

Decision No. R20-0283-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
ADDRESSING OUTSTANDING FILINGS,
DISMISSING CLAIM AND PARTY,
VACATING HEARING, AND SCHEDULING
REMOTE PREHEARING CONFERENCE**

Mailed Date: April 24, 2020

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I. STATEMENT, FINDINGS, AND CONCLUSIONS.**A. Procedural Background.**

1. On February 25, 2020, William Danks (Mr. Danks) initiated this matter by filing a Complaint with the Public Utilities Commission against DCP Operating Company, LP (DCP) and Oneok Elk Creek Pipeline LLC (Oneok), (collectively Respondents). The Complaint argues that the Respondents failed to file an application for a certificate of public convenience and necessity as required by law.

2. On February 28, 2020, the Commission Director issued an Order to Satisfy or Answer, providing Respondents notice of the Complaint, and requiring them to answer the Complaint in writing or satisfy the matters in the Complaint within 20 days. At the same time, the Commission Director scheduled a hearing on the Complaint for May 11, 2020 at 9:00 a.m. at a Commission Hearing Room in Denver, Colorado.

3. On March 19, 2020, DCP and Oneok each filed a separate Motion to Dismiss with attachments. Both Motions assert that the Commission lacks jurisdiction.

4. On March 31, 2020, Mr. Danks filed a Response to DCP's Motion to Dismiss, an "Amendment to Formal Complaint" (Amendment), along with Addendums 1 and 2 to the Formal Complaint (Addendum 1 or 2). The Amendment states that the Complaint is amended with Addendum 1, which makes allegations relating to DCP. Amendment, ¶ 9. The Amendment also states that Mr. Danks withdraws its claim against Oneok, and that Addendum 2 explains the reasons it does so. *Id.* at ¶ 12. Addendum 2 makes allegations relating to Oneok.

5. Mr. Danks did not file a response to Oneok's Motion to Dismiss.

6. On April 1, 2020, the Commission referred this matter to an Administrative Law Judge (ALJ).

7. 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).

8. On April 23, 2020, Mr. Danks filed “Complainant’s Response to DCP’s Pleading Filed on April 15, 2020” (Response or Response to Motion to Strike). Given that the only filing DCP made on April 15, 2020 is its Motion to Strike, the ALJ construes Mr. Danks’s April 23, 2020 filing as his response to DCP’s Motion to Strike and refers to it as such.

B. Amendment to Complaint, Claim Against Oneok, and Motion to Strike.

9. Among other matters, the Amendment to seeks to add factual assertions, to “clearly include DCP processing plants,” and to reiterate or add legal arguments. Amendment at 1-3. Notably, the Amendment states that Mr. Danks withdraws the Complaint’s claim against Oneok. Amendment at ¶ 12; Addendum 2 at 1 and 9. This more akin to voluntarily dismissing a claim or action, rather than seek to amend a complaint. *See e.g.*, C.R.C.P. 41. As such, the ALJ construes Mr. Danks’s comments in the Amendment and Addendum as voluntarily withdrawing or dismissing the Complaint’s claim against Oneok. Oneok filed nothing in response to the Amendment or its Addendums, but in its Motion to Dismiss, Oneok seeks to have the claim against it dismissed. DCP takes “no position” on Mr. Danks’s “attempt to withdraw his claim against ONEOK through the amended complaint.” Motion to Strike, fn. 12. Based on the foregoing, the ALJ concludes that Mr. Danks’s request to withdraw or dismiss his claim against Oneok is unopposed.

10. The ALJ finds that dismissing the claim against Oneok at this stage serves the parties’ interests in conserving resources, as well as administrative efficiency. Because the request is unopposed, and serves the parties’ interests and administrative efficiency, the ALJ deems the Complaint’s claim against Oneok withdrawn, and will dismiss Oneok as a party. The

caption in this proceeding is amended (as reflected above) to indicate that Oneok is no longer a party.

11. The ALJ next turns to the remaining issues relating to the Amendment. The Motion to Strike asks the Commission to strike Mr. Danks's Amendment and arguments in his Response (presumably to DCP's Motion to Dismiss) that are based on the Amendment because Mr. Danks failed to seek leave to amend the Complaint as required by Commission Rule 1309(a), 4 CCR 723-1. Motion Strike, 1-2. Alternatively, DCP argues that if Mr. Danks's Amendment is construed as a motion to amend, that such a motion should be denied because the Amendment unnecessarily raises standing arguments, makes irrelevant and cumulative assertions, and inappropriately attempts to expand the scope of the Complaint. *Id.* at 2-5.

12. DCP also seeks leave to reply to Mr. Danks's Response to DCP's Motion to Dismiss. DCP's reply is included as a part of its Motion to Strike. *Id.* at 5-17. In support, DCP argues that its reply is permitted under Rule 1400(e), 4 CCR 723-1, because Mr. Danks's Response to DCP's Motion to Dismiss contains misrepresentation of material facts, presents new issues, and contains incorrect statements of law. *Id.* at 5-8.

13. Mr. Danks's Response to Motion to Strike reads as a sur-reply to DCP's Motion to Dismiss. For example, he reiterates his response to DCP's standing argument, asserts that DCP's standing argument is spurious and that the merits of the case should be decided at hearing, not on a motion to dismiss. Response to Motion to Strike, 1-6. Nowhere does Mr. Danks respond to DCP's argument that his Amendment should not be allowed for having failed to follow Commission Rule 1309(a), 4 CCR 723-1. This renders DCP's request to strike Mr. Danks's Amendment to Complaint uncontested.

14. Rule 1309(a) unambiguously requires a complainant to seek leave from the Commission to amend or supplement a complaint. 4 CCR 723-1. Nothing in Mr. Danks's Amendment, the attachments thereto, or his Response to Motion Strike can fairly be read as seeking leave from the Commission to amend his Complaint. The ALJ concludes that Mr. Danks failed to comply with Rule 1309(a), 4 CCR 723-1. While the ALJ generally prefers that complaints be amended as early as possible in a proceeding to promote administrative efficiency and resource conservation, the circumstances here do not warrant allowing the Amendment. Specifically, even when DCP moved to strike the Amendment, Mr. Danks did not attempt to belatedly seek leave to amend. What is more, the manner in which Mr. Danks attempted to amend the Complaint makes it difficult to identify and assess the claims in this proceeding. In particular, Mr. Danks attempts to amend the Complaint through multiple different documents; within those are quoted email exchanges, photographs, and arguments in response to DCP's Motion to Dismiss. *See* Amendment, Addendum 1, and Addendum 2. The purported Amendment is more similar to a response to DCP's Motion to Dismiss than an attempt to amend the Complaint. As presented, the Amendment does more to obfuscate than to clarify or supplement the claims asserted. For all these reasons, the ALJ will not permit Mr. Danks to amend the Complaint based on the current filings.

15. Nonetheless, to encourage a full and complete resolution of the disputes between the remaining parties, the ALJ will allow Mr. Danks an opportunity to seek leave to amend the Complaint, as set forth in Ordering ¶ 6 below. The ALJ includes specific requirements for an amended complaint in order to avoid the same lack of clarity created by Mr. Danks's Amendment.

16. The ALJ expects all parties, including Mr. Danks, to comply with the Commission's Rules of Practice and Procedure, 4 CCR 723-1.¹ Failing to do so creates unnecessary delays in the forward movement of this proceeding and may result in decisions adverse to the failing party's interests.

17. As mentioned, DCP's Motion to Strike also seeks leave to reply to Mr. Danks's Response to DCP's Motion to Dismiss. Mr. Danks does not respond to this. *See generally*, Response to Motion to Strike. This renders DCP's request to reply uncontested. *See* Rule 1400(d), 4 CCR 723-1. As noted, Mr. Danks's Response addresses DCP's proposed reply to Mr. Danks's Response to DCP's Motion to Dismiss, essentially reading as a sur-reply. The ALJ agrees with DCP that Mr. Danks's Response to its Motion to Dismiss raises new issues. Based on the foregoing, the ALJ will grant DCP's request for leave to reply to Mr. Danks's Response to Motion to Dismiss. DCP's reply, contained within its Motion to Strike, will be accepted. The ALJ denies DCP's request to strike assertions within Mr. Danks's Response to Motion to Dismiss that pertain to the Amendment as unnecessary given that DCP's reply is accepted.²

C. Oneok's Motion to Dismiss.

18. Because the Complaint's claims against Oneok are withdrawn, Oneok's Motion to Dismiss is moot and will be denied for that reason.

D. May 11, 2020 Hearing Date and Prehearing Conference.

19. The ALJ finds that under the circumstances, the May 11, 2020 hearing date is premature. More time is necessary before an evidentiary hearing to allow Mr. Danks an

¹ These Rules may be found on the Commission's website at: <https://www.colorado.gov/pacific/dora/pucrulespractice>.

² The ALJ will not rule on DCP's Motion to Dismiss until after the deadline for Mr. Danks to seek leave to amend his Complaint has expired.

opportunity to request to amend his Complaint, for a response thereto, and, if permitted, for DCP to respond to an amended complaint. In addition, the current hearing date leaves little time for the parties to prepare for the hearing, conduct discovery, and file and exchange witness and exhibit lists and exhibits. What is more, the Commission's offices are currently closed to the public, and Commission staff currently have limited access to the Commission's office. Thus, even setting aside the issues mentioned above, it is not realistic to assume that an in-person hearing may proceed on May 11, 2020.

20. To effectuate the forward movement of this matter, the ALJ will schedule a prehearing conference which parties may attend from remote locations by video conference or telephone.³ Parties may not appear in person for the prehearing conference. During the remote prehearing conference, the ALJ will schedule an evidentiary hearing (if necessary), establish deadlines to file and exchange witness and exhibit lists, exhibits and other filings,⁴ and will address any other relevant matters raised during the hearing as appropriate. The parties must be prepared to discuss how much time they will require to present their evidence at hearing, the timing for a hearing, and the referenced deadlines. The ALJ encourages the parties to confer with each other in advance on all matters to be addressed at the prehearing conference.

21. The ALJ encourages the parties to attend the hearing by video conference, as this will provide helpful information on appropriate next steps, including whether the evidentiary hearing may be held by video conference. Indeed, given the uncertainty created by the

³ The ALJ is scheduling the prehearing conference for early June 2020 to allow enough time for Mr. Danks to seek to amend his complaint, for DCP to respond to such a request, for the ALJ to rule on the request, and for the parties to evaluate the need for, and extent of an evidentiary hearing prior to setting a hearing date. This will help ensure that when the prehearing conference is held, the parties will be in a better position to discuss the forward movement of this proceeding.

⁴ For example, the ALJ anticipates setting deadlines for: dispositive motions, pretrial motions, and statements of position.

COVID-19 pandemic relating to future public gatherings, it is helpful for the forward movement of this proceeding to determine at the prehearing conference whether the parties are capable of participating in an evidentiary hearing by video conference.

22. The remote prehearing conference will be held using the web-hosted video conferencing service, GoToMeeting. Information on how to use GoToMeeting to attend the hearing by video conference is provided in Attachment A to this Decision. The web link and access code to attend by video conference are included in Ordering ¶ 2; instructions to attend by telephone are included in the same paragraph. The ALJ strongly encourages the parties planning to attend the prehearing conference by video conference to test their capability to use GoToMeeting before the remote prehearing conference.

23. *All parties are on notice that* failure to appear at the prehearing conference may result in decisions adverse to their interests, including granting the complete relief opposing parties seek. This may include dismissing the Complaint, or granting the Complaint's relief.

24. *All parties are on notice that* the ALJ will deem any party's failure to appear at the prehearing conference to be a waiver of that party's objection to the rulings made during the prehearing conference.

II. ORDER

A. It Is Ordered That:

1. The hearing scheduled in this matter for May 11, 2020 at 9:00 a.m. at a Commission hearing room is vacated.

2. A remote prehearing conference is scheduled as follows:

DATE: June 4, 2020

TIME: 11:00 a.m.

METHOD: Join by video conference online at:
<https://global.gotomeeting.com/join/404173349>
(If necessary, use 404173349 as the access or ID code)

OR

Join by telephone:
Dial +1 872-240-3212, and
when prompted, enter access or ID code: 404173349

3. Consistent with the above discussion, the claim against Oneok Elk Creek Pipeline LLC (Oneok), in this proceeding is withdrawn. Oneok is dismissed as a party, and Oneok's Motion to Dismiss is denied as moot.

4. The caption in this proceeding is amended to remove Oneok as a Respondent.

5. Mr. Danks's Amendment to Formal Complaint filed on March 31, 2020 is not accepted.

6. Mr. Danks may seek leave to amend his Complaint by filing a motion consistent with Rule 1309(a), 4 CCR 723-1. If he wishes to amend his Complaint, Mr. Danks must file his motion to amend his Complaint and a complete proposed amended complaint on or by close of business on May 7, 2020. If accepted, the proposed amended complaint will replace, not supplement, the original Complaint. The deadline to respond to a proposed amended complaint will not begin to run until the amended complaint is accepted.

7. Consistent with the above discussion, DCP Operating Company, LP's (DCP) request for leave to reply to Mr. Danks's Response to DCP's Motion to Dismiss is granted and the reply included in DCP's Motion to Strike is accepted. DCP's request to strike portions of

Mr. Danks's Response to DCP's Motion to Dismiss which relate to assertions from Mr. Danks's Amendment to Formal Complaint is denied.

8. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director