

145 FERC ¶ 61,025
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.

Arlington Storage Company, LLC

Docket No. CP13-83-000

ORDER REQUIRING PRODUCTION OF MATERIAL PURSUANT TO A
PROTECTIVE AGREEMENT

(Issued October 8, 2013)

1. On February 26, 2013, Arlington Storage Company, LLC (Arlington) filed an application in Docket No. CP13-83-000 for authorization under section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² to convert two existing salt caverns, known as Gallery 2, to natural gas storage at its Seneca Lake Storage facility in Schuyler County, New York. On August 28, 2013, Arlington filed an objection to providing information filed as privileged or Critical Energy Infrastructure Information (CEII) to Gas Free Seneca, an intervenor in this proceeding, and requested that the Commission sustain its objection to the request for disclosure. On September 10, 2013, Gas Free Seneca filed a response to Arlington's objection, requesting the Commission require Arlington to comply with section 388.112 of the Commission's regulations and provide the materials.³ As discussed below, we are requiring Arlington to provide Gas Free Seneca with a copy of the requested non-public documents.

I. Background

2. Arlington is a limited liability company organized and existing under the laws of Delaware, and is a developer of underground natural gas storage facilities in New York. Arlington offers firm and interruptible natural gas storage services in interstate commerce through the Seneca Lake Storage Project under a FERC Gas Tariff which Arlington

¹ 15 U.S.C. § 717f(b) and (c) (2012).

² 18 C.F.R. Pt. 157 (2013).

³ 18 C.F.R. § 388.112 (2013).

maintains on file with the Commission.⁴ The Seneca Lake Storage facility interconnects with the natural gas pipeline systems of Dominion Transmission, Inc. and Millennium Pipeline Company, LLC. Arlington requests authorization to expand its Seneca Lake Storage facility. The project, referred to as the Gallery 2 Expansion Project (Gallery 2 Project), would involve converting two existing interconnected bedded salt caverns (collectively known as Gallery 2) previously used for liquefied petroleum gas storage to natural gas storage. The addition of the Gallery 2 Project would add an incremental 0.55 billion cubic feet (Bcf) of working gas capacity and 0.20 Bcf of base gas capacity to the Seneca Lake Storage facility.

3. Arlington filed the following documents with its application as privileged or CEII, along with an executed protective order: (1) Landowner Lists; (2) Exhibit G Flow Diagrams; (3) Geological Resource Reports and Maps; and (4) Attachment C of the application.

4. Notice of Arlington's application was published in the *Federal Register* on April 12, 2013 (78 Fed. Reg. 21,931). On March 26, 2013, Gas Free Seneca filed a timely, unopposed motion to intervene.⁵

5. Under section 388.112 of the Commission's Regulations, Gas Free Seneca sent a request to Arlington for access to all documents that Arlington filed with the Commission as CEII or privileged with an executed protective agreement. On August 28, 2013, Arlington filed an objection with the Commission in which it agreed to provide Gas Free Seneca with Exhibit G Flow Diagrams and the Attachment C that was filed as CEII, but refused to provide any other requested documents including landowner lists and geological and geophysical information pertaining to wells. On September 10, 2013, Gas Free Seneca filed an answer asking the Commission to require Arlington to comply with section 388.112 of the Commission's regulations and provide all the requested materials, except the landowner lists.

II. Discussion

6. 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 the Freedom of Information Act (FOIA). To obtain

⁴ Arlington received Commission authorization to acquire the Seneca Lake Storage Project in 2010, and completed its acquisition in 2011. *Arlington Storage Co., LLC*, 132 FERC ¶ 61,171 (2010).

⁵ 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).

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.⁶

7. 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 filing⁷ and provide the public version of the document and its proposed form of protective agreement to each entity that is required to be serviced 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 of the person's right to party status or a copy of their motion to intervene. The Commission specifically exempts four categories of documents from the protective agreement procedure: (1) landowner lists, (2) privileged information filed under section 380.12(f) or section 380.16(f), which pertains to cultural resources, (3) privileged information filed under section 380.12(m), which pertain to reliability and safety information that must be filed by liquefied natural gas facilities, and (4) privileged information filed under section 380.12(o), which pertain to engineering and design material information that must be filed by liquefied natural gas facilities.

8. Arlington objects to the disclosure of its confidential well information, contained in the geological resource reports, stating, "these materials are exempt from disclosure under federal law and the Commission's regulations and because such disclosure presents the possibility that the information could be further disclosed, resulting in substantial commercial and competitive harm to Arlington and its affiliates."⁸ Arlington asserts that FOIA and section 388.107 of the Commission's regulations exempts from disclosure the well information as trade secrets and the geological and geophysical information and data as commercially sensitive.⁹ In response, Gas Free Seneca states correctly that section 388.107 of the Commission's regulations does not apply to non-disclosure agreement procedures with an intervening party under section 388.112, because section 388.107 only relates to material that may be protected from the public at-large.

9. Arlington further contends that its confidential well information cannot be adequately preserved by a protective agreement. However, the Commission finds that

⁶ 18 C.F.R. § 388.112(b)(1).

⁷ 18 C.F.R. § 388.112(b)(2)(i).

⁸ Arlington August 28, 2013 filing at 2.

⁹ *Id.* at 2-3.

Arlington has failed to demonstrate why these documents cannot be adequately protected by means of a protective agreement governing Gas Free Seneca's use and disclosure of the information Arlington believes to be commercially sensitive.¹⁰ 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.¹¹ 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.

10. Accordingly, the Commission hereby orders Arlington to provide Gas Free Seneca with a copy of the requested documents, except the landowner lists, 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.¹² However, use of such procedure shall not extend the 15-day deadline for production of the requested material.

The Commission orders:

(A) Within 15 days after the issuance of this order, Arlington shall provide the requested materials, except the landowner lists, to Gas Free Seneca pursuant to the terms of an executed protective agreement, as required by section 388.112(b)(2) of the Commission's regulations.

¹⁰ "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, et al.*, 38 FERC ¶ 61,249, at 61,842 (1987)).

¹¹ See, e.g., *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 29 (2011) and *Southern Company Energy Marketing, Inc., et al.*, 111 FERC ¶ 61,011 (2005).

¹² If Arlington and Gas Free Seneca 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>).

(B) Gas Free Seneca 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.