

Decision No. R24-0283-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 RESPONDENTS' FIRST
MOTION FOR EXTRAORDINARY PROTECTION**

Mailed Date: April 29, 2024

I. STATEMENT

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

4. On February 8, 2024, Summit Utilities filed a Motion to Quash the Subpoena (Motion to Quash). On February 22, 2024, Complainants, Staff, and UCA filed responses to the Motion to Quash.

5. On February 23, 2024, Complainants filed a Motion to Compel Discovery from Respondents (Motion to Compel).

6. On April 5, 2024, the ALJ issued Decision No. R24-0209-I that granted-in-part and denied-in-part the Motion to Quash, granted the Motion to Compel, and ordered Summit Utilities and Respondents to supplement their responses to the discovery addressed in the decision within two weeks.

7. On April 18, 2024, Respondents filed a First Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information for documents and categories of information that it plans to produce in response to the Motion to Quash and the Motion to Compel (First Motion).

8. On April 19, 2024, the ALJ issued Decision No. R24-0249-I that shortened response time to the First Motion to April 24, 2024 and Respondents filed an Unopposed Revised Motion for Extension to Respond to Certain Requests in the Subpoena (Unopposed Revised Motion). On that day, the ALJ sent an email to counsel for the parties informing them that the Unopposed Revised Motion would be granted. Decision No. R24-0273-I granting the Unopposed Revised Motion issued on April 24, 2024.

9. On April 24, 2024, Complainants filed a response to the First Motion (Response).

B. Parties' Positions**1. Respondents**

10. In its Motion for Extraordinary Protection, Respondents seek highly confidential protection for the following:

corporate materials including, but not limited to, information regarding Summit Utilities Inc., Summit LDC Holdings, books and records related to Summit Utilities, Inc., and Summit LDC Holdings, Board of Directors ("Board") meeting minutes, Board presentations, project proposals, memorandums, studies and other supplemental documents presented to the Board, any and all contracts or arrangements with gas suppliers, all invoices by such suppliers demonstrating the amount purchased, on what date at what price, all calculations and supporting documents used to calculate the WACOG unit prices and documents supporting the upstream charges by Xcel, the supporting workbooks and documents showing the total amounts of gas purchased by Wolf Creek per month and how such amounts are weighted and allocated among other customers.¹

Elsewhere, Respondents describe the documents as:

commercially sensitive corporate documents maintained by non-parties to this proceeding, board meeting minutes, contracts with other third parties that are also non-parties to this proceeding, customer identifying information maintained by the Respondents, shareholder information of CNG as well as non-parties to this proceeding, financial documents and tax returns of Respondents and other related material.²

According to Respondents, the information contained in the documents includes "natural gas purchases by non-party customers" that is "commercially competitive information," the identity of "customers," "differences in supplier pricing strategies" the release of which could "increase gas supply costs to all customers," and "confidential corporate materials not intended to be publicly disclosed."³ Respondents further state that:

[t]his request is not limited to any specific documents cited in this Motion but includes any documents or information discussing or identifying any of the indicated Highly Confidential Information, including all testimony,

¹ First Motion at 1-2.

² First Motion at 3 (¶ 4).

³ *Id.* at 4 (¶¶ 6, 8).

discovery responses (including attachments), and any other associated documents containing such types of information as may be provided throughout the course of this proceeding.⁴

11. Respondents argue that the information described above is subject to highly confidential protection “because the public release of this information could harm the business interests of Respondents and likewise negatively impact their customers.”⁵ Respondents also state that the information for which it seeks protection is “commercially sensitive, privileged, and confidential.”

2. Complainants

12. Complainants limit their opposition to the treatment as highly confidential of documents produced in response to Requests for Production (RFPs) 17 and 38 to CNG and RFPs 15 and 16 to Wolf Creek. Those RFPs seek:

all invoices by [] suppliers demonstrating the amount purchased, on what date at what price, all calculations and supporting documents used to calculate the WACOG unit prices and documents supporting the upstream charges by Xcel, the supporting workbooks and documents showing the total amounts of gas purchased by Wolf Creek per month and how such amounts are weighted and allocated among other customers.⁶

Complainants contend that these documents “are central to their claims in this proceeding that they have been unfairly billed and overcharged”⁷ and “[f]orcing [Complainants’ employees and managers] to read redacted, partial testimony or analysis on these key issues, or even to leave the hearing room, violates [Complainants’] due process rights.”⁸ Complainants further contend that Respondents’ assertion that “gas supply information” is “commercially competitive information”

⁴ *Id.* at 3-4 (¶ 5).

⁵ *Id.* at 5 (¶ 9).

⁶ Response at 4.

⁷ *Id.*

⁸ *Id.* at 5.

is “unsubstantiated hyperbole,” particularly given that Complainants “are not competitors” of Respondents.⁹

C. Analysis

13. Under Rule 1100(b) of the Commission’s Rules of Practice and Procedure,¹⁰ information filed with the Commission is presumed to be a public record. Rule 1101 provides the procedure and requirements for the designation of certain documents or information to be designated as highly confidential, thus justifying the limitation of access to such records. Under Rule 1101(b), a motion seeking highly confidential treatment:

- (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;
- (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

⁹ *Id.* at 4-5.

¹⁰ 4 CCR 723-1.

movant may show why providing the subject information would be overly burdensome, impractical, or too sensitive for disclosure.

14. Here, Respondents' First Motion includes proposed forms of nondisclosure agreements for retained subject matter experts and attorneys, and an affidavit stating that only employees with "a compelling need to know the Highly Confidential information have access to the Highly Confidential information" and stating that extraordinary protection sought for the information must remain in place "indefinitely."¹¹ Respondents did not file unredacted highly-confidential versions of the documents for which it seeks highly confidential protection because they are voluminous and it would be overly burdensome and impractical to do so, but has described the information with sufficient detail to allow the ALJ to make a judgment about the requested relief.

15. In addition, Respondents have identified the grounds for seeking highly confidential protection for the information identified in the First Motion. Specifically, Respondents have stated that the information identified in the First Motion is confidential commercial information. Under § 24-72-204(3)(a)(IV), C.R.S., confidential commercial information is protectable from public disclosure. Further, the Uniform Trade Secrets Act requires courts to "preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders."¹² Trade secrets include "confidential business or financial process, procedure, formula, information, the listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value."¹³ To be a "trade

¹¹ First Motion, Attach. A at 2 (¶¶ 4, 5).

¹² § 7-74-106, C.R.S.

¹³ § 7-74-102(4), C.R.S.

secret” the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.¹⁴

16. While the First Motion does not expressly address the question, it appears that the information it seeks to protect qualifies as trade secrets. Respondents derive value from maintaining the confidentiality of the information as its disclosure would “harm the business interests of Respondents and likewise negatively impact their customers.”¹⁵ Similarly, Respondents have asserted that the requested “gas supply information” is commercially sensitive and thus has value because it reveals “differences in supplier pricing strategies.”¹⁶ Finally, Respondents have taken reasonable steps to maintain the confidentiality of the information in question by restricting access to it by their employees to those who “have a compelling need to know” it.¹⁷ While Complainants may not be “competitors” of Respondents, the ALJ is not convinced that Complainants could not use the “gas supply information” to their advantage and/or to the disadvantage of Respondents.

17. Based on the foregoing, the ALJ finds and concludes that Respondents have satisfied their burden under Rule 1101(b). Conversely, the ALJ finds and concludes Respondents’ argument that their “due process rights” will be infringed if the First Motion is granted – without any further explanation or citation to legal authority – is unpersuasive. In granting the First Motion, the ALJ reminds Respondents that “[a]cceptance of information claimed to be confidential or highly confidential by any party shall in no way constitute a waiver of the rights of that party to contest any assertion or finding of trade secret, confidentiality, or privilege.” If, after reviewing the information that is the subject of the First Motion that will subsequently be produced,

¹⁴ *Id.*

¹⁵ First Motion at 5 (¶ 9).

¹⁶ *Id.* at 4 (¶ 6).

¹⁷ *Id.*, Attach. A at 2 (¶ 4).

Complainants believe that it is not worthy of highly confidential protection, they can file an appropriate motion supported by citations to relevant authority and persuasive argument.

II. ORDER

A. It Is Ordered That:

1. The First Motion for a Protective Order Affording Extraordinary Protection for Highly Confidential Information filed by Respondents on April 18, 2024 is granted consistent with the discussion above.
2. 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

A handwritten signature in black ink that reads "Rebecca E. White". The signature is written in a cursive, flowing style.

Rebecca E. White,
Director