

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE CONTRACT BETWEEN AN END USER	)	CASE NO. 98-380
AND DELTA NATURAL GAS COMPANY, INC.	)	CASE NO. 98-412
FOR NATURAL GAS TRANSPORTATION SERVICE	)	CASE NO. 98-479

O R D E R

This matter arises upon separate petitions of Delta Natural Gas Company, Inc. ( Delta ), filed pursuant to 807 KAR 5:001, Section 7, for confidential protection of portions of special contracts with selected customers, including attachments thereto, on the grounds that disclosure is likely to cause Delta competitive injury. The Commission by Order consolidated these cases for all administrative and hearing purposes and set a public hearing on all issues. On September 17, 1998, a public hearing was held at which Delta presented evidence in support of its request for confidential treatment of these contracts.

The Commission finds that Delta has entered into separate contracts<sup>1</sup> with several of its customers. Each contract is called a Large Volume Natural Gas Service Agreement. Under the terms of these contracts, Delta has agreed to furnish all of the customers natural gas service requirements under rates and conditions that vary from those contained in the tariff filed with the Commission, which applies to customers generally.

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<sup>1</sup> The contracts, though similar, are not identical to one another. Therefore, not every item of the information sought to be protected is in all of the agreements.

In submitting copies of the contracts to the Commission for its review, Delta has petitioned to protect as confidential the following information found within them:

1. The identity and business location of the customers.
2. The identity of the person who signed the agreements on behalf of the customer.
3. The identity of the interconnection points at which gas will be delivered to Delta for redelivery to the customer.
4. The names of the companies from whom gas will be delivered.
5. The date performance is to begin under the agreements.
6. The method of calculating refunds.
7. The quantities of gas and maximum daily volumes under the agreements.
8. The terms of the agreements.
9. The rate or pricing of the transportation service.

Delta maintains that disclosure of all the designated information is likely to cause it competitive injury and, therefore, that the information should be protected as confidential.

Delta cites as authority to maintain the material as confidential the Commission's regulations at 807 KAR 5:001, Section 7(1), which in turn cites KRS 61.870, *et seq.*, as the standard for confidential treatment of material submitted under the regulation.

Delta is correct when it vouchsafes that KRS 278.160 is the codification of the filed rate doctrine. However, Delta would have the Commission interpret KRS 278.160(1) to mean that even though the rates and conditions of service are required to be filed, this requirement does not make them necessarily open to the public. Delta has

failed to read the entire section of the statute it relies upon. KRS 278.160(1) provides in total as follows:

Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions of service established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes. (Emphasis added.)

Delta maintains that the public could be furnished redacted copies under Commission rules. 807 KAR 5:011, Section 12, is the Commission rule relating to copies of the utility tariff schedules and states in pertinent part:

Section 12. Posting Tariffs, Administrative Regulations and Statutes. Every utility shall provide a suitable table or desk in its office and place of business, on which shall be available to the public at all times the following:

(1) A copy of all effective tariffs and supplements setting out its rates, classifications, charges, rules and administrative regulations, together with forms of contracts and applications applicable to the territory served from that office or place of business.

(2) Copies of the Kentucky Revised Statutes applicable to the utility.

(3) A copy of the administrative regulations governing such utility adopted by the commission.

(4) A suitable placard, in large type, giving information to the public that said tariffs, rules and administrative regulations and statutes are kept there for public inspection. (Emphasis added.)

The Commission rule that relates to special contracts, is found in 807 KAR 5:011, Section 13, that reads in pertinent part:

Section 13. Special Contracts. Every utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or conditions of service not included in its general tariff. The provisions of this administrative regulation applicable to tariffs containing rates, rules and administrative regulations, and general agreements, shall

also apply to the rates and schedules set out in said special contracts, so far as practicable.

While it is true that the Commission can prescribe the form of the schedules, (i.e., style and size), it cannot order that the schedules and rates be withheld from public view.

The Commission, while recognizing that material filed with it is open to public view, has found that certain information can be granted confidential treatment if it conforms to the requirements of law and Commission regulations.

807 KAR 5:001, Section 7, sets out the procedures and grounds for dealing with the question of confidential material, stating in pertinent part as follows:

Confidential Material.

(1) All material on file with the commission shall be available for examination by the public unless the material is confidential as provided herein.

(2) Procedure for determining confidentiality.

(a) Any person requesting confidential treatment of any material shall file a petition which:

1. Sets forth specific grounds, pursuant to KRS 61.870, *et seq.*, the Kentucky Open Records Act, upon which the commission should classify that material as confidential; and

(d) The burden of proof to show that the material falls within the exclusions from disclosure requirements enumerated in KRS 61.870, *et seq.*, shall be upon the person requesting confidential treatment.

Accordingly, the Commission finds that KRS 61.872(1) requires information filed with the Commission to be available for public inspection unless specifically exempted by statute. Exemptions from the requirement of public disclosure are provided in KRS 61.878(1). That subsection of the statute exempts several categories of information. One category, exempted in paragraph c(1) of subsection (1), is commercial

information confidentially disclosed to an agency which, if made public, would permit an unfair commercial advantage to competitors of the party from whom the information was obtained. To qualify for the exemption, the party claiming confidentiality must demonstrate actual competition and a likelihood of substantial competitive injury if the information is publicly disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage.

The Commission finds that, as a regulated utility, Delta offers service to its customers generally in accordance with its published tariffs. Here, though, the contracts offer service under terms that are specific to each particular customer. Because the contracts deviate from the general tariffs, they are characterized as special contracts and are used in situations where the published tariffs do not satisfy the demands or needs of the customer. Special contracts are reviewed by the Commission to ensure that the general body of customers does not unduly subsidize them.

In these cases, disclosure will adversely affect Delta's ability to contract on favorable terms with other special needs customers. Because these and future special needs customers will want the most favorable terms they can negotiate, it is unlikely they will agree to terms less favorable than those agreed to by Delta in the subject contracts. Thus, disclosure of the information sought to be protected is likely to cause Delta competitive injury and the information falls within the provisions of KRS 61.878(1)(c)(1). Nevertheless, not all of the information is entitled to protection.

The Commission finds that those provisions of the contracts that set forth the rates and terms under which service is to be provided are not entitled to protection even though Delta's competitors or customers may derive substantial benefit from the

information. The public disclosure of that information is mandated by KRS 278.160. That statute requires all utilities to file schedules of their rates and conditions of service with the Commission and to display those schedules for public inspection. The prices to be charged under the contracts and the services to be rendered are rates and conditions of service" within the meaning of KRS 278.160 and are subject to its requirements. In cases where public disclosure is directed by another statute, KRS 61.878(1)(c)(3) provides that the exemption provisions do not apply. Therefore, while the information pertaining to the identity of each customer is entitled to protection, the remaining items sought to be protected are not so protected.

IT IS HEREBY ORDERED that:

1. The identity of each customer with whom Delta has entered into a special contract; the business location of the customers; the identity of the person who signed the agreements on behalf of the customer; and the identity of the interconnection points at which gas will be delivered to Delta for redelivery to the customer, all of which Delta has petitioned to be withheld from public disclosure, shall be held and retained by this Commission as confidential and shall not be opened for public inspection.

2. The names of the companies from whom gas will be delivered; the date performance is to begin under the agreements; the method of calculating refunds; the quantities of gas and maximum daily volumes under the agreements; and the terms of the agreements and the rate or pricing of the transportation service are not entitled to protection under KRS 61.878(1)(c)(1), and Delta's petition to withhold the same from public disclosure is denied.

3. The transportation prices, term of the agreement, and the maximum daily volumes of gas to be delivered relate to rates, terms, and conditions of service and are of public record and shall be maintained in the public record.

4. Within 20 days from the date hereof, Delta shall file edited copies of the contracts for inclusion in the public record, obscuring only those portions protected by this Order.

Done at Frankfort, Kentucky, this 18<sup>th</sup> day of February, 1999.

By the Commission

ATTEST:

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Executive Director