

# Morgan Lewis

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November 8, 2021

G. Paul Bollwerk III, Chairman  
Nicholas G. Trikouros  
Dr. Gary S. Arnold  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Re: Docket Nos. 50-269-SLR, 50-270-SLR, and 50-287-SLR, Duke Energy Carolinas, LLC (Oconee Nuclear Station, Units 1, 2, and 3); Notification Regarding Information Potentially Relevant to the Adjudicatory Proceeding

Dear Administrative Judges:

In accordance with the obligation of adjudicatory participants to inform the presiding officer of information potentially relevant to pending adjudicatory proceedings, Duke Energy Carolinas, LLC ("Duke") hereby notifies the Atomic Safety and Licensing Board ("Board") of the following:

- The "Ethics in Government Act," as amended,<sup>1</sup> and the United States criminal code at 18 U.S.C. 207 prohibit certain acts by former government employees which involve, or may appear to involve, the unfair use of prior government employment.<sup>2</sup>
- The basic prohibition of 18 U.S.C. 207(a)(1) provides that no former federal government employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a particular matter involving a specific party or parties, in which he participated personally and substantially as an employee, and in which the United States is a party or has a direct and substantial interest.<sup>3</sup> In essence, this prohibits former federal employees from "switching sides" to make representations on behalf of a private party before or against the United States government.<sup>4</sup>

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<sup>1</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

<sup>2</sup> See 5 C.F.R. § 2641.101.

<sup>3</sup> See 5 C.F.R. § 2641.201.

<sup>4</sup> See generally Congressional Research Service, "Post-Employment, 'Revolving Door,' Laws for Federal Personnel" at 3 (May 12, 2010).

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- A person or entity who aids, abets, counsels, commands, induces, or procures commission of a violation of section 207 is punishable as a principal under 18 U.S.C. 2.<sup>5</sup>
- On September 27, 2021, Diane Curran, Esq., filed, on behalf of Beyond Nuclear, Inc. and the Sierra Club, Inc. ("Petitioners"), a hearing request, petition to intervene, and petition for waiver ("Hearing Request") and an attachment thereto titled "Declaration of Jeffrey T. Mitman in Support of Beyond Nuclear and Sierra Club Hearing Request" ("Mitman Declaration") before the U.S. Nuclear Regulatory Commission ("NRC") purporting to challenge Duke's subsequent license renewal application for Oconee Nuclear Station, Units 1, 2, and 3 ("Oconee") based on an alleged failure to consider the risk to Oconee posed by a hypothetical failure of the Jocassee Dam.<sup>6</sup>
- In the Mitman Declaration, Mr. Mitman: (1) stated that he was a former NRC employee, (2) stated that, "[a]s an NRC Staff member, I participated in some NRC safety reviews and performed risk analysis for Oconee, including reviews related to the risk to Oconee posed by potential failure of the upstream Jocassee Dam," and (3) stated that his Declaration and attached report were intended for submission to the NRC on behalf of the Petitioners in connection with this proceeding.<sup>7</sup>
- NRC procedures specify that "[a]ny person obtaining information of a possible violation by a former [NRC] employee of the post-employment restrictions set forth in the criminal post-employment statute or implementing regulations (18 U.S.C. 207; [5 C.F.R.] Part 2641) should report the facts forming the basis for the possible violation to the Office of the Inspector General (OIG)."<sup>8</sup> Criminal and civil enforcement of the provisions of 18 U.S.C. 207 is the responsibility of the Department of Justice ("DOJ"), but agencies are required to report to the Attorney General any information, complaints or allegations of possible violations.<sup>9</sup>
- Counsel for Duke made multiple sincere attempts to consult with counsel for the NRC Staff and the Petitioners on this matter to determine: (1) whether the information noted above had been reported, considered, and dispositioned by the appropriate entities, and (2) whether the participants believed that the Board should be informed of this information. Counsel for the NRC Staff declined to consult. Counsel for Petitioners stated she did not believe Petitioners had any adjudicatory obligations related to this matter.

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<sup>5</sup> See 5 C.F.R. § 2641.103 (Note).

<sup>6</sup> Hearing Request and Petition to Intervene by Beyond Nuclear and Sierra Club and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.53(c)(3)(ii)(L), 51.71(d), 51.95(c)(1), and 10 C.F.R. Part 51 Subpart A, Appendix B, Table B-1 to Allow Consideration of Category 1 NEPA Issues (Sept. 27, 2021) (ML21270A250) (the Mitman Declaration is Attachment 1 to the Petition and includes a report labeled as "Exhibit 1").

<sup>7</sup> Mitman Declaration at 1.

<sup>8</sup> NRC Management Directive 7.12, "Enforcement of Post-Employment Restrictions," Directive Handbook at 2 (Sept. 15, 2015) (ML18073A193).

<sup>9</sup> See 28 U.S.C. 535; 5 C.F.R. § 2641.103(a).

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- Because it remains unclear whether the information noted above has, in fact, been reported, considered, and dispositioned by the appropriate entities, the undersigned counsel reported this information to the NRC OIG on November 8, 2021, and requested a confirmation of whether Mr. Mitman's involvement in this proceeding complies with applicable requirements.

The Board may view this information as potentially relevant<sup>10</sup> to Proposed Contentions 1, 2, and 3, and the waiver request.<sup>11</sup>

Sincerely,

*Signed electronically by Ryan K. Lighty*

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Dated in Washington, D.C.  
this 8<sup>th</sup> day of November 2021

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<sup>10</sup> See *Metro. Edison Co., et al.* (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1582-84 (1984).

<sup>11</sup> Petition at 14 (as to Proposed Contention 2, "Petitioners rely on the factual assertions and technical analysis in the attached Mitman Report"); *id.* at 17 (as to Proposed Contention 3, "[Petitioners] rely on Mr. Mitman's discussion of SAMAs in Section 3 of his Expert Report"); *id.* at 13 (as to Proposed Contention 1, "Petitioners rely on Contentions 2 and 3"); *id.* at 21 n.31 & 22 (citing the Mitman Declaration as alleged support for the waiver request).

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	Docket Nos. 50-269-SLR
	)	50-270-SLR and
DUKE ENERGY CAROLINAS, LLC	)	50-287-SLR
	)	
(Oconee Nuclear Station, Units 1, 2, and 3)	)	November 8, 2021
	)	

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Notification Regarding Information Potentially Relevant to the Adjudicatory Proceeding” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

*Signed (electronically) by Ryan K. Lighty*  
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