

Decision No. C24-0422

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0248G

SYMMETRY ENERGY SOLUTIONS, LLC,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**COMMISSION DECISION GRANTING, IN PART, AND
DENYING, IN PART, EXCEPTIONS TO RECOMMENDED
DECISION NO. R24-0044**

Mailed Date: June 17, 2024
Adopted Date: May 8, 2024

TABLE OF CONTENTS

I.	BY THE COMMISSION	2
A.	Statement	2
B.	Background.....	2
C.	Exceptions	4
D.	Conclusion.....	9
II.	ORDER.....	9
A.	The Commission Orders That:	9
B.	ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 8, 2024.....	10

I. BY THE COMMISSION**A. Statement**

1. Through this Decision, the Commission addresses the exceptions to Decision No. R24-0044, issued January 22, 2024, by Administrative Law Judge (ALJ) Alenka Han (Recommended Decision). The Recommended Decision grants Public Service Company of Colorado's (Public Service) Motion to Dismiss (Motion) the Formal Complaint (Complaint) filed by Symmetry Energy Solutions, LLC (Symmetry). Consistent with the discussion below, we grant, in part, and deny, in part, Symmetry's exceptions.

B. Background

2. Symmetry initiated this proceeding by filing its Complaint pursuant to Commission Rule 1302, 4 *Code of Colorado Regulations* (CCR) 723-1, on May 17, 2023. The Complaint challenges the Commission's decision in the Storm Uri Proceeding.¹

3. The Storm Uri Proceeding was initiated by Public Service in May 2021 when it filed an application seeking Commission approval of, among other things, variances to its tariff regarding the penalties it could charge shippers (like Symmetry) for violating Public Service's Operational Flow Orders (OFOs) leading up to and during Winter Storm Uri. The OFOs required shippers to add a certain volume of gas to the system to maintain overall system balance and included a financial penalty for non-compliance. Because several shippers did not comply with the OFOs, Public Service incurred significant expenses in purchasing natural gas at market rates to make up for the gas shortfall caused by certain shipper's noncompliance. Public Service sought Commission approval of market-based OFO penalties which exceeded the amounts permitted by

¹ Proceeding No. 21A-0192EG.

its tariff but would allow Public Service to recover the significant expenses it incurred purchasing gas to fill the shortfall caused by incompliant shippers.

4. Symmetry, a shipper that was assessed an OFO penalty as a result of the Storm Uri Proceeding, now seeks to challenge that proceeding on three distinct legal theories. First, Symmetry asserts that the Public Service's notice of the Storm Uri Proceeding was constitutionally defective and violated Symmetry's due process rights.² Second, Symmetry argues that Public Service violated its contractual obligations with Symmetry by failing to provide it with personal notice of the Storm Uri Proceeding.³ Third, Symmetry's Complaint claims that the OFO penalties constitute unjust and unreasonable charges under § 40-3-101(1), C.R.S. because the notice was deficient and because Public Service failed to revisit the billed gas amounts that form the basis for the OFO penalties.⁴

5. Public Service filed a Motion to Dismiss the Complaint which the ALJ granted in its Recommended Decision.⁵ The ALJ rejected Symmetry's due process claim because Public Service is not a state actor and therefore could not have violated its due process rights.⁶ The ALJ dismissed Symmetry's contract claim for lack of subject matter jurisdiction.⁷ Finally, the ALJ dismissed Symmetry's third and fourth claims because they were collateral attacks on the Storm Uri Proceeding's final decision and were thus barred by the doctrine of claim preclusion.⁸

6. In its exceptions, Symmetry challenges the ALJ's findings and conclusions on all of Symmetry's claims.

² Symmetry Formal Complaint, ¶¶ 33-46.

³ Symmetry Formal Complaint, ¶¶ 47-53.

⁴ Symmetry Formal Complaint, ¶¶ 54-63.

⁵ Recommended Decision No. R24-0044.

⁶ *Id.* at 13.

⁷ *Id.* at 17.

⁸ *Id.* at 19-21.

C. Exceptions

a. Symmetry's Due Process Claim

7. Symmetry contends the ALJ erred by concluding that Public Service did not violate Symmetry's right to due process when Public Service did not provide personal notice of the Storm Uri Proceeding to Symmetry.⁹ It argues that Public Service, by providing utility notice as prescribed by a Commission decision, was taking "state action" – and therefore constitutional due process obligations attached to the act.¹⁰ Symmetry asserts that under Colorado law, it was owed personal notice of the Storm Uri Proceeding as it was a quasi-judicial proceeding.¹¹

8. Public Service responds that Symmetry's claim to personal notice relies on an incomplete reading of the state Administrative Procedure Act (APA) and utilities statutes as well as over-reading the case Symmetry marshals in support of its claim.¹² Public Service contends that the ALJ correctly concluded that Public Service's notice of the Storm Uri Application was not "so intertwined" with this agency that the utility's act of giving notice could be considered a state action.¹³

9. We start by noting that the party bringing exceptions, in this case, Symmetry, bears the burden of persuasion.¹⁴ In our view, whether it was Public Service's notice that should be considered, or the Commission's notice, Symmetry's argument that it was owed personal notice of the proceeding is unpersuasive. While the requirements of due process are flexible,¹⁵ Symmetry does not present an analysis under any established legal framework to analyze what process is due.

⁹ Exceptions, p. 4.

¹⁰ Exceptions, pp. 3-9.

¹¹ Symmetry Formal Complaint, ¶ 35.

¹² Response to Exceptions, pp. 5-8.

¹³ Response to Exceptions, pp. 8-10.

¹⁴ See, e.g., Decision No. C20-0238, Proceeding No. 18A-0809R; Rule 1500, 4 CCR 723-1.

¹⁵ See *Matthews v. Eldridge*, 429 U.S. 319 (1976).

Instead, the company relies on a provision of the state APA and one judicial opinion to support its contention. Neither stands for the proposition that Symmetry was due personal notice of the Storm Uri Proceeding.

10. The APA provision Symmetry relies on is in section 24-4-105(2)(a), C.R.S., which provides that in general, agencies must provide personal notice of an adjudicatory hearing either personally or by mail, unless another law provides otherwise. In this case, the Public Utilities Law provides otherwise. Section 40-6-108(2)(a), C.R.S., governs notice for application proceedings, like the Storm Uri Proceeding, and requires that the Commission give notice of all applications to all persons the Commission believes are interested. Unlike the provisions in the APA which specifically require personal or mailed service, the Commission's notice section does not require that notice be provided personally or by mail. The legislature clearly knew how to require those types of notice and declined to require them for application proceedings at this Commission.

11. The other source of law Symmetry relies upon for its contention that it was owed personal notice is a Colorado Supreme Court case from 1992.¹⁶ We have reviewed the case at length – it does not stand for the proposition that personal notice is required in all quasi-judicial cases, or in this one. Instead, *Douglas County* stands for the general proposition that notice is required for quasi-judicial proceedings, and in fact, the case involved a quasi-judicial proceeding where the statutory scheme required notice “to the community”, not personal notice.

12. So, whether or not Public Service was a state actor, Symmetry's argument that it was due personal notice of the Storm Uri Proceeding is based on a misreading of the governing statutes, and case law, and ultimately fails to put forth a due process analysis that demonstrates it

¹⁶ *Douglas County Bd. of Comm'rs v. Pub. Utils. Comm'n of Colorado*, 829 P.2d 1303 (Colo. 1992).

was owed personal notice of the Storm Uri Proceeding. Accordingly, we reject Symmetry's argument that it was owed personal service by Public Service.

b. Symmetry's Contract Claim

13. Symmetry also challenges the ALJ's finding that the Commission does not have jurisdiction over Symmetry's contract claim and dismissing the claim on those grounds. Symmetry's contract claim alleges that two contracts it has in place with Xcel, its Interruptible Gas Transportation Service Agreement and Firm Gas Transportation Service Agreement (attached to its Complaint as Exhibits 2 and 3 respectively), require Xcel to notify Symmetry any time Xcel takes action at the Commission that would lead to tariff modifications affecting Symmetry.¹⁷ Symmetry alleges that Xcel breached those contracts by failing to notify Symmetry of the Storm Uri Proceeding.¹⁸ The ALJ dismissed this claim because the Commission does not have jurisdiction over breach of contract claims.¹⁹ In support of its argument that this Commission has jurisdiction over this claim, Symmetry points out that a district court dismissed a declaratory judgment claim that was similar to the contract claim it asserts here, with the district court concluding that it lacked jurisdiction to hear the claim because it may have to analyze tariffs on file at the Commission.²⁰

14. The Recommended Decision was correct. It is a rare breach of contract claim that this Commission may entertain. The Commission may only hear those claims plead as breach of contract when the core of the claim requires an interpretation of filed tariffs.²¹ Symmetry's claim alleges that Xcel breached the terms of two agreements by failing to notify Symmetry of the Storm

¹⁷ Symmetry Formal Complaint, ¶¶ 47-53.

¹⁸ *Id.*

¹⁹ Recommended Decision No. R24-0044, ¶¶ 48-49.

²⁰ Exceptions, p.10.

²¹ *Cf. City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999) (concluding the Commission had jurisdiction over a claim, plead as breach of contract, alleging utility had miscalculated certain rates according to formulas in its tariffs).

Uri Proceeding. Symmetry does not allege, and we do not perceive, how this claim requires an analysis of tariffs on file with this Commission. Accordingly, Symmetry's claim falls outside this Commission's jurisdiction.²² Symmetry may have presented a similar declaratory judgment claim to a district court,²³ but it now asserts that it has a ripe breach of contract claim against Xcel.²⁴ The proper venue for that claim is not the Public Utilities Commission, but an Article VI court.

c. Symmetry's Third and Fourth Claims

15. As recounted by the ALJ, Symmetry's third and fourth claim argue that the penalties approved by the Commission stemming from the Storm Uri Proceeding are unjust and unreasonable because Symmetry did not have personal notice of the Storm Uri Proceeding²⁵ and because the billed gas amounts it was charged by Xcel have not been "revisited" and therefore are "likely" to contain errors.²⁶ The Recommended Decision dismissed both claims. The ALJ found that Symmetry's claims were impermissible collateral attacks on a final commission decision and that Symmetry was barred from raising these issues by the doctrine of claim preclusion.²⁷

16. Symmetry challenges that conclusion, arguing that claim preclusion does not bar its claims because it was not in privity with any party in the Storm Uri Proceeding. Xcel responds that Symmetry was in privity with Tiger Natural Gas Inc. (Tiger) – a shipper who had participated in the Storm Uri Proceeding.²⁸

²² See, *Tiger Natural Gas, Inc. v. Pub. Serv. Co.*, Decision No. R21-0696-I, Proceeding No. 21F-0290G, issued Nov. 5, 2021 (dismissing breach of contract claim for lack of Commission jurisdiction).

²³ The district court's dismissal of a related declaratory judgment claim, which Symmetry now points to in support of its position, cannot expand the Commission's jurisdiction to include pure contract claims.

²⁴ Response to Motion to Dismiss, p. 9, ¶ 3.

²⁵ Symmetry Formal Complaint, ¶ 59.

²⁶ *Id.* at ¶ 63.

²⁷ Recommended Decision No. R24-0044, ¶¶ 58-60.

²⁸ We recognize there was significant briefing on claim preclusion and privity in the parties' exceptions. We provide this brief treatment of the issue because as discussed below, Symmetry is statutorily barred from raising these claims.

17. We agree with Symmetry's argument regarding claim preclusion and therefore grant the exceptions as to this issue. Symmetry was not in privity with Public Service, nor did Tiger sufficiently represent Symmetry's interests such that the two shippers were in privity. Under Colorado law, privity between a party and a non-party, for purposes of the doctrine of claim preclusion, requires both (1) a substantial identity of interests and (2) a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation.²⁹ Symmetry's relationship with Tiger does not satisfy the second prong of this analysis. While Symmetry and Tiger are both shippers and likely have similar interests, they do not have a functional or working relationship. Tiger, as a separate entity from Symmetry, cannot be said to have presented and protected Symmetry's interests in the Storm Uri Proceeding.

18. While we disagree with the claim preclusion analysis in the Recommended Decision, Symmetry's final two claims are barred because they are impermissible collateral attacks on a final Commission decision. Collateral attacks on final Commission decisions are precluded by section 40-6-112(2), C.R.S. That statute provides: "In all *collateral actions or proceedings*, the decisions of the commission *which have become final* shall be conclusive" (emphasis added).³⁰ The Colorado Supreme Court defines a collateral attack on a judgment as "'an attempt to avoid, defeat or evade it, or deny its force and effect, in some incidental proceeding not provided by law.'"³¹ In asserting these claims, Symmetry is attempting to evade the effects of the Commission's final decision in the Storm Uri Proceeding.

²⁹ *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo.1999).

³⁰ See also *Lake Durango Water Co. v. Pub. Utilities Comm'n of State of Colorado*, 67 P.3d 12, 22 (Colo. 2003).

³¹ *People v. Wiedemer*, 852 P.2d 424, 429 (Colo. 1993) (quoting *Brennan v. Grover*, 158 Colo. 66, 69, 404 P.2d 544, 546 (1965)).

19. By its own admission, Symmetry received notice of the Commission-approved OFO penalties six days before the briefing window closed in the Storm Uri Proceeding.³² Despite this notice, Symmetry chose not to intervene in that proceeding and instead waited nearly eight months to file a complaint in which it seeks to escape the enforcement of the noticed OFO penalties. Through these claims Symmetry is attempting to challenge issues already decided in a final Commission decision and this type of collateral attack is prohibited by 40-6-112(2), C.R.S. We therefore dismiss both claims.

D. Conclusion

20. While we have granted Symmetry's exceptions in part, for the reasons set forth above we deny the relief sought. Between the Recommended Decision, and this Decision, all four of Symmetry's claims are dismissed. We leave the contract claim to its proper venue: district court.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Decision No. R24-0044 filed by Symmetry Energy Solutions, LLC on February 23, 2024, are granted, in part, and denied, in part, consistent with the discussion above.

2. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

³² Symmetry Formal Complaint ¶ 21.

3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 8, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners