

145 FERC ¶ 61,027  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

Texas Eastern Transmission, LP

Docket No. CP13-84-000

ORDER REQUIRING PRODUCTION OF MATERIAL PURSUANT TO A  
PROTECTIVE AGREEMENT

(Issued October 8, 2013)

1. On February 27, 2013, Texas Eastern Transmission, LP (Texas Eastern) filed an application in Docket No. CP13-84-000 for authorization under section 7 of the Natural Gas Act (NGA)<sup>1</sup> and Part 157 of the Commission's regulations<sup>2</sup> to construct and operate the Texas Eastern Appalachia to Market 2014 Project (TEAM 2014 Project). On August 5, 2013, ConocoPhillips Company (ConocoPhillips), an intervenor in the proceeding, requested that the Commission require Texas Eastern to comply with section 388.112 of the Commission's regulations by filing a form of protective agreement and providing ConocoPhillips with certain requested non-public documents upon receipt of ConocoPhillips' executed protective agreement.<sup>3</sup> As discussed below, we are requiring Texas Eastern to enter into a protective agreement with ConocoPhillips and to provide ConocoPhillips with a copy of the requested non-public documents.

**I. Background**

2. Texas Eastern is a natural gas company as defined in the NGA, engaged in the transmission of natural gas in interstate commerce, subject to the jurisdiction of the Commission.

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<sup>1</sup> 15 U.S.C. § 717f (2012).

<sup>2</sup> 18 C.F.R. Part 157 (2013).

<sup>3</sup> 18 C.F.R. § 388.112 (2013).

3. As proposed, the TEAM 2014 Project would consist of pipeline looping and aboveground modifications located on various segments of the Texas Eastern system in Pennsylvania, West Virginia, Ohio, Kentucky, Tennessee, Alabama, and Mississippi.

Among other things, Texas Eastern would construct approximately 33.6 miles of new 36-inch-diameter pipeline loop and compressor station upgrades resulting in a net increase of 77,100 horsepower of compression.

4. Texas Eastern states that it entered into Precedent Agreements with two shippers for transportation service on the TEAM 2014 Project totaling 600,000 dekatherms per day, with a target in-service date of November 1, 2014. Texas Eastern states it conducted a binding Open Season from January 17, 2012, through February 17, 2012, to determine whether additional demand existed for firm service as part of TEAM 2014. No additional Precedent Agreements resulted from the Open Season.

5. The Precedent Agreements, filed as Exhibit I of its application, were filed by Texas Eastern as privileged and not available to the public. Texas Eastern did not file a form of protective agreement or public versions of the Precedent Agreements with its application as required by section 388.112 of the Commission regulations.

6. Notice of Texas Eastern's application was published in the *Federal Register* on March 21, 2013 (78 Fed. Reg. 17,389). On April 5, 2013, ConocoPhillips filed a timely, unopposed motion to intervene.<sup>4</sup>

7. ConocoPhillips states that it requested Texas Eastern to provide a form of protective agreement that would enable ConocoPhillips to access Exhibit I, and the other privileged materials in Texas Eastern's application, and that Texas Eastern declined to do so. Subsequently, on August 5, 2013, ConocoPhillips asked that the Commission require Texas Eastern to comply with section 388.112 of the Commission's regulations and (1) file a protective agreement and (2) provide ConocoPhillips with complete, non-public copies of the Precedent Agreements within 5 days of receiving ConocoPhillips' executed protective agreement.<sup>5</sup> ConocoPhillips states that if it does not have the opportunity to

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<sup>4</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2013).

<sup>5</sup> ConocoPhillips also requested that the Commission provide a copy of the Precedent Agreements to ConocoPhillips pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (2012). On June 13, 2013, the Commission denied ConocoPhillips' request, stating that the Precedent Agreements are withheld from public disclosure under FOIA Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* at § 552(b)(4). On July 25, 2013, ConocoPhillips appealed the Commission's FOIA denial, and on September 6, 2013, the Commission denied ConocoPhillips' appeal. However, for proceedings in which there is a right to intervene, parties do not have to seek access to

review the non-public versions of the Precedent Agreement it “will be denied its due process rights to challenge Texas Eastern’s assertions that the Precedent Agreements dictated [Texas Eastern’s] choice of the in-service date and the project route and/or investigate whether there are other conditions precedent or contingencies related to the Precedent Agreements.”<sup>6</sup>

8. On August 12, 2013, Texas Eastern filed an answer alleging that even limited disclosure of “sensitive commercial information to ConocoPhillips is still problematic as ConocoPhillips is a direct competitor of the Project shippers.”<sup>7</sup>

## II. Discussion

9. Section 388.112 of the Commission’s regulations permits any person filing a document with the Commission to request privileged treatment for some or all of the information contained in the document that the filer claims is exempt from the mandatory public disclosure requirements of FOIA. To obtain privileged treatment, the filer must: (1) include a justification for requesting privileged treatment; (2) designate the document as privileged; and (3) submit a public version of the document with the information that is claimed to be privileged material redacted, to a practicable extent.<sup>8</sup>

10. However, when such material is filed in a proceeding to which a right to intervene exists (as is the case here), the filer is required to include a proposed form of protective agreement with the filing<sup>9</sup> and provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing. An intervenor to the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the protective agreement and a statement on the person’s right to party status or copy of their motion to intervene.

11. Texas Eastern states correctly that the Commission in Order No. 769 noted that a “filing party that has reason to question whether a party has a legitimate need to review information in a Commission proceeding may file an objection to disclosure to that

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non-public information under FOIA. Non-public information can be requested through the Commission’s procedures laid out in section 388.112 of the regulations. *See* 18 C.F.R. § 388.112.

<sup>6</sup> ConocoPhillips’ August 5, 2013 Filing at 4.

<sup>7</sup> Texas Eastern’s August 12, 2013 Filing at 4.

<sup>8</sup> 18 C.F.R. § 388.112(b)(1).

<sup>9</sup> 18 C.F.R. § 388.112(b)(2)(i).

person.”<sup>10</sup> Texas Eastern asserts that ConocoPhillips has provided inadequate support for disclosure of the agreements. However, the Commission finds, to the contrary, that Texas Eastern has failed to demonstrate why its (and/or its customers) competitive interests cannot be adequately protected by means of a protective agreement governing ConocoPhillips’ use and disclosure of the information Texas Eastern believes to be commercially sensitive.<sup>11</sup> It is common practice for parties to a proceeding to use a protective agreement to gain access to confidential and proprietary information submitted on a non-public basis while at the same time ensuring such information is neither publicly disclosed nor used by parties for purposes unrelated to their participation in the proceeding.<sup>12</sup> The Commission finds use of such agreements appropriately balances the interests of filers in protecting their sensitive information against inappropriate disclosure and the right of intervenors to access information necessary to their full and meaningful participation in a contested proceeding.

12. Accordingly, the Commission hereby orders Texas Eastern to enter into a protective agreement with ConocoPhillips and to provide ConocoPhillips with a copy of the requested Precedent Agreements within 15 days of the date of this order. Should the parties desire assistance in determining the terms of such an agreement, they may make use of the services of the Commission’s designated on-call Settlement Judge.<sup>13</sup> However, use of such procedure shall not extend the 15-day deadline for production of the requested material.

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<sup>10</sup> Filing of Privileged Materials and Answers to Motions, Order No. 769, 141 FERC ¶ 61,049, at P 27 (2012). We note that while not limited to such circumstances, the quoted statement was made in the context of a party seeking access to critical energy infrastructure information (CEII).

<sup>11</sup> “The burden is on the party seeking to safeguard information to show that the protective order does not adequately protect its interests.” *Empire State Pipeline*, 115 FERC ¶ 61,113 (2006) (citing *Mojave Pipeline Company*, 38 FERC ¶ 61,249, at 61,842 (1987)).

<sup>12</sup> See, e.g., *West Depford Energy, LLC*, 134 FERC ¶ 61,189, at P 29 (2011) and *Southern Company Energy Marketing, Inc., et al.*, 111 FERC ¶ 61,011 (2005).

<sup>13</sup> If Texas Eastern and ConocoPhillips decide to request a Settlement Judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. While parties may request a specific Settlement Judge, they must name at least one additional judge that has been agreed to by the parties. The Commission’s website contains a list of the Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

The Commission orders:

(A) Within 15 days after the issuance of this order, Texas Eastern provide the requested Precedent Agreements to ConocoPhillips pursuant to the terms of an executed protective agreement, as required by section 388.112(b)(2) of the Commission's regulations.

(B) ConocoPhillips may file additional comments based upon the privileged information with 21 days after receipt of such information.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.