

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 50-346-LR
)	
FirstEnergy Nuclear Operating Company)	ASLBP No. 11-907-01-LR-BD01
)	
(Davis-Besse Nuclear Power Station, Unit 1))	[DATE]

MEMORANDUM AND ORDER

(Protective Order Governing the Disclosure of Protected Information)

Upon Consideration of the Joint Motion for Entry of a Protective Order of the Nuclear Regulatory Commission Staff (NRC Staff), Joint Petitioners¹, and FirstEnergy Nuclear Operating Company (Applicant) (jointly, the Parties), we GRANT the motion and issue this Protective Order, the terms of which are as follows:

1. This Protective Order shall govern the use of all Protected Information produced by, or on behalf of, the Parties in this proceeding. Protected Information consists of information designated by the Parties as sensitive unclassified non-safeguards information (SUNSI), i.e., information whose disclosure could “reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals.”² This Protective Order shall remain in effect until specifically terminated by the Atomic Safety and Licensing Board (“Licensing Board”) or the Commission.
2. This Protective Order does not govern Protected Information owned by third parties and in the possession or control of the Parties (“Third-Party Protected Information”). Should any party seek access to Third-Party Protected Information of another party, then the producing party shall make reasonable efforts to obtain from the owner of the Third-Party Protected Information any necessary approvals for its release, subject to any appropriate nondisclosure provisions. If there are costs associated with acquiring the rights or approval to produce Third-Party Protected Information (e.g., copyright or subscription

¹ Joint Petitioners consist of Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio.

² COMSECY-05-0054, Attachment 2, NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (Oct. 26, 2005). See also NRC Management Directive 12.6, NRC Sensitive Unclassified Information Security Program (Dec. 20, 1999); NRC Regulatory Issue Summary 2005-31, Control of Security-Related Sensitive Unclassified Non-Safeguards Information Handled by Individuals, Firms, and Entities Subject to NRC Regulation of the Use of Source, Byproduct, and Special Nuclear Material (Dec. 22, 2005).

costs), then the producing party will inform the requesting party of the total costs involved, and the requesting party must agree to pay those costs as a condition of being supplied the Third-Party Protected Information. If the requesting party does not agree to pay these costs, then the producing party is not obligated to go through the effort of acquiring approval to produce the Third-Party Protected Information.

3. Individual representatives of, and consultants and experts retained by the Parties shall be entitled to have access to the Protected Information if they execute and deliver the attached Affidavit of Non-Disclosure to the party producing the Protected Information. An individual that does not execute and file the Affidavit of Non-Disclosure is not authorized to access the Protected Information.
4. Other than the filing deadlines set forth in this Order, the terms of this Protective Order do not apply to the NRC Staff, contractors, or NRC legal counsel. The NRC Staff's use of Protected Information is governed by NRC regulations and policies as well as other applicable law.
5. Protected Information shall be treated as confidential by the Parties. Protected Information shall not be used except as necessary for the conduct of a proceeding on the Applicant's License Renewal Application (Application) for the Davis-Besse Nuclear Power Station, Unit 1. A proprietary document subject to this Protective Order shall not be disclosed in any manner to any person except (1) the Commission, the Office of the Secretary, the Board and their respective staffs; (2) the NRC Staff, its counsel, and contractors or consultants employed by the U.S. government, and (3) those persons engaged in the conduct of this proceeding who have executed an Affidavit of Nondisclosure. An individual with access to Protected Information may make copies of and take notes on the Protected Information, but such copies and notes become Protected Information subject to the terms of this Protective Order.
6. The Parties shall maintain all Protected Information in a secure location and shall not provide the Protected Information to anyone not authorized to receive it pursuant to this Order.
7. Legal counsel for the Parties may allow legal staff under their supervision access to the Protected Information as necessary in the course of the representation, provided the legal staff members execute the Nondisclosure Affidavit. Even if no longer engaging in this proceeding, every person who has executed an Affidavit of Non-Disclosure shall continue to be bound by the provisions of this Protective Order and the Affidavit of Non-Disclosure. .
8. Upon the termination of a proceeding on the Application or upon order by the Atomic Safety and Licensing Board or Commission, the Parties shall return all materials containing Protected Information to the party that produced that information, or destroy that information, including copies of filings, official transcripts, and notes that contain Protected Information. Each recipient of Protected Information shall execute an affidavit stating that the Protected Information within its possession or control has been returned

or destroyed, and shall serve a copy of the executed affidavit upon the applicable party within fifteen (15) calendar days.

9. A party that has reason to suspect that Protected Information may have been lost or misplaced, or that Protected Information has otherwise become available to unauthorized persons, shall promptly notify the other parties of those suspicions and their basis and any corrective actions that have been taken to recover the information and prevent future disclosures. If no agreement can be made as to the appropriate corrective actions, the parties will inform the Licensing Board.
10. If, upon receipt and review of a document containing Protected Information, a party determines that such document does not appear to qualify for protection, that party may file a motion with the Board challenging such designation. The motion shall not contain any Protected Information and shall be filed as a "Public Submission" through the EIE; the challenged documents which contain Protected Information shall be filed as an "In-Camera Submission" through the EIE. In this manner, all parties and the public will know when such a motion is filed, but the Protected Information will continue to be withheld from public disclosure. Absent good cause shown, any such motion shall be filed within ten (10) days of receipt of the Proprietary Document. Prior to presenting any such dispute to the Board, the parties shall consult and use their best efforts to resolve it, including, but not limited to, the use of redaction. However, no party is obligated to redact documents containing Protected Information.
11. If a party has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Protected Information in question shall continue to be held in confidence. If the Board rules that a document does not qualify as Protected Information, then the unrestricted use of such documents may begin fifteen (15) days after the Board's decision. If, during such time, the party that asserted protected status of the document files an interlocutory appeal or request that the issue be certified to the Commission, such period of time shall be extended until such time as the Board or the Commission rules on the appeal or request for certification.
12. The Board may alter or amend this Protective Order and resolve disputes. The Parties may seek amendments to this Order or the Non-Disclosure Affidavit by filing a motion for amendment.
13. Pleadings or other documents for filing that contain information protected pursuant to this Order shall be filed electronically using the NRC's E-Filing system. The person filing the document must properly choose the option to prevent the document from being filed in the public docket. Only members of the ASLB, NRC Staff counsel, and authorized persons should be "checked" as recipients on the electronic service list. If any party to a proceeding on this Application intends to submit an exhibit, testimony, or pleading containing Protected Information without using the E-Filing system, the party shall notify the Licensing Board prior to such filing. Nothing in this Order shall preclude a party to a proceeding on the Application from objecting to the use of an exhibit, testimony, or a pleading because it contains Protected Information. The Board may issue additional orders concerning the use of Protected Information at a hearing.

14. Nothing in this Order shall preclude any person from seeking public disclosure of Protected Information in accordance with NRC regulations. Nothing in this Order shall preclude any person from seeking, through discovery in any other administrative or judicial proceeding, information protected by this Order.
15. Any violation of this Protective Order or of any Non-Disclosure affidavit executed hereunder may result in the imposition of sanctions as the Licensing Board or the Commission may deem to be appropriate. Nothing in this Order restricts or waives a party's rights to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Protected Information.
16. If a party wishes to receive Protected Information, then it must send any signed Non-Disclosure Affidavits to the other parties. In this manner, all of the Parties will know the identity of individuals who are authorized to access Protected Information in this proceeding. Any party possessing Protected Information is not required to produce that Information as part of the mandatory disclosure process until it receives one or more signed Non-Disclosure Affidavits from another party. Protected Information may be produced as part of the mandatory disclosures process in paper or electronic form.

It is so ORDERED.

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FirstEnergy Nuclear Operating Company)	ASLBP No. 11-907-01-LR-BD01
)	
(Davis -Besse Nuclear Power Station, Unit 1))	[DATE]

NON-DISCLOSURE AFFIDAVIT

I, _____, being duly sworn, states:

1. I have read the [DATE] 2011 Atomic Safety and Licensing Board Protective Order issued in this proceeding governing access to Protected Information and will comply in all respects with its terms and conditions regarding the Protected Information produced in connection therewith. I will protect and keep confidential all Protected Information in accordance with the terms of this Non-Disclosure Affidavit.
2. I will not disclose Protected Information to anyone except an authorized person. I will protect documents containing or revealing Protected Information in written or recorded form (including any portions of transcripts of in camera hearings, filed testimony, or any other documents that contain or reveal such Protected Information), so that the Protected Information contained therein remains at all times under the control of an authorized person and is not revealed to anyone else.
3. When not under my direct control or the direct control of another authorized person, I will keep and protect all documents containing or revealing Protected Information (including, without limitation, transcripts, pleadings that I may generate, and any notes and copies that I may make) in a secure location.
4. I will know that I am in possession of a document containing Protected Information because each document that contains or reveals Protected Information will be marked "Contains Protected Information" or "Contains Proprietary Information" or "Proprietary" in a conspicuous manner.
5. Neither during nor after this proceeding will I publicly reveal any Protected Information that I receive in this proceeding.
6. I will return or destroy any Protected Information I acquired or generated during this proceeding as required by the Protective Order.

7. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's Protective Order, which incorporates the terms of this affidavit, may result in the imposition of such sanctions on me that the Licensing Board or the Commission may deem to be appropriate. I also acknowledge that if I am involved in the actual or anticipated disclosure of Protected Information, or otherwise violate the terms of this affidavit or the Licensing Board's Protective Order, then the party that produced the information or another affected entity might pursue legal or equitable remedies against me personally.

WHEREFORE, I do solemnly agree to protect and keep confidential such Protected Information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit.

(Name)

Subscribed to and sworn before me this ____ day of _____, 2011.

Notary Public

My commission expires: _____

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In the Matter of)

FIRSTENERGY NUCLEAR OPERATING COMPANY)

(Davis-Besse Nuclear Power Station, Unit 1))

Docket No. 50-346-LR

September 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of the proposed “Protective Order Governing the Disclosure of Protected Information” and “Non-Disclosure Agreement”, and the letter from Alex S. Polonsky to the Board transmitting the Protective Order and Non-Disclosure Agreement were filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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Signed (electronically) by Alex S. Polonsky

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