

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DG 15-155**

**VALLEY GREEN NATURAL GAS, LLC**

**Petition for Franchise Approval**

**Order on Motion to Compel**

**ORDER NO. 25,867**

**February 17, 2016**

This order grants, with one condition, the Motion to Compel filed by intervenor Ariel Arwen directed to the petitioner in this matter, Valley Green Natural Gas, LLC (“Valley Green”). The condition is that Ms. Arwen and Valley Green must enter into an appropriate and reasonable nondisclosure agreement that will allow her to use confidential information in this matter, but not to disclose it to the public or use it in any other way.

**I. PROCEDURAL BACKGROUND**

Valley Green is before the Commission seeking franchise approval to provide regulated gas service for the Town of Hanover and the City of Lebanon. Ms. Arwen, a resident of Lebanon, sought and was granted intervenor status.

During discovery, Valley Green responded to a number of data requests, including Commission Staff (“Staff”) request 1-2 and a subsequent follow-up to Staff Data Request 1-2, designated Staff 3-10. It is Staff 3-10 that is the subject of the Motion to Compel. Staff 3-10 is as follows:

Ref. Staff DR 1-2. Please calculate the revenue requirement and rates using the attached Excel format and a 40 year average service life to calculate depreciation on structures. Please provide the response in both hard copy and electronic (Microsoft Excel) formats, with all data and formulas intact.

Valley Green's initial response to Staff 3-10 was,

See CONFIDENTIAL Supplemental Staff 1-2, attached.

Valley Green understands that staff seeks to have Valley Green provide for future test years 2017 and 2020 and complete Schedule 1, Revenue Requirement; Schedule 2, Revenue, Expenses and Income; Schedule 3, Working Capital; and Schedule 4 Rate of Return.

Ms. Arwen did not receive anything from Valley Green other than that response. *See* Motion to Compel at 1.

Ms. Arwen subsequently had an email exchange with counsel for Valley Green.

Ms. Arwen requested a full, unredacted copy of Valley Green's response to Staff 3-10. Counsel for Valley Green replied that the response contained "competitively sensitive information," and stated that, "we'll have to discuss this internally on how to give you access." *Id.* at 2. Counsel's response also contained a suggestion about how Ms. Arwen might get access to the confidential information. "What has been done in the past is to have a time when you can come to Concord, sign a confidentiality form, and review the spreadsheets in person. We could set that up for this docket." Attachment to Motion to Compel.

Ms. Arwen responded to Valley Green's counsel with a request for the proposed confidentiality agreement. In addition, Ms. Arwen questioned the basis for requiring what she understood from counsel's suggestion to be "a supervised visual examination" of the documents." *See id.*

According to Ms. Arwen, counsel for Valley Green also sent a one-sentence email to the service list with the subject listed as "Supplemental Discovery." The email said, "Valley Green has forwarded its confidential supplemental responses (financial spreadsheets) to Staff for Staff 3-10" [and two other data requests]. Motion to Compel at 2.

## **II. POSITIONS OF THE PARTIES**

### **A. Ms. Arwen**

Ms. Arwen makes three basic arguments. First, she asserts that Valley Green failed to comply with NH Code of Admin. Rules Puc 203.08(d), and thus cannot claim confidentiality for its discovery responses, because Valley Green did not identify a good faith basis for confidential treatment of its response to Staff 3-10 at the time it filed the response. *See* Motion to Compel at 2. Second, Ms. Arwen claims that at least some of the information in the data response cannot be considered confidential. *See id.* Third, she says that, as an intervenor, she is entitled to all discovery so that she can prepare her case, without any limitation of the confidentiality provisions of RSA 91-A or restrictions by Valley Green. *See* Reply letter from Ms. Arwen, January 10, 2016 (“Reply”), at 1. It is Ms. Arwen’s view that the Commission’s discovery rules and her rights as an intervenor under RSA 541-A supersede any confidentiality rights Valley Green may have under RSA 91-A. *Id.*

Regarding the possibility of entering into a confidentiality or nondisclosure agreement, Ms. Arwen, states that, “counsel for Valley Green has made it clear to me that Valley Green refuses to enter into such arrangements with me,” because “Valley Green does not trust me to abide by any confidentiality agreements into which I might enter.” *Id.*

Ms. Arwen asks the Commission to grant her Motion to Compel with no restrictions or limitations.

### **B. Valley Green**

Contrary to Ms. Arwen’s assertions, Valley Green claims that it complied with the requirement in Puc 203.08(d) to identify confidential information in discovery. According to Valley Green, it “informed Staff that it considered the information [in its response to Staff 3-10]

to be commercial and financial information protected from disclosure pursuant to RSA 91-A:5, IV.” Valley Green Natural Gas, LLC Objection to Arwen Motion to Compel, January 8, 2016 (“Objection”), ¶ 2; *see id.* ¶ 7 (acknowledging that the template provided by Staff is not confidential, but asserting that the information put into the template by Valley Green should be protected from disclosure).

Valley Green also makes an argument that is very similar to what it would say in a motion seeking confidential treatment. Valley Green cites the relevant statutes, orders, and court decisions. *See id.* ¶¶ 3-6. It asserts that the substantive information at issue is sensitive commercial and financial information to which Valley Green has a privacy interest under RSA91-A:5, IV. Valley Green argues that its privacy interest outweighs Ms. Arwen’s interest in disclosure. ¶¶ 8-9.

Accordingly, Valley Green believes Ms. Arwen’s motion should be denied.

### **III. COMMISSION ANALYSIS**

#### **A. Scope of Discovery**

To prevail on her motion, Ms. Arwen must demonstrate that she seeks information or facts that are admissible or are reasonably calculated to lead to the discovery of admissible evidence. *Public Service Co. of N.H.*, Order No. 25,646 (April 8, 2014) (citations omitted). “Discovery is not the time to argue policy or advocate for the final result, but to merely seek and respond to factual matters that may lead to admissible evidence.” *City of Nashua*, Order No. 24,485 at 4 (July 8, 2005). A data request serves as a “vehicle for developing factual information.” *Freedom Ring Communications, LLC d/b/a Bay Ring Communications*, Order No. 24,760 at 2 (June 7, 2007).

In ruling on a motion to compel, we “enjoy broad discretion in the management of discovery.” *Public Service Co. of N.H.*, Order No. 24,342 at 23 (June 29, 2004) (quoting *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)). We weigh “the effort needed to gather [the requested information], the availability of the information from other sources, and other relevant criteria.” *Public Service Co. of N.H.*, Order No. 25,559 at 2-3 (Nov. 15, 2013); *City of Nashua*, Order No. 24,485 at 4. If we perceive of no circumstance in which the requested data would be relevant, we will deny a request to compel its production.

Staff 3-10 requested information concerning the revenue requirement and rates forecast by Valley Green for its new franchise area in Lebanon and Hanover. Information concerning Valley Green’s projected costs to provide natural gas service to its proposed franchise area is clearly relevant to questions of whether it is for the public good to grant Valley Green such a franchise. *See* RSA 374:26 (Commission may grant franchises for the public good and not otherwise.)

#### **B. Balancing of Interests**

Having found the discovery request likely to lead to relevant information, we next consider whether Valley Green’s financial forecasts of costs, revenues requirements, and resulting customer rates, are confidential. Although Valley Green has not filed a formal motion for confidential treatment, it notified staff in accordance with Puc 203.08(d) and asserted in its Objection that the information responsive to Staff 3-10 is entitled to such treatment. The Objection cites the orders the Commission usually relies on when ruling on such motions and lays out Valley Green’s view of how the company’s privacy interests stack up against Ms. Arwen’s interest in disclosure.

The New Hampshire Supreme Court and the Commission apply a three-step balancing test to determine whether information falls within the scope of RSA 91-A:5, IV. *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-383 (2008); *Abenaki Water Company, Inc.*, Order No. 25,840 (November 13, 2015), at 2 (citation omitted). Under the test, the Commission first inquires whether the information involves a privacy interest and then asks if there is a public interest in disclosure. *Id.* Finally, the Commission balances those competing interests and decides whether disclosure is appropriate. *Id.* Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.*

We agree with Valley Green that the forecasted financial information includes Valley Green's investment plans for its proposed franchise area and comprises sensitive financial information. It is the type of information the disclosure of which the Commission generally concludes may cause harm to the company in question. Moreover, the Commission's practice is to honor a request for confidentiality that is made in a discovery response until the matter is brought forward for a formal ruling. Even if a motion seeking confidential treatment is denied, the Commission continues to maintain confidentiality until appeal rights are exhausted.

As stated above, Ms. Arwen believes that her ability to receive all of the confidential information is unaffected by RSA 91-A. In her view, her rights as an intervenor supersede Valley Green's rights to the protection of its confidential information. We disagree. The administrative procedure provisions of RSA 541-A contain no indication that they are intended to eliminate anyone's rights under RSA 91-A. The Commission has long been able to allow full participation by intervenors while still protecting confidential information from general public disclosure when appropriate. We see no reason to do anything different here.

While Ms. Arwen's assertion that her status in this matter under RSA 541-A supersedes Valley Green's rights under RSA 91-A is incorrect, we agree with the position implicit in Ms. Arwen's arguments that the public has an interest in disclosure of this information, because it is central to whether Valley Green could offer natural gas service in the proposed franchise area that would meet the public good requirements. When balancing these two interests we find that, although the information does inform the public of the Commission activities in this docket, the Company's provisional privacy interest – provisional as Valley Green has not yet filed a formal motion seeking to protect the information – is greater and the balance of those interests does not favor general disclosure.

That determination does not, however, end the matter. Ms. Arwen is an intervenor in this proceeding and should be able to obtain access to the confidential information under the type of nondisclosure agreement that is used regularly in proceedings before the Commission.<sup>1</sup> Therefore, to allow Ms. Arwen to participate fully in this docket, we grant her Motion to Compel Valley Green to provide her with all of the information produced to Staff in response to Staff 3-10, on the express condition that Ms. Arwen signs an appropriate, reasonable nondisclosure agreement provided by Valley Green. Under the agreement, Ms. Arwen will not be allowed to disclose the confidential information, except to Staff, the OCA, the Commission, and other parties who have signed a nondisclosure agreement with Valley Green.

**Based upon the foregoing, it is hereby**

**ORDERED**, Ariel Arwen's motion to compel is **GRANTED** on the condition discussed herein; and it is

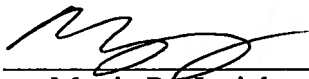
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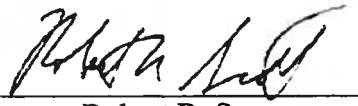
<sup>1</sup> That Ms. Arwen and Valley Green were not able to reach that conclusion on their own is concerning, but ultimately not relevant to our determination.

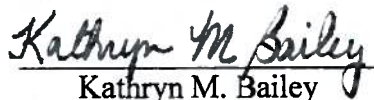
**FURTHER ORDERED**, that before receiving the answer to data request Staff 3-10, Ariel Arwen must sign a non-disclosure agreement consistent with the terms of this Order, to be provided by Valley Green; and it is

**FURTHER ORDERED**, that if Valley Green wishes to keep the information in its response to Staff 3-10 confidential, Valley Green must file an appropriate motion on or before February 24, 2016.

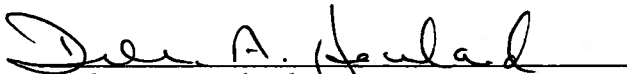
By order of the Public Utilities Commission of New Hampshire this seventeenth day of February, 2016.

  
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Martin P. Honigberg  
Chairman

  
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Robert R. Scott  
Commissioner

  
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Kathryn M. Bailey  
Commissioner

Attested by:

  
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Debra A. Howland  
Executive Director