Decision No. R25-0741

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

PROCEEDING NO. 23AL-0635G

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IN THE MATTER OF ADVICE LETTER NO. 133 FILED BY COLORADO NATURAL GAS, INC. TO ELIMINATE THE CONSTRUCTION ALLOWANCES, TO BECOME EFFECTIVE APRIL 29, 2024.

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# RECOMMENDED DECISION PERMANENTLY SUSPENDING TARIFF SHEETS, REQUIRING FILING, AND CLOSING PROCEEDING

Issued Date: October 14, 2025

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## I. STATEMENT

### A. Procedural Background

1. On December 29, 2023, Colorado Natural Gas, Inc. ("CNG") filed Advice Letter No. 133 with modified tariff sheets addressing the Service Lateral Connection and Distribution Main Extension Policy ("Line Extension Policy") within its Rules and Regulations for Natural Gas Service for effect April 29, 2024. The proposed changes to the tariff sheets include: (a) the

elimination of the construction allowance generally; and (b) the introduction of exceptions that may cause certain new customers to qualify for a construction allowance. CNG filed Advice Letter No. 133 in compliance with the part of Senate Bill ("SB") 23-291 codified at § 40-3.2-104.3, C.R.S. that requires each of Colorado's investor-owned gas utilities to file with the Commission, no later than December 31, 2023, an updated tariff to reflect the removal of any incentives for establishing gas service. CNG contends that § 40-3.2-104.3, C.R.S. violates the Contract and Takings Clauses of the U.S. and Colorado Constitutions. For that reason. CNG filed Advice Letter No. 133 "under protest" and set the effective date as April 29, 2024 "to allow for the [Constitutional] issues raised [in Advice Letter No. 133] to be addressed in the appropriate forum."[1]

2. On January 5, 2024, Staff of the Colorado Public Service Commission ("Staff") filed a protest to Advice Letter No. 133. Staff stated that, in its "plain-language reading of the new statute," CNGs construction allowances for service lines and main lines are only one component of the "incentives" that must be removed from CNG's tariff. Staff argued that CNG's proposed tariff revisions do not include removal of the incentives for a utility-provided meter and other infrastructure associated with the addition of a new customer, such as a service regulator. For this reason, Staff expressed concern that CNG's filing may not satisfy the statutory requirement to file an "updated tariff to reflect the removal of any incentives for an applicant to establish gas service to a property." Staff further stated that the Commission would benefit from additional legal analysis and briefing regarding CNG's claims that § 40-3.2-104.3, C.R.S. violates the U.S. and Colorado Constitutions.

[1] Advice Letter No. 133 at 1.

3. On January 18, 2024, the Colorado Office of the Utility Consumer Advocate ("UCA") filed an intervention as of right and request for hearing in this Proceeding. UCA stated that it shares the concerns raised by Staff in its protest.

4. On January 26, 2024, the Commission issued Decision No. C24-0061 which suspended the tariff sheets filed with CNG's Advice Letter No. 133 for 120 days (through August 29, 2024), set the matter for hearing, established an intervention period through February 23, 2024, waived the December 31, 2024 deadline in Commission Rule 4210(d)[2] pursuant to Commission Rule 1003(a),[3] and referred the proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

5. On February 23, 2024, Staff filed a Notice of Intervention.

6. On February 23, 2024, Sierra Club filed a Motion to Intervene. On February 29, 2024, CNG filed a Response in Opposition to Sierra Club's Motion to Intervene. On March 5, 2024, Sierra Club filed a Motion for Leave to Reply and Reply in Support of Motion to Intervene ("Motion for Leave").

7. On March 11, 2024, the ALJ issued Decision No. R24-0157-I that granted Sierra Club's Motion to Intervene, denied its Motion for Leave, scheduled a remote prehearing conference for March 21, 2024, and required the parties to confer regarding a schedule for this proceeding, any discovery procedures that are inconsistent with the Commission's rules governing discovery, and the method by which the hearing should be conducted. Decision No. R24-0157-I also required CNG to file a Conferral Report by March 19, 2024.

[2] 4 *Code of Colorado Regulations* (CCR) 723-4.
[3] 4 CCR 723-1.

8. On March 20, 2024, CNG filed the report required by Decision No. R24-0157-I and the ALJ informed counsel for the parties by email that the information contained in the conferral report was sufficient and the remote prehearing conference was vacated.

9. On April 26, 2024, the parties sent an email proposing to amend their previously proposed schedule to substantially extend this proceeding. In the email, counsel for CNG stated that if the proposed schedule is adopted CNG would "forgo offering any construction allowances from the time when a Commission decision would otherwise have to issue in this proceeding which [CNG] [] calculate[s] as January 4, 2025, to the date of the Commission decision in this proceeding." As a result, the ALJ scheduled a remote prehearing conference for May 2, 2024.

10. On April 29, 2024, Decision No. R24-0286-I issued that, among other things, adopted a schedule based on the information provided in the Conferral Report and extended the effective date of the tariff sheets filed with the Advice Letter for an additional 130 days pursuant to § 40-6-111(1), C.R.S., which resulted in a new effective date of the Advice Letter and accompanying tariff sheets, after suspension, of January 4, 2025.

11. On April 30, 2024, the ALJ issued Decision No. R24-0288-I that scheduled a remote prehearing conference for May 2, 2024.

12. On May 2, 2024, the remote prehearing conference took place. The ALJ instructed CNG that in order to amend the schedule as proposed, CNG would need to file an amended advice letter and tariff sheets changing the effective date of the changes proposed therein to August 1, 2024. After application of the cumulative 250-day suspension in Decision No. C24-0061 issued on January 26, 2024 and Decision No. R24-0286-I, the amended tariff sheets would go into effect on April 8, 2025. Such an effective date would accommodate the amended schedule proposed by the parties.

13. On May 24, 2024, CNG filed the Amended Advice Letter and Tariff Sheets discussed at the May 2, 2024 remote prehearing conference and an Unopposed Motion to Modify Procedural Schedule ("Unopposed Motion"). The Amended Advice Letter and Tariff Sheets list April 8, 2025 as their effective date, which, after the 250-day suspension entered by the Commission, would result in a new effective date of December 14, 2025.

14. On June 13, 2024, the ALJ issued Decision No. R24-0416-I that granted the Unopposed Motion in reliance on the representation by CNG that it will forego offering construction allowances between the current suspended effective date of the Advice Letter and accompanying tariff sheets (January 4, 2025) and the date on which the tariff sheets go into effect under the proposed amended schedule following a final Commission decision in this proceeding. The resulting schedule was as follows:

| **Event** | **New Deadline** |
|---|---|
| CNG's Direct Testimony and Opening Brief | July 22, 2024 |
| Intervenors' Answer Testimony and Response Brief | October 4, 2024 |
| Rebuttal/Cross-Answer Testimony and Reply Brief | November 8, 2024 |
| Prehearing Motions | November 15, 2024 |
| Settlement Agreement(s) | November 18, 2024 |
| Responses to Prehearing Motions<br>Cross-Examination Matrix<br>Corrections to Testimony and Exhibits | November 22, 2024 |
| Remote Evidentiary Hearing | December 3-5, 2024 |
| Statements of Position | December 19, 2024 |

15. The parties filed their testimony and briefs consistent with the schedule adopted in Decision No. R24-0416-I.

16. On November 27, 2024, Staff filed a Motion for an Adverse Inference, Sanctions, and Shortened Response Time ("Motion for Sanctions"). CNG filed its Opposition Brief on December 2, 2024.

17. The remote evidentiary hearing took place on December 3, 2024. The ALJ held oral argument on the Motion for Sanctions at the beginning of the hearing. At the conclusion of the oral argument, Staff withdrew the Motion and the fourth set of discovery requests that were the subject of the Motion. In light of the withdrawal, the ALJ denied the Motion for Sanctions as moot.

18. The parties filed their Statements of Position ("SOPs") by the deadline specified in the schedule.

## II. § 40-3.2-104.3, C.R.S.

19. Section 40-3.2-104.3, C.R.S. is entitled in relevant part "Eliminating incentives for gas service to properties – gas line extension allowances." The statute states that "[a] gas utility shall not provide an applicant an incentive, including a line extension allowance, to establish gas service to a property."[4] "[L]ine extension allowance" and "applicant" are defined as "a bundle of costs that includes construction allowances for new service lines, meters, and other infrastructure associated with the addition of a new customer to a gas utility's distribution system,"[5] and "a person that requests natural gas service and that owns the real property requiring the service[,] . . . include[ing] a developer, builder, legal entity, or other person that has

[4] § 40-3.2-104.3(2)(a), C.R.S.
[5] § 40-3.2-104.3(1)(d), C.R.S.

legal authority over the property,"[6] respectively. There are exemptions for applicants who submitted applications for natural gas service to a utility or a permit application, or a site development plan or plat to the local government with jurisdiction over the applicant's property, on or before August 7, 2023. In the case of a site development plan or plat, the exemption applies only if the local government approved the plan or plat by December 31, 2023 for the applicant to be exempt. Finally, Section 40-3.2-104.3(2)(c), C.R.S. required "each gas utility [to] file with the commission an updated tariff to reflect the removal of any incentives for an applicant to establish gas service to a property" by December 31, 2023.

## III. PARTIES' ARGUMENTS

20. The parties agree that the prohibition on allowances in § 40-3.2-104.3(2)(a), C.R.S.: (a) applies to service line extensions; and (b) does not apply to infrastructure upstream of distribution mains.[7] As a result, the dispute between the parties boils down to whether allowances for distribution main extensions are prohibited.[8] As explained in more detail below, the Intervenors asserts that they are, and CNG contends that they are not.

### A. CNG

#### 1. Plain Meaning

21. CNG asserts that § 40-3.2-104.3(2)(a), C.R.S. should be interpreted to mean that each applicant must pay for the "customer-specific infrastructure needed to connect the customer to the distribution main" and the utility must pay "for the distribution main and any upstream

[6] § 40-3.2-104.3(1)(a), C.R.S.

[7] CNG's Reply Brief at 3-4 ("All parties now agree that 'upstream costs' beyond distribution mains, such as regulator stations, are not included in the statutory scope. Likewise, all parties agree that service line extensions are included. Unless the Commission takes a contrary view on either of those issues, the only point of debate is whether the statute prohibits allowances for distribution main extensions."); CNG's SOP at 20 ("The testimony also supports, albeit indirectly, CNG's interpretation of the statute as requiring elimination of service line extension allowances, but not of distribution main extension allowances.").

[8] CNG's Reply Brief at 3-4.

costs of expanding the system."[9] As support, CNG points to the statute's definition of "line extension allowance" and its reference to "a bundle of costs . . . associated with the addition of a new customer to a gas utility's distribution system."[10] CNG concludes that construction allowances for distribution main extensions must be permissible under the statute because "[c]onnecting an individual customer to the distribution system is distinct from expanding the distribution system itself."[11]

22. CNG further argues that the interpretive principle of *ejusdem generis* must be applied to the definition. The principle applies "where a general term follows a list of things in a statute" and requires that "the general terms are applied only to those things of the same general kind or class as those specifically mentioned."[12] According to CNG, the definition of "line extension allowance" follows this structure because it "lists two customer-specific items ('service lines' and 'meters'), followed by a catchall item, 'other infrastructure associated with the addition of a new customer to a gas utility's distribution system.'"[13] The application of the *ejusdem generis* principle to the definition requires the catchall term to be "limited to customer-specific costs." CNG concludes that the prohibition in § 40-3.2-104.3(2)(a), C.R.S. applies solely to service line extension allowances, not distribution main extension allowances. CNG thus contends that it is permitted to continue offering construction allowances for distribution main extensions required to connect a new customer to its gas system.[14]

[9] CNG's Opening Brief at 4-5.
[10] § 40-3.2-104.3(1)(d), C.R.S.
[11] CNG's SOP at 1. *See also* CNG Reply Brief at 1 (HE 104) (Section 40-3.2-104(1)(d) contains "customer-specific language that is focused on connecting a particular new customer to the distribution system, as distinct from investing in the distribution system itself.").
[12] CNG's Opening Brief at 5 (quoting *Winter v. People*, 126 P.3d 192, 195 (Colo. 2006)).
[13] CNG's Reply Brief at 4.
[14] CNG's Opening Brief at 4-7; CNG's SOP at 20.

23. CNG argues that its interpretation is also supported by the statute's reference to "applicant" and "property" in § 40-3.2-104.3(2)(a), C.R.S. By referring to an individual "applicant" and a singular "property," CNG contends that the statute focuses exclusively on "customer-specific infrastructure" or "customer-specific costs."[15] According to CNG, "[u]nder ordinary principles of statutory interpretation, the statute is best read to require each new customer to pay for the customer-specific infrastructure needed to connect the customer to the distribution main—leaving the utility to invest in the distribution main and any upstream costs of expanding the system."[16]

24. Finally, CNG contends that the use of "incentives" in § 40-3.2-104.3(2)(a), C.R.S. does not require a different result. CNG concedes that "incentives" is a broad term.[17] However, CNG contends that, when it is read in context with the rest of the statute, "incentives" must be limited to "customer-specific costs" that do not extend beyond the customer's service line. CNG also contends that "incentives" by itself "has no limiting principle." As a result, rejecting CNG's narrow interpretation leads "inexorably" to the "absurd" conclusion that § 40-3.2-104.3(2)(a), C.R.S. prohibits all "growth-related investment in facilities of any type because any such investment 'incentivizes' people to join by spreading costs across all ratepayers rather than imposing the entire cost on a new customer. Even the mere fact of offering service is arguably an 'incentive' to join."[18] CNG concludes that § 40-3.2-104.3(2)(a), C.R.S. is not ambiguous and its interpretation "best reflects the ordinary meaning of the statutory language, terms, and structure."[19]

[15] CNG's Opening Brief at 4-5; CNG's Reply Brief at 4.
[16] CNG's Opening Brief at 4-5.
[17] CNG's Reply Brief at 4 ("the statute uses the potentially broad word 'incentive'").
[18] *Id*. at 5-6.
[19] *Id*. at 16.

### 2. Canon of Constitutional Doubt

25. CNG argues in the alternative that, if the Commission determines that the statute is ambiguous, the canon of constitutional doubt requires the adoption of CNG's interpretation of § 40-3.2-104.3(2)(a), C.R.S. While the Commission does not have jurisdiction to decide constitutional questions, CNG asserts that the Commission can use the canon of constitutional doubt to interpret Colorado statutes because it is "a normal tool of statutory construction, and courts do not resolve constitutional questions in employing it."[20] According to CNG, any interpretation other than its own raises serious questions about the constitutionality of § 40-3.2-104.3(2)(a), C.R.S. under the Contracts and Takings Clauses of the U.S. and Colorado Constitutions. To be sure, CNG does not "concede that its interpretation fully resolves all constitutional concerns." Instead, its "point is simply that the best reading of the statute" is CNG's, which "rais[es] far less constitutional doubt than the Staff's sweeping interpretation."[21]

#### a. Takings Clauses

26. CNG contends that the intervenors' interpretation of § 40-3.2-104.3(1)(d), C.R.S. violates the Takings Clauses of the U.S. and Colorado Constitutions.[22] While not entirely clear, CNG asserts that its affected property interest is in investing in its facilities and earning a return on that investment.[23] CNG expresses this property interest in the context of the "regulatory

[20] *Id*. at 15.

[21] CNG's Opening Brief at 9.

[22] U.S. Const. Amend V ("[N]or shall private property be taken for public use, without just compensation"); Colo. Const. Art II, § 15 ("Private property shall not be taken or damaged, for public or private use, without just compensation.").

[23] CNG's Opening Brief at 10-11 ("Under Colorado law, CNG has property interests in its system and facilities, the right (and arguably the obligation) to invest in that system within its certificated and franchised areas and to use that system to provide service, and the right to earn a reasonable rate of return on its investments.") (citations omitted), 19 ("[t]he 'right' at issue here is the basic benefit of the bargain for CNG – the way it makes investments in order to earn a return"). *But see* CNG's Reply Brief at 17 (summarizing Staff's assertion that CNG's relevant claimed property interest is in "investments that it has not yet made," and then stating that Staff "mischaracterizes CNG's claim. CNG is claiming property rights in existing franchise agreements and CPCNs for existing service areas.").

compact," which CNG characterizes as the bargain between states and utilities in which a utility "is granted a monopoly in its service territory and the promise of the opportunity to earn a reasonable rate of return on investments made in the system (e.g., pipes and equipment purchased by the utility and placed into service) in exchange for providing readily accessible, adequate, and reliable service to customers at just, reasonable, and nondiscriminatory rates."[24] According to CNG, § 40-3.2-104.3(1)(d), C.R.S. impermissibly eliminates CNG's property interest and upends the regulatory impact by depriving CNG of the benefit of its bargain.[25]

27. CNG further asserts that the Intervenors' interpretation will force it to "carry on its business virtually for free."[26] As support, CNG states that it would have to install service and distribution lines for new customers, but would only be able to charge the customer for its time, materials, and overhead costs. As a result, it would recoup its costs of installation from the new customer and thus would not have any "investment" on which it can earn a return.[27]

28. Section 40-3.2-104.3, C.R.S. also significantly and disproportionately burdens gas utilities like CNG. The new statute "targets only gas utilities" because "no other company (or individual) is deprived of future returns on its business in order to promote the government's regulatory goals."[28] The new statute also disproportionately burdens new ratepayers who pay for the new service without a construction allowance. The new customers will subsidize existing

[24] *Id*. at 1.
[25] *Id*. at 11 ("The statute effectively takes away CNG's core right to invest in infrastructure in its certificated territory and thus to earn a reasonable rate of return on those investments. This right is a central tenet of the regulatory compact" and "imped[es] gas utilities' ability to make investments and earn a return on them."), 19 (the statute "takes away CNG's core right to expand and invest in facilities, systems, and services in its certificated territories, precluding most growth, expansion, and opportunities to earn revenue").
[26] *Id*. at 12.
[27] *See id*. *See also* CNG's Reply Brief at 10-12; Hearing Transcript at 73:5-74:16.
[28] CNG's Opening Brief at 15.

customers because "[t]he cost of the existing infrastructure has already been socialized in current rates, whereas the cost of new line extensions will now be borne entirely by new customers."[29]

29. Finally, § 40-3.2-104.3(1)(d), C.R.S. frustrates the reasonable investment-backed expectations of CNG and its investors. Citing laws passed by the Colorado General Assembly ("General Assembly") in 1999, 2000, and 2007, CNG states that "Colorado's historic statutory and regulatory treatment has consistently encouraged investment in and expansion of natural gas utilities."[30] But even if natural gas utilities should have expected "some movement" toward renewable energy as a means of fighting climate change, the change represented by § 40-3.2-104.3, C.R.S. was much more significant and earlier than anybody reasonably expected and thus interfered with the reasonable investment expectations of CNG and its investors.[31]

**b. Contracts Clauses**

30. CNG contends that the Intervenors' interpretation would violate the Contracts Clauses of the U.S. and Colorado Constitutions[32] because it would "substantially impair CNG's contractual rights" in its Franchise Agreements by eliminating CNG's return on new investment in new distribution mains necessary to serve new customers.[33] According to CNG, "[r]emoving that ability 'undermines the contractual bargain' by eliminating the very rights that induced CNG

[29] *Id*. at 7 n. 2 (citing *Black Hills Colo. Gas, Inc.*, No. 19AL-0075G, 2020 WL 2620533, at *27, ¶ 95 (Colo. P.U.C. Apr. 14, 2020); *Pub. Serv. Co. of Colo., Nos*. 01S-365G & 01S-404G, 2002 WL 1554454, at ¶ A.1.a (Colo. P.U.C. Apr. 12, 2002)).

[30] *Id*. at 14 (citing 1999 Colo. Sess. Laws ch. 243 (codified at § 40-2-122(1), C.R.S.) ("The general assembly find determines, and declares that natural gas service is essential to the health and well-being of all Colorado natural gas customers."); 2000 Colo. Sess. Laws ch. 335 (codified at § 29-20-108(1)(a), C.R.S.) ("A reliable supply of electric power and natural gas statewide is of vital importance to the health, safety, and welfare of the people of Colorado . . . ."); 2007 Colo. Sess. Laws ch. 189 (codified as amended at § 30-28-211(1), C.R.S.) ("The general assembly hereby finds and declares that there is statewide interest in requiring an effective energy efficient building code for the following reasons: . . . (d) There is statewide interest in the reliability of the electrical grid and an adequate supply of heating oil and natural gas.").

[31] *Id*. at 14-15.

[32] U.S. Const. Art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); Colo. Const. Art. II, § 11 ("No . . . law impairing the obligation of contracts . . . shall be passed by the general assembly.").

[33] CNG's Opening Brief at 16, 17.

to enter into the franchise agreements."[34] The change will deprive CNG of the "right to grow," "ossif[y] CNG's system," and lead to "significantly lower returns relative to what it expected when it made the business decision to invest in facilities to expand natural gas service to customers within its certificated service territory."[35]

31. In addition, this change was not reasonably foreseeable because the "right to invest in new infrastructure and earn a reasonable rate of return" is the "foundation of the regulated monopoly framework for public utility regulation that has been in place for over a century."[36] As a result, CNG reasonably expected that the change brought by § 40-3.2-104.3(2)(a), C.R.S. would not happen and thus bears no responsibility for not taking action to avoid any resulting harm.

32. CNG also argues that, if Intervenors' interpretation is adopted, the statutory change is not a "reasonable and appropriate way of advancing" the purposes of that change "when considered against the severity of the contractual impairment" suffered by CNG.[37] CNG appears to concede that the stated purposes of § 40-3.2-104.3(1)(d), C.R.S. – to both save money for energy consumers and accelerate Colorado's transition to renewable energy – are significant and legitimate public purposes.[38] However, citing case law holding that a statutory impairment of a contract is unreasonable as a matter of law "if the problem sought to be resolved . . . existed at

[34] *Id*. at 17 (quoting *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018)).
[35] CNG's Reply Brief at 13.
[36] CNG's Opening Brief at 19. *See also* CNG's Reply Brief at 13 (regulated monopoly framework "was founded on the opportunity to grow.").
[37] CNG's Opening Brief at 21.
[38] *See id*. at 20 ("the stated purposes of the statute are to save money for energy consumers and to accelerate Colorado's transition toward renewable energy. It is not enough to identify legitimate public purposes.") (citing press release issued by Governor Polis on May 11, 2023 stating "Today, Governor Polis will sign legislation into law to help save people money on energy and build upon the Polis administration's work in partnership with the legislature to help Colorado achieve 100% renewable energy by 2040.").

the time the contractual obligation was incurred,"[39] CNG concludes that the impairment caused by § 40-3.2-104.3(1)(d), C.R.S. is unreasonable because "concerns with energy costs and the desire to transition to renewable energy to protect the environment have been discussed for decades."[40] Further, the statute was not adequately tailored to achieve its ends because "the current Colorado energy mix for electric production . . . depends mostly on gas and coal," which means that customers who employ electricity for heating "will not necessarily reduce greenhouse gas emissions (and may well increase them)."[41] Similarly, there is "no reason to be confident that new or existing customers will pay lower rates in the long term (or that electric utility service will result in lower energy costs for customers who decline service)" because fewer CNG customers will "leave fewer customers to pay for existing system costs, potentially leading to higher rates [for CNG customers] over time."[42] The ALJ should not, therefore, adopt Intervenors' statutory interpretation because it violates the U.S. Constitution's contract clause.

### B. Intervenors

#### 1. Staff & UCA[43]

##### a. `Plain Language

33. Staff argues that the plain language of § 40-3.2-104.3, C.R.S. prohibits any construction allowance for service line and distribution main extensions. As to the latter, a construction allowance for a distribution main extension is "an incentive . . . to establish gas

[39] *Id*. at 21 (quoting *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union v. Virgin Islands*, 842 F.3d 201, 213 (3d Cir. 2016)).

[40] *Id*. (citing 2007 Colo. Sess. Laws ch. 253 (codified at § 40-3.2-101, C.R.S.) ("The general assembly hereby finds, determines, and declares that cost-effective natural gas and electricity demand-side management programs will save money for consumers and utilities and protect Colorado's environment.")).

[41] *Id*. at 22 ((citing "Colorado State Energy Profile, Energy Info. Admin. (last updated June 20, 2024), https://www.eia.gov/state/print.php?sid=co (reporting roughly 29 percent gas-fired, 32 percent coal fired, and 39 percent renewable generation").

[42] *Id*. at 22 & n. 10.

[43] UCA's Response Brief at 1 ("UCA supports Staff's arguments in its opposition briefs").

service to a property." Further, a distribution main is "other infrastructure associated with the addition of a new customer to a gas utility's distribution system." By prohibiting a gas utility from providing an incentive, including a line extension allowance[] to establish gas service to a property," and then defining "line extension allowance" as including "other infrastructure associated with the addition of a new customer to a gas utility's distribution system," the plain language of § 40-3.2-104.3, C.R.S. prohibits construction allowances for service lines and distribution main extensions.[44]

34. Staff further asserts that the plain language of the statute provides a limiting principle to the infrastructure to which the statute applies.[45] Staff states that, while it is possible for the addition of a single new customer to require the installation or replacement of a distribution main, the construction or replacement of infrastructure upstream of distribution mains (such as compressor stations, regulator stations, and high-pressure mains) is never triggered by the connection of a single new property to CNG's system.[46] As a result, infrastructure upstream of distribution mains is not "other infrastructure associated with the addition of a new customers to a gas utility's distribution system."

35. Staff disagrees with CNG's contention that not allowing it to provide a construction allowance for distribution main extensions would violate the "regulatory compact" and force CNG to operate for "free" or "at cost." Under Staff's interpretation of the statute, CNG would still be able to "to invest in upstream infrastructure such as compressor stations and regulator stations, while incorporating such investments into its rate base."[47] Staff notes that CNG will continue to earn on that rate base, and that CNG's current authorized Return on Equity

[44] Staff's Opposition Brief at 11-12.
[45] Staff's Statement of Position at 2-4.
[46] *Id*. at 4 (citing Hearing Transcript at 70:3-17).
[47] Staff's Opposition Brief at 14.

of 10.3 percent "is greater than the authorized rate of return for any of the other Colorado gas utilities regulated by the Commission."[48] Prohibiting CNG from providing a construction allowance for distribution main extensions would not violate the regulatory compact.

36. Finally, Staff notes that the other gas utilities regulated by the Commission have removed construction allowances for both service lines and distribution main extensions from their tariffs.[49] Allowing CNG to provide a construction allowance for distribution mains, therefore, would give CNG a "competitive advantage."[50] Further, "[t]here is no reason that the law should apply differently to CNG."[51] For these reasons, Staff's proposed plain language interpretation should be adopted.[52]

**b. Canon of Constitutional Doubt**

37. Staff argues that the Commission cannot consider the canon of constitutional doubt for two reasons. First, the doctrine is used to interpret ambiguous statutes. Because § 40-3.2-104.3, C.R.S. is not ambiguous, the canon cannot be employed. Second, the Commission "may not review the constitutionality of a statute enacted by the very body from which [the Commission's] authority derives – the Legislature – and must leave that review to the judicial branch of government."[53] According to Staff, application of the canon requires the Commission to impermissibly determine "whether the statute is unconstitutional when read according to its plain meaning."[54]

[48] *Id*.
[49] *Id*. at 8; Staff's SOP at 6-7.
[50] Staff's Opposition Brief at 15.
[51] Staff's SOP at 7.
[52] *Id*.; Staff's Opposition at 15.
[53] *Id*. at 16.
[54] *Id*.

38. Nevertheless, Staff addresses CNG's constitutional arguments on their merits "in the interest of giving the Commission a complete record on which to make its decision."[55]

### 1. Takings Clauses

39. Staff first argues that CNG does not have a property right in future investments. According to Staff, there is no authority establishing otherwise.[56] Further, holding that CNG has a property interest in future investments "would make it impossible for the Commission to regulate the growth of utilities."[57] However, if the Commission believes that CNG has a property interest in future investments, Staff asserts that the elimination of utility-funded incentives to establish gas service to a property does not constitute an unconstitutional regulatory taking for two reasons.

40. First, citing *Murr v. Wisconsin*, 582 U.S. 383, 384 (2017), Staff argues that the elimination of construction allowances for service lines and main extensions will not eliminate all future investment by CNG. Instead, CNG will continue to invest and earn a return on infrastructure upstream of the mains, whether by replacing aging infrastructure or constructing new infrastructure to expand its overall system to bring new customers online. As a result, § 40-3.2-104.3, C.R.S. does not "den[y] all economically beneficial or productive use of" CNG's alleged property interest in future investments in its system.[58]

41. Second, § 40-3.2-104.3, C.R.S. does not fail the multifactor test announced in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) and refined in subsequent cases to identify those regulations that are unconstitutional takings even though they do not deny all beneficial or productive use of property. According to Staff, the elimination of

[55] Staff's Opposition Brief at 17.
[56] *Id*. at 20.
[57] *Id*.
[58] *Id*. at 22.

allowances for service lines and main extensions is but one strand in CNG's "full bundle of property rights" in such future investment.[59] Staff concludes that CNG has not satisfied its burden of establishing a sufficient economic injury to satisfy the first factor in the *Penn Central* test.[60]

42. Staff also contends that § 40-3.2-104.3, C.R.S. does not interfere with "distinct investment-backed expectations" because "[i]t has been apparent for several years that the State of Colorado seeks to curtail the growth of gas infrastructure in order to combat climate change."[61] As a result, "CNG could not have reasonably expected that the Legislature would never pass a law aimed at removing incentives for new customers to extend gas service to their properties."[62] For this reason, the second *Penn Central* factor does not support a finding of a taking.

43. Finally, citing *U.S. West Comm'ns v. City of Longmont*, 948 P.2d 509 (Colo. 1997), Staff argues that "[g]iven the very real danger posed by climate change, the third *Penn Central* factor ('the character of the government action') weighs strongly in favor of finding that the Legislature's effort in § 40-3.2-104.3, C.R.S. to remove incentives for the growth of gas infrastructure was a valid exercise of the State's police power."[63] All three *Penn Central* factors support the conclusion that § 40-3.2-104.3, C.R.S. does not violate the Takings Clause.

[59] *Id*. at 23 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) ("("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking" (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

[60] *Id*.; Staff's SOP at 9-15.

[61] Staff's Opposition Brief at 23-24.

[62] *Id*. at 24.

[63] *Id*. at 25-26.

### 2. Contract Clauses

44. Staff argues that § 40-3.2-104.3, C.R.S. does not cause a substantial impairment of a contractual relationship of CNG. Staff contends that CNG has identified only one provision in one contract with which the statute conflicts. That contract – with the Town of Alma – requires CNG to pay for the meters used by Alma-based customers. Staff argues that "the statute's abrogation of this provision by requiring new customers to pay for their own meters is hardly a 'substantial impairment' of the contract."[64]

45. Similarly, while CNG submitted evidence that approximately 50 potential customers declined service based on the lack of a construction allowance, there is no evidence establishing whether those potential customers required a distribution main extension.[65] Likewise, CNG's lost profits analysis fails to distinguish between alleged lost profits due to installations requiring main and service line extensions versus those that only require service line extensions.[66] Because the dispute in this proceeding is limited to whether § 40-3.2-104.3, C.R.S. prohibits allowances for distribution main extensions, CNG has failed to prove a substantial impairment of a contract.[67]

46. Second, even if it causes a "substantial impairment," § 40-3.2-104.3, C.R.S. "is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose."[68] Specifically, the statute addresses "the widespread and increasing threat posed by climate change," not by banning all new gas hookups and gas infrastructure expansions altogether, but by merely eliminating line extension allowances. Staff concludes that this

[64] *Id*. at 31.
[65] Staff's SOP at 9-10 (citing Hearing Transcript at 78:21-79:1).
[66] *Id*. at 10-13.
[67] *Id*. at 9-15.
[68] Staff's Opposition Brief at 32 (quoting *Sveen*, 584 U.S. at 819).

impairment of CNG's contract with the Town of Alma is reasonable given the importance of the public purpose served by § 40-3.2-104.3, C.R.S.[69] Staff also cites testimony from a CNG witness who declined to conclude that CNG's interest in its contracts outweigh the public interest in attempting to mitigate the effects of climate change, which Staff contends is one of the primary purposes of § 40-3.2-104.3, C.R.S.[70] Staff concludes that CNG has not proven that its interests outweigh the public purpose in promulgating § 40-3.2-104.3, C.R.S.

### 3. Sierra Club

#### a. Plain Language

47. Sierra Club asserts that the plain language of § 40-3.2-104.3, C.R.S. reveals "that the legislature intended gas utilities to revise their tariffs to remove all construction allowances for new customers that existed on or before December 31, 2023."[71] As support, Sierra Club cites the heading of the statute ("Eliminating incentives for gas service to properties")[72] and its provision requiring "each gas utility to file an 'updated tariff to reflect the removal of any incentives for an applicant to establish gas service to a property.'"[73] As it is undisputed that on and before December 31, 2023, CNG offered only two incentives/construction allowances for extending service lines and distribution mains,[74] the plain language of the statute prohibits only these two incentives.

[69] *Id*. at 32-33.

[70] *Id*. at 32 (§ 40-3.2-104.3, C.R.S. "was enacted to help mitigate 'a broad and general social or economic problem' – climate change.") (quoting *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

[71] Sierra Club's Statement of Position at 4.

[72] *Id*. at 4-5.

[73] *Id*. at 5.

[74] *Id*. at 3-4 (citing CNG's Opening Brief at 3 and Hearing Transcript at 70:18-72:8); 12-13 (citing Proceeding Nos. 23AL-0579G (Atmos' proceeding triggered by § 40-3.2-104.3, C.R.S.); 23AL-0631G (Black Hills' proceeding triggered by § 40-3.2-104.3, C.R.S.); 23AL-0636G (Public Service's proceeding triggered by § 40-3.2-104.3, C.R.S.).

48. Sierra Club also argues that service line and distribution main extensions both qualify as "line extension allowances" in the statute. As stated above, that term is defined as "a bundle of costs that includes construction allowances for new service lines, meters, and other infrastructure associated with the addition of a new customer to a gas utility's distribution system."[75] Sierra Club contends that distribution mains fall into the "other infrastructure associated with the addition of a new customer to a gas utility's distribution system."

49. Finally, Sierra Club asserts that the "limiting principle" of its interpretation is the statute itself. As "[o]ne can only 'remove' something that already exists," the limiting principle of Sierra Club's interpretation is the plain language of the statute that requires gas utilities "to remove the construction allowances that they were providing on or before December 31, 2023."[76] As CNG was offering construction allowances only for service line and distribution main extensions on or before that date, the statute's reach is limited to those incentives.[77] CNG's interpretation effectively seeks to add "service" to "line extension allowance" to reach the result it desires. Sierra Club concludes that § 40-3.2-104.3, C.R.S. should be limited to prohibiting service line and distribution main extensions.

**b. Canon of Constitutional Doubt**

50. Sierra Club maintains that the Commission should not employ the canon of constitutional doubt for three reasons. First, the Commission does not have the authority to employ the canon of constitutional doubt because it cannot address constitutional issues.[78] Second, the canon of constitutional doubt applies only when a statute is ambiguous. Since Sierra Club contends that § 40-3.2-104.3, C.R.S. is not ambiguous, resort to the canon is

[75] *Id*. at 5 (quoting § 40-3.2.-104.3(1)(d), C.R.S.).
[76] *Id*. at 8.
[77] *Id*. at 7-8.
[78] *Id*. at 14-15.

inappropriate.[79] Finally, because CNG asserts that even its interpretation of § 40-3.2-104.3, C.R.S. is unconstitutional,[80] the canon cannot be employed because its purpose is to aid deliberative bodies in choosing an interpretation that ***is*** constitutional and thereby "avoid[s] the need even to address serious questions about [a statute's] constitutionality."[81]

51. If the Commission does address the canon of constitutional doubt, Sierra Club asserts that CNG's Takings and Contracts Clause arguments are based on "sheer speculation."[82] Sierra Club also contends that § 40-3.2-104.3, C.R.S. "is drawn in an 'appropriate' and 'reasonable way' to advance '[the] significant and legitimate public purpose[s]'"[83] of protecting consumers, reducing the overall costs that existing customers pay, and protecting the environment.[84] The General Assembly's legislative judgment that § 40-3.2-104.3, C.R.S. is necessary to protect those public purposes is entitled to significant deference.[85] That other states

[79] *Id*. at 15-16.

[80] CNG's Opening Brief at 9 ("Nor does CNG concede that its interpretation fully resolves all constitutional concerns; its point is simply that the best reading of the statute has the additional benefit of raising far less constitutional doubt than the Staff's sweeping interpretation.").

[81] Sierra Club's Response Brief at 16.

[82] *Id*. at 15 ("CNG's testimony estimating the statute's impact on its profits rests on the unsubstantiated assumption that CNG will not add any new customers after 2025. . . . CNG's takings claims rest on sheer speculation about the effects of removing incentives to establish new gas service."), 17 ("CNG's claims of impairment rest upon sheer speculation as to the impact of the statute on CNG's customer count and rate base.")

[83] *Id*. at 17 (quoting *Sveen*, 584 U.S. at 812).

[84] *Id*. at 17-18

[85] *Id*. at 18.

are phasing out gas line extension allowances supports the conclusion that § 40-3.2-104.3, C.R.S. is reasonable and appropriate.[86]

## IV. FINDINGS AND CONCLUSIONS

### A. Analytical Approach

52. In rendering this Decision, the ALJ has carefully reviewed and considered all the evidence introduced by the Parties during the hearing, including the testimony and hearing exhibits, even if this Decision does not specifically address all of the evidence presented, or every nuance of each party's position in each issue. Moreover, the ALJ has considered all the legal arguments set forth in the SOPs, even if the Decision does not explicitly address every legal argument. In rendering this Decision, the ALJ has weighed the evidence and evaluated the credibility of all the witnesses and hearing exhibits.[87]

### B. Burden of Proof

53. Except as otherwise provided by statute, the Administrative Procedures Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."[88] The party bearing the burden must prove their case by a preponderance of the

[86] *Id*. (citing Wash. Util. and Transp. Comm'n ("UTC"), Proceeding No. UG-210729, Order 01 ¶ 27 (Oct. 29, 2021) (finding that Washington's historic gas line extension allowances was "contrary to the legislature's clear direction to reduce greenhouse gas emissions and the use of fossil fuels"); Wash. UTC, Proceeding No. UE-220053, Order 10/04 ¶ 88 (Dec. 12, 2022) (finding that a settlement phasing out a utility's gas line extension allowance, among other provisions, will aid the utility's compliance with Washington's Climate Commitment Act); Wash. UTC, Proceeding No. UG-210729, Order 24/10 ¶ 290 (Dec. 22, 2022) (finding that a settlement provision to phase out a utility's gas line extension allowance was consistent with the public interest); Cal. Pub. Util. Comm'n, Proceeding No. R.19-01011 (Sept. 20, 2022) at 2 (finding that eliminating California's gas line extension allowances would "move the state closer to meeting its goal of reducing [greenhouse gas] emissions and combatting climate change," and would result in "improved quality of life and health for customers, hundreds of millions of dollars in ratepayer savings annually, greater equity for low-income customers, and greater certainty for builders, developers, and individual customers"); Mass. Dep't of Pub. Util., Order on Regulatory Principles and Framework, No. 20-80-B at 98 (Dec. 6, 2023) (stating that Massachusetts' climate laws require gas utilities "to move beyond a 'business as usual' approach to system planning and expansion," and determining that "the standards for investments to serve new customers be examined and revised.").

[87] *See Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244, 252 (Colo. 2005); *RAM Broadcasting of Colo., Inc. v. Public Utilities Comm'n.*, 702 P.2d 746, 750 (Colo. 1985).

[88] § 24-4-105(7), C.R.S.

evidence.[89] The evidence must be "substantial evidence," which is defined as "such relevant evidence as a reasonable [person's] mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[90] This standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.[91]

### C. Statutory Interpretation

#### 1. General

54. The goal of statutory interpretation is to give effect to the intent of the General Assembly. The language of the statute must be read and considered as a whole, and it should be construed to give consistent, harmonious, and sensible effect to all its parts.[92] Words and phrases must be read in context and given their plain and ordinary meaning in that context.[93] Resort to a definition in a "recognized dictionary" to determine the plain and ordinary meeting is permissible.[94] Where statutory language is unambiguous, resort to other rules of statutory interpretation is unnecessary and the language is applied as written.[95]

[89] 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 CCR 723-1.

[90] *See*, *e.g.*, *City of Boulder v. PUC*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. PUC*, 949 P.2d 577, 585 (Colo. 1997)).

[91] *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985).

[92] *Safehouse Prog. Alliance for Nonviolence, Inc. v. Qwest Corp.*, 174 P.3d 821, 826 (Colo. App. 2007).

[93] *In re Miranda*, 289 P.3d 957, 960 (Colo. 2012); *Klinger v. Adams Cnty. Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006). *See also Dep't of Transportation v. Amerco Real Est. Co.*, 380 P.3d 117, 121 ("While there will often be room for debate about the breadth of surrounding text to be considered in assessing whether particular language can have more than one reasonable understanding, and is therefore considered ambiguous, there can be little question that the meaning of words or phrases cannot be separated from the broader context in which they are used and the function they serve, according to accepted rules of grammar and syntax, in the very sentence in which they appear.").

[94] *Cowen v. People*, 431 P.3d 215, 218 (Colo. 2018) ("When determining the plain and ordinary meaning of words, we may consider a definition in a recognized dictionary.").

[95] *Foiles v. Whittman*, 233 P.3d 697, 699 (Colo. 2010).

55. If the statutory language is ambiguous, however, additional tools of statutory construction are employed.[96] A statute is ambiguous if it is reasonably susceptible to multiple interpretations that lead to different results.[97] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[98] The additional tools used to construe the meaning of an ambiguous statute include canons of statutory construction, the consequences of a given construction, the end to be achieved by the statute, and the circumstances surrounding the statute's adoption.[99] One of the best guides is the context in which the statutory provisions appear.[100]

### 2. Canon of Constitutional Doubt

56. The canon of constitutional doubt "is a tool for choosing between competing plausible interpretations of a statutory text."[101] For this reason, the canon can only be used if a statute is ambiguous.[102] Under the canon, courts should "construe statutes in such a way as to avoid calling their constitutional validity into question."[103] Put differently, "courts should construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality."[104]

[96] *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 561 (Colo. 2013).
[97] *See A.M. v. A.C.*, 296 P.3d 1026, 1030 (Colo. 2013).
[98] *People v. Diaz*, 347 P.3d 621, 625 (Colo. 2015).
[99] *Bostelman v. People*, 162 P.3d 686, 690 (Colo. 2007); *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006).
[100] *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P.3d 1014, 1019 (Colo. 2014).
[101] *Clark v. Martinez*, 543 U.S. 371, 381 (2005).
[102] *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 314, 331 (Colo. 2020).
[103] *People v. Lee*, 476 P.3d 351, 354 (Colo. 2020). *See also Perry Park Water & Sanitation Dist. v. Cordillera Corp.*, 818 P.2d 728, 732 (Colo. 1991) ("A construction of statutory language that creates doubts as to the constitutional validity of the legislation should be assiduously avoided if an alternative construction consistent with legislative intent is available.").
[104] *Rocky Mountain Gun Owners*, 467 P.3d at 33.

57. As summarized above and explained below, the parties disagree about whether the Commission can employ the canon of constitutional doubt.

## D. Analysis

### 1. Plain Meaning

58. The ALJ concludes that the plain meaning of § 40-3.2-104.3, C.R.S. requires the removal of incentives for the establishment of new gas service that existed at the time of the statute's passage. This interpretation is required by the words and structure of the statute. The title of the statute is "Eliminating incentives for gas service to properties" and it requires "each gas utility [to] file with the Commission an updated tariff to reflect the ***removal*** of any incentives for an applicant to establish gas service to a property."[105] "Eliminate" and "remove" mean "to get rid of."[106] Both presuppose that the incentives being eliminated or removed existed at the time the statute went into effect. Because it is undisputed that the four gas utilities to which § 40-3.2-104.3, C.R.S. applies (Atmos Energy Corporation ("Atmos"), Black Hills Colorado Gas, Inc. ("Black Hills"), CNG, and Public Service Company of Colorado ("Public Service")) provided construction allowances only for service line and distribution main extensions at the time of the passage of § 40-3.2-104.3, C.R.S.,[107] those are the incentives prohibited by the statute.

[105] § 40-3.2-104(2)(c), C.R.S. (emphasis added).

[106] Merriam Webster Dictionary (2025) available at https://www.merriam-webster.com/dictionary/eliminate and https://www.merriam-webster.com/dictionary/remove (last visited on Oct. 9, 2025).

[107] Unanimous Comprehensive Settlement Agreement filed in Proceeding No. 23AL-0636G on April 19, 2024 at 2 (Public Service agreed to "remov[e] all customer construction allowances"), 13 (redlined Tariff No. 6 Gas (Public Service) establishing that only customers grandfathered under § 40-3.2-104.3(2)(d), C.R.S. are eligible for construction allowances for service line and distribution main extensions); Redlined Tariff No. 1 Gas (Black Hills) filed with Amended Advice Letter No. 40 filed in Proceeding No. 23AL-0631G on April 5, 2024 at 1 (eliminating construction allowances for service lines and mains except for grandfathered customers); Redlined Tariff No. 7 Gas (Atmos) filed with Advice Letter in Proceeding No. 23AL-0579G on Nov. 30, 2023 (eliminating construction allowances for "service lines" and "gas main extensions"); Stipulation and Settlement Agreement filed in Proceeding No. 23AL-0579G on Feb. 27. 2024 at 2 ("The amendments are intended to make clear that [Atmos'] customers initiating service to a new location will be required to pay the cost of any main extensions, the service line, regulator, and meter."). *See also* Staff's Response Brief at 10 & n. 44 (noting this fact and citing the settlement agreements and tariff sheets in Proceeding Nos. 23AL-0579G, 23AL-0631G, and 23AL-0636G).

59. This conclusion is reinforced by the statute's use of "incentives" in the title of the statute and in subsection (2)(c), and the use of "including" in subsection (2)(a). Subsection (2)(c) requires "the removal of any incentives [provided by gas utilities in their tariffs] for an applicant to establish gas service to a property." If the General Assembly had intended to limit the scope of the removal requirement in § 40-3.2-104.3(2)(c), C.R.S. to a single incentive, it would have used the singular "incentive." That it did not is strongly indicative of the General Assembly's intent not to so limit the prohibition.

60. The use of the "including" clause is subsection (2)(a) also supports this conclusion.[108] "[I]ncluding" is a word of enlargement, which means that the single given example is merely illustrative, not exhaustive,[109] which CNG concedes.[110] The use of "an" to modify the singular form of "incentive" is not restrictive generally, but is particularly not so given that the "including" clause directly follows. The plain meaning of § 40-3.2-104.3(2)(a), C.R.S., therefore, is that "a line extension allowance" is a subset or example of the prohibited "incentives." Limiting the prohibition to single type of construction allowance for the connection of a service line from the distribution main to a structure on a property would be contrary to the plain meaning of the statute.

[108] Section 40-3.2-104.3(2)(a), C.R.S. ("A gas utility shall not provide an applicant an incentive, including a line extension allowance, to establish gas service to a property.").

[109] *See*, *e.g.*, *Preston v. Dupont*, 35 P.3d 433, 439 (Colo. 2001) (includes "denotes that the examples listed are not exhaustive or exclusive,"); *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) ("[T]he word 'include' is ordinarily used as a word of extension or enlargement."); *People v. Patton*, 425 P.3d 1152, 1157 (Colo. App. 2016) ("[I]nclude indicates that what is to follow is only part of a greater whole.... By the use of the non-limiting term "includes," however, the list used to define 'person' is illustrative rather than exhaustive."); *Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998) ("The word 'includes' is generally used as a term of extension or enlargement when used in a statutory definition.").

[110] CNG Reply Brief at 4 (stating that "line extension allowance" is an "example of a prohibited incentive"). *See also Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1154 (Colo. App. 1998) ("The word 'includes' is generally used as a term of extension or enlargement when used in a statutory definition."); *Preston v. Dupont*, 35 P.3d 433, 439 (Colo. 2001) (includes "denotes that the examples listed are not exhaustive or exclusive,"). *See also* Patton, 425 P.3d at 1157 (citing Bryan A. Garner, Garner's Dictionary of Legal Usage 439 (3d ed. 2011 for "including ... should not be used to introduce an exhaustive list, for it implies that the list is only partial[;] ... 'the use of the word including indicates that the specified list ... is illustrative, not exhaustive.'").

61. The statute's definition of "line extension allowance" also supports the ALJ's conclusion.[111] The definition has at least three important textual clues that the General Assembly intended the statutory term "line extension allowance" to be expansive. First, it uses "includes," indicating that the listed examples – "service lines" and "meters" – are illustrative, not exhaustive.[112] Second, it cites multiple "construction allowances," not a single "construction allowance." If the General Assembly intended the defined term to mean only a single type of line extension allowance as CNG contends, it would not have used the plural. Third, it uses the expansive expression "and other infrastructure associated with." "Associated" means, among other things, "related, connected, or combined together."[113] Consistent with this definition, and in the absence of other conflicting statutory language, State and Federal courts have liberally construed "associated with."[114] In light of the other textual clues revealing the non-limited nature of the definition of "line extension allowance" in § 40-3.2-104.3(1)(d), C.R.S., the ALJ interprets "associated with" as indicating that line extension allowances are not limited to the preceding specific examples.[115] As a result, read in the context of the entire statute, the definition of "line extension allowance" is not limited to a service line construction allowance.

62. The *ejusdem generis* interpretive canon does not require a narrower construction of § 40-3.2-104.3(1)(d), C.R.S., as CNG contends. That rule provides that when "general words follow specific words in a statutory enumeration, the general words are usually construed to

[111] Section 40-3.2-104.3(1)(d), C.R.S. ("'Line extension allowance' means a bundle of costs that includes construction allowances for new service lines, meters, and other infrastructure associated with the addition of a new customer to a gas utility's distribution system").

[112] *See supra* n. 109.

[113] Merriam Webster Dictionary (2025) available at https://www.merriam-webster.com/dictionary/associated (last visited on Oct. 9, 2025).

[114] *See State v. Jedlicka*, 305 Neb. 52, 59–60 & nn.16-18 (2020) (collecting cases).

[115] *See Apprio, Inc. v. Zaccari*, 104 F.4th 897, 907 (D.C. Cir. 2024) (definition of "electronic signature" as "an electric sound, symbol, or process, attached to or logically ***associated with*** a contract or other record and executed or adopted by a person with the intent to sign the record" is "expansive") (emphasis added) (quoting 15 U.S.C. § 7006(5)).

embrace only objects similar in nature to those objects enumerated by the preceding specific words."[116] *Ejusdem generis* must not be applied "woodenly," and sometimes legislatures elect to include one or more specific examples to remove doubt about a statute's scope, even when the example(s) fall within the statute's general term.[117]

63. Here, read in the context of the entire definition and statute, "line extension allowance" is not limited to a single type of line extension allowance for the reasons stated above. Nor does it indicate that the entire statutory prohibition contained in § 40-3.2-104.3, C.R.S. is so limited. As a result, CNG's use of *ejusdem generis* would defeat the General Assembly's intent to prohibit all incentives provided by utilities as of the effective date of the statute. It would also render meaningless the expansive language used elsewhere in the statute addressed above.[118]

64. The ALJ also disagrees with CNG's argument that the reference to "associated with the addition of a new customer to a gas utility's distribution system" in the "line extension allowance" definition necessarily means that the General Assembly intended to limit the prohibited incentives to a "service line extension allowance."[119] CNG's supporting statement that "[c]onnecting an individual customer to the distribution system is distinct from expanding the distribution system itself" is neither here nor there.[120] There is no evidence that utilities and/or the General Assembly treat distribution mains and "distribution systems" as one and the same. Even if there were such evidence, this single reference to the "distribution system" in a

[116] *Yates v. U.S.*, 574 U.S. 528, 545 (2015) (plurality opinion).
[117] *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226–27 (2008).
[118] *See U.S. v. Alpers*, 338 U.S. 680, 682 (1950) (instructing that rule of *ejusdem generis* cannot be employed to "obscure and defeat the intent and purpose of Congress" or "render general words meaningless").
[119] § 40-3.2-104.3(1)(d), C.R.S.
[120] CNG's SOP at 1. *See also* CNG Reply Brief at 1 (HE 104) (Section 40-3.2-104(1)(d) contains "customer-specific language that is focused on connecting a particular new customer to the distribution system, as distinct from investing in the distribution system itself.").

definition, not the prohibitory section of the statute, cannot overcome the overwhelming other evidence discussed above that the General Assembly meant to prohibit all incentives in the form of construction allowances provided by utilities at the time that the statute went into effect.

65. Likewise, the ALJ disagrees with CNG's conclusion that the reference to "applicant" and "property" in § 40-3.2-104.3(2)(a), C.R.S. indicates that the General Assembly intended to exclude distribution main extensions from the statutory prohibition.[121] Specifically, CNG argues that the cited references indicate the General Assembly's intent to prohibit construction allowances only for "customer-specific infrastructure," which "distribution mains" are not.[122] Yet, a main ***extension*** is "customer-specific infrastructure" because it is paid for by a single customer to serve a single property.[123] While one or more future customers owning different properties may subsequently connect new service lines to the already extended distribution main,[124] the extended distribution main served a single property and thus was

[121] CNG's Opening Brief at 4-6; CNG's Reply Brief at 4-5.

[122] CNG's Reply Brief at 1 ("The only line the statute draws is between customer-specific infrastructure and the utility's distribution system, of which distribution mains are a part.").

[123] Redlined Tariff No. 6 Gas (Public Service) filed with Unanimous Comprehensive Settlement Agreement filed in Proceeding No. 23AL-0636G on April 19, 2024 at 9 (defining "Applicant" as "Individual person or persons requesting gas service on or after the effective date of this Gas Tariff, who own the property requiring such service"); 13 (stating that only an "Applicant" grandfathered under § 40-3.2-104.3(2)(d), C.R.S. is eligible for construction allowances for service line and main extensions); Redlined Tariff No. 1 Gas (Black Hills) filed with Amended Advice Letter No. 40 filed in Proceeding No. 23AL-0631G on April 5, 2024 at 1 ("The Customer will be responsible for all Main and/or Service Line extension costs in excess of the Construction Allowances, except for grandfathered customers."); Redlined Tariff No. 7 Gas (Atmos) filed with Stipulation and Settlement Agreement filed in Proceeding No. 23AL-0579G on Feb. 27. 2024 at 19 (defining "Subscriber" as "The individual or entity that requests a Main Extension, and/or Service Line Extension. "); 20 ("The Subscriber is responsible for the cost of the Main Extension.").

[124] *See* Redlined Tariff No. 1 Gas (Black Hills) filed with Amended Advice Letter No. 40 filed in Proceeding No. 23AL-0631G on April 5, 2024 at 1 ("The Customer and Company may sign a five-year agreement covering the Customer Contribution paid to the Company for Main and/or Service Line extensions. The Customer Contribution paid to the Company may be refundable for a five-year period in the amount stipulated in the agreement for each subsequent Customer connected to the same extension, provided however that the refunds will not exceed the total amount of the Customer Contribution"); Stipulation and Settlement Agreement filed in Proceeding No. 23AL-0579G on Feb. 27. 2024 at 18 (Redlined Tariff No. 7 Gas (Atmos)) at 20 ( defining "Main Extension" as "Distribution or supply mains, including all facilities, necessary to supply service to additional customers"); 22 (redlining showing that former tariff provided "Construction Payment Refunds" to Subscriber when new customers connected new service lines to main extension for which Subscriber paid less the construction allowance within five years of construction of main extension).

"customer-specific infrastructure" until the second customer attaches a new service line. As a result, CNG's argument that "distribution mains" are not "customer-specific infrastructure" is inaccurate.

66. Finally, the ALJ disagrees with CNG that there is no limiting principle to any interpretation of § 40-3.2-1043, C.R.S. other than CNG's. While CNG is correct that "incentive" has a broad meaning, the inclusion of "eliminating" and "removal" limits the scope of that meaning and thus the statute. Specifically, the General Assembly's use of those words clearly and unambiguously signal its intent that the prohibition in § 40-3.2-104.3, C.R.S. is limited to those incentives included in each gas utility's tariff when the statute took effect.

67. In addition, the record establishes that it would be, at a minimum, atypical for the addition of a single new customer to trigger the need to replace or expand infrastructure upstream of distribution mains.[125] For this reason, no utility to which § 40-3.2-104.3, C.R.S. applies offered an incentive in the form of a construction allowance to new potential customers for replacements/expansions of such infrastructure. This fact reinforces the conclusion that § 40-3.2-104.3, C.R.S. does not apply to infrastructure upstream of distribution mains.

68. For the foregoing reasons, the ALJ concludes that the plain language of § 40-3.2-104.3, C.R.S. signals the General Assembly's intent to prohibit the construction allowances provided by the utilities to which the statute applies as of the effective date of the statute.

**2. Canon of Constitutional Doubt**

69. As concluded above, § 40-3.2-104.3, C.R.S. plainly and unambiguously prohibits incentives in the form of construction allowances provided by the utilities to which the statute applies at the time the statute went into effect. As a result, and because the canon of

[125] Hearing Transcript at 70:3-17, 72:14-18.

constitutional doubt applies only when a statute is ambiguous, the canon is inapplicable in this proceeding. However, as explained below, even if the statutory language were ambiguous, the ALJ would find and conclude that the foregoing interpretation does not raise sufficient constitutional concern to warrant adopting CNG's interpretation.

#### a. The Commission's Authority (*Vel Non*) to Employ the Canon of Constitutional Doubt

70. The intervenors unanimously agree that the ALJ cannot employ the canon of constitutional doubt. As support, they argue that it is beyond the Commission's power to declare any statute unconstitutional. They conclude that it must follow that the Commission cannot even ***consider*** the constitutionality of dueling interpretations of a statute.

71. However, no party has cited a case holding that the Commission, or any other administrative agency, cannot even consider the canon of constitutional doubt. And, in fact, at least one decision specifically states that, like courts, administrative agencies have an "obligation" to adopt statutory interpretations that do not raise a serious constitutional question.[126] Given this obligation, administrative agencies like the Commission must be permitted to consider whether a proposed statutory interpretation at least raises serious constitutional concerns. As that is what the canon requires, the ALJ concludes that the Commission is not just permitted, but required, to apply the canon of constitutional doubt to

[126] *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1250 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities. . . . It may well be that some ambiguous statutes are susceptible of only one interpretation that avoids constitutional doubts. In such a case, both agencies and courts are obligated to interpret the statute in the one manner that does not raise a serious constitutional question."). *See also Mountain States Tel. & Tel. Co. v. Dep't of Lab. & Emp.*, 520 P.2d 586, 589 (Colo. 1974) (in reversing administrative agency's dismissal of appeal of referee's decision as untimely filed when administrative agency failed to serve referee's decision on appellant's attorney of record, holding that "due-process requirements qualify statutory enactments, which must be interpreted, if possible, so as to conform to constitutional standards.").

competing interpretations of a statute and at least one interpretation implicates one or more constitutional issues.

72. This conclusion is consistent with the purpose of the prohibition against administrative agencies declaring statutes unconstitutional, which is to prevent the executive branch (of which the Commission is a member) from exercising an "essential" power of the judicial branch. Such an arrogation of power could lead to its concentration in the judicial branch that is dangerous to our democratic form of government. However, the separation of powers doctrine is only concerned with the exercise of another branch's power that is "essential to [that other] department's proper exercise of its constitutionally assigned functions."[127] For this reason, the purpose of the separation of powers doctrine "is not to create three mutually exclusive, watertight compartments of government"[128] because doing so would risk rendering government inefficient and ineffective.[129] Instead, the doctrine provides flexibility for overlaps in responsibilities involving powers that are not essential to any one branch. Here, declaring statutes unconstitutional is an essential function of the judiciary that administrative agencies, like

[127] *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 527 (Colo. 1985).
[128] *Id*.
[129] *Id*.

the Commission, cannot undertake.[130] However, it is beyond dispute that interpreting statutes is not an essential function of the judiciary, as administrative agencies commonly perform that function and have done so for an extended period without concentrating power in the executive branch. If administrative agencies are permitted to interpret statutes, they must be allowed to employ all of the tools of statutory construction. As the canon of constitutional doubt is one of those tools,[131] administrative agencies must be allowed to employ it.

73. In addition, if the Commission considers the canon of constitutional doubt, the Commission's record of this proceeding will be far more comprehensive. The record will contain evidence and argument from the parties concerning the canon, and the Commission's statutory interpretation based on the application of the Commission's knowledge and expertise in regulating public utilities in a way that is cognizant of, and thus designed to avoid, constitutional concerns. If the Commission's decision is then subjected to judicial review, the judicial branch will have a far more comprehensive record. Such an outcome will be far more efficient and effective than if the Commission does not consider the canon of constitutional doubt.[132]

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[130] *Arapahoe Roofing and Sheet Metal, Inc. v. City and County of Denver*, 831 P.2d 451, 454 (Colo. 1992) ("This court and the court of appeals have consistently held that administrative agencies do not have authority to pass on the constitutionality of statutes or ordinances."); *Clasby v. Klapper*, 636 P.2d 682, 684 n.6 (Colo. 1981) ("There was no need for the appellant to present his constitutional challenge to the board before raising that issue on appeal to the district court. Since the board could not rule on that claim, it would serve no purpose to impose such a requirement.") (citations omitted); *Kinterknecht v. Industrial Comm'n. of Colorado*, 485 P.2d 721, 724 (Colo. 1971) ("Where the constitutionality of a statute, under which an administrative agency acts, is challenged, the administrative agency cannot pass upon its constitutionality. That function may be exercised only by the judicial branch of government."). *But see Industrial Comm'n. of Colorado v. Bd. of County Comm'rs of Adams County*, 690 P.2d 839, 844 n. 6 (Colo. 1984) ("Even though Adams County raised its constitutional arguments at the earliest administrative review, it is *doubtful* that the Commission has authority to decide constitutional questions.") (emphasis added). *But see Denver Center for the Performing Arts v. Briggs*, 696 P.2d 299, 305 n.5 (Colo. 1985) (""an administrative hearing officer . . . may consider the facial constitutionality of a statute or ordinance . . . [but] the hearing officer's decision will not be considered authoritative."). *See also* Decision No. C02-1355 issued in Proceeding No. 02G-133TO on Dec. 5, 2002 at 17 ("We concur with the ALJ that Arapahoe Roofing & Sheet Metal supra, holds that administrative agencies do not have authority to pass on the constitutionality of statutes or ordinances.").

[131] *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (canon of constitutional doubt "is a tool for choosing between competing plausible interpretations of a statutory text").

[132] *See Lamm*, 700 P.2d at 527.

74. Finally, Sierra Club is correct that CNG's request for the Commission to employ the canon is atypical because CNG refuses to "concede that its [favored] interpretation fully resolves all constitutional concerns." Instead, CNG asserts that its interpretation merely "rais[es] far less constitutional doubt than the Staff's [] interpretation."[133] However, neither Sierra Club nor any other party have cited authority holding that the ALJ cannot consider the constitutional implications of competing interpretations under these circumstances. As a result, the ALJ does not conclude that CNG's atypical employment of the canon forecloses the ALJ's consideration of it.

75. Based on the foregoing, and because the parties have fully briefed the argument, the ALJ will employ the canon of constitutional doubt to analyze the competing interpretations of § 40-3.2-104.3, C.R.S. offered by the parties.

**b. Takings Clauses**

76. The U.S. and Colorado Constitutions prohibit the taking of private property for a public purpose without "just compensation."[134] This requirement is included in the "Takings Clause" of each Constitution. With one exception that is inapplicable here, Colorado's Takings Clause is interpreted identically to the Takings Clause of the U.S. Constitution.[135]

77. Government regulation that "goes too far" is a taking.[136] A party seeking to prove such a "regulatory taking" may do so in two ways. First, it may show that the regulation "denies all economically beneficial or productive use of" its property and is thus a *per se* violation of the

[133] CNG's Opening Brief at 9.

[134] U.S. Const. Amend. V ("[N]or shall private property be taken for public use without just compensation."); Colo. Const. Art II, 15 ("private property shall not be taken or damaged, for public or private us, without just compensation.").

[135] *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 38 P.3d 59, 64 (Colo. 2001) ("this court has interpreted the Colorado takings clause as consistent with the federal clause.").

[136] *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

Takings Clauses.[137] If the regulation does not do so, it may still constitute a taking under the multi-factor test announced in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) and refined in subsequent cases. The factors are the economic impact of the regulation, the regulation's interference with reasonable investment-backed expectations, and the character of the governmental action ("*Penn Central* factors").[138] The Supreme Court emphasized, however, that whether or not a taking has occurred "depends largely 'upon the particular circumstances [in that] case.'"[139]

78. Here, CNG argues that § 40-3.2-104.3(2)(a), C.R.S. effects a taking under the *Penn Central* multi-factor test. CNG does not assert that it will be denied "all economically beneficial or productive use of" its property by the statute.[140] As a result, CNG's argument will be analyzed using *Penn Central's* multi-factor test.

### 1. Property Interest

79. The first step in the Takings analysis is to define the "property" allegedly taken. However, the Takings Clauses of the U.S. and Colorado Constitutions do not define property. Relevant to the determination of what constitutes "property" for purposes of the Takings Clauses are "'existing rules or understandings' about property rights" from state law, "traditional property law principles," "historical practice," and case law.[141]

80. Here, CNG asserts that it has a property interest in "its system and facilities, the right (and arguably the obligation) to invest in that system within its certificated and franchised

[137] *Murr v. Wisconsin*, 582 U.S. 383, 384 (2017).
[138] *Penn Cent.*, 438 U.S. at 124.
[139] *Id. See also Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979) (stating that the second prong of the Penn Central test examines a regulation's "interference with reasonable investment backed expectations").
[140] CNG's Reply Brief at 19 ("To be clear, CNG is not arguing that it has lost all or substantially all economic value of its overall business; that would be necessary for a *per se* takings claim.").
[141] *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 638 (2023).

areas and to use that system to provide service, and the right to earn a reasonable rate of return on its investments."[142] However, CNG argues only that § 40-3.2-104.3(2)(a), C.R.S. impermissibly impacts a portion of the second of those claimed property interests – the right to invest in its system within its certificated and franchised areas. Indeed, CNG has not claimed that § 40-3.2-104.3(2)(a), C.R.S. effects a taking of its existing system and facilities or denies it the right to earn a reasonable rate of return on its existing investments. This makes sense given that § 40-3.2-104.3(2)(a), C.R.S. is prospective in nature and, therefore, does not seek to impact CNG's existing investment in its infrastructure.[143] As a result, the relevant questions are: (a) whether CNG has a property right in future investment in its gas delivery system within its certificated and franchised areas; and (b) if so, whether § 40-3.2-104.3(2)(a), C.R.S. goes to far in regulating that interest.

81. As to the first question, CNG has not cited a single case holding that a public utility has a property interest in future investment. Perhaps for that reason, CNG repeatedly asserts that § 40-3.2-104.3(2)(a), C.R.S. violates the "regulatory compact," but never defines the compact with precision. The closest CNG comes is the following:

> Under the regulatory compact, CNG, like other utilities, is granted a monopoly in its service territory and the promise of the opportunity to earn a reasonable rate of return on investments made in the system (e.g., pipes and equipment purchased by the utility and placed into service) in exchange for providing readily accessible, adequate, and reliable service to customers at just, reasonable, and nondiscriminatory rates.[144]

[142] CNG's Opening Brief at 10-11.
[143] § 40-3.2-104.3(2)(c), C.R.S. ("On or before December 31, 2023, each gas utility shall file with the commission an updated tariff to reflect the removal of any incentives for an applicant to establish gas service to a property.").
[144] CNG's Opening Brief at 1.

Elsewhere, CNG describes the regulatory compact as a "bargain struck between utility companies and the government to induce utility companies to invest in systems that require extensive infrastructure and capital and to ensure that the benefits of those systems are accessible to all."[145] However the "regulatory compact" is described, CNG contends that the right to invest is a "central tenet" of, and "foundational" to, it.[146] As a result, elimination of the right to invest eliminates CNG's benefit of the bargain it struck with the State of Colorado.[147]

82. The ALJ concludes that CNG has not carried its burden of establishing that it has a property interest in future investment for purposes of the Takings Clauses. As noted, CNG has not cited authority supporting that proposition, or that CNG has a property interest in any particular level of future investment, and the ALJ is not otherwise aware of any. Nor is the ALJ aware of any authority supporting CNG's recitation of the "regulatory compact" as including the

[145] *Id*. at 11.
[146] *Id*. at 11, 12.
[147] *Id*. at 12 ("Under the Staff's reading, the statute yanks out one of the foundational supports of the regulatory compact. The Staff would have utilities deliver on their end of the bargain—by providing reliable service at reasonable, nondiscriminatory rates—while refusing to uphold the state's obligations in exchange."). *See also* CNG's Reply Brief at 19 ("The 'right' at issue here is the basic benefit of the bargain for CNG—the way it makes investments in order to earn a return. . . . CNG's claim is that the basic benefit of its bargain underpinning the CPCNs and franchise agreements (its right to expand and invest in infrastructure, facilities, and services in order to earn a return) has been taken away.")

agreement by the state to allow CNG to invest at any particular level in the future.[148] Instead, the authority of which the ALJ is aware describes the "regulatory compact" as the understanding by which a state grants a monopoly over the provision of gas service within a defined geographic area to a public utility in return for the public utility's agreement to be regulated by the state and to provide service "to any qualified applicant at a fair, reasonable, and nondiscriminatory rate."[149] The state's regulation replaces competition as the check against the public utility taking advantage of its monopoly power to the detriment of its ratepayers.[150] While the regulatory compact guarantees a public utility the ***opportunity*** to earn a fair return on the prudent

[148] CNG's Opening Brief at 11-12 ("The statute effectively takes away CNG's core right to invest in infrastructure in its certificated territory and thus to earn a reasonable rate of return on those investments. This right is a central tenet of the regulatory compact, the bargain struck between utility companies and the government to induce utility companies to invest in systems that require extensive infrastructure and capital and to ensure that the benefits of those systems are accessible to all customers on nondiscriminatory and reasonable terms."); 12 ("Make no mistake: The statute will upend the regulatory compact in this way no matter how individual customers respond. On the one hand, if customers decline service, CNG will be deprived of the right to invest in infrastructure in its certificated territory, leaving it with a static or declining customer base to pay for the system."); CNG's Reply Brief at 2 ("The statute substantially impacts CNG economically and deprives it of the core right to expand and invest in gas facilities, systems, and services within its certificated territories in order to earn a return on those investments."); 19 (the statute "takes away CNG's core right to expand and invest in facilities, systems, and services in its certificated territories, precluding most growth, expansion, and opportunities to earn revenue. . . . CNG's claim is that the basic benefit of its bargain underpinning the CPCNs and franchise agreements (its right to expand and invest in infrastructure, facilities, and services in order to earn a return) has been taken away."); CNG's SOP at 1 ("the basic tenets of the regulatory compact [are] the utility's right and obligation to provide facilities and services to all customers within a designated area, and in exchange, to have the opportunity to invest in that system and earn a reasonable rate of return."), 20 ("The testimony confirms that the statute has a substantial impact on CNG, precludes its growth and investment in new infrastructure, and thereby removes the key benefit of the regulatory compact.").

[149] CNG's Reply Brief at 8.

[150] *See* 64 Am. Jur. 2d Public Utilities § 15 ("utility regulation is premised on a regulatory compact in which the state sanctions a utility's monopoly within a defined service area and subjects the utility to various regulatory restrictions and responsibilities. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, a utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer."); "*Rate regulation as term of franchise*," 2A Ordinance Law Annotations Electricity § 39 ("The rationale underlying the grant of power to the Public Service Commission to determine utility rates, and utility regulation in general, is known as the "regulatory compact," which is a theoretical agreement between the utilities and the state in which, as a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer."); "*The Role of ADR in the Competitive Electric Power Supply Industry*," Disp. Resol. J., OCTOBER 2001, at 24, 26 ("Under this regulatory scheme—often called a "regulatory compact"—electric utilities accepted the obligation to serve any customer in their "certified" service area and a limitation on rates of return on their investment dedicated to public service, in return for regulatory promise that they would have the opportunity—not the guarantee—to earn a fair return on that investment.").

investment it makes, as approved by the state, at a level that allows the public utility to attract capital,[151] it does not guarantee any particular level of future investment or a particular return on any historical or future investment.

83. Moreover, § 40-3.2-104.3(2)(a), C.R.S. does not take any other asset in which CNG can claim a property interest for purposes of the Takings Clauses. The statute does not seek to dispossess CNG of its existing system or its Certificates of Public Convenience and Necessity ("CPCNs").[152] Nor does it deny CNG the ability to make a fair return on its investment. In fact, CNG's authorized return on equity of 10.3 percent is the highest of any Colorado gas public utility.[153]

84. Accordingly, the ALJ concludes that CNG has not carried its burden of establishing that it has a property interest in any level of future investment in its gas delivery

[151] Decision No. R13-0096 issued in Proceeding No. 11A-1001E on Jan. 17, 2013 at 42 (¶ 114) ("Additionally, it would have certainly violated regulatory principles and the regulatory compact to deny Public Service full recovery of costs already determined by the Commission to have been prudently incurred."); Decision No. C06-0004 issued in Proceeding No. 05F-337E on Jan. 5, 2006 at 9 (¶ 19) ("Under the regulatory compact, when the Commission establishes rates for a utility, there is no guaranty that the utility will actually earn the established rates for return on equity and ratebase. Instead, the utility is provided the opportunity to earn those returns through its management discretion on how best to operate its utility."); Decision No. R06-1023 issued in Proceeding No. 05A-333W on Dec. 1, 2006 at 22 (¶ 80) ("As part of a regulatory compact, the Commission defines a monopolistic service territory in which the public utility has the obligation to serve. Customers are restricted from getting utility service from any other private utility company within the service territory."); 24 (¶ 90) ("Part of the duty and responsibility to serve the public convenience and necessity in a monopolistic territory is to do so in a fair and equitable manner."). *See also Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 700 (D.C. Cir. 2000) ("To satisfy expected customer demand, utilities invested money, built facilities, and entered into long-term fuel or power contracts, relying on the "regulatory compact" under which utility shareholders accepted lower rates of return on their investment in exchange for the certainty of regulated rates and resulting ability to recover prudently incurred costs."); *Allegheny Energy v. DQE, Inc.*, 74 F.Supp.2d 482, 486 (W.D. Pa. 1999) ("In order to ensure that rates were both stable and as low as possible, the PUC required utilities to defer recovery of certain obligations and investments, including investments in generation assets, in return for the assurance—or the so-called "regulatory compact"—that they would have an opportunity to recover such costs under regulation in the future."); Proposed Rulemaking and Supplemental Proposed Rulemaking, 60 Fed. Reg. 17662, 17663 (FERC Mar. 29, 1995) ("Utilities have invested billions of dollars in order to meet their obligations. Those investments have been made under a "regulatory compact" whereby utilities—and their shareholders—expect to recover prudently incurred costs.").

[152] *See Poudre Valley Rural Elec. Ass'n v. City of Loveland*, 807 P.2d 547, 555 (Colo. 1991) ("Both Poudre Valley's facilities and its right to serve customers under the certificate of public convenience and necessity are property for purposes of the takings clause"); *Pub. Serv. Co. of Colo. v. Pub. Utils. Comm'n*, 483 P.2d 1337, 1339 (Colo. 1971) ("The right to give service under an existing [CPCN] is a property right under Colorado law").

[153] Staff's Response Brief at 14 n. 62.

system or gas infrastructure for purposes of the Takings Clauses of the U.S. and Colorado Constitutions. For this reason, CNG has not carried its burden of proving that § 40-3.2-104.3(2)(a), C.R.S. raises a sufficient Takings concern to justify adopting CNG's interpretation of the statute.

### 2. Penn Central Factors

85. Even if CNG had a legally cognizable property right to the future construction allowances prohibited by § 40-3.2-104.3, C.R.S., the statute's prohibition on granting those allowances does not satisfy the *Penn Central* factors. As to the first factor (economic impact resulting from § 40-3.2-104.3, C.R.S.), CNG's evidence establishes, if anything, that its economic damage to date resulting from § 40-3.2-104.3, C.R.S. is attributable almost exclusively to the elimination of service line construction allowances.[154] There is no evidence establishing the economic impact of the statute on CNG resulting from the elimination of construction allowances for distribution main extensions. As CNG seeks an interpretation that § 40-3.2-104.3, C.R.S. does not prohibit construction allowances for distribution main extensions, CNG has not carried its burden of proving the first factor in the *Penn Central* analysis.

86. Similarly, CNG has not carried its burden that § 40-3.2-104.3, C.R.S. interferes with reasonable investment-based expectations. In support, CNG cites legislation passed by the General Assembly in 1999, 2000, and 2007 that it characterizes as "promoting expansion of the gas system and ready access to gas service by all customers."[155] However, the 2007 legislation

[154] Hearing Transcript at 78:21-29:1 (Mr. Marcum testifying that CNG does not know how many potential customers declined service because they were ineligible for a distribution main extension allowance, except that "the percentage [of the overall declinations] was very low."); 134:24-135:12 (Ms. Van Tassel testifying that she based her analysis on information from Mr. Marcum about the number of potential customers who declined service in the second half of 2023 and the first half of 2024).

[155] CNG's Opening Brief at 14-15 (citing 1999 Colo. Sess. Laws ch. 243; 2000 Colo. Sess. Laws ch. 335; and 2007 Colo. Sess. Laws ch. 189).

required every board of county commissioners to adopt an "energy code" to improve the efficiency, and thus reduce the power consumption, of new and renovated buildings.[156] The 2007 legislation thus appears to at least suggest that Colorado's interest was in the reduction, or at least the slowing of the growth, of the consumption of electricity and natural gas. Similarly, the 1999 legislation addressed the deregulation of the natural gas market to encourage competition in the sale of natural gas to the benefit of Colorado natural gas consumers,[157] and the 2000 legislation addressed time-limits for local governments to issue decisions regarding public utility applications addressing the location, construction, or improvement of major electrical or natural gas facilities within their jurisdictions.[158] It is not clear how the 1999 and 2000 legislative acts encouraged ***reasonable*** investment-backed expectations that Colorado would "encourage investment in and expansion of natural gas facilities" without limitation for the foreseeable future. In fact, CNG argues elsewhere that "[c]oncerns with energy costs and the desire to transition to renewable energy to protect the environment have been discussed for decades,"[159] which at least suggests that any investment-backed expectations of the growth of gas-related infrastructure into perpetuity have been less than reasonable during the same period.

87. In contrast, Staff cites legislation from 2019 and 2021 as follows:

> Colorado House Bill ("HB") 19-1261, which took effect on May 30, 2019, set statewide greenhouse gas reduction targets of at least 26 percent from 2005 levels by 2025, 50 percent by 2030, and 90 percent by 2050. HB 21-1238, which was enacted on June 24, 2021, emphasized the importance of DSM in meeting the State's emissions reduction goals. It also allowed the Commission and utilities to consider factors, such as the social costs of carbon dioxide and methane, that make DSM programs – which avoid the need for infrastructure investments – more likely to be deemed cost-effective. Senate Bill ("SB") 21-246, which was enacted on

[156] 2007 Colo. Sess. Laws ch. 189.
[157] *See* 1999 Colo. Sess. Laws ch. 243.
[158] *See* ; 2000 Colo. Sess. Laws ch. 335
[159] CNG's Opening Brief at 21.

> June 21, 2021, noted that "Colorado has significant potential for replacing fossil gas with clean electricity" through beneficial electrification ("BE"), and instituted measures aimed at making BE programs more effective.[160]

Based on these legislative acts, Staff correctly concludes that "[i]t has been apparent for several years that the State of Colorado seeks to curtail the growth of gas infrastructure in order to combat climate change."[161] Based on the foregoing, the ALJ concludes that CNG has not satisfied its burden of establishing that the second *Penn Central* factor weighs in its favor.

88. Finally, the ALJ concludes that CNG has not carried its burden of establishing that the last *Penn Central* factor -- the character of the governmental action – cuts its way. CNG's argument is that § 40-3.2-104.3, C.R.S. unduly and disproportionately burdens gas utilities.[162] However, the three other regulated gas utilities in Colorado – Atmos Energy Corporation, Black Hills Colorado Gas, Inc., and Public Service – have filed tariffs consistent with Staff's interpretation of the statute. While those outcomes resulted from settlements with Staff, they are indicative that the statute is not unduly burdensome on natural gas public utilities like CNG. Moreover, Sierra Club has submitted evidence that other states (Washington, California, and Massachusetts) are in the process of "phasing out gas line extension allowances either legislatively or administratively."[163] CNG has not disputed Sierra Club's characterization of those decisions or offered evidence supporting its predictions regarding the burdensomeness of such decisions. For these reasons, and because CNG concedes that "it is still early to evaluate the tariffs' impacts,"[164] the ALJ concludes that CNG has not satisfied its burden of establishing that the third *Penn Central* factor favors CNG.

[160] Staff's Response Brief at 24.
[161] *Id*.
[162] CNG's Opening Brief at 15; CNG's Reply Brief at 20-21; CNG's SOP at 17-18.
[163] Sierra Club's Response Brief at 18 & n. 53 (citing decisions in 2022 (Washington and California) and 2023 (Massachusetts)).
[164] CNG's Reply Brief at 31.

### c. Contracts Clauses

89. As noted above, the U.S. and Colorado Constitutions prohibit state laws "impairing the Obligation of Contracts."[165] The same test applies under both constitutions.[166] "The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship.'"[167] Considerations that are relevant to answering that question are the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights.[168] Another consideration is "whether the industry the complaining party has entered has been regulated in the past."[169] As the Supreme Court has held, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."[170]

90. If there is a substantial impairment, "the inquiry turns to the means and ends of the legislation."[171] If the law in question is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose,"[172] such as "the remedying of a broad and general social or economic problem,"[173] it does not violate the Contracts Clause. Likewise, if the challenged law results in "the adjustment of the rights and responsibilities of the contracting parties [] based upon reasonable conditions and is of a character appropriate to the public

[165] U.S. Const. Art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); accord Colo. Const. Art. II, § 11 ("No . . . law impairing the obligation of contracts . . . shall be passed by the general assembly.).
[166] *Justus v. State*, 336 P.3d 202, 208 (Colo. 2014).
[167] *Sveen v. Melin*, 584 U.S. 811, 819 (2018) (citation omitted).
[168] *Id*.
[169] *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983) (citations omitted).
[170] *Id*. (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).
[171] *Sveen*, 584 U.S. at 819.
[172] *Id*. (citation omitted).
[173] *Energy Reserves Grp.*, 459 U.S. at 411-412.

purpose justifying the legislation's adoption," it passes Constitutional muster.[174] On the other hand, public concerns that were known at the time of contracting and did not change in kind (as opposed to degree) over the ensuing years are less likely to justify the later impact on the contract in question by a legislative change under the Contracts Clauses.[175] When determining whether legislation is necessary and reasonable, the State is entitled to deference in its legislative judgment as to the necessity and reasonableness of the legislation.[176]

### 1. Substantial Impairment

91. The ALJ concludes that CNG has not carried its burden of proving that the statute substantially impairs its contracts with the Towns of Alma and Watkins, and its CPCN for Pueblo County. CNG states that it would not have entered into the contracts, or applied for the CPCN, if § 40-3.2-104.3, C.R.S. had been on the books at the time.[177] As support, CNG repeats its claim that the statute eliminates its benefit of the bargain.[178] Yet, CNG offers no evidence supporting that conclusion. Indeed, there is no witness testimony or documentary evidence establishing that CNG would not have pursued the contracts or the CPCN if the prohibition on construction allowances contained in § 40-3.2-104.3, C.R.S. had existed at the time. Accordingly, CNG has not satisfied its burden of proving this "undisputed" fact.

92. Staff concedes that the statute impairs CNG's contract with the Town of Alma that requires CNG to provide customers with "meters of modern approved type upon the property of each consumer of gas"[179] because Section 40-3.2-104.3, C.R.S. prohibits CNG from

[174] *Id*.
[175] *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 29-32 (1977).
[176] *Id*. at 23-24.
[177] CNG's Reply Brief at 23 ("There is no dispute that CNG would not have entered into these contracts without being able to earn a return in exchange for making infrastructure investments and assuming operational obligations extending over decades.").
[178] *Id*. at 22 ("Intervenors ignore CNG's argument that the statute impairs the basic benefit of the bargain").
[179] Staff's Response Brief at 31 & Attach. E.

providing this benefit. However, Staff contends – and CNG does not dispute – that this impairment is not "substantial" for purposes of the Contracts Clause analysis.[180] Instead, CNG asserts that "[f]ocusing only on the cost of meters ignores the bigger picture" that the statute eliminates CNG's benefit of the bargain generally in entering into these contracts. By making broad statements unsupported by citations to the record, CNG has not carried its burden of proving that § 40-3.2-104.3, C.R.S. substantially impairs its contracts.

### 2. Means and Ends

93. Even if CNG had proven a substantial impairment of a contract, the ALJ would conclude that CNG has not satisfied its burden of proving that the passage of § 40-3.2-104.3, C.R.S. was an inappropriate or unreasonable means of advancing a significant and legitimate public purpose. The statute was enacted to help mitigate climate change, which is "a broad and general social or economic problem."[181] It is also narrowly tailored to accomplish that goal. Rather than banning new gas service and/or infrastructure altogether, the law simply eliminates incentives used by gas utilities to entice new customers. Given the widespread and increasing threat posed by climate change, the ALJ concludes that the statute is an "appropriate and reasonable way to advance [the statute's] significant and legitimate public purpose."[182]

94. CNG's argument that the statute was "not a reasonable measure" to address climate change because "the desire to transition to renewable energy has been discussed for decades" and climate change was already occurring when it signed the contract at issue is unavailing.[183] CNG cites *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 30-31 (1977), *United Steel Paper & Forestry Mfg. Allied Indus. & Serv. Workers Int'l Union v. Virgin Islands*, 842

[180] Staff's Response Brief at 31-32.
[181] *Energy Reserves Grp.*, 459 U.S. at 411-412.
[182] *Sveen*, 582 U.S. at 819.
[183] CNG's Opening Brief at 21.

F.3d 201, 213 (3d Cir. 2016) and *S. Cal. Gas v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003) in support of its argument. In each of those cases, the governmental entity that passed the challenged statute was a party to the contracts that were impaired by that statute.[184] Under those circumstances, the governmental entities were not entitled to the usual deference for their legislative acts because their "self-interest [was] at stake."[185] The governmental entities were thus required to establish that the problem that the challenged statute was designed to address was different in kind, not degree, from the problem that existed when the governmental entity entered into the contracts that were substantially impaired by the challenged statute.[186]

95. Here, in contrast, the State is not a party to the contracts, which were between CNG and the Towns of Alma and Watkins, or to the CPCN for Pueblo. As a result, the State of Colorado did not pass legislation that impaired a contract into which it had previously entered. For this reason, the holding of the cited cases is inapposite, and the General Assembly is entitled to deference to its legislative judgment to promulgate § 40-3.2-104.3, C.R.S. to mitigate the effects of climate change.

96. For the foregoing reasons, the ALJ concludes that CNG has not proven that interpreting § 40-3.2.-104.3 C.R.S. to prohibit construction allowances for distribution main extensions would violate the contracts clauses of the U.S. or Colorado Constitutions.

[184] *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. at 30-31 (state was "impairing the obligations of its own contracts"); *United Steel Paper & Forestry Mfg. Allied Indus. & Serv. Workers Int'l Union v. Virgin Islands*, 842 F.3d at 213 ("Government is not entitled to impair its contracts at will"); *S. Cal. Gas v. City of Santa Ana*, 336 F.3d at 894 ("Santa Ana has substantially impaired its own contract").

[185] *U.S. Trust Co. of N.Y.*, 431 U.S. at 26.

[186] *U.S. Tr. Co.*, 431 U.S. at 31-32 (societal changes of "degree and not of kind" did not justify a law that changed the terms of a contract with a state where the issues existed at the time of contracting); *United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union v. Virgin Islands*, 842 F.3d 201, 213 (3d Cir. 2016) ("[A]ny impairment must also be reasonable, and it is not a reasonable one if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred."); *S. Cal. Gas*, 336 F.3d at 89496 (9th Cir. 2003) (similar).

Accordingly, CNG has not carried its burden of establishing that the canon of constitutional doubt favors its interpretation of § 40-3.2-104.3, C.R.S.

### E. Meters and Service Regulators

97. In its Response Brief, Staff stated that CNG "did not revise Sheet R34 of its tariff, which provides in relevant part that, for new customers connecting to its system, the 'Company will furnish the appropriate meter and regulators to supply Applicant's requirements and install same along with meter piping.'"[187] Staff further asserted that "it is not clear . . . why CNG has not revised this part of its tariff" given the inclusion of "meters" and "other infrastructure associated with the addition of a new customer" in the statutory definition of "line extension allowances."[188] Based on the foregoing, Staff alleged that CNG "may be violating the statute by continuing to provide new customers with free meters and service regulators,"[189] and requested that "the Commission order CNG to (1) revise Tariff Sheet R34 to make it clear that new customers must pay for their own meters, regulators, and meter piping, and (2) explain why this revision was not made as part of its original Advice Letter filing."[190]

98. At the hearing, Mr. Marcum testified that CNG is not, and has not at any time relevant to this proceeding, provided meters or service regulators to customers for free.[191] Based on this testimony, Staff withdrew the request in its Response Brief quoted above.[192] Accordingly, Staff's request is denied as moot.

99. In accordance with § 40-6-109, C.R.S., the ALJ recommends the Commission enter the following order.

[187] Staff's Response Brief at 33.
[188] *Id*. at 34.
[189] *Id*. at 33 (initial caps deleted).
[190] *Id*. at 34.
[191] Hearing Transcript at 66:19-69:4.
[192] Staff's SOP at 15 n. 56.

## V. ORDER

### A. The Commission Orders That:

1. The Motion for an Adverse Inference, Sanctions, and Shortened Response Time filed by Trial Staff of the Commission on November 7, 2024 is denied as moot for the reasons stated on the record at the December 3, 2024 evidentiary hearing.

2. For the reasons stated above, the effective date of Tariff Sheet Nos. R35, R36, and R45 filed with Advice Letter No. 133 by Colorado Natural Gas, Inc. ("CNG") on May 24, 2024, is permanently suspended and shall not be further amended.

3. No later than five calendar days after this Recommended Decision becomes the Decision of the Commission, if that is the case, CNG shall file a new advice letter and modified Tariff Sheet Nos. R35, R36, and R45 on not less than two days' notice to place the compliance tariff sheets R35, R36, and R45 of P.U.C. No. 2 Gas Tariff into effect, consistent with the findings, discussion, and conclusions in this Decision. The advice letter and tariff shall be filed as a new advice letter proceeding and shall comply with all applicable Commission rules. In calculating the proposed effective date, the date the filing is received at the Commission is not included in the notice period and the entire notice period must expire prior to the effective date. The advice letter and tariffs must comply in all substantive respects to this Decision in order to be filed as a compliance filing on shortened notice.

4. Proceeding No. 23AL-0635G is closed.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be made available to all parties in the proceeding, 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.

6. 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.

7. Response time to any exceptions that may be filed is shortened to seven (7) days.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Rebecca E. White,
Director