

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
 Columbus Southern Power Company and)
 Ohio Power Company for Authority to)
 Recover Costs Associated with the Ultimate) Case No. 05-376-EL-UNC
 Construction and Operation of an Integrated)
 Gasification Combined Cycle Electric)
 Generation Facility.)

ENTRY

The Attorney Examiner finds:

- (1) By Opinion and Order issued in this case on April 10, 2006 (Order), the Commission, among other things, affirmed the Attorney Examiners' ruling to grant the requests of Columbus Southern Power Company and Ohio Power Company (jointly AEP-Ohio or Companies) and General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation (jointly GE/Bechtel) for protective treatment of certain documents. GE/Bechtel are vendors with whom AEP-Ohio contracted to provide certain services in relation to the engineering, design and construction of the proposed integrated gasification combined cycle (IGCC) facility at issue in this case. The Office of the Ohio Consumers' Counsel (OCC) argued on brief in the case that the protective order prevented public scrutiny of the documents in violation of Section 149.43, Revised Code, and Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.). In the Order, the Commission found that the documents included trade secret information as defined in Section 1333.61(D) Revised Code. As such, the Commission reasoned that the trade secrets and testimony about the trade secrets are exceptions to Section 149.43(A), Revised Code. Section 149.43, Revised Code, essentially states that all proceedings of the Commission and all documents and records in its possession are public records, with certain limited exceptions, not inconsistent with the purposes of Title 49 of the Revised Code. Accordingly, the Commission affirmed the Attorney Examiners' ruling and directed that the documents remain under seal for 18 months from the date of the Order, until October 10, 2007.

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- (2) On August 23, 2007, AEP-Ohio filed a motion to extend the protective order. Attached to the motion, identified as Exhibit 1 through Exhibit 3, are affidavits from American Electric Power Service Corporation (AEP-SC), Sargent & Lundy (S&L), and Battelle Memorial Institute (Battelle) in support of the original motion for protective order and the current motion to extend the protective order. AEP-Ohio states that the Companies' request for protective treatment in this case included only a portion of four exhibits (OCC Exs. 6 and 7, OEG Ex. 3 and IEU Ex. 8) and redacted versions of the protected exhibits are part of the public record. AEP-Ohio states that the protected documents refer to the site selection analyses performed in the Eastern State Site Selection Study prepared by S&L and the Site Screening Analysis for Geologic Carbon Sequestration Suitability conducted by Battelle. AEP-Ohio states that the materials deserve continued protection as represented in the affidavits filed by the Companies, S&L and Battelle on August 8, 2005. AEP-Ohio argues that the affidavits establish that: (a) the protected site evaluation data, ranking criteria, weighted values used and total weighted scores for the sites studied and includes S&L's or Battelle's evaluation methodology; (b) the protected information is treated as confidential by S&L or Battelle and is not released in the public domain; (c) the protected information represents S&L's or Battelle's work product and has commercial value to each of them; (d) the protected information could be used by S&L's or Battelle's respective competitors as a basis for providing similar services to other clients; and (e) Battelle and/or S&L will suffer competitive harm if the information is released into the public domain or treated in a non-confidential manner.
- (3) Furthermore, in regards to both the site selection and carbon sequestration studies, AEP-Ohio contends that the list of sites in the reports is not in the public domain as identification of all the sites is strategically important to AEP-Ohio and its affiliates within American Electric Power Company (AEP system) for future expansion plans. According to AEP-Ohio, knowledge of the sites by competitors could potentially affect AEP system's plans to use such sites for power facilities in the future. The sites listed in the studies also include development activities by non-affiliated entities with which AEP system has a non-disclosure agreement concerning proposed projects. AEP-Ohio states that the disclosure of the scoring of the individual sites,

relative to one another, will likely harm AEP system and other non-affiliated entities by putting them at a competitive disadvantage in any negotiations to sell low ranking sites. Finally, AEP-Ohio states that AEP system has maintained the confidentiality of the reports and the reports have not been released to third parties without the execution of a non-disclosure agreement.

- (4) AEP-Ohio concludes that the law, on which the original motion for protective order was granted by the Commission and affirmed on rehearing, is the same and, therefore, as a matter of law, the information is still entitled to protection from public disclosure. Finally, AEP-Ohio notes its support of GE/Bechtel's motion for an extension of the protective order. AEP-Ohio states that it has concerns about the chilling effect a ruling not to extend the protective order could have on the willingness of vendors to share confidential information with AEP-Ohio/AEP system and its affiliates, as well as other Ohio utilities.
- (5) On August 27, 2007, GE/Bechtel also filed a motion to extend the protective order. GE/Bechtel asks that the protective order be extended indefinitely. GE/Bechtel recounts the process on which the Commission relied to affirm the protective order. As described by GE/Bechtel, the information under protective order pertains to GE/Bechtel's financial and technical association with AEP-Ohio for the construction of an IGCC facility. GE/Bechtel argues as attested to in the affidavits previously provided, that the information protected under seal meets the requirements of a trade secret, pursuant to Section 1333.61(D), Revised Code, and should continue to be protected under the order.
- (6) OCC filed a motion for a four-day extension of time to file its memorandum contra to AEP-Ohio's motion to extend the protective order on August 31, 2007. By entry issued September 7, 2007, OCC's request for a four-day extension of time to file its memorandum contra was granted.
- (7) OCC filed its memorandum contra AEP-Ohio's and GE/Bechtel's motions to extend the protective order on September 11, 2007. OCC requests that the motions to extend the protective order be denied. Both motions, according to

OCC, fail to include a detailed discussion of the need for continued protection from disclosure, rely upon the Commission's initial grant of the protective order and provide conclusory affidavits and statements as to the continued sensitive nature of the protected information. OCC contends that AEP-Ohio and GE/Bechtel failed to meet the burden to demonstrate that the information under seal required protection pursuant to Rule 4901-1-27(B)(7)(e), O.A.C. OCC states that the original affidavits also lacked detail sufficient to protect the documents from disclosure. As such, OCC reasons that repeating such statements by reference also fails to provide the detail required pursuant to Rule 4901-1-24(F), O.A.C.

As to GE/Bechtel's motion to extend the protective order, OCC claims that GE/Bechtel has not sufficiently minimized the information protected from public disclosure. OCC notes that GE/Bechtel continues to request that entire documents be protected from disclosure.

The extension period requested is also inappropriate according to OCC. OCC notes that AEP-Ohio did not state a specific period for the requested extension of the protective order and GE/Bechtel requests an indefinite extension of the protective order.

Finally, OCC argues that the Ohio Supreme Court has adopted six factors to analyze a trade secret claim. See *Besser v. Ohio State University*, 89 Ohio St.3d 396, 399-400 (August 9, 2000). One factor considered in *Besser* is the value to the holder in having the information protected as against competitors. OCC argues that the information may not have the same value after 18 months and may lose even more value and/or become outdated as time progresses. Further, OCC claims that with the announcement of Ohio Governor Strickland's Energy Plan, legislation regarding the regulation of electric utilities is currently under extensive discussion. OCC posits that the legislation adopted may affect the value of the information subject to the protective order or may create a regulatory structure under which power plant costs recovered is considered by the Commission in a regulated process. For these reasons, OCC requests that AEP-Ohio's and GE/Bechtel's motions for an extension of the protective order be denied. In

the alternative, OCC requests that any extension of the protective orders not exceed six months.

- (8) AEP-Ohio and GE/Bechtel filed replies to OCC's memorandum contra on September 17, 2007, and September 18, 2007, respectively.

In its reply, AEP-Ohio responds to OCC's first point, that AEP-Ohio has not presented a detailed discussion of the need for continued protection from disclosure. AEP-Ohio states that OCC overlooks that the renewed affidavits accompanying the Companies' extension motion reassert the detailed discussion of the need for the protection of the information. AEP-Ohio states that the disclosure of the protected information will be harmful to AEP-Ohio, S&L and Battelle. Further, AEP-Ohio opines that disclosure of the protected information will inhibit Ohio's ability to promote advanced energy technology to the detriment of Ohio's economy and AEP-Ohio's customers.

Second, AEP-Ohio addresses OCC's claims that the amount of information protected from disclosure has not been minimized. AEP-Ohio reiterates that minimization of the information protected from disclosure was accomplished at the conclusion of the hearing and, OCC was notified, along with the other parties, of AEP-Ohio's effort to minimize the amount of material under seal.

Finally, AEP-Ohio admits that it did not set forth a requested extension period, as OCC asserts. AEP-Ohio states that the Companies contemplated an 18-month extension of the protective order consistent with Rule 4901-1-24, O.A.C. In its reply, however, AEP-Ohio argues that due to the nature of the protected information (technological processes, potential sites for development of generation facilities and sequestration of carbon dioxide), that GE/Bechtel's request for an indefinite extension is more appropriate. Contrary to OCC's assertion, AEP-Ohio argues that possible legislative changes in Ohio will not change or eliminate the need for the protective order. The Companies contend that even if as OCC argues new laws change the appropriateness of continuing the protective order, OCC can make that argument once such laws become effective.

- (9) In its reply to OCC, GE/Bechtel emphasizes that OCC does not claim that the protected information is not confidential, protectable trade secrets or proprietary information. GE/Bechtel states that OCC is attempting to relitigate the claims OCC previously made in this proceeding which were denied.

Like AEP-Ohio, at the conclusion of the hearing in this case, GE/Bechtel was directed to review the confidential documents admitted into evidence and redact any trade secrets, confidential or proprietary information. GE/Bechtel states that it complied with the directive. Accordingly, GE/Bechtel states that OCC is incorrect in its assertion that the protected information has not been minimized.

GE/Bechtel contends that the information under protective order consist of financial information, technical scientific and engineering data and processes which are proprietary to GE/Bechtel and, as such, the protected information is of enormous value to GE/Bechtel and its competitors and the protected information retains its value, the same as when the protective order was requested and approved two years ago. GE/Bechtel states that they developed the protected information for their joint internal use and, subject to a protective agreement, revealed the information to AEP-Ohio solely for the purposes of its IGCC project. GE/Bechtel states that the company continues to make reasonable efforts to maintain the secrecy of the protected information. Given the sensitive nature of the information, GE/Bechtel contends that the protected information should be protected indefinitely, as the information will retain its value for many years to come.

- (10) As noted, the information at issue, has already been granted protective treatment in this case and there is no need to review the initial process by which AEP-Ohio and GE/Bechtel were granted protective treatment. Rule 4901-1-24(F), Ohio Administrative Code (O.A.C.), provides, in relevant part:

A party wishing to extend a protective order beyond the 18 months shall file an appropriate motion at least 45 days in advance of the expiration date of the existing order. The motion

shall include a detailed discussion of the need for continued protection from disclosure.

- (11) Thus, pursuant to Rule 4901-1-24, O.A.C., to be granted an extension of a protective order the applicant must comply with two requirements: timely file the motion and provide a detailed explanation stating why the information requires continued protective treatment.

The original protective order is scheduled to expire on October 11, 2007. Accordingly, any motion to extend the protective order needed to be filed by no later than August 27, 2007. AEP-Ohio and GE/Bechtel timely filed their respective motions to extend the protective order.

GE/Bechtel and AEP-Ohio have also presented sufficient reason to extend the protective order. The Commission has previously established that the protected information constitutes trade secret, confidential information. AEP-Ohio and GE/Bechtel have presented reasonable arguments that the protected information continues to retain some value, as against their respective competitors and the protected information is not public. The Attorney Examiner notes, for example, that the site selection study specifically includes information as to numerous sites throughout the eastern United States and an evaluation of each site. Further, the Attorney Examiner recognizes that the IGCC process is an evolving technology. As such, the Attorney Examiner believes that the protected information has retained a significant share of its value to AEP-Ohio, and its third party vendors in the design, and engineering of the proposed IGCC facility, S&L, Battelle and GE/Bechtel. Accordingly, the protective order should be extended.

The next issue is how long the protective order should be extended. GE/Bechtel argues, and eventually AEP-Ohio agrees, that the protective order should be extended indefinitely. The movants argue that the information will retain its value for many years to come. On the other hand, OCC requests, that if the order is to be extended, that it should be extended for no more than six months in light of the possibility of electric regulatory restructuring.

While the protected information may retain its value for a number of years, GE/Bechtel's and AEP-Ohio's request for an indefinite protective order should be denied. GE/Bechtel's and AEP-Ohio's proposal for an indefinite protective order could cause the Commission to protect information that has lost its value. With the passage of time and changing circumstances, it is likely that the information these parties seek to protect will become stale and lose its worth to competitors. For these reasons, it is against the Commission's policy to grant an indefinite protective order. See, Case No. 02-3069-TP-ALT, *In the Matter of the Application of SBC Ohio for Approval of an Alternative Form of Regulation* (June 30, 2004). The Commission believes that it is more appropriate to periodically review information granted protected status as a trade secret, confidential or proprietary information. On the other hand, the Attorney Examiner finds the prospect of electric regulatory restructuring an insufficient reason to extend the protective order for only six months. Accordingly, AEP-Ohio's and GE/Bechtel's motions for extension of the protective orders granted in this case are approved for an additional 18 months. Therefore, the information currently under seal in this docket should remain under seal for an additional 18 months from the date the original protective order expires on October 11, 2007.

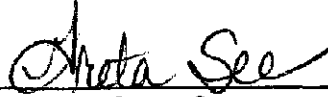
The parties should note that the protective order will automatically expire, in accordance with Rule 4901-1-24(F), O.A.C. Extensions of the protective order may be requested by filing an appropriate motion at least 45 days in advance of the expiration of the existing order.

It is, therefore,

ORDERED, That AEP-Ohio's and GE/Bechtel's requests to extend the protective order is granted. Accordingly, the Docketing Division shall maintain under seal the information granted protective treatment in this case for an additional 18 months from the date the original protective order expires, October 11, 2007. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Greta See
Attorney Examiner

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Entered in the Journal

OCT 11 2007



Renee J. Jenkins
Secretary