

G-002/M-93-773 ORDER DENYING CERTAIN PARTIES INTERVENOR STATUS,
GRANTING REQUEST TO CLOSE MEETING, PARTIALLY DENYING AND
PARTIALLY GRANTING MOTION FOR PROTECTIVE ORDER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Marshall Johnson	Commissioner
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner

In the Matter of a Petition from Northern States Power Company to Recover the Acquisition Premium Associated with Its Purchase of the Viking Gas Transmission Company

ISSUE DATE: January 14, 1994

DOCKET NO. G-002/M-93-773

ORDER DENYING CERTAIN PARTIES INTERVENOR STATUS, GRANTING REQUEST TO CLOSE MEETING, PARTIALLY DENYING AND PARTIALLY GRANTING MOTION FOR PROTECTIVE ORDER

PROCEDURAL HISTORY

On August 11, 1993, Northern States Power Company Gas Utility (NSP or the Company) filed an Application for an Accounting Order. The Company sought permission to recover through the monthly Purchased Gas Adjustment (PGA) the amortization of an acquisition premium for the purchase of the Viking Gas Transmission Company (Viking).

On September 30, 1993, the Department of Public Service (the Department) and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) filed comments.

On September 30, 1993, and October 5, 1993, ANR Pipeline Company (ANR) and Northern Minnesota Utilities (NMU) filed petitions to intervene in the proceeding. ANR's request was confined to contested case proceedings.

Reply comments were filed by NSP, the Department and the RUD-OAG on October 11, 1993, and October 25, 1993.

On November 5, 1993, the Company filed a motion to close the hearing in which the merits of NSP's August 11, 1993 application would be discussed. The Company claimed that much of the information necessary for consideration of the application should be deemed trade secret.

On December 6, 1993, the Company filed a Notice of Motion and Motion for a Protective Order and Closed Hearings to Safeguard Trade Secret Information. NSP also included a proposed protective order and a proposed order on the merits for Commission consideration.

On December 16, 1994, the Department and the RUD-OAG filed comments regarding the Company's motion for a protective order and a closed meeting.

The Company's motion for a protective order and a closed meeting came before the Commission for consideration on December 22, 1993.

FINDINGS AND CONCLUSIONS

I. The Status of ANR and NMU

ANR and NMU are both major shippers on Viking's pipeline. They claim they qualify for intervenor status because their position as Viking customers gives them an interest in NSP's proceeding.

Under Minn. Rules, part 7830.0600, a petitioner may be eligible for intervenor status and thus become a party to the proceedings if the petitioner is specifically deemed by the relevant statute to be interested in the matter involved, or is declared by the relevant statute to be an interested party to a particular type of proceeding, or will be bound by the outcome of the proceedings and will be favorably or adversely affected.

ANR and NMU are not deemed by any relevant statute to be parties or to be interested in the matter involved. Nor have these companies shown that they will be bound by the outcome of the proceedings or favorably or adversely affected by them.

As an interstate pipeline, Viking is under the exclusive jurisdiction of the Federal Energy Regulatory Commission (the FERC). Viking's rates extended to ANR and NMU are set by the FERC, not the Commission. The Commission's decisions regarding the NSP's proposed PGA passthrough will clearly affect NSP ratepayers.¹ As Viking customers, ANR and NMU have not shown how these decisions will bind them, or how they will be favorably or adversely affected by the outcome.

The Commission finds that ANR and NMU have not made a showing that they are eligible for intervenor status under Minn. Rules, part 7830.0600. If these companies have further information which they feel will provide the requisite showing under the rule, they are free to refile formal petitions for intervenor status.

II. The Motion for a Protective Order

A. NSP's Motion

In its November 5, 1993, request for a closed meeting and its December 6, 1993, Notice of Motion and Motion for a Protective Order and Closed Hearings to Safeguard Trade Secret Information,

¹ As state agencies representing Minnesota ratepayers, the Department and the RUD-OAG are therefore parties to the proceedings.

NSP asked the Commission to declare certain information regarding the acquisition of Viking as non-public, or trade secret, data. The Company further asked the Commission to issue a protective order relating to the information deemed non-public. Finally, the Company requested that the Commission close its meetings regarding the issuance of the protective order and the merits of NSP's request for an accounting order.

B. Positions of the Parties

1. NSP

NSP filed both proprietary and non-proprietary versions of its August 11, 1993 application for an accounting Order. The non-proprietary version contained most of the facts surrounding the accounting proposal.

NSP stated that it was necessary to move quickly to purchase Viking in 1993, due to the schedule set by the seller, Tenneco. The necessity for a swift closing meant that the Company could not find out beforehand if the Commission would allow acquisition costs to be offset against benefits in retail rates.

NSP stated that its purchase of Viking resulted in direct savings to NSP ratepayers. The Company claimed \$2.7 million of savings in the first year of ownership, and eventual savings of \$4.3 million per year for years four through fifteen. The Company stated that savings were due to operational flexibility cost savings, reductions in transportation costs, and better use of Canadian supplies.

The acquisition premium for the purchase of Viking was \$29.7 million. Under NSP's proposal, this amount would be booked to Viking and billed to NSP through a 15 year amortization.

In its August 11, 1993 filing, NSP requested Commission permission to offset its annual acquisition amortizations to the PGA savings associated with the Viking purchase. In the alternative, NSP requested permission to increase base rates by a like amount.

The essential element which was revealed only in NSP's proprietary filings concerned a discount obtained from Northern Natural Gas Company (Northern). According to NSP, only the purchase of Viking gave it the leverage to negotiate a discount from Northern. This discount represented real savings to NSP ratepayers. NSP wanted these savings to be offset in the PGA by the amortization of the acquisition adjustment.

In the Company's November 5, 1993 and December 6, 1993 motions to close meetings and obtain protective orders, the Company filed further proprietary information regarding the Northern discount. The Company argued that this information met the definition of trade secret found in the Minnesota Government Data Practices Act, Minn. Stat. § 13.37, subd. 1 (b):

"Trade secret information" means government data... (1) that was supplied by the affected...organization, (2) that is the subject of efforts by the...organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

The Company provided an affidavit from its Director of Gas Supply and Plants which purported to establish the independent economic value of the information regarding the Northern discount. According to NSP, knowledge of the discount would enable competing third party suppliers to adjust their proposed gas commodity prices accordingly. Knowledge of the discount would also hurt NSP in its bidding strategies to obtain reliable gas supplies from third party suppliers. These disadvantages would work against the interests of NSP ratepayers.

NSP therefore requested that any hearings on its accounting proposal be closed to all but the Commission, its Staff, NSP, the Department and the RUD-OAG. In support of its request, the Company cited Minn. Stat. § 237.115, which states the following regarding information subject to protective order:

In any meeting of the Commission during which information that is subject to a protective order is discussed, the Commission shall employ the procedures of section 14.60 to close to all persons who are not authorized to obtain the information under the protective order that portion of the meeting during which the information will be discussed and take other appropriate measures to ensure that the data is not disclosed to persons who are not authorized to obtain the information under the protective order.

Minn. Stat. § 14.60, cited in the above statute, allows the Commission to conduct closed hearings to discuss trade secret information, to fashion protective orders, and to seal all or a part of the hearing record.

The Company stated that if a balancing of interests is conducted under Minn. Stat. § 13.03, subd. 6, the interests of parties seeking access to the non-public data would be met by dissemination of the information to the Department and the RUD-OAG.

Finally, the Company argued that a legally sufficient Commission Order could be drafted without including any information on the Northern discount.

2. The Department

The Department stated that the Commission has the authority to close a meeting to the public, once the requirements of Minn. Stat. § 237.115 are met. The Department recommended that the Commission bifurcate the proceedings into a public meeting regarding jurisdictional issues and a closed or partially closed meeting regarding nonjurisdictional issues. The Department

suggested that jurisdictional issues would include legal issues such as the legality of awarding an acquisition adjustment for property that is not subject to rate base treatment. Nonjurisdictional issues would include specific discussions on NSP's actions, its motives, and the reasonableness of available alternatives.

3. The RUD-OAG

The RUD-OAG stated that the Commission may only close an otherwise open meeting under two statutory provisions. First, the Commission may close a meeting in a contested case when the hearing record includes information which is not public. Minn. Stat. § 14.60, subd. 2. Second, the Commission may close a meeting under Minn. Stat. § 237.115 if information subject to a protective order will be discussed. The RUD-OAG maintained that the Commission is not free to close the hearing because the NSP proceedings are not currently in contested case hearings or subject to a valid protective order.

The RUD-OAG stated that they had no objection to the form of the Company's proposed protective order, only its scope. The Company's overly broad request for protected status would prevent the Commission from writing a meaningful Order.

The RUD-OAG suggested that under the Data Practices Act, Minn. Stat. § 13.03, subd. 6, if the Company pursues a more limited protective order, it must demonstrate that its economic need for confidentiality outweighs ratepayers' need for information regarding rates.

At the meeting, the RUD-OAG stated that the fact that NSP received a discount from Northern is of insubstantial economic value and thus fails both the definition of trade secret and the balancing test under Minn. Stat. § 13.03, subd. 6. The terms and conditions of the discount, on the other hand, appear to have independent economic value.

The RUD-OAG also stated that under some circumstances the Commission has authority to discuss non-public information under the Minnesota Open Meeting Law, Minn. Stat. § 471.705, subd. 1(a).

C. Commission Action

1. The Closed Meeting

Under the Minnesota Open Meeting Law, Minn. Stat. § 471.705, there is a presumption that Commission meetings will be open to the public unless "otherwise expressly provided by statute." Because NSP has asked to close the meeting regarding its accounting proposal, the Commission must decide if it has the authority to comply with NSP's request under existing statutes.

Both Minn. Stat. § 14.60, subd. 2 and Minn. Stat. § 237.115, subd. 1 provide authority in some circumstances for the Commission to close otherwise open meetings. Minn. Stat. § 14.60, subd. 2 provides in relevant part:

When the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

Minn. Stat. § 237.115 states in relevant part:

In any meeting of the Commission during which information that is subject to a protective order is discussed, the Commission shall employ the procedures of section 14.60 to close to all persons who are not authorized to obtain the information under the protective order that portion of the meeting during which the information will be discussed and take other appropriate measures to ensure that the data is not disclosed to persons who are not authorized to obtain the information under the protective order.

Both statutes thus provide the Commission the authority to close otherwise open meetings while assertions of non-public data are addressed and proper protective orders are if necessary fashioned. The Commission disagrees with the RUD-OAG that a protective order must already be in place before the meeting, or contested case proceedings be in process. To require an open meeting to determine the validity of a trade secret assertion would be an unworkable "Catch-22" which would contravene the authority found in the statutes. To confine consideration of trade secret issues to contested case proceedings would undermine the authority of the Commission to fashion protective orders and make judgments regarding the status of sensitive data.

Because NSP requested a closed hearing to address the issues raised in its proposed protective order, and because the Commission has the clear statutory authority to close its meeting to address issues of confidential data, the Commission closed its meeting after a decision was reached on the status of ANR and NMU. The rest of the meeting was open only to the Commission, its Staff, the Company, the Department and the RUD-OAG.

2. Trade Secret Status

NSP asserted that information surrounding its discount from Northern was non-public information. In analyzing this claim, the Commission looked to both the definition of trade secret under Minn. Stat. § 13.37, subd. 1(b), and the balancing of competing interests under Minn. Stat. § 13.03, subd. 6.

Section 13.37, subd. 1 of the Data Practices Act provides the following definition of trade secret information:

"Trade secret information" means government data... (1) that was supplied by the affected...organization, (2) that is the subject of efforts by the...organization that are reasonable under the circumstances to maintain its secrecy, and (3) that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

There is no controversy that the relevant information was supplied by NSP and is the subject of reasonable Company efforts to maintain its secrecy. The RUD-OAG argued that the subject information, specifically the fact of the discount itself, fails to fulfill the third element of the statutory definition. The Commission agrees.

Pipeline transportation discounts are common in the gas industry. NSP's accounting proposal, which alleges substantial "direct gas cost savings" from an unspecified source, is likely to supply enough information for competitors to deduce that a discount exists. It is thus doubtful if such knowledge, without further facts, would be "not generally known" or "not readily ascertainable by proper means." Knowledge that the discount exists would be unlikely to have any significant financial impact on NSP. The fact of the Northern discount, of itself, fails to fulfill the third element of the statutory definition of trade secret.

The fact of the discount is a separate issue from the specific terms and conditions negotiated by the parties. The contractual terms and conditions, if revealed, could impact on the financial interests of NSP and its ratepayers. It is not unlikely that a competitor could use the knowledge of the discount terms and conditions to tailor its own negotiations, thus lessening the benefit of the discount for NSP and its ratepayers. The terms and conditions of the NSP/Northern contract are of potential economic value and thus fulfill the third element of the statutory definition of trade secret information.

The Commission also analyzed NSP's assertions of non-public data under a balancing of interests test. Under Minn. Stat. § 13.03, subd. 6, if a state agency opposes discovery of government data on the grounds that it is not public, the presiding officer must decide:

...whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or to the privacy interest of an individual identified in the data.

In this case, the legitimate interests of NSP ratepayers and the general public in the facts surrounding rates must be balanced against the economic interests of the Company and the confidentiality interests of the Commission if it has found the data non-public.

Revealing the existence of the Northern discount is a significant benefit to ratepayers and the general public, because this fact underlies NSP's arguments for its accounting proposal. It would be impossible to write a meaningful Commission Order without revealing the basis of NSP's proposal--the allegation that the Viking acquisition premium is a direct cost of gas because of the resulting Northern discount. Treating the existence of the discount as a trade secret would disadvantage ratepayers and the general public because the integrity of the Commission process requires discussing the fact of the discount in the Order addressing NSP's accounting proposal. Knowledge of the discount

by the RUD-OAG and the Department would not substitute sufficiently for clear exposition of the facts in a Commission Order. When weighed against the questionable economic value of finding the discount non-public, open discussion of the discount clearly brings greater benefit to the Commission, NSP ratepayers and the general public.

On the other hand, balancing the competing interests under Minn. Stat. § 13.03, subd. 6 confirms that the terms and conditions of the Northern discount should remain non-public. As has been discussed previously, revealing the contractual terms and conditions would be likely to adversely impact the Company financially. The Commission should be able to conduct its business and issue an informative Order without revealing the terms and conditions of the discount. Ratepayers and the general public should not be harmed by maintaining these factors as non-public because the basis of NSP's proposal can be understood without them.

The Commission finds that NSP's proposed protective order should be confined to the terms and conditions of the Northern discount. The Commission will proceed with its consideration of NSP's accounting proposal under a protective order tailored to the findings of this Order.

3. Stay of the Public Dissemination of the Order

The Commission's Amended Procedures for Handling Trade Secret Information, issued October 25, 1985, provide the following regarding information proposed as non-public:

9. When a state agency receives a request for the data from an outside party it will notify the supplier of the data of the request for the data. If the supplier believes that the information marked "Trade Secret" continues to be so classified, it shall file with the state agency a verified affidavit stating the grounds for claiming continued non-public status. The state agency will review the telephone company's or utility's affidavit and determine whether release of the data is required under Minn. Stat. § 13.03, subd. 3. If the information is classified as non-public data, the state agency will inform the requesting person of this status, and deny the request for access. **If the information is classified as public, the state agency will notify the parties of this status and will make the material available to the requesting party on the tenth day a notice is given.**

Emphasis supplied.

The Commission has classified a portion of NSP's proposed trade secret information (the fact of the Northern discount) as public. The Commission will therefore stay the dissemination of this Order to parties other than those who participated in the closed meeting (the Company, the Department and the RUD-OAG) for ten days after the issuance of the Order. During the ten day period,

the parties must treat all information proposed as non-public by the Company, including the information the Commission classified as public in this Order, as non-public data.

ORDER

1. The Commission denies the requests for intervenor status by ANR and NMU.
2. The Commission has granted NSP's request to close the December 22, 1993 meeting during consideration of issues other than the above requests for intervenor status.
3. The Commission grants NSP's request for a protective order to be confined to information regarding the terms and conditions of the Northern discount. Within ten days of the date of this Order the Company shall file a proposed protective order for Commission approval.
4. For ten days from the date of this Order, parties to this proceeding shall treat all information proposed as non-public information by the Company, including the information the Commission classified as public in this Order, as non-public data.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)