

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF DELTA	)	
NATURAL GAS COMPANY, INC. FOR AN	)	CASE NO.
ADJUSTMENT OF ITS RATES AND A	)	2021-00185
CERTIFICATE OF PUBLIC CONVENIENCE	)	
AND NECESSITY	)	

ORDER

On May 28, 2021, Delta Natural Gas Company, Inc. (Delta) filed a petition, pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1), requesting that the Commission grant confidential treatment for a map contained in Exhibit JM-1 to the direct testimony of Delta’s Director of Operations, Mr. Jonathan Morphew, customer-identifying information contained in Tabs 55 and 66 of the application, and the compensation of Delta’s president contained in Tab 60 of the application.

Exhibit JM-1 to Morphew’s testimony is a preliminary map of the route of a proposed natural gas pipeline. In support of its petition, Delta argues that Exhibit JM-1 is confidential or proprietary and disclosure would permit an unfair and commercial advantage to competitors. Therefore, Delta maintains it is seeking confidential treatment for this information under KRS 61.878(1)(c)(1).<sup>1</sup> Delta argues that the map showing the proposed natural gas pipeline in Nicholasville would create a competitive disadvantage for Delta. Delta claims it has not notified landowners of the proposed route and if it is

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<sup>1</sup> KRS 61.878(1)(c)(1) exempts from public disclosure records disclosed to an agency that are generally recognized as proprietary, which if openly disclosed would permit an unfair commercial advantage to the competitors of the entity that disclosed the records.

disclosed the land could increase in value forcing Delta to spend more to construct the pipeline.

Delta provided a jurisdictional rate base summary and schedules containing revenue summaries in Tabs 55 and 66 of its application. Delta states that these documents contain customer-identifying information. In support of its petition, Delta states that this information is personal to the customers who would be identified by the disclosure of the information, and it is therefore exempt from public disclosure under KRS 61.878(1)(a).<sup>2</sup>

Delta stated that it has not publicly disclosed executive compensation; this information has not been disclosed in filings with the Securities and Exchange Commission (SEC); and executive compensation should be treated as confidential under KRS 61.878(1)(a). Delta claims that disclosure of this information would not serve the purpose of the Open Records Act,<sup>3</sup> which Delta concedes is to make government and its actions open to public scrutiny.<sup>4</sup> Delta argues that disclosure of its president's compensation would constitute an unwarranted invasion of personal privacy.

#### LEGAL STANDARD

The Commission is a public agency subject to Kentucky's Open Records Act, which requires that all public records "be open for inspection by any person, except as otherwise provided by KRS 61 .870 to 61 .884."<sup>5</sup> The exceptions to the free and open

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<sup>2</sup> KRS 61.878(1)(a) exempts from public disclosure public records containing personal information where the disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

<sup>3</sup> KRS 61.870 through KRS 61.884.

<sup>4</sup> Petition of Delta for Confidential Protection at 3, paragraph 4.

<sup>5</sup> KRS 61.872(1).

examination of public records contained in KRS 61.878 should be strictly construed.<sup>6</sup> The party requesting that materials be treated confidentially has the burden of establishing that one of the exceptions is applicable.<sup>7</sup> In determining whether materials should be exempt from disclosure, the Commission must balance the potential harm from disclosure with “the effect of protecting a given document from scrutiny by the public and potential intervenors.”<sup>8</sup>

The map provided by Delta in Exhibit JM-1 depicts a preliminary location of a pipeline project. Delta has not developed engineering plans for the project, and Delta has not indicated there is any concern about endangering public safety if the map were made public. The only reason Delta cites to support its contention that the map should be kept confidential is the possibility of an increase it may ultimately have to pay for the land if the project is approved. There are many factors that contribute to land costs. A public utility potentially needing to acquire the land is just one of several factors. Additionally, Delta has the ability under KRS 278.502 to utilize eminent domain proceedings if needed.

However, the map may constitute preliminary information exempt from disclosure under KRS 61.878(1)(i) or (1)(j), which exempt:

- (i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency; [and]
- (j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.

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<sup>6</sup> See KRS 61.871.

<sup>7</sup> 807 KAR 5:001, Section 13(2)(c).

<sup>8</sup> *Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195, 199 (Ky. 1997), *abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004).

The Kentucky Supreme Court has determined that “materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.”<sup>9</sup> The Court of Appeals examined the meaning of “adopted” further, stating “The Act does not require that an agency reference or incorporate specific documents in order for those records to be adopted into the final agency action. Rather, we agree with the Attorney General that preliminary records which form the basis for the agency's final action are subject to disclosure.”<sup>10</sup> In the present case, Delta withdrew its application for a Certificate of Public Convenience and Necessity (CPCN) for which the map was produced, intending to refile at a later date.<sup>11</sup> The Commission rendered a final Order on January 3, 2022, recognizing the withdrawal of the CPCN application.<sup>12</sup> Lastly, the applicability of KRS 61.878(1)(i) and (1)(j) is not changed by the fact that the information was generated by a non-agency.<sup>13</sup> Preliminary status is determined by whether the agency to which the information is submitted used the information as a basis for its final action. Here, Delta voluntarily withdrew its application for a CPCN. The Commission

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<sup>9</sup> *University of Kentucky v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). In that case, the University sought to withhold information gathered to investigate violations by its athletic staff of National Collegiate Athletic Association (NCAA) rules. The Court found that this information lost its preliminary status once it was used as a basis for the University's official response to the NCAA, which constituted the University's final action that adopted the investigatory material.

<sup>10</sup> *University of Kentucky v. Lexington H-L Services, Inc.*, 579 S.W.3d 858, 863 (Ky. App. 2018). In that case, the University contracted to purchase a clinic and extend faculty status to its physicians. The University conducted an audit pertaining to medical record and billing practices and ultimately chose to cut ties with the clinic. The Court found that the decision to end its relationship with the clinic was the University's final action adopting the formerly preliminary audit information, despite no express adoption of the audit material in rendering its decision.

<sup>11</sup> Order (Ky. PSC Jan. 3, 2022) at 5–6, 29.

<sup>12</sup> *Id.*

<sup>13</sup> See OAG 84-249, in which witness statements made to police did not lose preliminary status since no action was taken by police.

took no final action on the CPCN application. Since production of the map pertained solely to the CPCN, and the final Order of the Commission in this case expressly recognized the withdrawal of the CPCN application, the map was not adopted by the Commission. It has retained its preliminary status until Delta refiles its CPCN and the Commission issues a ruling adopting the map by using it as a basis for a finding regarding the CPCN.<sup>14</sup>

Delta's customers have a reasonable expectation of privacy concerning their usage of natural gas, the physical assets that Delta has installed to service them, and the cost they incur to receive the gas. Tab 55 of the application contains information which identifies eleven specific Delta customers and the cost of the physical assets needed to service each of those customers. Tab 66 of the application contains customer-specific billing amounts for the base period and the forecasted period. This is information for which Delta's customers have a reasonable expectation of privacy. KRS 61.878(1)(a) exempts from public disclosure public records of a personal nature the disclosure of which would result in a clearly unwarranted invasion of personal privacy.

The redacted information relating to executive compensation in Tab 60 is a matter of public concern and its disclosure is necessary for the public to properly scrutinize the Commission's actions in ratemaking. Executive officer compensation information does not meet the criteria for confidential treatment because the salaries and other executive compensation are included as an expense in base rate calculations. Information

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<sup>14</sup> See also OAG 19-192 at 3, *citing Univ. of Ky.*, 579 S.W.3d at 863. The Attorney General determined that work papers used by Public Service Commission (PSC) staff to draft a report pursuant to 807 KAR 5:076, Section 11(2)(b) were exempt from disclosure under KRS 61.878(1)(i) and (1)(j) because although the PSC reached a final decision, it did not fully adopt the staff report or documents relied upon in the report, and therefore the records not relied upon did not lose their preliminary status.

concerning executive compensation is also often readily available. Although Delta maintains this information has not been disclosed in SEC filings, Delta does not argue that the SEC prohibits public disclosure of this information until it is disclosed in an SEC filing. This distinguishes Delta's current request from the request made by Kentucky Power Company in Case No. 2017-00179. In that case, the Commission granted confidential protection for executive salary information for a brief period until the information was filed with the SEC, and thus became publicly available.<sup>15</sup> The Commission has previously held that executive salaries are not entitled to confidential protection because of the public interest in disclosure.<sup>16</sup> The Commission further warns

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<sup>15</sup> Case No. 2017-00179, *Electronic Application of Kentucky Power Company for (1) A General Adjustment of Its Rates for Electric Service; (2) An Order Approving Its 2017 Environmental Compliance Plan; (3) An Order Approving Its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) An Order Granting All Other Required Approvals and Relief* (Ky. PSC Aug. 23, 2017), Order at 2–3 and 6–7.

<sup>16</sup> The Commission has a long precedent of not granting confidential treatment for executive compensation. See Case No. 2012-00221, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Sept. 11, 2013); Case No. 2014-00371, *Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Jan 20, 2016); Case No. 2015-00418, *Application of Kentucky-American Water Company for an Adjustment of Rates* (Ky. PSC Aug. 31, 2016); Case No. 2017-00321, *Electronic Application of Duke Energy Kentucky, Inc. For: 1) An Adjustment of the Electric Rates; 2) Approval of an Environment Compliance Plan and Surcharge Mechanism; 3) Approval of New Tariffs; 4) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 5) All other Required Approvals and Relief* (Ky. PSC June 12, 2018); Case No. 2018-00294, *Electronic Application of Kentucky Utilities Company for an Adjustment of its Electric Rates* (Ky. PSC Oct. 8, 2019); Case No. 2018-00295, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates* (Ky. PSC Oct. 8, 2019); Case No. 2019-00268, *Application of Knott County Water and Sewer District for an Alternative Rate Adjustment* (Ky. PSC Dec. 3, 2019); Case No. 2019-00271, *Electronic Application of Duke Energy Kentucky, Inc. for 1) An Adjustment of the Electric Rates; 2) Approval of New Tariffs; 3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; and 4) All other Required Approvals and Relief* (Ky. PSC May 4, 2020); Case No. 2020-00290, *Electronic Application of Bluegrass Water Utility Operating Company, LLC for an Adjustment of Rates and Approval of Construction* (Ky. PSC Dec. 27, 2021); Case No. 2020-00349, *Electronic Application of Kentucky Utilities Company for an Adjustment of Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit* (Ky. PSC Dec. 7, 2021); Case No. 2020-00350, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of its Electric and Gas Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of One-Year Surcredit* (Ky. PSC Dec. 7, 2021); Case No. 2021-00183, *Electronic Application of Columbia Gas of Kentucky, Inc. for an Adjustment of Rates; Approval of Depreciation Study; Approval of Tariff Revision; Issuance of a Certificate of Public Convenience and Necessity; and Other Relief* (Ky. PSC Oct. 5, 2021); Case No. 2021-00185, *Electric Application of Delta*

Delta that, as a result of the long-standing precedent denying confidential treatment to executive compensation, it will not look kindly on subsequent motions for confidential treatment of executive compensation.

Having considered the petition and the material at issue, the Commission finds that the petition shall be granted in part and denied in part. The pipeline map included as part of Exhibit JM-1 Mr. Jonathan Morphew's testimony is granted confidential treatment pursuant to KRS 61.878(1)(i) as a preliminary draft of the expected pipeline route. Information redacted from Tab 60 of the application does not meet the criteria for confidential treatment and is therefore not exempted from public disclosure pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(a). The Commission finds that this request for confidential treatment shall be denied. The customer-identifying information in Tab 55 and Tab 66 of the application does meet the criteria for confidential treatment pursuant to 807 KAR 5:001, Section 13, and KRS 61.878(1)(a).

IT IS THEREFORE ORDERED that:

1. Delta's petition for confidential treatment for Exhibit JM-1 to the direct testimony of Mr. Jonathan Morphew in support of the application, customer-identifying information contained in Tabs 55 and 66 of the application, and the compensation of Delta's president contained in Tab 60 of the application is granted in part and denied in part.

2. Delta's petition for confidential treatment for Exhibit JM-1 to the direct testimony of Delta's Director of Operations, Mr. Jonathan Morphew in support of the

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*Natural Gas Company, Inc. for an Adjustment of its Rates and a Certificate of Public Convenience and Necessity* (Ky. PSC Dec. 8, 2021).

application and the customer-identifying information contained in Tabs 55 and 66 of its application is granted.

3. Delta's petition for confidential treatment for the compensation of Delta's president contained in Tab 60 of the application is denied.

4. The designated material granted confidential treatment by this Order shall not be placed in the public record or made available for public inspection for an indefinite period or until further Order of this Commission.

5. Use of the designated material granted confidential treatment by this Order in any Commission proceeding shall comply with 807 KAR 5:001, Section 13(9).

6. Delta shall inform the Commission if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

7. If a nonparty to this proceeding request to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, Delta shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If Delta is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Commission shall deny the request for inspection.

8. The Commission shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow Delta to seek a remedy afforded by law.



9. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

10. If Delta objects to the Commission's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to KRS 278.400 or judicial review of this Order pursuant to KRS 278.410. Failure to exercise either of these statutory rights will be deemed as agreement with the Commission's determination of which materials shall be granted confidential treatment.

11. Within 30 days of the date of service of this Order, Delta shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

12. The designated material for which Delta's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow Delta to seek a remedy afforded by law.

By the Commission



ATTEST:

A handwritten signature in blue ink that reads "Linda C. Bridwell". The signature is written in a cursive style and is positioned above a horizontal line.

Executive Director

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