

Decision No. R23-0072-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22AL-0426G

IN THE MATTER OF ADVICE LETTER NO. 126 FILED BY ROCKY MOUNTAIN NATURAL GAS LLC DOING BUSINESS AS BLACK HILLS ENERGY TO REVISE ITS COLORADO PUC NO. 4 TARIFF FOR AN INCREASE IN RATES AND TO IMPLEMENT OTHER PROPOSED CHANGES, TO BECOME EFFECTIVE NOVEMBER 7, 2022.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ALENKA HAN
GRANTING RMNG'S SECOND MOTION FOR
EXTRAORDINARY PROTECTION OF HIGHLY
CONFIDENTIAL INFORMATION**

Mailed Date: February 3, 2023

I. STATEMENT

A. Procedural Background

1. On October 7, 2022, Rocky Mountain Natural Gas LLC, doing business as Black Hills Energy (RMNG or the Company), commenced this Proceeding by filing Advice Letter No. 126 with the Public Utilities Commission (PUC or Commission), seeking approval of a 39.1percent rate increase.¹

2. The Colorado Office of the Utility Consumer Advocate (UCA) filed a Protest to RMNG's Advice Letter on October 17, 2022.²

¹ Advice Letter No. 126, issued by Rocky Mountain Natural Gas LLC, d/b/a Black Hills Energy, filed October 7, 2022.

² Utility Consumer Advocate's Protest, ¶ 6(a)-(s), filed October 17, 2022.

3. On November 3, 2022, the Commission suspended the effective date of RMNG's Advice Letter and referred the matter to an Administrative Law Judge (ALJ) for disposition.

4. UCA and Commission Staff filed Notices of Intervention as a Matter of Right on November 16, 2022, and November 21, 2022, respectively. On November 28, 2022, AM Gas Transfer Corporation filed a Motion to Intervene permissively in this Proceeding. The Motion to Intervene was granted by Decision No. R22-0821-I, issued December 19, 2022. No other interventions have been received.

5. Contemporaneously with its Advice Letter, on October 7, 2022, RMNG filed a Motion for Protective Order Affording Extraordinary Protection for Highly Confidential Information relevant to this Proceeding. RMNG's Motion for Protective Order was granted by Decision No. R22-0799-I, issued December 13, 2022.

B. RMNG's Second Motion for Extraordinary Protection of Highly Confidential Information

6. RMNG filed a Second Motion for Extraordinary Protection of Highly Confidential Information on January 6, 2023.

7. In its Second Motion, RMNG asks for protection of the following information sought by Commission Staff in discovery requests propounded upon RMNG:

(1) Discovery Request CPUC 3-4: A list of all employees, including age and salary, noting if they are 1) eligible for the pension plan and 2) if they are accruing benefits or if the pension benefits are frozen;³ and,

(2) Discovery Request CPUC 5-6: A list of all employees contributing to employee compensation expenses in this Proceeding, providing annual actual expenses from 2019 to 2022 for all components of the Company's employee compensation.⁴

³ RMNG's Second Motion for Extraordinary Protection of Highly Confidential Information, ¶ 3, p. 3, filed January 6, 2022.

⁴ *Id.*

8. RMNG characterizes the above-described information as “highly confidential, proprietary, commercially sensitive or trade-secret” because it concerns the personal financial and compensation information of its employees.⁵ RMNG notes that the information sought is “extremely sensitive and has been closely held and maintained within RMNG and its affiliates . . . as highly confidential.”⁶ According to RMNG, Commission Staff’s disclosure request could encompass disclosure of “employee identifying information, such as employee identification numbers and job titles, that would allow parties to determine the specific salaries or other compensation of individual employees.”⁷

9. RMNG argues that its employees have a right to privacy over their personal financial and compensation information. The right to privacy, it contends, protects its employees’ interests “in avoiding disclosure of personal matters.”⁸

10. RMNG therefore seeks an order imposing highly confidential protections for the above-listed categories of Highly Confidential Information.

11. When the right to privacy is invoked to protect employees’ sensitive, personal information, the fact finder must engage in a three-part test to determine whether the information should be protected. The fact finder must consider

- (1) whether the individual has a legitimate expectation of nondisclosure;
- (2) whether disclosure is nonetheless required to serve a compelling state interest;
- and (3) where a compelling state interest necessitates disclosure of otherwise

⁵ *Id.* at ¶¶ 4 and 13, pp. 3 and 5.

⁶ *Id.* at ¶ 4, p. 3.

⁷ *Id.*

⁸ *Corbetta v. Albertson’s, Inc.*, 975 P.2d 718, 720 (Colo. 1999) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

protected information, how disclosure may occur in a manner which is least intrusive with respect to the right to confidentiality.⁹

12. The ALJ finds that RMNG employees have a legitimate expectation that their personal financial and compensation information, in addition to their employee identifying information, will be kept private and not disclosed to the public. Other than “high-level officers and directors” whose compensation packages are “routinely made publicly available,”¹⁰ employees have a right to privacy over their salary, compensation, and financial information. The first prong of the *Corbetta* test is thus met.¹¹

13. However, RMNG acknowledges in its Second Motion “that certain salary and other compensation-related information may be relevant to this proceeding.”¹² Because it recognizes the relevance of the personnel information sought by Commission Staff to this Proceeding, RMNG does not seek to prevent disclosure altogether. Based upon extraordinary circumstances, RMNG instead requests that access be restricted to the Commission, any ALJs, Commission Staff, UCA, and attorneys representing these entities.¹³ In accordance with Rule 1101(b)(V), 4 *Code of Colorado Regulations (CCR) 723-1*, the motion was accompanied by a specific form of nondisclosure agreement it requests be used in this Proceeding.¹⁴

⁹ *Corbetta*, 975 P.2d at 721.

¹⁰ RMNG’s Second Motion for Extraordinary Protection, ¶ 4, p. 3.

¹¹ See *Corbetta*, 975 P.2d at 721.

¹² *Id.*, ¶ 8, p. 4.

¹³ *Id.*, ¶ 13, p. 6.

¹⁴ *Id.*, Attachment A.

14. No objections to the Second Motion for Protective Order Affording Extraordinary Protection for Highly Confidential Information have been filed. Indeed, RMNG represents its Second Motion is unopposed.¹⁵

15. RMNG notes that highly confidential protections have been afforded similar documents that were found to be highly confidential in prior Commission proceedings involving RMNG. *See, e.g.*, Decision No. R19-0351-I; and Decision No. R17-1044-I.

16. Under Rule 1100(b) CCR 723-1, information filed with the Commission is presumed to be a public record, including (I) annual reports; (II) rates, terms, and conditions for regulated services; and (III) tariffs and price lists. Rule 1101 provides the procedure and requirements for filing and seeking highly confidential protections for a document. Rule 1101(c) governs records that are presumed to be public under Rule 1100(b) and allows an entity or person to file a motion requesting highly confidential protection for records in accordance with Rule 1101(b). Rule 1100(d) specifies that the party requesting highly confidential protection carries the burden of proof to establish the need for highly confidential protection.

17. Under Rule 1101(b), 4 CCR 723-1, a motion seeking highly confidential protection:

- (I) shall include a detailed description and/or representative sample of the information for which highly confidential protection is sought;
- (II) shall state the specific relief requested and the grounds for seeking the relief;
- (III) shall advise all other parties of the request and the subject matter of the information at issue;

¹⁵ *Id.*, ¶ 1, p. 2.

(IV) shall include a showing that the information for which highly confidential protection is sought is highly confidential; that the protection afforded by the Commission's rules for furnishing confidential information provides insufficient protection for the highly confidential information; and that, if adopted, the highly confidential protections proposed by the movant will afford sufficient protection for the highly confidential information;

(V) shall be accompanied by a specific form of nondisclosure agreement requested;

(VI) shall be accompanied by an affidavit containing the names of all persons with access to the information and the period of time for which the information must remain subject to highly confidential protection, if known; and

(VII) shall include an exhibit, filed in accordance with the procedures established in paragraph (a), containing the information for which highly confidential protection is requested. Alternatively, the movant may show why providing the subject information would be overly burdensome, impractical, or too sensitive for disclosure.

18. RMNG provides a detailed description of the information for which it seeks protection and a showing that it deserves and needs highly confidential protection. Its Second Motion for Extraordinary Protection of Highly Confidential Information includes a proposed form of nondisclosure agreement to be signed by individuals who may encounter the information during this Proceeding and by legal counsel.¹⁶ It has also provided the affidavit of Michael J. Harrington, Director -- Regulatory and Finance for Black Hills, identifying the individuals and departments within RMNG that have access to the information it describes as highly confidential.¹⁷ A public version of the subject information with the allegedly highly confidential information redacted¹⁸, and an unredacted highly confidential version of those

¹⁶ *Id.*, Attachment A.

¹⁷ *Id.*, Attachment B.

¹⁸ *See id.*, Attachments C and D.

documents¹⁹ were also filed contemporaneously with the Second Motion for Extraordinary Protection.

19. RMNG has thus satisfied each of the requirements of Rule 1101(b) and has shown good cause for highly confidential protection of the identified information. Accordingly, RMNG's Second Motion for Extraordinary Protection of Highly Confidential Information will be granted.

II. ORDER

A. It Is Ordered That:

1. The Second Motion for Extraordinary Protection of Highly Confidential Information filed by Rocky Mountain Natural Gas LLC, doing business d/b/a Black Hills Energy, on January 6, 2023, is granted.

¹⁹ See *id.*, Attachments C and D.

2. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ALENKA HAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script, appearing to read "G. Harris Adams".

G. Harris Adams,
Interim Director