

Decision No. R20-0430-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0077G

WILLIAM C. DANKS,

COMPLAINANT,

V.

DCP OPERATING COMPANY, LP,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
SCHEDULING REMOTE EVIDENTIARY HEARING,
ESTABLISHING DEADLINES AND PROCEDURES,
AND ADDRESSING MOTIONS**

Mailed Date: June 10, 2020

I. STATEMENT, FINDINGS, AND CONCLUSIONS

1. Only the procedural history necessary to understand this Decision is included. On February 25, 2020, Mr. William Danks initiated this matter by filing a Complaint with the Public Utilities Commission (Commission).

2. On March 19, 2020, DCP Operating Company LP (DCP) filed its first Motion to Dismiss Formal Complaint (First Motion to Dismiss).

3. On March 31, 2020, Mr. Danks made filings purporting to amend or supplement the Complaint. See Amendment to Formal Complaint (Amendment) and Addendums 1 and 2 to the Formal Complaint.

4. On April 15, 2020, DCP filed a Combined Motion to Strike Amended Complaint, Motion for Leave to Reply to Response to Motion to Dismiss and Reply (Motion to Strike).

5. On April 23, 2020, Mr. Danks filed Complainant's Response to DCP's Pleading Filed on April 15, 2020. The Administrative Law Judge (ALJ) construed Mr. Danks's April 23, 2020 filing as his response to DCP's Motion to Strike. Decision No. R20-0283-I issued April 24, 2020.

6. On April 24, 2020, the ALJ rejected Mr. Danks's March 31, 2020 Amendment to Formal Complaint and scheduled a remote prehearing conference for June 4, 2020 at 11:00 a.m. *Id.* The ALJ also ordered that if Mr. Danks wishes to amend his Complaint, he must file a motion consistent with Rule 1309(a), 4 *Code of Colorado Regulations* (CCR) 723-1, of the Commission's Rules of Practice and Procedure, by May 7, 2020, with the proposed amended complaint. Decision No. R20-0283-I.

7. On May 1, 2020, Mr. Danks filed a Motion to Amend Complaint (Motion) and the proposed Amended Complaint, consistent with Decision No. R20-0283-I. On May 15, 2020, DCP filed a Response to Motion for Leave to Amend Formal Complaint (Response). In its Response, DCP did not object to Mr. Danks's Motion.

8. On May 19, 2020, the ALJ granted the Motion, accepted the Amended Complaint, and held that the only complaint at issue is the Amended Complaint filed on May 1, 2020. Decision No. R20-0376-I.

9. On May 21, 2020, Mr. Danks filed a Second Motion to Amend Complaint (Second Motion), and a proposed Second Amended Complaint.

10. On May 28, 2020, DCP filed a Motion to Dismiss Amended Complaint (Motion to Dismiss), and a Combined Response to Complainant's Motion to Amend Complaint and Motion for Attorney's Fees (Response to Second Motion).

11. On June 1, 2020, Mr. Danks filed a Third Motion to Amend the Complaint (Third Motion) and a proposed Third Amended Complaint. That same day, he also filed a Motion for Summary Judgment and Brief in Opposition to DCP's Motion to Dismiss (Motion for Summary Judgment), and Memorandum for Prehearing Conference Set for June 4, 2020 at 11:00 a.m. (Memorandum for Prehearing Conference).

12. On June 2, 2020, DCP filed a Proposed Procedural Schedule, Combined Response to Mr. Danks's Motion for Summary Judgment and Motion for Attorney's Fees (Response to Motion for Summary Judgment), and a Combined Response to Mr. Danks's Third Motion to Amend the Amended Complaint and Motion for Attorney's Fees (Response to Third Motion). Also on June 2, 2020, DCP filed a Combined Motion for Leave to Reply to Response to Motion to Dismiss the Amended Complaint and Reply.

13. On June 5, 2020, Mr. Danks filed a Brief in Opposition to DCP's Motions for Attorney Fees (Response to Motions for Attorney Fees).

14. The ALJ called the matter for a remote prehearing conference on June 4, 2020, as noticed. All parties appeared. During the prehearing conference, the ALJ addressed the two pending motions to amend the Amended Complaint and the Motion for Summary Judgment, scheduled an evidentiary hearing, and established a procedural schedule, as set forth below. The ALJ did not rule on DCP's requests to limit discovery and set a 14-day response time to discovery requests (in its Proposed Procedural Schedule), but does so here. Also during the

prehearing conference, Mr. Danks clarified that his Amended Complaint does not name DCP's President and CEO, Wouter Van Kempen, as a respondent.

A. Evidentiary Hearing by Video-Conference

15. During the prehearing conference, the ALJ explained that due to the COVID-19 global pandemic, the Commission's offices currently are not open to the public, and therefore no in-person hearings are being held. The ALJ also explained that it is unknown when the Commission will be able to hold hearings in-person, and offered to schedule the hearing for October or November 2020 to increase the likelihood that an in-person hearing may be held. DCP was amenable to hearing dates in October or November; Mr. Danks preferred the hearing to be held as soon as possible, so the hearing was not scheduled for October or November.

16. The ALJ informed the parties that due to the global COVID-19 pandemic, the Commission has been holding evidentiary hearings by video-conference. All parties stated that they are willing and able to participate in the evidentiary hearing by video-conference. The ALJ finds that at this time, it is in the parties' interests to plan and prepare for a remote video-conference evidentiary hearing. Doing so is consistent with public health advisories to prevent the spread of COVID-19, and allows this proceeding to move forward. As explained in more detail below, the hearing will be held by video-conference, and the parties and witnesses will be required to participate by video-conference.¹

17. The procedures developed for the remote evidentiary hearing are intended to replicate, as practicable, evidence presentation as it occurs when parties and witnesses are present in the hearing room. For example, this Decision explicitly does not require parties to pre-

¹ If circumstances change to allow for a safe in-person hearing, the ALJ may convert the video-conference hearing to an in-person hearing.

file or serve exhibits that may be used solely to impeach, refresh recollection, or for rebuttal, as those exhibits are ordinarily presented for the first time during the hearing. Instead, the parties will upload such documents to box.com; those documents may be presented electronically during hearing as needed.² This box.com process will be used only for exhibits that are not required to be pre-filed pursuant to this Decision. In addition, participating by video-conference allows parties and witnesses to view exhibits on the video-conference screen while the exhibits are being testified to and offered into evidence.

18. This Decision and Attachment A hereto includes important requirements and technical information to ensure that the remote evidentiary hearing proceeds efficiently without technical problems. As such, it is vitally important that the parties carefully review and follow all requirements in this Decision and Attachment A.

19. The Commission will use the web-hosted video conferencing service GoToMeeting to hold the remote evidentiary hearing. To minimize the potential that the video-conference hearing may be disrupted by non-participants, the link and meeting ID or access code to attend the hearing will be provided to the parties by email before the hearing, and the parties and witnesses will be prohibited from distributing that information to anyone not participating in the hearing.³ The ALJ anticipates holding an informal practice video-conference with the parties before the hearing to confirm the parties are prepared to participate in the remote evidentiary hearing.

² The Public Utilities Commission Administrative Hearings Section utilizes box.com to receive exhibits that are first presented at hearing (e.g., exhibits for impeachment, to refresh recollection, or for rebuttal). Box.com is a web-based document sharing service. All parties must ensure they can access and use box.com. The parties will be provided with additional information on box.com, including a link that parties will use to upload documents for use during the hearing.

³ The ALJ anticipates that the hearing will be webcast, consistent with Commission practice; this means that those wishing to observe the hearing may do so without the need to join the hearing as a participant.

B. DCP's Requests Concerning Discovery

20. DCP's Proposed Procedural Schedule requests that each party be limited to issuing 20 interrogatories, 20 requests for production of documents, and 20 requests for admission, and that the response time to discovery be 14 days. In addition, DCP also proposed that the ALJ set a deadline for discovery requests to be issued. During the prehearing conference, Mr. Danks posited that discovery is unnecessary in this proceeding, and objected to DCP's requests concerning discovery.

21. As the ALJ stated during the prehearing conference, the parties are entitled to discovery, even if one party believes it is unnecessary. *See* Rule 1405, 4 *Code of Colorado Regulations* (CCR) 723-1. That said, parties may seek relief from or compel discovery as permitted by Commission Rule 1405(g), 4 CCR 723-1. The ALJ reminds the parties that Rule 1405(g) requires parties to make a good faith effort to resolve a discovery dispute before filing a motion to compel or for protective order, and explicitly warns that the Commission will sanction parties and counsel who do not cooperate in good faith.

22. Given that the Commission's rules do not establish discovery limits, a discovery response time, or a discovery issuance deadline in complaint cases, it is appropriate to address such discovery issues at the onset of a proceeding, especially where the parties are unable to reach an agreement. This promotes efficiency, and helps the parties avoid unnecessarily expending resources by filing a motion on these issues later if a dispute arises. The ALJ finds that DCP's proposed limits on the number of interrogatories, requests for production of documents, and requests for admission discovery, and proposed 14-day response time to discovery requests are reasonable, and do not unduly burden either party. As such, the ALJ will approve the proposed discovery limits and discovery response time. During the prehearing

conference, the ALJ set a deadline for discovery to be issued, as set forth below, and also ordered that formal discovery is stayed pending issuance of this Decision. That stay is lifted.

C. First Motion to Dismiss, Motions to Amend the Amended Complaint, Motion for Summary Judgment, and Motions for Attorney Fees

23. Mr. Danks's Amended Complaint was accepted on May 19, 2020. DCP's First Motion to Dismiss argued for dismissal of the original Complaint, filed on February 25, 2020. Given that the Amended Complaint replaces the original Complaint, DCP's First Motion to Dismiss will be denied as moot.

24. Both the Second and Third Motions to Amend the Complaint state that the purpose for the proposed amendments is to address standing arguments raised by DCP. But neither Motion provides cause for the amendments. They simply state Mr. Danks's desire to further supplement his responsive arguments to DCP's standing argument.

25. DCP objects to Mr. Danks's Second and Third Motions. DCP argues that Mr. Danks failed to show good cause for such amendments, that allowing the amendments prejudices DCP, and that there is no need for the proposed amendments. See Response to Second Motion at 3-15, and Response to Third Motion at 2-4. DCP also asserts that Mr. Danks's repeated attempts to amend his Complaint are designed to harass DCP, to cause DCP to waste resources, and to increase the costs of litigation. DCP asks that Mr. Danks be ordered to pay DCP's attorney fees associated with responding to the motions to amend. DCP also argues that Mr. Danks's Motion for Summary Judgment is premature, and that it should be awarded attorney fees for responding to it. Response to Motion for Summary Judgment at 1-4.

26. During the prehearing conference, the ALJ informed Mr. Danks that at that point, she agreed with DCP that Mr. Danks failed to demonstrate good cause to further amend the

Amended Complaint. The ALJ offered Mr. Danks another opportunity to establish good cause for the proposed amendments. Mr. Danks agreed that he could have included the proposed amendments in the Amended Complaint that he filed on May 1, 2020, and that good cause is established because the assertions made in the proposed amendments are relevant to standing. Mr. Danks argued that DCP caused him to file the proposed amendments because DCP refused to withdraw its argument that Mr. Danks lacks standing. See Second and Third Motions at 1. In other words, Mr. Danks placed the responsibility for his decision to file the Second and Third Motions on DCP.

27. The purpose of the proposed amendments is to supplement arguments that Mr. Danks has made concerning standing. The vast majority of the Amended Complaint addresses standing. Indeed, of the 19-page Amended Complaint, 13 pages are dedicated to standing. Given DCP's prior Motions to Dismiss raising standing, and that Mr. Danks devoted a significant amount of his Amended Complaint to standing, there is no question that when he filed his Amended Complaint, Mr. Danks had notice that standing could continue to be at issue. Mr. Danks's choice not to include his additional standing arguments in his Amended Complaint is inexplicable. As stated during the prehearing conference, the ALJ finds that Mr. Danks has failed to show good cause to amend the Amended Complaint.

28. Mr. Danks also argued that DCP should not have filed its Motion to Dismiss, and instead should have filed an answer. He argued that DCP's Motion to Dismiss has delayed the forward progress of this proceeding. But Mr. Danks fails to recognize that his repeated attempts to amend the Complaint have, in fact, slowed the forward movement of the case. Motions to amend the Amended Complaint must be decided before a ruling on DCP's standing argument (in its Motion to Dismiss) can be made. That is because the Motion to Dismiss becomes moot if

amended complaints are accepted, thus resetting the clock for DCP to respond to the latest amended complaint. *See supra*, ¶ 23. So far, Mr. Danks has attempted to amend his complaint four separate times. He has delayed a ruling on DCP's Motion to Dismiss, and converted the Complaint into a moving target. To allow Mr. Danks to continue to amend his Amended Complaint would unreasonably delay the forward progress of this proceeding, unnecessarily increase the costs of litigation, and reward Mr. Danks's voluntary decision not to include the proposed amendments in the Amended Complaint.

29. For all the reasons discussed, Mr. Danks's Second and Third Motions are denied. No further amendments to the Amended Complaint will be permitted.

30. Disallowing Mr. Danks's most recent attempts to amend the Amended Complaint does not mean that Mr. Danks is deprived of the ability to raise arguments in response to DCP's standing argument. Indeed, in addition to the 13 pages of standing argument in the Amended Complaint, Mr. Danks also responded to the standing argument through his Motion for Summary Judgment, which includes his response to DCP's Motion to Dismiss. He also presented 13 pages of standing arguments in his Response to Motion for Attorney Fees, and repeatedly argued standing during the prehearing conference. Mr. Danks has been heard. The ALJ will issue a decision on the Motion to Dismiss, including the standing arguments, as soon as practicable.

31. As noted during the prehearing conference, Mr. Danks's Motion for Summary Judgment is exceedingly premature given that it was filed *before* a ruling on his Second and Third Motions. It is denied for that reason.

32. DCP requests that it be awarded attorney fees associated with responding to Mr. Danks's Second and Third Motions, and to the Motion for Summary Judgment. As already mentioned, DCP argues that these Motions are aimed at harassing DCP, unnecessarily increasing

the costs of litigation, and wasting resources. The ALJ is not prepared to find that the referenced motions have been filed for those purposes. Through his many filings, including his Response to Motion for Attorney Fees, it is evident that Mr. Danks genuinely wished to supplement his arguments relating to standing. As such, DCP's requests for attorney fees is denied.

33. The ALJ notes that Mr. Danks makes assertions suggesting that he believes that DCP must defend itself in this proceeding as Mr. Danks directs. See Response to the Motion for Attorney Fees at 18; Memorandum for Prehearing Conference at 2; Second Motion at 1; and Third Motion at 1. Just as Mr. Danks has the right to present his case in the manner he chooses consistent with applicable rules and law, DCP has the right to defend itself in the manner it chooses consistent with applicable rules and law.

D. Advisements

34. *Mr. Danks is on notice that he carries the burden of proof by a preponderance of the evidence that the relief sought by his Amended Complaint should be granted.* §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500, 4 CCR 723-1. The preponderance standard requires the fact finder to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dep't of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party. *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986). Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence 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. *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000).

35. *All parties are on notice that failure to appear at the evidentiary hearing may result in decisions adverse to their interests, including granting relief opposing parties seek.*

II. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, (a) DCP's Motion to Dismiss Formal Complaint filed on March 19, 2020 is denied as moot; (b) DCP's requests for attorney fees are denied; (c) Mr. Danks's Motion for Summary Judgment filed on June 1, 2020 is denied; (d) Mr. Danks's Second Motion to Amend the Complaint filed on May 21, 2020 is denied; and (e) Mr. Danks's Third Motion to Amend Complaint filed on June 1, 2020 is denied. No more amendments to the Amended Complaint will be permitted.

2. A remote evidentiary hearing on the Amended Complaint is scheduled as follows:

DATE: September 22, 2020

TIME: 9:00 a.m.

METHOD: Join by video-conference online at the meeting link to be sent to parties before the hearing.

3. The parties and witnesses may not distribute the GoToMeeting link and access or ID code to anyone not participating in the hearing. Unless otherwise ordered, the parties and witnesses may not appear in person at the Commission for the above-scheduled hearing. Instead, parties and witnesses will participate in the hearing from remote locations, consistent with the requirements of this Decision.

4. All participants must comply with the requirements in Attachment A to this Decision, which is incorporated herein.

5. **Video-Conference Participation.** The parties and witnesses are required to participate in the evidentiary hearing by video-conference using GoToMeeting. The parties must

ensure that they and their respective witnesses are ready and able to participate in the evidentiary hearing by video-conference.

6. **Evidence Presentation at the Evidentiary Hearing.** Because the hearing will be held remotely by video-conference, all evidence must be presented electronically. Each party is responsible for ensuring that they and their respective witnesses (a) have access to all pre-filed exhibits; and (b) are able to download and view documents available from box.com *during the hearing*.

7. **Dispositive Motions.** The parties must file and serve dispositive motions by July 20, 2020.

8. **Discovery.** The parties must serve discovery requests by August 7, 2020. Consistent with the above discussion, the parties are limited to issuing 20 interrogatories, each of which shall consist of a single question; 20 requests for production of documents, each of which shall consist of a single request; and 20 requests for admission, each of which shall consist of a single request. The parties must respond to discovery requests within 14 days of the date the discovery requests are served. The stay on discovery ordered during the prehearing conference is lifted.

9. **Hearing Exhibits, Hearing Exhibit Lists, and Witness Lists.** The parties must file and serve pre-marked hearing exhibits, hearing exhibit lists, and witness lists by August 24, 2020. The parties are not required to pre-file and serve hearing exhibits which will be used solely for impeachment, to refresh recollection, or for rebuttal. Any party may use any other party's hearing exhibits during the course of the hearing and need not file them separately. Witness lists must include a brief description of the witnesses' anticipated testimony and the witnesses' contact information. Exhibit lists must identify the hearing exhibit number, the title of each

hearing exhibit (i.e. substantive title of the document), and provide a brief description of each hearing exhibit the party intends to offer into evidence during the evidentiary hearing.

10. Hearing Exhibit Requirements.

a. Identification Requirements. Mr. Danks is assigned hearing exhibit numbers 1 to 199 and DCP is assigned hearing exhibit numbers 200-399. The parties must conspicuously mark their hearing exhibits for identification with an exhibit number within their assigned exhibit number block *before* filing their exhibits, and *before* uploading exhibits to box.com. The parties must identify each exhibit as a “hearing exhibit.” For example, Mr. Danks’s first exhibit should be marked as “Hearing Exhibit 1” and DCP’s first exhibit should be marked as “Hearing Exhibit 200.”

b. Requirements for Titling Exhibits When Filing in the Commission’s E-Filing System. The parties are required to electronically file their hearing exhibits within the Commission’s E-Filing System. When doing so, the parties must enter the document title for the hearing exhibit identical to document’s hearing exhibit number. For example, the title entered into the Commission’s E-Filing System for Hearing Exhibit 1 should be “Hearing Exhibit 1.”

c. Requirements for Exhibits That Do Not Need to Be Pre-Filed – Box.com Process. Any party wishing to use exhibits or documents that this Decision does not require to be pre-filed, (e.g., for impeachment, to refresh recollection, or for rebuttal), must: (1) pre-mark the documents for identification with a hearing exhibit number within the party’s assigned exhibit number block; (2) upload the pre-marked exhibits into the party’s designated box.com folder prior to using the exhibits during the hearing; and (3) have an electronic copy of such pre-marked exhibits available during the hearing.

d. Hearing Exhibit Page Numbering. The parties must sequentially page-number each page of any hearing exhibit that is longer than two pages. The parties must number the first page of hearing exhibits as page 1, regardless of content.

11. **Prehearing Motions.** The parties must file and serve any prehearing motions by August 31, 2020.

12. **Statements of Position.** As agreed during the prehearing conference, the parties will not file statements of position; instead, they will make verbal closing arguments when the hearing concludes.

13. In addition to the requirements set forth here and in Attachment A, the parties must comply with the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.

14. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge