

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-2
Oconee Nuclear Station,)	July 29, 2024
Units 1, 2 & 3)	

**RESPONSE BY BEYOND NUCLEAR AND SIERRA CLUB
TO JOINT MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board’s (“ASLB’s”) Memorandum and Order (Regarding Objection to Motion for Entry of a Protective Order) (July 25 2024) (“July 25 Order”), Petitioners Beyond Nuclear, Inc. (“Beyond Nuclear”) and the Sierra Club, Inc. (“Sierra Club”) hereby respond to Joint Motion for Proposed Protective Order Governing Disclosure of Sensitive Unclassified Non-Safeguards Information and Non-Disclosure Declaration (July 24, 2024) (“Motion for Protective Order”). In this Part 54 proceeding for consideration of Duke Energy Corp.’s (“Duke’s”) application to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for subsequent license renewal (“SLR”) of the operating license for the Oconee Units 1, 2 and 3 nuclear power plant,¹ the proposed Protective Order would govern Petitioners’ actions with respect to “unknown information” to be designated by the NRC Staff as Sensitive Unclassified Non-Safeguards Information or “SUNSI.”

Petitioners have given thorough and careful consideration to the draft Protective Order and the draft Nondisclosure Agreement and whether they meet the ASLB’s stated purpose to “aid the Board in ensuring that both the participants and the public have appropriate and timely

¹ Petitioners note that the Licensing Board inadvertently refers to this proceeding as a “Part 52 proceeding.” July 25 Order at 1.

access to documents in this proceeding.”² However, Petitioners do not believe the imposition of a protective order is necessary, lawful or appropriate in light of three unusual circumstances presented by this proceeding.

First, this proceeding has two distinct stages with respect to the information that may be necessary for effective participation and decision-making. In this initial stage of the proceeding to consider Petitioners’ hearing request, all of the parties and the Board already have the information the Staff seeks to protect. If the Board grants Petitioners’ hearing request and opens a second stage, it is possible that Duke or the Staff will rely on information that is not on the public record. But that stage has not occurred yet and it may not occur at all.

Second, the Staff seeks to restrict Petitioners’ use of a body of information whose full parameters are unknown.³ That information includes information that the NRC has already disclosed publicly through the Freedom of Information Act (“FOIA”) and/or the NRC’s Agencywide Document Access and Management System (“ADAMS”), including the three Oconee dockets and the Electronic Hearing Docket for this adjudicatory proceeding and the first Oconee SLR adjudicatory proceeding.

Third, the Staff’s proposal is based on the assumption that another federal agency, the Federal Energy Regulatory Commission (“FERC”), will make a future determination that this unknown body of information is exempt from disclosure under the FOIA or some other statute. The Staff is unable to say when FERC will make this determination. In the meantime, the Staff is effectively presuming what information FERC will instruct the Staff to withhold.

² Memorandum and Order (Regarding NRC Staff Review of Initial Prehearing Conference Transcript) at 2 (July 8, 2024) (“July 8 Order”).

³ The Petitioners highlight “unknown” because the only guidance they have on what information is SUNSI can only be deduced from the proposed redactions of the June 24 oral argument transcripts.

As discussed in more detail in Section III, Petitioners have concluded that the standard boilerplate protective order on which the Staff has modeled the proposed Protective Order will not fit the current circumstances for three reasons:

First, imposition of a protective order is unnecessary at this stage of the proceeding.

Second, and in any event, Petitioners object to the content of the proposed Protective Order because it inappropriately establishes a pretense of granting controlled “access” to information that the NRC has already provided to the public through disclosures under the FOIA and ordinary posting of documents on ADAMS and that the Petitioners currently have. Having previously released the information to the public, it does not appear that the NRC has the legal authority to forbid the Petitioners from discussing it or the manner in which they store or use it. And while the NRC Staff may possess SUNSI related to Oconee flood risk and flood protection that has not been placed on the public record so far, it is premature to discuss measures for protecting that information until FERC has determined whether the information is exempt from disclosure.

Finally, the ASLB should not adopt the proposed Protective Order or the Nondisclosure Declaration because they are unlawfully and unacceptably burdensome, vague, and restrictive of the Petitioners. The Petitioners note in this regard that by itself, the Protective Order would bind and restrict the Petitioners and their representatives (as they are identified as “Authorized Recipients” by the proposed Protective Order) with respect to withheld information already lawfully in their possession – whether or not their representatives sign the Nondisclosure Declaration. Thus, the Protective Order would amount to a gag order on the Petitioners.

In Section IV, Petitioners propose a set of alternative steps for the protection of allegedly exempt information during this first phase of the proceeding related to the Board’s determination

of admissibility of contentions. They also propose additional steps if the Board admits contentions for which the hearing process would involve production and discussion of information the NRC Staff and/or FERC determine to be exempt from disclosure.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual History of Public Disclosures Regarding Flooding Risks and Protection Measures at Oconee Nuclear Power Plant

Until ten to fifteen years ago, some key information about flooding risk to the Oconee reactors and the degree to which the NRC required the reactors to be protected from flooding was kept off the public record by the NRC. But after a series of FOIA requests, the NRC placed much of this key information on the public record. And Petitioners' ability to participate in this proceeding has depended to a significant degree on that information. The important role played by the FOIA is noted by Petitioners' expert Jeffrey T. Mitman in his technical report supporting Petitioners' hearing request:

A note about secrecy: A significant portion of the information relied on in this report was not available publicly until members of the public forced NRC to release it by requesting it under the Freedom of Information Act (FOIA). I am grateful to Jim Riccio for FOIA Request FOIA/PA-2012-0325 (submitted on behalf of Greenpeace) and Dave Lochbaum for FOIA Request FOIA/PA-2018-0010 (submitted on behalf of the Union of Concerned Scientists), which generated some of the key information relied on this report. The NRC never attempted to justify withholding this critical, “damming,” and now-public safety information from the public eye, nor is any justification evident.⁴

As Mr. Mitman also noted, while some nonpublic documents are cited in the footnotes to his report, the report does not rely directly on the content of any of those nonpublic documents.

⁴ NRC Relicensing Crisis at Oconee Nuclear Station: *Stop Duke From Sending Safety Over the Jocassee Dam: Updated Analysis of Neglected Safety, Environmental and Climate Change Risks* at 3 (April 2024) (Corrected May 15, 2024) (“Mitman Report”). Petitioners, with Mr. Mitman's assistance, have also submitted multiple FOIA requests to the NRC and obtained disclosure of relevant documents. See FOIA-2022-160 (submitted May 6, 2022); FOIA-2022-000172 (submitted May 23, 2022); FOIA-2022-000210 (submitted July 28, 2022).

Citations of those documents are provided for completeness of the record, not for their content.

When the content of nonpublic document is described in Mr. Mitman's report, that description is taken from descriptions in publicly available documents. Thus, while Petitioners and Mr. Mitman have used the FOIA to seek disclosure of information withheld by the NRC, they are careful to respect the NRC's designation of information as nonpublic where required.

Unfortunately, however, Mr. Mitman reported that Duke and the NRC have continued to withhold some information relevant to this report, and that the NRC had even withdrawn several documents that formerly were released under FOIA.⁵ An example of a previously released document that the NRC now asserts is exempt from disclosure is the 2011 Staff Safety Evaluation mentioned in the ASLB's July 25 Order at page 5. Yet, Mr. Mitman found that:

The information now in the public record is more than sufficient to show that Duke has failed to provide the public with an accurate, up-to-date, and thorough risk analysis of the potential for a serious core melt accident at Oconee Units 1, 2, and 3 during the second license renewal term. In addition, publicly available information is more than sufficient to show that for the past ten years, the NRC has considered the risk of a core melt accident caused by Jocassee Dam failure to implicate the adequacy of protection to public health and safety and require significant measures to prevent catastrophe. By assembling this information into a single document, the author seeks to ensure a measure of accountability by Duke and the NRC that they previously eluded through secrecy.⁶

Petitioners share Mr. Mitman's goal of ensuring a measure of accountability for Duke's and the NRC's failure to follow up on flood protection measures that were deemed essential to public health and safety in 2011 but which the NRC has since abandoned without acknowledging the safety implications, and even attempted to obfuscate that abandonment. This is the key reason why Petitioners will approach with great caution any proposed measures that would prevent them from discussing or disseminating information that (a) they have lawfully accessed

⁵ Mitman Report at 3.

⁶ *Id.*

from the public record and (b) are still available elsewhere on the public record, either in ADAMS or on other public websites. In this regard, Petitioners note that some of the information sought to be withheld by the NRC Staff has been in the public domain for over a decade.

B. Procedural History of Proposed Protective Order

On July 17, 2024, in response to the Board's July 8 Order, counsel for the NRC Staff circulated to counsel for the other parties a draft Protective Order and Nondisclosure Agreement and a proposed redacted version of the transcript of the oral argument held on June 24, 2024.

As erroneously asserted in the Motion for Protective order and as credited by the ASLB in its July 25 Order, the Petitioners "offered no comments or edits [to both the draft protective order and non-disclosure declaration] . . . [and] oppose this motion and reserve the right to respond to it."⁷ To the contrary, on July 18, 2024, Petitioners' counsel commented on the draft Motion and the Protective order as follows:

It now appears that the legal basis for redacting some information from our hearing request and the hearing transcript is that FERC considers it to constitute Critical Energy/Electric Infrastructure Information. As you suggest, however, it is not possible for the Staff to specifically identify the information that must be withheld and redacted from public documents until FERC has reviewed the pleadings and transcript and gotten back to you.

We remain unwilling to consider entering nondisclosure agreements because we still don't know what is the exact information that you seek to withhold from public disclosure. And at this point, we don't see the purpose of a protective order for discussions between the parties and the Board when it appears that an outside entity – FERC -- is the ultimate decider of what information should be withheld.

Therefore, it seems most reasonable to wait for FERC's determination on what information it will require to be redacted from the pleadings and transcript of the SLR proceeding. At that point, the Board will become aware of what information in the record it must redact from its decision. And we will know what exactly is the confidential information at issue.⁸

⁷ *Id.* at 2 (citing Motion for Protective Order at 1, 3).

⁸ Under ordinary circumstances, Petitioners would not reproduce the contents of consultations between the parties. However, Petitioners respectfully submit that provision of the information is

On July 19, 2024, counsel for the NRC Staff emailed counsel again about the Motion for Protective Order. The email stated that the Staff intended to file the motion on July 22 and would state that Petitioners “have indicated they do not join the motion and intend to respond upon its filing.” Petitioners did not object to that characterization, which was accurate if somewhat incomplete.

On July 22, 2024, counsel for the Staff circulated a transcript of the June 24, 2024 oral argument with proposed redactions, along with a proposed Joint Motion for Redaction of the Official Transcript for the Initial Prehearing Conference Held on June 24, 2024 (“Motion for Redactions”). Because the Staff had already circulated a proposed redacted version of the oral argument transcript on July 17, Petitioners reasonably – but mistakenly -- assumed that the Staff was responding to the concerns stated in Petitioners’ July 18 email by offering an alternative approach to the entry of a Protective Order, *i.e.*, to simply redact the transcript.

Because Petitioners do not know the scope or the legal basis for the proposed redactions, Petitioners’ counsel responded that they take no position on the proposed redactions. Petitioners also stated their view that the redactions should not have any effect on the Licensing Board’s ability to issue a decision on their hearing request because the Board is in possession of all information that is relevant to the decision.

Following that email exchange, Petitioners made no further comment on the draft Protective Order because they assumed – again reasonably but mistakenly – that the Staff would present the Motion for Redactions together with the Motion for Protective Order as a possible alternative.

warranted by the Staff’s mischaracterization of Petitioners’ position in a way that implies disregard for the consultation process and disrespect for the Board’s request to consider a Protective Order and Nondisclosure Declaration.

Petitioners were therefore surprised on July 24, 2024, when the Staff filed the Motion for Protective Order without the Motion for Redactions. They were also surprised by the Staff's erroneous representation that the Petitioners had stated their opposition to the Motion for Protective Order without comment.

III. DISCUSSION

A. Issuance of a Protective Order is Not Necessary to a Decision on Petitioners' Hearing Request.

Petitioners respectfully submit that entry of a protective order is not necessary at this stage of the proceeding because the Board and parties already have access to the information on which Petitioners rely for their contentions, all of which was in the public record at the time of their hearing request and the oral argument. Petitioners already have access to any information that the Board may redact from the oral argument transcript, the pleadings, and its decision.⁹ Therefore, they will not be prejudiced by the absence of a protective order.

Further, if the Board denies Petitioners' hearing request, Petitioners intend to conform to the Board's redactions with respect to any motion for reconsideration or appeal brief they file. Petitioners are also willing to obtain NRC Staff confirmation that their redactions are sufficient before their pleadings are posted publicly. If Petitioners decide to seek disclosure of the redacted information, they will use the NRC's procedures in 10 C.F.R. Part 9 and may appeal to Federal District Court as permitted by the FOIA.

⁹ Petitioners take no position on the Staff's proposed redactions to the June 24 oral argument transcript, nor do they anticipate taking a position on the proposed redactions to their pleadings that the Staff plans to make. Petitioners have no legal basis to object because they do not know the legal basis for the proposed redactions. That information is known only to FERC, which has not weighed in yet. In the meantime, it appears the NRC is just making an informed guess.

If the Board admits any of Petitioners' contentions that may involve consideration of SUNSI, Petitioners propose to return to the Board to request additional procedures for consideration of SUNSI going forward. In that event, and at that time, FERC may have provided more information about the scope and legal basis for withholding information and thus it may be easier to discern what are appropriate measures to protect confidential information without muzzling the Petitioners.

B. Redaction of the Oral Argument Transcript, Pleadings and Other Documents is Premature.

Petitioners respectfully submit two reasons that it is premature to redact the pleadings and oral argument transcript, or for the Board to issue a decision with redactions. First, the parties and the Board have not yet learned from FERC what is the scope and legal basis for any redactions required by FERC. If the Board approves the NRC-proposed redactions now, it may find later that FERC wanted more redactions or fewer redactions, depending on FERC's legal basis for the redactions. If the Board is concerned about inadvertently disclosing sensitive information, it is difficult to see how it can avoid inadvertent disclosures until FERC states its requirements. But it should be noted that the entire hearing request record is currently disclosed with the exception of the transcripts of the oral argument – and this event was open to and attended by the public.

Second, it appears that some or all of the information the NRC seeks to withhold may not be exempt from disclosure under the doctrine of official acknowledgement. As set forth by the U.S. Court of Appeals for the D.C. Circuit:

When information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765, 286 U.S. App. D.C. 13 (D.C. Cir. 1990). A three-part test determines whether an item is "officially acknowledged": (1) "the information requested must be as specific as the information previously released"; (2) "the information requested must match the

information previously disclosed"; and (3) "the information requested must already have been made public through an official and documented disclosure." *Id.*¹⁰

For instance, the 2011 Safety Evaluation that the NRC Staff has pulled from ADAMS and now seeks to withhold in this proceeding was formally released almost ten years ago in its entirety, in response to a FOIA request. The NRC's Response to Freedom of Information Act (FOIA/Privacy Act (PA) Request No. 2012-0325 (April 21, 2105) is attached. The 2011 Safety Evaluation is item number 15 (highlighted). Petitioners respectfully submit that in order to adequately determine what proposed redactions may meet this test, the Board should await a determination from FERC regarding what information it proposes to redact from the public record and on what grounds.

C. The Proposed Protective Order is Unlawful and Inappropriate to These Circumstances.

Petitioners respectfully submit that in addition to being unnecessary in this stage of the proceeding and potentially inconsistent with the doctrine of official acknowledgement, the proposed Protective Order is unlawful and inappropriate to the circumstances of this case because it establishes a pretense of granting controlled "access" to information that the NRC has already provided to the public through disclosures under the FOIA and ordinary posting of documents on ADAMS. In the first place, the Board does not appear to be authorized to order the Petitioners not to discuss or disclose information that has already been disclosed under the FOIA.¹¹ At the very least, the issue is complex and first requires some understanding of the

¹⁰ *Mobley V. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015). *See also ACLU v. C.I.A.*, 710 F.3d 422 (D.C. Cir. 2013).

¹¹ *100Reporters v. United States Dep't of State*, 602 F. Supp. 3d 41 (D.D.C. 2022) ("[A]bsent legal authority indicating that the Court has the authority to order that a FOIA recipient return records that were inadvertently released without redactions, the Court has no reason to consider whether the proposed redactions would be proper, were the Department allowed a mulligan.").

government's legal basis for retracting the information.¹² Petitioners note that unlike the cases cited in notes 11 and 12 above, the previous FOIA disclosures were not inadvertent but intentional, thus weighing against reversal of those disclosures.

Further, while the NRC Staff may possess SUNSI related to Oconee flood risk and flood protection that has not been placed on the public record so far, it is premature to discuss measures for protecting or seeking disclosure of that information until FERC has determined whether and on what legal grounds the information is exempt from disclosure under the FOIA.

D. The Proposed Protective Order is Unlawfully and Unfairly Restrictive and Burdensome to Petitioners.

The proposed Protective Order would impose unlawful, unfair, and unnecessary restrictions and obligations on Petitioners with respect to information that is on the public record.

First, as discussed in Section B above, the Protective Order seeks to claw back information the NRC previously put on the public record and penalize the Petitioners for discussing and disseminating information they obtained through lawful means. The FOIA does not give the Board the authority to regulate the conduct of the Petitioners in this way. *See* cases cited above in note 11.

Second, the subject matter of the Protective Order is impermissibly vague. For instance, in paragraph 1, the proposed Protective Order states that the Order “shall govern the access, disclosure, and use of all [SUNSI] in this proceeding.” But Petitioners have no idea what the

See also Human Rights Def. Ctr. v. United States Park Police, 2023 U.S. Dist. LEXIS 151815 (D.D.C. Aug. 29, 2023) (“FOIA does not provide for the compelled return or destruction of inadvertently produced documents.”).

¹² *Nat'l Press Club Journalism Inst. v. United States Immigr. & Customs Enf't*, 2023 U.S. Dist. LEXIS 229953 (D.D.C. Dec. 28, 2023) (quoting *Amiri v. Nat'l Sci. Found.*, 2021 U.S. Dist. LEXIS 185032 (D.D.C. Sept. 28, 2021) (whether an agency has waived a FOIA exemption “depends upon the nature and circumstances of disclosure.”)).

SUNSI consists of, because FERC has yet to make a determination. In the meantime, the definition appears to be changeable, based on whatever interim designation the Staff makes at whatever time it wishes. Because the Petitioners are likely to already have information the Staff designates as SUNSI, this puts the Petitioners at risk of unwittingly disclosing SUNSI and thereby being exposed to sanctions via paragraph 21.

Third, the Protective Order is impermissibly broad and burdensome, requiring the Petitioners to take extraordinary measures to survey their files and take special measures for the storage of a potentially wide array of documents they have possessed for years and have mixed with their other public documents.¹³ And while the Protective Order recognizes the right of the Petitioners to use lawfully obtained information, they bear a heavy burden of justifying the use, with exposure to significant penalties.¹⁴ The draconian nature of the language is worth noting here:

If information identified in this proceeding as SUNSI comes into the possession of or is known by any participant independently of SUNSI accessed in this proceeding, and such knowledge was acquired without violation of law or other requirements applicable to such participant directing the participant to keep such information confidential, use of that document or information in this proceeding, without compliance with the terms of this Protective Order, shall not be a violation of the terms of this Protective Order. *If a party asserts that disclosure of such information or document was a violation of this Protective Order, then the participant asserting independent knowledge of the contents of SUNSI or independent access to such a document shall have the burden of proving that (1) such information was independently obtained and (2) was not improperly disclosed in contravention of any law or other non-disclosure promise.*¹⁵

Importantly, the Protective Order imposes all of the above obligations on the Petitioners *per se*, regardless of whether their representatives have signed a Nondisclosure Agreement. Thus, if the Protective Order is approved, Petitioners will be required to gag themselves with respect to an

¹³ *Id.*, paragraph 8.

¹⁴ *Id.*, paragraph 20.

¹⁵ *Id.* (emphasis added).

unknown and therefore necessarily expansive body of information relating to flood risk and flood protection measures at the Oconee Nuclear Station.

As discussed above, imposing these burdens on the Petitioners is unnecessary at this stage of the proceeding and potentially inconsistent with the doctrine of acknowledgement of disclosures. And if the Board admits Petitioners' contentions, Petitioners respectfully request the Board to establish a process for distinguishing information that can be disclosed and information that must be lawfully withheld, before entertaining the imposition of a protective order.

IV. PROPOSED ALTERNATIVE STEPS FOR THE PROTECTION OF ALLEGEDLY EXEMPT INFORMATION

Petitioners propose the following steps to be taken by the ASLB and parties:

1. The ASLB should postpone public issuance of a decision on Petitioners' hearing request until FERC has informed the NRC Staff of what information it requires to be redacted from the pleadings, the oral argument transcript, and the Board's decision. Petitioners would be amenable to a time-limited protective order that restricts access to the Board's decision and potential motion for reconsideration or appeal brief, pending a determination by the Board on appropriate redactions. *See* par. 2 below.
2. After FERC has made its determination regarding exempt information, and before considering any redactions from documents submitted or generated in this proceeding, the Board should entertain a briefing on whether proposed redactions are consistent with the doctrine of acknowledgment of disclosures or otherwise lawful.
3. No protective order should be issued at this time.
4. If the Board proceeds with the redactions posed by the Staff, and if the Board denies Petitioners' hearing request, the Petitioners will conform to the Board's redactions in any motion for reconsideration or appellate brief they submit to the NRC. In the meantime,

Petitioners will also pursue appropriate remedies to seek disclosure of the redacted information under the FOIA.

5. If the Board grants Petitioners' hearing request and it appears that development of the issues may require access to SUNSI that has not previously been put on the public record, the Board and parties should consider whether a limited protective order is appropriate, or what other procedures are appropriate for protecting SUNSI and ensuring that all information that is lawfully in the public domain remains open to discussion.

V. CONCLUSION

For the foregoing reasons, the ASLB should not adopt the proposed Protective Order or the associated Nondisclosure Declaration. Instead, Petitioners respectfully request the Board to take the steps described in Section IV above.

Respectfully submitted,

____/signed electronically by/____

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July 29, 2024

**RESPONSE TO FREEDOM OF
INFORMATION ACT (FOIA) / PRIVACY
ACT (PA) REQUEST**

2012-0325

4

RESPONSE
TYPE

INTERIM



FINAL

REQUESTER

Jim Riccio

DATE

APR 21 2015

PART I. -- INFORMATION RELEASED

- ☐ No additional agency records subject to the request have been located.
- ☐ Requested records are available through another public distribution program. See Comments section.
- ☒

GROUP I

 Agency records subject to the request that are identified in the specified group are already available in public ADAMS or on microfiche in the NRC Public Document Room.
- ☒

GROUP J, K

 Agency records subject to the request that are contained in the specified group are being made available in public ADAMS.
- ☐

GROUP

 Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☒ See Comments.

PART I.A -- FEES

AMOUNT*

\$

* See comments
for details

You will be billed by NRC for the amount listed.



None. Minimum fee threshold not met.



You will receive a refund for the amount listed.



Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- ☐ We did not locate any agency records responsive to your request. *Note:* Congress allowed agencies to treat three discrete categories of law enforcement and national security records as not subject to the FOIA ("exclusions"). See 5 U.S.C. 552(c). This is a standard notification that we give to all requesters; it should not be taken as an indication that any of these excluded records do, or do not, exist.
- ☒ We have withheld certain information in the records from disclosure pursuant to the FOIA exemptions described, and for the reasons stated, in Part II.
- ☒ Because this is an interim response to your request, you may not appeal this determination at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination on your request.
- ☐ You may appeal this final determination within 30 calendar days of the date of this response, by writing to the FOIA Officer, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001. Please be sure to mark your letter/envelope or email that it is a "FOIA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

The incoming request is available in ADAMS as ML12263A087. Records with an ML accession number are publicly available in the NRC's Public Electronic Reading Room at <http://www.nrc.gov/reading-rm.html>. If you need assistance in obtaining these records, please contact the NRC's Public Document Room (PDR) at 301-415-4737, or 1-800-397-4209, or by email to PDR.Resource@nrc.gov.

To facilitate your review, comment boxes may appear on pages to refer you to documents (by their ML #) already available in public ADAMS, or to refer you to related documents in other interim responses to your request, or to otherwise provide clarification..

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Roger D. Andon

**RESPONSE TO FREEDOM OF INFORMATION
ACT (FOIA) / PRIVACY ACT (PA) REQUEST**DATE **APR 21 2015****PART II.A -- APPLICABLE EXEMPTIONS**

- GROUP **K** Records subject to the request that are contained in the specified group are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).
- ☐ Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- ☐ Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.
- ☐ Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
- ☐ Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
- ☐ Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
- ☐ 41 U.S.C., Section 4702(b), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- ☐ Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
- ☐ The information is considered to be confidential business (proprietary) information.
- ☐ The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
- ☐ The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- ☐ Disclosure will harm an identifiable private or governmental interest.
- ☒ Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
- ☒ Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
- ☐ Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
- ☐ Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- ☒ Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- ☐ Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
- ☐ (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrong doing or a violation of NRC requirements from investigators).
- ☐ (C) Disclosure could constitute an unwarranted invasion of personal privacy.
- ☐ (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
- ☐ (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
- ☒ (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- ☐ OTHER (Specify)

PART II.B -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL		
			EDO	SECY	IG
Dr. Brian W. Sheron	Director, Nuclear Regulatory Research	Group K	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
William M. Dean	Director, Nuclear Reactor Regulation	Group K	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

Group I

FOIA/PA NO: 2012-0325

RECORDS ALREADY PUBLICLY AVAILABLE

- 1. ML14135A408 – Applied Research & Engineering Sciences (ARES) Letter to Duke Energy, dated January 29, 2007, subject: “Duke Energy Carolinas, LLC, Contract NE 23546 – Letter Report and Transmittal of Supporting Data – ARES TASK NO. 0630302.01.**
- 2. ML073241045 – NRC Letter to Duke Power Co., dated November 20, 2007, subject: “Reconsideration of Final Significance Determination Associated with Standby Shutdown Facility Flood Barrier White Finding.”**
- 3. ML090570779 – NRC Letter to Duke Energy, dated April 30, 2009, subject: “Evaluation of Duke Energy Carolinas, LLC (Duke), September 26, 2008 Response to NRC Letter dated August 15, 2008, related to External Flooding at Oconee Nuclear Station, Units 1, 2, and 3 (Oconee) (TAC NOS. MD8224, MD8225, and MD8226).”**
- 4. ML091470265 – Duke Energy Letter to NRC, dated May 20, 2009, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Request for Extension of Duke Response Time to Referenced Letter.”**

5. ML093380701 – Duke Energy Letter to NRC, dated November 30, 2009, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee External Flood Analyses and Associated Corrective Action Plan.”

6. ML100210199 – Duke Energy Letter to NRC, dated January 15, 2010, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee External Flood Interim Actions.”

7. ML12363A085 – NRC Letter to Duke Energy, dated January 29, 2010, subject: “Evaluation of Duke Energy Carolinas, LLC (Duke), November 30, 2009 Response to NRC Letter dated April 30, 2009, related to External Flooding at Oconee Nuclear Station, Units 1, 2, and 3 (Oconee) (TAC NOS. ME3065, ME3066, and ME3067).”

8. ML100470053 – Duke Energy Letter to NRC, dated February 8, 2010, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee External Flood, Response to Request for Additional Information (RAI).”

9. ML100610674 – Duke Energy Letter to NRC, dated February 26, 2010, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee External Flood Revised Commitment.”

10. ML103430047 – Duke Energy Letter to NRC, dated March 5, 2010, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and

50-287, Oconee External Flood, Response to Request for Additional Information (RAI)."

11. ML101600468 – Duke Energy Letter to NRC, dated May 27, 2010, subject: "Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee External Flood; Revision of Commitment from January 15, 2010, Letter."

12. ML12363A086 – NRC Letter to Duke Energy, dated June 22, 2010, subject: "Confirmatory Action Letter – Oconee Nuclear Station, Units 1, 2, and 3 Commitments to Address External Flooding Concerns (TAC NOS. ME3065, ME3066, and ME3067)."

13. ML101900305 – Memorandum from Lois James, Chief, Probabilistic Risk Assessment Operational Support Branch, Division of Risk Assessment, NRR, to Benjamin Beasley, Chief, Operating Experience and Generic Issues Branch, Division of Risk Analysis, RES, dated July 19, 2010, subject: "Identification of a Generic External Flooding Issue Due to Potential Dam Failures."

14. ML102170006 – Duke Energy Letter to NRC, dated August 2, 2010, subject: "Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee Response to Confirmatory Action Letter (CAL) 2-10-003."

15. ML110280153 – NRC Letter to Duke Energy, dated January 28, 2011, subject: "Staff Assessment of Duke's Response to Confirmatory Action Letter Regarding Duke's Commitments to Address External Flooding Concerns at the Oconee Nuclear Station, Units 1, 2, and 3 (ONS) (TAC NOS. ME3065, ME3066, and ME3067)."

16. ML111460063 – Duke Energy Letter to NRC, dated April 29, 2011, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Oconee Response to Confirmatory Action Letter (CAL) 2-10-003.”

17. ML11174A138 – NRC Letter to Duke Energy, dated August 18, 2011, subject: “Oconee Nuclear Station, Units 1, 2, and 3, Assessment of Duke Energy Carolinas, LLC’s April 29, 2011, Response to Confirmatory Action Letter regarding Modifications to Address External Flooding Concerns (TAC NOS. ME6133, ME6134, and ME6135).”

18. ML11294A341 – Duke Energy Letter to NRC, dated October 17, 2011, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Response to Requests for Additional information Regarding Necessary Modifications to Enhance the Capability of the ONS Site to Withstand the Postulated Failure of the Jocassee Dam.”

19. ML090510269 – NRC Information Notice 2012-02: Potentially Nonconservative Screening Value for Dam Failure Frequency in Probabilistic Risk Assessments, dated March 5, 2012.

20. ML13256A372 – Letter from Lawrence Criscione to Chairman Allison Macfarlane, NRC, dated September 18, 2012.

21. ML12053A016 – Duke Energy Letter to NRC, dated February 17, 2012, subject: “Duke Energy Carolinas, LLC, Oconee Nuclear Station, Units 1, 2, and 3, Renewed Facility Operating License, DPR-38, DPR-47, and DPR-55, Docket Nos. 50-269, 50-270, and 50-287, Duke Energy’s Recommended Revisions to the Oconee Nuclear Station Section of NRC’s Screening Analysis Report for

the Proposed Generic Issue on Flooding of Nuclear Power Plant Sites Following Upstream Dam Failure.”

- 22. ML12164A399 – Duke Energy Letter to NRC, dated June 8, 2012, subject: “Duke Energy Carolinas, LLC (Duke Energy), Oconee Nuclear Station (ONS), Units 1, 2 and 3, Docket Nos. 50-269, 50-270, 50-287, Renewed License Nos. DPR-38, DPR-47, and DPR-55 Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding the Flooding Aspects of Recommendations 2.1 and 2.3 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident.”**
- 23. ML14058A028 – NRC-prepared slides for the NRR LT meeting on the subject of “Oconee Flood Protection and the 10 CFR 50.54(f) Response”, dated October 21, 2008 (attachment to document J/2).**
- 24. ML14135A408 – Duke-prepared slides on the subject of “Oconee Nuclear Station External Flood NRR Meeting, Rockville, MD”, dated December 4, 2008.**
- 25. ML091380424 – Duke-prepared on the subject of “Oconee Nuclear Station External Flood NRR Meeting, Rockville, MD”, dated May 11, 2008 (attachment to document J/3).**
- 26. ML092380305 – Duke-prepared slides on the subject of “Oconee Nuclear Station External Flood Technical Meeting, Rockville, MD”, dated August 27, 2009.**
- 27. ML13066A420 – Oconee ICM Inspection Matrix (attachment to document J/9).**
- 28. ML13039A084 – Generic Failure Rate Evaluation for Jocassee Dam, dated March 15, 2010 (attachment to document J/10).**

29. ML13256A372 – Letter from Larry Criscione to Chairman Macfarlane, dated September 18, 2012 (attachment to document K/34).

30. ML081640244 – NRC Letter to Duke Energy, dated August 15, 2008, subject “Information request Pursuant to 10 CFR 50.54(f) Related to External Flooding, including Failure of the Jocassee Dam, at Oconee Nuclear Station, Units 1, 2, and 3 with enclosure, “Documents Related to Failure of the Jocassee Dam at Oconee Nuclear Station, Units 1, 2, and 3” w/ enclosure, “Documents Reviewed Related to Failure of the Jocassee Dam at Oconee Nuclear Station” (ML12363A132) (both are included in the attachment referred to as References.pdf” in document K/34)

31. ML082390669 – Email from Jack Grobe, NRR, to Leonard Olshan, NRR, et al., dated August 26, 2008, on the subject of “Proposal for a Risk Analysis of the Failure of the Jocassee and Keowee Dams to Assess the Potential Effects on the Safe Shutdown Facility of Oconee Nuclear Station, with attached proposal.

32. ML12012A006 – DG-1285, Sec. 2.1, pages 11-18.

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-2
Oconee Nuclear Station,)
Units 1, 2 & 3)

CERTIFICATE OF SERVICE

I certify that on July 29, 2024, I posted RESPONSE BY BEYOND NUCLEAR AND SIERRA CLUB TO JOINT MOTION FOR PROTECTIVE ORDER and its attachment on the NRC's Electronic Information Exchange.

/signed electronically by/
Paul Gunter