

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

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Clinch River Nuclear Site Early Site Permit
Application)

Docket No. 52-047-ESP

ASLBP No. 17-954-01-ESP-BD01

December 11, 2017

PROTECTIVE ORDER

This Protective Order governs the disclosure and use in this proceeding of certain documents that applicant Tennessee Valley Authority (TVA), or any other Participant in this proceeding, claims contain proprietary trade secrets and/or proprietary commercial or financial information.¹ For purposes of this Protective Order, the term “documents” 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,

¹ The provisions of this Protective Order do not restrict the use by U.S. Nuclear Regulatory Commission Staff counsel, witnesses, employees, consultants, and others representing the NRC Staff (NRC Staff) of documents containing protected material that the NRC has received or may receive apart from its role as a litigant in this proceeding (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). Instead, NRC Staff use and disclosure of such documents is governed by 10 C.F.R. §§ 2.390, 9.17, and 9.25, and NRC Management Directive 12.6, “NRC Sensitive Unclassified Information Security Program.” 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, except that such persons are not required to execute a Nondisclosure Agreement and Acknowledgement form.

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. Pursuant to this Protective Order, counsel, witnesses, employees, members, officers, consultants, and others representing a party in this proceeding (all of whom are referred to herein, collectively, as Participants) shall be permitted access to proprietary documents held by another Participant in this proceeding (Initial Holders) otherwise required to be disclosed in accordance with 10 C.F.R. § 2.336(a) 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 the Atomic Safety and Licensing Board (Board) or the U.S. Nuclear Regulatory Commission (Commission).

Those persons who (1) are qualified pursuant to paragraph F of this Protective Order; and have executed a Nondisclosure Agreement and Acknowledgment in the form included as Attachment A to this Protective Order, the terms of which are hereby incorporated herein, shall be permitted access to proprietary information that subject to this Protective Order and is relevant to an admitted contention in this proceeding under the following conditions:

A. If the Initial Holder of proprietary information or its counsel has a good faith belief that a document or portion thereof contains information that qualifies as a trade secret and/or commercial or financial information that is proprietary or confidential under 10 C.F.R. § 2.390(a)(4) and (b)(4)(i)-(v), then the Initial Holder or its counsel may designate such document on its proprietary log as a "proprietary document," and it shall be protected in accordance with the terms and conditions of this Protective Order. Such designation shall take place as follows: the Initial Holder shall (1) prominently mark, with a conspicuous "Contains [insert owner's name] Designated Proprietary Information" label, each proprietary document on the first page and on each other page of the document; and (2) on or before the later of (a) thirty (30) days after the date of this Protective Order, or (b) thirty (30) days after the date a

Participant 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 Participant requesting the proprietary document (as defined in paragraph F below), provided each such representative has signed a Nondisclosure Agreement and Acknowledgment. Upon the request of NRC Staff counsel, the party claiming protected status for a Proprietary Document shall provide an unredacted copy of such document to NRC Staff counsel.

B. Documents that are designated in accordance with paragraph A shall be held in strict confidence pursuant to 10 C.F.R. § 2.390(a)(4) and this Protective Order. This Protective Order, and the good faith representation and designation of documents as proprietary documents by the Initial Holder thereof, serves in lieu of the requirement for an affidavit under 10 C.F.R. § 2.390(b) and allows the NRC Staff to receive proprietary documents and to protect their confidentiality under the Freedom of Information Act. Nothing in this Protective Order shall be interpreted to prevent the NRC or TVA from discharging their obligations to release or retain documents in their possession and control in accordance with, and only to the extent required by, federal regulations or statute.

C. Prior to presenting any dispute arising under this Protective Order to the Board, the parties to the dispute shall consult and endeavor to resolve such dispute, including, but not limited to, the use of redaction. The Board shall resolve any disputes arising under this Protective Order not previously resolved, including those relating to the public release of information in a proprietary document otherwise designated as subject to nondisclosure.

D. Any Participant that objects to the designation of a document as proprietary shall provide a notice of objection to the Initial Holder stating the Participant's objection, and specifying the portions of the document that should be disclosed. Upon such objection, the parties shall have twenty (20) days (the Consultation Period) to engage in good faith efforts to resolve the matter. The objecting party may file a motion with the Board within ten (10) days of the expiration of the Consultation Period. The Initial Holder shall have the burden of showing

that the applicable information in the proprietary document is a trade secret and/or commercial or financial information that is proprietary or 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. Any such objections shall be submitted no later than sixty (60) days before the first scheduled day of hearing. However, in no case may an Intervenor submit such an objection with respect to a document that is not relevant to that Intervenor's own admitted or adopted contention(s).

E. If a Participant files a motion for disclosure under paragraph D above, pending a ruling by the Board, the proprietary document in question shall continue to be held in confidence. If the Board rules that a document does not qualify for the asserted protection, 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, 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.

F. Only individual counsel, consultants, witnesses, employees, members, officers, and others representing a Participant listed in Attachment B who have executed the attached Nondisclosure Agreement and Acknowledgment, and other persons identified in Paragraph H, will be afforded access to proprietary information. Participants may have an additional or substitute person(s) necessary for the preparation of materials for this proceeding be authorized to receive proprietary documents. Participants must advise the Initial Holder by electronic mail of the names of any additional or substitute person(s) for whom access to proprietary information is sought. The notification must certify that the individual to be authorized is either: (a) legal counsel to a Participant; (b) an employee, member, officer, or representative of a Participant; or (c) a consultant, witness, or another individual whose review thereof is necessary

for the preparation of materials for this proceeding. If the Initial Holder agrees to disclose to the additional or substitute designee, the Initial Holder will so notify the Participant, and the individual must execute and serve the attached Nondisclosure Agreement and Acknowledgment prior to receipt of proprietary information. If the Initial Holder declines to disclose to the applicable designee, then the Participant may seek approval from the Board by filing a motion stating that such agreement was sought and declined, and the basis for its belief that such information should be disclosed to the proposed designee. The Initial Holder may challenge such a motion within ten (10) days of receipt of the Participant's filing and the Board will determine the designation of such additional or substitute recipients by further order. Only after the approval of the requested designation by the Board and the individual's execution and filing of the attached Nondisclosure Agreement and Acknowledgment, may such person(s) be granted access to any proprietary information. Nothing in the Protective Order shall be interpreted to waive the existing Order and procedures described in "Tennessee Valley Authority; Clinch River Nuclear Site Early Site Permit Application and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information," 82 Fed. Reg. 16436, 16436-42 (Apr. 4, 2017).

G. Each executed Nondisclosure Agreement and Acknowledgment shall be filed with the Board and served on the other Participants.

H. A proprietary document disclosed pursuant to this Protective Order shall only be used as necessary for the conduct of this proceeding and any further Commission or judicial proceedings in this matter, by approved designees. 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 a Nondisclosure Agreement and Acknowledgment. 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.

I. Counsel, consultants, witnesses, employees, members, officers, and others representing a Participant 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 Nondisclosure Agreement and Acknowledgment, the terms of which are incorporated herein. Even if no longer engaged in this proceeding, every person who has executed a Nondisclosure Agreement and Acknowledgment shall continue to be bound by the provisions of this Protective Order and the attached Nondisclosure Agreement and Acknowledgment.

J. Counsel and others representing a Participant shall take all precautions necessary to assure that proprietary documents and proprietary information are not distributed to unauthorized persons. Counsel and others representing a Participant are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

K. All pleadings, issuances, testimony, exhibits, and correspondence in this proceeding that contain proprietary information shall be treated as confidential, marked in accordance with paragraph A above, and, if served, shall be filed electronically using the E-Filing system. The individual filing the document shall use the Non-Public Submissions option for filing, and shall select as recipients of the document only persons who are authorized to receive information pursuant to this Protective Order. In addition, any document subject to this Protective Order shall include an attached cover sheet bearing prominent markings indicating the attached document contains "Confidential Proprietary Information Subject to Nondisclosure Agreement," and a cover letter that describes the contents of the pleading or correspondence without reference to such information. If the document is to be served on the Board and the parties, the individual filing the document shall include a statement that the filing contains proprietary information in the Document Processing Comments field of the Electronic Information Exchange (EIE). Paper copies of documents subject to this order shall be sent by

U.S. first class, registered, express, or certified mail, internal NRC mail, messenger-courier, or overnight delivery service in a sealed envelope.

L. At any hearing or conference in this proceeding in which a statement is made by a representative of a Participant, 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 and may only be distributed to persons who are authorized to receive such information pursuant to this Protective Order. It shall be the duty of the presenting Participant to notify the Board and the Initial Holder that such testimony or statement will contain proprietary information, at least thirty (30) days prior to the testimony or statement being made.

M. Proprietary documents shall remain available for the purposes of this proceeding until the date that an order terminating this proceeding is no longer subject to judicial review (the Proceeding Termination Date), or as otherwise provided by an adjudicatory order.² The Participants shall, within forty-five (45) days of the Proceeding Termination Date, return all proprietary documents in their possession, or in the possession of their counsel, consultants, employees, members, officers, and agents, to the Initial Holder's counsel or shall destroy that material. Within such time period, each Participant receiving proprietary documents under this Protective Order shall submit to the Initial Holder's counsel an affidavit stating that, to the best of his/her knowledge, all proprietary documents have been returned or destroyed. To the extent that such filings, issuances, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this Protective Order.

² The proceeding may be ongoing with respect to some matters for which no proprietary information is required, while the matters for which proprietary information is required have been resolved. If an adjudicatory order provides that the portion of the proceeding for which proprietary information is required has been concluded, all proprietary documents shall be returned or destroyed in accordance with the procedures set out in this paragraph following the Proceeding Termination Date.

N. Counsel, consultants, employees, members, officers, or any other individuals representing a Participant 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 or following the completion of this proceeding shall notify the Board and the Initial Holder's counsel promptly of such belief and the reasons for it.

O. Any violation of the terms of this Protective Order or a Nondisclosure Agreement and Acknowledgment 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.

P. Nothing in this Protective Order precludes any Participant(s) in this proceeding from seeking changes in this Protective Order from the Board, the Commission, or a court as future circumstances warrant.

Q. Nothing in this Protective Order shall be deemed to preclude any Participant 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 a document or information identified in this proceeding as proprietary comes into the possession of, or is known by any Participant independently of a proprietary document produced in this proceeding, and such knowledge was acquired without violation of law or other requirement applicable to such Participant directing the Participant 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 Participant 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 if the Initial Holder asserts that disclosure of such information or document was a violation of this Protective Order.

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 BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 11, 2017

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Clinch River Nuclear Site Early Site Permit
Application)

Docket No. 52-047-ESP

ASLBP No. 17-954-01-ESP-BD01

NONDISCLOSURE AGREEMENT AND ACKNOWLEDGEMENT

Under penalty of perjury, I hereby agree and acknowledge that (i) access to “proprietary documents,” as that term is defined in the Atomic Safety and Licensing Board’s Protective Order dated December 11, 2017, issued in Docket No. 52-047-ESP, ASLBP No. 17-954-01-ESP-BD01 (Protective Order), may be 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) 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 strict confidence and shall not be disclosed to anyone except in accordance with that Protective Order, and shall be used only for purposes of this proceeding. I acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order, which incorporates the terms of this Nondisclosure Agreement and Acknowledgment, constitutes a violation of an order of the U.S. Nuclear Regulatory Commission and may result in the imposition of such

sanctions as the Atomic Safety and Licensing Board or the U.S. Nuclear Regulatory Commission may deem to be appropriate. I also acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment of the Protective Order shall entitle the Initial Holder or owner of the proprietary document(s) or proprietary information contained therein to seek immediate injunctive relief prohibiting such violation.

WHEREFORE, I do solemnly agree to protect such proprietary documents, and their contents, as may be disclosed to me in this proceeding, in accordance with the terms of the attached Protective Order and this Nondisclosure Agreement and Acknowledgment.

Name (printed): _____

Title: _____

Employed by or Representing: _____

Signature: _____

Executed on (date): _____

ATTACHMENT B

Individuals Approved to Receive Proprietary Documents Upon Execution of
Nondisclosure Agreement and Acknowledgement

Tennessee Valley Authority

Christopher C. Chandler (Counsel for TVA)

Blake J. Nelson (Counsel for TVA)

Ryan Dreke (Counsel for TVA)

Southern Alliance for Clean Energy and Tennessee Environmental Council

Diane Curran (Harmon, Curran, Spielberg & Eisenberg LLP – Counsel for SACE and
TEC)

Dr. Edwin S. Lyman (Expert Witness for SACE and TEC)

M.V. Ramana (Expert Witness for SACE and TEC)

Sara Barczak (Representative of SACE)

Donald Safer (Representative of TEC)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket No. 52-047-ESP
)
(Early Site Permit Application)
for Clinch River Nuclear Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PROTECTIVE ORDER** have been served upon the following persons by Electronic Information Exchange.

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Mail Stop O-16B33
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

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Office of the Secretary of the Commission
Mail Stop O-16B33
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U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
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Dated at Rockville, Maryland
this 11th day of December, 2017

[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission