

THE EARLY CONSTRUCTION CO., :
 :
 Plaintiff, : Case No.: CC-40-2022-C-88
 :
 v. : Judge Hammer
 :
 AMERICAN ELECTRIC POWER :
 SERVICE CO., *et al.*, :
 :
 Defendants. :

CONFIDENTIALITY STIPULATION AND PROTECTIVE ORDER

The parties to this action anticipate that they will request of each other the production of discovery material which contains trade secrets, sensitive, or confidential information relating to the claims and defenses raised in the pleadings. The parties have accordingly agreed to the terms of this Stipulated Protective Order and Stipulated Order Governing Privileged Information. Accordingly, IT IS HEREBY STIPULATED, AGREED, AND ORDERED:

1. Scope of Confidentiality. All documents produced in the course of discovery, including initial disclosures, all responses to discovery requests, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause, and information derived directly therefrom, shall be subject to this Order concerning confidential information as set forth below. As there is a presumption in favor of open and public judicial proceedings in the West Virginia courts, this Order shall be strictly construed in favor of public disclosure and open proceedings wherever possible. The Order is also subject to the West Virginia Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. Form and Timing of Confidentiality and Highly Confidential Designation. A producing party may designate documents as confidential and restricted in disclosure under this

Order by placing or affixing the words “CONFIDENTIAL” or “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” (referred to herein as “Confidential”) or “HIGHLY CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” (referred to herein as “Highly Confidential”) on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the designation, if necessary. Documents shall be designated Confidential or Highly Confidential prior to or at the time of the production or disclosure of the documents. A Confidential or Highly Confidential designation does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

3. Documents Which May be Designated Confidential. Any party may designate documents as Confidential upon making a good faith determination that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, medical or psychiatric information, trade secrets, sensitive commercial information, personnel records, or such other sensitive information that is not publicly available. Public records and other information or documents that are publicly available may not be designated as Confidential. Mass, indiscriminate, or routinized confidentiality designations are prohibited.

4. Documents Which May Be Designated Highly Confidential. Any party may designate documents as Highly Confidential upon making a good faith determination that the documents contain information that is highly sensitive, which is defined as those documents that the review of which would potentially cause substantial harm if disclosed.

5. Depositions. Deposition testimony shall be deemed Confidential or Highly Confidential only if designated as such. Such designation shall be specific as to the portions of the

transcript or any exhibit to be designated. Thereafter, the deposition transcripts and any those portions so designated shall be protected as Confidential or Highly Confidential, pending objection, under the terms of this Order. If not otherwise deemed Confidential or Highly Confidential during the deposition, portions of transcripts may be deemed Confidential or Highly Confidential if so designated within 14 days after receipt of the transcript. Such designation must be specific as to which portions of the transcript and/or any exceptions to which the confidentiality designation applies, except if any Confidential or Highly Confidential designation already exists on an exhibit when used during the deposition, that exhibit shall be presumed to fall within the provisions of this Order without further designation.

6. Limitations on Use.

(a) General Protections. Documents designated Confidential and Highly Confidential under this Order shall not be used or disclosed by the parties, counsel for the parties, or any other persons identified in this Order for any purpose whatsoever other than the prosecution or defense of this action, including any appeals. Confidential and Highly Confidential information shall not be used for any other purpose.

(b) Limited Third-Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any Confidential documents to any third person or entity except as set forth in subparagraphs (i)-(vii) below. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated Confidential:

(i) Counsel. Counsel for the parties and employees and agents of counsel who have responsibility for the preparation and trial of the action.

(ii) **Parties.** Parties and employees of a party to this Order, who are actively engaged in the litigation on an ongoing basis.

(iii) **Court Reporters and Recorders.** Court reporters and recorders engaged for depositions.

(iv) **Court and Court Personnel.** The Court and Court Personnel pursuant the conditions outlined in Paragraph 7 below.

(v) **Consultants, Investigators and Experts.** Consultants, investigators, or experts (hereinafter referred to collectively as “experts”) employed by the parties or counsel for the parties to assist in the preparation and trial of this action or proceeding, but only after such persons have completed the certification contained in Appendix A, Acknowledgment of Understanding and Agreement to Be Bound.

(vi) **Deponents.** Persons subpoenaed to testify or who voluntarily appear to testify at a deposition in this action, but only after such persons have completed the certification contained in Appendix A, Acknowledgment of Understanding and Agreement to Be Bound.

(vii) **Others by Consent.** Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Appendix A, Acknowledgment of Understanding and Agreement to Be Bound.

(c) **Persons to Whom Information Marked Highly Confidential May be Disclosed.** Use of any information, documents, or portions of documents marked Highly Confidential, including all information derived therefrom, shall be restricted solely to the

following persons, unless additional persons are stipulated to by counsel or authorized by the Court:

(i) outside counsel of record for the parties, and the administrative staff of outside counsel's firms;

(ii) one designated representative from in-house counsel for the parties;

(iii) independent consultants or expert witnesses (including partners, associates and employees of the firm which employs such consultant or expert) retained by a party or its attorneys for purposes of this litigation, but only to the extent necessary to further the interest of the parties in this litigation, and only after such persons have completed the certification attached hereto as Attachment A, Acknowledgment of Understanding and Agreement to be Bound;

(iv) the Court and its personnel, including, but not limited to, stenographic reporters regularly employed by the Court and stenographic reporters not regularly employed by the Court who are engaged by the Court or the parties during the litigation of this action;

(v) the authors and the original recipients of the documents;

(vi) any court reporter or videographer reporting a deposition;

(vii) employees of copy services, microfilming or database services, trial support firms, and/or translators who are engaged by the parties during the litigation of this action;

(viii) any other person agreed to in writing by the parties.

(d) **Consent to Protective Order.** With respect to the persons referenced in Paragraphs 6(b)(v)-(vii) and 6(c)(iii) above, prior to the disclosure of any Confidential or Highly Confidential material, the disclosing party shall (1) provide the person with a copy of this Order,

and (2) obtain from that person written agreement to be bound by the terms of this Order in the form attached hereto as Appendix A.

(e) **Control of Documents.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as Confidential and Highly Confidential pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one year after dismissal of the action, the entry of final judgment and/or the conclusion of any appeals arising therefrom.

(f) **Copies.** Prior to production to another Party, all copies, electronic images, duplicates, extracts, summaries, or descriptions of documents designated as Confidential and Highly Confidential under this Order, or any individual portion of such a document, shall be affixed with the appropriate designation if the words do not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order.

(g) **Inadvertent Production of Confidential and Highly Confidential Information.**

(i) If a producing party discovers after the production of discovery material that it has inadvertently failed to designate the material as Confidential or Highly Confidential, it shall give written notice to the receiving party that the material is Confidential or Highly Confidential. Within five (5) business days of the notice, (i) the receiving party shall, to the extent possible, retrieve all copies of the inadvertently produced discovery material from any person or persons in possession of such copies and return them to the Producing Party; (ii) the Producing Party will simultaneously provide copies of the same discovery material marked with the appropriate designation; and (iii) thereafter the parties shall treat such copies as designated.

(ii) The information shall not lose its protected status through such production or disclosure if the producing party provides written notice to the receiving party within fourteen (14) days of the discovery of the inadvertent production or disclosure, identifying the document or information in question and the corrected confidential designation for the document or information. Disclosure by the receiving party to unauthorized persons before being notified of the inadvertent disclosure shall not constitute a violation of this Order. Nothing in this Order shall preclude the receiving party from challenging the confidentiality designation of the late-marked material pursuant to the provisions of this Order.

7. Filing of Confidential and Highly Confidential Documents Under Seal. To the extent that a party wishes to attach to a brief, memorandum, or pleading any documents marked as Confidential or Highly Confidential, then, prior to filing, the party must move the Court for permission to file such document under seal.

(a) Before any document marked as Confidential or Highly Confidential is filed under seal with the Clerk of Court, the filing party shall first consult with the party that originally designated the document to determine whether, with the consent of that party, the document or a redacted version of the document may be filed with the Court not under seal.

(b) Where agreement is not possible or adequate, before a Confidential or Highly Confidential document is filed with the Clerk, it shall be placed in a sealed envelope marked Confidential or Highly Confidential, displaying the case name, docket number, a designation of what the document is, the name of the party in whose behalf it is submitted, and name of the attorney who has filed the documents on the front of the envelope. A copy of any document filed under seal shall also be delivered to the judicial officer's chambers, unless the Court determines that such delivery is not required.

(c) To the extent that it is necessary for a party to discuss the contents of any Confidential or Highly Confidential information in a written pleading, then such portion of the pleading may be filed under seal with leave of Court. In such circumstances, counsel shall prepare two versions of the pleadings, a public and a confidential version. The public version shall contain a redaction of references to Confidential or Highly Confidential documents. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal as above. A copy of the unredacted pleading also shall be delivered to the Court's chambers.

(d) If the Court, a particular judicial officer, or the Clerk of Court has developed an alternative method for the filing of documents under seal, electronic or otherwise, then the parties shall follow this alternative method and shall not file any documents or pleadings manually with the Clerk of Court.

8. Challenges by a Party to Designation as Confidential or Highly Confidential. Any Confidential or Highly Confidential designation is subject to challenge by any party or nonparty with standing to object. Before filing any motions or objections to a confidentiality designation with the Court, the objecting party shall have an obligation to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the Confidential or Highly Confidential designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

9. Action by the Court. Applications to the Court for an order relating to any documents designated Confidential or Highly Confidential shall be by motion under the West Virginia Rules of Civil Procedure and any other procedures set forth in the presiding judge's standing orders or other relevant orders. Nothing in this Order or any action or agreement of a

party under this Order limits the Court's power to make any orders that may be appropriate with respect to the use and disclosure of any documents produced or use in discovery or at trial.

10. Use of Confidential Documents or Information at Trial. All trials are open to the public. Absent order of the Court, there will be no restrictions on the use of any document that may be introduced by any party during the trial. If a party intends to present at trial Confidential or Highly Confidential documents or information derived therefrom, such party shall provide advance notice to the other party at least fourteen (14) days before the commencement of trial by identifying the documents or information at issue as specifically as possible (i.e., by Bates number, page range, deposition transcript lines, etc.) without divulging the actual Confidential documents or information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

11. Claw-back of Privileged Information Produced During Discovery.

(a) The parties have agreed to implement and adhere to reasonable procedures to ensure that information produced in discovery, ESI, and other information that is privileged is identified and withheld from production. Nothing in this Order overrides any attorney's ethical responsibilities to refrain from examining or disclosing materials that the attorney knows or reasonably should know to be privileged or protected.

(b) Notwithstanding the previous paragraph, the production of documents protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege during the course of discovery shall not constitute a waiver of the privileges or protections from discovery in this action or in any other federal or state court proceeding. This presumption of non-waiver shall apply without inquiry into: (i) whether the parties' production of the information was inadvertent, (ii) the adequacy or reasonableness of the document review

procedures or efforts to rectify any errors made by the party who produced the privileged information or efforts to rectify the error, or (iii) the prejudice which might result from the return the privileged information and/or inability to use the privileged information.

(c) Nothing contained herein is intended to, or shall serve to, limit a party's right to conduct a review of the documents, ESI, or other information (including metadata) for relevance, responsiveness, and/or segregation of privileged and/or protected information before production.

(d) If a party discovers that it has *received* ESI, documents, or other information that the party knows or reasonably should know was protected by the attorney-client privilege, work product doctrine, or any other applicable privilege, such party shall promptly notify the producing party, in writing, of the disclosure. If requested to do so by the producing party, the receiving party shall delete or, if deletion is not feasible, segregate the privileged information, and shall not use such information for any purpose.

(e) If a party discovers that it has *produced* ESI, documents, or other information that the party believes is protected by the attorney-client privilege, the work product doctrine, or any other applicable the producing party shall promptly notify the receiving party, in writing, of the disclosure. If the receiving party agrees that the document is privileged, such party shall delete or, if deletion is not feasible, segregate the privileged information, and shall not use such information for any purpose. If the receiving party disputes whether or not the information is privileged, the receiving party shall advise, in writing, the producing party within ten (10) days of the date the dispute arose. If the parties cannot resolve the matter after a meet and confer, the party asserting privilege shall file a motion seeking a ruling from the Court.

(f) Even if no notifications under paragraph 11(d) and 11(e) have been made, nothing shall preclude any party from asserting at any time an objection to the use of any privileged information for any purpose and at any time during the course of this litigation.

(g) Nothing herein shall prevent a receiving party from challenging a producing party's designation of ESI, documents, or other information as privileged or protected information or prevent a receiving party from seeking relief from the Court by motion. If a receiving party disputes a claim of privilege or protection by a producing party, the receiving party shall not use the challenged information unless and until the dispute is resolved. A disclosing party retains the burden, upon challenge by any other party, of establishing the privileged or protected nature of any disputed information.

(h) Nothing in this Order limits the right of any party to petition the Court for an in-camera review of the protected information. This Order does not preclude a party from voluntarily waiving the attorney-client privilege, work product protection, or protection under any other applicable privilege.

12. Obligations on Conclusion of Litigation.

(a) **Order Remains in Effect.** Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) **Return of Confidential and Highly Confidential Documents.** Upon the written request and expense of the producing party, within 30 days after the entry of a final judgment no longer subject to appeal on the merits of this case, or the execution of any agreement between the parties to resolve amicably and settle this case, the parties and any person authorized by this Protective Order to receive confidential information shall return to the producing entity, or destroy, all information and documents subject to this Order, unless the specific document or

information has been offered into evidence or filed without restriction as to disclosure. The party requesting the return of materials shall pay the reasonable costs of responding to its request. The party returning or destroying the documents or other information shall certify that it has not maintained any copies of confidential information, except as permitted by this Order.

(c) **Counsel Allowed to Retain Copy of Filings.** Nothing in this Order shall prevent outside counsel for a party from maintaining in its files a copy of any filings in the Action, including any such filings that incorporate or attach Confidential or Highly Confidential. Moreover, an attorney may use his or her work product in subsequent litigation provided that such use does not disclose any Confidential or Highly Confidential materials. In-house counsel is not permitted to retain a copy as provided herein.

13. Order Subject to Modification. This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter. Motions to modify this Order shall be served and filed in accordance with the West Virginia Rules of Civil Procedure and any applicable standing orders or other relevant orders. Applications to modify or enforce this Order may be made to any federal or state court with concurrent subject matter jurisdiction over the claims and defenses raised in this action, including the Circuit Court of Putnam County, West Virginia, any federal or state court to which this case may be transferred, and any federal or state court issuing a subpoena or otherwise having concurrent subject matter jurisdiction over discovery proceedings.

14. No Greater Protection of Specific Information. Except on privilege grounds, no party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an order providing such additional or special protection.

15. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated Confidential by counsel or the parties is subject to protection under the West Virginia Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

16. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms. To the extent any third-parties wish to invoke the confidentiality designations herein, those third-parties may elect to do so by indicating their intent to be bound to the terms of this Order.

Dated: 11/21/2023

It is so Ordered:



JUDGE DAVID M. HAMMER

**WE SO AGREE and agree to
abide by the terms of this Order.**

For the Plaintiff:

/s/ J.H. Mahaney with permission

Dated: 11/20/23

J.H. Mahaney (WV 6993)
Daniel A. Earl (WV 6025)
DINSMORE & SHOHL LLP
611 Third Avenue
Huntington, West Virginia 25701
P: (304) 691-8320
John.Mahaney@dinsmore.com
Daniel.Earl@dinsmore.com

William M. Mattes *pro hac vice*
Justin M. Burns *pro hac vice*
DINSMORE & SHOHL LLP

191 W. Nationwide Blvd., Ste. 200
Columbus, Ohio 43215
P: (614) 628-6901
bill.mattes@dinsmore.com
justin.burns@disnmore.com

For the AEP Defendants/Counterclaimants:

/s/ W. Bradley Sorrells
W. Bradley Sorrells (WV 4991)
ROBINSON & McELWEE PLLC
700 Virginia Street East
Charleston, West Virginia 25301
P: (304) 347-8343
wbs@ramlaw.com

Dated: 11/20/23

Jeremy M. Grayem, *pro hac vice*
Joseph P. Guenther, *pro hac vice*
ICE MILLER LLP
250 West Street, 7th Floor
Columbus, Ohio 43215
(T): 614-462-1063
Joseph.guenther@icemiller.com
Jeremy.grayem@icemiller.com

For the Defendant Joel Sigler, Individually:

/s/ Gerhardt Gosnell, II with permission
Gerhardt Gosnell, II *pro hac vice*
James E. Arnold *pro hac vice*
ARNOLD & CLIFFORD LLP
115 W. Main Street, 4th Floor
Columbus, Ohio 43215
P: (614) 460-1608
GGosnell@arnlaw.com
JArnold@arnlaw.com

Dated: 11/20/23

J. Tyler Dinsmore
FLAHERTY SENSABAUGH BONASSO PLLC
P.O. Box 3843
Charleston, West Virginia 25338-3843
(304) 345-0200
tdinsmore@flahertylegal.com

APPENDIX A

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

THE EARLY CONSTRUCTION CO.,	:	
	:	
Plaintiff,	:	Case No.: CC-40-2022-C-88
	:	
v.	:	Judge Hammer
	:	
AMERICAN ELECTRIC POWER	:	
SERVICE CO., <i>et al.</i> ,	:	
	:	
Defendants.	:	

**ACKNOWLEDGMENT AND
AGREEMENT TO BE BOUND**

The undersigned hereby acknowledges that he/she has read the Stipulated Protective Order dated _____ in the above-captioned action and attached hereto (the "Order"), understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Circuit Court of Putnam County, West Virginia, in matters relating to the Order and understands that he/she is obligated to all of the protections and obligations set forth in the Order. The undersigned acknowledges that violation of the Order may result in penalties for contempt of Court.

Name: _____

Job Title: _____

Employer: _____

Business: _____
Address

Date: _____

Signature

