

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

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary Arnold
Nicholas G. Trikouros

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 2)

Docket No. 50-341

ASLBP No. 14-933-01-LR-BD01

April 20, 2015

PROTECTIVE ORDER

DTE Electric Company, with the agreement of NRC Staff, submitted a proposed protective order to govern the use and distribution of confidential materials in this proceeding.¹ The Intervenors did not respond to this motion. We grant the motion and adopt a protective order, the terms of which are as follows:

- A. This protective order governs the use of all protected materials produced by, or on behalf of, any party in this proceeding. Even after this proceeding is terminated, this protective order will remain in effect unless specifically modified or terminated by the Board or the Commission.
- B. A party 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 found in public sources.²

¹ Joint Motion for Protective Order (Apr. 2, 2015).

² 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. “Party” means DTE Electric Company (“DTE”) and its employees, the Intervenor and their members,³ and the NRC Staff.
2. Other than the filing deadlines, the terms of this Protective Order do not apply to the NRC Staff, its contractors, or its legal counsel. NRC regulations, policies, and other applicable law govern the NRC Staff’s use of protected materials.
3. “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 other changes), and drafts.
4. “Protected materials” means:
 - i. Materials provided by a party as a mandatory disclosure or in response to discovery requests, designated by that party in writing as “protected materials,” and that meet the definition in Paragraph B;
 - ii. Any information contained in or obtained from any designated protected materials;
 - iii. Any other materials that are made subject to this protective order by the Board, the Commission, any court or other body having appropriate authority, or by agreement of the parties;

³ Don’t Waste Michigan, Citizens Environment Alliance of Southwestern Ontario, Beyond Nuclear, and Citizens’ Resistance at Fermi 2.

- iv. Notes of protected materials; or
- v. Copies of protected materials.

“Protected materials” does not include:

- vi. 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
 - vii. 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.
5. “Notes of protected materials” means memoranda, handwritten notes, or any other form of information (including information in electronic form) that copies or discloses protected materials. 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.
6. “Nondisclosure declaration” means the declaration included as Attachment A to this protective order. Persons who have been granted access to protected materials must sign the declaration to certify that they have read the protective order and agree to be bound by it. All nondisclosure declarations must be served on counsel for all the parties, as provided on the official service list in this proceeding.
7. “Reviewing representative” means a person who has signed a nondisclosure declaration and who is:
- i. An attorney or pro se Intervenor representative who has filed a notice of appearance in this proceeding, except for NRC staff counsel;
 - ii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney described above;

- iii. An official, member, 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;
 - iv. A person designated as a reviewing representative by order of the Board or the Commission; or
 - v. Court reporters hired for depositions or record proceedings.
- D. Protected materials will be made available under the terms of this protective order only to parties and only through their reviewing representatives as provided in paragraphs H through L. The party producing the protected materials must physically mark each page as "PROTECTED MATERIALS," "PROPRIETARY," "CONFIDENTIAL," or with words of similar meaning, as long as the term "Protected Materials," "Proprietary," or "Confidential" is included in the label to show that they are protected materials.
- E. Protected materials will remain available to parties until: (1) the date that an order terminating this proceeding is no longer subject to judicial review or (2) the date that any other Commission proceeding related to the protected material is finished and no longer subject to judicial review, whichever comes later. The parties must, within 15 days of the date described above, return the protected materials to the party that produced them, or must destroy the materials, except that the party may keep copies of filings, official transcripts and exhibits in this proceeding that contain protected materials, and notes of protected materials, if they are maintained in accordance with paragraph F. Within that same time period, each party must 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, have been destroyed or will be maintained in accordance with paragraph F. If protected materials are not returned or destroyed, they remain subject to this Protective Order.

- F. Parties must maintain all protected materials in a secure place. Access to these materials must be limited to those reviewing representatives specifically authorized according to paragraphs I through L. The parties and their counsel are entitled to retain filings, official transcripts, exhibits, and attorney-work product in this proceeding that contain protected materials, provided that the parties, their employees, and counsel, and employees of such counsel may 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, satisfies 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.
- H. Protected materials must be treated as confidential by each party and by the reviewing representative in accordance with the nondisclosure declaration executed pursuant to paragraph K. Protected materials must not be used except as necessary for the conduct of this proceeding, nor may 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 or pro se representative. Reviewing representatives may make copies of protected materials, but these copies become protected materials. Reviewing representatives may take notes of protected materials, which they must treat as protected materials if the notes contain the contents of protected materials.
- I. Reviewing representatives may not use any protected materials obtained in this proceeding to give any party or any competitor of any party a commercial advantage.

- J. If a party wishes to designate as a reviewing representative a person not described in paragraph C.7, the party must seek agreement from the party providing the protected materials. If an agreement is reached, that person will be a reviewing representative with respect to those materials. If no agreement is reached, the party must submit the disputed designation to the Board for resolution.
- K. A reviewing representative is not permitted to inspect, participate in discussions regarding, or otherwise access protected materials unless the reviewing representative has first executed a nondisclosure declaration. A reviewing representative must provide counsel or representative for the party asserting confidentiality with a copy of each signed nondisclosure declaration before the party is required to disclose any protected material to that reviewing representative.
- L. Attorneys and pro se representatives 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. An attorney or pro se representative is not responsible for violations of this Order by a party or other reviewing representatives.
- M. Any reviewing representative may share protected materials with other reviewing representative as long as both have executed nondisclosure declarations. 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.7, access to protected materials by that person must be terminated. Even if no longer engaged in this proceeding, every person who has executed a nondisclosure declaration is still bound by the provisions of this protective order and the declaration.
- N. Subject to paragraph U, the Board will resolve any disputes arising under this protective order. Before presenting a dispute to the Board, the parties to the dispute must use their

best efforts to resolve it. Any party that contests the designation of materials as protected must notify the party that provided the protected materials by specifying in writing the materials whose designation is contested. This protective order will automatically cease to apply to such materials 10 days after the notification is made unless the designator, within that 10-day period, files a motion with the 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 is on the party seeking protection. If the ASLB finds that the materials at issue are not entitled to protection, the procedures of paragraph U will 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, must be filed and served:
1. Via the Commission's E-Filing electronic submittal system, but must 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 NRC Staff, representatives of Intervenor who have signed nondisclosure declarations, and the individual members of the Licensing Board and the Board's law clerks.

Such documents must be marked "PROTECTED MATERIALS," "PROPRIETARY," or "CONFIDENTIAL" as specified in paragraph D. If the party making the filing requests it, counsel for the producing party must provide a list of reviewing representatives who are entitled to receive such material. Counsel and pro se representatives must take all reasonable precautions necessary to ensure 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 must 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, will be withheld from distribution to the public. It is 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 precludes any party from objecting to the use of protected materials on any legal grounds.
- R. Nothing in this protective order precludes any party from requesting the Board, 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 Board 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 Board or the Commission, including by stipulation or motion under 10 C.F.R. § 2.323.
- T. Nothing in this protective order prevents 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 Board finds at any time in the course of this proceeding that all or part of the protected materials need not be protected, those materials will, nevertheless, be subject to the protection afforded by this protective order for 10 days from the date of issuance of the Board's decision, and also for an additional 10 days if the party seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission.

The parties do not waive their rights to seek additional administrative or judicial remedies after the Board'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 must not be disclosed to anyone other than in accordance with this protective order and must be used only in connection with this proceeding. Any violation of this protective order and of any nondisclosure declaration is a violation of an order of the Commission. Any violation of this protective order may result in the imposition of sanctions as the Board 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.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 20, 2015

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
DOCKET NO. 50-341

NONDISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify that I understand 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 must 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, is a violation of an order of the Nuclear Regulatory Commission and may result in sanctions as the 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: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of |) | |
| |) | |
| DTE ELECTRIC COMPANY |) | Docket No. 50-341-LR |
| |) | |
| (Fermi 2) |) | |
| |) | |
| (License Renewal) |) | |

CERTIFICATE OF SERVICE

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

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

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: ronald.spritzer@nrc.gov

Gary S. Arnold
Administrative Judge
E-mail: gary.arnold@nrc.gov

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

Kathleen Schroeder, Law Clerk
E-mail: kathleen.schroeder@nrc.gov

Nicole Pepperl, Law Clerk
E-mail: nicole.pepperl@nrc.gov

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

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Catherine Kanatas, Esq.
Brian Harris, Esq.
Edward Williamson, Esq.
Jeremy Wachutka, Esq.
Joseph Lindell, Esq.
John Tibbetts, Paralegal
Email: catherine.kanatas@nrc.gov
brian.harris@nrc.gov
edward.williamson@nrc.gov
jeremy.wachutka@nrc.gov
joseph.lindell@nrc.gov
john.tibbetts@nrc.gov

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

FERMI 2 (Docket No. 50-341-LR)
PROTECTIVE ORDER

DTE Energy Company
One Energy Plaza, 688 WCB
Detroit, MI 48226
Bruce R. Maters, Assistant General Counsel
Jon P. Christinidis, Esq.
E-mail: matersb@dteenergy.com
christinidisj@dteenergy.com

Counsel for the Applicant:

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Tyson R. Smith, Esq.
Darani Reddick, Esq.
Carlos L. Sisco, Paralegal
E-mail: trsmith@winston.com
dreddick@winston.com
csisco@winston.com

Intervenor: Citizens' Resistance At Fermi 2
(CRAFT)

Jessie Pauline Collins
17397 Five Points Street
Redford, MI 48240
E-mail: jessiepauline@gmail.com

Intervenors: Don't Waste Michigan, Citizens
Environment Alliance of Southwestern Ontario and
Beyond Nuclear

Terry J. Lodge, Esq.
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
Email: tjlodge50@yahoo.com

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

Kevin Kamps
Beyond Nuclear
6930 Carroll Avenue, Ste. 400
Takoma Park, MD 20912
E-mail: kevin@beyondnuclear.org

[Original signed by Brian Newell ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of April, 2015