

Decision No. R21-0281

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21A-0072SG

IN THE MATTER OF THE APPLICATION OF COLORADO NATURAL GAS, INC. FOR AN
ORDER AUTHORIZING A STOCK PLEDGE AND DEBT REFINANCE PURSUANT TO
SECTION 40-1-104 C.R.S. AND SECTION 40-5-105 C.R.S.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
GRANTING MOTION FOR LEAVE TO
WITHDRAW APPLICATION, VACATING
HEARING, AND CLOSING PROCEEDING**

Mailed Date: May 6, 2021

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I. STATEMENT**A. Background**

1. On February 9, 2021, Colorado Natural Gas, Inc. (CNG) filed an Application requesting authorization for its parent company, Summit LDC Holdings, LLC (Midco), to refinance and restructure three credit facilities, pursuant to §§ 40-1-104 and 40-5-105, C.R.S., and Rules 4002, 4104, and 4105 (Application).¹ In Proceeding No. 19A-0070SG, the Commission approved CNG's request for a corporate restructuring that resulted in Midco's creation as the direct parent of CNG, and Midco's subsequent pledge of CNG's capital stock as security for the three credit facilities that are the subject of the Application.²

2. On February 10, 2021, the Commission issued a notice of the Application, established a ten-day intervention period, and set a hearing for March 4, 2021 in accordance with the statutory requirements for expedited consideration of securities-related applications.

3. On February 19, 2021, Commission Trial Staff (Staff) timely filed a notice of intervention by right and request for hearing.

4. On March 3, 2021, the Commission issued Decision No. C21-0122-I that deemed the Application incomplete, vacated the hearing scheduled for March 4, 2021, and extended the deadline for a decision in this proceeding pursuant to Rule 4105(g) of the Commission's Rules Regulating Gas Utilities and § 40-1-104(5), C.R.S., and referred the proceeding to an Administrative Law Judge (ALJ).

¹ 4 *Code of Colorado Regulations* (CCR) 723-4 of the Commission's Rules Regulating Gas Utilities.

² Decision No. C19-0195 issued in Proceeding No. 19A-0070SG on February 22, 2019.

5. On March 4, 2021, the ALJ issued Decision No. R21-0127-I that scheduled a remote prehearing conference for March 17, 2021, and ordered the parties to confer regarding a procedural schedule and for CNG to file a report of the parties' conferral by March 12, 2021.

6. On March 12, 2021, CNG filed the report of the conferral by the parties, which resulted in a proposed schedule agreed to by the parties (Consensus Schedule).

7. On March 16, 2021, the ALJ issued Decision No. R21-0159-I that, among other things, established a prehearing schedule based on the Consensus Schedule, scheduled the hearing for May 18, 2021, and vacated the remote prehearing conference.

8. On March 26, 2021, the parties filed a Joint Motion for Partial Suspension of Procedural Schedule and Waiver of Response Time (Joint Motion). In the Joint Motion, the parties stated that they

have engaged in preliminary settlement discussions . . . and believe that negotiation may be the best way to explore and resolve the issues in this case with the minimum expenditure of time and resources. . . . The partial suspension of the procedural schedule will give the Parties time to seek a resolution of the issues in this proceeding and to reach a settlement, and if settlement is successful, afford the ALJ an opportunity to hear expert witness testimony about the settlement on May 18, 2021. . . . The Parties propose to report the progress of those settlement discussions to the ALJ on or before April 9, 2021. If settlement appears unlikely to succeed, the Parties' report will propose a procedural path forward so the case can still be adjudicated.³

9. On April 9, 2021, the parties filed the status report (Status Report) promised in the Joint Motion. In the Status Report, the parties stated that the settlement discussions remained

³ Joint Motion at 2-3 (¶¶ 7-9).

ongoing. Because the discussions had not yielded a settlement agreement, the parties proposed the following revised and expedited schedule:

<u>Event:</u>	<u>Date/Deadline:</u>
Direct Testimony	April 19, 2021
Answer Testimony	May 3, 2021
Rebuttal/Cross-Answer Testimony	May 13, 2021
Prehearing Motions Corrections to Testimony Settlement Agreements	May 15, 2021
Evidentiary Hearing	May 18, 2021
Statements of Position	May 28, 2021

The parties also proposed in the Status Report that response time to discovery be shortened to three business days.

10. On April 14, 2021, the ALJ issued Decision No. R21-0230-I that granted the Joint Motion and revised the procedural schedule consistent with the revised schedule proposed by the parties.

11. On April 15, 2021, the Office of Consumer Counsel (OCC) filed an Unopposed Motion for Late-Filed Intervention (Unopposed Motion).

12. On April 26, 2021, the ALJ issued Decision No. R21-0252-I that granted the OCC's Unopposed Motion, and CNG filed a Motion for Leave to Withdraw the Application Pursuant to Rule 1309(d) of the Commission's Rules of Practice and Procedure (Motion to Withdraw Application).

13. On April 27, 2021, the ALJ issued Decision No. R21-0254-I that shortened response time to the Motion to Withdraw Application until April 30, 2021.

14. On April 30, 2021, Staff filed its Response to the Motion to Withdraw Application (Staff's Response). The OCC did not file a response.

B. Motion to Withdraw Application

15. CNG states that it plans to file “in the near future” an application pursuant to §§ 40-1-104 and 40-5-105, C.R.S., and Rules 4002, 4104, and 4105 to seek financing for “extraordinary gas costs [incurred] during an extreme weather event of February 13-16, 2021.”⁴ Noting that Staff served its third set of discovery requests on CNG containing 20 questions, CNG suggests that the amount of Staff's attention paid to the Application is atypical for such applications.⁵ CNG concludes that it would be more efficient for it “to seek[s] approval of all financing needs in a single future proceeding.”⁶ Although not expressly stated, it appears that the “single future proceeding” would seek Commission approval of the refinancing and restructuring of the three credit facilities that are the subject of the current Application, and the additional financing that CNG alleges it requires “to pay gas suppliers for commodity costs associated with the February 2021 extreme weather event.”⁷

C. Staff's Response

16. Staff opposes the Motion to Withdraw Application because it claims it will be prejudiced if the motion is granted. Specifically, Staff states that it propounded a third set of discovery on CNG, but CNG refused to respond thereto, citing the filing of its Motion to Withdraw Application as justification for its nonresponse. The discovery sought information concerning: (a) the retirement of CNG's long-term debt; and (b) the ownership of CNG and its

⁴ Motion to Withdraw Application at 2 (¶¶ 5, 8).

⁵ *Id.* at 2 (¶ 6).

⁶ *Id.*

⁷ *Id.* at 2 (¶ 8).

parent company.⁸ Staff suspects that CNG withheld information from the Commission “both during and after CNG’s 2019 securities case” regarding both issues.⁹ Staff also questions whether the retirement of CNG’s long-term debt was in the public interest.¹⁰ Staff concludes that it will be prejudiced if the proceeding is dismissed without CNG being forced to respond to Staff’s outstanding discovery.¹¹

17. Staff asserts that efficiency would best be served if CNG amended the Application in this proceeding to seek the additional financing for the gas costs resulting from the February 2021 weather event, rather than withdrawing the current Application and filing a consolidated new application.¹² Staff thus suggests that the ALJ should force CNG to amend the Application to seek the additional financing referenced in the Motion to Withdraw Application. Staff does not propose a revised schedule that would accommodate such a revised Application.

18. Staff requests that the ALJ grant the Motion to Withdraw Application only if the following four conditions are met: (a) CNG responds to Staff’s third set of discovery requests “within a reasonable time and by a date certain;” (b) the OCC be allowed to propound discovery on CNG by May 5, 2021 and CNG respond thereto “within a reasonable time and by a date certain;” and (c) CNG file an affidavit “by a person authorized by CNG’s Board of Directors to speak on the Board’s behalf, representing to the Commission that:” (i) CNG has not engaged in any securities transactions without Commission approval required by § 40-1-104, C.R.S.; and (ii) CNG has not “sold, assigned or leased as any other property” without the Commission’s

⁸ Staff’s Response at 5-7 (¶¶ 12-15).

⁹ *Id.* at 6 (¶ 14).

¹⁰ *Id.*

¹¹ *Id.* at 7 (¶ 17).

¹² *Id.* at 7-8 (¶ 18).

authorization, as required by § 40-5-105, C.R.S.¹³ Staff also requests that the hearing scheduled for May 18, 2021 be converted into a conference at which Staff's proposed conditional granting of the Motion to Withdraw Application would be discussed.¹⁴

D. Analysis

19. Rule 1309(d) states:

A party may withdraw an application or petition upon notification to the Commission and all parties prior to 45 days before the first day of hearing. Thereafter, the party shall file a motion to obtain leave of the Commission to withdraw the application or petition. In ruling on such a motion, the Commission shall consider whether good cause for withdrawal is stated and whether other parties would be prejudiced by the withdrawal.¹⁵

Here, CNG filed the Motion to Withdraw Application within 45 days of the hearing. As a result, CNG must establish good cause to grant the Motion to Withdraw Application and that no other party will be prejudiced thereby.

20. The ALJ concludes that CNG has established good cause to grant the Motion to Withdraw Application. As noted above, CNG states that it plans to file a new application "in the near future" to seek financing to address allegedly higher than normal gas costs resulting from the February 2021 weather event, which occurred after CNG filed the Application in this proceeding. In that new application, CNG will "seek approval of all financing needs," which as noted presumably will include the refinancing and restructuring of the three credit facilities addressed in this Application. The proposed approach thus offers potential efficiencies by consolidating proceedings and thereby avoiding a piecemeal process for seeking the

¹³ *Id.* at 8 (¶ 19).

¹⁴ *Id.* at 9 (¶ 20).

¹⁵ 4 CCR 723-1.

Commission's approval pursuant to §§ 40-1-104, and 40-5-105, C.R.S., and Rules 4002, 4104, and 4105 (Application).¹⁶

21. Staff's argument that it would be more efficient for CNG to instead amend the current application to seek the additional financing it claims it needs as a result of the February 2021 weather event is unpersuasive. Staff has not proposed an amended schedule that would allow CNG to amend the Application to seek its alleged financing needs resulting from the February 2021 weather event. Further, it is not clear that CNG currently has precisely determined either those financing needs or the source of the financing that would satisfy § 40-1-104, C.R.S. As a result, there is no basis upon which the ALJ could establish a deadline by which CNG must file an amended application or establish a revised schedule in this proceeding. Under these circumstances, the ALJ concludes that it would be more efficient to grant the Motion to Withdraw Application, close the proceeding, and allow CNG to file a new comprehensive application that seeks approval of its financing needs when it is ready to do so.

22. Staff's assertion of prejudice is also unpersuasive. While CNG should not have unilaterally decided not to comply with the Commission's discovery rules, Staff can propound the same discovery in CNG's forthcoming new application proceeding. If that application proceeding does not materialize and CNG is not otherwise forthcoming with the information sought by Staff, Staff can pursue a show cause proceeding if it believes there is a basis therefor.¹⁷ As a result, there is an insufficient basis for the ALJ to conclude that Staff would be prejudiced by the granting of the Motion to Withdraw Application and dismissal of this proceeding.

¹⁶ 4 CCR 723-4.

¹⁷ Rule 1302(g), 4 CCR 723-1.

23. Accordingly, based on the foregoing, the ALJ recommends that the Motion to Withdraw Application be granted.

II. ORDER

A. The Commission Orders That:

1. For the reasons stated above, the Motion for Leave to Withdraw the Application Pursuant to Rule 1309(d) of the Commission's Rules of Practice and Procedure filed by Colorado Natural Gas, Inc. on April 26, 2021 is granted.

2. The hearing scheduled for May 18, 2021 is vacated.

3. Proceeding No. 21A-0072SG is closed.

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

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

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion within 20 days after service, 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.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director