

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BP Pipelines (Alaska) Inc.	Docket No. IS09-348-004
BP Pipelines (Alaska) Inc.	Docket No. IS09-395-004
BP Pipelines (Alaska) Inc.	Docket No. IS10-204-002
BP Pipelines (Alaska) Inc.	Docket No. IS10-491-000
ConocoPhillips Transportation Alaska Inc.	Docket No. IS09-384-004
ConocoPhillips Transportation Alaska Inc.	Docket No. IS10-205-003
ConocoPhillips Transportation Alaska Inc.	Docket No. IS10-476-001
ExxonMobil Pipeline Company	Docket No. IS09-391-004
ExxonMobil Pipeline Company	Docket No. IS09-177-005
ExxonMobil Pipeline Company	Docket No. IS10-200-002
ExxonMobil Pipeline Company	Docket No. IS10-547-000
Unocal Pipeline Company	Docket No. IS09-176-004
Unocal Pipeline Company	Docket No. IS10-52-001
Unocal Pipeline Company	Docket No. OR10-3-001
Unocal Pipeline Company	Docket No. IS10-490-000
Unocal Pipeline Company	Docket No. IS11-3-000
Koch Alaska Pipeline Company, L.L.C.	Docket No. IS10-54-001
Koch Alaska Pipeline Company, L.L.C.	Docket No. IS10-496-000

ORDER ON INTERLOCUTORY APPEAL

(Issued June 27, 2011)

1. On May 27, 2011, the Administrative Law Judge (ALJ) issued an order (the May 27 Order) confirming her rulings at the May 26, 2011 oral argument denying the May 4, 2011 Motion of BP Pipelines (Alaska) Inc. (BPPA) Regarding Protected Materials, including the denial of any requests for interlocutory appeals of the rulings at oral argument. On June 3, 2011, BPPA filed an interlocutory appeal of the ALJ's May 27 Order. BPPA also sought a stay of the ALJ's order until resolution of this appeal

of the documents at issue. By notice issued on June 10, 2011, Chairman Wellinghoff, as Motions Commissioner, referred the matter to the Commission and stayed public

disclosure of the documents at issue. For the reasons set forth, the Commission denies the appeal in part, and remands the balance to the ALJ as indicated in the text of the order.

I. Procedural History

2. This proceeding involves determining the interstate rates on the TransAlaska Pipeline System (TAPS), and BPPA is one of the TAPS Carriers that are the owners of TAPS.¹ A major issue is the cost of the Strategic Reconfiguration project (SR project). On March 11, 2010, Judge Silverstein issued a Protective Order to “govern the use of all Protected Materials produced by, or on behalf of, any Participant or Third Party during the captioned proceedings.”² The Protective Order permits Participants to designate materials, subject to certain requirements as Confidential Materials, Highly Confidential Materials, or Critical Energy Infrastructure Information (CEII). The parties also entered into a Discovery Stipulation to resolve any disputes regarding designations made pursuant to the Protective Order.

3. On February 18, 2011, Anadarko Petroleum Corporation (Anadarko) a shipper on TAPS served upon the TAPS Carriers the testimony of its witnesses Barry Sullivan (AT-1) and John Brown (AT-16), along with certain exhibits referenced in that testimony. When a dispute arose over certain confidential designations in that testimony, BPPA filed its May 4 Motion Regarding Protected Materials so that the ALJ could resolve the dispute. BPPA argued that continued protection of the Confidential and Highly Confidential materials is necessary to protect BPPA from a substantial risk of competitive or business injury. On May 19, 2011, Anadarko filed an Answer to BPPA’s motion that the exhibits at issue should be publically available.

¹ The TAPS Carriers are BPPA, ConocoPhillips Transportation Alaska Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company LLC, and Unocal Pipeline Company.

² In January 2010 this matter was divided into two phases with two different ALJs, IS09-348-000 and IS09-348-004. ALJ Cianci was designated on the 000 phase, and ALJ Silverstein on the 004 phase, and he was the ALJ when the protective order in this proceeding was issued in March 2010. Subsequently in October, 2010 Judge Silverstein was no longer available on this matter, and on October 27, 2010, Judge Carmen Cintron was designated by the Chief Judge as the ALJ on the 004 phase, the phase involved here.

II. The May 27 Order

4. On May 26, 2011, oral argument was held concerning BPPA's motion. The May 27 Order confirmed the rulings made at the oral argument. The May 27 Order stated that all eleven exhibits at issue were discussed individually at the oral argument, and both BPPA and Anadarko were given the opportunity to argue their respective positions. The ALJ ruled that the materials did not warrant Highly Confidential or Confidential treatment and they should be publically available.³ The ALJ held that the materials are relevant to the proceeding, and that BPPA did not prove that disclosure of the materials would result in business or competitive harm citing *Columbia Gas Transmission Corp.*, 19 FERC ¶ 63,039, at 65,143 (1982).⁴ Further, the ALJ held that any potential competitive harm is outweighed by the public's interest in having access to the documents.⁵ The ALJ also stated the exhibits at issue are more than two years old and by the terms of the parties' Discovery Stipulation are classified as public. The ALJ made one exception as to one exhibit, AT-21 at pages 49 and 52, since it contained Critical Energy Infrastructure Information (CEII), and thus these portions of the cited exhibit will not be made public. Accordingly, she denied BPPA's request to maintain the confidential or highly confidential classification of these materials except for the portions containing CEII. In addition, the ALJ denied any requests for interlocutory appeals on the ground that there are no extraordinary circumstances to merit granting such a request.

³ The primary distinction between the treatment of Confidential and Highly Confidential documents under the Protective Order concerns to whom the documents can be disclosed.

⁴ The ALJ stated that that case held that in the absence of a specific showing that such disclosure would result in a clearly defined injury, the party requesting confidentiality will fail to meet its burden.

⁵ Citing *Southern Cal. Edison Co.*, 49 FERC ¶ 63,029, at 65,128-29 (1989) (as holding that the public's right to open adjudicatory proceedings must be balanced against the potential for private competitive harm).

5. On June 3, 2011 BPPA filed its Interlocutory Appeal.⁶ BPPA stated it was limiting the appeal to only a portion of materials addressed in the ALJ's order.⁷ On June 3, 2011 ExxonMobil Pipeline Company (EMPCo) filed a petition and affidavit in support of BPPA's appeal, asserting that the confidentiality issue is relevant to its documents as well. On June 6, 2011, ConocoPhillips Transportation Alaska Inc. (CPTA) filed comments in support of BPPA's appeal. Anadarko filed an answer to BPPA's appeal and the supporting filings by the TAPS Carriers. A Notice of Determination was issued June 10, 2011, by Chairman Wellinghoff finding that extraordinary circumstances existed which warranted referring BPPA's appeal to the Commission for consideration pursuant to Rule 715 of the Commission's Rules of Practice and Procedure.

III. BPPA's Contentions

6. BPPA asserts the ALJ applied the wrong standard in requiring BPPA to establish an actual business or competitive harm upon disclosure of the information, rather than a substantial *risk* of a business or competitive harm. Next, it asserts that the ALJ erred in concluding that no harm would result from disclosures because the documents were "aged documents" since they were more than two years old and by the terms of the parties' Discovery Stipulation⁸ are classified as public. BPPA asserts the Discovery

⁶ The filing included different versions, a public version, a confidential version, and a highly confidential version.

⁷ The material addressed as Exhibit A in BPPA's appeal are:

1. Selected Excerpt from AT-4 (1 page)
2. Selected Excerpts from AT-14 (2 pages)
3. Selected Excerpts from AT-15 (7 pages)
4. AT-19 (In its entirety 12 pages) (Aleyaska Governance Memo)
5. Selected Excerpts from AT-20 (2 pages)
6. Selected Excerpts from AT-21 (21 pages)

⁸ The Discovery Stipulation sets forth a procedure by which a party may challenge the confidentiality designation given to pre-filed testimony or exhibits to such testimony and sets forth non-binding guidelines "intended to provide general guidance for the confidential designation of discovery materials to minimize future conflicts among the Parties over the proper designation of those materials." Stipulation P 10. However, the
(continued...)

Stipulation non-binding guidelines provide that documents older than two years should be considered confidential under certain circumstances, and this is one of the situations envisioned. Moreover, BPPA argues, the Discovery Stipulation was not to be used as a basis for any decision by the Commission concerning confidentiality. Thus, BPPA contends the Presiding Judge's reliance on the Discovery Stipulation was error.

7. BPPA asserts that whatever the origin of the documents, they reveal financial benchmarks, risk analysis methodologies, and business analyses and strategies that are currently used by BPPA and its parent and affiliated companies (BP Group). Since the documents would allow insights into how it, and the BP Group, evaluate decisions

regarding future projects, investments and other business strategies, BPPA argues disclosure of the documents would subject BPPA to a clear risk of business and competitive harm.

8. BPPA cites to the Protective Order, at P 2, which permits a party to designate as Confidential "those materials which customarily are treated by that Participant or Third Party as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers or Third Party to risk of competitive disadvantage or other business injury."

9. BPPA states that the Protective Order provides that one of the categories of documents that qualify for Highly Confidential treatment is "material that is competitively sensitive among any of the Participants to this proceeding." BPPA asserts that the material for which it seeks continued confidential treatment is competitively sensitive and falls within this provision.

10. BPPA argues that the ALJ erroneously held that BPPA had to demonstrate that "disclosure of the materials would result in business or competitive harm," May 27 Order at P 3, because the test is not whether actual harm is shown but whether there is "evidence supporting the existence of potential competitive injury or economic harm."⁹ BPPA cites to *National Community Reinvestment Coalition v. National Credit Union Administration*, 290 F. Supp.2d 124 (D.D.C. 2003), where the court stated "To determine

Discovery Stipulation expressly states that such guidelines are not binding and are not "intended to provide guidance or be used in any fashion by the FERC or the RCA to resolve a dispute among the Parties as to the appropriate confidential designation of any discovery materials or otherwise be used as precedent or to be binding upon or enforceable by the Parties." *Id.*

⁹ Citing *Exxex Electro Engineers, Inc. v. U.S. Secretary of Army*, 686 F.Supp. 2d 91 at 94 (D.D.C. 2010).

whether disclosure of information would likely cause substantial competitive injury, the court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the [competitors] do business.” *Id.* at 134. BPPA asserts that the minimal amount of material at issue clearly meets this test, as fully explained in the attached affidavit of John Haines (Exhibit G to the Interlocutory Appeal), a senior Commercial Analyst for BPPA, familiar with its commercial operations. **[Confidential material deletion begins]**

11. **[Confidential material deletion ends]**

12. BPPA argues that where, as here, documents provide insight into how a company might act with respect to a business transaction in the future, such information has been accorded confidentiality protection in both court cases and regulatory proceedings, as well as by the Commission itself citing *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 FERC ¶ 61,391, at 62,223 (1990), and *West Deptford Energy, LLC*, 134 FERC ¶ 61,189, at P 26 (2011).

13. In short, BPPA states that maintaining the confidentiality of these documents is necessary to avoid that substantial risk to BPPA. BPPA states here it is not a matter of withholding the material but only to limit its disclosure. Thus, Anadarko is not harmed by maintaining the confidentiality of the documents because it has full access to the documents and may use them in preparing its case.

14. BPPA contends that the ALJ failed to balance BPPA’s confidentiality interest by giving undue weight to the public interest in disclosure. In fact, BPPA argues that the Commission recognized that the need to provide continued protection of confidential documents is not trumped by an interest in conducting a wholly public hearing. Thus, BPPA cites to *State of Alaska v. BP Pipelines (Alaska) Inc. et al.*, 117 FERC ¶ 61,256 (2006), when the Commission disapproved of the practice of disclosing confidential documents in order to avoid sealing part of the hearing manuscript, particularly where, as in this case, it is unavoidable that part of the hearing will need to occur in confidential session.

15. **[Confidential material deletion begins]**

16. **[Confidential material deletion ends]**

17. BPPA requested, pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2011), that the ALJ’s order be stayed pending final action on this motion for interlocutory appeal to prevent any party from placing BPPA’s documents in the public record while the Commission considers BPPA’s interlocutory appeal.

IV. Anadarko's Answer

18. Anadarko filed an answer to BPPA's appeal and to the comments in support of that appeal, both in public and privileged versions.¹⁰ Anadarko states that the material at issue consists of the exhibits supporting the Prepared Direct Testimony of its witnesses Sullivan (AT-1) and Brown (AT-16) filed on the SR issue in the underlying proceeding. Anadarko asserts that much of the information sought to be protected consists of documents almost six years old or older or consists of deposition testimony on actions taken more than six years ago. Anadarko argues that the Commission should deny the appeal because if successful, its grant will interfere with the right to a public hearing and unduly burden the ALJ and the parties due to the necessity of repeatedly moving in and out of confidential session during hearing in this case. Similarly, it contends that a motion for a stay should be denied.¹¹

19. Anadarko asserts that a party seeking an interlocutory appeal must meet the stringent standard of showing there are "extraordinary circumstances" warranting immediate review "to prevent detriment to the public interest or prevent irreparable harm to a person" and BPPA has failed to put forth a single argument to meet the extraordinary circumstances standard as established by the Commission, and there are none.

20. **[Confidential material deletion begins]**

21. **[Confidential material deletion ends]**

V. Discussion

22. At issue here is whether a limited number of documents should continue to have the confidential or highly confidential treatment as designated by BPPA, or whether they should be made publicly available. The material is available to the parties to the proceeding so granting BPPA's appeal would not interfere with Anadarko's ability to fully present its position in the hearing. The Commission has determined that the ALJ

¹⁰ Rule 715(b) (2) states that the presiding officer "need not consider" any answer but is silent as to an answer after the presiding officer stage of the proceeding. Regardless, the Commission will accept the answer as it supplements the record.

¹¹ Anadarko submits that the petition of EMPCo and the motion of CPTAI should be disregarded given that EMPCo and CPTAI did not participate in earlier proceedings on BPPA's motion and any consideration of the implications of the ALJ's rulings on EMPCo or CPTAI are premature at best, since no confidentiality designation issues with respect to EMPCo or CPTAI have been presented to the ALJ for determination.

properly found that there should be public disclosure of certain documents and denies BPPA's appeal as to these documents, but remands back to the ALJ the determination as to other documents consistent with the discussion in this order.

23. While public disclosure is always the preferred option, public policy limits disclosure under certain circumstances. Thus, Exemption 4 of the Freedom of Information Act (FOIA), provides that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from disclosure.¹² To determine whether information falls under the exemption, the information would be confidential if:

disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.¹³

24. In the May 27 Order, the ALJ stated that public disclosure of the materials at issue was warranted because "BPPA did not prove that disclosure of the materials would *result* in business or competitive harm (emphasis supplied) (May 27 Order at P 3)." Thus, it appears the ALJ applied a too stringent test in reaching her decision since the test is not whether the party has demonstrated that disclosure would result in actual harm but whether there is "evidence supporting the existence of potential competitive injury or economic harm..."¹⁴ Moreover, the ALJ also considered the age of the documents as a decisive factor in determining whether public disclosure should be ordered, stating that "exhibits at issue are more than two years old and by the terms of the parties' Discovery Stipulation are classified as public."¹⁵ The Discovery Stipulation provides that "materials that have been in existence for more than two years should be public," but continues that this would not apply under certain circumstances such as when public disclosure "would reveal proprietary production projections, proprietary reserve

¹² 5 U.S.C. § 552 (b) (4). Under Commission Rule 410 (d), 18 CFR § 385.410 (d), in determining privilege issues, the Commission considers relevant federal court decisions.

¹³ *Critical Mass Energy Project, v. Nuclear Regulatory Comm'n*, 830 F.2d 278, 282 (D.C. Cir. 1974), vacated on other grounds, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).

¹⁴ *Exxex Electro Engineers, Inc. v. U.S. Secretary of Army*, 686 F.Supp. 2d 91 at 94 (D.D.C. 2010).

¹⁵ May 27 Order P 3.

information, or similarly sensitive, proprietary information....”¹⁶ In fact, the ALJ granted BPPA’s request as to the CEII material without regard to its age, CEII being a circumstance which would bar public disclosure. Thus, the age of a document does not automatically determine whether the document should be made public if the release of the information could still result in a competitive disadvantage or business injury or the application of some other exception.

25. In *BP Pipelines (Alaska, Inc.)*, 117 FERC ¶ 61,256 (2006) the Commission was faced with an issue concerning the confidential status of certain information. In that case the ALJ ruled, similar to the ALJ here that: “I do not believe that there’s any harm, any competitive harm for the Carriers from making these documents public. And secondly, if there is any competitive harm, it is *de minimis* vis a vis my obligation to conduct public hearings. I think the public harm of keeping these documents confidential outweighs the -- any *de minimis* competitive harm.” (*Id.* P 8.) The Commission found release of the information at issue “is likely to have an adverse impact on the existing competition situation...” (*Id.* at P 15), and granted the appeal because “once the information becomes public, the decision to make it public cannot be corrected later on.” (*Id.*) In addition, the Commission stated that “Finally, if we grant the appeal, the number of exhibits that will remain Highly Confidential is *de minimis* in the context of this proceeding, in which hundreds of public exhibits have already been submitted.” (*Id.* at P 16.) The same is true here, where BPPA states the TAPS Carriers “produced more than 2.84 million documents comprising nearly 15 million pages of material.”

26. The Commission has considered the documents at issue and the ALJ’s rulings as embodied in the May 27 Order in light of the above discussion and concludes that as to some there is no basis to change the ALJ’s rulings but will remand other documents to permit the ALJ to consider their status consistent with the above discussion.

27. Some of the documents for which BPPA seeks confidential treatment clearly would not meet the standard for confidential treatment described above. [**Confidential material deletion begins**]

28. [**Confidential material deletion ends**] Thus, we see no merit in BPPA’s contention that this material is entitled to the designation it gave to the material. We deny the appeal as to these documents, and permit their public disclosure.

29. The remaining documents consist of material [**Confidential material deletion begins**]

¹⁶ Discovery Stipulation P 10.

30. **[Confidential material deletion ends]** whose disclosure might possibly be entitled to protection from public disclosure. **[Confidential material deletion begins]**

31. **[Confidential material deletion ends]** Under these circumstances present here, the Commission will require the ALJ familiar with the issues in this proceeding, to review these few documents under the standards described above and determine whether public disclosure of them is appropriate.¹⁷

32. Granting a stay as to these documents will not harm any other participant. BPPA has already produced the documents at issue, and Anadarko witnesses have already made use of the documents by attaching them as exhibits to their testimony. If BPPA is ultimately unsuccessful in its interlocutory appeal, those participants will have ample opportunity to refile the testimony and exhibits to make BPPA's documents public. On the other hand, if there was public disclosure and BPPA is successful on the appeal, the damage to BPPA will already have occurred.

The Commission orders:

(A) BPPA's interlocutory appeal is denied in part, and the proceeding is remanded to the ALJ as set forth in the body of this order.

(B) The documents still at issue shall remain subject to the Protective Order until their status is determined pursuant to the guidelines in this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁷ The ALJ can determine the procedure on the remand.