

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

PROCEEDING NO. 22AL-0426G

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IN THE MATTER OF ADVICE LETTER NO. 126 FILED BY ROCKY MOUNTAIN  
NATURAL GAS LLC D/B/A BLACK HILLS ENERGY TO INCREASE ITS BASE RATES  
FOR ALL NATURAL GAS SERVICES.

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**INTERIM DECISION OF  
ADMINISTRATIVE LAW JUDGE  
ALENKA HAN,  
GRANTING PERMISSIVE INTERVENTION  
AND DENYING MOTION TO DENY  
INTERVENTION OF RIGHT**

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Mailed Date: December 19, 2022

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**I. STATEMENT**

**A. Procedural Background**

1. On October 7, 2022, Rocky Mountain Natural Gas LLC, doing business as Black Hills Energy (RMNG), filed Advice Letter No. 126 (Advice Letter) with the Public Utilities

Commission (PUC or Commission) indicating its intent to increase its base rate by 39.1percent, to become effective November 7, 2022.<sup>1</sup>

2. On October 17, 2022, the Colorado Office of the Utility Consumer Advocate (UCA) filed a Protest to RMNG’s Advice Letter, raising nineteen identified issues concerning RMNG’s Advice Letter.<sup>2</sup>

3. On November 3, 2022, in Decision No. C22-0684, the Commission suspended the effective date of RMNG’s Advice Letter until March 7, 2023. The order set a notice period within which interventions could be filed in this Proceeding, which expired December 3, 2022. The Commission also referred the matter to an Administrative Law Judge (ALJ) for disposition.

4. UCA filed its timely Notice of Intervention as a Matter of Right on November 16, 2022. Commission Staff filed a Notice of Intervention of Right on November 21, 2022. A M Gas Transfer Corporation (AM Gas) filed a Motion for permissive intervention in the Proceeding on November 28, 2022. The Commission has not received any other interventions.

**B. RMNG’s Motion to Deny UCA’s Intervention of Right**

5. On November 23, 2022, RMNG moved to “deny” UCA’s intervention as a matter of right.

6. Because UCA timely intervened as of right, UCA is a party to this Proceeding unless its intervention is stricken. *See* Rule 1401(b) of the Commission’s Rules of Practice and Procedure, 4 *Code of Colo. Regulations* (CCR) 723-1.

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<sup>1</sup>, Advice Letter No. 126, issued by Rocky Mountain Natural Gas LLC, d/b/a Black Hills Energy, filed October 7, 2022.

<sup>2</sup> Utility Consumer Advocate’s Protest, ¶ 6(a)-(s), filed October 17, 2022.

7. The rule permits motions to strike an intervention as of right “to the extent that the challenge is to the party’s legally protected interest or the party’s request for hearing.” *Id.*

8. UCA is a legislatively-created entity charged by the General Assembly with protecting the public interest in certain utility proceedings. Specifically, UCA is statutorily-mandated to

represent the public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers by appearing in proceedings before the commission and appeals therefrom in matters which involve proposed changes in a public utility’s rates and charges.

§ 40-6.5-104(1), C.R.S.

9. Article 6.5 of Title 40 of the Colorado Revised Statutes defines the three specific categories of consumers protected by UCA under § 40-6.5-104(1) as follows:

(1) “Agricultural consumer” means a public utility customer whose utility service is classified as an agricultural user or an irrigation user pursuant to a utility tariff established by the commission or a public utility customer who is seeking such tariff status.

(4) “Residential consumer” means a public utility customer whose utility service is limited to his residence.

(5) “Small business consumer” means a public utility customer whose utility service is classified as a small business user or a small commercial user pursuant to a utility tariff established by the commission or a public utility customer who is seeking such tariff status.

§ 40-6.5-101(1), -(4), -(5), C.R.S.

10. RMNG argues that it does not provide utility services to agricultural, residential, or small business consumers. It states that it “does not own and operate a local gas distribution system and, with the exception of one industrial end-user, does not provide utility service

directly to any end-user in Colorado.”<sup>3</sup> Rather, it explains, all of its services are considered “upstream services” within the meaning of Commission Rule 4601(z), which defines “upstream services” as “all transmission, gathering, compression, balancing, treating, processing, storage, and like services performed by others under contract with the utility for the purpose of effectuating delivery of gas commodity to the utility’s jurisdictional gas facilities.” Rule 4601(z), 4 CCR 723-1.

11. In contrast, it argues, UCA’s constituency does not “include consumers of downstream goods and services that merely use upstream services in the production of those goods and services.”<sup>4</sup> Even though downstream producers “may include the cost of RMNG’s upstream gas transportation and storage services” in the amount they charge their customers, “does not make the purchasers of these goods and services customers of RMNG.”<sup>5</sup>

12. Finally, RMNG notes, the legislature did not authorize UCA to represent the interests of consumers in proceedings before the Federal Energy Regulatory Commission (FERC), which regulates other pipeline companies. If the legislature intended UCA to protect consumers’ interests “in the determination of the rates of upstream service providers,” it argues, it would have authorized UCA to participate in FERC proceedings.<sup>6</sup>

13. In response to RMNG’s motion to deny UCA’s intervention of right, UCA argues that RMNG has misinterpreted the former’s statutory mandate.<sup>7</sup> The legislature granted UCA the authority to “represent the public interest *and*” the specific interests of agricultural, residential, or

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<sup>3</sup> RMNG’s Motion to Deny Intervention of Right of the UCA, ¶ 9, filed November 23, 2022.

<sup>4</sup> *Id.* at ¶ 10.

<sup>55</sup> *Id.*

<sup>6</sup> *Id.* at ¶ 11.

<sup>7</sup> Response of the Office of the Utility Consumer Advocate (“UCA”) to Rocky Mountain Natural Gas’ Motion to Deny the UCA’s Intervention of Right, pp. 4-7, filed December 7, 2022.

small business consumers. § 40-6.5-104(1), C.R.S. (emphasis added). Thus, UCA's first and foremost enumerated mandate is to represent the public interest generally, rather than only the interests of the agricultural, residential, or small business consumers RMNG identifies as beyond the scope of its customer base.

14. UCA's statutory authority is broader than that characterized by RMNG. In addition to representing the interests of agricultural, residential, and small business consumers, when evaluating whether to intervene in a proceeding before the Commission, UCA is required to

consider the importance and the extent of the public interest involved. In evaluating the public interest, the consumer counsel shall give due consideration to the short- and long-term impact of the proceedings upon various classes of consumers, so as not to jeopardize the interest of one class in an action by another. If the consumer counsel determines that there may be inconsistent interests among the various classes of the consumers he represents in a particular matter, he may choose to represent one of the interests *or to represent no interest*.

§ 40-6.5-104(2), C.R.S. (emphasis added). In other words, contrary to RMNG's characterization, UCA's authority is *not* limited to representing the interests of agricultural, residential, and small business consumers. Consequently, even if it is true that RMNG does not provide services to any customers falling within the three defined categories — and the undersigned ALJ does not reach this issue — UCA would nonetheless have authority to intervene in order to represent the public interest generally rather than that of one or more specific constituencies.

15. Next, UCA points out, RMNG did not challenge UCA's intervention of right in other proceedings involving RMNG or entities related to it.<sup>8</sup> *See, e.g.*, Decision No. R18-0263, April 16, 2018; Decision No. R16-0058, January 22, 2016; Decision No. R14-0114,

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<sup>8</sup> *Id.* at pp. 7-12.

January 30, 2014. In each case, UCA intervened as of right and represented the public interest, but no motions to strike its intervention of right were filed.

16. Last, as UCA notes, RMNG's contention that UCA lacks authority to appear before FERC is inaccurate. To the contrary, UCA is *expressly* authorized to

*petition for, request, initiate, or seek to intervene in any proceeding before a federal agency that regulates utility rates or service . . . when the matter before the agency . . . will affect a rate, charge, tariff, or term of service for a utility product or service for a residential, small business, or agricultural utility consumer in the state of Colorado.*

§ 40-6.5-106(2.5), C.R.S. (emphasis added).

17. The undersigned ALJ finds UCA's responsive arguments persuasive. The ALJ is not persuaded that because RMNG is an intrastate natural gas pipeline company providing gas transportation and storage services and does not service end-use customers directly, it does not fall under the umbrella of interests UCA is mandated to protect. Moreover, any rate increase is likely to be passed on to end-use customers, thereby directly affecting the public interest UCA has been directed to protect.

18. For the above-stated reasons, RMNG's motion to deny UCA's intervention of right in this Proceeding will be denied.

19. Finally, the ALJ acknowledges UCA's indication that RMNG's responses to UCA's discovery requests are overdue pending the resolution of RMNG's motion to deny. As UCA is a party to this proceeding, RMNG is instructed to respond to any overdue discovery propounded upon it by UCA forthwith.

### **C. A M Gas's Motion to Intervene**

20. A M Gas filed a timely motion seeking permissive intervention in this proceeding.

21. As it explains in its motion to intervene, A M Gas operates a gas transportation business in an area serviced by RMNG.<sup>9</sup> A M Gas is “a transportation customer of RMNG in moving gas to its customers.”<sup>10</sup>

22. In its motion to intervene, A M Gas contends that RMNG’s proposed “rate increases and tariff changes will directly impact” it and its customers.<sup>11</sup> It points to RMNG’s proposed increase in storage rates, rates for “Automatic Park and Loan,” and possible changes to the terms and conditions of service as potentially impacted it and its customers.<sup>12</sup> It notes that the proposed changes have the potential to impact its own “tangible and pecuniary interests” as well as those of its customers.<sup>13</sup> In addition, it states that it acts as the agent for many Black Hills Energy customers who “will be impacted by” the rate increases and tariff changes set out in RMNG’s Advice Letter.

23. It also stresses that if it is not permitted to intervene, neither its interests nor the interests of the Black Hills Energy customers for whom it acts as agent will be adequately represented in this Proceeding.<sup>14</sup> It claims that no other party represents A M Gas’s interests in this Proceeding.

24. A M Gas expressly states that UCA does not represent AM Gas’s interests in this Proceeding.<sup>15</sup> UCA’s statutory mandate is to “represent the public interest and . . . the specific interests of residential consumers, agricultural consumers, and small business consumers . . . in

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<sup>9</sup> A M Gas Transfer Corp.’s Motion to Intervene, ¶ 2, filed November 28, 2022.

<sup>10</sup> *Id.* at ¶ 3.

<sup>11</sup> *Id.* at ¶ 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 6.

<sup>15</sup> *Id.* at ¶ 5.

proceedings before the [C]ommission . . . that involve proposed changes in a public utility's rates and charges." § 40-6.5-104(1), C.R.S.

25. Finally, A M Gas asserts that its intervention in this Proceeding "will not broaden the issues" because any issues it addresses "will pertain" to RMNG's proposed rate hike and tariff changes.<sup>16</sup>

26. Two classes of parties may intervene in proceedings such as this: parties with a statutory right or a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding and would not otherwise be adequately represented (permissive intervention). Rule 1401(b) and (c), 4 CCR 723-1; see § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Pub. Utils. Comm'n*, 702 P.2d 746, 749 (Colo. 1985) ("This provision creates two classes that may participate in [Commission] proceedings: those who may intervene as of right and those whom the Commission permits to intervene.").

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<sup>16</sup> *Id.* at ¶ 7.

27. Rule 1401(c), 4 CCR 723-1, requires persons seeking permissive intervention to show the following:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. . . . The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Anyone desiring to respond to the motion for permissive intervention shall have seven days after service of the motion, or such lesser or greater time as the Commission may allow, in which to file a response.

27. The requirement in Rule 1401(c) requiring persons or entities seeking permissive intervention in a proceeding to demonstrate that their interests "would not otherwise be adequately represented" is similar to Colorado Rule of Civil Procedure 24(a), which provides that even if a party seeking intervention in a case has sufficient interest in the case, intervention is not permitted if the existing parties adequately represent the interest. *See Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n*, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case's judgment. *See Denver Chapter of the Colo. Motel Ass'n v. City & Cnty. of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

28. In its motion, A M Gas states that its pecuniary interests will be directly impacted by RMNG's proposed rate increase and tariff changes. Likewise, it explains, its customers and those Black Hills Energy customers whom it represents as agent will also be impacted.

29. A M Gas suggests that unless it is permitted to intervene in this Proceeding, it will not be able to address and analyze the effect any rate increases or tariff changes will have upon it and the entities it represents as agent before those increases and changes become effective.

30. UCA's mandate to represent the public interest in Proceedings such as this may not include the interests of A M Gas, its customers, or those businesses that A M Gas represents as agent.

31. No objections to A M Gas's motion to intervene have been filed. A M Gas represents that RMNG does not oppose the motion.<sup>17</sup>

32. The ALJ finds that the proposed rate increases, tariff changes, and potential changes to the terms and conditions of RMNG's service could substantially affect the pecuniary interests of A M Gas, its customers, and the customers of Black Hills Energy that A M Gas represents as agent.

33. The ALJ further finds that A M Gas is not a consumer whose interests are protected by UCA, and that consequently its interests may not be adequately represented and protected in this Proceeding.

34. For these reasons, A M Gas's motion to intervene will be granted.

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<sup>17</sup> *Id.* at ¶ 1.

**II. ORDER**

**A. It Is Ordered That:**

1. The Motion to Deny Intervention of Right of the Colorado Office of the Utility Consumer Advocate filed by Rocky Mountain Natural Gas LLC d/b/a Black Hills Energy is denied. The Utility Consumer Advocate is a party to this Proceeding.

2. Rocky Mountain Natural Gas LLC d/b/a Black Hills Energy is ordered to respond to any overdue discovery propounded upon it by UCA forthwith.

3. The Motion to Intervene filed by A M Gas Transfer Corporation is granted.

4. This Decision is effective immediately.

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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO



ALENKA HAN

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Administrative Law Judge

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ATTEST:

A TRUE COPY

G. Harris Adams,  
Interim Director