

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

DUKE ENERGY CAROLINAS, LLC

(Oconee Nuclear Station, Units 1, 2, and 3)

Docket Nos. 50-269-SLR-2
50-270-SLR-2
50-287-SLR-2

August 27, 2024

**DUKE ENERGY CAROLINAS, LLC'S
MOTION FOR CLARIFICATION OF PROTECTIVE ORDERS**

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's ("Board") Initial Prehearing Order,¹ Duke Energy Carolinas, LLC ("Duke") submits this Motion to seek clarification of two protective orders issued by the Board governing the use and reproduction of certain non-public information.² One order pertains to certain Critical Electric/Energy Infrastructure Information ("CEII") (the "CEII Protective Order"),³ and the other pertains to certain *ex parte* communications received by the Board (the "Ex Parte Protective Order") (collectively, the "Protective Orders").⁴ In Duke's view, the Protective Orders contain certain terms that may be

¹ Licensing Board Memorandum and Order (Initial Prehearing Order) (May 8, 2024) (unpublished) (ML24129A147).

² Counsel for Duke certifies that Duke has made a sincere effort to contact the other parties in the proceeding and resolve the issues raised in this motion. Petitioners take no position on this motion and further stated that they may separately seek clarification or reconsideration of the Protective Orders and may comment on the relationship of such request to the instant motion. The NRC Staff does not object to the instant motion.

³ Licensing Board Memorandum and Order (Protective Order Governing Specific Sensitive Unclassified Non-Safeguards Information) (Aug. 19, 2024) (unpublished) (ML24232A213). *See also* Licensing Board Memorandum and Order (Granting Motion to Enter Protective Order) (Aug. 19, 2024) (unpublished) (ML24232A211) ("Order Granting Motion").

⁴ Licensing Board Memorandum and Order (Protective Order Regarding Ex Parte/Separation of Functions Communications) (Aug. 19, 2024) (unpublished) (ML24232A225). *See also* Licensing Board Memorandum and Order (Notice Concerning Ex Parte/Separation of Functions Communications) (Aug. 19, 2024) (unpublished) (ML24232A221).

ambiguous or susceptible to multiple interpretations, on two particular topics, for which further clarification would benefit the parties.⁵

First, Duke seeks clarification regarding the scope of covered information, the intent of the prohibition against use or reproduction of covered information for non-adjudicatory purposes, and the intent of the “independent source” exclusions in the Protective Orders. As explained below, the plain text of those terms could be construed in a manner that would result in significant consequences that the Board did not intend. Second, Duke seeks clarification regarding the impact of any challenges to CEII determinations on the issuance of the Board’s decision on standing and contention admissibility. The Protective Orders are silent on this second logistical matter, whereas clarification of the Board’s expectations would be helpful to the parties. Duke respectfully requests that the Board GRANT this Motion and provide the requested clarifications.

I. THE SCOPE OF COVERED INFORMATION

The protective order originally proposed in the NRC Staff’s Motion to Enter Protective Order, which Duke joined, contained a carefully crafted distinction between the obligations of the parties. Namely, the proposed protective order recognized that all parties (including Beyond Nuclear and Sierra Club, together “Petitioners”) have a legitimate need to access certain non-public information for the purpose of participating in this adjudicatory proceeding; whereas, the NRC Staff and Duke also have a *separate* need to access and maintain that information for other legitimate *non-adjudicatory* purposes. Accordingly, consistent with protective orders issued in other NRC

⁵ For clarity, this motion does not seek clarification of any of the protective order provisions cited in the paragraph starting on page 2 and ending on page 3 of the Board’s August 26, 2024 order; and the signatories of the Duke nondisclosure declarations filed on August 22, 2024, do not wish to withdraw those declarations per the discussion in the paragraph starting on page 3 and ending on page 4 of that order. *See* Licensing Board Memorandum and Order (Regarding Nondisclosure Declaration Filings, Reconsideration/Clarification Motions, Nonpublic Document Redaction, and Marking Nonpublic Documents) at 2–4 (Aug. 26, 2024) (unpublished) (ML24232A225).

adjudicatory proceedings, the proposed protective order distinguished between two categories of possession:

- Authorized Recipients (i.e., individually-named representatives of the Petitioners), who could only use the covered information for adjudicatory purposes and would be required to destroy covered information at the conclusion of the adjudicatory proceeding; and
- Authorized Holders (i.e., any personnel of the NRC and Duke), whose use of the covered information was not limited to adjudicatory purposes and who would not be required to destroy such information at the conclusion of the adjudicatory proceeding, given their ongoing and entity-level need to access such information for legitimate non-adjudicatory purposes.

In issuing the Protective Orders, the Board did not adopt those proposed terms and eliminated the distinction between Authorized Recipients and Authorized Holders. Instead, the Protective Orders ostensibly label all parties as Authorized Holders; but they then exclude the NRC from compliance with most of the terms therein. In practical effect, this arrangement continues to acknowledge the NRC's need to use or reproduce covered information for legitimate non-adjudicatory purposes.⁶ But it does not do the same for Duke. This approach appears to be rooted in the Board's belief that "there is nothing indicating that the CEII information involved would necessarily belong to the applicant."⁷

Based on Duke's understanding of what may be considered covered information, Duke has a reasonable belief that it may encompass: at least some information that was generated by Duke in the first instance as part its ongoing legal and regulatory responsibilities, e.g., historical regulatory correspondence; information intertwined with the Oconee design and licensing bases; and docketed correspondence authored by or issued to Duke by the NRC or other federal agencies. Such information already in Duke's possession is subject to NRC recordkeeping requirements. It likely

⁶ See e.g., CEII Protective Order ¶¶ 2.a & 3, Ex Parte Protective Order ¶¶ 2.a & 3 (exempting the NRC from most requirements).

⁷ Order Granting Motion at 6.

also has been used to develop derivative analyses, procedures, or other documents within and without the scope of NRC jurisdiction. And the direct or indirect use or reproduction of such information may be essential to countless other lawful purposes, including compliance with regulatory requirements. As counsel for Duke explained to the Board during the oral argument on the Motion for Protective Order, Duke likely “has an ongoing business need to access this information in perpetuity to comply with its regulatory obligations.”⁸

Accordingly, if such information is indeed within (and not otherwise excluded from) the scope of the Protective Orders, that would create significant difficulties for Duke. The scope of coverage is generally defined in Paragraph 1 of each of the Protective Orders and includes the following three categories:

- “Identified CEII,” which is defined as “information in a document” that is designated (or pending designation) by the United States Federal Energy Regulatory Commission (“FERC”) as CEII *and* is listed in Appendix 1 to the CEII Protective Order;
- “Board-Designated Information,” which is any participant submission or Board issuance in this proceeding if designated as such by the Board; and
- “Specified Emails SUNSI,” which is “any information” in four specified emails that is designated (or pending designation) by FERC as CEII or otherwise constitutes any form of SUNSI.

As used below, these categories are collectively the “Covered Information.”

The Protective Orders, as currently drafted, expressly prohibit Duke from “us[ing] or reproduce[ing]” Covered Information “except as necessary for the conduct of this proceeding.”⁹ So, for example, if Duke needs to “use” Covered Information to comply with Oconee’s current licensing basis (“CLB”), such use would nominally violate the Protective Orders. The Protective Orders do have “independent source” exclusions, which provide as follows:

⁸ Tr. at 225 (MR. LIGHTY).

⁹ CEII Protective Order at 3 ¶ 4; Ex Parte Protective Order at 3 ¶ 4.

If CEII or Board-Designated Information [or Specified E-Mails SUNSI] comes into the possession of or is known by any participant independent of the access provisions of this Protective Order or outside of this adjudicatory proceeding and such knowledge was acquired without violation of law or other nondisclosure requirements applicable to such participant, *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.¹⁰

However, this may not sufficiently address the scenario contemplated above, in which Duke maintains and uses independently-acquired Covered Information for purposes of CLB compliance. That is because the text of the exclusion makes the “use of [independently-acquired Covered Information] *in this proceeding*” a non-violation. It does not appear to affect the general prohibition (in Paragraph 4 of each of the Protective Orders) against *all non-adjudicatory* uses of the Covered Information. It also does not appear to alter the general requirement (in Paragraph 15 of the CEII Protective Order and Paragraph 13 of the Ex Parte Protective Order) for Duke to “destroy” the Covered Information at the conclusion of the proceeding. Yet, the destruction of Covered Information may very well contravene NRC recordkeeping requirements.

Thus, if the definitions of Covered Information (as provided in Paragraph 1 of each of the Protective Orders) were interpreted as including information for which Duke requires access for legitimate non-adjudicatory purposes; and the prohibitions against non-adjudicatory use (as provided in Paragraph 4 of each of the Protective Orders) were interpreted to make such non-adjudicatory use a violation of the Protective Orders; and the “independent source” exclusions (as provided in Paragraph 19 of the CEII Protective Order and Paragraph 16 of the Ex Parte Protective Order) were interpreted as not applicable to such non-adjudicatory use; that seemingly would place Duke in a “Catch 22” situation—either comply with the Protective Orders and violate other

¹⁰ CEII Protective Order at 9 ¶ 19; Ex Parte Protective Order at 7 ¶ 16.

regulatory requirements, or comply with those regulatory requirements and violate the Protective Orders.

Duke understands that the Board did not intend the Protective Orders to be read as placing Duke in a no-win scenario. Accordingly, Duke respectfully requests clarification on how the Protective Orders should be interpreted in light of these concerns. For example, it would be helpful to understand whether the general prohibition in Paragraph 4 of each of the Protective Orders (prohibiting use and reproduction of Covered Information for non-adjudicatory purposes) should be read to permit otherwise lawful non-adjudicatory use and reproduction; and whether the exceptions in Paragraph 19 of the CEII Protective Order and Paragraph 16 of the Ex Parte Protective Order should be read to deem otherwise lawful uses of independently-acquired Covered Information both inside and outside the adjudicatory proceeding to be non-violative of the Protective Orders.

II. IMPACT OF POTENTIAL CHALLENGES TO CEII DETERMINATIONS ON ISSUANCE OF THE BOARD'S ORDER ON STANDING AND CONTENTION ADMISSIBILITY

Prior to issuance of the CEII Protective Order, the parties appeared to unanimously agree that this adjudicatory proceeding is not the appropriate forum for challenges to CEII designations.¹¹ The Board, however, determined that it has authority to adjudicate such challenges.¹² Accordingly,

¹¹ See Response by Beyond Nuclear and Sierra Club to Joint Motion for Protective Order at 8 (July 29, 2024) (ML24211A183) (Petitioners stating that if they “decide to seek disclosure of the redacted information, they will use the NRC’s procedures in 10 CFR Part 9, and may appeal to federal district court as permitted by the FOIA.”); Order Granting Motion at 9–10 (citing Tr. at 181) (NRC Staff counsel concluding that the Board “would not have the authority” to overturn a CEII designation); Tr. at 171 (Duke counsel stating “We agree that the agency’s normal FOIA process is the appropriate agency process” for raising such challenges).

¹² See Order Granting Motion at 9–13 (reaching this conclusion primarily because the NRC can decide whether to invoke FOIA exemption 3 and because precedent exists for presiding officers to adjudicate, under 10 C.F.R. § 2.390, disputes on whether third-party commercial information qualifies as proprietary under FOIA exemption 4). *But see* 10 C.F.R. § 2.390 (providing criteria for determining whether third-party commercial information qualifies as proprietary under FOIA exemption 4, but providing no such criteria for any other FOIA exemption); Tr. at 171 (MR. LIGHTY: “unlike challenges to proprietary information designations, . . . we are unaware of any regulation or delegation of authority to the board to adjudicate other types of SUNSI determinations. . . .”); NRC Management Directive 3.4, Release of Information to the Public (prescribing the process through which the NRC would normally decide whether to invoke FOIA exemptions).

Paragraphs 11 and 12 of the CEII Protective Order contain a process for “Contesting the Status of Protected Information.” During the pendency of any such challenges or other related legal proceedings, “the Identified CEII or Board-Designated Information will continue to be withheld from public disclosure.”¹³ However, it is unclear from this provision whether the pendency of such a challenge also would result in the Board continuing to withhold the issuance (either public or non-public) of its ruling on standing and contention admissibility. Accordingly, Duke respectfully requests clarification on whether that circumstance would cause further delays to this proceeding.

III. CONCLUSION

Duke respectfully requests that the Board GRANT this Motion and provide additional clarification regarding the scope and intent of the Protective Orders.

Respectfully submitted,

Signed (electronically) by Ryan K. Lighty

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Dated in Washington, DC
this 27th day of August 2024

¹³ CEII Protective Order at 6.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Duke Energy Carolinas, LLC’s Motion for Clarification of Protective Orders” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

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