

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0153SG

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 APPLICATION WITH CONDITION
AND CLOSING PROCEEDING**

Mailed Date: October 10, 2022

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A. The Commission Orders That:20

I. STATEMENT

A. Procedural Background

1. On April 4, 2022, Colorado Natural Gas, Inc. (CNG) filed a Verified Application (Application) seeking an order from the Commission authorizing the pledge of CNG’s capital stock as security for financing obtained by CNG’s parent company, Summit LDC Holdings, LLC (MidCo). CNG sought approval of the Application pursuant to §§ 40-1-104, 40-1-105, C.R.S. and Rule 4104(b)(IV) of the Rules Regulating Gas Utilities and Pipeline Operators (Gas Rules).¹ In the Application, CNG proposed to allow MidCo to “transition certain portions of its revolving debt into a fixed loan and expand its revolving credit facility”² and “refinance[e] some of the existing credit facilities at revised rates.”³ MidCo’s existing revolving credit facility was due to mature on May 8, 2022, and CNG requested that “to the extent final Commission approval of this Application is not achieved in advance of that date, that the Commission approve a conditional extension of that revolving credit facility until such time as this application is administratively final.”⁴ With the Application, CNG filed the direct testimony of Steven E. Birchfield.

2. Also on April 4, 2022, the Commission issued a Notice of Application Filed (Notice). The Notice set a remote hearing for this proceeding for April 28, 2022.

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

² Application at 4 (¶ 21).

³ Hearing Exhibit 100 at 7:3-4 (Direct Testimony of Steven E. Birchfield).

⁴ *Id.* at 4-5 (¶ 22).

3. On April 14, 2022, the Office of the Utility Consumer Advocate (UCA) and Commission Trial Staff (Staff) filed notices of intervention by right.

4. On April 27, 2022, the Commission issued Decision No. C22-0257-I that vacated the hearing set for April 28, 2022, finding “good cause to extend the deadline for a decision on the Application beyond the 30 days specified in Rule 4105(g) and § 40-1-104(5), C.R.S.”⁵ The Commission also referred the proceeding to an Administrative Law Judge (ALJ) “on an expedited basis.”⁶ The proceeding was subsequently assigned to the undersigned ALJ.

5. On April 29, 2022, the Application was deemed complete pursuant to Rule 1303(c)(IV) of the Commission’s Rules of Practice and Procedure.⁷

6. On May 24, 2022, CNG filed a Request to Set a Procedural Schedule (Request) in which it proposed the following procedural schedule:

<u>Event</u>	<u>Deadline</u>
Answer Testimony	June 1, 2022
Rebuttal Testimony	June 15, 2022
Corrections to Pre-Filed Testimony Prehearing Motions	June 20, 2022
Hearing	June 23, 2022
Statements of Position	July 1, 2022

In the Request, CNG stated that it had conferred with UCA regarding a procedural schedule, but not with Staff. CNG did not state whether UCA agreed with the procedural schedule proposed by CNG in the Request.

⁵ Decision No. C22-0257-I at 4 (¶ 12).

⁶ *Id.* at 4 (Ordering ¶ 1).

⁷ 4 *Code of Code Regulations* 723-1.

7. On May 25, 2022, the ALJ sent an email to counsel for all parties requesting “Staff and UCA respond to this email (copying all of the other recipients of this email) as soon as reasonably possible, and in no event later than tomorrow at 5:00 p.m., informing [the ALJ] whether the schedule proposed in the Request works for counsel and their witness(es).” On May 26, 2022, the ALJ sent a follow-up email to all counsel for the parties requesting that they “specify in an email sent by 5:00 p.m. today whether the party prefers an in-person, remote, or hybrid hearing, or has no preference.”

8. Later on May 25, 2022, the parties responded by email to the two questions posed by the ALJ. Staff’s email was lengthy. UCA stated that it “could make the schedule proposed by CNG work,” but Staff objected to the expedited schedule because, among other reasons, Staff believed that CNG should be forced to file Supplemental Direct Testimony and then Staff should be permitted adequate time to conduct discovery on that Supplemental Direct Testimony before filing answer testimony. UCA stated that it “takes no position at this time regarding the reasons CNG advances for [its proposed expedited] schedule or the reasons Staff gives for opposing the schedule.” As to the method of conducting the hearing, CNG preferred a remote hearing, UCA had no preference between a remote or a hybrid hearing, and Staff preferred an in-person or hybrid hearing.

9. On May 27, 2022, the ALJ issued Decision No. R22-0333-I that scheduled a remote prehearing conference for June 2, 2022 at 1:30 p.m., required the parties to confer regarding a procedural schedule, and ordered CNG to file a report of the conferral by June 1, 2022 at 12:00 p.m. (Report).

10. On June 1, 2022, CNG filed the Report in which CNG reported that the parties had agreed to the following schedule for this proceeding (Consensus Schedule):

<u>Event</u>	<u>Deadline</u>
Supplemental Direct Testimony	June 15, 2022
Answer Testimony	July 13, 2022
Rebuttal/Cross Answer Testimony	July 27, 2022
Hearing	August 4, 2022
Statements of Position	Two (2) weeks after receipt of hearing transcript

The parties also agreed to “to shorten discovery turnaround to five (5) business days on the Company’s Direct and Supplemental Direct, five (5) business days on the Answer Testimony and three (3) business days on Rebuttal and Cross-Answer.”⁸

11. On June 1, 2022, the ALJ issued Decision No. R22-0338-I that accepted the Consensus Schedule as the schedule for the proceeding, scheduled the hybrid evidentiary hearing, and vacated the remote prehearing conference.

12. Pursuant to the schedule, CNG filed the Supplemental Direct Testimony of Mr. Birchfield on June 15, 2022, Staff and UCA filed the answer testimony of Fiona Sigalla and Ronald Fernandez, respectively, on July 13, 2022, and CNG filed the rebuttal testimony of Mr. Birchfield on July 27, 2022.

13. On August 2, 2022, two days before the scheduled hearing, CNG filed a Motion for Summary Judgment.

14. On August 4, 2022, the hybrid hearing took place. Hearing Exhibits 202C, 204, 205, 301, 302, and 400 (including the exhibits listed therein) were admitted into the evidentiary record. At the close of the hearing, the ALJ closed the evidentiary record and advised the parties that a Recommended Decision would issue after the Commission’s receipt of the parties’ Statements of Positions (SOPs).

⁸ Report at 2.

15. On August 23, 2022, CNG, Staff, and UCA each filed an SOP.

B. Corporate and Financial Background

16. The Commission granted CNG a Certificate of Public Convenience and Necessity to provide natural gas service in certain areas of Colorado in 1997.⁹ In 2004, CNG became a wholly owned subsidiary of CNG Holdings, Inc. (CNG Holdings), which the Commission approved in 2005.¹⁰ In that proceeding, the Commission approved a settlement agreement that authorized CNG to move all of its shareholders' equity to CNG Holdings in exchange for several obligations imposed on CNG.¹¹ At some point thereafter, CNG Holdings' name changed to Summit Utilities, Inc. (Summit). In 2019, the Commission approved both the formation of MidCo as a subsidiary of Summit and the new holding company of CNG and the pledge of CNG's stock to MidCo to be used as collateral for debt.¹² In so doing, the Commission did not transfer to, or otherwise impose on, MidCo the obligations on CNG Holdings imposed by the Commission in Proceeding No. 05A-225G in approving the creation of CNG Holdings as the holding company of CNG and the pledge of CNG's equity to CNG Holdings.¹³

17. MidCo is not regulated by the Commission or any other state public utilities commission. Two out of the three direct subsidiaries of MidCo are regulated public utilities (CNG and Summit Natural Gas of Missouri, Inc.). The one remaining direct subsidiary – A.O.G. Corporation – is not regulated, but is the parent of Arkansas Oklahoma Gas Corporation, which is regulated.¹⁴ Summit has three other regulated public utilities that are not subsidiaries of

⁹ See Decision No. C97-223 issued in Proceeding No. 96A-107G on March 6, 1997.

¹⁰ Decision No. R05-1109 issued in Proceeding No. 05A-225G on September 14, 2005. See also Hearing Exhibit 200 at 11:4-6 (Answer Testimony of Ms. Sigalla)

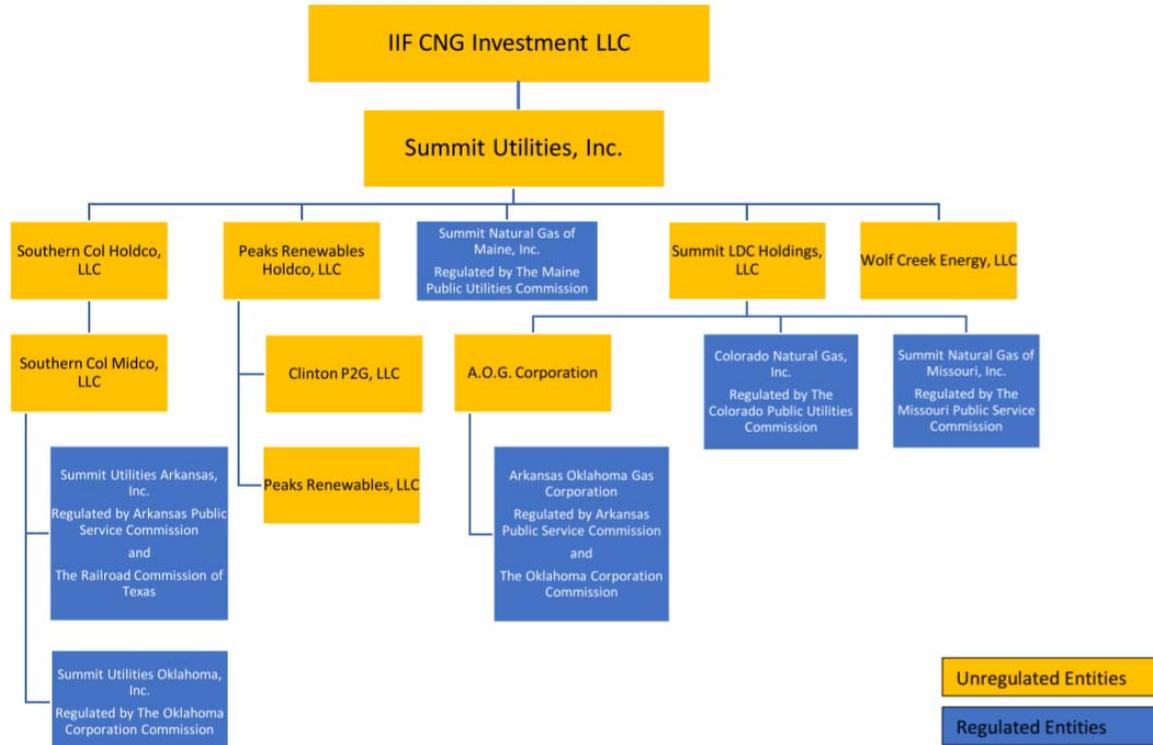
¹¹ *Id.* at 4-5 (¶¶ 13(a)-(i)).

¹² Decision No. C19-0195 issued in Proceeding No. 19A-0070SG on February 22, 2019.

¹³ Hearing Exhibit 200 at 22:15-25:10 (Answer Testimony of Ms. Sigalla).

¹⁴ Hearing Exhibit 200, Attach. FDS-6 at 2 (Direct Testimony of Mr. Birchfield).

MidCo – Summit Natural Gas of Maine, Inc., Summit Utilities Arkansas, Inc., and Summit Utilities Oklahoma, Inc. The following is the Summit corporate organizational chart:¹⁵



18. After the Commission’s 2019 approval of the creation of MidCo as, among other things, CNG’s parent, and CNG’s pledge of its stock to MidCo, MidCo extinguished CNG’s debt with an equity infusion.¹⁶ As a result, CNG’s capital structure is 100 percent equity, with no debt financing CNG’s operations,¹⁷ notwithstanding that CNG’s current Commission-approved capital structure for ratemaking purposes is 57.08 percent debt and 42.92 percent equity.¹⁸ The cost of the early retirement of CNG’s debt was \$8 million.¹⁹

¹⁵ *Id.*

¹⁶ Hearing Exhibit 102 at 14:4-22 (Rebuttal Testimony of Mr. Birchfield).

¹⁷ *Id.* at 5:24-6:4; Hearing Transcript at 26:12-14.

¹⁸ Decision No. R18-0972 issued in Proceeding No. 18AL-0305G on November 1, 2018 at 4 (¶ 16).

¹⁹ Hearing Exhibit 102 at 14:15-22 (Rebuttal Testimony of Mr. Birchfield).

II. PARTIES' POSITIONS

A. CNG

19. As noted above, CNG seeks authorization from the Commission for MidCo to “transition certain portions of its revolving debt into a fixed loan and expand its revolving credit facility.”²⁰ According to CNG, fixing a portion of its revolving debt and expanding the remainder of the revolving credit facility “provides stability to [CNG]’s overall cost of debt, and therefore [CNG]s overall cost of capital which directly impacts customer rates, during periods of inflation and rising interest rate environments.”²¹ CNG further stated in the Application that “[t]here would be no new allocation of debt to [CNG] as a result of the financing,” and “[a]ny funds contributed by [MidCo] to [CNG] in the near term would likely be in the form of equity.”²² Finally, CNG stated that: (a) it “would not pledge any of its utility plant in support of [MidCo]’s proposed financing;” (b) “[t]here would be no change in [CNG]’s operations or personnel resulting from the refinancing;” and (c) “[t]he refinancing will not in any way diminish the Commission’s ability to establish an appropriate capital structure in the Company’s next rate case.”²³

20. As to MidCo issuing the debt and not CNG itself, CNG stated: “the overall cost of debt at MidCo is consistent or lower than the cost of debt that the Company could achieve if it were issuing debt on its own behalf . . . due to economies of scale provided by MidCo because of its ability to access various capital markets that individual regulated operating companies would not be able to access on their own behalf and issue larger debt obligations with more favorable

²⁰ Application at 4 (¶ 21).

²¹ Hearing Exhibit 100 at 7:6-8 (Direct Testimony of Mr. Birchfield).

²² Application at 5 (¶ 23).

²³ *Id.* at 5 (¶ 24).

pricing and covenant packages by prospective lenders.”²⁴ CNG also said that, on balance, the transaction sought by CNG is a net positive for ratepayers. According to CNG, the terms and conditions of the new debt facilities would be similar to those of existing debt, no utility plant facilities would be pledged in support of the proposed financing, and “the refinancing will not, in any way, diminish the Commission’s ability to establish an appropriate capital structure in the Company’s next rate case.”²⁵

B. Intervenors

1. Staff

21. Staff requests the Commission to take four actions in this proceeding. First, Staff requests that the Commission issue an order on its own motion, pursuant to Rule 1302(g), “to show cause why CNG’s rates should not be found unjust or unreasonable considering the significant changes in ownership, capital structure, and debt that were modified without Commission authority to do so.”²⁶ As support for this request, Staff asserts that “Summit, MidCo, and CNG have entered into several financial transactions that are opaque at best. For example, Staff believes that in Proceeding No. 19A-0070SG, some or all of CNG’s capital stock was pledged for a debt issuance that might have been used by one of MidCo’s other subsidiaries.”²⁷ According to Staff, this “may have been cross-subsidization,”²⁸ which echoes

²⁴ Hearing Exhibit 100 at 7:9-12 (Direct Testimony of Mr. Birchfield).

²⁵ *Id.* at 9:17-19.

²⁶ *Id.* at 13-14.

²⁷ Staff’s SOP at 10.

²⁸ *Id.*

another charge of cross-subsidization resulting from CNG's allegedly recently commenced practice of issuing dividends.²⁹ However, Staff goes on to state that "it is not stating that it knows for sure if such irregularities or unreasonable decisions took place. Instead, Staff states that there is enough evidence of such irregularities or unreasonable decisions to justify further investigation through a show cause order."³⁰

22. Second, Staff requests that CNG be ordered to file a new Cost Assignment and Allocation Manual (CAAM).³¹ As justification, Staff states that "[i]t does not appear that CNG has filed [an updated CAAM] since the corporate reorganization that occurred following the last rate case."³² CNG's filed its last rate case in 2018 and the decision terminating that proceeding issued on November 1, 2018.³³ The "corporate reorganization" to which Staff refers is the Commission-approved creation of MidCo as the new holding company of CNG in 2019. Staff states that an up-to-date CAAM helps to prevent cross-subsidization by CNG of its unregulated affiliates. Because CNG filed the current CAAM before the corporate reorganization that led to the creation of MidCo and the placement of CNG under MidCo with other subsidiaries of

²⁹ Hearing Exhibit 200 at 44:17-48:4 (Answer Testimony of Ms. Sigalla) (stating that MidCo's practice of assigning its debt to its subsidiaries based on "'the combination of the net assets at each utility, as well as the earnings and cash flow generated by each utility'. . . could result in CNG paying larger dividends to service debt used to finance operations at another utility—possibly even an unregulated entity") (quoting Hearing Exhibit 100 at 7:20-23 (Direct Testimony of Mr. Birchfield)).

³⁰ *Id.* at 10-11.

³¹ The Gas Rules define a CAAM as: "the indexed document filed by a utility with the Commission that describes and explains the cost assignment and allocation methods the utility uses to segregate and account for revenues, expenses, assets, liabilities, and rate base cost components assigned or allocated to Colorado jurisdictional activities. It includes the cost assignment and allocation methods to segregate and account for costs between and among jurisdictions, between regulated and non-regulated activities, and between and among utility divisions." Rule 4501(d), 4 CCR 723-4.

³² Hearing Exhibit 200 at 55:6-8 (Answer Testimony of Ms. Sigalla).

³³ Decision No. R18-0972 issued in Proceeding No. 18AL-0305G.

MidCo, Staff contends that a new CAAM is necessary to mitigate the risk of cross-subsidization.³⁴

23. Third, Staff requests that CNG be required to: (a) file annual financial statements with workpapers for CNG, MidCo, and Summit; (b) file quarterly financial updates, like what is provided to the SEC in Form 10-Q filings; and (c) report to the Commission any material events, like what is required by the SEC in Form 8-K filings.³⁵ These filings and reports will provide the Commission with more insight into CNG, MidCo, and the broader corporate family and “ensure that no cross-subsidies will occur among or between subsidiaries of MidCo.”³⁶

24. Fourth, Staff requests that CNG be forced to adopt the obligations that it agreed to in Proceeding No. 05-225G in which it sought the Commission’s approval to pledge CNG’s equity to CNG Holdings and make CNG Holdings a holding company of CNG.³⁷ Specifically, in Proceeding No. 05-225G, CNG agreed: (a) that no cross-subsidies would occur among or between subsidiaries of CNG Holdings, Inc., after the date stock was transferred; and (b) to hold Colorado ratepayers harmless from any increased capital costs or operating expenses because of CNG Holdings activities and agree to bear the burden of proof in any proceeding where such subject is at issue. For its part, CNG Holdings agreed: (a) to maintain data, allocate corporate costs, and make available to Staff the books, records, employees and officers of CNG Holdings; (b) not to, either directly or indirectly, allow any debt of CNG Holdings or any of its affiliate or

³⁴ See Transcript at 34:24-36:7, 67:4-23; Staff’s SOP at 10.

³⁵ Staff’s SOP at 14.

³⁶ Hearing Exhibit 200 at 57:16-17 (Answer Testimony of Ms. Sigalla).

³⁷ Staff’s SOP at

subsidiary companies to be recourse to CNG, nor pledge CNG equity as collateral or securities for the debt of CNG Holdings, or any of CNG Holding's affiliate or subsidiary companies, without prior Commission approval; (c) not to transfer to CNG Holdings or any affiliate or subsidiary companies, directly or indirectly, assets necessary and useful in providing service to CNG ratepayers, without prior Commission approval; (d) not to, either directly or indirectly, through an affiliate or subsidiary, expand its activities with respect to the operation of an energy marketing and trading business, without approval from the Commission; and (g) to subject itself to audit by Staff of all books, records, employees, and officers of CNG Holdings and any affiliate, division, or subsidiary of CNG Holdings that engages in transactions with CNG.³⁸ Staff concludes that "it is important that the Commission add guardrails to CNG's financial relationship with its parent and reporting requirements that will strengthen Commission oversight."³⁹

2. UCA

25. UCA supports approval of the Application, but only with three "ratepayer protections." First, UCA asserts that the approval should be conditioned on "CNG continuing to use a 55 percent debt to 45 percent equity target for its regulatory capital structure."⁴⁰ UCA explains that CNG's current authorized capital structure for ratemaking purposes is 57.08 percent debt to 42.92 percent equity⁴¹ and CNG has committed in its last two rate cases to move toward a capital structure for ratemaking purposes of 55 percent debt and 45

³⁸ Decision No. R05-1109 issued in Proceeding No. 05A-225G on September 14, 2005 at 4-5 (¶¶ 13(b)-(i)).

³⁹ Hearing Exhibit 200 at 8:1-3 (Answer Testimony of Ms. Sigalla).

⁴⁰ UCA's SOP at 3.

⁴¹ Decision No. R18-0972 issued in Proceeding No. 18AL-0305G on November 1, 2018 at 4 (¶ 14).

per equity.⁴² However, UCA notes that CNG is now financed with 100 percent equity, and the current capital structure of MidCo is “significantly different” from CNG’s target regulatory capital structure.⁴³ According to UCA, “CNG has indicated that it may propose the MidCo capital structure in its next rate case.”⁴⁴ UCA contends, however, that CNG’s target capital structure is more appropriate than MidCo’s current capital structure because “among other reasons . . . MidCo finances several Summit subsidiaries in other states.”⁴⁵ Conditioning approval of the application on UCA’s continued commitment to move toward the target capital structure for ratemaking purposes is necessary “[t]o ensure CNG’s ratepayers are protected from the effects of the Summit reorganization and Summit’s needs with respect to the financing of the other, non-Colorado MidCo subsidiaries.”⁴⁶

26. Second, UCA argues that the approval of the Application “should include language . . . protect[ing] ratepayers from any potential increase in debt costs due to the Summit reorganization.”⁴⁷ As justification, UCA states notes that CNG has stated in this proceeding granting the Application will lower debt costs and that CNG ratepayers “are not negatively impacted” by Summit issuing debt at the MidCo level.⁴⁸ As a result, UCA asserts that the Commission should require the authorized debt costs in CNG’s next rate case to be “the lower of

⁴² UCA’s SOP at 3-4.

⁴³ *Id.* at 3.

⁴⁴ Hearing Exhibit 300 at 5:17-18 (Answer Testimony of Mr. Fernandez).

⁴⁵ *Id.* at 4. *See also* Hearing Exhibit 200 at 38:15-39:8 (Answer Testimony of Ms. Sigalla) (stating that “[c]ommon equity is more expensive than long-term debt. . . . [As a result], [a] capital structure that is heavy in common stock will result in higher costs to CNG’s customers.”).

⁴⁶ Hearing Exhibit 300 at 5:17-18 (Answer Testimony of Mr. Fernandez).

⁴⁷ UCA’s SOP at 4 (footnote omitted).

⁴⁸ *Id.* (citing Hearing Exhibit 100 at 8:19-9:6 (Direct Testimony of Mr. Birchfield)).

(i) the MidCo debt costs at the end of the relevant test period or (ii) CNG's current authorized debt cost of 5.51%, which was based on the cost of the debt that was retired early in 2019."⁴⁹

27. Finally, UCA requests that the Commission "bar CNG from recovering any costs of its 2019 early debt termination in any future rate case."⁵⁰ As support, UCA states that CNG has committed unequivocally not to collect these costs from ratepayers.⁵¹

C. CNG's Response to Issues Raised by Intervenors

28. In its Rebuttal Testimony and again at the hearing, CNG committed to not seeking recovery of the \$8 million in costs of the early retirement of CNG's debt from ratepayers.⁵² CNG also committed to work "toward a capital structure more in line with the structure agreed to in the last base rate case."⁵³ As noted above, the capital structure agreed to for ratemaking purposes in the settlement agreement in the last rate case and approved by the Commission is 57.08 percent debt and 42.92 percent equity.⁵⁴

29. Otherwise, CNG states that issues raised by Staff and UCA are outside the scope of this proceeding (e.g., CNG's capital structure, Summit's corporate structure, including the inclusion of an unregulated entity under MidCo, and CNG's dividend practices)⁵⁵ and speculative (e.g., cross-subsidization, use of the "benefits-for-loss basis" to allocate deferred income taxes in a way that benefits Summit entities at the expense of CNG, Summit's parent companies).⁵⁶ CNG further argues that Staff's and UCA's positions represent prohibited collateral attacks on prior

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² CNG's SOP at 2.

⁵³ *Id.*

⁵⁴ Decision No. R18-0972 issued in Proceeding No. 18AL-0305G on November 1, 2018 at 4 (¶ 16).

⁵⁵ CNG's SOP at 7-8.

⁵⁶ *Id.* at 8-9.

Commission decisions (e.g., Proceeding Nos. 19A-0070SG, 18AL-0305G).⁵⁷ CNG concludes that the positions taken by Staff and UCA “fly in the face” of established law that utilities should generally be left to manage their capital financing during the interim between rate cases “unless there is a substantial showing that rate payers are being prejudiced materially by managerial options in the area of capital financing.”⁵⁸ CNG concludes that no such evidence has been presented in this proceeding. For this reason, CNG requests that the Application be granted.

III. ANALYSIS

A. Application

1. Elements

30. Pursuant to § 40-1-104, C.R.S., any public utility deriving more than 5 percent of its gross revenues in Colorado that desires to issue or assume securities must seek permission from the Commission, and such permission cannot be withheld unless “the commission finds that such transactions are inconsistent with the public interest or that the purpose thereof is not permitted or is inconsistent with the provisions of this section.”⁵⁹ In addition, under § 40-5-105, C.R.S., the assets of any public utility, including any certificate of public convenience and necessity, may be sold, assigned, or leased only upon authorization of the Commission.

31. Rule 4104(b)(IV) of the Gas Rules requires that the applicant seeking Commission approval for such a transaction of a gas utility must provide “all facts showing that the transaction which is the subject of the application is not contrary to the public interest.”⁶⁰ Rule 4104(b)(V) requires that the applicant include “an evaluation of the benefits and detriments

⁵⁷ *Id.* at 10-11.

⁵⁸ *Id.* at 11-12 (quoting *Mountain States Tel. & Tel. Co. v. Public Utilities Com.*, 513 P.2d 721, 727 (Colo. 1973)).

⁵⁹ § 40-1-104(3), C.R.S.

⁶⁰ 4 CCR 723-4

to the customers of each party and to all other persons who will be affected by the transaction which is the subject of the application.”⁶¹

2. Burden of Proof

32. CNG bears the burden of proving the elements noted above by a preponderance of the evidence in this proceeding.⁶² 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.”⁶³ A party has satisfied its burden under this standard when the evidence, on the whole, tips in favor of that party.

3. Findings and Conclusions

33. The ALJ concludes that there is insufficient evidence in this record upon which to conclude that granting the Application is inconsistent with the public interest or otherwise inconsistent with the provisions or purpose of §§ 40-1-104, 40-4-105, or Rule 4104(b)(IV) of the Gas Rules.⁶⁴ The Application seeks permission to repledge the same capital stock as security for debt acquired by MidCo that the Commission previously approved to be pledged for the same purpose in Decision No. C19-0195. As a result of that prior decision, MidCo entered into three credit facilities: a fixed rate loan, a floating-rate loan, and a revolving credit facility.⁶⁵ MidCo now seeks to “refinance[e] some of the existing credit facilities at revised interest rates” and

⁶¹ *Id.*

⁶² 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.

⁶³ *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)).

⁶⁴ 4 CCR 723-4.

⁶⁵ Hearing Exhibit 100 at 6: 18-21 (Direct Testimony of Mr. Birchfield).

“transition certain portions of its [existing] revolving debt into a fixed loan and expand its revolving credit facility.”⁶⁶ MidCo may “[c]onvert[] a portion of [its] floating rate debt into fixed rate debt,” which would provide “stability to the [] overall cost of debt, and therefore [CNG’s] overall cost of capital [that] directly impacts customer rates, during periods of inflation and rising interest rate environments.”⁶⁷

34. The ALJ finds and concludes that the concerns raised by Staff are too speculative to form the basis for the rejection of the Application or for any of the relief requested by Staff. In fact, Staff concedes it has no evidence establishing that the alleged “irregularities and unreasonable decisions [that form the basis for its opposition] took place.”⁶⁸ Elsewhere, Staff has argued that approval of the Application “could” limit the capital structure going forward. But any change to CNG’s capital structure will occur, if at all, at CNG’s next rate case, the timing and circumstances of which are unknown. Even if CNG argued in that future rate case that approval of this Application supports a material change to its capital structure for ratemaking, Staff is free to argue against CNG’s position given the then-current circumstances in which CNG and its ratepayers find themselves.

35. The ALJ also finds and concludes that the granting of the Application without the first two ratepayer protections requested by UCA would not be inconsistent with the public interest. It is unclear how much protection UCA’s first proposed ratepayer protection would actually provide to ratepayers. Specifically, UCA’s proposal to require CNG to continue to use a 55 percent debt to 45 percent equity “target” for its regulatory capital structure is just that – a non-obligatory “target.” The consequences of CNG not hitting that target are unclear. Further,

⁶⁶ *Id.* at 7: 3-5.

⁶⁷ *Id.* at 7:5-8.

⁶⁸ Staff’s SOP at 10.

CNG's authorized capital structure for ratemaking purposes will continue to be 57.08 percent debt to 42.92 percent equity until CNG's next rate case.⁶⁹ Finally, UCA can argue in CNG's next rate case that CNG's appropriate capital structure continues to be 55 percent debt and 45 percent equity. As a result, UCA has not established that it would be inconsistent with the public interest not to include its first proposed ratepayer protection.

36. Similarly, UCA has not established that the granting of the Application without its second ratepayer protection – requiring the authorized debt costs in CNG's next rate case to be “the lower of (i) the MidCo debt costs at the end of the relevant test period or (ii) CNG's current authorized debt cost of 5.51%, which was based on the cost of the debt that was retired early in 2019”⁷⁰ – would be inconsistent with the public interest. In fact, adopting UCA's proposal would inappropriately prejudge the question of CNG's authorized debt costs that will be decided in CNG's next rate case. Such a decision would purport to bind the Commission in a future decision on a significant issue that will be decided based on the facts and circumstances at that time. The undersigned ALJ will not render such a decision in this proceeding, particularly given that UCA is free to advocate in that future rate case for the debt costs used to determine CNG's rates under the circumstances that exist at that time.

37. The final ratepayer protection requested by UCA – barring recovery from ratepayers of the costs of the early extinguishment of CNG's debt in 2019 – shall be granted. UCA correctly points out that at the hearing CNG committed to foregoing the recovery of these costs from ratepayers.⁷¹ Accordingly, CNG shall be barred from recovering those costs from ratepayers.

⁶⁹ Decision No. R18-0972 issued in Proceeding No. 18AL-0305G on November 1, 2018 at 4 (¶ 14).

⁷⁰ *Id.*

⁷¹ Hearing Transcript at 66:11-22.

38. As the Commission stated in Decision No. C19-0195, approval of this Application is narrow and limited to the relief sought therein. While granting the Application could have an impact in the future on CNG's rates, that question is not currently before the Commission in this proceeding. Similarly, the granting of the Application relieves CNG from no burdens in its future rate cases regarding a showing that the Company's cost of capital is just and reasonable.

39. To be sure, there are legitimate questions raised by the use of unregulated holding companies that have both regulated and unregulated subsidiaries. On the one hand, CNG is correct that such a corporate structure should – in theory – allow both the regulated and unregulated subsidiaries to obtain lower cost debt. On the other hand, Staff's concern that such a corporate structure decreases transparency and increases the risks of cross-subsidization are legitimate. Staff is also correct that any such cross-subsidization would be difficult to uncover due to the unregulated status of the parent holding company and its unregulated subsidiaries. For these reasons, Staff is correct that there is at least an increased theoretical incentive caused by the increased opacity of such a corporate structure for corporate leadership to cross-subsidize. This theoretical risk is amplified where, as here, the unregulated entities are privately-held and thus do not have the reporting requirements of publicly-held companies.

40. CNG did not present evidence of actual debt cost savings resulting from employing MidCo to obtain debt for its subsidiaries. For example, CNG has not presented evidence showing the debt terms available to MidCo compared to the debt terms available to CNG at the same point in time. Thus, the Commission has not received evidence of actual cost savings resulting from the use of MidCo as a holding company of regulated and unregulated subsidiaries that might provide important context to better assess the increased risk of cross-subsidization noted above.

41. Similarly, CNG did not propose any reporting in response to Staff's reporting proposal that is designed to improve transparency and decrease the risk of corporate leadership succumbing to the theoretically increased incentive to cross-subsidize inherent in the MidCo-type of corporate structure. While the ALJ finds and concludes that Staff has not presented sufficient evidence justifying its requested reporting, it may be wise for CNG and any other regulated utility with a similar corporate structure to present evidence in a future proceeding establishing that ratepayers are actually obtaining benefits, and are not being saddled with inappropriate costs, resulting from the same or similar MidCo-type of corporate structure.

42. In accordance with the foregoing, the ALJ finds and concludes that CNG has carried its burden of establishing that the Application should be granted pursuant to §§ 40-1-104, 40-1-105, C.R.S., and Rule 4104(b)(IV) of the Gas Rules.⁷²

B. Motion for Summary Judgment

43. Based on the foregoing, the Motion for Summary Judgment is denied as moot.

C. Recommended Decision

44. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following Order.

IV. ORDER

A. The Commission Orders That:

1. For the reasons stated above, the Verified Application seeking an order from the Commission authorizing the pledge of Colorado Natural Gas, Inc.'s (CNG) capital stock as security for financing obtained by CNG's parent company, Summit LDC Holdings, LLC filed by Colorado Natural Gas on April 4, 2022 is granted.

⁷² 4 CCR 723-4.

2. The Motion for Summary Judgment filed by CNG on August 2, 2022, is denied as moot.

3. CNG is barred from recovering from ratepayers the costs of the early extinguishment of certain of CNG's debt in 2019, as described above.

4. Proceeding No. 22A-0153SG is closed.

5. 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.

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

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the Recommended Decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director