

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19R-0703GPS

IN THE MATTER OF THE PROPOSED RULES REGULATING PIPELINE OPERATORS
AND GAS PIPELINE SAFETY, 4 CODE OF COLORADO REGULATIONS 723-11.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
ADOPTING RULES**

Mailed Date: November 4, 2020

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A. The Commission Orders That:16

I. STATEMENT

A. Background

1. The Colorado Public Utilities Commission issued Decision No. C19-0983, which was a Notice of Proposed Rulemaking (NOPR) to amend the Rules Regulating Pipeline Operators and Gas Pipeline Safety (Pipeline Safety Rules) on December 9, 2019. The NOPR initiated this proceeding. The NOPR proposed significant changes to the Pipeline Safety Rules, including moving the Pipeline Safety Rules from their present location within the Gas Utilities and Pipeline Operator Rules at 4 *Code of Colorado Regulations* (CCR) 723-4, to a new, standalone Part 11, 4 CCR, 723-11. The NOPR described the proposed changes in detail and the justifications therefor, attached a clean copy of the Rules and a version in legislative (*i.e.*, strikeout/underline) format (Initial Proposed Rules), established deadlines of January 17, 2020 and January 31, 2020 for initial comments and reply comments concerning the Initial Proposed Rules, respectively, and scheduled a hearing for February 10, 2020 at 9:00 a.m. for oral comments regarding the Initial Proposed Rules. The NOPR also referred this proceeding to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

2. The American Petroleum Institute (API); Atmos Energy Corporation (Atmos); Black Hills Colorado Gas, Inc. and Rocky Mountain Natural Gas LLC (Black Hills);, Colorado Natural Gas, Inc. (CNG); the Colorado Office of Consumer Counsel (OCC);, the Colorado Oil

and Gas Association (COGA); the Colorado Oil and Gas Conservation Commission; Public Service Company of Colorado (PSCo); and SP Pipeline Services Inc. (SP Pipeline) submitted initial comments and/or reply comments by the deadlines specified in the NOPR.

3. At 9:00 a.m. on February 10, 2020, the ALJ held the hearing noticed in the NOPR. The ALJ discussed several of the Initial Proposed Rules with the participants at the hearing. Based on the input of the commenters at the hearing, the ALJ continued the hearing to allow the commenters to engage in a stakeholder process to address and revise the Initial Proposed Rules, submit revised proposed rules (Revised Proposed Rules) to the Commission, comment on those Revised Proposed Rules in writing, and schedule a continued hearing to receive additional oral comments regarding the Revised Proposed Rules.

4. In Decision No. R20-0168-I issued March 12, 2020, the ALJ established the schedule for the informal stakeholder process. The Decision set May 15, 2020 as the deadline to file a notice that summarized the stakeholder process with attachments thereto consisting of the Revised Proposed Rules, and June 5, 2020 and June 19, 2020 as the deadlines for comments and response comments, respectively, regarding the Revised Proposed Rules.

5. On May 18, 2020, the ALJ issued Decision No. R20-0374-I that granted an informal request to continue: (a) the deadline to submit the notice and attachments referenced in Decision No. R20-0168-I to June 1, 2020; and (b) the deadlines for comments and response comments concerning the Revised Proposed Rules to June 15 and 29, 2020, respectively.

6. On June 1, 2020, Joe Molloy, the Chief of the Commission's Pipeline Safety Program filed the Notice of Draft Rule Stakeholder Workshop Process and Results (Notice) and copies of the Revised Proposed Rules in clean and legislative formats.

7. COGA, Colorado Springs Utilities, API, and CNG filed initial comments regarding the Revised Proposed Rules from June 12 to 15, 2020. No party filed response comments.

8. On July 7, 2020, the ALJ issued Decision No. R20-0492-I that converted the in-person continued public comment hearing into a remote continued public comment hearing.

9. On July 10, 2020, the ALJ held the remote continued public comment hearing. During the hearing, some participants expressed an interest in having a last opportunity to provide comments concerning the Revised Proposed Rules. In particular, some participants requested the opportunity to provide further comment regarding a proposal to allow an operator to request dismissal of a Notice of Probable Violation (NPV) to Proposed Rule 11505(c)(II)(a), rather than “revocation” of the NPV, as proposed by COGA in its comments filed on June 12, 2020. Some participants also requested the opportunity to provide further comments concerning whether a process for requesting and/or addressing “revocation” or “dismissal” of an NPV should be specified in the rules.

10. On July 14, 2020, the ALJ issued Decision No. R20-0507-I that established the deadline of July 24, 2020 for any final comments regarding the Revised Proposed Rules.

11. On July 15, 2020, PSCo filed its Final Comments.

12. Being fully advised in this matter, the ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision in accordance with § 40-6-109, C.R.S.

II. DISCUSSION

A. Introduction

13. In rendering this Decision, the ALJ has carefully reviewed and considered all the comments filed in this Proceeding and provided at the public comment hearing, even if this Decision does not specifically address every comment made, or every nuance of each comment.

B. Stakeholder Process

14. As noted, the stakeholder process took place from approximately late February through May 2020. The attendees at the first public comment hearing were invited to participate in the stakeholder process, but the process was not closed to new participants. Initially, API created a working draft of the Initial Proposed Rules and the comments/proposed changes submitted in writing before the February 10, 2020 public comment hearing and the comments made at that hearing.

15. The stakeholder participants agreed to divide the Initial Proposed Rules with comments/proposed changes into the following four groups: (a) Initial Proposed Rules 11000 to 11099; (b) Initial Proposed Rules 11100 to 11399; (c) Initial Proposed Rules 11400 to 11509; and (d) Initial Proposed Rules 11500 to 11509. The participants also agreed to hold four meetings addressing these groups of rules in succession. The four meetings were held once a week from April 24, 2020 to May 20, 2020. At the end of this process, the participants agreed to hold a fifth meeting to review the changes to Initial Proposed Rules 11500 to 11509.

16. Twenty-seven stakeholder participants attended the first meeting, and an average of 25 participants attended the subsequent meetings. According to the Notice, API, Atmos, Black Hills, CNG, OCC, COGA, PSCo, and SP Pipeline were “strong repeat commenters and

contributors” to the stakeholder process.¹ The stakeholder process resulted in “numerous significant changes” to the Initial Proposed Rules. The Notice stated that the stakeholder participants supported the changes and the final rules attached to the Notice.

C. Written Comments Concerning the Revised Proposed Rules

17. COGA and Colorado Springs Utilities filed substantive comments regarding the Revised Proposed Rules. In its comments, COGA recommended adding “revocation” to Rule 11504(c)(II)(A) as one of the actions that operators may request the Commission undertake with respect to a NPV. For its part, Colorado Springs Utilities proposed: (a) corrections to several typographical errors; (b) reinserting into Rule 11001 the definition of “Small operator” that was included in the redlined, but omitted from the clean, rules filed with the Notice; and (c) adding to Rule 11001 a definition of “confirmed discovery” that is the same as the definition of that term in 49 *Code of Federal Regulations* (C.F.R.) § 191.3. No party filed response comments opposing or offering revisions to the comments of COGA and Colorado Springs Utilities.

D. Public Comment Hearing

18. The stakeholder participants attended the public comment hearing on July 10, 2020. No participant opposed the changes proposed by COGA and Colorado Springs Utilities. However, a consensus emerged to replace “revocation” with “dismissal” in COGA’s proposal. Specifically, the stakeholders, including COGA, agreed that “dismissal,” rather than “revocation,” should be added to Rule 11504(c)(II)(A) as one of the actions that operators may

¹ Notice at ¶ 7.

request the Commission undertake with respect to an NPV. In addition, the question was raised as to whether the procedure by which an NPV is “revoked” by the Commission must be specified in the rules. However, this question was eliminated from consideration once the stakeholders agreed to replace revocation with dismissal in Rule 11504(c)(II)(A), as the procedure involving dismissals is well-known to the Commission.

E. Post-Hearing Final Comments

19. PSCo filed post-hearing comments to reiterate that it supports replacing “revocation” with “dismissal” in the list of actions specified in Rule 11504(c)(II)(A) as one of the actions that operators may request the Commission undertake with respect to an NPV. PSCo also stated that it would support specifying a process in Rule 11504(c)(II) or (III) by which a letter would be filed in the proceeding stating that the Commission dismisses an NPV. However, PSCo also stated that it “does not feel strongly that the process needs to be specifically expressed in the Pipeline Safety Rules of 4 CCR 723-11.”²

F. Analysis

1. Typographical Errors

20. The typographical errors identified by Colorado Springs Utilities shall be corrected. In addition, the ALJ has made several other changes to correct other typographical errors and to aid the readability of the Revised Proposed Rules. The ALJ’s intent in making these changes was not to change the meaning of the relevant rules.

² PSCo’s Final Comments at 2.

2. Rule 11000

21. The ALJ has added the following underlined text to Revised Proposed Rule 11000(f):

Consistent with § 40-15-107(2)(a), C.R.S., all information, documents, and copies of documents provided in connection with an audit, including any Request for Information from the PSP Chief or PSP Staff, shall be treated as confidential and shall not be made public by the Commission or any other person without prior written consent of the person providing such information, documents, or copies; or pursuant to a court order issued pursuant to § 24-72-204(5), C.R.S. If any such information, document, or copy of a document becomes the basis for, or employed within, an enforcement action pursuant to Rule 11500 et seq., Rules 1100-1103 of the Commission’s Rules of Practice and Procedure shall govern any claim of confidentiality in such proceeding. Any such information, document, or copy of a document that is not treated as, or deemed, confidential or highly confidential in any such proceeding thereafter shall not be treated by the Commission as confidential for any other purpose.

The purpose of the change is to specify that once information obtained through a Request for Information is employed in an enforcement action, Rules 1100 through 1103 of the Rules of Practice and Procedure 4 CCR 723-1, govern confidentiality in that proceeding, not Revised Proposed Rule 11000(f). As such, the burden would be on the operator to assert confidentiality over the information in the enforcement proceeding and, if challenged, establish that the information is entitled to confidential or highly confidential treatment. In addition, if such information is found by the Commission to not be confidential or highly confidential, the presumption accorded by Rule 11000(f) would terminate and the Commission, including the PSP Chief and PSP Staff, would no longer treat the information as confidential.

3. Rule 11001

22. The unopposed changes proposed by Colorado Springs Utilities to Rule 11001 shall be adopted. Accordingly, Rule 11001 shall contain the definition of “Small operator” that was included in the redlined, but omitted from the clean version of the rules filed with the

Notice. It will also include a definition of “confirmed discovery” that is the same as the definition of that term in 49 C.F.R. § 191.3.

4. Rules 11010 and 11011

a. Rule 11010

23. The ALJ has made the following changes, shown in underline and strikethrough, to Revised Proposed Rule 11010(b):

(a) Consistent with Rule 1304 of the Commission Rules of Practice and Procedure, 4 CCR 723-1, ~~a~~An operator may file a petition seeking a declaratory order ~~to request a resolution of that resolves~~ a controversy or uncertainty regarding any statute, Commission rule, regulation, and/or Commission decision and/or decisions consistent with rule 1304, of the Commission Rules of Practice and Procedure, 4 CCR 723-1. The requestor shall include with each request, at least the following:

(I) the statutory provision(s), Commission rule(s), regulation(s), and/or decision(s) ~~reference~~at issue;

(II) the specific instance or illustration of the ~~rule’s or decision’s~~ application of the statutory provision(s), Commission rule(s), regulation(s), and/or decision(s) ~~requiring interpretation~~that causes the controversy or uncertainty; and

(III) the complete petitioner’s contact information.

(IV) The petition may also include a request for expedited treatment if an interpretation is needed quickly and good cause exists.

(b) Upon receipt of the petition for a declaratory order, the Commission will consider whether to accept the filing consistent with Rule 1304 of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1.

~~(I) If the Commission determines that the requested resolution concerns a Colorado specific rule or Commission decision that is only technical in nature and no subsequent review by PHSMA is required, the PSP Chief shall advise the Commission that the Commission does not need to accept the petition because no controversy exists. An order declining to accept the petition will clarify the technical matter raised.~~

~~(II) If the Commission determines that the requested resolution concerns a Colorado specific rule or Commission decision that addresses Commission administration or processes and no subsequent review by~~

~~PHMSA is required, the Commission shall accept the petition in order to resolve the controversy or uncertainty.~~

24. The ALJ made these changes to specify that Rule 1304 of the Commission's Rules of Practice and Procedure will govern the Commission's consideration of a petition for declaratory order. The language that the ALJ has modified and deleted risked creating confusion about the standard to be applied to such petitions filed by pipeline operators.

25. The ALJ made the following changes to Revised Proposed Rules 11010(c) and (d):

~~(e) Any interpretation or rule or decision is effective upon approval by the Commission or the PHMSA Administrator for Pipeline Safety, as applicable.~~

(d) Nothing in these rules prohibits an operator from contacting the PSP Chief or PSP Lead Engineer for informal assistance if no formal action is necessary. Consistent with Rule 1007(d) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, opinions expressed ~~Any interpretation or direction provided~~ by the PSP Chief or PSP Lead Engineer do not represent the official views of the Commission, but are designed to aid the public and to facilitate the accomplishment of the Commission's functions. Nothing communicated by the PSP Chief or PSP Lead Engineer constitutes legal advice. ~~es not constitute a final Commission decision, consistent with the Commission's Rules of Practice and Procedure 4 CCR 723-1-1007(d).~~

26. The ALJ deleted Revised Proposed Rule 11010(c) because it is unnecessary and thus superfluous. The ALJ's changes to Revised Proposed Rule 11010(d) make clear that any informal assistance provided by Commission Staff is subject to Commission Rule 1007(d), 4 CCR 723-1. Informal assistance provided by the PSP Chief or PSP Staff is thus not accorded any greater weight than informal assistance provided by any other Commission Staff member.

b. Rule 11011

27. The ALJ has made substantial changes to Revised Proposed Rule 11011 to specify that: (a) operators seeking waivers of Commission rules, including requests for waiver or federal regulations incorporated into the Commission's rules, must file a petition or motion for waiver

pursuant to Commission Rule 1003(b); and (b) the Commission will decide such petitions. The NOPR specified that the proposed rules “are aimed at adding transparency and Commissioner engagement throughout the [Pipeline Safety Program] processes.” Requiring the Commission, and not the PSP Chief, to make decisions on waiver requests better serves those aims.

c. Rules 11010 and 11011

28. The ALJ has also made substantial changes to both Rules 11010 and 11011 to specify the process of obtaining a review by the Pipeline and Hazardous Materials Safety Administration (PHMSA), which is an agency of the United States Department of Transportation, of Commission decisions interpreting federal regulations, or granting waivers of such regulations, that are incorporated into the Commission’s rules.³ Rule 11010 addresses Commission decisions interpreting, among other things, “any . . . Commission rule [or] regulation,” including the federal regulations incorporated into the Commission’s rules. Rule 11011 addresses Commission decisions on requests for waivers from the safety standards in 49 C.F.R. Part 192 that are incorporated into the Commission’s rules. The ALJ’s changes specify that the decision by an ALJ or the Commission interpreting a federal regulation pursuant to Rule 11010, and/or granting a waiver from a federal regulation pursuant to Rule 11011, must be an interim decision.

29. These changes are designed to ensure that parties to Commission proceedings are not required to file exceptions to a Recommended Decision, or an application for rehearing, reargument, or reconsideration (RRR), or for judicial review of a Commission Decision, during the pendency of PHMSA’s review of that Recommended or Commission Decision. Filing and considering exceptions, RRR, and/or judicial review during the pendency of PHMSA’s review of

³ See Commission Rule 11008.

a Commission decision would be an inefficient use of the resources of the Commission and the parties to the proceeding in which the Commission's decision issued.⁴ The changes do not, however, eliminate the opportunity for parties to file exceptions to a Recommended Decision, or an application for RRR or for judicial review of a Commission Decision, interpreting a federal regulation pursuant to Rule 11010 and/or granting a waiver from a federal regulation pursuant to Rule 11011. Instead, parties can file exceptions, or an application for RRR or for judicial review, once PHMSA's response is incorporated into an ALJ's Recommended Decision or a Commission Decision, respectively.

5. Rule 11013

30. The ALJ has made the following change to Revised Proposed Rule 11013(b):

Prior to an inspection or investigation, the PSP Chief or assignee shall notify an operator. Except in emergency situations, ~~t~~The operator shall have an opportunity to respond to the notification prior to the initiation of an inspection or investigation relating to any jurisdictional pipeline facility, including the Facilities subject to inspection include, but are not limited to, an operator's right of way or easement, new and existing piping, valves, and other above ground appurtenances attached to pipes, or, upon request of the PHMSA, an interstate pipeline to determine compliance with 49 U.S.C. §§ 60101 et. seq., with these rules, and/or with applicable Commission orders.

31. The purpose of the change is to place a reasonable limitation on the right of response to an inspection or investigation so the Commission is not impeded from timely addressing an emergency situation that could put the public at risk.

⁴ The changes to Rules 11010 and 11011 are too extensive to show effectively in underlining and strikethrough.

6. Rule 11501

32. The ALJ has made two primary sets of changes to this rule. First, the ALJ made the following addition to Revised Proposed Rule 11501(a):

This rule shall apply to violation(s) that would have otherwise been discovered by a prudent operator in the normal course of business. This is the lowest degree of culpability for which operators may be penalized and does not limit the Commission from penalizing operators for higher degrees of culpability.

The ALJ added the underlined sentence to underscore that the preceding sentence does not prohibit the Commission from addressing more culpable conduct:

33. Second, the ALJ has added provisions addressing the Commission's authority to assess doubled or tripled penalties pursuant to § 40-7-113.5(3) and (4), C.R.S. The language specifies the circumstances in which the Commission may assess doubled and tripled penalties. The added provisions are adapted from Rules 3010(f) and (g) and Rule 6019 of the Commission's Electric and Transportation Rules, respectively.⁵ The changes make clear when the Commission can exercise its statutory authority to assess double or treble damages and treats pipelines the same as electric utilities and regulated transportation providers.

34. Finally, the ALJ has deleted provisions limiting the Commission's discretion in assessing penalties. As proposed by the parties, Rule 11501(k) and (l) removed the Commission's ability to impose joint liability (and thus joint and several liability) for violations of the rules, or to impose penalties for violations of the Commission's rules "assessed on the operator by the Commission's state or federal regulatory counterparts." The ALJ finds and concludes that these limitations should not be imposed on the authority of the Commission by

⁵ Commission's Rules Regulating Electric Utilities 4 CCR 723-3 and Rules Regulating Transportation by Motor Vehicle 4 CCR 723-6.

rule, particularly given that joint and several liability has been imposed by the Commission in the past⁶ and there may be circumstances in the future in which it would be in the public interest for the Commission to pursue penalties for violations that have been the subject of separate actions by federal or other state regulatory authorities. Instead, the concepts embodied in Proposed Rule 11501(k) and (l) should be reserved for argument by operators concerning the appropriate penalty to be imposed in individual compliance proceedings.

7. Rule 11502

35. The ALJ has made changes to Revised Proposed Rule 11502(d) and (e) to specify that service of process, and the resulting notice provided to the recipient, shall be governed by Rule 1205 of the Commission's Rules of Practice and Procedure and § 40-6-108, C.R.S. There is no reason to deviate from these legal requirements that govern all other Commission proceedings.

8. Rules 11504 and 11506

36. The ALJ has deleted Revised Proposed Rules 11504(c)(I)(C) and 11506(c)(I)(C) to eliminate any possible inconsistency between those provisions and newly added Rule 11501(i). Specifically, the deletion removes the ability of an operator to "admit" the NPV or NOA by paying the proposed civil penalty and agreeing to implement the proposed compliance directive, but then state in the written explanation that the circumstances alleged in the NPV or NOA do not constitute a violation of the Commission's rules. The operator could

⁶ See, e.g., Decision No. R10-1216 issued on November 8, 2010 in Proceeding No. 10G-177EC at 12-13 (¶ 61), 14 (Ordering ¶ 5).

later attempt to argue that the Commission does not have the authority to impose double or treble penalties because the operator's statement in the earlier proceeding establishes that it did not "admit" liability in that proceeding. The deletion of Revised Proposed Rules 11504(c)(I)(C) and 11506(c)(I)(C) does not eliminate the ability of an operator to argue that a previous admission of liability in a previous proceeding does not justify the imposition of double or treble damages in a proceeding in which such damages are sought.

37. The ALJ has also added "or dismissal" to the list of actions an operator can request of the Commission in response to an NPV in Revised Proposed Rule 11504(c)(II)(A). COGA requested this change, the Stakeholder Group agreed to it, and no public comment was submitted opposing the change. The ALJ agrees with this option to Rule 11504(c)(II)(A).

9. Rule 11507

38. The ALJ has deleted the following portions of Revised Proposed Rule 11507(e) as unnecessary and thus superfluous:

- (e) A Commission decision finding that a pipeline facility or a LNG facility is a hazardous facility shall contain ~~the following:~~
- ~~(I) findings of fact that form the basis for the conclusion that the pipeline facility or the LNG facility is hazardous to life or property;~~
 - ~~(II) a conclusion that the pipeline facility or the LNG facility is a hazardous facility;~~
 - ~~(III) the legal basis for the decision and order;~~
 - ~~(IV) a description of the corrective action required of the operator; and~~
 - ~~(V) the date by which the operator shall complete the ordered corrective action.~~

39. The ALJ also replaced subparagraph (h) as follows:

(h) ~~Following issuance of an order of satisfaction, the PSP Chief may issue a NPV pursuant to rule 11504 if information obtained during hazardous facility mitigation indicates that a violation of these rules led to the facility becoming hazardous. PSP Staff may bring a formal complaint seeking the issuance of an HFO and an NPV in the same proceeding, but is not required to do so.~~

The ALJ made this change to specify the full range of the authority of PSP Staff in bringing such actions and to avoid any future argument that PSP Staff is required to bring in a formal complaint requesting the issuance of an HFO and an NPV as separate proceedings. There may be efficiency and other reasons for bringing a consolidated formal complaint and NPV proceeding. The change preserves the ability of the Commission to conduct proceedings in the most efficient way possible.

40. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

III. ORDER

A. The Commission Orders That:

1. The Rules Regulating Pipeline Operators and Gas Pipeline Safety, attached to this Recommended Decision are adopted.

2. The Part 4 rules in redline legislative format and in final format are attached to this Recommended Decision as Attachments A and B, respectively. The Part 11 Rules in final format are attached as Attachment C. All three attachments are also available in the Commission's E-Filings system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=19R-0703GPS

3. 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.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be made available to all parties in the proceeding, 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.

5. 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