complaint.¹¹

10. On December 20, 2024, Public Service filed a Motion to Dismiss the Third Complaint (“Third Motion”).

11. Mr. Simmons did not file a response to the Third Motion.

12. On January 27, 2025, Public Service filed a Motion to Vacate and Reschedule Hearing.

13. On January 28, 2025, Mr. Simmons filed a response to the Motion to Vacate and Reschedule Hearing in which he states his opposition to the Motion.

⁹ Third Complaint at 2.

¹⁰ *Id.*

¹¹ *Id.* at 3.

B. Public Service's Motions to Dismiss

14. In its Motions, Public Service makes four arguments supporting its conclusion that the Second and Third Complaints should be dismissed.

First, the Commission previously reviewed and considered the issues surrounding the same DER Agreement and then granted the Company's motion to dismiss the First Complaint with prejudice. Second, the Second Complaint is an impermissible collateral attack on the Commission's final decision on the First Complaint. Third, the Second Complaint does not allege conduct supporting the Commission fining Public Service \$1,160,000; it merely states that much time passed between the Complainant paying an initial fee and the DER Agreement later being executed, omitting significant deficiencies in the application for interconnection of the Complainant's rooftop solar facility. Fourth and finally, the relief requested in the Second Complaint would constitute an impermissible ex post facto penalty because the applicable statute took effect after the alleged conduct occurred.¹²

C. Legal Standard

1. Consolidation

1. Commission Rule 1402 of the Rules of Practice and Procedure provides that "[e]ither on its own motion or on the motion of a party, the Commission may consolidate proceedings where the issues are substantially similar and the rights of the Parties will not be prejudiced."¹³ Whether to grant consolidation is within the Commission's discretion.

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

2. Public Service seeks to dismiss the Complaint pursuant to C.R.C.P. 12(b)(5), which requires a complaint to be dismissed for "failure to state a claim upon which relief can be granted." In ruling on such a motion, the Complainant's allegations of material fact must be

¹² Second Motion at p. 6 (¶ 10). See Third Motion at p. 6 (¶ 10).

¹³ 4 *Code of Colorado Regulations* 723-1402.

accepted as true. However, this tenet is inapplicable to legal conclusions.¹⁴ The Commission “may consider only matters stated in the complaint and must not go beyond the confines of the pleadings,”¹⁵ except for documents that are referenced in, and central to, the complaint.¹⁶

3. “The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff’s claims.”¹⁷ As a result, motions to dismiss “are viewed with disfavor.”¹⁸ Nevertheless, “only a complaint that states a plausible claim for relief will survive a motion to dismiss.”¹⁹

D. Analysis

1. Consolidation

4. The ALJ finds that the Parties are identical, the issues are substantially similar in the two proceedings, and the rights of the Parties will not be prejudiced by consolidation. For these reasons, and because consolidation will serve administrative efficiency by conserving the resources of the Commission, the undersigned ALJ finds good cause to consolidate Proceeding Nos. 24F-0508E and 24F-0529E. Proceeding No. 24F-0508E will be the primary proceeding.

2. Motions to Dismiss

15. Public Service’s Motions to Dismiss will be granted for three reasons. First, Mr. Simmons has not responded to, and thereby has confessed, those Motions. Second, the Second and Third Complaints are impermissible collateral attacks on Decision No. R24-0717

¹⁴ *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (adopting the standard for review of motions to dismiss for failure to state a claim enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

¹⁵ *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004).

¹⁶ *Prospect Dev. Co. v. Holland & Knight*, 433 P.3d 146, 149 (Colo. App. 2018).

¹⁷ *Rosenthal v. Dean Witter Reynolds*, 908 P.2d 1095, 1099-1100 (Colo. 1995). (Internal citations omitted)

¹⁸ *Hirsch Trust v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017)

¹⁹ *Warne*, 373 P.3d at 591 (quoting *Iqbal*, 556 U.S. at 679).

under § 40-6-112(2), C.R.S. Finally, the Second and Third Complaints are barred under the doctrines of issue and claim preclusion.

a. Rule 1400(d)

16. Rule 1400(d) of the Commission's Rules of Practice and Procedure provides that "[t]he Commission may deem a failure to file a response as a confession of the motion."²⁰ Here, Mr. Simmons has not filed a response to either of the Motions to Dismiss. Mr. Simmons is aware of the requirement to file responses to Motions and is capable of doing so, as he filed a response to Public Service's Motion to Dismiss in the First Proceeding. Under these circumstances, the ALJ deems Mr. Simmons' failure to file a response to the Second and Third Motions a confession of both. Accordingly, the Second and Third Motions shall be dismissed based on Rule 1400(d).

b. Section 40-6-112(2), C.R.S.

17. The Second and Third Complaints must also be dismissed pursuant to § 40-6-112(2), C.R.S. because they are collateral attacks on Decision No. R24-0717. Section 40-6-112(2), C.R.S. states that "[i]n all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive." A Recommended Decision becomes final when the time within which to request review by the Commission (via the filing of exceptions²¹) or by the Courts (via the filing of a petition for writ of certiorari or review) has

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

²¹ § 40-6-109(2), C.R.S. ("if no exceptions are filed within twenty days after service upon the parties, or within such extended period of time as the commission may authorize in writing (copies of any such extension to be served upon the parties), or unless such decision is stayed within such time by the commission upon its own motion, such recommended decision shall become the decision of the commission and subject to the provisions of section 40-6-115.").

elapsed.²² Thereafter, the final Commission decision cannot be subjected to “collateral attack” in subsequent proceedings, which is a request for a decision that contradicts or is inconsistent with the final Commission decision.²³

18. Here, Decision No. R24-0717 held that Mr. Simmons’ allegations in the First Complaint concerning Public Service’s conduct with respect to the DER Agreement failed to state a legal claim upon which relief could be granted. Mr. Simmons did not file exceptions, or for judicial review of, Decision No. R24-0717 and the deadlines to do so have elapsed. As a result, Decision No. R24-0717 is a final Commission decision.

19. Nevertheless, the Second and Third Complaints address the same alleged conduct with respect to the same DER Agreement that was addressed in Decision No. R24-0717, and request that Public Service be penalized for that alleged conduct. The Second and Third Complaints thus request relief that would contradict or, at least, be inconsistent with, Decision No. R24-0717. As Decision No. R24-0717 is a final Commission Decision that is no longer susceptible to judicial review, the Second and Third Complaints are impermissible collateral attacks on Decision No. R24-0717 and must be dismissed under § 40-6-112(2), C.R.S.

c. Issue and Claim Preclusion

20. The Motions to Dismiss must also be dismissed under the related doctrines of claim and issue preclusion. The goal of both doctrines “is to promote judicial economy by barring a claim [or issue] litigated in a prior proceeding from being litigated again in a second

²² § 40-6-115(1), C.R.S. (“Within thirty days after a final decision by the commission in any proceeding, any party to the proceeding before the commission may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness of the final decision inquired into and determined.”).

²³ See § 40-6-112(2), C.R.S. (“In all collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive.”); *Closed Basin Landowners Ass’n. v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, (Colo. 1987) (barring as a collateral attack an argument that was “inconsistent” with a final Water Court decision).

proceeding.”²⁴ “[C]laim preclusion prevents the perpetual re-litigation of the same claim or cause of action.”²⁵ “The doctrine not only bars litigation of issues actually decided but also any issues that should have been raised in the first proceeding but were not.”²⁶ Four elements must be met for claim preclusion to apply: (a) the judgment in the prior proceeding was final; (b) 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.²⁷

21. In contrast, issue preclusion prevents the re-litigation of discrete issues, rather than causes of action. It is thus “broader than the doctrine of claim preclusion because it applies to claims for relief different from those litigated in the first action, but narrower in that it applies only to issues actually litigated.”²⁸ Four elements must be met for issue preclusion to apply: (a) the prior proceeding was decided on a final judgment on the merits; (b) the issue in the current proceeding is identical to the issue actually adjudicated in a prior proceeding; (c) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (d) the party against whom issue preclusion is asserted is a party or in privity with a party in the prior proceeding.

22. Here, as found above, Decision No. R24-0717 is final, the First, Second, and Third Complaints all address the same subject matter, the parties in all three proceedings are identical, the issue in the First, Second, and Third Complaints is identical (Public Service’s alleged failures with respect to the consummation of the DER Agreement), and Mr. Simmons

²⁴ *Foster v. Plock*, 394 P.3d 1119, 1122 (Colo. 2017).

²⁵ *Id.*

²⁶ *S.O.V. v. People in Int. of M.C.*, 914 P.2d 355, 358 (Colo. 1996).

²⁷ *Foster*, 394 P.3d at 1123.

²⁸ *Id.*

had a full and fair opportunity to litigate that issue and its claims for relief in the First Proceeding. In addition, while Mr. Simmons did not expressly request in the First Proceeding that Public Service be forced to pay penalties for its alleged failures, that relief could have, and should have, been raised in the First Proceeding. As a result, the Second and Third Complaints are barred by the doctrines of issue and claim preclusion.

23. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, a written recommended decision, and a recommended order.

II. ORDER

A. The Commission Orders That:

1. Proceeding Nos. 24F-0508E and 24F-0529E are consolidated. Proceeding No. 24F-0508E is the primary proceeding.

2. The Motions to Dismiss filed by Public Service Company of Colorado (“Public Service”) on December 11, 2024 and December 20, 2024 in Proceeding Nos. 24F-0508E and 24F-0529E, respectively, are granted.

3. The Formal Complaints filed by Mr. Simmons on November 21 and 25, 2024 in Proceeding Nos. 24F-0508E and 24F-0529E, respectively, are dismissed.

4. The evidentiary hearings scheduled for February 4, 2025 and February 10, 2025 in Proceeding Nos. 24F-008E and 24F-0529E, respectively, are vacated.

5. The Motions to Vacate and Reschedule Hearings filed by Public Service on January 27, 2025 are denied as moot.

6. Proceeding Nos. 24F-0508E and 24F-0529E are closed.

7. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

8. As provided by §40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- 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.

9. 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