

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman  
Nicholas G. Trikouros  
Dr. James F. Jackson

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

Docket No. 52-011-ESP

ASLBP No. 07-850-01-ESP-BD01

December 19, 2008

MEMORANDUM AND ORDER

(Protective Order Governing Disclosure of Proprietary Materials)

Upon consideration of the December 18, 2008 joint motion of applicant Southern Nuclear Operating Company (SNC), Joint Intervenors,<sup>1</sup> and the NRC staff, for approval of a proposed protective order to govern the use and dissemination of certain confidential information of SNC and its vendor or contractors, we grant the motion and adopt the proposed protective order, as revised by the Licensing Board, the terms of which are set forth below.

This protective order governs the disclosure and use in this proceeding of certain documents that applicant SNC claims contain proprietary trade secrets and/or commercial or financial information of SNC or its vendors and contractors.<sup>2</sup> Pursuant to this protective order,

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<sup>1</sup> Joint Intervenors include the Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League.

<sup>2</sup> The provisions of this protective order do not restrict the use by staff counsel, witnesses, employees, consultants, and others representing the staff of documents containing protected material that NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g., documents containing information required to be submitted to NRC by statute, (continued...))

counsel, witnesses, employees, consultants, and others representing Joint Intervenors or representing the NRC staff shall be permitted access to such documents upon the conditions set forth herein. Except as otherwise expressly set forth herein, this protective order shall remain in effect until specifically modified or terminated by this Board or the Commission

Those persons who (1) are qualified pursuant to this protective order; and (2) have executed a non-disclosure declaration in the form included as Attachment A to this protective order shall be permitted access to proprietary information under the following conditions:

A. If SNC counsel in good faith believes that a document or portion thereof contains information that qualifies under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v) as a trade secret and/or commercial or financial information that is privileged and confidential, then he/she may designate it as such, and it shall be protected in accordance with the terms and conditions of this protective order. Each such document is hereinafter referred to as a "proprietary document." SNC shall (1) prominently mark with a conspicuous "Proprietary" label each proprietary document on the first page and on each page of the document containing such information; and (2) on or before the later of (a) the date seven (7) days after the date of this protective order, or (b) the date seven (7) days after the date a party requests a copy of the proprietary document, produce an copy of the document with the proprietary information unredacted by providing it to the duly authorized representatives of the party requesting the proprietary document (as defined in paragraph F below), provided each such representative has signed a nondisclosure declaration.

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<sup>2</sup>(...continued)

regulation, or license condition, or information submitted to, or acquired by, NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Instead, staff use and disclosure of such documents is governed by 10 C.F.R. §§ 2.390, 9.17, and 9.25. The provisions of this protective order apply to NRC counsel, witnesses, employees, consultants, and others representing the staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this protective order.

B. Proprietary documents shall be deemed to contain proprietary trade secrets and/or commercial and financial information required to be held in confidence pursuant to the policy reflected in 10 C.F.R. § 2.390(a)(4). Joint Intervenors and, if it chooses to access or accept proprietary documents, the staff shall hold such documents in confidence and in compliance with the terms and conditions of this protective order.<sup>3</sup>

C. The Board shall resolve any disputes arising under this protective order, including those relating to the public release of information in a proprietary document otherwise designated as subject to nondisclosure. Prior to presenting any such dispute to the Board, the parties to the dispute shall consult and use their best efforts, including the use of redaction, to resolve such dispute.

D. Any party that objects to the designation of a document as proprietary shall file a motion with the Board stating the party's objection, and specifying the portions of the document that should be disclosed. Within seven (7) days, SNC shall have the burden of showing that information in the proprietary document is a trade secret and/or commercial or financial information that is privileged and confidential so that the Board can determine, as applicable,

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<sup>3</sup> This protective order, and the good faith representation and designation of a document as a proprietary document by SNC counsel, serves in lieu of the requirement for marking and for an affidavit under 10 C.F.R. § 2.390(b) and allows the staff to receive the proprietary document and protect its confidentiality under the Freedom of Information Act (FOIA). However, the staff (as well as any representative of the United States Army Corps of Engineers participating at the request of the staff) is not obligated to participate in this protective order or to obtain proprietary documents hereunder. Instead, the staff may access the documents under an alternate approach as follows (or in any other way that SNC and the staff agree is appropriate and make known in the record of this proceeding): Rather than producing proprietary documents to the staff in their entirety under this protective order, SNC will retain a set of the documents at a mutually acceptable location for inspection by the staff. The staff would then inspect the documents and identify a list for production to the staff. These documents would then be submitted to the agency pursuant to the procedures in section 2.390 and would be dispositioned in accord with that provision.

whether, on balance, protection of the document from public disclosure is warranted under 10 C.F.R. § 2.390.

E. If a party files a motion for disclosure under paragraph D above, pending a ruling by the Board, the proprietary document in question shall continue to be held in confidence. If the Board rules that a document does not qualify for the asserted privilege, or that, on balance, the document should be disclosed without the restrictions of this protective order, then the unrestricted use of such documents may begin ten (10) days after the Board's decision. If during such time SNC files an interlocutory appeal or request that the issue be certified to the Commission, such period of time shall be extended for an additional ten (10) days, during which time the Board or Commission may consider a request for any further stay.

F. Only individual counsel (including, without limitation, student-attorneys of the Turner Environmental Law Clinic), consultants, witnesses (including witnesses from the U.S. Army Corps of Engineers participating at the request of the staff), employees, and others representing Joint Intervenors or the staff who have executed the attached non-disclosure declaration may have access to proprietary documents. A proprietary document shall only be used as necessary for the conduct of this proceeding. A proprietary document shall not be disclosed in any manner to any person except (1) the Board and its staff; and (2) those engaged in the conduct of this proceeding who have executed a nondisclosure declaration and who, in the reasonable opinion of the party who has received the proprietary document, needs to know the information contained in the proprietary documents to carry out his/her responsibilities in this proceeding. An individual with access to a proprietary documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become proprietary documents subject to the terms of this protective order.

G. Counsel, consultants, witnesses, employees, and others representing a party who receive documents subject to the terms of this protective order shall maintain the confidentiality of the information contained therein as required in the nondisclosure declaration. Even if no longer engaged in this proceeding, every person who has executed a nondisclosure declaration shall continue to be bound by the provisions of the protective order and the declaration.

H. Counsel shall take all reasonable precautions necessary to assure that proprietary documents and the information contained therein are not distributed to unauthorized persons. Counsel are responsible for ensuring that persons under their supervision or control comply with this protective order.

I. All pleadings, issuances, testimony, exhibits, and correspondence in this proceeding that contain information derived from a proprietary document shall be treated as confidential, marked in accordance with paragraph A above, and, if served, shall be served:

1. via the Commission's E-Filing electronic submittal system, but shall be excluded from the public docket for this proceeding by selecting the non-public "Protective Order" filing option on the agency's E-Filing website; and
2. only on counsel for SNC, personnel from the Office of the Secretary on the E-Filing service list for this proceeding, the staff,<sup>4</sup> a representative of Joint Intervenors who has signed a nondisclosure declaration, and the individual members of the Licensing Board and the Board's law clerks.

J. At any hearing or conference in this proceeding in which a statement is made by a representative of a party, or a witness is questioned, concerning a proprietary document or information contained therein, the statement or testimony shall be given in camera or under other suitable conditions as the Board may establish, and the record of that portion of the hearing and any transcript thereof, shall be withheld from distribution to the public. It shall be

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<sup>4</sup> The staff should be served as provided in this paragraph if staff counsel has either executed a nondisclosure declaration or SNC has provided the subject proprietary document to staff counsel pursuant to the alternative approach outlined in footnote 2 supra.

the duty of the presenting party to notify the Board and SNC that such testimony or statement will contain proprietary information, prior to the testimony or statement being made.

K. A party intending to file or submit any pleading, testimony, exhibit, or correspondence in this proceeding that contains a proprietary document or information derived from a proprietary document, shall notify SNC counsel in writing, as soon as the party is aware of the likely use of the proprietary document and, to the fullest extent possible, no less than five (5) days prior to the date of the intended filing; provided, however, that such notice shall be provided to SNC no less than ten (10) days prior to an evidentiary hearing. Such notice shall identify the proprietary document(s) that the party intends to use or include. Unless SNC submits an affidavit conforming to the requirements of 10 C.F.R. §§ 2.390(b)(1)(ii) and (iii) within ten (10) days after the filing of such pleading, testimony, exhibit, or correspondence, the protections of this protective order shall automatically cease to apply to the proprietary document.

L. Proprietary documents shall remain available until the date that an order terminating this proceeding is no longer subject to judicial review. The parties shall, within fifteen (15) days of the date described above, return the proprietary documents in their possession to SNC counsel or shall destroy that material, except that copies of filings, issuances, transcripts, and exhibits in this proceeding that contain such information and notes taken by persons reviewing proprietary material, may be retained if they are maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. Within such time period, each party receiving proprietary documents under this protective order shall submit to SNC counsel an affidavit stating that, to the best of his/her actual knowledge, all proprietary documents have been returned or destroyed, or, in the case of filings, issuances, transcripts, exhibits, or notes in this proceeding, that such documents will be maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. To the extent

that such filings, issuances, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this protective order.

M. Counsel, consultants, employees, or any other individuals representing a party who have reason to believe that proprietary documents may have been lost or misplaced or may have otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the Board and SNC counsel promptly of their concerns and the reasons for them.

N. Any violation of the terms of this protective order or a nondisclosure declaration executed in furtherance of this protective order may result in the imposition of such sanctions as the Board may deem appropriate including, but not limited to, referral of the violation to appropriate bar associations and/or other disciplinary authorities.

O. Nothing in this protective order precludes Joint Intervenors, SNC, or the staff from seeking changes in this protective order from the Board or the Commission as future circumstances warrant.

P. Nothing in this protective order shall be deemed to preclude any party from independently seeking, through discovery in any other administrative or judicial proceeding, any proprietary document or information produced in this proceeding under this protective order. In addition, if information identified in this proceeding as proprietary comes into the possession of, or is known by any party independently of a proprietary document produced in this proceeding, and such knowledge was acquired without violation of law or other requirement applicable to such party directing the party to keep such information confidential, use of that document or information in this proceeding, without compliance with the terms of this protective order, shall not be a violation of the terms of this protective order. The party asserting independent knowledge of the contents of a proprietary document or independent access to such a



ATTACHMENT A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman  
Nicholas G. Trikouros  
Dr. James F. Jackson

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Early Site Permit for Vogtle ESP Site)

Docket No. 52-011-ESP

ASLBP No. 07-850-01-ESP-BD01

NONDISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify that (i) access to “proprietary documents,” as that term is defined in the Atomic Safety and Licensing Board’s protective order dated December 19, 2008, has been provided to me pursuant to the terms and restrictions of the protective order; (ii) I have been given a copy and have read the protective order; and (iii) I agree to be bound by the terms of the protective order. I understand and agree that proprietary documents, their contents, or any notes or other memoranda summarizing or otherwise describing their contents, or any form of information that derives from the proprietary documents and copies or discloses the contents of the proprietary documents, shall be held in confidence and shall not be disclosed to anyone except in accordance with the protective order. I acknowledge that a violation of this declaration or the protective order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Atomic Safety and Licensing Board or the Nuclear Regulatory Commission may deem to be appropriate.

WHEREFORE, I do solemnly swear to protect such proprietary documents, and their contents, as may be disclosed to me in this proceeding, in accordance with the terms of this declaration.

[Note: For NRC representatives executing this nondisclosure declaration, an executed agreement will be modified to contain the following additional sentence: "My agreement and acknowledgment, however, are not binding on the Nuclear Regulatory Commission's fulfillment of its obligations under the Freedom of Information Act."]

Name (printed): \_\_\_\_\_

Title: \_\_\_\_\_

Employed by or Representing: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
SOUTHERN NUCLEAR OPERATING ) Docket No. 52-011-ESP  
COMPANY )  
 )  
(Early Site Permit for the Vogtle ESP Site) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (PROTECTIVE ORDER GOVERNING DISCLOSURE OF PROPRIETARY MATERIALS) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-011-ESP  
LB MEMORANDUM AND ORDER (PROTECTIVE ORDER GOVERNING  
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[Original signed by Nancy Greathead]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 19<sup>th</sup> day of December 2008