

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Empire State Pipeline
Empire Pipeline, Inc.

Docket Nos. CP06-5-001
CP06-6-001
CP06-7-001

ORDER REQUIRING PRODUCTION OF MATERIAL PURSUANT TO A
PROTECTIVE AGREEMENT

(Issued April 26, 2006)

1. On April 7, 2006, Sithe/Independence Power Partners, L.P. (Sithe) filed a request for a protective order in these proceedings so that Sithe may review certain documents for which Empire State Pipeline (Empire) and Empire Pipeline, Inc. (EPI) have requested privileged treatment. This order directs Empire and EPI to provide Sithe access to such information pursuant to a protective agreement, within 10 days of the date of this order, as discussed below.

I. Background

2. On October 11, 2005, Empire, a company that is exempt from the Commission's jurisdiction under section 1(c) of the Natural Gas Act (NGA), and EPI, a newly formed company with no pipeline facilities, filed a joint application under section 7(c) of the NGA to construct pipeline facilities to connect Empire's existing non-jurisdictional system to Millennium Pipeline Company, L.P.'s (Millennium) proposed system at Corning, New York.¹ EPI also requests authorization under section 7(c) to operate the facilities to be constructed, as well as Empire's existing system, as a jurisdictional interstate pipeline. In support of its proposal, EPI states that it entered into a precedent agreement with KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KeySpan) to transport 150,750 Dth of gas per day on a firm basis from the United

¹ Empire consists of a 24-inch diameter natural gas pipeline that extends approximately 157 miles from a connection with TransCanada PipeLines, Ltd. (TransCanada) at the United States-Canada border near Chippawa, Ontario to a terminus near Syracuse, New York.

States-Canada border to a connection with Millennium's proposed pipeline at Corning for a 10-year term.

3. EPI proposes separate incremental rates to provide service to Empire's current customers and for customers on the proposed facilities. EPI submitted proposed tariff sheets that permit it to enter into negotiated rate transactions. EPI also proposes, among other things, a discount adjustment and an acquisition adjustment.

4. In the application, EPI requested confidential treatment for its negotiated rate agreement with KeySpan, the negotiated rate agreements between Empire and some of its existing customers, and for the flow diagrams in Exhibits G, G-I, and G-II that EPI contends contain critical energy infrastructure information.

5. On January 17, 2006, Sithe filed a timely motion to intervene and protest,² stating that as a large customer on Empire's system it has a direct and substantial economic interest in the proceeding.³ In its motion, Sithe objected to numerous tariff and rate proposals, including the discount adjustment and acquisition adjustment. Sithe also asserted that it did not have an opportunity to review the contracts and rates underlying EPI's request for a discounted rate. Sithe reiterated these concerns in an answer to an answer filed on February 28 and in comments on the Data Responses of EPI and Empire filed on April 4. In its April 7, 2006 filing requesting a protective order, Sithe contends that without the ability to review and comment on the confidential documents, it will not have a fair opportunity to participate and protect its interests.

6. In an April 14 response to Sithe's request, EPI and Empire assert that the Commission should deny Sithe's request for a protective order, because Sithe has not demonstrated why a protective agreement between the parties is not achievable. In the alternative, if the Commission believes that a protective order is appropriate, EPI and Empire contend, among other things, that the protective order should apply to all Sithe employees involved in the marketing, purchasing, sale, and transportation of natural gas and restrict these employees from direct participation in commercial transactions between Sithe and EPI.

² Timely, unopposed motions to intervene are granted by operation of Rule 214. 18 C.F.R. § 385.214 (2005).

³ Sithe owns and operates a 1,060 net megawatt electric generation plant in Seneca, New York.

II. Discussion

7. There appears to be no dispute among the parties that a release of the information requested by Sithe under a protective agreement should be adequate protection against harm. However, after a significant period of negotiation, the parties appear unable to agree on the terms of such an agreement. The burden is on the party seeking to safeguard this information to show that the protective order does not adequately protect its interests.⁴

8. Sithe has submitted a form of protective order essentially mirroring the model form available on the Commission's website. EPI and Empire contend that the order should be modified to extend the provision (paragraph 8(a)) applicable to employees involved in the "marketing of energy" to those involved in "the purchase of natural gas or the transportation of natural gas" and that a provision should be added restricting the participation of those with access to privileged information from direct participation in commercial transactions between Sithe and Empire. EPI and Empire note that while EPI's negotiated rate agreements with its customers, including KeySpan, will be public should the Commission grant its application to become a jurisdictional natural gas company, Empire's existing agreements with its shippers are afforded confidential treatment under the New York Public Service Commission regulations to which it is currently subject.

9. The Commission believes that the provisions of the protective order submitted by Sithe are adequate to safeguard the interests of EPI and Empire with respect to much of the information being sought, including KeySpan's precedent agreement with EPI. Regarding Empire's agreements with its existing customers, we will allow inclusion of the additional restrictions noted above, with the clarification that the prohibition against reviewing representatives participating in commercial transactions between Sithe and Empire shall not extend to transactions between Sithe and a jurisdictional EPI.

10. Accordingly, we hereby order EPI and Empire to enter into a protective agreement consistent with the discussion above and to provide Sithe with the privileged information it has requested, within 10 days of the date of this order. Should the parties desire

⁴ *Mojave Pipeline Company*, 38 FERC ¶ 61,249 at 61,842 (1987) ("Since in most instances a protective order can protect against harmful disclosure, a party claiming that confidential treatment should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record.")

additional assistance, they may make use of the Commission's designated on-call settlement judge. However, the use of such a procedure shall not extend the 10-day deadline for production of the requested material. After receiving the documents from EPI and Empire, Sithe shall have seven days to file its comments on the documents with the Commission.

The Commission orders:

(A) Within 10 days after the issuance of this order, EPI and Empire shall provide the requested information to Sithe pursuant to the terms of an executed protective agreement. A copy of the executed agreement shall be filed with the Commission.

(B) Sithe may file additional comments based upon the privileged information within seven days after receipt of such information.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.