Decision No. R20-0549

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0077G

WILLIAM C. DANKS,

COMPLAINANT,

V.

DCP OPERATING COMPANY, LP,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MELODY MIRBABA GRANTING MOTION TO DISMISS

Mailed Date: July 29, 2020

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I. STATEMENT AND BACKGROUND

A. Summary

1. This Decision grants the Motion to Dismiss Amended Complaint, vacates the hearing and all related deadlines, and closes this proceeding. The Motion to Dismiss raises two questions: whether the Complainant, Mr. Danks, has standing to prosecute the Amended Complaint, and, if so, whether Respondent, DCP Operating Company, LP., is a public utility over which the Commission has subject matter jurisdiction to decide the Amended Complaint. Because this Decision concludes that Mr. Danks lacks standing, the Decision does not address the second question.[1]

B. Procedural History

2. A more robust procedural history is provided in prior decisions and is not repeated here. On February 25, 2020, Mr. William Danks initiated this matter by filing a Complaint with the Public Utilities Commission (Commission).

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

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

[1] In reaching this Decision, the ALJ has considered and weighed all arguments, allegations, and evidence, whether discussed or not. The topic headings in this Decision are for ease of reference only.

5. 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 Reply to First Motion to Dismiss).

6. 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.

7. 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.

8. On May 1, 2020, Mr. Danks filed a Motion to Amend Complaint 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 stating that DCP does not object to Mr. Danks's Motion to Amend.

9. On May 19, 2020, the ALJ granted the Motion to Amend Complaint, 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.

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

11. On May 28, 2020, DCP filed a Motion to Dismiss Amended Complaint (Motion to Dismiss) with Attachment A, an Affidavit of John R. Cochran (Affidavit), and a Combined Response to Complainant's Motion to Amend Complaint and Motion for Attorney's Fees (Motion for Attorney Fees).

12. On June 1, 2020, Mr. Danks filed a Third Motion to Amend the Complaint (Third Motion to Amend) and a proposed Third Amended Complaint. That same day, he also filed a combined Motion for Summary Judgment and Brief in Opposition to DCP's Motion to Dismiss (Response to Motion to Dismiss).

13. On June 2, 2020, DCP filed a 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.

14. 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 (Motion to Reply).

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

16. The ALJ called the matter for a remote prehearing conference on June 4, 2020, as noticed. All parties appeared. During the prehearing conference, Mr. Danks confirmed that DCP is the only Respondent in this proceeding. Decision No. R20-0430-I issued June 10, 2020. Also during the prehearing conference, the ALJ heard argument on, then denied the two pending motions to amend the Amended Complaint and the Motion for Summary Judgment, scheduled an evidentiary hearing, and established a procedural schedule. *Id.*

17. On June 10, 2020, the ALJ denied DCP's Motion for Attorney Fees, and denied DCP's First Motion to Dismiss as moot. *Id.*

18. Based on the foregoing, two motions are pending: DCP's Motion to Dismiss and DCP's Motion to Reply. Before turning to the Motion to Dismiss, the ALJ must first decide whether to grant DCP's Motion to Reply. The Motion to Reply argues that DCP should be permitted to file a reply to Mr. Danks's Response to Motion to Dismiss because Mr. Danks's Response misrepresents material facts and makes incorrect statements of law. Motion to Reply, 2. The ALJ finds that DCP has established good cause for its Reply, consistent with Rule 1308(b), 4 CCR 723-1. *See* Motion to Reply, 2-4. As such, DCP's Motion to Reply is granted, and the Reply (contained within the Motion to Reply) is accepted.

II. ALLEGATIONS, UNDISPUTED FACTS, AND ARGUMENTS

A. Amended Complaint's Allegations

19. The Amended Complaint alleges that DCP is a gathering pipeline and a public utility. Amended Complaint, 1- 2. It states that DCP failed to obtain a certificate of public convenience and necessity (CPCN) as required by § 40-5-101, C.R.S. from the Commission before beginning construction of a 62-mile pipeline project called the Grand Parkway pipeline, "including processing plants, compression stations etc. in Weld County." *Id.* at 2 and 4.

20. The Amended Complaint states that the Grand Parkway's purpose is to serve as a gathering line for the natural gas that is produced by wells drilled by separate drilling companies inside and outside of the Grand Parkway. *Id.* at 5. The Grand Parkway pipeline is a loop in Weld County with the city of Greeley the center of the loop. *Id.* at 5. The Amended Complaint also alleges that DCP failed to get a CPCN for "its [p]roposed addition of two segments named by DCP as Red Cloud and Lindsay pipelines. . .." *Id.* at 2.

21. The Amended Complaint asks the Commission to "take appropriate action as required by CRS 40-5-101" for DCP's failure to obtain the referenced CPCNs before beginning construction. *Id.* at 4. It also generally requests whatever relief the Commission deems appropriate. *Id.* at 18.

22. The Amended Complaint states that Mr. Danks "has been injured in many ways including damage to property." *Id.* The Amended Complaint states that Mr. Danks and his wife live in a farmhouse at Weld County Roads 61 and 50; they farm 310 acres of irrigated wheat, corn, and grass hay. *Id.* at 2.

23. The Amended Complaint states that DCP has four different pipelines on Mr. Danks's property, and that Mr. Danks has suffered damage to his property rights from those pipelines and from wells drilled by other companies near the Grand Parkway pipeline. *Id.* at 6 and 10.

24. According to the Amended Complaint, DCP's first pipeline was "on the northern 1/2 of [the Danks's] farm," and was used to transfer raw gas produced from two vertical wells that another company, Bonanza, drilled. *Id.* at 6. The Amended Complaint states that this DCP pipeline runs approximately 800 feet from the "tank battery" to Colorado Road 61 to a DCP gathering line, and that after Bonanza plugged its vertical wells, DCP eventually severed and closed the underground "T" connection. *Id.* at 6-7. While 800 feet of pipeline is still in the ground, because it is severed and closed at both ends, no gas runs through it. *Id.* at 7. The Amended Complaint alleges that Bonanza acknowledged compaction around the two Bonanza wells, and paid for the crop damage which it caused. *Id.* at 17.

25. The Amended Complaint states that DCP's second pipeline on Mr. Dank's property is "on the south 1/2 of [the Danks's] farm." *Id.* This DCP pipeline runs from the "tank battery" which was used for four vertical wells that Noble (another drilling company) plugged before being replaced by a horizontal well drilled by another company, Highpoint Drilling Company (Highpoint). *Id.* at 7. The Amended Complaint alleges that "upon information and belief, the natural gas produced from this Highpoint horizontal well flows into DTC Grand Parkway pipeline." *Id.* Mr. Danks also alleges that the DCP pipeline connecting into a "T" to the DCP gathering line on CR 61 is "in the process of being removed." *Id.*

26. The Amended Complaint also states that because of Highpoint's horizontal drilling project, six old vertical wells on Mr. Danks's property must be removed, and that the equipment that was brought onto the property to cap the vertical wells severely compacted soil in a radius of approximately 150 feet from the well head. *Id.* at 16. The Amended Complaint alleges that Mr. Danks's farm land and farming operations are being damaged as a result of Highpoint's horizontal drilling under an unconstitutional and void permit. *Id.* at 14.

27. The Amended Complaint states that DCP's third pipeline "is short and similar to the first two pipelines," and that it runs "a short distance from the tank battery 50 yards east of [the Danks's] farm house." *Id.* at 7. The Amended Complaint states that this DCP pipeline carried gas from two Noble wells on the north end of Mr. Danks's property, but that the wells have been "shut down but not yet plugged in anticipation of the drilling this coming year of a horizontal well under the northern end of [the Danks's] farm and farm house." *Id.*

28. The Amended Complaint states that DCP's fourth pipeline "runs for 1/2 mile along the southern boundary of [the Danks's] property." *Id.* The Amended Complaint alleges that Mr.

Danks sent an email to a DCP attorney concerning this pipeline, and includes the text of the email. *Id.* at 8-9. The email asserts that DCP is trespassing on Mr. Danks's property based on this fourth DCP pipeline, and demands that DCP cut a two-foot section of the pipe both at the pipe's entrance and exit to Mr. Danks's property, and send photos of the same. *Id.* The Amended Complaint states that Mr. Danks is attempting to determine whether the easement for this pipeline has been terminated based on non-use for a six-month period. *Id.*

29. The Amended Complaint states that DCP caused Mr. Danks direct damage through its efforts "to run the main line of the Grand Parkway through the middle of [the Danks's] farm and DCP efforts to build a 'compression' plant 1/2 mile to the east of [the Danks's] farm and farm house." *Id.* at 10. Initially, DCP stated that it would not "go around" Mr. Danks's property with its main pipeline, but ultimately, DCP did go around Mr. Danks's property. *Id.* Nevertheless, the Amended Complaint alleges that DCP's initial statements that it would not go around the Danks's property is an implied threat to sue Mr. Danks for condemnation. The Amended Complaint asserts that because DCP does not have the power of condemnation, that DCP's statements amount to "fraudulent concealment and misrepresentation." It alleges that DCP used the same fraudulent concealment and misrepresentation to acquire all of the easements in the 62-mile Grand Parkway pipeline project. *Id.*

30. The Amended Complaint states that Mr. Danks spent hundreds of hours to protect his property from a Spot Zoning application which would have allowed DCP to build an industrial plant one-half a mile west of his property, and that DCP withdrew the application days before the scheduled hearing before the Weld County Commissioners on the application. *Id.* at 10.

31. The Amended Complaint alleges that Mr. Danks suffers damage to property rights based on injection wells that are needed near the Grand Parkway. *Id.* at 11. The Amended Complaint asserts that the fair market value of three "legal lots" on Mr. Danks's property have decreased by a total of $74,350, and that decreased value is a result of DCP building the Grand Parkway which attached the well drilling and injection wells near the DCP pipeline. *Id.* at 11. The Amended Complaint breaks down the alleged decrease in fair market value for each of the referenced three legal lots on Mr. Danks's property.

32. As to the first legal lot, Mr. Danks alleges that NGL Injection Well Company's (NGL) USR permit caused a $25,000 decrease in fair market value. The Amended Complaint alleges this was due to tanker truck traffic on the dirt road "in front of the house to and from the NGL Injection Well" and that NGL built this injection well after being granted a "USR Permit." It also alleges that heavy trucks also damaged the stone foundation of "this homestead." *Id.* The Amended Complaint also alleges that the first legal lot suffers an additional decrease in fair market value of $22,500 based upon "four planned PDC Drilling Company WOGLA sites along CR 61 between CR 48 and 1/2 mile north of CR 50." *Id.* at 11.

33. As to the second legal lot, the Amended Complaint alleges that NGL's USR Permit caused a $6,500 decrease in the fair market value. It alleges that the decrease was caused by tanker truck traffic on the dirt road in front of a guest or rental house on the second legal lot. *Id.* The Amended Complaint also alleges that the "four planned PDCE Drilling Company WOGLA sites along CR 61 between CR 48 and 1/2 mile north of CR 50" caused an additional $12,350 decrease in fair market value to the second legal lot. *Id.* at 12.

34. As to the third legal lot, the Amended Complaint alleges that the "four Planned WOGLA sites along CR 61 between CR 48 and 1/2 mile north of CR 50" caused an $8,000 decrease in fair market value. *Id.* at 12. The Amended Complaint alleges that the PDCE Drilling Company's (PDCE) pad, currently under construction, is directly across from this third legal lot. The Amended Complaint includes photographs of a completed drilling pad approximately five miles from Mr. Danks's property, which it alleges is comparable to PDCE's four planned pads. *Id.* at 13-14. The Amended Complaint alleges that PDCE has completed three of the four drilling sites. *Id.* at 12.

35. The Amended Complaint alleges that PDCE's four planned drilling sites are "across from and just north of" Mr. Danks's property "in an industrial strip-zone along CR 61." *Id.* at 14.

36. The Amended Complaint alleges that DCP, other drilling companies, and the Weld County Commissioners by-passed zoning amendment procedures, instead using spot-zoning exceptions. *Id.* at 6.

B. Undisputed Facts.

37. DCP is the only Respondent in this proceeding.

38. Mr. Danks and his wife live in a farmhouse at Weld County Roads 61 and 50; they farm 310 acres of irrigated wheat, corn, and grass hay.

39. Multiple companies other than DCP own and operate or operated wells or drilling sites located on or near Mr. Danks's property. DCP does not own or operate wells or drilling sites referenced in the Amended Complaint.

40. DCP operates a gas gathering system in Weld County, Colorado made up of a series of pipelines that collect and move raw and unprocessed gas from wellhead delivery points to processing facilities.

41. DCP's gathering system includes smaller well connection pipelines, including the Red Cloud and Lindsay pipelines, and larger gathering pipelines such as the Grand Parkway pipeline.

42. DCP's Grand Parkway was a multi-phase project; the first phase of the project went into operation in 2016.

43. The Red Cloud and Lindsay pipelines are under construction, and will be well connection pipelines that feed into the Grand Parkway when completed. Once completed, the Red Cloud and Lindsay pipelines will gather raw gas purchased by DCP at the well under a gas gathering and processing contract between DCP and the producer.

44. DCP's gas gathering system collects and delivers raw gas produced from wells to eleven natural gas processing facilities which are primarily owned by or operated for DCP. The processing facilities remove impurities and convert the raw gas into processed dry gas and natural gas liquids (collectively, processed gas).

45. After processing, DCP's marketing affiliates, DCP Midstream Marketing, LLC and DCP NGL Services, LLC, market the DCP-owned processed gas for sale into competitive commodities markets.

46. DCP sells the processed gas to customers in competitive markets.

47. All of the DCP-processed gas requires transportation via inter- and intrastate pipelines or trucks before being delivered to the ultimate purchaser.

48. DCP does not market or sell any of the raw and unprocessed gas in its gathering system. No end-use consumers are served directly from DCP's gathering system.

49. DCP's gathering system transports approximately 1,400 MMcf/day. DCP holds title to 93 percent of that raw and unprocessed gas, and transports 97.9 percent of that gas to its own processing facilities.

50. Of the raw and unprocessed gas on DCP's gathering system, seven percent is owned by third parties, and of that amount, 2.1 percent is gathered-only raw gas that is taken to third- party processing facilities while 4.9 percent is "take-in-kind" raw and unprocessed gas that is not sold to DCP but is taken to DCP's processing facilities for processing.

51. Approximately 830 MMcf/day of raw and unprocessed gas flows through DCP's Grand Parkway as it moves through DCP's gathering system, from wellheads to processing facilities in Weld County. Of that amount, approximately 98.7 percent is raw and unprocessed gas to which DCP holds title and delivers to its processing facilities. Approximately 1.2 percent of that amount is gathered-only raw and unprocessed gas, and approximately 0.1 percent is take-in-kind raw and unprocessed gas, totaling 1.3 percent. Two companies unaffiliated with DCP own this 1.3 percent of raw and unprocessed gas transported over the Grand Parkway system, which DCP gathers based on a contract that has existed since 1995.

52. No portion of the Grand Parkway, Red Cloud, or Lindsay pipelines cross or will cross under or through property owned by Mr. Danks.

53. DCP owns four well connection pipelines that are or were located under Mr. Danks's property. DCP has abandoned or removed three of the four pipeline segments that were once operational under Mr. Danks's property.

54. All of DCP's well connection pipelines on Mr. Danks's property: predate the construction of the Grand Parkway, Red Cloud, and Lindsay pipelines; were present based on rights-of-way easements or mineral lease right agreements; transport or transported raw gas from wells that cannot be consumed until processed.[2]

55. Mr. Danks is not a customer of DCP for gathering and processing gas in Colorado and has never sought to become one.

C. Parties' Arguments.

56. DCP argues that the Amended Complaint should be dismissed because Mr. Danks lacks standing to pursue the Amended Complaint, and because the Commission lacks subject matter jurisdiction over DCP because it is not a public utility.

1. Standing.

57. DCP argues that the Commission has regularly required those appearing before it to demonstrate sufficient facts to satisfy the following standing test: (1) that the complaining party has suffered an actual injury; and (2) that the complaining party has a legally protected right or interest that is the subject of the injury. Motion to Dismiss, 6. DCP argues that in the context of administrative action, the injury-in-fact element of the standing test requires Mr. Danks to demonstrate that the administrative action threatens to cause an injury. *Id.* at 8.

58. DCP argues that its well connection pipelines beneath Mr. Danks's property are or were lawfully in place under an easement, or per rights conferred under a mineral lease. *Id.* at 9. DCP further argues that any dispute that Mr. Danks has about DCP's legal right to operate the

[2] This Decision explicitly draws no conclusion as to the lawfulness of the easements or mineral lease rights, present or past.

existing lines on his property should be brought before a court, not the Commission, and that any such disputes do not constitute an injury for purposes of establishing standing here. *Id.* DCP also argues that because the DCP pipelines under Mr. Danks's property existed before the Grand Parkway was built, the Grand Parkway pipeline construction has no impact on Mr. Danks's property. *Id.* DCP also argues that Mr. Danks lacks standing because the Amended Complaint does not allege any injury caused by DCP's well connection pipelines under Mr. Danks's property. *Id.*

59. DCP also argues that Mr. Danks lacks standing because the Grand Parkway does not cross his property. *Id.* at 10. In addition, DCP argues that drilling operations and USR and WOGLA applications which Mr. Danks alleges have diminished his property value have nothing to do with DCP, its gathering and processing network, or the Commission's jurisdiction. *Id.* DCP argues that these injury allegations concern other companies (such as Bonanza and Noble). *Id.*

60. DCP argues that to meet the second prong of the standing test, Mr. Danks must show that he has a legally protected right or interest in the CPCN proceeding that he seeks to impose through the Amended Complaint. *Id.* at 11. DCP argues that the question is whether the constitutional or statutory provision on which the claim rests grants the complainant a right to relief. *Id.* DCP argues that § 40-5-101, C.R.S., which requires public utilities to obtain CPCNs, is intended to protect ratepayers within a regulated monopoly framework and to prevent duplication of services and competition between utilities. *Id.* at 12. DCP concludes that because Mr. Danks is not a DCP ratepayer or competitor, that any interest that Mr. Danks would have in a CPCN proceeding relating to DCP's gathering and processing network does not reach the level of a legal right or interest protected by § 40-5-101, C.R.S., and instead is subjective rather than pecuniary or tangible. *Id.* at 13. DCP also argues that requiring DCP to obtain a CPCN for its gathering and processing network, as Mr. Danks seeks, would not remedy Mr. Danks's purported injuries. *Id.*

61. Mr. Danks responds that he has standing based on damage to his property outlined in the "Standing" section of the Amended Complaint. Response to Motion to Dismiss, 3. He argues that such damage would not have occurred without DCP's Grand Parkway pipeline project. In other words, Mr. Danks argues that the damage caused by companies who own and operate wells and drilling sites on or near Mr. Danks's property would not have occurred if DCP's Grand Parkway pipeline did not exist.

62. Mr. Danks also responds to DCP's standing arguments by reasserting allegations he sought to add to the Amended Complaint through his Second and Third Motions to Amend.[3] Response to Motions for Attorney Fees, 4-17. He describes these as five substantive allegations which establish standing. *Id.* at 4.

63. First, he argues that he has established injury-in-fact based on "DCP's recalcitrance in removing the one-half mile of DCP pipeline" on the southern boundary of his property, and the 800 feet of DCP pipeline from the Bonanza tank battery across the farm. *Id.* He argues that both of these pipelines were rendered obsolete by DCP's Grand Parkway and horizontal wells. *Id.*

64. Second, Mr. Danks asserts that he has been injured based on DCP's "monopoly power," since DCP is the only possible buyer for gas extracted from mineral interests which Mr. Danks and his wife own. *Id.*

65. Third, Mr. Danks argues that he has standing because he has the legally protected right "that the DCP attorney will not have ex parte communication with the Weld County

[3] Much of these allegations are copied and pasted email exchanges between Mr. Danks and various other persons.

Commissioners to find out how the Weld County Commissioners were going to decide DCP's spot zoning application." *Id.* at 9.

66. Fourth and fifth, Mr. Danks argues that he has standing because he has the legally protected right not to be subject to torts of fraudulent misrepresentation and concealment of material facts, which he alleges occurred when DCP impliedly threatened a lawsuit if Mr. Danks did not grant an easement for DCP's main pipeline. *Id.* at 9-10.

67. Mr. Danks also argues that standing does not apply to proceedings before administrative bodies.

2. Jurisdiction.

68. DCP also argues that the Amended Complaint should be dismissed because it is not a public utility, and therefore, the Commission lacks subject matter jurisdiction. Motion to Dismiss, 14. In support, DCP argues that the Commission has never regulated gas gathering or processing gas a public utility, and that DCP is not a public utility. *Id.*

69. DCP argues that to be considered a public utility under § 40-1-103, C.R.S., it must operate for the purpose of supplying the public for domestic, mechanical, or public uses, or be declared by law to be affected with a public interest, and that the Commission may consider whether the public is entitled to demand service from the entity alleged to be a public utility. *Id.* 14-15. DCP submits that when deciding whether an entity is a public utility, all of the public utility laws, including relevant provisions of the Colorado constitution, should be considered. *Id.* at 15.

70. DCP argues that its gathering system is not operated for the purpose of supplying the public as contemplated under § 40-1-103, C.R.S. because it collects and moves raw gas that cannot be consumed by end users. *Id.* at 16-17. In other words, DCP asserts that since its gathering

system carries no consumable supply, it does not operate for the purpose of supplying the public. *Id.* In support, DCP points to Commission decisions finding that a pipeline corporation cannot be a public utility under § 40-1-103, C.R.S., if it does not deliver a commodity to an end user for the purpose of consumption.[4] *Id.* at 17-18. DCP argues that under Commission precedent, only after raw gas is processed can it be considered a commodity that could be used to supply the public, and even then, consumers must obtain transportation and other services using inter- or intrastate pipelines or trucks in order to receive the processed gas. *Id.* at 19, (citing *HRM Resources II, LLC v. Anadarko Petroleum Corp.,* Decision No. R18-0057 issued January 25, 2018 in Proceeding No. 19F-0599G (*Anadarko,* Decision No. R18-0057). DCP argues that based on the foregoing authority, the raw gas that moves through its gathering system is not a commodity, and as such, DCP does not supply the public. For the same reasons, DCP argues that the public does not have the right to demand its gathering service or delivery of raw gas for consumption. *Id.* at 16-17.

71. DCP argues that whether some of the gas products it sells eventually ends up in consumers' hands is not the test for deciding that it is a public utility. In support, DCP argues that the Commission expressly rejected arguments to the contrary in the recent *Anadarko* case, and it should do so again here. *Id.* at 20. DCP argues that the Commission has considered the following four factors in deciding whether an entity operates for the purpose of supplying the public in this context: (1) whether the gas is transported for compensation; (2) whether the gas is transported to unaffiliated third parties; (3) if the gas is transported to third parties, whether gas transported to those parties is in a substantial quantity; and (4) whether the pipeline can properly be considered

[4] DCP cites *Cascade Village Condominium Ass'n, Inc. v Mill Creek Water Sales & Distribution, LLC,* Decision No. C05-0949 issued June 29, 2005 in Proceeding No. 03F-740W and *In the Matter of the Petition of Public Service Co. of Colo.,* Decision No. C98-0275 issued March 11, 1998 in Proceeding No. 97D-414. Motion to Dismiss, 17-18.

a private use line.[5] *Id.* at 21 Because the Red Cloud and Lindsay pipelines will transport only raw gas that DCP owns to DCP processing facilities, DCP argues that under the above factors, these pipelines are private use pipelines. *Id.* at 23. Likewise, DCP argues that because it takes title at the wellhead to 98.7 percent of the raw gas that the Grand Parkway gathers and transports to DCP's processing plant, that the Grand Parkway is also a private use line. *Id.* DCP makes similar arguments relating to its entire gathering system. *Id.*

72. DCP asserts that § 40-2-122(1), C.R.S. demonstrates the General Assembly's policy to encourage competition in the sale of natural gas, which is exactly what it does through its gathering and processing efforts. *Id.* at 27.

73. DCP also argues that the Commission has never asserted jurisdiction to regulate the processing of raw gas, or sale of the processed commodities, and that gas gathering or processing systems have not been declared to be affected with a public interest within the meaning of Title 40. *Id.* at 24-25. DCP submits that gas gathering and processing does not fit into the regulated monopoly framework for public utilities in Colorado because there is no need to prevent competition or duplication of such services, or to protect ratepayers from bearing unnecessary costs. *Id.* at 26. DCP argues that the legislature and Commission have implicitly disclaimed Commission jurisdiction over gas gathering and processing, as shown through the definition of utility in Commission rules and statutes. *Id.* at 24-25; 28-29.

74. DCP argues that under Commission Rules, it is not a public utility because it does not provide sales service; purchase gas for resale or delivery to any customers; sell and distribute gas for end-user consumption; and because the raw gas it gathers and transports is not a

[5] DCP cites *Public Service Co. of Colo. v. Trigen-Nations Energy Co., L.L.L.P.,* Decision No. C98-1084 issued September 24, 1998 in Proceeding no. 97F-241G. Motion to Dismiss, 21.

commodity. *Id.* at 28-29, (discussing Rules 4001(s), (ss), and (ff), of the Commission's Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4). DCP also argues that the Commission's rules were crafted to prevent regulating gas gathering as a public utility. *Id.* at 29.[6] DCP concludes that all of this leads to a clear Commission policy to disavow jurisdiction over the gas gathering industry. *Id.* at 30.

75. Mr. Danks argues that in deciding whether an entity is a public utility, the Commission should look to the comprehensive scheme regulating public utilities, and should reject outdated common law tests, as required by *Bd. of County Comm'rs v. Denver Bd. of Water Comm'rs,* 718 P.2d 235 (Colo. 1986). Response to Motion to Dismiss*,* 3-7. He asserts that it is undisputed that DCP is a pipeline corporation operating for the purpose of supplying the public under § 40-1-103(1)(a), C.R.S. *Id.* at 2. In support, Mr. Danks relies on statements that DCP made in its First Motion to Dismiss that after it processes the raw gas, it markets the gas to end-users. *Id.* at 2-3, (referring to First Motion to Dismiss, 2-3). Mr. Danks argues that DCP has not established a statutory exemption to regulating it as a public utility. *Id.* at 6. For these reasons, he argues the Motion to Dismiss should be denied, and that judgment should be entered in his favor. *Id.* at 7.

76. DCP replies by asserting that it has always disputed whether it is a public utility, and that it has already clarified the statement in its First Motion to Dismiss upon which Mr. Danks relies. Motion to Reply, 4. Specifically, DCP points to its Motion to Reply to First Motion to

[6] DCP cites 2005 and 2018 rulemaking decisions, In the Matter of the Proposed Repeal and Re-Enactment of all Rules Regulating Gas Utilities, 4 CCR 723-4, 8, 10, 11, 17 and 32, Decision No. R05-0523 issued May 6, 2005 in Proceeding No. 03R-520G, and In the Matter of the Proposed Amendments to the Rules Regulating Gas Utilities and Pipeline Operators 4 *Code of Colorado Regulations* 723-4, Decision No. R18-0090 issued on February 5, 2018 in Proceeding No. 17R-0569G.

Dismiss, which states that, "[a]lthough DCP's Motion to Dismiss stated that it marketed residue gas and NGLs to customers including industrial end-users, DCP has since confirmed that none of the companies purchasing residue gas or NGLs from DCP are the ultimate consumers." *Id.,* quoting Motion to Reply to First Motion to Dismiss, fn. 50. DCP reiterates that this clarification was made again in other DCP pleadings and affidavits, including the pending Motion to Dismiss. *Id.*

III. RELEVANT LAW, DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Relevant Law.

77. The Commission has repeatedly required complainants to establish standing to prosecute complaints filed under § 40-6-108, C.R.S. *See e.g., Delta-Montrose Electric Ass'n for Tri-State Generation and Transmission Ass'n Inc.,* Decision No. C19-0297-I issued February 14, 2019 in Proceeding No. 18F-0866E; *Home Builders Ass'n v. Public Service Co. of Colo.,* Decision No. C03-1093 issued September 24, 2003 in Proceeding No. 01F-071G; *Roszell v. Union Pacific Railroad Co.,* Decision No. R12-1481 issued December 31, 2012 in Proceeding No. 12F-1030R; *Bass v. Public Service Co. of Colo.,* Decision No. R08-1188 issued November 13, 2008 in Proceeding No. R08-1188 (hereinafter *Bass,* Decision No. R08-1188); and *Roehling and Rainville v. Public Service Co. of Colo.*, Decision No. R08-1299 issued December 19, 2008 in Proceeding No. 08F-400EG. Given the Commission's significant history requiring complainants to establish standing to prosecute complaints under § 40-6-108, C.R.S., the ALJ rejects Mr. Danks's argument that he is not required to establish standing here.

78. Standing is a threshold question of law. *Bd. of County Comm'rs of La Plata County, et al. v. Colorado Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003). Indeed, the question of standing involves the fundamental consideration of whether a party has asserted a legal basis upon which a claim for relief can be grounded. *O'Bryant v. Pub. Utils.*

Comm'n, 778 P.2d 648, 652 (Colo. 1989). As such, this question must be answered before addressing to the merits of a complaint.

79. In deciding a motion to dismiss alleging that a complainant lacks standing, courts must accept the complaint's allegations as true, and must view the allegations in a light most favorable to the complainant. *Dunlap v. Colorado Springs Cablevision, Inc.,* 829 P.2d 1286, 1291 (Colo. 1992); *Colo. Manufactured Housing Ass'n v. Pueblo County,* 857 P.2d 507, 510 (Colo. App. 1993). Courts may consider evidence outside the complaint when deciding standing. *See Bd. of County Comm'rs v. Bowen/Edwards Assoc.,* 830 P.2d 1045, 1053 (Colo. 1992); *Bd. of County Comm'rs of La Plata County, et al.*, at 1122.

80. To establish standing, the complainant must demonstrate injury-in-fact to a legally protected interest as contemplated by statutory or constitutional provisions, and that the injury is due to the action of the respondent. *Douglas County Bd. of Comm'rs v. Pub. Utils. Comm'n*, 829 P.2d 1303, 1309 (Colo. 1992); *O'Bryant,* at 652; *Cloverleaf Kennel Club, Inc. v. Colorado Racing Comm'n*, 620 P.2d 1051, 1055-56 (Colo. 1980). These factors provide the framework to determine whether the asserted legal basis for a claim can be properly understood to grant a party a right to relief. *O'Bryant,* at 652.

81. The "actual injury" or "injury-in-fact" element of standing does not require direct pecuniary loss. *Id*. In the context of administrative action, injury-in-fact is established when the allegations of the complaint, along with any other evidence submitted, establish that a regulatory scheme "threatens to cause injury to the plaintiff's present or imminent activities." *Bd. of County Comm'rs of La Plata County, et al.*, at 1122. The alleged injury-in-fact must be "sufficiently direct and palpable" to allow a decision-maker to say, with "fair assurance," that there is an actual

controversy proper for judicial or administrative resolution. *O'Bryant,* at 652. Put differently, complainant must demonstrate that there is an existing controversy that can be effectively resolved by a decision on the merits of the complaint, not a mere possibility of a future dispute over some issue. *Bowen/Edwards Assoc.,* at 1053.

82. The second aspect of the standing test requires that the alleged injury be to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions for which relief is available. *Douglas County Bd. of Comm's*, at 1309; *O'Bryant,* at 652-53; *Cloverleaf Kennel Club, Inc.* at 1051. (Colo. 1980). Thus, when answering this question, it is appropriate to consider whether the Public Utilities Laws reveal a legislative intent that a legal right inures to Mr. Danks under the circumstances of his Amended Complaint. *See e.g., Bass,* Decision No. R08-1188, 13.

83. The Public Utilities Laws at issue in the Amended Complaint are §§ 40-5-101, and 40-6-108, C.R.S. Specifically, the Amended Complaint is filed under § 40-6-108, and it seeks a finding that DCP violated § 40-5-101, C.R.S. by not first obtaining a CPCN before beginning construction on the Grand Parkway, Red Cloud and Lindsay pipelines. *See* Amended Complaint, 3-4. Section 40-6-108, C.R.S. allows persons to file written complaints alleging that a public utility has violated a provision of law, or Commission rule or order, and gives the Commission discretion not to dismiss a complaint for the lack of direct damage to the complainant.[7] And, § 40-5-101, C.R.S., requires public utilities to obtain a CPCN from the Commission before beginning construction to extend or create new facilities. The ALJ reads these provisions together, and gives

[7] Given this statutory provision, the ALJ looks first to the legally protected interest standing element. Because the ALJ concludes that the Public Utilities Laws do not inure a legally protected interest in the circumstances of the Amended Complaint, there is no need to determine how to apply § 40-6-108(1)(d), C.R.S.

meaning to both in deciding whether the Public Utilities Laws reveal an intent to give Mr. Danks a legal right in the circumstances here. *See Martinez v. People,* 69 P.3d 1029, 1033 (Colo. 2003); *M.S. v. People,* 812 P.2d 632, 637 (Colo. 1991).

84. Colorado has long been dedicated to applying the regulated monopoly doctrine in the conduct of public utility operations. *Public Service Co. of Colo. v. Pub. Utils. Comm'n,* 765 P.2d 1015, 1021 (Colo. 1988). This doctrine is designed to protect the public as a whole by preventing competition and inefficient duplication of public utility services. *Id.* at 1024. Notably, the Colorado Supreme Court has specifically held that the regulated monopoly doctrine has its basis in § 40-5-101, C.R.S., which is at issue here. *Id.* at 1021. Section 40-5-101, C.R.S., is intended to prevent duplication of services between utilities, and to only authorize new ones when existing services are found inadequate. *Id.* Requiring Commission approval before beginning construction on new or extended facilities does just that; it also prevents interference with public utility services. § 40-5-101(1)(b) and (2), C.R.S.; *see Public Service Co. of Colo. v. Pub. Utils. Comm'n,* 350 P.2d 543, 550 (Colo. 1960). Section 40-5-101, C.R.S., also protects a public utility's ratepayers because, in granting a CPCN, the Commission must find that the public convenience and necessity requires the construction or extension to ensure the public utility provides safe and reliable service, and that the cost is reasonable and prudent. *Id.; see e.g., In re the Application of Black Hills/Colorado Electric Utility Company, LP,* Decision No. C15-0373 at 9, issued April 24, 2015 in Consolidated Proceeding Nos. 13A-0445E, 13A-0446E, and 13A-0447E.

B. Discussion, Analysis, and Conclusions.

85. The plain language of § 40-5-101, C.R.S., contemplates at least two types of complaints, that is, complaints seeking to prevent either duplication or interference with public utility services. § 40-5-101(1)(b), and (2), C.R.S., The statute includes no language allowing for

complaints such as the one at issue here. Indeed, such complaints have no connection to the statutory intent behind § 40-5-101, C.R.S., to prevent competition, and avoid duplication and interference with public utility service.

86. Mr. Danks has asserted no interest in the requested CPCN proceeding as a DCP customer, ratepayer, or competitor. Nor does Mr. Danks assert the type of interest contemplated by § 40-5-101(1)(b), or (2), C.R.S. Instead, the Amended Complaint asserts a legally protected interest in the requested CPCN proceeding based on alleged property damage, land use or siting issues, or other tortious conduct. These alleged legally protected interests have no connection with a CPCN proceeding under § 40-5-101, C.R.S., but concern interests unrelated to a CPCN proceeding.

87. As discussed, § 40-5-101, C.R.S., protects public utilities' ratepayers and customers, and, consistent with the regulated monopoly doctrine, is intended to avoid duplication and interference with public utility service. And while § 40-5-101, C.R.S., contemplates complaints that may arise of a CPCN proceeding, it does not contemplate the type of complaint at issue here. Read together, §§ 40-6-108 and 40-5-101(1)(b) and (2), C.R.S., do not inure a legally protected interest in the circumstances of the Amended Complaint. *See* § 2-4-205, C.R.S. As a result, the ALJ concludes that Mr. Danks failed to meet the second prong of the standing test. For that reason, the Complaint should be dismissed for lack of standing.

88. Mr. Danks's lack of standing is highlighted by his alleged injuries.[8] Indeed, the standing inquiry involves determining whether an existing controversy exists that can be

[8] The ALJ considered Mr. Danks's allegations of injury-in-fact in his Response to Motions for Attorney Fees. Those are the same allegations which Mr. Danks sought to include in a second and third Amended Complaint. *See* Second and Third Motions to Amend, Second and Third Amended Complaints, and Response to Motions for Attorney Fees, 4-19.

effectively resolved by a decision on the merits of the Amended Complaint. *See Bowen/Edwards Assoc.,* at 1053. Whether in this proceeding, or in a CPCN proceeding, the Commission lacks authority to provide relief for Mr. Danks's alleged injuries.

89. Many of the alleged injuries appear related to land use or siting issues. Amended Complaint, 6-17 (allegations relating to property damage caused by wells and easements for DCP's pipelines on Mr. Danks's property; allegations relating to time spent protecting property from Spot Zoning application before Weld County Commissioners); Response to Motions for Attorney Fees, 4-9 (allegations relating to easements and mineral interests; allegations relating to *ex parte* communications between DCP counsel and Weld County Commissioners). Under the plain language of § 40-5-101(1)(a), C.R.S. the Commission lacks authority to consider land use rights or siting issues, which are under the jurisdiction of local government's land use regulation.

90. Other alleged injuries are founded in tort, relate to property rights, or are equitable in nature. Amended Complaint, 6-17 (allegations relating to property damage caused by wells; allegations relation to fraudulent concealment and misrepresentation); Response to Motions for Attorney Fees, 4-17 (allegations relating to DCP's "recalcitrance" in removing DCP pipeline from Mr. Danks's property; allegations that DCP is the only possible buyer for raw gas extracted from mineral interests; allegations relating to easements and mineral interests; allegations relating to *ex parte* communications between DCP counsel and Weld County Commissioners; and allegations relating to fraudulent misrepresentation and concealment of material facts). It is well established that the Commission lacks jurisdiction to decide property rights. *Public Service Co. of Colo. v. Van Wyk,* 27 P.3d 377, 385 (Colo. 2001). Because it is not a court of equity, the Commission also cannot decide or address other alleged tortious conduct, including those that are equitable in nature. *Ephraim Freightways, Inc., Red Ball Motor Freight, Inc.,* 376 F.2d 40, 41 (10th (Cir.), *cert denied,*

389 U.S. 829 (1967) (administrative proceedings before the Commission "are not to be equated with an historical equity action."); *see Van Wyk,* at 385. And, while § 40-6-108, C.R.S. authorizes the Commission to determine whether a utility violated a provision of law, Commission rule, or order, it does not give the Commission authority to provide Mr. Danks relief for the injuries he alleges. Put differently, a decision on the merits of the Amended Complaint simply cannot redress any of the alleged injuries.[9]

91. Based on the foregoing, the ALJ concludes that Mr. Danks has failed to establish an existing controversy that can be effectively resolved by a decision on the merits of the Amended Complaint. *Bowen/Edwards Assoc.,* at 1053.

92. Because the ALJ concludes that Mr. Danks lacks standing, the ALJ does not address DCP's argument that the Commission lacks jurisdiction over it because it is not a public utility.

93. For the reasons and authorities discussed, the ALJ recommends that the Amended Complaint be dismissed. Pursuant to § 40-6-109, C.R.S., the ALJ transmits the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order to the Commission.

IV. ORDER

A. The Commission Orders That:

1. The Amended Complaint filed on May 1, 2020 is dismissed.

2. The September 22, 2020 hearing, and all deadlines and procedural requirements established in this proceeding through prior decisions are vacated.

[9] This is especially the case given that the DCP pipelines on Mr. Danks's property existed *before* the Grand Parkway, Red Cloud, and Lindsay pipelines were built, and because those pipelines are not on Mr. Danks's property. It is also notable that the alleged property damage and associated decreased property value appear to arise from actions taken by entities other than DCP.

3. Proceeding No. 20F-0077G is closed.

4. This Recommended Decision will 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 will 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 will 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 may not exceed 30 pages in length, unless the Commission finds good cause and permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director