

November 19, 2021

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

In the Matter of)
Duke Energy Carolinas, LLC) Docket Nos. 50-269/270/287 SLR
Oconee Nuclear Station,)
Units 1, 2 & 3)

**PETITIONERS' RESPONSE TO DUKE'S NOTIFICATION
REGARDING INFORMATION POTENTIALLY RELEVANT
TO THE ADJUDICATORY PROCEEDING**

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") Order of November 10, 2021, Petitioners, Beyond Nuclear and the Sierra Club, hereby respond to a letter from Ryan K. Lighty, counsel for Duke Energy Carolinas, LLC ("Duke") to this ASLB panel, presenting "information" that Duke asserts is "potentially relevant" to the contentions and waiver request submitted by Petitioners in this proceeding.¹ Petitioners respectfully submit that Mr. Lighty has no grounds for his suggestion that Petitioners and Jeffrey Mitman, the author of the expert declaration and expert report supporting Petitioners' Contentions 2 and 3², may have violated the Ethics in Government Act, 18 U.S.C. § 207(a)(1).

Petitioners note that Mr. Mitman is separately represented by his own counsel, Tom Devine and John A. Kolar of the Government Accountability Project ("GAP"); and that Mr. Devine and

¹ Letter from Ryan K. Lighty to G. Paul, Bollwerk III, *et al.* 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 (Nov. 8, 2021) ("Lighty Letter").

² 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), 51.71(d), and 51.95(c)(1) to Allow Consideration of Category 1 NEPA Issues (Sept. 27, 2021) ("Hearing Request").

Mr. Kolar have written to the NRC's Inspector General regarding Mr. Lighty's letter.³

Accordingly, Petitioners do not purport to speak for Mr. Mitman in this pleading. Petitioners rely on and incorporate by reference the legal arguments and factual assertions in the GAP Letter, for the purpose of demonstrating that Mr. Lighty lacks any legal or factual basis for suggesting that (a) Petitioners themselves have engaged in unlawful conduct by submitting Mr. Mitman's declaration and expert report to the ASLB (Lighty Letter at 2) or that (b) Mr. Mitman's conduct in this subsequent license renewal proceeding may warrant some adverse action by the ASLB against Petitioners. Lighty Letter at 3 (citing *Metro. Edison Co., et al* (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 N.R.C. 1579, 1582-85 (1984)).

As discussed in detail in the attached GAP Letter, Mr. Mitman has not violated the Ethics in Government Act. While Mr. Mitman is a former NRC employee who participated in previous NRC safety reviews related to the Oconee nuclear power plant, he was never involved in the "particular matter" of the NRC's subsequent license renewal review for Oconee while he was employed at the NRC, and therefore 18 U.S.C. § 207(a)(1) does not apply to him. By the same token, Petitioners have not violated 18 U.S.C. § 2 by aiding, abetting, or otherwise procuring a violation of 18 U.S.C. § 207(a)(1). *See* GAP Letter at 2-3.

Even assuming for purposes of argument that Mr. Mitman's previous work for the NRC on Oconee-related safety issues could be deemed to constitute the same "particular matter" as his participation in this subsequent license renewal proceeding, he has consistently advocated for NRC's fulfillment of its mission to ensure adequate protection of public health and safety from

³ *See* attached Letter from Tom Devine and John A. Kolar, Government Accountability Project to Hon. Robert J. Feitel, NRC Inspector General re: Whistleblower Complaint on Behalf of Jeff Mitman (Nov. 18, 2021) ("GAP Letter").

risks posed by Oconee's operation, rather than for Duke's economic interests; and thus, he has not violated the Ethics in Government Act by using his former role as an NRC staff member for personal enrichment or advancement. *Id.* Again, by the same token, Petitioners have not violated the Ethics in Government Act by submitting Mr. Mitman's declaration and expert report to the ASLB.

Equally important, Mr. Mitman's statement of his views on unacceptable and unlawful health and safety risks posed by the proposed extended operation of Oconee for an extended license renewal term is protected by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)-(9), which prohibits a federal agency from taking action against an employee because of any disclosure by the employee that the employee reasonably believes evidences a "violation of any law, rule or regulation," or "a substantial and specific danger to public health or safety," if such disclosure "is not specifically prohibited by law . . ." *See* GAP Letter at 4. The Ethics in Government Act contains no specific prohibitions that would override these protections of the Whistleblower Protection Act. *Id.*

Thus, contrary to the implicit suggestion of the Lighty Letter at page 3 (citing *Metro. Edison Co.*, 20 N.R.C. at 1582-85), the ASLB has no reason to take any adverse action with respect to Petitioners' Hearing Request. In fact, the Whistleblower Protection Act prohibits the ASLB members, as federal agency employees, from using their offices to take retaliatory action against whistleblowers like Mr. Mitman. 5 U.S.C. § 2302(a)(2)(c) and (b)(8)-(9). *See* GAP Letter at 4.

According to Mr. Lighty, he has reported the information in his letter to the NRC's Office of Inspector General ("OIG"). Lighty Letter at 3. As with the ASLB, the Whistleblower Protection Act prohibits the OIG from taking retaliatory action against Mr. Mitman. *See* GAP Letter at 4. In addition, the federal witness tampering statute prohibits Duke from engaging in

any unlawful effort to intimidate Mr. Mitman and thereby prevent him from providing expert support for Petitioners in this case, including expert testimony if Petitioners' Hearing Request is granted. *See* GAP Letter at 4 (citing 18 U.S.C. §§ 1503 and 1512).

If and when the OIG raises any concern about Petitioners' or Mr. Mitman's conduct, we will inform the ASLB. In the meantime, Petitioners respectfully submit that Mr. Lighty's letter does not provide any grounds for the ASLB to take adverse action with respect to Petitioners' hearing request and waiver petition.

Respectfully submitted,

/signed electronically by/
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NUCLEAR REGULATORY COMMISSION
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CERTIFICATE OF SERVICE

I certify that on November 19, 2021, I posted on the NRC's Electronic Information Exchange
PETITIONERS' RESPONSE TO DUKE'S NOTIFICATION REGARDING INFORMATION
POTENTIALLY RELEVANT TO THE ADJUDICATORY PROCEEDING.

/signed electronically by/
Diane Curran



November 18, 2021

By electronic mail to: Robert.Feitel@NRC.gov

Honorable Robert J. Feitel
Inspector General
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Whistleblower Complaint on Behalf of Jeff Mitman

Dear Inspector General Feitel:

We represent former Nuclear Regulatory Commission (NRC) employee Jeffrey Mitman, a whistleblower protected by the Whistleblower Protection Act (WPA), codified at 5 U.S.C. 2302(b)(8)-(9), in connection with alleged ethics issues arising from his provision of an expert declaration and report in the Subsequent License Renewal Proceeding (SLR Proceeding) for Oconee Nuclear Station, Units 1, 2 and 3, Docket Nos. 50-269-SLR, 50-270-SLR, 50-287-SLR before the Atomic Safety and Licensing Board (ASLB). Mr. Mitman provided an expert declaration and report in support of the Petitioners' Hearing Request and Petition to Intervene and Waiver Petition submitted by Beyond Nuclear and the Sierra Club. These documents are posted on the NRC's Agencywide Documents Access and Management System (ADAMS) at Accession No. ML21270A249.

On November 8, 2021, Mr. Ryan K. Lighty of Morgan Lewis wrote to the ASLB alleging that Mr. Mitman may be violating the post-employment statute or implementing regulations at 18 U.S.C. § 207(a)(1) and 5 C.F.R. Part 2641 by providing expert testimony. Letter from Ryan K. Lighty to G. Paul Bollwerk, III, et al. (ADAMS Accession No. ML21312A551). He also stated that he had reported this information to you and had requested "a confirmation of whether Mr. Mitman's involvement in this proceeding complies with applicable requirements." We write to make it clear that Mr. Mitman's right to testify in this regard is protected by the First Amendment and by the WPA, and that his doing so does not violate § 207.

In addition, we formally request that you investigate whether Duke has unlawfully tried to deter Mr. Mitman from giving his evidence in this matter before the ASLB, in violation of the WPA and federal witness tampering prohibitions, 18 U.S.C. § 1512(d)(4).

Mr. Mitman, by education and experience, is a nuclear engineer, with a significant level of expertise in risk analysis. He started work for the NRC in approximately 2005. He has more than 40 years of experience in the nuclear industry and 16 years as a regulator with the NRC. His experience includes 16 years on the technical staff of the NRC as a Reliability and Risk Analyst. For the past 15

years, he has served as Senior Reliability and Risk Analyst, with significant responsibility for managing a number of risk analysis projects and teams. Mitman Declaration (Decl.) ¶¶ 1 and 3.

During his employment in the nuclear industry and NRC, Mr. Mitman became very familiar with NRC regulations and guidance regarding nuclear power plant safety, and with the application of risk analysis to reactor safety analysis. He is also generally familiar with the NRC's conceptual approach to the analysis of Severe Accident Mitigation (SAMA) alternatives in the context of reactor license renewal. (Mitman Decl. ¶ 4.)

Mr. Mitman retired from the NRC on March 26, 2021.

As you know, the Ethics in Government Act, 18 U.S.C. § 207(a)(1), provides that “no former federal 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.” Section 207(a)(1) was enacted in 1962 as part of a major revision of bribery and conflict of interest laws.¹ The statute has since been significantly amended in 1978, 1989, and 2007.²

A key purpose of the Ethics Reform Act was “to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered.” S. Rep. No. 170, 95th Cong., 2d Sess. 31 (1978). The 1989 amendments were enacted in order to “eliminate the perception that a ‘revolving door’ exists between the private [sector] and government service.” *United States v. Martin*, 39 F. Supp. 2d 1333, 1335 (D. Utah 1999) (cites and quotes omitted). Put another way, the statute addresses the “nagging and persistent conflicting interests of the government official who has his eye cocked toward subsequent private employment. *United States v. Conlon*, 628 F.2d 150, 155, n. 26 (D.C. Cir. 1980).³

In keeping with its legislative history, 18 USC. § 207(a)(1) is widely known among the agencies to whose former employees it applies as the “Permanent Ban on Switching Sides.”⁴ The Department of the Interior advises its employees:

The purpose behind these restrictions is to prevent you from “switching sides” on a matter in which you were involved when you worked for DOI

¹ Congressional Research Service (CRS), “Post-Employment, ‘Revolving Door,’ Laws for Federal Personnel,” by Jack Maskell, Jan. 7, 2014, <https://fas.org/sgp/crs/misc/R42728.pdf>. (“Revolving Door CRS Report”) at 1.

² *Id.*

³ The case dealt with a related statute restricting potential future private employment of a current federal official.

⁴ See, e.g. Center for Disease Control’s (CDC) website, <https://www.cdc.gov/ethics/resources/topics/postEmployment.html>; Food & Drug Administration’s (FDA) website, <https://www.fda.gov/about-fda/ethics/post-employment-restrictions>; Office of Government Ethics (OGE), [https://www.oge.gov/Web/oge.nsf/0/6F0B33C29C0E772E852585B6005A1BB7/\\$FILE/Combined%20Senior%20Employees.pdf](https://www.oge.gov/Web/oge.nsf/0/6F0B33C29C0E772E852585B6005A1BB7/$FILE/Combined%20Senior%20Employees.pdf); Securities and Exchange Commission (SEC), <https://www.sec.gov/about/offices/ethics/ethics-post-employment.htm>; see also, (“Revolving Door CRS Report”) at 3 (“Lifetime Ban on Switching Sides.”).

and to preclude you from sharing in certain profits that your new employer may have received in connection with a matter that was pending before the Federal government during your DOI tenure.⁵

In two significant respects, the prohibitions of 18 U.S.C. § 207(a)(1) do not apply to Mr. Mitman.

First, as discussed above, Mr. Mitman retired from the NRC on March 26, 2021. The SLR Proceeding in which he submitted his expert report and declaration did not arise until June 2021 (see Mitman Decl. ¶ 6), when Duke Energy Corp. (Duke) filed its SLR application. By definition, Mr. Mitman could not have participated “personally and substantially” in the “particular matter” of the SLR Proceeding while he was employed by the NRC, since that proceeding did not commence until after he had left the NRC.⁶

Second, even assuming for purposes of argument that Mr. Mitman’s previous, separate work on dam safety issues related to the Oconee nuclear plant could be deemed to constitute the same “particular matter” as the SLR Proceeding, Mr. Mitman has not “switched sides.” Both in his Oconee-related work as an NRC employee, and as a post-retirement expert for the Petitioners in the SLR Proceeding, Mr. Mitman has been guided by a single-overriding aim: to fulfill the NRC’s statutory mission under the Atomic Energy Act of protecting the health and safety of the public against the risk that a failure of the Jocassee Dam could result in an Oconee core meltdown and potentially catastrophic radionuclide release. While still an NRC employee, he submitted a statement on the public record under the Whistleblower Protection Act that is completely consistent with the testimony he wants to provide as a former employee.⁷

In providing his expert declaration and report in the SLR Proceeding, Mr. Mitman is not testifying “against” the NRC; rather, he submitted his expert declaration and report with the purpose of supporting the NRC’s mission to protect the public against such threats. The views expressed in his declaration and expert report are the same views he expressed in his earlier positions as an NRC employee when he was serving the same goal. This is important in light of Congress’ purpose in enacting the prohibitions of 18 U.S.C. § 207 and related statutes, which notably are placed in Chapter 11 of Title 18 of the U.S. Code, entitled “Bribery, Graft, And Conflicts of Interest.”

In sum, Mr. Mitman’s testimony does not violate the Ethics in Government Act because he is not “switching sides” or using information he gained while in the government or starting a new, lucrative career for himself on the other side of the “revolving door.”

⁵[https://www.usbr.gov/ethics/docs/Exit%20Package%20for%20Reclamation%20Employees%20\(OCT%202016\).pdf](https://www.usbr.gov/ethics/docs/Exit%20Package%20for%20Reclamation%20Employees%20(OCT%202016).pdf).

⁶ To be sure, Mr. Mitman, while an NRC staff member, 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. He also participated in a generic study by NRC of dam failure risk, with particular application to Oconee. However, this general activity did not involve the same “particular matter” as the instant SLR matter initiated by Duke in June 2021, following Mr. Mitman’s retirement. Mitman Decl. ¶ 5.

⁷ Mr. Mitman’s document can be found on the OSC’s web site at <https://osc.gov/PublicFiles#k=DI-15-5254#l=1033>. The document starts on Page 60 of 102 of the file called "DI 15-5242 WB Comments (Redacted).pdf." It has ADAMS Accession No. ML16242A333.

In this last respect, we note that Mr. Mitman's expert report is based on publicly available documents generated by Duke and the NRC. Curran Decl. ¶ 6; Mitman Expert Report, p.2. It is not based on "insider information" that was only available to Mr. Mitman because he was an agency employee. Mr. Mitman notes that, although he cites some non-public documents in footnotes to his report, the report does not rely on the contents of those non-public documents, but rather he obtained the content entirely from public sources. *Id.*

Equally importantly, Mr. Mitman's statement of his views on important NRC health and safety issues is protected by the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), which prohibits a federal agency from taking action against an employee because of any disclosure by the employee that the employee reasonably believes evidences a "violation of any law, rule or regulation," or "a substantial and specific danger to public health or safety," if such disclosure "is not specifically prohibited by law . . ." The Ethics in Government Act contains no specific prohibitions that would override these protections of the Whistleblower Protection Act. A broad prohibition such as Section 207 does not qualify. *See MacLean v. Department of Homeland Security*, 714 F. 3d 1301 (Fed. Circ. 2013), *petition for rehearing denied*, 460 Fed. Appx. 926, *aff'd* 574 U.S. 383, 135 S. Ct. 913 (2015) In this context, we remind you that the WPA prohibits you from using your office to retaliate against Mr. Mitman as a whistleblower. Government Accountability Project recently settled a WPA matter for another nuclear safety whistleblower. The OIG had subjected that whistleblower to a retaliatory investigation in reprisal for his protected disclosures. As part of that resolution, the OIG was required to hold trainings for all of its employees regarding the WPA prohibition against retaliation against truth-tellers such as Mr. Mitman in this instance. If the agency acts against Mr. Mittman through a retaliatory investigation, he has jurisdiction to file a complaint for a violation of section 2302(b)(8) with the U.S. Office of Special Counsel seeking protection and disciplinary action for the violation. 5 USC § 1215.

Finally, given that Mr. Mitman's conduct is strongly protected by the WPA, and given the inapplicability of the Ethics in Government Act to these circumstances, we respectfully submit that Duke is attempting to deter Mr. Mitman's testimony by raising the specter of investigation and prosecution. Such conduct may violate the letter and spirit of the witness tampering statute, 18 U.S.C. § 1512(d)(4). *See F.D.I.C. v. Refco Group, Ltd.*, 46 F.Supp.2d 1109, 1113 (D. Colo. 1999) (district judge suggesting sympathy for argument that threatening witness with prosecution might be a violation of 18 U.S.C. §§ 1503 and 1512). Therefore, we formally request that you investigate the role of Duke in trying to deter Mr. Mitman from giving his evidence in this matter before the ASLB, and determine whether that effort ran afoul of the witness tampering prohibitions and the WPA.

Thank you for your courtesy and consideration.

Sincerely,

/s/ Tom Devine
Tom Devine
Legal Director

/s/Jack Kolar
John A. Kolar
Director of Litigation

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