

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

In the Matter of:)
)
DTE ELECTRIC COMPANY) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))

MEMORANDUM AND ORDER
(Protective Order)

Upon consideration of the joint motion of the parties for approval of a proposed protective order to govern the use and dissemination of proprietary or other Protected Materials in this proceeding, in which the DTE Electric Company (“DTE”), the Intervenors,¹ and the NRC Staff concur, we grant the motion and adopt a protective order, the terms of which are as follows:

A. This protective order shall govern the use of all protected materials produced by, or on behalf of, any party to this proceeding, as defined in Paragraph C below. Notwithstanding any order terminating this proceeding, this protective order shall remain in effect until specifically modified or terminated by the Atomic Safety and Licensing Board (“ASLB” or “Licensing Board”) or the Commission.

B. A participant may designate as Protected Materials information (1) that is of a type customarily held in confidence by its owner; (2) for which there is a rational basis for having customarily held it in confidence; (3) that has, in fact, been kept in confidence; and (4) that is not

¹ Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronardo, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman (collectively “Intervenors”).

found in public sources. *See Kansas Gas and Electric Co.* (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 416-17 (1976).

C. Definitions – For purposes of this protective order:

1. The term “party” shall mean DTE, the Intervenors, or any member thereof, and the NRC Staff. However, the provisions of this protective order do not restrict the use by NRC Staff counsel, witnesses, employees, consultants, and others representing the NRC 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, NRC 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.

2. The term “materials” means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

3. The term “protected materials” means:

a. materials provided by a party pursuant to mandatory disclosure obligations or in response to discovery requests and designated by such party in writing as “protected materials;”

b. any information contained in or obtained from such designated protected materials

c. any other materials that are made subject to this protective order by the Licensing Board, by the Commission, by any court or other body having appropriate authority, or by agreement of the parties;

d. notes of protected materials; and

e. copies of protected materials

The term “protected materials” does not include:

a. any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court, or

b. information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this protective order or in violation of other applicable obligations of non-disclosure.

4. The term “notes of protected materials” means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses protected materials described in paragraph C.3 above. Notes of protected materials are subject to the same restrictions provided in this protective order for protected materials except as specifically provided in this protective order.

5. The term “nondisclosure declaration” shall mean the declaration included as Attachment A to this protective order, which persons who have been granted access to protected materials will use to certify their understanding that such access is pursuant to the terms and restrictions of this protective order, and that such persons have read the protective order and agree to be bound by it. All nondisclosure declarations shall be served on counsel for the parties listed in paragraph C.1 above and the NRC Staff, as provided on the official service list in this proceeding.

6. The term “reviewing representative” shall mean a person who has signed a nondisclosure declaration and who is:

a. an attorney who has made an appearance in this proceeding for a party, except for staff counsel;

b. attorneys, paralegals, and other employees associated for purposes of this case with an attorney described above;

c. an official or employee of a party, or a consultant or expert retained by a party (whether paid or unpaid) assisting or testifying on behalf of a party in this proceeding;

d. a person designated as a reviewing representative by order of the ASLB or the Commission; or

e. court reporters engaged for depositions or record proceedings.

D. Protected materials shall be made available under the terms of this protective order only to parties and only through their reviewing representatives as provided in paragraphs H-L below. The party producing the protected materials shall physically mark each page as “PROTECTED MATERIALS,” “PROPRIETARY,” “CONFIDENTIAL,” or with words of similar import, as

long as the term “Protected Materials,” “Proprietary,” or “Confidential” is included in that designation to indicate that they are protected materials.

E. Protected materials shall remain available to parties until the later of the date that an order terminating this proceeding is no longer subject to judicial review or the date that any other Commission proceeding relating to the protected material is concluded and no longer subject to judicial review. The parties shall, within fifteen (15) days of the later date described above, return the protected materials (excluding notes of protected materials) to the party that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain protected materials, and notes of protected materials may be retained, if they are maintained in accordance with paragraph F below. Within such time period, each participant shall also submit to the producing party an affidavit stating that, to the best of its knowledge, all protected materials and all notes of protected materials have been returned or have been destroyed or will be maintained in accordance with paragraph F below. To the extent protected materials are not returned or destroyed, they shall remain subject to this Protective Order.

F. Parties shall maintain all protected materials in a secure place. Access to these materials shall be limited to those reviewing representatives specifically authorized pursuant to paragraphs I-L below. The parties and their counsel shall be entitled to retain filings, official transcripts and exhibits in this proceeding that contain protected materials and attorney-work product, provided that the parties, their employees, and counsel, and employees of such counsel shall not disclose the portions of filings, official transcripts, exhibits, or attorney-work product containing protected information to any person except pursuant to court order, or agreement with the party or protected third party that produced the protected information.

G. This protective order, and the good faith representation and designation of a document as a proprietary document by 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 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 DTE 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, DTE 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.

H. Protected materials shall be treated as confidential by each party and by the reviewing representative in accordance with the declaration executed pursuant to paragraph K below. Protected materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any matter to any person except a reviewing representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding, in the discretion of the parties after consultation with their counsel. Reviewing representatives may make copies of protected materials, but such copies become protected materials. Reviewing representatives may take notes of protected materials, which shall be treated as notes of protected materials if they disclose the contents of protected materials.

I. Reviewing representatives may not use information contained in any protected materials obtained through this proceeding to give any party or any competitor of any party a commercial advantage.

J. In the event that a party wishes to designate as a reviewing representative a person not described in paragraph C.6 above, the party shall seek agreement from the party providing the protected materials. If an agreement is reached, that person shall be a reviewing representative pursuant to paragraph C.6 above with respect to those materials. If no agreement is reached, the party shall submit the disputed designation to the Licensing Board for resolution.

K. A reviewing representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to protected materials pursuant to this protective order unless the reviewing representative has first executed a nondisclosure declaration. A reviewing representative must provide counsel for the party asserting confidentiality with a copy of each executed nondisclosure declaration before the party will disclose any protected material to that reviewing representative.

L. Attorneys qualified as reviewing representatives are responsible for using their reasonable best efforts to ensure that persons under their supervision or control comply with this protective order, provided that an attorney for a party shall not be held liable for violations of this Order by a party or other reviewing representatives.

M. Any reviewing representative may disclose protected materials to any other reviewing representative as long as the disclosing reviewing representative and the receiving reviewing representative have both executed a nondisclosure declaration. In the event that any reviewing representative to whom the protected materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a

reviewing representative under paragraph C.6 above, access to protected materials by that person shall be terminated. 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 this protective order and the declaration.

N. Subject to paragraph U below, the ASLB shall resolve any disputes arising under this protective order. Prior to presenting any dispute under this protective order to the ASLB, the parties to the dispute shall use their best efforts to resolve it. Any party that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials whose designation is contested. This protective order shall automatically cease to apply to such materials ten (10) days after the notification is made unless the designator, within said ten-day period, files a motion with the Licensing Board, with supporting affidavits, demonstrating that the materials should continue to be protected. In any challenge to the designation of materials as protected, the burden of proof shall be on the party seeking protection. If the ASLB finds that the materials at issue are not entitled to protection, the procedures of paragraph U below shall apply.

O. All copies of all documents reflecting protected materials that are filed by any party, including any pleadings, testimony, transcripts or exhibits, which refer to protected materials, shall be filed and 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 DTE, personnel from the Office of the Secretary on the E-Filing service list for this proceeding, the Staff,² representatives of

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

Intervenors who have signed nondisclosure declarations, and the individual members of the Licensing Board and the Board's law clerks.

Such documents shall be marked "PROTECTED MATERIALS," "PROPRIETARY," or "CONFIDENTIAL" as specified in paragraph D. Counsel for the producing party shall provide to all parties who request the same, a list of reviewing representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that protected materials are not distributed to unauthorized persons.

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

Q Nothing in this protective order shall be construed as precluding any party from objecting to the use of protected materials on any legal grounds.

R. Nothing in this protective order shall preclude any party from requesting the ASLB, the Commission, or any other body having appropriate authority, to find that this protective order should not apply to all or any materials previously designated as protected materials pursuant to this protective order. The ASLB may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding.

S. Each party governed by this protective order has the right to seek changes in it as appropriate from the ASLB or the Commission, including by stipulation or motion under 10 C.F.R. § 2.323.

T. Nothing in this protective order shall prevent any party from seeking public disclosure of information designated as protected materials, in accordance with NRC regulatory procedures or other applicable law.

U. If the ASLB finds at any time in the course of this proceeding that all or part of the protected materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this protective order for ten (10) days from the date of issuance of the ASLB's decision, and if the party seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional ten (10) days. The parties do not waive their rights to seek additional administrative or judicial remedies after the ASLB's decision respecting protected materials or reviewing representative, or the Commission's denial of any appeal thereof.

V. Nothing in this protective order precludes any party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this protective order.

W. None of the parties waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of protected materials.

X. Protected materials or any other form of information that copies or discloses protected materials shall not be disclosed to anyone other than in accordance with this protective order and shall be used only in connection with this proceeding. Any violation of this protective order and of any nondisclosure declaration executed hereunder shall constitute a violation of an order of the Commission. Any violation of this protective order may result in the imposition of sanctions as the Licensing Board of the Commission may deem to be appropriate, including, but not

limited to, referral of the violation to appropriate bar associations, and other disciplinary authorities.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
DOCKET NO. 52-033-COL
NONDISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that access to protected materials is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's protective order in this proceeding, that I have been given a copy of and have read the protective order, and that I agree to be bound by it. I understand that the contents of the protected materials, any notes or other memoranda, or any other form of information that copies or discloses protected materials shall not be disclosed to anyone other than 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 sanctions as the Licensing Board or the Commission may deem appropriate, including, but not limited to, referral of the violation to appropriate bar associations or other disciplinary authorities.

WHEREFORE, I do solemnly agree to protect such confidential information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (Printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____