**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 19**

**THE BOEING COMPANY**

**and** **Case 19-CA-32431**

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS**

## ACTING GENERAL COUNSEL'S SUPPLEMENTAL POSITION REGARDING PROTECTIVE ORDER

On July 29, 2011, Administrative Law Judge Clifford Anderson directed the parties to submit to him any agreed protective order or, absent agreement, their positions and supporting arguments concerning Respondent's motion seeking the Administrative Law Judge's approval of a protective order. Unfortunately, despite the parties' best efforts, they have been unable to reach agreement as to a protective order. Accordingly, the Acting General Counsel submits this supplemental pleading supporting its proposed protective order and rebutting Respondent's argument in support of its motion.

As explained below, based on Respondent's partial showing of good cause for a limited protective order, the Acting General Counsel has modified its previously proposed protective order. The Acting General Counsel's modified proposed protective order (the "AGC Proposal") is attached as Exhibit A. As set forth fully in the AGC Proposal, the Acting General Counsel proposes that upon disclosure of subpoenaed documents, Respondent identify the documents that it, in good faith, believes must be

treated as confidential. The Acting General Counsel and the Charging Party would then have the opportunity to challenge Respondent's confidentiality designations. During the hearing, Respondent could move for documents containing confidential information and related testimony to be sealed. Such information would then be provisionally sealed, and disputes concerning whether such information should remain permanently sealed would be resolved at the closure of the hearing. The Acting General Counsel respectfully requests that the Administrative Law Judge adopt the attached AGC Proposal because it:

(1) includes a requirement that Respondent establish good cause for the protection of information not otherwise adequately addressed in the declaration submitted by Respondent in support of its motion for approval of a protective order;

(2) respects the role of the Administrative Law Judge in conducting unfair labor practice hearings and the role of the district court in enforcing subpoenas;

(3) ensures that the right of the Charging Party International Association of Machinists and Aerospace Workers District Lodge 751 ("Charging Party" or the "Union") to participate fully in this unfair labor practice hearing will not be unjustly impaired;

(4) sets forth a procedure to be followed in the event that a non-party seeks to intervene to challenge the sealing of evidence; and

(5) avoids imposing improper and unnecessary restrictions on the receiving parties.

## I. THE AGC PROPOSAL APPROPRIATELY REQUIRES RESPONDENT TO ESTABLISH GOOD CAUSE FOR PROTECTION OF DOCUMENTS

As explained in detail in the Acting General Counsel's original response to Respondent's request for a protective order (the "AGC Response"), Respondent must be required to submit to the Administrative Law Judge a specific factual showing sufficient to establish good cause for subjecting subpoenaed documents to a protective

order. (*See* AGC Response at 2-6, and cases cited therein) As of the filing of the AGC Response, Respondent had not submitted any factual showing of cause to the Administrative Law Judge. Shortly after the filing of the AGC Response, Respondent submitted a declaration signed by Stephen Bodensteiner, the director of business operations for production integration for Respondent's 787 program. In that declaration, Mr. Bodensteiner identified certain categories of allegedly confidential and proprietary information contained in documents responsive to the subpoenas served on Respondent.

As stated by Counsel for the Acting General Counsel during oral argument concerning Respondent's motion for approval of a protective order, the Acting General Counsel is satisfied that, based on the factual information set forth in the declaration of Mr. Bodensteiner, there is no longer a need for Respondent to produce a log or other showing of good cause supporting its initial designation of certain limited categories of information as confidential, as described herein. In particular, there is no longer a need for Respondent to produce a log or other showing supporting its initial designation of documents containing the following types of information as confidential: "proprietary aerospace technology," "proprietary design attributes," and "profit margins" and "production schedules" for the 787. (Exhibit A, Section I—"Non-Logged Documents" and Section II-B-1)

However, because Respondent has yet to make a sufficient showing of good cause for its initial designation of all other categories of information as confidential, and in view of the fact that Respondent has not yet identified any particular confidential document, the Acting General Counsel's proposed order continues to require

Respondent to produce a log or other showing of good cause for such designations, contemporaneously with its production of the information. (Exhibit A, Section II-B-1)

## II. THE AGC PROPOSAL RESPECTS THE APPROPRIATE ROLES OF THE ADMINISTRATIVE LAW JUDGE AND THE DISTRICT COURT

In its motion for approval of a protective order and its oral argument, Respondent has requested that, instead of issuing a protective order himself, the Administrative Law Judge "approve" a protective order for entry by the district court. An Administrative Law Judge's "approval" of a district court order, as far as Counsel for the Acting General Counsel is aware, would be unprecedented. It would also be inappropriate.

As explained in the AGC Response to Respondent's request for a protective order, it is the Administrative Law Judge's responsibility to issue a protective order in appropriate circumstances. (*See* AGC Response at 7-9, and cases cited therein) Respondent has asserted that the Administrative Law Judge should not issue a protective order in this case because the Board lacks the power to enforce a protective order. However, as acknowledged by Respondent on page 18 of its motion for approval of a protective order, tribunals inherently have the power to enforce the protective orders they have issued. Indeed, in *United Parcel Service*, 304 NLRB 693, 693-94 (1991), the Board specifically contemplated sanctioning an individual who allegedly violated a protective order issued by an Administrative Law Judge. Although the Board ultimately found in *United Parcel Service* that the alleged violation of the protective order did not warrant sanctions, that case demonstrates that protective orders issued by Administrative Law Judges are properly enforceable.

Moreover, we recognize that Respondent has the power to refuse to produce subpoenaed documents it alleges are confidential until it has been ordered to do so by a

district court enforcing the Administrative Law Judge's order (or order of the Board in the event of any Special Appeals). The AGC Proposal, however, ascribes the legally appropriate role to the Administrative Law Judge in issuing and interpreting his protective order. That is, the procedures set forth in the AGC Proposal would govern the manner and order in which the Administrative Law Judge would address confidentiality claims, and the proposal does not seek to alter the legislatively designated avenues for appeal from rulings of the Administrative Law Judge or enforcement in district court. Specifically, under the AGC Proposal, counsel for the AGC and the Charging Party would have sixty days from the date disclosure is completed to challenge Respondent's confidentiality designations. If the parties are unable to resolve their differences within five days of the date of challenge, the matter would be submitted to the Administrative Law Judge for ruling. And, if within five days of such ruling, Respondent notifies Counsel for the AGC of its objections to the ruling, then Counsel for the AGC will seek enforcement of the relevant subpoenas, and the matter will be resolved by the district court. On the other hand, if Counsel for the AGC or the Charging Party object to the Administrative Law Judge's rulings on particular documents, those rulings could be appealed to the Board pursuant to the Board's Rules and Regulations and, in an orderly fashion, subjected to review by the district court pursuant to its limited authority under Section 11(2) of the Act. As explained in the AGC Response, the district court's role in reviewing rulings of the Administrative Law Judge and the Board would, of course, be limited and deferential. (*See* AGC Response at 7-9, and cases cited therein)

By contrast, Respondent's Proposal includes a provision relating to the timeframe for challenges to Respondent's designation of documents as confidential that is illogical and creates the potential for serious and unnecessary inefficiencies. (Respondent's Proposal, Section 17-A) In particular, Respondent's Proposal requires notification of disputes regarding Respondent's confidentiality designations be made within 15 days from Respondent's notice of "substantial compliance" with the subpoenas. The parties would then have 5 days from the date of notification of the disputes to confer about the disputes. Unresolved disputes would need to be submitted to the Administrative Law Judge for ruling within 8 days of notice of "substantial compliance." After the ruling by the Administrative Law Judge, the parties would have 5 days to seek review in district court. Thus, it appears that Respondent's Proposal would require that disputes be submitted to the Administrative Law Judge within 8 days of "substantial compliance," before the 15 days for submission of notifications of dispute had even run. Even if the dates in Respondent's Proposal lined up properly, linking deadlines for challenging Respondent's confidentiality designations with the date of notification of "substantial compliance" would create a real possibility that additional subpoenaed documents could be disclosed after the procedure for challenging the confidential designation of the documents initially disclosed by Respondent is already underway. Respondent's Proposal would, therefore, undermine the efficiency of the Acting General Counsel's proposed approach for addressing claims of confidentiality.

Thus, the Acting General Counsel respectfully requests that the Administrative Law Judge adopt the procedure set forth in the AGC Proposal because that proposal

provides for the Administrative Law Judge to make rulings on confidentiality claims without inappropriately altering the available avenues of appeal.

## III. THE AGC PROPOSAL ENSURES THAT THE CHARGING PARTY'S RIGHT TO PARTICIPATE FULLY IN THIS HEARING WILL NOT BE UNJUSTLY IMPAIRED

In its motion for approval of a protective order and its oral argument, Respondent claims it should be permitted to withhold certain – thus far unidentified – documents from the Charging Party because they contain confidential information that, if disclosed to the Charging Party's bargaining agents, would result in an "unfair advantage" in collective bargaining in 2012. Respondent has not made any showing that any particular documents are properly withheld from the Charging Party on that basis.

In his declaration submitted in support of Respondent's motion for approval of a district court protective order, Mr. Bodensteiner provides scant support for withholding any information from the Charging Party. The descriptions of the scope of Mr. Bodensteiner's responsibilities in paragraphs 2 and 9 of his declaration reflect no involvement with, or personal knowledge of, collective bargaining negotiations between Respondent and the Charging Party. Further, in speculating that the Charging Party would gain an "unfair advantage" through access to subpoenaed information, Mr. Bodensteiner does not describe any advantage to be gained by the Charging Party or identify what subpoenaed information would give the Charging Party such any such unfair advantage.

Moreover, although the Union is neither a customer nor a supplier of Respondent, Mr. Bodensteiner implies that the Charging Party's access to certain information would somehow place Respondent's customers and suppliers in an

improved bargaining position and could reduce the prices Respondent is able to obtain on the market. But any disclosure by the Charging Party to Respondent's customers or suppliers is expressly prohibited by Section III of the AGC's Proposal, which also forbids the Charging Party from using Respondent's confidential information for any other purpose than to litigate this matter. Respondent seems to presume that, for some inexplicable reason, the Charging Party would want to violate the protective order entered in this case and place its members' employer in an unfavorable position *vis-à-vis* its customers and suppliers. Such a presumption is plainly unfounded.

As explained in the AGC Response, the Charging Party's right to fully participate in this proceeding should not be unjustly curtailed. (*See* AGC Response at 9-10, and cases cited therein) In analogous circumstances the Board has recognized that the right to receive information in litigation or under the Act should be evaluated independently. In *Westinghouse Electric Corp.*, 239 NLRB 106, 111 (1978), *enf'd and modified on other grds,* 648 F.2d 18 (D.C. Cir. 1980), the Board found an employer obligated to provide information that was relevant to parties' collective bargaining, rejecting the claim that the information should not be provided because the union was in litigation on the same issue and the provision of the information under Section 8(a)(5) would be an "end run" around the rules of discovery. So too here, if the information is necessary to the Union's right to participate as a full party in this litigation, the fact that the Union would not be able to obtain it under the Section 8(a)(5) duty to bargain should not defeat the Union's due process rights.

Further, a prohibition or limitation of access to relevant information by persons affiliated with the Charging Party could severely hamper Counsel for the Acting General

Counsel's litigation of this case. Consultation with employees/members and their bargaining representatives will be critical in Counsel for the Acting General Counsel's preparation for, and litigation of, this case because such persons, by virtue of their long-standing relationships with Respondent, possess the type of knowledge of Respondent's operations that will be essential to understanding subpoenaed documents and evidence.

In view of Respondent's failure, well over two months following the issuance of the Acting General Counsel's subpoena, to establish any basis for withholding relevant subpoenaed documents from the Charging Party, the Acting General Counsel respectfully requests that the Administrative Law Judge decline to include any limitation excluding the Charging Party, its representatives, or its members from access to subpoenaed documents under any protective order.

## IV. THE AGC PROPOSAL INCLUDES AN APPROPRIATE PROCEDURE TO BE FOLLOWED IN THE EVENT OF INTERVENTION TO CHALLENGE THE SEALING OF EVIDENCE

Since it filed the AGC Response, Counsel for the Acting General Counsel was informed that inquiry had been made of the Board regarding the possibility of a third-party intervention concerning public access to exhibits and testimony in this matter. Accordingly, the AGC Proposal has been modified to include procedures addressing challenges to the sealing of evidence by non-parties. (Exhibit A, Section V-B) Such procedures should be included in any protective order issued by the Administrative Law Judge in this case. Courts have "routinely found ... that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to

information or judicial proceedings." *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 777 (3d Cir. 1994).

The protective order in this matter should therefore not only set forth a procedure for the parties to challenge the sealing of evidence; it should also include a procedure for addressing challenges by non-party intervenors. The AGC Proposal would allow persons challenging the sealing of evidence to submit briefs in response to Respondent's motion to place certain evidence under permanent seal at the closure of the hearing in the Board Proceeding.[1] The proposed procedure would avoid interruption of the hearing by an intervenor wishing to challenge the sealing of evidence, while still affording any intervenor the right to participate in arguments concerning whether evidence will be placed under permanent seal. Because the procedure proposed by the Acting General Counsel allows for careful and efficient consideration of the interests of intervenors, the Acting General Counsel respectfully requests that the Administrative Law Judge adopt that procedure as part of any protective order.

## V. THE AGC PROPOSAL AVOIDS IMPOSING IMPROPER AND UNNECESSARY RESTRICTIONS ON THE RECEIVING PARTIES

Respondent's Proposal and additional provisions proposed by Respondent since oral argument would impose a number of requirements that are not appropriate for inclusion in a protective order and that will interfere with the presentation of evidence in

[1] As Counsel for the Acting General Counsel has argued, upon any challenge to the sealing of evidence, Respondent bears the burden of establishing compelling reasons justifying sealing the evidence. (*See* AGC Response at 13-15, and cases cited therein) Respondent, by contrast, has asserted in its motion for approval of a protective order and in oral argument that the burden of showing that documents should *not* be sealed should fall on the challenging party because the "compelling reasons" standard for sealing evidence does not apply to documents traditionally kept secret. Respondent is mistaken; unlike the types of documents discussed in the cases cited in Respondent's motion, exhibits in unfair labor practice proceedings have not traditionally been kept secret. *See Times Mirror Co. v. The Copley Press, Inc.,* 873 F.2d 1210, 1219 (9th Cir. 1989) (warrants and supporting affidavits during pre-indictment stage of a criminal investigation traditionally kept secret); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (pre-sentence reports traditionally treated as confidential).

this case. (*See* Exhibit A to Respondent's Motion for Protective Order) ("Respondent's Proposal") The Acting General Counsel respectfully requests that such requirements not be included in any protective order issued by the Administrative Law Judge. The inappropriate and unduly burdensome requirements proposed by Respondent will each be addressed below.

### A. Limitations on Disclosure of Information to Witnesses or Potential Witnesses Who Have Not Been Subpoenaed

Since the parties' oral arguments regarding Respondent's request for approval of a protective order, Respondent has proposed to the Acting General Counsel an unnecessary and overly burdensome requirement that the Acting General Counsel and the Charging Party only be permitted to disclose confidential information to witnesses or potential witnesses if they have been subpoenaed. Such a requirement is inconsistent with established procedures in unfair labor practice hearings and would unnecessarily interfere with the ability of both the Acting General Counsel and the Charging Party to litigate this case. In particular, a requirement limiting disclosure of documents to subpoenaed witnesses is inappropriate because, in unfair labor practice hearings, the parties often call witnesses whose testimony has not been compelled by a subpoena. Further, in preparation for unfair labor practice hearings, counsel often consult with persons who are not ultimately called as witnesses – for example, to determine whether to call such persons as witnesses, or to seek assistance with understanding subpoenaed documents or evidence adduced at hearing.

### B. Provisions Governing the Parties' Presentation of Evidence

Respondent's Proposal also inappropriately seeks to govern the parties' presentation of evidence. In particular, Respondent's Proposal includes a requirement

that the parties "take all reasonable steps to minimize disruptions to the Board Proceeding and any Related Federal Court Proceeding, and to minimize limitations on public access to the Proceedings, by structuring the order and examination of witnesses without reference to Confidential documents where reference to non-Confidential documents would be equally as effective as reference to Confidential documents." (Respondent's Proposal, Section 7-A) Moreover, since the parties' oral arguments regarding Respondent's request for approval of a protective order, Respondent has also proposed to the Acting General Counsel that the protective order provide that, except by agreement of the parties, no witness shall be recalled to testify at the hearing on the ground that a confidentiality designation had not been challenged, or that such a challenge had not been resolved, prior to the witness's attendance. While the Acting General Counsel is certainly interested in minimizing disruptions and ensuring public access to the unfair labor practice hearing, provisions governing the order and examination of witnesses are not appropriately included in a protective order. The provisions proposed by Respondent create a risk that counsels' ability to effectively present evidence in support of their positions could be hampered. Further, the Administrative Law Judge can effectively address any problems relating to the order and examination of witnesses as they arise pursuant to his authority to regulate the course of the hearing, as described in Section 102.35 of the Board's Rules and Regulations.

### C. Provisions Requiring 24-Hour Notice of Introduction of Confidential Information into Evidence

Since the parties' oral arguments regarding Respondent's request for approval of a protective order, Respondent has also proposed to the Acting General Counsel that

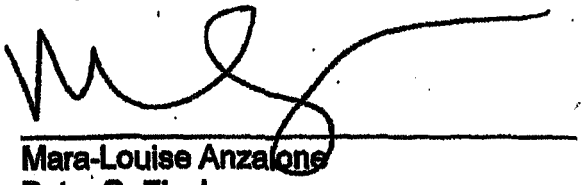
the parties be required to provide each other with 24-hour notice before introduction into evidence or filing of any document containing confidential information during the hearing. Such a requirement would effectively require the parties to provide each other with lists of exhibits or potential exhibits in advance of witness testimony. Such a requirement would be inappropriate and unworkable in an unfair labor practice hearing. Because the parties cannot engage in pre-trial discovery, the presentation of evidence is less predictable than in other types of litigation. A requirement of 24-hour notice before introducing a document could cause serious disruption in witness testimony if there is an unexpected need to introduce a document not identified in advance. Further, such a requirement would unfairly require the parties to provide each other with information in advance about what documents they plan to use while cross-examining witnesses or examining witnesses pursuant to Rule 611(c) of the Federal Rules of Evidence. Respondent has established no basis for such a requirement. Moreover, because all confidential information will be provisionally sealed upon motion by Respondent at the hearing, a requirement that the parties notify each other in advance of what evidence they plan to introduce would add nothing to protect the confidentiality of the information.

## VI. CONCLUSION

The Acting General Counsel respectfully requests that the Administrative Law Judge adopt the AGC Proposal for the reasons set forth in the AGC Response, as modified, and because that proposal sets forth appropriate and efficient procedures for addressing Respondent's claims that certain documents must be treated as confidential.

**DATED** at Seattle, Washington, this 5th day of August, 2011.

**Respectfully submitted,**



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Supplemental Position Regarding Protective Order was served on the 5th day of August, 2011, on the following parties:

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Kristy Kennedy
Secretary

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 19**

**THE BOEING COMPANY**

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**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 751, affiliated with INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS**

# [PROPOSED] PROTECTIVE ORDER

## I. Definitions

"Acting General Counsel" means the Acting General Counsel of the National Labor Relations Board or his successors.

"Board Proceeding" means the hearing, adjudication, or administrative appeals of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431, including, without limitation, any compliance proceeding.

"Charging Party" means the International Association of Machinists and Aerospace Workers, District Lodge 751.

"Confidential Information" means any type of information that is designated as confidential by the Disclosing Party and shall contain, include, or consist of confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business and which the Disclosing Party reasonably and in good faith believes that, if disclosed, will cause specific financial and/or competitive harm to the Disclosing Party.

"Disclosing Party" means The Boeing Company, its subsidiaries, managers, supervisors, agents, and/or representatives, including, but not limited to, Boeing Commercial Airplanes.

"Document" or "Documents" mean all materials within the scope of Federal Rules of Civil Procedure 26 and 34, computer tapes or disks, information, matters, tangible items, things, objects, materials, and substances disclosed in the Board Proceeding or any Related Federal Court Proceeding, whether originals or copies, whether disclosed pursuant to subpoena *duces tecum* or by agreement, as well as hearing papers to the extent that such papers quote, summarize, or contain Confidential Information covered by this Protective Order.

"Non-Logged Documents" means any Document that the Disclosing Party designates as Confidential Information and which constitutes: (a) "proprietary aerospace technology," as referenced in the fourth paragraph of the July 15, 2011 Declaration of Stephen Bodensteiner ("Bodensteiner Declaration") attached to Disclosing Party's Motion for a Protective Order; (b) "proprietary design attributes" of the 787," as referenced in the fifth paragraph of the Bodensteiner Declaration, including the processes by which it is assembled, the design of the buildings and tooling stations used in assembly, and the confidential research and development information underlying its creation and ongoing production; (c) "cost and revenue structures," "profit margins," and "production schedules" for the 787, as well as the design and specifications for the Charleston, South Carolina facility, and proprietary production schedules for that facility, as

referenced in the sixth paragraph of the Bodensteiner Declaration, and (d) tax and other non-public financial information, as referenced in the seventh paragraph of the Bodensteiner Declaration. The Receiving Parties may object to the Disclosing Party's designation of specific documents in the above categories as Confidential pursuant to the procedure outlined in Section IV.

"Party" or "Parties" mean any person or entity that is a party either to the Board Proceeding or any Related Federal Court Proceeding and who has full rights of participation.

"Qualified Persons" includes:

a. The Administrative Law Judge, the Board members, any judicial officer before whom the Board Proceeding or any Related Federal Court Proceeding is pending, and any of their respective support personnel;

b. Counsel for the Acting General Counsel and any Board employees who are engaged in assisting or advising Counsel for the Acting General Counsel in the Board Proceeding or any Related Federal Court Proceeding;

c. Counsel for the Charging Party, including counsel's partners, associates, legal assistants, secretaries and employees who are engaged in assisting such counsel in the Board Proceeding or any Related Federal Court Proceeding;

d. Courtroom personnel, including court reporters/stenographic reporters engaged in the Board Proceeding or any Related Federal Court Proceeding;

e. Individuals assisting Counsel for the Acting General Counsel or the Charging Party, who are designated by Counsel for the Acting General Counsel or Counsel for the Charging Party after review of Confidential Information produced by the Disclosing Party;

f. Witnesses or prospective witnesses, including expert witnesses and their staff, who reasonably need access to such materials in connection with the Board Proceeding or any Related Federal Court Proceeding;

g. Independent litigation support services, including, but not limited to, document reproduction services, computer imaging services, and demonstrative exhibit services;

h. Any person who authored or received the particular Confidential Information sought to be disclosed;

i. Any other person whom the Parties and Counsel for the Acting General Counsel collectively agree in writing to include and/or to whom the Administrative Law Judge orders disclosure.

Confidential Information shall not be disclosed to persons described in (e), (f) or (i) unless or until such persons have been provided with a copy of this Order and have agreed in writing to abide by and comply with the terms and provisions therein.

"Receiving Parties" means (i) counsel for the Acting General Counsel, and/or (ii) the Charging Party.

"Related Federal Court Proceeding" means any case seeking judicial enforcement or review, or judicial resolution, of any matter arising in connection with *The Boeing Company*, Board Case 19-CA-32431.

## II. Designation and Disclosure of Confidential Information

A. Compliance with disclosure of Documents shall include identification of all Documents by Bates number and shall provide a written certification of the date on which Documents so identified were disclosed. Regardless of the date or manner of disclosure, before delivering any Documents containing Confidential Information to the Receiving Parties, the Disclosing Party shall designate such Confidential Information by stamping or otherwise marking the word "CONFIDENTIAL" on each page of any such Document. If the Disclosing Party designates only a portion of a Document as confidential, the Disclosing Party shall, in addition to the other requirements of this section, indicate which portion of the Document contains Confidential Information. Stamping or marking of a Document will be done in a manner so as not to interfere with the legibility of any of the contents of the Document.

B. For all information that the Disclosing Party designates as Confidential other than Non-Logged Documents, the Disclosing Party will, contemporaneous with its disclosure, provide the Receiving Parties with a log or other showing of good cause setting forth the reason as to why the information must be treated as

Confidential Information, as that term is defined herein. Upon request, counsel for the Disclosing Party will identify the category in the Bodensteiner Declaration to which a particular document or documents corresponds.

C. By marking a Document as confidential in the manner described in Section II-A and by raising its confidentiality claims at all times as set forth in Sections IV and V, the Disclosing Party conditionally discloses such a Document subject to a final ruling on its claim of confidentiality.

## III. Restrictions on Use of Confidential Information

A. Only Qualified Persons may have access to Confidential Information. All Confidential Information shall be controlled and maintained by the Parties in a manner that precludes access by any person not entitled to access under this Protective Order.

B. Confidential Information shall be used only for the purpose of litigating the Board Proceeding or any Related Federal Court Proceeding and not for any other purpose whatsoever.

## IV. Disputes Regarding Designation of Confidential Information

A. The Charging Party or the Counsel for the Acting General Counsel may challenge the Disclosing Party's designation of any document as Confidential Information by the following procedure: If the Charging Party and/or Counsel for the Acting General Counsel object to the Disclosing Party's designation of a document as Confidential Information, the Charging Party and/or Counsel for the

Acting General Counsel (hereinafter "the Objecting Party") shall serve a written notice of the dispute upon the other Party/Parties within sixty (60) days of receipt of notice from Disclosing Party that it has completed production in compliance with a subpoena pursuant to Section II.A. All Parties shall, within five (5) business days of receipt of the written notice of the dispute, confer or attempt to confer with each other in a good faith effort to resolve the dispute. In the event that the dispute is not resolved through such conference, the Objecting Party may thereupon move for a ruling from the Administrative Law Judge on all disputed designations.

B. If the Disclosing Party produces additional documents designated Confidential Information after it has provided its original notice pursuant to Section II.A. above, the Disclosing Party will identify such documents by Bates number and provide an additional written certification of the date on which Documents so identified were produced. The Charging Party or the Acting General Counsel may challenge Disclosing Party's designation of any such document as Confidential Information pursuant to the same procedure set forth in Section IV.A..

C. At all times, the Disclosing Party bears the burden to establish "good cause" for applicability of this Order to a contested Document based on a showing that a) the Document in fact constitutes confidential, proprietary, and/or trade secret financial, personal, business, or technical information that the Disclosing Party maintains in confidence in the ordinary course of business, and

b) disclosure of the Document will cause specific financial and/or competitive harm to the Disclosing Party.

D. Where there is any dispute pending regarding the designation of records or Documents as Confidential Information, the disputed matter shall be treated as Confidential Information and subject to this Order until final resolution of the dispute.

E. All disputes arising under this Order shall be initially resolved by the Administrative Law Judge.

F. Within five (5) days of the Administrative Law Judge's ruling or the resolution of any special appeals to the Board therefrom, if aggrieved, Disclosing Party will notify Counsel for the Acting General Counsel in writing of its objection to the Administrative Law Judge's or Board's determination and, upon such notice, Counsel for the Acting General Counsel will bring an action to enforce or to enforce ex rel. in District Court. The District Court shall rule with due deference to the decision of the Administrative Law Judge or the Board. Any objection by a Receiving Party to any Administrative Law Judge determination shall be governed by the Board's Rules and Regulations.

## V. Confidential Information Placed Under Provisional Seal at Hearing

A. Immediately preceding any Party's introduction into evidence or filing of any Document containing Confidential Information during the Board Proceeding, the introducing Party shall so notify the other Parties. The other Parties may then move the Administrative Law Judge under the appropriate standard for

sealing documents for an order placing such Document under seal and state the reasons therefore. Upon such motion, the introducing Party shall state on the record whether they agree to or oppose the other Party's motion. The Administrative Law Judge shall then order that the Document be introduced into evidence or filed by the introducing Party under provisional seal.

B. Upon motion by the Disclosing Party, the hearing room in the Board Proceeding shall be cleared of all individuals other than Qualified Persons and essential personnel such as court reporters and security officers when witnesses testify regarding the contents of any provisionally sealed Document. Transcripts of proceedings that occur while the hearing room is cleared shall also be placed under provisional seal.

C. Final adjudication of any and all motions to seal Documents and transcripts of proceedings shall be deferred by the Administrative Law Judge until the closure of the hearing before the Administrative Law Judge as set forth in Section VI.

## VI. Confidential Information Placed Under Permanent Seal at Conclusion of Hearing

A. At the closure of the hearing in the Board Proceeding, pursuant to such schedule as the Administrative Law Judge shall direct, the Disclosing Party shall file with the Administrative Law Judge a motion and any supporting brief to place under permanent seal, under the appropriate standard, any Documents and transcript excerpts containing Confidential Information that were provisionally

sealed pursuant to Section V. The Receiving Parties shall submit briefs in response to the Disclosing Party's motion, and the Disclosing Party shall have the option to file a reply. To the extent that any such motion, affidavit, brief or other filing contains, quotes, or summarizes Confidential Information, it shall be filed under provisional seal.

B. If, at any time, a non-Party seeks to intervene to challenge the Disclosing Party's motion to place Documents and transcript excerpts under seal, and if the request for intervention is granted, the Administrative Law Judge shall resolve the intervenor's challenge at the same time and pursuant to the same procedure referenced in Section VI-A, except that the intervenor shall also file a brief at the same time as the Receiving Parties, and the Receiving Parties shall have the option to file a statement of position regarding any intervenor brief at the same time that the Disclosing Party's reply brief is due.

C. The Administrative Law Judge shall issue a written order that resolves every uncontested as well as disputed Document and transcript excerpt in the Disclosing Party's motion. Any Documents or transcript excerpts that were provisionally sealed pursuant to Section V but are not listed in the Disclosing Party's motion for permanent seal shall be ordered unsealed.

## VII. Freedom of Information Act ("FOIA") Requests

A. The Acting General Counsel agrees to promptly notify the Disclosing Party of any FOIA request it receives seeking the disclosure of Confidential Information

in order to permit the Disclosing Party the opportunity to explain why such records should not be disclosed.

B. The Acting General Counsel agrees that any information marked by the Disclosing Party as Confidential Information pursuant to Section II-A above shall be treated by the Agency as triggering the procedures of Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

C. The Acting General Counsel agrees that he will not disclose any Confidential Information in response to a FOIA request without first providing the Disclosing Party written notice at least 10 business days in advance of the proposed disclosure of such information. Pursuant to the FOIA, in the event of such notice, the Disclosing Party shall have the right to file a written statement explaining why the information comes within Exemption 4, and to object to any disclosure. If, after consideration of the Disclosing Party's objections, the Acting General Counsel makes an ultimate disclosure determination, the Acting General Counsel acknowledges that the Disclosing Party may have the right to file a lawsuit seeking to prevent the disclosure of the asserted Confidential Information. In this regard, the Acting General Counsel will follow the process described in Section 102.117 of the Board's Rules and Regulations. If the Disclosing Party files suit to enjoin disclosure of Confidential Information, the Board will not disclose such Documents pending the final disposition of that lawsuit.

## VIII. Termination of the Proceeding

Within 30 days after the final conclusion of the Board Proceeding and any Related Federal Court Proceeding including, without limitation, any judicial review, all Documents designated as confidential and which have not been made part of the record before the Board, shall be returned to counsel for the Disclosing Party. Alternatively, at the option of the Receiving Party or Qualified Person in possession, all Documents designated as confidential and which have not been made part of the record before the Board, shall be destroyed. Following termination of the Board Proceeding and all related federal court proceedings, the provisions of this Protective Order relating to the confidentiality of protected documents and information, including any final decision on the sealing of documents and testimony, shall continue to be binding, except with respect to documents or information that are no longer confidential.

## IX. No Waiver

A. The inadvertent disclosure of privileged matter by the Disclosing Party or its counsel shall not constitute a waiver of any applicable privilege. If the Disclosing Party inadvertently discloses any matter it claims to be covered by a privilege, it shall give notice promptly after discovery of the inadvertent disclosure that the matter is privileged. Upon receipt of such notice, if the person to whom such information was disclosed seeks to challenge the claim of privilege or lack of waiver, the matter shall be submitted to the Administrative Law Judge as provided in Section IV.

B. Disclosure of Confidential Information pursuant to the procedures set forth in this Protective Order does not constitute a waiver of any trade secret or any intellectual property, proprietary, or other rights to, or in, such information. It is expressly acknowledged that no such rights or interests shall be affected in any way by production of subpoenaed material designated as containing Confidential Information in the Board Proceeding.

## X. Rights Reserved

A. Nothing in this Protective Order shall be construed as a waiver of the right of any Party to object to the production of documents on the grounds of privilege or on other grounds not related to the confidentiality of the Documents.

B. Nothing in this Protective Order shall be construed as a waiver by any Party of any objections that might be raised as to the admissibility at hearing or trial of any proposed evidentiary materials.

## XI. Modification

Nothing in this Protective Order shall prevent any party from seeking modification of this Protective Order by the Administrative Law Judge.

## XII. Duration

This Order shall remain in full force and effect until modified, superseded, or terminated by consent of the Parties and Counsel for the Acting General Counsel or by Order of the Administrative Law Judge.

## XIII. Violations

The Parties and Counsel for the Acting General Counsel may bring any claim of breach of the terms of this Protective Order before the Administrative Law Judge at any time, and the Administrative Law Judge will have the authority to remedy any sustained claim that a breach constituted conduct prejudicial to any Party and/or the Board Proceeding. Appeals from the Administrative Law Judge's rulings shall be governed by § 102.26 of the Board's Rules and Regulations.

**IT IS SO ORDERED.**

Issued at _____ this ____ day of _____, 2011.

_____
Clifford H. Anderson
Administrative Law Judge