

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

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

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)	October 19, 2011

PROTECTIVE ORDER

(Governing Non-Disclosure of Documents Claimed to Contain Protected Information)

Pursuant to Section A.5. of the June 15, 2011 Initial Scheduling Order in this proceeding,¹ counsel for FirstEnergy Nuclear Operating Company (Applicant) submitted a proposed protective order on September 28, 2011 that has been approved by all Parties in this proceeding.² After due consideration of the proposed protective order, the public interest in an open and public hearing, and the practical and efficient conduct of this proceeding, the Board issues this Protective Order. This Protective Order shall govern the use of all Protected Information produced by, or on behalf of, the Parties in this proceeding.

1. 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

¹ Board Order (Initial Scheduling Order) (June 15, 2011) at 10 (unpublished).

² Letter from Alex S. Polonsky, counsel for FirstEnergy Nuclear Operating Co., to Licensing Board (Sept. 29, 2011). The Parties to this proceeding are the Nuclear Regulatory Commission Staff (NRC Staff); Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, Joint Intervenors); and FirstEnergy Nuclear Operating Company.

programs, or the personal privacy of individuals.”³ This Protective Order shall remain in effect until specifically terminated by the 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 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.

³ NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (ADAMS Accession No. ML052990146), attached to Letter from Luis A. Reyes, Executive Director for Operations, Re: Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-safeguards Information (SUNSI), COMSECY-05-0054 (Oct. 26, 2005) (ADAMS Accession No. ML052520181).

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 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 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 that contain asserted 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 Board, 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 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. In addition, if documents identified in this proceeding as Protected 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 Protected 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 Order. The party asserting independent knowledge of the contents of Protected Documents or independent access to such documents shall have the burden of proving that such information

was independently obtained in the event that the Disclosing Party asserts that the disclosure of such information or document was a violation of 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 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.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 19, 2011

⁴ A copy of this Notice was sent this date by the NRC's E-Filing System to: (1) the pro se representative for Beyond Nuclear; (2) counsel for Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio; (3) counsel for FirstEnergy; and (4) counsel for the NRC Staff.

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]

NON-DISCLOSURE AFFIDAVIT

I, _____, being duly sworn, state:

1. I have read the October 19, 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 Board's Protective Order, which incorporates the terms of this affidavit, may result in the imposition of such sanctions on me that the 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 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 NRC proceeding, in accordance with the terms of this agreement.

Name (printed): _____

Title: _____

Signature: _____

Date: _____

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

Notary Public

My commission expires: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FIRST ENERGY NUCLEAR OPERATING)
COMPANY)
)
(Davis-Besse Nuclear Power Station, Unit 1))
)

Docket No. 50-346-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of the PROTECTIVE ORDER (Governing Non-Disclosure of Documents Claimed to Contain Protected Information) has been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Edward L. Williamson, Esq.
E-mail: edward.williamson@nrc.gov

William J. Froehlich, Chair
Administrative Judge
E-mail: William.froehlich@nrc.gov

Lloyd B. Subin, Esq.
E-mail: lloyd.subin@nrc.gov
Brian Harris, Esq.

Nicholas G. Trikouros
Administrative Judge
E-mail: nicholas.trikouros@nrc.gov

E-mail: brian.harris@nrc.gov

William E. Kastenberg
Administrative Judge
E-mail: wek1@nrc.gov

Richard S. Harper, Esq.

richard.harper@nrc.gov

Brian P. Newell, Paralegal

E-mail: brian.newell@nrc.gov

Hillary Cain
Law Clerk
E-mail: hillary.cain@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

FirstEnergy Service Company.
Mailstop: A-GO-15
76 South Main Street
Akron, OH 44308
David W. Jenkins, Esq.
E-mail : djenkins@firstenergycorp.com

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PROTECTIVE ORDER (Governing Non-Disclosure of Documents Claimed
to Contain Protected Information)

Morgan, Lewis & Bockius
Pennsylvania Avenue, NW
Washington, D.C. 20004
Stephen Burdick, Esq.
E-mail: sburdick@morganlewis.com
Alex Polonsky, Esq.
E-mail: apolonsky@morganlewis.com
Kathryn M. Sutton, Esq.
E-mail: ksutton@morganlewis.com
Martin O'Neill, Esq.
E-mail: martin.oneill@morganlewis.com
Timothy Matthews, Esq.
E-mail: tmatthews@morganlewis.com
Mary Freeze, Legal Secretary
E-mail: mfreeze@morganlewis.com
Lisa Harris, Legal Secretary
E-mail: lisa.harris@morganlewis.com

Citizens Environmental Alliance (CEA)
of Southwestern Ontario
1950 Ottawa Street
Windsor, Ontario Canada N8Y 197

Green Party of Ohio
2626 Robinwood Avenue
Toledo, Ohio 43610

Don't Waste Michigan
811 Harrison Street
Monroe, Michigan 48161
Michael Keegan
E-mail: mkeegani@comcast.net

Terry J. Lodge, Counsel for CEA, Don't
Waste Michigan, and Green Party of Ohio
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
E-mail: tjlodge50@yahoo.com

Beyond Nuclear
6930 Carroll Avenue Suite 400
Takoma Park, Md. 20912
Kevin Kamps
E-mail : kevin@beyondnuclear.org
Paul Gunter
E-mail : paul@beyondnuclear.org

[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of October 2011