

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of

PROGRESS ENERGY FLORIDA, INC.

(Combined License Application for Levy County
Nuclear Power Plant, Units 1 and 2)

Docket No. 52-029-COL, 52-030-COL

ASLBP No. 09-879-04-COL-BD01

October 14, 2009

ORDER

(Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary)

This protective order governs the disclosure and use in this proceeding of certain documents that the applicant Progress Energy Florida, Inc. (Progress) claims contain proprietary trade secrets and commercial and financial information of Progress or its vendors and contractors.¹ Pursuant to this protective order, counsel, witnesses, employees, consultants, and others representing the Nuclear Information and Resource Service (NIRS), the Ecology Party of Florida, and the Green Party of Florida (jointly, Intervenors), and the NRC Staff shall be permitted access to such documents upon the conditions set forth herein.

¹ The provisions of this protective order do not restrict use by NRC counsel, witnesses, employees, consultants and others representing the NRC Staff of documents containing protected material that the 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 the NRC by statute, regulation, or license condition or information submitted to or acquired by the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Rather, NRC's use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this protective order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this protective order.

I. Procedural Posture

Each party to this proceeding is required to disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is being made. 10 C.F.R. § 2.336(a)(2). In the latter case, the party must list such documents. 10 C.F.R. § 2.336(a)(3).

On August 27, 2009, the Board issued its Initial Scheduling Order, in which it directed the parties to confer with one another on or before October 1, 2009, for the purpose of discussing and developing a joint proposed protective order and non-disclosure agreement dealing with the handling (and redaction) of documents that are claimed to contain privileged, proprietary or otherwise protected information.² The parties did confer and developed a unanimously agreed proposed protective order and non-disclosure agreement, which they jointly submitted to the Board on September 30, 2009.³

The proposal by the parties relates only to those documents for which Progress claims a privilege based on the assertion that the documents contain proprietary trade secrets and commercial or financial information. Certain attorney-client, attorney work-product and deliberative process privilege issues were handled amicably earlier.⁴

² Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC __ (slip op. at 7) (Aug. 27, 2009) (Initial Scheduling Order).

³ Joint Motion for Protective Order Governing Access to and Disclosure of Certain Documents Claimed to be Proprietary (Sept. 30, 2009).

⁴ The Board previously granted a joint motion which exempted parties from listing certain documents for which privilege is claimed in their privilege logs. Initial Scheduling Order at 4-6; Licensing Board Memorandum and Order (Granting Motion for Clarification) at 1 (Sept. 3, 2009) (unpublished).

II. Terms and Conditions of Protective Order

After due consideration of the proposed protective order and non-disclosure agreement, the public interest in an open and public hearing, and the practical and efficient conduct of this proceeding, the Board issues the following protective order:

1. If counsel for Progress in good faith believes that a document contains information that qualifies under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v) as a trade secret and commercial or financial information that is privileged and confidential, then such counsel may designate it as such and it shall be protected in accordance with the terms and conditions of this order. Such documents shall hereinafter be referred to as “Proprietary Documents.” Progress shall (a) prominently mark each Proprietary Document on the first page with a conspicuous “Proprietary” label, (b) list each Proprietary Document on a Proprietary Document log provided to the other parties of this proceeding, and (c) make available, if requested, a redacted copy of the Proprietary Document for the other parties. The Proprietary Document log shall provide sufficient information for assessing the claim that the document or relevant portion of the document is entitled to be treated as proprietary.

2. Proprietary Documents duly listed on the Proprietary Document log shall be deemed to contain proprietary trade secrets and commercial and financial information required to be held in confidence pursuant to the policy reflected in 10 C.F.R. § 2.390(a)(4).

3. Progress shall provide access to an unredacted copy of each Proprietary Document to the duly authorized representatives of the Intervenors and the Staff if such representative has signed the non-disclosure agreement attached hereto. Such parties and representative shall hold such documents in confidence and in compliance with the terms and conditions of this order.⁵

⁵ This order, and the good faith representation and designation of documents as Proprietary Documents by counsel for Progress, serves in lieu of the requirement for marking and for an

4. If an Intervenor or the Staff declines to sign the nondisclosure agreement and requests a redacted version of the Proprietary Document, then Progress shall, within twenty (20) days of the request, provide the requestor a properly redacted version of the Proprietary Document. Paragraphs 3 and 4 of this order are not mutually exclusive.

5. The Board will resolve any disputes arising under this protective order. Prior to presenting any such dispute to the Board, the parties shall consult and use their best efforts to resolve it. Any party that objects to the designation of a document as proprietary or to the extent of its redaction, shall provide Progress with a written notice of objection. Except for good cause shown, notice of objection to the designation of the document as proprietary must be delivered to Progress within thirty (30) days of the date that Progress made the Proprietary Document available to the party. If the party has declined to sign the non-disclosure agreement, objections to the proprietary designation must be delivered to Progress within thirty (30) days of the date Progress listed the document on the Proprietary Document log, and objections to the extent of redaction must be delivered within thirty (30) days of receipt of the redacted version. The thirty-day period is deemed the Consultation Period. Prior to the end of the Consultation Period, the parties may obtain an automatic thirty (30) day extension by filing a joint certification that they have been and continue to be engaged in good faith efforts to resolve the matter. Further extensions may only be granted by affirmative action of the Board. These time limits do not apply to the October 29, 2009, deadline for filing objections to initial disclosures and updates mentioned in the Initial Scheduling Order. See Initial Scheduling Order at 7-8. For matters related to these disclosures, the deadlines contained in the Initial Scheduling Order remain in effect.

affidavit under 10 C.F.R. § 2.390(b) and allows the Staff to receive Proprietary Documents and to protect their confidentiality under FOIA.

6. The protections of this protective order shall automatically cease to apply to a Proprietary Document, as to which a party objects to such designation ten (10) days after the Consultation Period (and any extension) expires, unless, within that ten (10) days, Progress files a motion with the Board, with a supporting affidavit, demonstrating and specifying those portions of the Proprietary Document that should be protected. Progress has the burden of showing that information in the Proprietary Document is a trade secret and commercial or financial information that is privileged and confidential and that, on balance, it warrants protection under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v).

7. If Progress has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Proprietary Documents 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 fifteen (15) days after the Board's decision. If, during such time, Progress 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.

8. Only individual counsel, consultants, witnesses, employees, and others representing the Intervenors or the Staff who have executed the attached non-disclosure agreement, and the Board and its staff, may have access to Proprietary Documents.⁶ Proprietary Documents shall only be used as necessary for the conduct of this proceeding. Proprietary Documents shall not be disclosed in any manner to any person except (a) the Board and its staff, and (b) those representatives of the parties engaged in the conduct of this

⁶ Alternatively, Progress may make the documents it identified as proprietary in its Proprietary Document log available to NRC counsel, witnesses, employees, consultants and others representing the NRC Staff for inspection at the offices of Progress's counsel in lieu of such NRC representatives signing the non-disclosure agreement. In that event, access would not include making copies unless the Staff personnel signed the non-disclosure agreement.

proceeding who have executed the non-disclosure agreement and who, in the reasonable opinion of the party who has received the Proprietary Documents, need to know the information contained in the Proprietary Documents in order to carry out their responsibilities in this proceeding. Individuals with access to 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.

9. 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 attached non-disclosure agreement, the terms of which are incorporated herein.

10. Counsel or other party representatives shall take all reasonable precautions necessary to assure that Proprietary Documents and the information contained therein are not distributed to unauthorized persons. Counsel and other party representatives are responsible for ensuring that persons under their supervision or control comply with this protective order.

11. 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 counsel for Progress 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 ten (10) days prior to the date of the intended filing. Such notice shall identify the Proprietary Document(s) that the party intends to use or include. Unless Progress 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 or Progress already

has submitted such an affidavit to the NRC, the protections of this protective order shall automatically cease to apply to the Proprietary Document.⁷

12. All pleadings, testimony, exhibits and correspondence in this proceeding that contain information derived from a Proprietary Document shall:

a. Be provided to the NRC's Electronic Information Exchange (EIE) for service (except for attachments to such pleadings which are too large (50 MB) to serve by EIE), but shall be excluded from the public docket for this proceeding by selecting the non-public "Protective Order" filing option on the EIE website;

b. Include an attached cover sheet identifying the pleading, testimony, exhibit, or correspondence as containing a Proprietary Document or information derived therefrom, and a cover letter that describes the contents of the pleading or correspondence without reference to such information, and, in the subject line of the EIE filing, a statement that the electronic filing contains proprietary information;

c. Specifically designate, by highlighting, marginalia, or other appropriate markings, the portion of the pleading, testimony, exhibit or correspondence, that contains a Proprietary Document or information derived therefrom;

d. Be served only on the Board, the NRC's Office of the Secretary, and representatives of the Staff or appropriate party authorized to receive such information pursuant to this protective order; and

⁷ The submission of this affidavit does not reopen the opportunity, specified in paragraph 5 above, for a party to challenge the designation of a document as a Proprietary Document, except to the extent that a party can demonstrate by motion that new information contained in the section 2.390(b) affidavit shows that proprietary protection should not be afforded to the document. Any challenge to a section 2.390(b) affidavit submitted to the NRC prior to September 1, 2009 must be raised within the deadlines of the Initial Scheduling Order (i.e., October 29, 2009).

e. Be accompanied by a version of the pleading, testimony, exhibit and/or correspondence with the proprietary information redacted if, and to the extent that, the party filing the pleading, testimony, exhibit and/or correspondence in good faith determines that such a redacted version can be prepared without undue burden or expense.

13. At any hearing or conference in this proceeding in which a statement is made by the 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 this 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 the duty of the party whose statement or testimony contains the proprietary information to be presented, to notify the Board and the parties that such testimony or statement will contain proprietary information, prior to the testimony or statement being made.

14. 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 to counsel for Progress or shall destroy that material, except that copies of filings, 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 shall submit to counsel for Progress an affidavit stating that, to the best of its knowledge, all Proprietary Documents have been returned or destroyed, or, if filings, transcripts, exhibits, or notes in this proceeding, 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, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this protective order.

15. 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 counsel for Progress promptly of their concerns and the reasons for them.

16. Any violation of the terms of this protective order or a non-disclosure agreement executed in furtherance of this order may result in the imposition of such sanctions as the Board may deem appropriate, including but not limited to (1) referral of the violation to appropriate bar associations and/or other disciplinary authorities, (2) ordering the return of all Proprietary Documents, or (3) dismissing or narrowing any admitted contention related to Proprietary Documents.

17. Each party governed by this protective order has the right to seek changes in it as appropriate from the Board or the Commission.

18. 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 documents identified in this proceeding as proprietary or some or all of the information contained in such documents comes into the possession of or is known by any party independently of the Proprietary Document produced in this proceeding, 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 Proprietary Documents or independent access to such documents, shall have the burden of proving that such information was independently obtained in the event that Progress asserts that disclosure of such information or document was a violation of this Order.

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Before Administrative Judges:

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In the Matter of

PROGRESS ENERGY FLORIDA, INC.

(Combined License Application for Levy County
Nuclear Power Plant, Units 1 and 2)

Docket No. 52-029-COL, 52-030-COL

ASLBP No. 09-879-04-COL-BD01

NON-DISCLOSURE AGREEMENT

Under penalty of perjury, I hereby certify that access to Proprietary Documents is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's protective order, dated October 14, 2009, in this proceeding; that I have been given a copy and have read said protective order; and that I agree to be bound by it. 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 that protective order. I acknowledge that a violation of this agreement or the protective order, which incorporates the terms of this agreement, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Board or the Commission may deem to be appropriate.

WHEREFORE, I do solemnly agree to protect such Proprietary Documents, and their contents, as may be disclosed to me in this NRC proceeding, in accordance with the terms of this agreement.⁹

Name (printed): _____

Title: _____

Employed by or Representing: _____

Signature: _____

Date: _____

⁹ For NRC representatives executing this nondisclosure declaration, an executed agreement will be modified to contain the following additional sentence: "My agreement and acknowledgement, however, are not binding on the Nuclear Regulatory Commission's fulfillment of its obligations under the Freedom of Information Act."

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029-COL
) and 52-030-COL
)
(Levy County Nuclear Power Plant)
Units 1 and 2))
)
(Combined License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (PROTECTIVE ORDER GOVERNING NON-DISCLOSURE OF CERTAIN DOCUMENTS CLAIMED TO BE PROPRIETARY) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-029-COL and 52-030-COL
 LB ORDER (PROTECTIVE ORDER GOVERNING NON-DISCLOSURE OF CERTAIN
 DOCUMENTS CLAIMED TO BE PROPRIETARY)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
 this 14th day of October 2009