

121 FERC ¶ 61,222  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

SFPP, L.P.

Docket No. IS05-230-000

ORDER ON MOTION TO ENFORCE

(Issued November 30, 2007)

1. On November 2, 2007, SFPP, L.P. (SFPP) filed a motion pursuant to Rule 212 of the Commission's Rules of Practice and Procedure<sup>1</sup> to enforce a Protective Order dated July 5, 2005 in the instant docket.<sup>2</sup> The motion asserts that three named individuals<sup>3</sup> violated the protective order at issue by disclosing and relying on protected materials in the instant docket, in this case certain portions of Kinder Morgan Energy Partner's 2003 IRS Form 1065 (KMEP). The motion further asserts that the disclosure occurred when the relevant portions of KMEP's 2003 Form 1065 were relied upon to support a filing by Mr. Gooch and Ms. Myers on behalf of the Society for the Preservation of Oil Pipeline Shippers (SPOPS) in Docket No. PL07-2-000, a proceeding regarding the calculation of the equity rate of return for gas and oil pipelines.<sup>4</sup> SFPP's motion first requested that the Commission (1) find that the Respondents violated the Protective Order, (2) order the Respondents to cease and desist from violating the Protective Order, and (3) order Respondents to return to SFPP all protected materials in their possession in the instant

---

<sup>1</sup> 18 C.F.R. § 385.212 (2007).

<sup>2</sup> Order Adopting Protective Order and Protective Order, both issued July 5, 2005, in Docket No. IS05-230-000.

<sup>3</sup> R. Gordon Gooch, Esq., Elisabeth R. Myers, Esq., and Christopher P. Sintetos, Respondents.

<sup>4</sup> See Comments of the Society for the Preservation of Oil Pipeline Shippers (SPOPS) dated August 30, 2007, in Docket No. PL07-2-000, *Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 120 FERC ¶ 61,068 (2007).

docket and a number of related SFPP proceedings. SFPP later amended its motion to withdraw the third request. The motion acknowledges that the Respondents did not release any of the actual numbers contained in KMEP's 2003 Form 1065. However, SFPP asserts that the Respondents clearly believe that they can rely on and use to their benefit any protected materials in a Commission record as long as they do not release the actual numbers.

2. Mr. Gooch and Ms. Myers filed a reply on behalf of all three respondents. First, Mr. Gooch assumes full responsibility for authoring the SPOPS comments, but without admitting that he violated the Protective Order or the related Non-Disclosure Agreement.<sup>5</sup> Second, he states that there was no release of the actual numbers that were contained in the protected materials. Third, he asserts that there was an understanding at hearing in the instant docket that it was permissible to refer to the protected materials and characterize their contents in general terms as long as no numbers were disclosed. Fourth, Mr. Gooch argues that the relevant information supporting the assertions in the SPOPS comments are available from public sources such as SEC 10-Ks and from the discussions contained in the transcripts and briefs in the instant docket. Fifth, he asserts that SFPP has waived any confidentiality or privilege by not objecting to the use the summary analyses derived from the protected materials. Sixth, Mr. Gooch asserts that the motion is an effort to intimidate shipper counsel in the context of the general rulemaking, to suppress his clients' right to petition the government for relief, and to deprive his clients of the counsel who have been involved in a 15-year proceeding with a particularly complex record. Seventh, Mr. Gooch asserts that the instant motion should be treated as a complaint and set for hearing with opportunity for cross-examination.

3. The Commission first concludes that it will not docket the instant motion as a complaint based simply on one litigant's recharacterization of the opposing counsel's motion as a "complaint." There is an active, ongoing proceeding that provides a forum for addressing the merits of the motion and the relief requested. A separate complaint proceeding thus is unnecessary and would be disruptive of the Commission's efficient administration of the case at issue here. The instant docket is now before the Commission on an initial decision<sup>6</sup> and the Docket No. PL07-2-000 proceeding in which the alleged violation occurred is under the direct control of the Commission. The Commission is therefore exercising its discretion to address the motion as filed, and not subjecting it to any re-characterization as a complaint.

---

<sup>5</sup> Mr. Gooch states that Ms. Myers was not responsible for what he wrote in the SPOPS comments and that Mr. Sintetos, a Certified Public Accountant, relied on Mr. Gooch's legal counsel in providing his affidavit for the SPOPS comments.

<sup>6</sup> *SFPP, L.P.*, 116 FERC ¶ 61,059 (2006).

4. Regarding the merits, the Commission finds the following. First, all parties agree that none of the actual tax return numbers involved were actually released. Second, SFPP suffered no material harm and appropriately withdrew its request that the Commission require the Respondents to return all protected materials involved in several SFPP dockets. Third, KMEP's 2003 Form 1065 is protected material in Docket No. IS05-230-000 under the relevant Protective Order and the related Non-Disclosure Certificate. Fourth, all of the Respondents were subject to the Protective Order, executed the related Non-Disclosure Certificate, and were properly Participants or Reviewing Representatives in Docket No. IS05-230-000. Fifth, while no actual numbers were disclosed, the Respondents explicitly referred to and relied on the contents of KMEP's 2003 Form 1065 in preparing SPOPS's August 30, 2007 filing in Docket No. PL07-2-000. Sixth, while all of the Respondents were authorized to access that form in Docket No. IS05-230-000, none were so authorized in Docket No. PL07-2-000.

5. Given these findings, the sole issue to be decided here is whether the Respondents' express reliance on KEMP's 2003 Form 1065 in Docket No. PL07-2-000 and its disclosure to Mr. Sintetos in that docket violated the Protective Order and the Non-Disclosure Certificate in Docket No. IS05-230-000. This requires a review of those documents and parties' assertions of how the documents should be interpreted. First, the Non-Disclosure Certificate provides in part that the signing party understands "that the contents of the Protected Materials that may come into my possession or under my control, any notes or other memorandum, or any other form of information that copies or discloses Protected Materials may not be disclosed to anyone other than in accordance with that Protective Order."<sup>7</sup> Paragraph 7 of the Protective Order in turn provides in part:

¶ 7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed pursuant to Paragraph 9. Protected Materials shall not be used except as necessary for the conduct of this proceeding ... Protected Materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know information in order to carry out that person's responsibility in this proceeding.<sup>8</sup> (Emphasis added).

It is clear on this record that the phrase "this proceeding" refers to Docket No. IS05-230-000 only and that it cannot be extended to Docket No. PL07-2-000. Thus, the protected materials could not be disclosed to individuals in the latter

---

<sup>7</sup> Exhibit B to SFPP's Motion.

<sup>8</sup> Exhibit A to SFPP's Motion, Protective Order issued July 5, 2005, Par. 7.

proceeding or relied on to support factual assertions in that proceeding within the limits of the Protective Order and the Non-Disclosure Certificate.

6. On review of the Protective Order, the Non-Disclosure Certificate, and the parties' practice at hearing, the Commission concludes that the Respondents inappropriately disclosed and relied on protected information contained in Docket No. IS05-230-000 in another proceeding, Docket No. PL07-2-000. This was unfortunate as Respondents could have made their desired points by relying on the public transcripts or other public materials, such as KMEP's 10-K filings. However, normal discovery protocol requires the execution of a subsequent non-disclosure agreement if a party wishes to disclose and rely on protected materials in a subsequent docket. This is true even if the parties had agreed in Docket No. IS05-230-000 to use summaries of the protected materials in the public portions of the transcripts and their briefs. The Commission thus concludes here that Respondent's failure to execute an additional disclosure agreement was procedural error, but that this resulted in no material injury to SFPP. The Commission also assumes that with the clarification stated here, there will be no need to discuss the matter again. Given the lack of injury to SFPP, no further action will be taken on SFPP's motion.

The Commission orders:

SFPP's motion to enforce the Protective Order is resolved as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.