

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Westar Energy, Inc. and
ONEOK Energy Services Company, L.P.

Docket No. EC06-48-000

ORDER DIRECTING RELEASE OF INFORMATION

(Issued April 11, 2006)

1. This order directs Westar Energy, Inc. (Westar Energy) and ONEOK Energy Services Company, L.P. (ONEOK Energy Services) (collectively, Applicants) to provide privileged information withheld from certain Oklahoma Municipal Power Authority's (OMPA) requesters. As discussed below, we find that Applicants' failure to provide such information is not in accordance with Commission policies and precedent or with Applicants' proposed protective order.

I. Background

2. The protective order issue arose in this proceeding under section 203 of the Federal Power Act (FPA).¹ On December 21, 2005, Applicants filed an application for authorization for disposition and acquisition of the Spring Creek generating facility (the Facility) and the transfer from ONEOK Energy Services to Westar Energy of a wholesale power purchase agreement with OMPA that provides for the sale of approximately 75 MWs of capacity and associated energy from the Facility. Applicants requested confidential treatment for commercially sensitive portions of the application and provided a proposed protective order and non-disclosure certificate "to facilitate access to this information in the event an entity seeking to intervene in [the] proceeding requires access to [the confidential information]."²

¹ 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-93 (2005) (EPAAct 2005).

² Application cover letter at p. 2. Under 18 C.F.R. § 33.9 (2005), applicants seeking to protect information filed as part of a section 203 filing must include a proposed protective order. *Also see* 18 C.F.R. § 388.112 (2005).

3. OMPA filed a timely motion to intervene and protest, raising, among other things, issues concerning Applicants' request for a protective order and failure to provide to OMPA certain information. OMPA objects to the protective order drafted by Applicants, claiming that it deviates from the Commission's model protective order without sufficient justification.³ Specifically, OMPA takes issue with the definition of "Reviewing Representative," which does not allow the following people to see the protected material: (1) consultants offering electricity marketing consulting services to entities engaged in sales or purchases of electric power at wholesale and (2) employees involved in marketing, purchase, or sale of electric power at wholesale, as well as their supervisors. OMPA argues that the proposed exclusion of these individuals from access to protected information is stricter than the Commission's model protective order, which simply restricts such individuals from using the information for commercial advantage. According to OMPA, denying information to consultants and those involved in marketing functions disadvantages small companies that do not have extensive administrative staffs, thereby impairing their ability to participate in the proceeding.⁴ OMPA urges the Commission to reject the proposed protective order.⁵

4. Applicants defend their proposed protective order, stating that they modified the model protective order to restrict marketing people from obtaining access to commercially sensitive information. They also say that this type of modification has been approved by Commission Administrative Law Judges in the past.⁶

5. In its reply, OMPA argues that although Commission Administrative Law Judges have distinguished requests involving competitive duty personnel from requests involving other personnel, competitive duty personnel generally are eligible to receive most protected documents. In the cases cited by Applicants, documents were divided into two categories, and all reviewing representatives could receive the first category of documents, while the second, more sensitive category of documents was not available to

³ A link to the Commission's model protective order can be found on its website at <http://www.ferc.gov/legal/admin-lit.asp#skipnavsub>. The model protective order is used in cases set for hearing to facilitate discovery while protecting privileged information from public disclosure. *See* 18 C.F.R. § 385.410.

⁴ OMPA protest at pp. 50-51.

⁵ OMPA protest at p. 51.

⁶ Applicants' answer at p. 49 (citing *PJM Interconnection, LLC*, Order Adopting Protective Order, Docket No. EL05-121-000 (Nov. 30, 2005) (*PJM*); *Golden Spread Electric Cooperative, Inc. v. Southwestern Public Service Company*, Order Adopting Protective Order, Docket No. EL05-19-000 (Feb. 28, 2005)).

competitive duty personnel. OMPA states that Applicants' protective order seeks to exclude competitive duty personnel from even the first category of documents.⁷

6. Moreover, OMPA claims that "Applicants have withheld portions of documents even from Reviewing Representatives who have signed non-disclosure agreements and who would not be deemed competitive duty personnel," which OMPA says is "clearly over-reaching." Specifically, OMPA states that Applicants have failed to provide pricing terms of the Redbud Agreement, "thus masking the compensation Westar receives for providing services under the Agreement." OMPA requests that the Commission order Westar to provide OMPA with information being withheld and provide OMPA with an opportunity to comment on such information.⁸

II. Discussion

7. We begin by noting that release under a protective order should be adequate protection against harm. The burden is on the party seeking to safeguard the information to show that the protective order does not adequately safeguard its interests.⁹ In this case, Applicants have not met that burden.

8. As noted by OMPA, the cases Applicants cite in support of their proposed protective order generally divide requesters and protected information into two groups and restrict individuals with "competitive duties" from reviewing certain "highly sensitive" protected material. Applicants have not provided any justification for their refusal to provide certain information to reviewers who have signed the protective order and who do not have competitive duties. Our regulation on section 203 applications that contain requests for privileged treatment requires the applicant to provide a proposed protective order "under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the applicant for which privileged treatment is sought."¹⁰ Applicants provided a proposed protected order that was executed by protestor's representatives, yet Applicants have failed to provide the privileged information to protestor's reviewers.

⁷ OMPA reply at pp. 30-31.

⁸ OMPA reply at p. 31.

⁹ *Mohave Pipeline Co., et al.*, 38 FERC ¶ 61,249 at p. 61,842 (1987) ("[s]ince in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material 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.")

¹⁰ 18 C.F.R. § 33.9 (2005).

9. Although the Commission has a model protective order, protective orders are to be drafted in light of the facts in a particular case. The goal is “to issue the least restrictive order that will accomplish the purpose of protecting against the harm of disclosure.”¹¹ The analysis generally involves three steps: (1) assess whether the information qualifies as confidential; (2) determine whether particular requesters needs access to some or all of the information and (3) determine what protection is needed for confidential information that will be disclosed under the protective order.¹² In this case, unlike typical protective order cases that arise in the course of a hearing before an Administrative Law Judge, the Commission does not have sufficient factual information available to it to make all these determinations. It is unclear from the record precisely which portions of the information marked as confidential have not been provided to OMPA requesters; it is also unclear who has filed requests on behalf of OMPA, and how those requests were handled.¹³ For these reasons, we leave open the question of whether the terms of the proposed protective order are appropriate.

10. In this case, we believe it is appropriate to require Applicants to provide the withheld information to requesters who do not have competitive duties. If, after those reviewers see the information, they believe it is important for individuals with competitive duties to see the information as well, OMPA can request that the Commission grant them access, explaining why such access is necessary. This approach is consistent with process set out in the *PJM* protective order cited by Applicants.¹⁴

11. What is clear, however, is that Applicants have not met their burden with respect to Reviewing Representatives as defined in section 3(d) of their own proposed protective order (*i.e.*, those who do not have competitive duties). We, therefore, order Applicants to provide within five (5) days of the date of this order any information withheld from such Reviewing Representatives according to the terms of the proposed protective order. OMPA will be given seven (7) days after receipt of such information to file any additional comments based upon such information.

¹¹ *Id.*

¹² *See, e.g., Stingray Pipeline Company*, 61 FERC ¶ 61,046 at p. 61,211 (1992).

¹³ While it is not clear which information is being withheld from OMPA representatives who have executed the protective order, we find that at least portions of the information withheld from Applicants’ public filings do qualify for protection.

¹⁴ The protective order in *PJM* lays out the steps competitive duty personnel may take to obtain permission to view information generally not available to competitive duty personnel under the protective order. In that case, a party seeking information had to show prejudice if that particular reviewer was denied access, identify the name and job title of proposed reviewers, and agree to abide by all restrictions. *PJM* at P 3.

The Commission orders:

(A) Applicants shall provide, within five days of the date of this order, all material withheld pursuant to the protective order to all Reviewing Representatives as defined in § 3(d) of the protective order.

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.