

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

Before Administrative Judges:

Paul S. Ryerson, Chairman
E. Roy Hawkens
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Enforcement Action)

Docket Nos. EA-20-006 and EA-20-007

ASLBP No. 21-969-01-EA-BD01

February 8, 2021

PROTECTIVE ORDER

(Governing Non-Disclosure of Certain Documents Claimed to be Confidential)

Upon consideration of the joint motion¹ of the Staff of the Nuclear Regulatory Commission (“Staff”)² and counsel for the Tennessee Valley Authority (each a “Party” and collectively the “Parties”) for approval of a proposed Protective Order to govern the use and dissemination of confidential materials in this proceeding, the Board grants the motion and issues a Protective Order, the terms of which are as follows:

¹ Joint Submittal of Proposed Protective Order Regarding Confidential Documents (Feb. 3, 2021).

² The provisions of this Protective Order do not restrict NRC counsel, witnesses, employees, consultants and others representing the NRC Staff from using documents containing protected material that the 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 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). Rather, NRC’s use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. 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 Subpart G and this Protective Order.

A. Terms and Conditions of Protective Order

1. If a Party maintains that information (regardless of how it is generated, stored, or maintained) or tangible things that are otherwise required to be disclosed, qualify for protection under 10 C.F.R. §§ 2.390(a)(4), 2.390(a)(5)–(6), 2.390(b)(4)(i)–(v), or 2.705(c), then such Party may designate it as CONFIDENTIAL, and it shall be protected in accordance with the terms of this Protective Order. Such documents shall hereinafter be referred to as “Confidential Documents.”
2. Upon request of a Party, the Party claiming protected status for a Confidential Document shall provide an unredacted copy of such document to the requesting Party. Each such Confidential Document produced shall be marked on the first page with a conspicuous “CONFIDENTIAL” label. The Parties and their Authorized Recipients receiving such Confidential Documents shall hold and use such documents in confidence and in compliance with the terms and conditions of this Order.³
3. Only individual counsel, consultants, witnesses, employees, and other representatives of the Parties (the “Authorized Recipients”) may have access to Confidential Documents. Confidential Documents shall only be used as necessary for the conduct of this proceeding. Confidential Documents shall not be disclosed in any manner to any person except (a) the Board and its staff and (b) Authorized Recipients engaged in the conduct of this proceeding who, in the reasonable opinion

³ This Order, and the good faith representation and designation of documents as Confidential Documents by counsel for the producing party, 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 Confidential Documents and to protect their confidentiality under Freedom of Information Act. Nothing in this Order shall be interpreted to prevent the NRC from discharging its obligation to determine the release or retention of documents in its possession and control in accordance with federal regulation or statute.

of the Party who has received the Confidential Documents, need to know the information contained in the Confidential Documents in order to carry out their responsibilities in this proceeding. Individuals with access to Confidential Documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become Confidential Documents subject to the terms of this Protective Order.

4. Authorized Recipients who receive documents subject to the terms of this Protective Order shall maintain the confidentiality of the information contained therein as required in this Protective Order.
5. In the event a Party is requested or required under the Freedom of Information Act, by legal process, or by binding order to disclose a Confidential Document(s) to a third party, the Party subject to such a request or requirement shall object to the disclosure of the Confidential Document(s) to the greatest extent possible under the Freedom of Information Act.
6. Counsel shall take all reasonable precautions necessary to assure that Confidential Documents and the information contained therein are not distributed to unauthorized persons and that persons under their supervision or control comply with this Protective Order.
7. All pleadings, testimony, exhibits and correspondence in this proceeding that include a Confidential Document or contain information derived from such a document shall:
 - a. Be served electronically using the NRC Electronic Submittal instructions applicable to submissions governed by the Protective Order and designating for electronic service only to those representatives of the Parties who are authorized to receive the Confidential Document under this Order, the Board, and the Secretary;

- b. Include an attached cover sheet identifying the pleading, testimony, exhibit or Correspondence as containing a Confidential Document or information derived therefrom;
 - c. Specifically designate, by highlighting, marginalia, or other appropriate markings, the portion of the pleading, testimony, exhibit, or correspondence, that contains a Confidential Document or information derived therefrom; and be accompanied by a version of the pleading, testimony, exhibit, and/or correspondence with the confidential information redacted unless the Party filing the pleading, testimony, exhibit and/or correspondence in good faith determines that such a redacted version cannot be prepared without undue burden or expense and so advises the Board and the other Party.
- 8. At any hearing or conference in this proceeding in which a statement is made by the representative of a Party, or a witness is questioned, concerning a Confidential Document or information contained therein, the statement or testimony shall be given in camera or under other suitable conditions as this 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 Party whose statement or testimony contains information contained in a Confidential Document to notify the Board and the Parties that such testimony or statement will contain confidential information, prior to the testimony or statement being made.
- 9. Confidential Documents shall remain available until the date that an order terminating this proceeding is no longer subject to judicial review. Upon request by a Party, the other Party shall, within fifteen (15) days of the date described above, return the Confidential Documents to counsel for the party that provided them or shall destroy such documents and shall submit to counsel for the disclosing Party an affidavit stating that, to the best of its knowledge, all Confidential Documents have

been returned or destroyed. Pending their return or destruction, Confidential Documents shall remain subject to the provisions of this Protective Order.

10. Authorized Recipients or any other individuals representing a Party who have reason to believe that Confidential Documents may have been lost or misplaced or may have otherwise become available to unauthorized persons shall promptly notify the Board and counsel for the disclosing Party of their concerns and the reasons for them.
11. Any violation of the terms 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.

B. Rights Unaffected by the Protective Order

1. The Parties may, by motion, seek an amendment, modification, or extension of this Protective Order. The Board shall resolve any disputes arising under or relating to this Protective Order. In any such dispute the party claiming a privilege, bears the burden of proving that the privilege properly applies. Prior to presenting any dispute under this Protective Order to the Board, the Parties shall use their best efforts to resolve the dispute. Each Party shall provide a justification for determining a document is Confidential within five (5) days of the other Party's request for such a justification. Each Party has ten (10) days after receipt of the justification to file a motion to compel production of the document.
2. If a Party has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Confidential Document in question shall continue to be held in confidence. If the Board rules that a document does not qualify as a Confidential Document, then the unrestricted use of such documents may begin five (5) days after the Board's decision.

3. Nothing in this Protective Order shall be construed as or shall result in waiver, limitation or restriction of any right (a) to challenge the designation of any documents or materials as privileged, or (b) to object to the admission or relevance of any privileged material on any legal grounds.
4. The Parties agree that production of privileged or work-product protected documents, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case. The producing party must notify the receiving party promptly, in writing, upon discovery that a privileged or protected document has been produced. Upon receiving written notice from the producing party that privileged and/or work product material has been produced, all such information, and all copies thereof, shall be destroyed and the receiving party shall not use such information for any purpose. The receiving party shall also attempt, in good faith, to retrieve and return or destroy all copies of the documents in electronic format. Any analyses, memoranda or notes which were internally generated based upon such produced information shall be destroyed.
5. Nothing in this Protective Order shall preclude a request that the Board, the Commission, or any other body having proper authority, find that this Protective Order should not apply to any or all information previously designated as confidential pursuant to this Protective Order.
6. Nothing in this Protective Order shall be deemed to preclude a Party from independently seeking, through discovery in any other administrative or judicial proceeding, information or materials produced in this proceeding under this Protective Order.
7. The right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Confidential Documents is not waived by this Protective Order.

8. 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
February 8, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PROTECTIVE ORDER (Governing Non-Disclosure of Certain Documents Claimed to be Confidential)** have been served upon the following persons by Electronic Information Exchange.

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TENNESSEE VALLEY AUTHORITY
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Dated at Rockville, Maryland,
this day 8th of February 2021.

Office of the Secretary of the Commission