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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION OF NATURAL GAS) CASE NO.
RETAIL COMPETITION PROGRAMS) 2010-00146

**RESPONSE OF DELTA NATURAL GAS COMPANY, INC. TO
MOTION OF STAND ENERGY CORPORATION TO COMPEL
RESPONSES TO DATA REQUESTS**

Delta Natural Gas Company, Inc. (“Delta”) respectfully submits this response to the Motion of Stand Energy Corporation (“Stand”) to Compel Responses to Data Requests (“Motion”). All of the data requests that are the subject of Stand’s Motion seek information that is not relevant to the subject matter of this proceeding and that is not reasonably calculated to lead to the discovery of admissible evidence. In addition, since Stand currently competes with Delta and its subsidiaries for the sale of gas to larger customers in Delta’s service territories, the requested information can be used by Stand to gain an unfair competitive advantage over Delta and its subsidiaries with respect to these customers. The Motion should, therefore, be denied.

Relevance

In its order dated April 19, 2010, the Commission initiated this proceeding and described it as follows:

This matter is established as an investigation of natural gas retail programs to determine if benefits could be derived from these programs, and to determine whether natural gas retail competition programs could be crafted to benefit Kentucky consumers.¹

¹ Order dated April 19, 2010, herein at 5.

The order was issued following the adoption by the General Assembly of House Joint Resolution 141, which directed the Commission to commence a collaborative study of whether retail competition in natural gas markets would benefit Kentucky's small-volume natural gas consumers.² Neither House Joint Resolution 141 nor the order commencing this proceeding relates to existing competition for larger volume customers nor to the activities of affiliates of utilities. The data requests that are the subject of Stand's Motion, however, do not relate to retail competition for small-volume customers, but rather, to existing competition for larger volume customers and to the relationships between Delta, its subsidiaries and others. Those issues are not present in this case and discovery regarding them is inappropriate.

An examination of the specific data requests at issue confirms that the information sought is not relevant to the subject matter of this proceeding. DR 1-6(C) concerns payments to Delta's "Asset Manager." This information cannot possibly assist the Commission in deciding whether retail competition programs can be crafted to benefit small-volume customers.

DR 1-9(B) relates to the number of Delta's transportation customers using one of Delta's subsidiaries as their natural gas supplier. Since Delta's transportation customers are not small-volume customers, this information is not relevant to this proceeding.

DR 1-9(D) relates to regulated and unregulated natural gas sales by Delta and its subsidiaries. It is inconceivable that this information could assist the Commission in deciding whether to craft retail competition programs that will benefit small-volume customers.

In DR 1-9(F-1) Stand wants to know if Delta and its unregulated subsidiaries purchase gas under the same contract with M&B Gas Services. Delta's current gas purchasing practices have nothing whatsoever to do with proposed retail competition programs for small-volume customers. Stand argues that the information relates to codes of conduct and nondiscriminatory

² House Joint Resolution 141 at 1; Commission News Release dated June 22, 2010, at 1.

access to services, but it simply does not relate to those two subjects. In any event, those topics were only to be considered by the Commission in crafting retail competition programs. There has been no directive by the Commission or the General Assembly to conduct an inquiry into current practices of utilities and their affiliates.

In DR 1-9(G), Stand asks how much of Delta's "non-regulated gas supplies" are produced in Kentucky. Again, the source of Delta's "non-regulated gas supplies" has nothing whatsoever to do with the decision of whether to craft retail competition programs for small-volume customers. The argument that the information is relevant to KRS 278.507 misses the point; this proceeding is not an inquiry into the policy advanced by that statutory provision.

In DR 1-9(H), Stand wants to know how much of the gas used by Delta's special contract customers was supplied by its "non-regulated marketing affiliate." Delta's four special contract customers are all large volume customers and are not the subject of this proceeding. Their source of supply is not relevant to retail competition programs.

In DR 1-9(I), Stand wants to know details regarding the use by Delta's "non-regulated marketing affiliate" of Delta's reserved pipeline capacity. Again, Stand invokes the language from the April 19, 2010, order herein about codes of conduct and non-discriminatory access in support of its Motion, but, as noted above, this case is not an inquiry into current compliance with those principles. Thus, even if the information were relevant to those issues (which it is not), it is not relevant to the advisability of retail competition programs.

Confidential and Proprietary Information

The information Stand is seeking is clearly confidential and proprietary business information, which if disclosed to Stand, would permit an unfair commercial advantage to Stand over Delta and its subsidiaries. Such information is exempt from disclosure under Kentucky's

Open Records Act³ and, thus, entitled to confidential protection under the Commission's regulations.⁴ However, since the party requesting the information is the competitor that will gain an unfair competitive advantage as a result of obtaining the information, the Commission's confidential protection procedure is not feasible. Instead, discovery of the information should be denied.

As the Commission observed in *In the Matter of: Green River Steel Corporation v. Kentucky Utilities Company*, confidential information enjoys no privilege from disclosure.⁵ The Commission went on to say, "Courts, however, have protected confidential commercial information where one party's need for protection outweighs the other party's need for disclosure."⁶ Such protection is warranted here.

John Dosker, testifying on behalf of Stand in this proceeding, stated that Stand "does compete with the unregulated marketing subsidiaries of Atmos Energy Marketing and Delta Energy Marketing [sic] . . ."⁷ Stand also competes with Delta for its larger customers. As indicated above, the information Stand seeks relates to the business practices of Delta and its subsidiaries with respect to customers that Stand would no doubt like to serve. For example, the information sought could enable Stand to calculate the sales margins realized by Delta's subsidiaries, which, in turn, could enable Stand to under price its services and take Delta's subsidiaries' customers. See, DR 1-9(D), 1-9(G) and 1-9(I). Discovery should not be used to lead to that result.

As indicated above, the information sought has absolutely no relevance to the issues before the Commission in this proceeding. Stand, therefore, has no need for the information for

³ KRS 61.878(1)(c)(1)

⁴ 807 KAR 5:001, Section 7(2)(a)(1)

⁵ Case No. 10300, Order dated January 6, 1989, at 2.

⁶ *Id.*

⁷ Testimony of John Dosker at 5.

use in this proceeding. Given that Stand competes with Delta and its subsidiaries for customers in Delta's service territories, the release of the information is likely to give Stand an unfair competitive advantage over Delta and its subsidiaries. Thus, under the principles in the *Green River* case, Delta's need for protection outweighs Stand's need for disclosure and discovery should be denied.

The Commission and the courts have consistently held that discovery in one proceeding will not be permitted if it seeks information to be used in another proceeding. See, *In the Matter of: The Joint Petition of Kentucky American Water Company, et al*⁸ and *Shepherd v. Wellman*⁹. While there is no suggestion that Stand will use the information sought in another proceeding, it is clear that Stand will use the information for a purpose other than to assist the Commission in deciding whether retail competition programs will be beneficial to small-volume customers. Thus, the principle about improper use of discovery applies to Stand's requested discovery just as it did to the improperly requested discovery in the *Kentucky-American* and *Shepherd* cases above.

Conclusion

The information that Stand seeks in its Motion is not relevant to the subject matter of this proceeding and not reasonably calculated to lead to the discovery of admissible evidence. The information is confidential and proprietary to Delta and its subsidiaries and its release to Stand would give Stand an unfair commercial advantage over Delta and its subsidiaries. Therefore, Delta's objections to the requested discovery should be should be sustained and Stand's Motion should be denied.

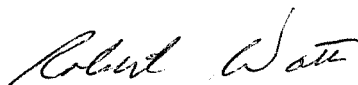
⁸ Case No. 2002-00317, Order dated November 19, 2002, at 3.

⁹ 313 F.3d 963, 969 (6th Cir. 2002)

Dated this 3^d day of September 2010.

Respectfully submitted,


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CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading has been served by mailing a true copy of same, postage prepaid, to the persons set forth on the attached service list on this 3^d day of September 2010.



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