Decision No. R24-0209-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0418G

ARM, LLC, and HEARTLAND INDUSTRIES, LLC

COMPLAINANTS,

V.

COLORADO NATURAL GAS, INC. and WOLF CREEK ENERGY, LLC,

RESPONDENTS.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE CONOR F. FARLEY GRANTING-IN-PART AND DENYING-IN-PART MOTION TO QUASH, GRANTING MOTION TO COMPEL, GRANTING UNOPPOSED SECOND MOTION TO AMEND PROCEDURAL SCHEDULE, RESCHEDULING REMOTE PREHEARING CONFERENCE, AND RESCHEDULING EVIDENTIARY HEARING

Mailed Date: April 5, 2024

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I. BACKGROUND

A. Procedural Background

1. On August 16, 2023, Arm, LLC and Heartland Industries, LLC (collectively, Complainants) filed a Formal Complaint (Complaint) against Colorado Natural Gas, Inc. (CNG) and Wolf Creek Energy, LLC (Wolf Creek) (collectively, Respondents) that initiated this proceeding.

2. On August 30, 2023, the Commission referred the matter by minute entry to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

3. On October 11, 2023, the ALJ issued Decision No. R23-0679-I that scheduled a remote prehearing conference for October 19, 2023, and required the parties to confer regarding a procedural schedule and for Complainants to file a report of the conferral by October 17, 2023.

4. On October 17, 2023, Complainants filed a Report of Conferral. In it, Complainants reported that the parties had agreed to the following procedural schedule (Consensus Schedule):

Event	Deadline
Answer to Amended Complaint Discovery Commences	November 10, 2023
Complainants' Direct Testimony	March 4, 2024
Respondents' and Intervenors' Answer Testimony	April 15, 2024
Rebuttal/Cross-Answer Testimony	May 22, 2024

Event	Deadline
Prehearing Motions	May 27, 2024
Corrections to Testimony and Exhibits	May 31, 2024
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	June 6, 2024
Prehearing Conference	June 7, 2023
Hearing	June 11-14, 2024
Statements of Position	July 2, 2024

5. On October 25, 2023, the ALJ issued Decision No. R23-0724-I that adopted the procedural schedule proposed by the parties, with one modification to the deadline for Complainants' direct testimony, which was changed to March 8, 2024.

6. On January 30, 2024, the ALJ signed a Subpoena Duces Tecum sought by the Utility Consumer Advocate (UCA) and directed to Summit Utilities, Inc. to produce documents at a deposition scheduled for February 9, 2024.

7. On February 8, 2024, Summit Utilities, Inc. filed a Motion to Quash Subpoena Duces Tecum to Summit Utilities, Inc. for Production of Certain Documents (Motion to Quash). On February 22, 2024, Complainants, Staff, and UCA filed responses to the Motion to Quash.

8. In their response to the Motion to Quash, Complainants repeatedly referenced a Motion to Compel that they contended had been filed on February 13, 2024. Because no such Motion to Compel appeared in the Commission's e-filing system, the ALJ sent an email to Complainants (and copied counsel for the other parties) on February 23, 2024 stating that the referenced Motion to Compel did not appear to have been filed with the Commission.

9. On February 23, 2024, Complainants filed: (a) a Motion to Compel Discovery from Respondents (Motion to Compel); and (b) an Unopposed Motion to Amend Procedural Schedule and Motion to Waive Response Time (Unopposed Motion) as follows:

Event	Current Deadline	New Deadline
Complainants' Direct Testimony	March 8, 2024	April 8, 2024
Respondents' and Intervenors' Answer Testimony	April 15, 2024	May 16, 2024
Rebuttal/Cross-Answer Testimony	May 22, 2024	June 24, 2024
Prehearing Motions	May 27, 2024	June 28, 2024
Corrections to Testimony and Exhibits	May 31, 2024	July 1, 2024
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	June 6, 2024	July 8, 2024
Remote Prehearing Conference	June 7, 2023	July 9, 2024
Hearing	June 11-14, 2024	July 15-18, 2024
Statements of Position	July 2, 2024	August 5, 2024

Complainants stated that the Motion to Quash and Motion to Compel necessitated the amended schedule. Specifically, both motions must be resolved before the parties can move forward with discovery and, to the extent either is granted and Respondents and/or Wolf Creek are required to produce additional documents, "sufficient time is needed to analyze the documents and schedule one or more depositions in advance of the filing of Complainants' direct testimony."[1]

[1] Unopposed Motion at 3.

10. On February 26, 2024, Complainants filed a Motion to Shorten Response Time to the Motion to Compel and to Waive Response Time to this Motion (collectively, Combined Motion).

11. On February 27, 2024, Respondents filed a Response to the Combined Motion (Response).

12. On February 28, 2024, the ALJ issued Decision No. R24-0123-I that granted the Unopposed Motion, granted-in-part and denied-in-part the Combined Motion, and shortened response time to the Motion to Compel to March 4, 2024.

13. On March 4, 2024, Respondents filed a Response to Complainants' Motion to Compel.

14. On March 7, 2024, Complainants filed a Motion for Leave to Reply and Reply in Support of Motion to Compel (Motion for Leave). Complainants state that Respondents oppose, and Staff and UCA take no position with respect to, the Motion for Leave.

15. On March 25, 2024, Arm and Heartland filed an Unopposed Second Motion to Amend Procedural Schedule and Motion to Waive Response Time requesting that the schedule be extended by approximately two months (Unopposed Second Motion) as follows:

Event	**Current Deadline**	**New Deadline**
Complainants' Direct Testimony	April 8, 2024	June 10, 2024
Respondents' and Intervenors' Answer Testimony	May 16, 2024	July 18, 2024
Rebuttal/Cross-Answer Testimony	June 24, 2024	August 12, 2024
Prehearing Motions	June 28, 2024	August 26, 2024
Corrections to Testimony and Exhibits	July 1, 2024	September 2, 2024

Event	Current Deadline	New Deadline
Hearing Witness Matrix Stipulation(s) and Settlement Agreement(s)	July 8, 2024	September 9, 2024
Remote Prehearing Conference	July 9, 2024	September 10, 2024
Hearing	July 15-18, 2024	September 16-18, 2024
Statements of Position	August 5, 2024	October 2, 2024

According to the Unopposed Second Motion, "[t]he requested extension to all deadlines is intended to allow time to resolve the pending discovery disputes, enable sufficient discovery prior to the deadlines for written testimony (including 30(b)(6) depositions of Respondents in mid-April to early May), and accommodate parties' existing schedule conflicts."[2] Because no party opposes the Unopposed Second Motion, Complainants request a waiver of response time to the Unopposed Second Motion.

B. Relevant Allegations

16. The First Amended Complaint alleges the following facts that are material to the discovery disputes in the proceedings.

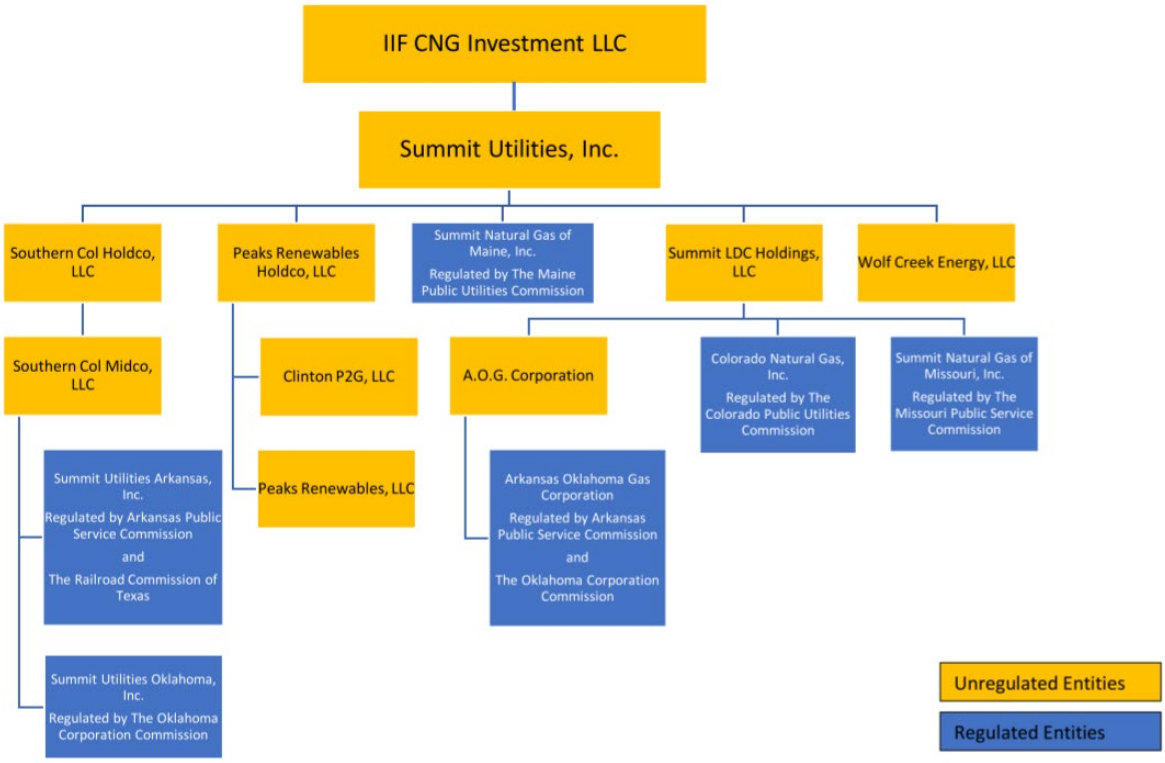
1. Proceeding No. 05A-0225G

17. In 2005, CNG filed an application with the Commission to transfer its equity to CNG Holdings, Inc., which commenced Proceeding No. 05A-225G.[3] Staff intervened in the proceeding and then reached a settlement agreement with CNG. In the Settlement Agreement,

[2] Unopposed Second Motion at 4.
[3] First Amended Complaint at 5 (¶ 12).

"CNG agreed to 'ensure that no cross-subsidies occur among or between subsidiaries of CNG Holdings, Inc. after the date stock was transferred.'"[4]

18. At some point thereafter, CNG Holdings, Inc. was renamed Summit Utilities, Inc. (Summit Utilities). In 2019, CNG's direct parent company became Summit LDC Holding, LLC (Summit LDC Holdings), which lies between CNG and Summit in the corporate heirarchy.[5] Summit LDC Holdings and Wolf Creek lie at the same level within the corporate hierarchy insofar as their direct corporate parent is Summit. While CNG is a regulated utility, Summit Utilities, Summit LDC Holdings, and Wolf Creek are not regulated.[6] The following is the corporate organizational chart:



[4] *Id*. (citing Decision No. R05-1109 issued in Proceeding No. 05A-225G on September 14, 2005).
[5] *Id*. at 4 (¶ 7).
[6] *Id*. at 4 (graphic).

19. In the First Amended Complaint, Complainants allege that CNG and Wolf Creek "have an alter ego relationship, including having been operated as a single entity with regard to ARM/Heartland's accounts, commingled assets, and disregarded legal formalities, in violation of Commission rules and Decisions."[7] Complainants also allege that "CNG is cross-subsidizing the business operations of Wolf Creek."[8]

2. Relationship Between Complainants and Respondents

20. ARM owns real property located at 9000 South Interstate 25, Pueblo, CO 81004 (Premises), including a 90,000 square-foot (approximately 2-acre) greenhouse and a 15,000 square-foot warehouse located at the Premises (together, the Facilities).[9] ARM leases the Premises, including the Facilities, to Heartland, which operates the Facilities to grow and sell cannabis products.[10]

21. ARM takes natural gas service from CNG and Wolf Creek, pursuant to three contracts and CNG's tariffs.[11] ARM and Wolf Creek entered into the first contract entitled "Base Contract for Sale and Purchase of Natural Gas" on February 12, 2015 (Wolf Creek Contract I).[12] According to Complainants, Wolf Creek Contract I "required Wolf Creek to deliver specific 'Base Load' quantities of gas per day for each month of the year, which could be adjusted upward or downward, at specific contract prices."[13] Wolf Creek Contract I specified that Wolf Creek

> will act as Agent for [ARM] regarding all aspects of [ARM's] natural gas transportation agreement with Colorado Natural Gas (CNG) except for payment of invoices to CNG. Under such Agency, Seller will be responsible for (i) nominating and scheduling Buyer's natural gas purchased herein, (ii) managing Buyer's imbalances, and (iii) responding to CNG

[7] First Amended Complaint at 9 (¶ 33).
[8] *Id*. at 29 (¶ 169).
[9] First Amended Complaint at 8 (¶ 22).
[10] *Id*. at 8 (¶ 23).
[11] *Id*. at 8 (¶ 25).
[12] *Id*. at 10 (¶ 40).
[13] *Id*. (¶ 41).

> Operational Flow Orders. Buyer and Seller will execute a Letter of Agency authorizing Seller as Buyer's Agent as described above.[14]

Wolf Creek Contract I was superseded by Wolf Creek Contract II that ARM and Wolf Creek entered into on November 1, 2022.[15]

22. ARM entered into the second contract with CNG on March 9, 2015, which is entitled "Firm Gas Transportation Service Agreement" (CNG Contract).[16] Pursuant to the CNG Contract, CNG "agree[d] to receive and transport [ARM's] Gas from [CNG's] Receipt Point to [certain] Delivery Point(s) . . . on a firm capacity basis up to [a certain] Firm Capacity Peak Day Quantity."[17] The CNG Contract had an initial five-year term, with consecutive five-year renewal terms provided the parties executed a document attached to the CNG Contract as Exhibit A.[18]

23. ARM entered into the third contract, entitled "Agency Delegation," with CNG on March 9, 2015 (Agency Agreement).[19] In it, ARM appointed Wolf Creek as its agent under Wolf Creek Contract I for the functions identified in Wolf Creek Contract I and other functions. By its terms, the Agency Agreement would "remain in effect until terminated by either Shipper or Agent upon providing written notice to" CNG.

24. On September 21, 2020, CNG issued an invoice to ARM for alleged underbilling from September 2018 through April 2020 in the amount of $213,267.29 (2018-2020 Billing Dispute).[20] The alleged underbilling resulted from an error by CNG in the programming of a flow computer installed at the Premises.[21] Complainants allege that CNG issued the invoice, which did not mention or otherwise state that Complainants owed any portion of the alleged underbilling to

[14] First Amended Complaint at 11 (¶ 46); Ex. 2 at 14.
[15] First Amended Complain at 19 (¶¶ 100-101); Ex. 10 at 3 (§ 12).
[16] First Amended Complaint at 12 (¶ 51).
[17] *Id*., Ex. 3 at 1.
[18] *Id*., Ex. 3 at 2.
[19] Motion to Dismiss, Ex. 2 at 2-3.
[20] First Amended Complaint at 17 (¶ 90).
[21] *Id*. at 17 (¶ 89).

Wolf Creek. Complainants further allege that "Wolf Creek never charged ARM for under-billing related to the 2018-2020 Billing Dispute."[22] However, "ARM/Heartland would later learn that approximately $124,000 of the total $213,267.80 alleged under-billing claimed by CNG was attributable to Wolf Creek."[23]

25. Complainants and CNG engaged in unsuccessful mediation of the 2018-2020 Billing Dispute in November 2022.[24] CNG then issued two disconnect notices to ARM, the second of which stated that service would be disconnected on January 24, 2023 if CNG did not receive payment for the amount stated in the September 21, 2020 invoice.[25] The disconnect notices stated that "[t]he past-due amount owed to Colorado Natural Gas, Inc. for utility service rendered is $213,267.80 (without late fees)." According to Complainants, "Wolf Creek is not mentioned in the Disconnect Notice."[26]

26. On January 17, 2023, CNG filed a lawsuit against Complainants in Denver District Court, alleging claims for breach of contract and unjust enrichment based on the 2018-2020 Billing Dispute. According to Complainants, "Wolf Creek was not a named party, nor even mentioned in CNG's Complaint."[27] Complainants allege that CNG's disconnection on January 24, 2023 "would have resulted in the loss of a $2 million crop and bankruptcy."

27. As a result, "ARM/Heartland under duress, executed on January 23, 2023 a 'Settlement Agreement' with CNG, which included the $150,000 payment to CNG, $50,000 of which had to be paid immediately."[28] Complainants allege that "Wolf Creek was not a party to the

[22] *Id*. at 18 (¶ 91).
[23] *Id*. at 18 (¶ 92),
[24] *Id*. at 20 (¶ 109).
[25] *Id*. (¶ 111).
[26] *Id*. at 21 (¶ 112).
[27] *Id*. (¶ 117).
[28] *Id*. at 22 (¶ 122).

Settlement Agreement between ARM/Heartland, nor even referenced therein."[29] Pursuant to the Settlement Agreement, Complainants released "CNG from any all claims . . . which arise directly or indirectly out of, or based in whole or in part on the Miscalibration Incident, the Undercharge, the Disconnect Notice, and the Litigation."[30] "CNG" is defined in the Settlement Agreement as "Colorado Natural Gas, Inc."[31]

28. Following the execution of the Settlement Agreement, the parties continued to have disputes regarding billing, a gas leak on CNG's side of the meter, whether the gas leak caused the high consumption claimed by Respondents and that was at least part of the billing disputes between the parties, and Respondents' responses to requests for information from Complainants.[32] Complainants requested mediation on May 13, 2023, but CNG did not respond within two months.[33] As a result, Complainants filed the Complaint on August 16, 2023.

3. Claims for Relief

29. The Complaint asserts the following claims: (1) Violation of Commission Decisions Requiring CNG and Wolf Creek to Operate as Separate Businesses (against by CNG and Wolf Creek); (2) Violations of Commission Transportation Rule 4208: Anticompetitive Conduct Prohibited (against CNG); (3) Violation of Commission Transportation Rule 4206: Failure to Require an Agency Agreement Between ARM and Wolf Creek (Against CNG); (4) Violation of Commission Rule 4403(l): Return of Utility Customer Deposit (Against CNG); (5) Violations of CNG's Firm Transportation Tariff (Against CNG and Wolf Creek); (6) Breach of

[29] *Id*. (¶ 123).
[30] *Id*., Ex. 1 at 2 (§ II.2).
[31] *Id*., Ex. 1 at 1.
[32] *Id*. at 22-26 (¶¶ 124-154).
[33] *Id*. at 27 (¶¶ 159-160). *See also* First Amended Complaint, Ex. 2 at 17 (§ 15.13) (Each Party may submit to a court of competent jurisdiction in the City and County of Denver any claim or dispute that cannot be resolved between the Parties through negotiation or mediation within two (2) months after the date of the initial demand for non-binding mediation.").

Firm Gas Transportation Agreement (Against CNG); (7) Breach of Wolf Creek Agreements (Against Wolf Creek); (8) Excessive Charges as a Result of 2018-2020 Bill Dispute (Against CNG); (9) Negligent and/or Fraudulent Misrepresentation (Against CNG); and (10) Excessive Charges in Winter 2023 (Against CNG and Wolf Creek). In its prayer for relief, Complainants request:

> that the Commission issue orders against Colorado Natural Gas, Inc. and Wolf Creek Energy, LLC requiring a full accounting and itemization, under oath, as set forth above; for damages in amounts to be determined at hearing; for pre-judgment and post-judgment interest at the highest lawful rate; for civil penalties in amounts to be determined at hearing; mandating Colorado Natural Gas to be ring-fenced from Wolf Creek Energy, such that the two entities' finances may not be commingled in any way going forward; for attorney fees and costs; and for such other and further relief the Commission deems just and proper.[34]

C. Motion to Dismiss and Response to Motion to Amend

30. In the Motion to Dismiss, Respondents argued, among other things, that Wolf Creek must be dismissed from this proceeding because it is not a public utility. Instead, CNG stated that Wolf Creek is "a private entity providing services to individual customers pursuant to contract."[35] Respondents concluded that the Commission does not have jurisdiction over it and, consequently, the First Amended Complaint must be dismissed as to Wolf Creek.

31. In their response to the Motion to Amend, Respondents argued that Complainants' proposed amendment must be denied because, to succeed on their alter ego-based piercing of the corporate veil theory, Complainants must prove that Wolf Creek and CNG are alter egos of a common parent company.[36] As the corporate organizational chart shows above, the common parent of CNG and Wolf Creek is Summit Utilities, which is the immediate parent of Wolf Creek. CNG's

[34] *Id*. at 40.
[35] *Id*. at 6.
[36] Response to Motion to Amend at 5.

immediate parent is Summit LDC Holdings, whose immediate parent is Summit Utilities.[37] As a result, Respondents argued that Complainants must prove that Wolf Creek is an alter ego of Summit Utilities, and that CNG is the alter ego of Summit LDC Holdings, which, in turn, is the alter ego of Summit Utilities.[38]

32. The ALJ denied the Motion to Dismiss and granted the Motion to Amend in Decision No. R23-0724-I on October 25, 2023. As to the Motion to Dismiss, the ALJ held that "Complainants have alleged sufficient facts in their 40-page, 264-paragraph First Amended Complaint to support their conclusion that Wolf Creek has been operating as a public utility, either due to piercing the corporate veil(s) separating CNG and Wolf Creek or otherwise."[39] The ALJ granted the Motion to Amend because Complainants had established good cause to amend the Complaint to make explicit the alter ego theory of their case.[40]

II. MOTION TO QUASH

A. Legal Standard

1. Motion to Quash

33. With a few exceptions, "the Commission [has] incorporate[d] by reference rules 26-37 of the Colorado Rules of Civil Procedure" that govern discovery.[41] The 2012 version of the Colorado Rules of Civil Procedure (C.R.C.P.) is the version incorporated by Commission Rule 1405(a)(I).[42] Under the 2012 version of C.R.C.P. 26(b)(1),

> parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence,

[37] *Id*. at 5-6.
[38] *Id*.
[39] Decision No. R23-0724-I at 23 (¶ 53).
[40] *Id*. at 13 (¶¶ 31-33).
[41] Rule 1405(a)(I), 4 CCR 723-1.
[42] Rule 1004(h), 4 CCR 723-1 ("'Colorado Rules of Civil Procedure' means the Colorado Rules of Civil Procedure, as published in the 2012 edition of the Colorado Revised Statutes.").

> description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

34. Based on the foregoing, the scope of discovery is "very broad."[43] Nevertheless, parties do not have an unlimited right to discovery of all available information.[44] Generally, "a nonparty lacks the expectation of being required to turn information over to an opposing party."[45] When a nonparty invokes a right to confidentiality or privacy in information being sought through discovery, "the trial court must balance the policy in favor of broad disclosure with the individual's right to keep personal information private."[46] Under this balancing test,

> [t]he party requesting the information must always first prove that the information requested is relevant to the subject of the action. Next, the party opposing the discovery request must show that it has a legitimate expectation that the requested materials or information is confidential and will not be disclosed. If the trial court determines that there is a legitimate expectation of privacy in the materials or information, the requesting party must prove either that disclosure is required to serve a compelling state interest or that there is a compelling need for the information. If the requesting party is successful in proving one of these two elements, it must then also show that the information is not available from other sources. Lastly, if the information is available from other sources, the requesting party must prove that it is using the least intrusive means to obtain the information.[47]

In the context of a subpoena served on a nonparty, the recipient's status as a nonparty is a factor that weighs against disclosure in the balancing test "because the nonparty does not have an interest

[43] *Corbetta v. Albertson's, Inc.*, 975 P.2d 718, 720 (Colo. 1999).
[44] *Stone v. State Farm Mut. Auto. Ins. Co.*, 185 P.3d 150, 155 (Colo. 2008).
[45] *Gateway Logistics, Inc. v. Smay*, 302 P.3d 235, 240 (Colo. 2013).
[46] *Id*. at 239 (internal citations omitted).
[47] *In re District Court*, 256 P.3d 687, 691-92 (Colo. 2011).

in the outcome of the litigation."[48] According to the Colorado Supreme Court, "[t]his makes sense because a nonparty lacks the expectation of being required to turn information over to an opposing party."[49]

2. UCA's Authority

35. "The director [of the UCA] shall represent the public interest and, to the extent consistent therewith, the specific interests of residential consumers, agricultural consumers, and small business consumers."[50] To fulfill this statutory duty, the UCA "may . . . intervene as a party in any commission proceeding."[51] In such proceedings, the UCA:

> (I) May inspect the records and documents of any public utility and conduct depositions under oath of any officer, agent, or employee of a public utility in relation to the public utility's business and affairs. To exercise this authority, the director shall request that the commission issue a subpoena pursuant to the commission's authority under section 40-6-103 (1) to:
>
> > (A) Issue a subpoena on a public utility requiring the public utility to produce records or documents, or, for records or documents kept outside of the state, to produce verified copies of records or documents, for inspection by the office at such time and place that the commission designates; or
> >
> > (B) Issue a subpoena for the attendance of witnesses at a deposition to be conducted by the director or the director's designee at such time and place that the commission designates. The director or the director's designee has the authority to administer oaths of witnesses at a deposition held pursuant to this subsection (1)(e)(I).
>
> (II) With respect to the good cause shown requirement set forth in section 40-6-103 (1) for the issuance of a subpoena, good cause is shown for a request made pursuant to this subsection (1)(e) if the director's request identifies the testimony, records, or documents sought pursuant to this subsection (1)(e).[52]

[48] *Gateway Logistics*, 302 P.3d at 240
[49] *Id*.
[50] § 40-6.5-104(1), C.R.S.
[51] § 40-6.5-106(2), C.R.S.
[52] § 40-6.5-106(1)(e), C.R.S.

3. 42 U.S.C. § 16453(a)

36. 42 U.S.C. § 16451 *et seq.* is known as the Federal Public Utility Holding Company Act of 2005. 42 U.S.C. § 16453(a) states:

> Upon the written request of a State commission having jurisdiction to regulate a public-utility company in a holding company system, the holding company or any associate company or affiliate thereof, other than such public-utility company, wherever located, shall produce for inspection books, accounts, memoranda, and other records that-
>
> (1) have been identified in reasonable detail in a proceeding before the State commission;
>
> (2) the State commission determines are relevant to costs incurred by such public-utility company; and
>
> (3) are necessary for the effective discharge of the responsibilities of the State commission with respect to such proceeding.

37. Under 42 U.S.C. § 16451(8), "holding company" is:

> (i) any company that directly or indirectly owns, controls, or holds, with power to vote, 10 percent or more of the outstanding voting securities of a public-utility company or of a holding company of any public-utility company; and
>
> (ii) any person, determined by the Commission, after notice and opportunity for hearing, to exercise directly or indirectly (either alone or pursuant to an arrangement or understanding with one or more persons) such a controlling influence over the management or policies of any public-utility company or holding company as to make it necessary or appropriate for the rate protection of utility customers with respect to rates that such person be subject to the obligations, duties, and liabilities imposed by this subtitle upon holding companies.

38. Finally, a "holding company system" is "a holding company, together with its subsidiary companies"[53] and a "person" is defined as "an individual or company."[54]

[53] 42 U.S.C. § 16451(9).
[54] 42 U.S.C. § 16451(12).

B. Parties' Arguments

1. Summit Utilities' Argument

39. The basis of Respondents objections to the requests in the Subpoena is the following:

> Neither SUI, nor Summit LDC, is party to this action and there are no claims asserted against them. While the Complaint alleges Respondents operate as a single entity under an alter ego theory, there are no allegations, implicit or otherwise, of SUI being an alter ego of either entity, or for that matter of SUI having any involvement in the disputes between the parties. Similarly, there are no arguments concerning Summit LDC Holdings, LLC's ("Summit LDC") being an alter ego of WCE, CNG, or SUI. As with SUI, there are no allegations connecting Summit LDC to this dispute. This is not surprising, as the claims asserted arise from a private dispute between the parties stemming from their nine-year natural gas relationship.
>
> SUI is a private entity. SUI is also a holding company with operations across multiple states through various subsidiaries. CNG is not a direct subsidiary of SUI, but rather a secondary subsidiary through Summit LDC.[55]

In short, Summit Utilities contends that any request for documents from Summit Utilities concerning Summit Utilities or Summit LDC Holdings is irrelevant – because neither is a party to this proceeding, and there are no express allegations in the First Amended Complaint of an alter ego relationship between Summit Utilities, Summit LDC Holdings, Wolf Creek, and/or CNG.[56] In addition, requests to Summit Utilities for documents concerning CNG are unduly burdensome because UCA can obtain those documents directly from CNG.[57] Any requests directed to Summit Utilities, therefore, are beyond the scope of discovery in this proceeding.

[55] Motion to Quash at 3.

[56] *Id*. at 7 (objecting on relevancy grounds to Requests 1 and 3); 7-8 (Requests 2 and 4); 9-11 (Requests 8, 9, 22, 24, 25, and 26); 11 (Requests 7, 12, 18, 19), 11-13 (Requests, 10, 13, 17, 20, and 23).

[57] *Id*. at 2, 10 (quoting *Vyanet Operating Grp., Inc. v. Maurice*, No. 121CV02085CMASKC, 2023 U.S. Dist. LEXIS 96780, *8 (D. Colo. June 2, 2023) ("When seeking discovery from a nonparty, the requesting party 'must meet a burden of proof heavier than the ordinary burden imposed under Rule 26.'"). *See also id*. at 7 (Requests 1 and 3 are unduly burdensome); 8 (Request 5), 8-9 (Requests 6, 11, 14, 15, and 16), 11-13 (Requests, 10, 17, 20, 23, and 27).

40. Summit Utilities also contends that the subpoena generally, and Request 5 specifically, are unduly burdensome because they are "facially overbroad." Specifically, Summit Utilities states that the subpoena is overbroad in its entirety because it seeks "documentation irrelevant to this dispute."[58] Request 5 is facially overbroad because it "would require the production of all material provided to SUI's board concerning operations across all other states, and subsidiaries not party to this action."[59]

41. Finally, Summit Utilities argues that certain requests should be quashed because they seek commercially sensitive information that implicates Summit Utilities' privacy interests.[60] According to Summit Utilities, Requests 5, 8, 9, 22, 24, 25, and 26 seek commercially sensitive information that is beyond the scope of discovery of a third-party.[61]

2. UCA's Argument

42. UCA argues that the Motion to Quash should be denied for four primary reasons. First, UCA contends that § 40-6.5-106 grants the director of the UCA broad powers to carry out UCA's "statutory obligation to represent the public interest," including "inspect[ing] the records and documents of any public utility . . . in relation to the public utility's business and affairs."62 UCA contends that the requested documents are required for UCA to fulfill its statutory duty to represent the public interest in regulating CNG.63 Second, 42 U.S.C. § 16453(a) "requires holding companies like [Summit Utilities] to provide state access to books and records upon the written request of a state public utility commission with jurisdiction to regulate a public utility in the

[58] *Id*. at 2.
[59] *Id*. at 8.
[60] *Id*. at 13-14.
[61] *Id*. at 8 (Request 5), 9-11 (Requests 8, 9, 22, 24, 25, and 26).
[62] UCA's Response at 6 (quoting § 40-6.5-104((e)(1)).
[63] *Id*. at 4.

holding company's system."64 According to UCA, "[e]ven though CNG may not be a direct subsidiary of [Summit Utilities] due to intermediary Summit LDC Holdings, LLC, CNG still exists as a public utility company within the [Summit Utilities] holding company system," which triggers Summit Utilities' duty to produce documents under 42 U.S.C. § 16453(a).65 Third, the requested documents have been identified in reasonable detail and "are relevant and necessary to understand . . . whether there has been any inappropriate cross-subsidization between CNG and its unregulated affiliate WCE" that would be contrary to the public interest.[66] Fourth, under these circumstances "it would be inappropriate to provide SUI the same privacy protection that truly disinterested nonparties are afforded" in disputes over subpoenas, particularly given the protections afforded by the Commission's Rules of Practice and Procedure for confidential and highly confidential information.[67]

3. Staff's Argument

43. Staff limits its response to the Motion to Quash to providing information that has come out in discovery regarding the relationship between Summit Utilities, Wolf Creek, and CNG.[68] Specifically, Staff states that "it appears as if Summit Utilities, Wolf Creek, and CNG, are effectively the same entity with regard to the provision of natural gas to transportation and sales customers, even though there are separate legal entities, and another corporation between CNG and Summit in the organization chart."[69] As support, Staff points to a discovery response in this proceeding that Summit Utilities "oversees all gas supply related functions for all SUI subsidiaries,

[64] *Id*. at 8 (citing 42 U.S.C. § 16453(a)).
[65] *Id*. at 9.
[66] *Id*. at 9-11.
[67] *Id*. at 3, 10.
[68] Staff's Response to Motion to Quash at 1.
[69] *Id*.

including Wolf Creek. This includes demand forecasting, buying, scheduling, invoicing and settlement of all gas supply payments for all subsidiaries.[70]" As a result of the foregoing, Summit Utilities "may have information *not* kept or maintained by its subsidiaries, especially since Wolf Creek competes with CNG."[71] Similarly, Staff believes "[i]t is conceivable that Summit has information that would otherwise be inaccessible."[72] Staff concludes that "discovery should [not] be limited to Wolf Creek and CNG simply because they represent that they can provide the information."[73]

C. Analysis

44. The ALJ will grant-in-part and deny-in-part the Motion to Quash. The ALJ concludes that the document requests are permissible under the Federal Public Utility Holding Company Act of 2005. Indeed, there is no dispute that Summit Utilities is a holding company under 42 U.S.C. § 16453(a) that is subject to the requirements of that federal statute. CNG is a public utility company over which the Commission has jurisdiction, and Respondents have admitted that "[f]or all intents and purposes, CNG and Wolf Creek are both wholly-owned subsidiaries of Summit [Utilities]." As a result, Summit Utilities is a holding company, and Summit Utilities, Wolf Creek, Summit LDC Holdings, and CNG are a holding company system under 42 U.S.C. §§ 16451,16453.

45. In addition, the document requests have been identified in reasonable detail, and UCA has established that, given the allegations of the First Amended Complaint, the documents sought are relevant to costs incurred by CNG and are necessary for the effective discharge of the

[70] *Id*. at 1-2.
[71] *Id*. at 2 (emphasis in original).
[72] *Id*.
[73] *Id*.

responsibilities of the UCA and the Commission. As argued by UCA, if the allegations in the First Amended Complaint are proven, there is a threat that cross-subsidization has taken place between CNG and one or more of its unregulated related companies within the holding company system. As a result, the Federal Public Utility Holding Company Act of 2005 requires Summit Utilities to produce documents in response to the document requests.

46. The ALJ concludes that the document requests are also permissible under § 40-6.5-106(1)(e), C.R.S. UCA established good cause for the issuance of the subpoena in this proceeding that is the subject of the Motion to Quash. Given the risk of cross-subsidization based on the allegations in the First Amended Complaint, UCA has also established that it requires access to the documents sought by the subpoena to serve its statutory duty to represent the public interest. As a result, UCA has established that the document requests contained in the subpoena comply with § 40-6.5-106(1)(e), C.R.S.

47. The ALJ also concludes that the balancing test required under Colorado law tips in UCA's favor. UCA has established that the requested documents are relevant to its statutory mandate to serve the public interest and that disclosure of the requested documents is required to serve the compelling state interest of ensuring that no cross-subsidization occurs between the regulated CNG and the other unregulated entities within the Summit Utilities holding company system. The subpoenaed documents are also relevant to the allegations in the First Amended Complaint of cross-subsidization between CNG and Wolf Creek.

48. As noted above, a nonparty like Summit Utilities typically has a legitimate expectation that its documents will not be subject to discovery in a proceeding in which it is not a party. However, any such expectation in Summit Utilities is mitigated by the fact that CNG, which is effectively Summit Utilities' wholly-owned subsidiary, is a party in this proceeding that is

regulated by the Commission, and the UCA's and this Commission's broad state and federal authority under 42 U.S.C. §§ 16453 and § 40-6.5-106(1)(e), C.R.S. to obtain documents and information from Summit Utilities to ensure that the public interest is being served. While Summit Utilities argues that many of the requested CNG and Wolf-Creek specific documents are available from those entities, UCA and Staff both suspect that at least some of the requested documents are not available from them. Even assuming that some of the documents are so available, the ALJ concludes that UCA is using the least intrusive means of obtaining them from Summit Utilities under the circumstances involving the mitigated privacy concerns of Summit Utilities in light of the alter ego allegations and the regulatory environment.[74] In any event, the weight given to this factor in the balancing test is mitigated here because, even if CNG and/or Wolf Creek could produce the requested documents, Summit Utilities' possession of them could be admissible evidence tending to provide that Summit Utilities, CNG, and/or Wolf Creek are alter egos.[75]

49. Finally, Summit Utilities' specific arguments for quashing specific requests in the subpoena are unsupported. As to its objection that Requests 1-5 are unduly burdensome, Summit Utilities does not provide any detailed explanation. For example, Summit Utilities does not explain why it would be unduly burdensome for it to provide the final versions of minutes for meetings of the Board of Directors of Summit, Summit LDC, or CNG (Requests 1-4), or the presentations, project proposals, memorandums, studies, and other supplemental documents presented to the Board of Directors (Request 5). Is it because those documents are voluminous,

[74] *See* 42 U.S.C. §§ 16453; § 40-6.5-106(1)(e), C.R.S.

[75] *See* C.R.C.P. 26(b)(1) ("parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition ***and location of any books, documents, or other tangible things***") (2012) (emphasis added). *See also Dill v. Rembrandt Grp., Inc.*, 474 P.3d 176, 183 (Colo. App. 2020) (to determine whether an entity is an alter ego of another, court must consider whether: (a) the corporation is operated as a distinct business entity; (b) funds and assets are commingled; (c) adequate corporate records are maintained; (d) the nature and form of the entity's ownership and control facilitate misuse by an insider; (e) the business is thinly capitalized; (f) the corporation is used as a "mere shell"; (g) legal formalities are disregarded; and (h) corporate funds or assets are used for noncorporate purposes.).

or is it that they are not maintained in a central location and thus would require many hours for them to be collected? Summit Utilities does not say either in its brief or in an affidavit from a witness with knowledge.

50. As to Summit Utilities' argument that Requests directed to documents from Summit Utilities and Summit LDC seek irrelevant information because there are no allegations in the First Amended Complaint that CNG and/or Wolf Creek are alter egos of Summit Utilities or Summit LDC Holdings, Respondents have argued elsewhere that Complainants must prove as much to prevail on their alter ego theory of the case. It would thus elevate form over substance to quash the subpoena for documents from Summit Utilities and Summit LDC on such a basis. As a result, based on the Respondents' theory of the case, the information sought in the subpoena more than surpasses the relatively low relevancy bar. Accordingly, the subpoena will not be quashed on relevancy grounds.

51. Summit's objection that Requests 5, 8, 9, 22, 24, 25, and 26, should be quashed because they seek "private financial information" that is commercially or competitively sensitive is also unsupported. Summit Utilities does not explain why the protections for confidential or highly confidential information in Rules 1100-1103 of the Commission's Rules of Practice and Procedure are insufficient.[76] Further, the ALJ concludes that the financial information sought by these Requests is reasonably calculated to lead to the discovery of admissible evidence concerning Complainants' allegations of improper cross-subsidies within the Summit Utilities holding company system. For these reasons, and because this argument has been considered in the balancing test above, the subpoena shall not be quashed in whole or in part because it seeks sensitive financial information.

[76] 4 CCR 723-1.

52. The ALJ will, however, restrict the time frame of the requested documents to start on January 2015. The relationship between Complainants and Respondents began in early 2015.[77] As UCA has chosen to serve this subpoena in this Complaint proceeding, the requests will be limited to the starting date of the relevant allegations in the First Amended Complaint. As a result, the earliest date of documents that Summit Utilities will be required to produce in response to the Subpoena is January 2015.

53. Finally, the ALJ notes that Summit Utilities does not state that it conferred with UCA and/or the Complainants in advance of filing the Motion to Quash, as it was required to do by Rule 1400(a) of the Commission's Rules of Practice and Procedure.[78] Further, it does not appear that Summit Utilities conferred with UCA regarding the subpoena, as neither Summit Utilities nor UCA references any such discussions or offer any compromises regarding the information sought in the subpoena. The ALJ notes that Rule 1400(a) is a requirement, not an option. Conferral regarding discovery disputes is particularly important because discovery requests are often written before the requester has any knowledge regarding the volume of the requested information or documents, the difficulty of collecting it, and/or the competitive importance of it. The conferral process can lead to negotiated resolutions based upon knowledge gained through the conferral process by both sides to the dispute. The parties are on notice that the ALJ will deny any future motion that does not include the required Rule 1400(a) certification, particularly any motion addressing a discovery dispute.

[77] First Amended Complaint at 10 (¶ 40).
[78] 4 CCR 723-1.

III. MOTION TO COMPEL

A. Legal Standard

54. Motions to compel discovery are "committed to the discretion of the trial court."[79] This discretion is in line with the "truth-seeking purpose" of the discovery rules, which are thus construed liberally.[80] As noted above, while parties do not have a right to discover all available information, they can obtain relevant information, which "need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[81]

B. RFPs 13-15 to CNG and RFPs 11-13 to Wolf Creek

1. Complainants' Argument

55. Complainants state:

> [Requests for Production] RFPs 13, 14, and 15 to CNG, and RFPs 11, 12, and 13 to Wolf Creek requested production of internal emails or other correspondence (a) between or among representatives of CNG, Wolf Creek, Summit and/or its affiliates relating to natural gas service to Complainants [RFPs 13 to CNG and 11 to Wolf Creek], (b) between or among representatives of CNG, Wolf Creek, Summit and/or its affiliates, on one hand, and representatives of ARM and/or Heartland relating to natural gas service to Complainants [RFPs 14 to CNG and 12 to Wolf Creek], and (c) between or among representatives of CNG, Wolf Creek, Summit and/or its affiliates regarding management and/or calculation of nominations, usage, and imbalances for customers receiving natural gas from CNG and Wolf Creek [RFPs 15 to CNG and 13 to Wolf Creek].[82]

Complainants time-limited the first two categories of requested documents (RFPs 13 and 14 to CNG and RFPs 11 and 12 to Wolf Creek) to January 2015 to the present. Complainants did not place a time limitation on RFP 15 to CNG and RFP 13 to Wolf Creek. According to Complainants, while Respondents objected to these RFPs on the basis that they are overbroad and unduly

[79] *Corbetta v. Albertson's, Inc.*, 975 P.2d 718, 720 (Colo. 1999).
[80] *Id*.
[81] C.R.C.P. 26(b)(1) (2012).
[82] Motion to Compel at 4-5.

burdensome, they also committed to produce "relevant, non-privileged, responsive documents in due course" after completing its review of "archived material."[83] While Complainants served the RFPs on December 22, 2023, Respondents had not produced any documents in response to these RFPs as of March 4, 2024.

56. Complainants request an order compelling responses to these RFPs and sanctions. As to the latter, Respondents served its first set of discovery consisting of 200 interrogatories and 52 RFPs on February 8, 2024. Complainants request an order that they "need not respond to these requests until Respondents have sufficiently responded to RFPs 13, 14, and 15 to CNG, and RFPs 11,12, and 13 to Wolf Creek."[84]

2. Respondents' Argument

57. In its Response, Respondents first note that CNG is "by far the smallest natural gas local distribution company" and Wolf Creek "may well be the least consequential company engaged in the procurement of natural gas in the State of Colorado."[85] As a result, "Respondents do not have resources dedicated to the production of information."[86] Instead, they have "limited litigation resources."[87]

58. As to the specific Requests noted above, Respondents state that "they have been engaged in searching emails and correspondence which may be responsive to these requests since they were first received."[88] This has required Respondents to "comb through data backups and other data repositories that are not easily accessible" necessitated by the time-period of the Requests, going back to 2015. Nevertheless, Respondents "plan to produce responsive

[83] *Id*. at 5.
[84] *Id*. at 7.
[85] Response at 2.
[86] *Id*.
[87] *Id*. at 3.
[88] *Id*.

documents" to these requests.[89] For this reason, Respondents assert that the Motion to Compel should be denied as to these Requests.

3. Analysis

59. In their Response, Respondents do not ask the Motion to Compel to be denied on the basis of their objections. Instead, Respondents focus on their circumstances and the burden that discovery in this proceeding has placed on them, which the ALJ understands and appreciates. However, it has almost been three months since the Requests were served on Respondents. As a result, the Motion to Compel as to RFPs 13-15 to CNG and RFPs 11-13 to Wolf Creek will be granted and Respondents will be ordered to respond thereto within two weeks of the issuance of this decision.

C. RFPs 15 and 16 to Wolf Creek

60. RFP 15 states: "For each invoice or bill, please produce all DOCUMENTS that support the amounts invoiced to Complainants by Wolf Creek, including but not limited to any DOCUMENTS showing and/or supporting nomination data, usage data, imbalance data, and past due amounts." Wolf Creek produced two spreadsheets identifying certain data for each month of 2022-2023. The data came from certain workbooks that were not produced and the links to the workbooks in each cell of the spreadsheets are nonfunctional.[90]

61. RFP 16 requests:

> all backup documents supporting and substantiating the amounts billed by Respondents since service began in late 2015, including:
>
> (a) Complete spreadsheet demonstrating how the charges were calculated with all cells functional;
>
> (b) The supporting workbooks, including showing the total amounts of gas purchased by Wolf Creek per month, and how such amounts are weighted

[89] *Id*.
[90] Motion to Compel at 8.

> and allocated among other customers (with confidential information appropriately redacted as appropriate under the Commission's Rules);
>
> (c) Contracts between Wolf Creek and its gas suppliers for the gas supplied to Heartland's premises;
>
> (d) Invoices by Wolf Creek's gas suppliers demonstrating the amount and price of gas purchased;
>
> (e) Invoices or documents from Xcel Energy d/b/a Public Service Company of Colorado regarding any gas purchased, as well as any upstream charges;
>
> (f) All documents supporting any under- or over-billings by Wolf Creek to Heartland including, including, if applicable, (i) the revised February 8, 2019 charge for alleged under-billing during the period July 1, 2018 through December 1, 2018, (ii) the refund issued in May 13, 2020, and (iii) the September 21, 2020 invoice for alleged underbilling for the period September 2018 through April 2020.[91]

1. Complainants' Argument

62. Complainants assert that the requested information will help them determine and understand how they "have been billed by the Summit entities, both for the transportation services by CNG and the gas marketing services provided by Wolf Creek, as well as how they tie together."[92] Toward that end, Complainants request that Wolf Creek be compelled to produce "complete workbooks supporting and substantiating the spreadsheets"[93] and

> any and all contracts that Wolf Creek has with gas suppliers, all invoices by such suppliers demonstrating the amount of has purchased, on what date at what price; [] all internal calculations and supporting documents used to calculate the [weighted average cost of has (WACOG)] unit price charged to ARM/Heartland by month[; and] documents supporting the upstream charges by Xcel.[94]

The workbooks and documents will allow Complainants to determine whether the amounts charged to them by Wolf Creek were correct.[95]

[91] *Id*. at 9-10.
[92] *Id*.
[93] *Id*.
[94] *Id*. at 9.
[95] *Id*.

63. Complainants propounded RFP 16 on Wolf Creek on February 2, 2024 "out of an abundance of caution," presumably because RFP 16 has more specificity than RFP 15 regarding the requested documents "support[ing] the amounts invoiced to Complainants by Wolf Creek."[96] For reasons that are unclear, Wolf Creek has not responded to RFP 16.[97]

64. According to Complainants, the documents requested in RFPs 15 and 16 are relevant "to the claims for over-billing and erroneous billing, potentially the anti-competitive claims, and certainly ARM/Heartland's damages."[98] Complainants request "an order compelling Wolf Creek to respond to RFP 15 and all of the categories of documents identified in RFP 16."[99] They will enter into nondisclosure agreements to protect any customer information included in the produced documents, and/or any such information can be redacted.[100]

2. Wolf Creek's Argument

65. Citing Commission Rules 1004(w), 1105, and 4027, Wolf Creek argues that it cannot provide further information in response to RFPs 15 and 16 because it contains customer information.[101] Wolf Creek also asserts that it cannot simply redact customer-identifying information such as names and addresses because "there are so few [Wolf Creek] customers and their volumes of gas so identifiable" that providing any further information would identify the customers.[102] Wolf Creek states that the Commission's Rules apply to them and providing the

[96] RFP 15.
[97] The parties agreed to response time of ten business days from the date of service of an RFP, which, absent extension, would have made the response to RFP 16 due on February 16, 2024. *See* Report of Conferral at 2 (filed on October 17, 2023).
[98] Motion to Compel at 8.
[99] *Id*. at 10.
[100] *Id*.
[101] Response at 4-5 & 4 n.5.
[102] *Id*. at 5.

additional information sought by Complainants would "violat[e] the Commission's Rules against disclosure of customer information."[103]

3. Analysis

66. It is not clear whether Wolf Creek objects to the disclosure of the information sought by RFPs 15 and 16 on the basis of relevance. Wolf Creek does not argue in its Response that the requested information is irrelevant. However, in an email dated January 19, 2024 attached as Exhibit 2 to the Motion to Compel, an attorney for Complainants states that Respondents had objected to RFP 15 on relevance grounds. Out of an abundance of caution, the ALJ will address the relevance of the information sought by RFPs 15 and 16.

67. The ALJ finds and concludes that the information sought by RFPs 15 and 16 is relevant to the dispute in this proceeding. Complainants have alleged that Respondents have billed them excessive amounts in violation of CNG's applicable tariff and the contracts Complainants entered into with Respondents. In order to determine whether they were, in fact, overbilled, Complainants must be able to review the information possessed by Respondents that they used, or should have used, to determine the amounts that Respondents paid and/or should have paid under the tariff and contracts. As RFPs 15 and 16 seek that information, those requests seek relevant information.

68. As to the question of whether Respondents can produce the requested information under the Commission's rules, Respondents are attempting to have it both ways. On the one hand, they deny in their Answer that Wolf Creek is a utility.[104] On the other hand, in its Response to the

[103] *Id*.

[104] Answer at 5 (¶ 33) (denying, among other things, that "the Commission should exercise jurisdiction over Wolf Creek as a "public utility." as defined under C.R.S. § 40-1-103(1)(a)(I)"), 23 (¶ 252) (denying, among other things, that "Wolf Creek should be held to the standard of a 'public utility'"); Motion to Dismiss at 2 ("Wolf Creek, by definition, is not a public utility subject to the Commission's jurisdiction"), 7 ("by definition, Wolf Creek is not a public utility and is therefore not subject to the Commission's jurisdiction").

Motion to Compel, Respondents contend that Commission Rules 1004(w), 1105, and 4027 prohibit Wolf Creek from disclosing any further information in response to RFPs 15 and 16. Commission Rules 1004(w), 1105, and 4027 apply solely to public utilities.[105] As a result, Respondents' reliance on Commission Rules 1004(w), 1105, and 4027 is valid only if Wolf Creek is a public utility.

69. There is no dispute that, to date, Wolf Creek has not been treated as a public utility in Colorado. As noted, Respondents contend that Wolf Creek is not a public utility.[106] For their part, Complainants are requesting that the Commission change course by treating Wolf Creek as a public utility going forward.[107]

70. Based on the foregoing, the ALJ also finds and concludes that Wolf Creek has not been deemed a public utility that is subject to Commission Rules 1105 and 4027. No Recommended Decision or Commission Decision has issued treating Wolf Creek as a public utility. As a result, the ALJ will not adopt Wolf Creek's argument that Commission Rules 1004(w), 1105, and 4027 prohibit it from providing further information to Complainants in response to RFPs 15 and 16.

71. Even if those rules did apply to Wolf Creek, the ALJ would grant the Motion to Compel with respect to RFPs 15 and 16. Rule 1105 states in relevant part that "[a] utility may only disclose personal information as permitted by Commission rule or as compelled by state or federal law."[108] Similarly, Rule 4027(b) states that "[a] utility shall not disclose customer data unless such disclosure conforms to these rules, except as required by law or to comply with

[105] Commission Rule 1105(a) ("A utility may only disclose personal information as permitted by Commission rule or as compelled by state or federal law."); 4027(a) ("A utility shall protect customer data in the utility's possession or control to maintain the privacy of customers, while providing reasonable access to that data. A utility is only authorized to use customer data to provide regulated utility service in the ordinary course of business."), 4 CCR 723-1, 723-4.

[106] *See supra* at 14 (¶ 30).

[107] *See* First Amended Complaint at 9 (¶ 33) ("the Commission should exercise jurisdiction over Wolf Creek as a 'public utility' as defined under C.R.S. § 40-1-103(1)(a)(I)").

[108] 4 CCR 723-1. *See also* Rule 1001(w) (defining "personal information").

Commission rule. Illustratively, this includes responses to requests of the Commission, warrants, subpoenas, court orders, or as authorized by § 16-15.5-102, C.R.S."[109]

72. Here, the ALJ finds and concludes that the information sought in RFPs 15 and 16 to Wolf Creek is relevant and discoverable under the 2012 Colorado Rules of Civil Procedure and the Commission's Rules of Practice and Procedure, which have the force and effect of Colorado law.[110] In addition, Commission Rules 1100 and 1101 provide adequate protections for confidential and highly confidential information produced in discovery in Commission proceedings. As a result, production of the information and documents sought by RFPs 15 and 16 is required by Colorado law and permitted by Commission Rule. As a result, Rules 1105 and 4027 do not prohibit the disclosure of the information sought by RFPs 15 and 16.

73. Based on the foregoing, the ALJ will grant the Motion to Compel as to RFPs 15 and 16.

D. RFPs 17 and 38 to CNG

74. RFPs 17 and 38 to CNG are similar in all critical respects to RFPs 15 and 16 to Wolf Creek.

1. Complainants' Argument

75. Complainants make the same arguments regarding RFPs 17 and 38, as they did about RFPs 15 and 16 propounded to Wolf Creek. Specifically, while CNG has produced

[109] 4 CCR 723-4. *See also* Rule 4001(p) (defining "customer data").

[110] *See* § 13-2-108, C.R.S. ("The supreme court has the power to prescribe, by general rules, for the courts of record in the state of Colorado the practice and procedure in civil actions and all forms in connection therewith; . . . The supreme court shall fix the dates when such rules take effect and the extent to which they apply to proceedings then pending, and thereafter all laws in conflict therewith shall be of no further force or effect."); § 40-6-101(1), C.R.S. ("The commission may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any individual commissioner or administrative law judge, including forms of notices and the service thereof."); § 40-6-101(4), C.R.S. ("All hearings and investigations before the commission, any individual commissioner, or any administrative law judge shall be governed by this title and by rules of practice and procedure adopted by the commission").

spreadsheets with final numbers, the links to the workbooks that generated the numbers are nonfunctional and CNG has not produced the underlying documentation from which the final numbers in the spreadsheets were derived. Complainants request that CNG be compelled to: (a) make the links in the spreadsheet to the workbooks from which the numbers in the spreadsheet were derived functional; and (b) produce the underlying documentation from which it derived the numbers in the spreadsheet.[111] Complainants repeat that they will enter into nondisclosure agreements to protect any customer information included in the produced documents, and/or any such information can be redacted or coded.[112]

76. In addition, Complainants state the spreadsheets produced by CNG include data only back to March 2018, even though their relationship with CNG began in late 2015. Complainants request that CNG be compelled to produce data back to the beginning of their relationship with Complainants.[113]

2. CNG's Argument

77. CNG repeats Wolf Creek's arguments against granting the Motion to Compel as to RFPs 15 and 16 to Wolf Creek.[114]

3. Analysis

78. For the same reasons stated with respect to RFPs 15 and 16 served on Wolf Creek, the ALJ will grant the Motion to Compel as to RFPs 17 and 38 to CNG.

E. RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek

79. Complainants identify the RFPs addressed in this section as follows:

[111] Motion at 10-11.
[112] *Id*.
[113] *Id*. at 10.
[114] Response at 5 ("The response to RFP Nos. 17 and 38 to CNG and the arguments against providing more identifiable customer information are the same as those set forth in defense of [Wolf Creek's] response to RFP No. 15 to Complainant."). *See supra* at 30-31 (¶ 65).

> RFP 2 to CNG: all minutes of any meetings of the shareholders of CNG dating back from January 2015 to the present;
>
> RFP 3 to CNG: all bylaws, operating agreements, and governing documents of CNG, including any amendments thereto;
>
> RFP 5 to CNG: all tax returns of CNG dating back from January 2015 to the present; • RFP 6 to CNG: all balance sheets of CNG dating back from January 2015 to the present;
>
> RFP 11 to CNG: all DOCUMENTS describing or identifying the ownership of the stock of CNG during its entire existence;
>
> RFP 12 to CNG: all documents related to any financial transactions between any two or more of the following persons or entities: (a) CNG, (b) Wolf Creek, and (c) Summit;
>
> RFP 2 to Wolf Creek: all minutes of any meetings of the members, managers, and/or member managers of Wolf Creek dating back from January 2015 to the present;
>
> RFP 3 to Wolf Creek: all bylaws, operating agreements, and governing documents of Wolf Creek, including any amendments thereto;
>
> RFP 4 to Wolf Creek: all contracts between CNG and Wolf Creek, and between Wolf Creek and Summit and/or Summit's affiliates, dating back from January 2015 to the present;
>
> RFP 5 to Wolf Creek: all tax returns of Wolf Creek, dating back from January 2015 to the present;
>
> RFP 6 to Wolf Creek: all balance sheets of Wolf Creek, dating back from January 2015 to the present;
>
> RFP 9 to Wolf Creek: all documents relating to the initial capitalization of Wolf Creek and/or relating to any subsequent capital contributions by any member, manager, or member-manager, any other PERSON or ENTITY.[115]

1. Complainants' Argument

80. Complainants assert that these requests are relevant to Claims 1, 5, 7, and 10 against, and the Commission's jurisdiction over, Wolf Creek. According to Complainants, they

> have asked the Commission to pierce the corporate veil between Respondents and maintain jurisdiction over Wolf Creek as a public utility pursuant to § 40-1-103(1)(a)(I). . . . Shareholder and member/manager meeting minutes (or the absence of any); the corporate governing

[115] Motion at 12-13.

> documents (or the absence of any); financial documents including tax returns and balance sheets (and the state of them), documents relating to initial capitalization of Wolf Creek, and documents pertaining to financial transactions between CNG, Wolf Creek, and Summit may disclose information relevant to this analysis, and therefore must be produced.[116]

Complainants also contend that the requested information is relevant to the allegations in Claim 1 of "unpermitted commingling of assets and cross-subsidization between Respondents," as well as Claim 2's allegations of anticompetitive conduct.[117]

2. Respondents' Argument

81. Respondents make five arguments against producing documents in response to the foregoing RFPs. First, "[t]he materials sought by these RFPs are commercially sensitive corporate materials unrelated to CNG's and WCE's Colorado operations, in some instances, and irrelevant to the claims made by Complainants in the First Amended Complaint in other instances."[118] Second, certain unidentified RFPs "seek financial documents and corporate materials irrelevant to the claims asserted in the First Amended Complaint."[119] Third, other unidentified RFPs are subject to the same objections lodged in the Motion to Quash insofar as they "involve[e] corporate documents from a non-party to this proceeding, *i.e.*, Summit Utilities."[120] As support, Respondents reiterate the argument made in the Motion to Quash that Complainants have not alleged that CNG and/or Wolf Creek are alter egos of Summit Utilities.[121] Fourth, Respondents argue that "none of these requests are limited to any of the allegations asserted in the Complaint."[122]

[116] *Id*. at 13.
[117] *Id*.
[118] Response at 5.
[119] *Id*.
[120] *Id*.
[121] *Id*. at 6.
[122] *Id*.

Finally, Respondents cite *Silva v. Basin Western, Inc.*, 47 P.3d 1184 (Colo. 2002) for the proposition that they will be subject to incurable damage if the Motion to Compel is granted as to these RFPs.[123]

3. Analysis

82. The ALJ will grant the Motion to Compel as to RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek. Complainants have carried their burden of establishing that the information sought by these RFPs is relevant to the dispute in this proceeding. Conversely, Respondents have not identified the particular RFPs to which each of its five arguments summarized above apply. As a result, the ALJ concludes that Respondents have not rebutted Complainants' arguments.

83. Further, Respondents do not explain why the protections for confidential or highly confidential information in Rules 1100-1103 of the Commission's Rules of Practice and Procedure are insufficient.[124] The ALJ concludes that those rules do provide sufficient protection to Respondents for any "commercially sensitive corporate information" that must be produced in response to the RFPs. As a result, Respondents objection on the basis that the RFPs call for commercially sensitive information is unsupported.

84. Respondents' argument that the Motion to Compel as to these RFPs should be denied because Complainants have not alleged an alter ego relationship between either Complainant and Summit Utilities, and the related argument that the RFPs are not limited to the First Amended Complaint's allegations, fails for the same reasons stated with respect to the same argument made in the Motion to Quash.[125]

[123] *Id*.
[124] 4 CCR 723-1.
[125] *See supra* at 24 (¶ 50).

85. Finally, the decision in *Silva* does not support Respondents' argument. *Silva* addressed whether a plaintiff pursuing a third-party personal injury tort claim can obtain discovery concerning the defendant's insurer's reserves, which are the funds insurance companies set aside to cover future expenses, losses, claims, or liabilities, and settlement authority for the case.[126] The trial court granted the plaintiff's motion to compel production of information concerning the defendant's insurer's reserves and settlement authority.[127]

86. The Colorado Supreme Court reversed the trial court's decision.[128] In so doing, the Supreme Court first noted that discovery rulings typically are not subject to interlocutory review by the Supreme Court.[129] However, the Supreme Court does review discovery decisions on an interlocutory basis when they would cause "unwarranted damage to a litigant" that "will not be curable on appeal." The Colorado Supreme Court held that the defendant in *Silva* would be so damaged by the trial court's decision, but did not expressly state why.[130] However, the Colorado Supreme Court appeared to believe that the disclosure of the defendant's insurer's reserves and settlement authority would unfairly impact the subsequent course of the case because the plaintiffs would be unlikely to settle the case for anything below the disclosed numbers.[131] This would be unfair because the Supreme Court believed that an insurer's reserves and settlement authority do not reflect an accurate valuation of the plaintiff's damages in a case.[132] Instead, they are "appropriate business decision[s] justified by the [insurer's] need to preserve financial stability

[126] *Silva*, 47 P.3d at 1186.
[127] *Id*.
[128] *Id*. at 1193.
[129] *Id*. at 1186-87.
[130] *Id*. at 1188.
[131] *Id*. at 1193 ("The [plaintiffs] presumably equate [the insurer's] reserves and settlement authority with the insurance company's valuation of the case.").
[132] *Id*. at 1189 ("[A] particular reserve amount does not necessarily reflect the insurer's valuation of a particular claim. Settlement authority or recommendations similarly cannot be equated with the insurer's valuation of a particular claim.").

given the unpredictability of future liabilities."[133] As a result, a defendant's insurer's reserves and settlement authority are irrelevant and thus not discoverable because of "the tenuous relationship between reserve amounts or settlement authority and an insurer's evaluation of a claim."[134]

87. Here, in contrast, the Respondents will not be incurably damaged by an order granting the Motion to Compel. As held above, the information sought by Complainants is relevant to the allegations in the First Amended Complaint. Further, its disclosure to Complainants will not unfairly impact the subsequent course of this proceeding. None of the information sought by Complainants has anything to do with Respondents' valuation of the claims asserted in the First Amended Complaint, and Respondents have not specified how else they will be incurably damaged by the disclosure of the information, particularly in light of their ability to protect the information as confidential and/or highly confidential under Commission Rules 1100-1103. Accordingly, the Colorado Supreme Court's decision in *Silva* does not require the Motion to Compel to be denied.

F. Request for Sanctions

88. Complainants request that Respondents be sanctioned for their "refusal to appropriately and timely supplement" their discovery responses. This request shall be denied. However, Respondents will be ordered to supplement their responses to the discovery requests addressed by the Motion to Compel and the Motion to Quash within two weeks of the issuance of this decision. If Respondents need additional time, they will file a motion requesting an extension describing the efforts taken to comply with this decision, the additional work that must be done, and an explanation for why the additional work could not be completed within the two-week timeframe set in this decision.

[133] *Id*. at 1191.
[134] *Id*. at 1190.

IV. MOTION FOR LEAVE

89. Complainants contend that they should be permitted to file a reply brief in support of their Motion to Compel because: (a) "there have been two developments in discovery that are germane to the Motion" to Compel;[135] and (b) in their Response to the Motion to Compel Respondents objected for the first time to RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek on the basis that they seek "commercially sensitive corporate materials unrelated to CNG's and [Wolf Creek's] Colorado operations."[136] The two "developments" are that CNG continues to object to RFP 38,[137] and Respondents served on Complainants "an additional 44 interrogatories and 41 RFPs."[138]

90. Complainants have satisfied their burden of establishing that it should be permitted to file a reply brief under Commission Rule 1400(e) as to the new objection lodged by Respondents to RFPs 2, 3, 5, 6, 11, and 12 to CNG, and RFPs 2-6, and 9 to Wolf Creek. This new objection is material for Complainants and fairness dictates that Complainants be permitted to address it. However, the "two developments" do not warrant a reply brief. Accordingly, the Motion for Leave will be granted-in-part and denied-in-part.

V. UNOPPOSED SECOND MOTION TO AMEND PROCEDURAL SCHEDULE

91. Complainants have established good cause to grant the Unopposed Motion. Because no party opposes the Unopposed Motion, response time shall be waived. The schedule shall be amended as laid out above.

[135] Motion for Leave at 2.
[136] *Id*. at 2, 3.
[137] *Id*. at 2, 4.
[138] *Id*. at 5.

VI. ORDER

A. It Is Ordered That:

1. The Unopposed Second Motion to Amend Procedural Schedule and Motion to Waive Response Time filed by Arm, LLC and Heartland Industries, LLC (Complainants) on March 25, 2024, is granted.

2. The schedule in this proceeding is amended as stated in paragraph 15 above.

3. The remote prehearing conference in this proceeding currently scheduled for July 9, 2024 is vacated and reset as follows:

DATE: September 10, 2024

TIME: 1:30 p.m.

WEBCAST: Commission Hearing Room

METHOD: Join by videoconference using Zoom at the link to be provided in an email from the Administrative Law Judge[139]

4. Nobody should appear in-person for the remote prehearing conference.

5. The hybrid hearing currently scheduled for July 15-18, 2024, is vacated, and rescheduled as a hybrid hearing as follows:

DATE: September 16-18, 2024

TIME: 9:00 a.m. to 5:00 p.m.[140]

PLACE: In-person: Commission Hearing Room, Suite 250, 1560 Broadway, Denver, Colorado

[139] Additional information about the Zoom platform and how to use the platform are available at: https://zoom.us/. All are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See https://zoom.us/test.

[140] The hybrid hearing will commence on September 18, 2024 after the completion of the Commissioners' Weekly Meeting.

By videoconference: using the Zoom web conferencing platform at a link be provided to the participants by email.[141]

6. The Motion to Quash filed by Colorado Natural Gas, Inc. (CNG) and Wolf Creek Energy, LLC (Wolf Creek) (collectively, Respondents) on February 8, 2024 is granted-in-part and denied-in-part consistent with the discussion above.

7. The Motion to Compel filed by Complainants on February 23, 2024 is granted consistent with the discussion above.

8. The Motion for Leave to Reply and Reply in Support of Motion to Compel filed by Complainants on March 7, 2024 is granted-in-part and denied-in-part consistent with the discussion above.

[141] Additional information about the Zoom platform and how to use the platform are available at: https://zoom.us/. All participants are strongly encouraged to participate in a test meeting prior to the scheduled hearing. See https://zoom.us/test.

9. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Rebecca E. White,
Director