

ATTACHMENT A

Draft: April xx, 2011

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board Panel

Before the Licensing Board:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 52-040-COL
)	52-041-COL
(Turkey Point Units 6 and 7))	
)	ASLBP No. 10-903-02-COL
(Combined License))	

MEMORANDUM AND ORDER

(Protective Order Governing Disclosure of Proprietary Materials)

Upon consideration of the April 7, 2011 joint request of applicant Florida Power & Light Company (FPL), intervenors Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association (hereinafter referred to collectively as Joint Intervenors) and Citizens Allied for Safe Energy, Inc. (CASE) (all intervenors collectively referred to as Intervenors) and the NRC staff (Staff), for approval of a proposed protective order to govern the use and dissemination of certain confidential information of FPL and its vendors or contractors, we grant the parties' request and adopt the proposed protective order, the terms of which are set forth below.

This protective order governs the disclosure and use in this proceeding of certain documents that applicant FPL claims contain proprietary trade secrets and/or commercial and financial information of FPL or its vendors and contractors.¹ Pursuant to this protective order, counsel, witnesses, employees, consultants, and others representing Intervenors or representing the 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 of the form included as Attachment A to this protective order, shall be permitted access to protected information governed by this protective order under the following conditions:

A. If counsel for FPL 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/or commercial or financial information of FPL or its vendors and contractors that is privileged and confidential, then he or 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 shall hereinafter be referred to as a “proprietary document.” FPL shall (1) prominently mark each proprietary document on the first page with a conspicuous “Proprietary” label and on each page of the document containing such

¹ 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, 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, 2.709, 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.

information; and (2) on or before the later of (a) the date ten (10) days after the date of this protective order, or (b) the date ten (10) days after the date a party requests a copy of the proprietary document, produce a 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.

B. Documents duly listed on the proprietary document log provided by FPL in accordance with paragraph G of the Board's Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order, and Administrative Directives) dated March 30, 2011 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), unless such documents are not deemed proprietary in accordance with Paragraphs D and E of this Order. 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.²

C. The Board will 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

² This protective order, and the good faith representation and designation of documents as proprietary documents by counsel for FPL, 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 proprietary documents and to protect their confidentiality under the Freedom of Information Act (FOIA). However, 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 FPL and the Staff agree is appropriate and make known in the record of this proceeding): Rather than producing proprietary documents for the Staff in their entirety under this protective order, FPL will retain a set of the documents at a mutually acceptable location for inspection by the Staff and potential production, if requested, pursuant to the provisions of 10 C.F.R. § 2.390.

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 notify FPL in writing. Except for good cause shown, such written objection must be delivered to FPL within sixty (60) days of the date that FPL provided the proprietary document to the party. If FPL and the objecting party have been unable to reach a mutually agreeable resolution to the objection within 10 (ten) days after delivery of the objection, the objecting party may, at its discretion, 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 thereafter, FPL 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, 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 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, FPL files a motion for reconsideration, an interlocutory appeal, or a request that the issue be certified to the Commission, and the request for such relief is accompanied, or followed within ten days, by a motion to stay the effectiveness of the Board's ruling, the period during which the document remains protected from unrestricted use shall be extended for (1) the time until the motion to stay is ruled upon by the Board, or (2) while the motion or appeal is under consideration by the Board

or the Commission, or (3) twenty (20) days from the date of filing of the motion to stay, whichever is shorter.

F. Only individual counsel (including, without limitation, student attorneys of the Turner Environmental Law Clinic), consultants, witnesses, employees, and others representing Intervenors or the Staff who have executed the attached non-disclosure declaration may have access to proprietary documents.³ 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, need to know the information contained in the proprietary document in order to carry out their responsibilities in this proceeding. An individual 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.

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

³ Individuals who are authorized to have access to proprietary information in this proceeding in accordance with this protective order and wish to have web-based access to docketed proprietary materials via the agency's Electronic Hearing Docket (EHD) should contact the Office of the Secretary via e-mail at hearingdocket@nrc.gov to obtain a password, which will provide them with access to the non-public portion of the EHD for this proceeding. Alternatively, after being served with such materials via the agency's E-Filing system, parties may wish to print/download those items, which will remain accessible via the link in the service e-mail for a period of 30 days from the date of the service e-mail. Proprietary materials accessed via the EHD or an E-Filing service e-mail must be protected in accord with the terms of this protective order.

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 Submission" filing option on the agency's E-Filing website; and
2. only on counsel for FPL, personnel from the Office of the Secretary on the E-Filing service list for this proceeding, the Staff, a representative of Intervenors who has signed a nondisclosure declaration, and the individual members of the Licensing Board and the Board's law clerks.⁴

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

⁴ The Staff should be served as provided in this paragraph if Staff counsel has either executed a nondisclosure declaration or FPL has provided the subject proprietary document to Staff counsel pursuant to the alternative approach outlined in note 2 supra.

If Staff counsel has not executed and submitted a nondisclosure declaration but wishes to be served with proprietary documents or filings, issuances, transcripts, and exhibits containing proprietary information via the E-Filing system in accordance with paragraph I.1 above, to be added to the service list for such an E-Filing "Non-Public Submission" pursuant to this protective order, Staff counsel needs to advise the Office of the Secretary in a filing made via the "Public Submission" option under the agency's E-Filing system. Likewise, FPL counsel wishing to be served with proprietary documents or filings, issuances, transcripts, and exhibits containing proprietary information via the E-Filing system in accordance with paragraph I.1 above, needs to advise the Office of the Secretary in a filing made via the "Public Submission" option under the agency's E-Filing system.

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 the duty of the presenting party to notify the Board and FPL 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 counsel for FPL 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 FPL 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. If FPL files such an affidavit and a dispute arises as to the eligibility of the document for protection from disclosure, the document shall continue to be treated as proprietary until the Board makes a final determination as to its eligibility for such protection.

L. Proprietary documents shall remain available to all parties 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 FPL or shall destroy that material and advise counsel for FPL of such destruction, 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 FPL an

affidavit stating that, to the best of its actual knowledge, all proprietary documents have been returned or destroyed, or, in the case of filings, transcripts, or 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, transcripts, and 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 counsel for FPL 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 Intervenors, FPL or the Staff from seeking changes in the 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 the 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 document shall have the burden of proving that such information was independently obtained in the event that FPL asserts that disclosure of such information or document was a violation of this protective order.

Q. Each executed nondisclosure declaration shall be served on the parties before it is deemed in effect. This service on the parties shall be accomplished solely through the use of e-mail, except for those individuals upon whom service of proprietary documents, or filings, issuances, transcripts, and exhibits containing proprietary information, can be made via the “Non-Public Submission” option under agency’s E-Filing system, in which case service of the executed nondisclosure declaration on the parties must be made via the “Public Submission” option under agency’s E-Filing system.

R. The Board may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland

April xx, 2011

⁵ Copies of this Order were sent this date by the agency’s e-filing system to: (1) counsel for Joint Intervenors; (2) the representative for CASE; (3) counsel for the Village of Pinecrest; (4) counsel for FPL; and (5) counsel for the NRC Staff.

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NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify that (i) access to “proprietary documents,” as the term is defined in the Atomic Safety and Licensing Board’s protective order, dated April xx, 2011, 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) that 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 that 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: _____