October 5, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	IA-20-008
JOSEPH SHEA	)	

JOSEPH SHEA'S MOTION FOR LEAVE TO REPLY TO THE NRC STAFF ANSWER

Pursuant to 10 C.F.R. § 2.323(c), and the instructions of the Atomic Safety and Licensing Board ("ASLB") during the September 30, 2020 prehearing scheduling conference in this matter, Mr. Joseph Shea submits this Motion for Leave to Reply to the NRC Staff Answer.[1]

On September 28, 2020, the NRC Staff submitted its Answer to Mr. Shea's Motion to Set Aside the Immediate Effectiveness of the Order.[2] Because the Answer (1) contains new, unanticipated legal theories; and (2) relies on documents not previously available to Mr. Shea, compelling circumstances exist to grant Mr. Shea's request.

I. Argument

Under 10 C.F.R. § 2.323(c), the ASLB may permit replies to answers in "compelling circumstances, such as where the moving party demonstrates that it could not reasonably have

[1] NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (Sept. 28, 2020) (the "Answer").

[2] Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging in NRC-Licensed Activities, Answer, And Request for Hearing (September 22, 2020) (the "Motion").

anticipated the arguments to which it seeks to reply." Moreover, Licensing Boards should grant such motions "where necessity or fairness dictates."[3] Such circumstances exist here.

As explained in Mr. Shea's attached Reply, the Staff's Answer raises for the first time in this proceeding a new and unfounded argument that an immediate ban for violating 10 C.F.R. § 50.5 can be based on a "prima facie" evidentiary showing of a 10 C.F.R. § 50.7 violation, therefore shifting the evidentiary burden to Mr. Shea.[4] The Staff's new argument incorrectly conflates the evidentiary standard in 10 C.F.R. § 50.7 (employee protection) with a Section 50.5 (deliberate misconduct) violation. Mr. Shea could not have anticipated that the Staff would take such an unprecedented position.

The Answer also relies on arguments based solely on an alleged showing that Mr. Shea violated Section 50.7.[5] That is inconsistent with the Order, however, which immediately banned Mr. Shea for violating Section 50.5.[6] In addition, the Answer newly relies on claims that Mr. Shea's violation was "willful."[7] But the Order itself clearly charges him with "deliberate misconduct," under Section 50.5.[8] Those are two different standards. It is unreasonable to expect that Mr. Shea could have anticipated the Staff's Answer would misapply the law and the Commission's regulations in such a fashion.

In addition, the Answer relies on documents previously unavailable to Mr. Shea. Specifically, the Answer contains excerpts of Office of Investigation transcripts for Ms. Beth

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[3] *U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-08-12, 67 N.R.C. 386, 393 (2008).

[4] Answer at 5.

[5] Answer at 11-12, 14, 19.

[6] Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective, IA-20-008 (August 24, 2020) (Adams Accession No. ML20219A676) (the "Order"). The Order states: "Mr. Joseph Shea … engaged in deliberate misconduct, in violation of 10 CFR 50.5, 'Deliberate Misconduct,' that caused an NRC licensee to be in violation of 10 CFR 50.7, 'Employee Protection.'" Order at 2.

[7] Answer at 15-17.

[8] Order at 2.

Wetzel and Ms. Deanna Fults, which the Staff had previously refused to provide to Mr. Shea.[9] The Answer also attaches Affidavits from Mr. Alejandro Echavarria and Mr. Ian Gifford, which were submitted "in support of" the Answer. Those Affidavits also were not available to Mr. Shea when he filed his Motion.

The Staff's Answer relies on these transcript excerpts and Affidavits to support its new arguments, and as evidence demonstrating why the Order's immediate ban is justified. Mr. Shea should be permitted to address the NRC Staff's new factual assertions and legal arguments and demonstrate that they do not amount to "adequate evidence" supporting the Order's immediate effectiveness. Fundamental fairness mandates that Mr. Shea be permitted to confront this new evidence against him. In addition, NRC regulations *require* that Mr. Shea move to set aside the immediate effectiveness of the Order "on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error."[10] This means that Mr. Shea has a right at this juncture of the proceeding to demonstrate that the Staff's purported support for the Order and its immediate effectiveness is not adequate or reliable.

Rather than rely on the information previously provided to Mr. Shea (i.e., the heavily redacted Report of Investigation and his own interview transcript), the Staff chose to support the Order and its immediate effectiveness with the witness transcript excerpts and Affidavits. Allowing the Staff to sandbag Mr. Shea in this manner, without an opportunity to respond, would

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[9] Mr. Shea notes that the Answer only contains small excerpts of these two transcripts. Mr. Shea still has not been provided the entire transcripts. Nor has he been provided the vast majority of the Staff's supposed evidence on which the "violation is grounded" that resulted from "extensive document reviews and interviews with numerous individuals, including Mr. Shea, Mr. Wetzel, and many other TVA officials." Answer at 6.

[10] 10 C.F.R. § 2.202(c)(2)(i).

be yet another example of how, in this proceeding, Mr. Shea has been denied his due process rights. And it would be contrary to the Commission's regulations.

II. Conclusion

For the foregoing reasons, Mr. Shea respectfully requests that the ASLB grant Mr. Shea leave to file the Reply that is attached hereto.

Respectfully submitted,

/s Electronically Signed by Timothy J. V. Walsh/

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October 5, 2020

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
	)	Docket No. IA-20-008
JOSEPH SHEA	)	
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	)	

JOSEPH SHEA'S REPLY TO THE NRC STAFF ANSWER

I. Introduction

Based on the compelling circumstances provided in the attached Motion for Leave to File a Reply pursuant to 10 C.F.R. § 2.323(c), Mr. Joseph Shea herein replies to the new arguments and information provided in the NRC Staff Answer[1] to Mr. Shea's Motion.[2] The Answer relies on a new, unsupported, legal theory that it only needs to make a *prima facie* showing of retaliation under 10 C.F.R. § 50.7 to justify the immediate effectiveness of an order premised on deliberate misconduct under 10 C.F.R. § 50.5. The Answer also appears to change the basis of Mr. Shea's Order from one of deliberate misconduct to willful misconduct, or at least incorrectly conflates the different legal standards for demonstrating such violations. Moreover, even if the ASLB were to overlook these legal errors, the Answer (and the Order,[3] as demonstrated

[1] NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (Sept. 28, 2020) (the "Answer").

[2] Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging in NRC-Licensed Activities, Answer, And Request for Hearing (Sept. 22, 2020) (the "Motion").

[3] Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective, IA-20-008 (Aug. 24, 2020) (Adams Accession No. ML20219A676) (the "Order"); In the Matter of Joseph Shea, Tennessee Valley Authority, Chattanooga, TN, 85 Fed. Reg. 53,423 (Aug. 28, 2020).

previously in Mr. Shea's Motion) has failed to provide adequate evidence—that is, evidence that is probative, reliable, and substantial—supporting the Order against Mr. Shea or its immediate effectiveness.[4] For these reasons, and the reasons previously detailed in Mr. Shea's Motion, Mr. Shea respectfully requests that the Board set aside the Order's immediate effectiveness.

II. The Staff's New Legal Theory Is Clear Legal Error and Does Not Demonstrate the Existence of Adequate Evidence in Support of the Immediate Effectiveness of the Order.

The Staff's Answer proffers, for the first time in this proceeding, a new legal theory and apparently a new underlying violation in an effort to support the Order's immediate effectiveness.[5] According to the Answer, the Staff can demonstrate the need for an immediately effective order by showing, through adequate evidence, the elements of a *prima facie* retaliation case, and that it is the employer's burden to "come[] back with 'clear and convincing evidence' that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity."[6] This new Staff theory is unsupported by Commission precedent, inconsistent with the burden of proof applied in proceedings regarding immediate effectiveness, inapplicable to the Order at hand (which claims that Mr. Shea engaged in deliberate misconduct), and inapplicable to Mr. Shea as an individual. Accordingly, the new legal bases in the Answer does not provide adequate evidence supporting the immediate effectiveness of Mr. Shea's ban from engaging in NRC-licensed activities.

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[4] 10 C.F.R. § 2.202(c)(2)(i) states in relevant part that the immediate effectiveness of an order can be set aside "on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error."

[5] Answer at 5.

[6] Answer at 5.

A. The Staff's Use of the 10 C.F.R. § 50.7 Evidentiary Framework to Support the Order's Immediate Effectiveness is Legally Unsupported.

As an initial matter, the Staff claims that "the need for an immediately effective order [can be] based on a 10 C.F.R. § 50.7 violation, such as this one, by showing through adequate evidence the elements of a *prima facie* case."[7] As the Answer explains, the 10 C.F.R. § 50.7 evidentiary framework requires that the Staff set forth only a *prima facie* discrimination case before shifting the evidentiary burden back to the "employer" to show "'clear and convincing evidence' that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity."[8] However, the Staff provides no support for using Section 50.7's evidentiary burden-shifting framework to support the immediate effectiveness of an enforcement order for a Section 50.5 deliberate misconduct violation. The Order itself clearly alleges that Mr. Shea violated 10 C.F.R. § 50.5, and that *TVA* violated 10 C.F.R. § 50.7.[9] The Order *does not* state that Mr. Shea committed a *prima facie* violation of Section 50.7.

The Staff cites to the *TVA* case[10] to support its claim that the need for immediate effectiveness can be shown through Section 50.7's burden-shifting framework. But the Staff's reliance on the *TVA* case is wholly inapt. That case did not involve an immediately-effective order, let alone one against an unlicensed individual like Mr. Shea for a deliberate misconduct violation. In the *TVA* case, the Commission was examining the burden of proof applied to an alleged violation of 10 C.F.R. § 50.7 by a licensed employer. That case was on appeal after a determination on the merits and had nothing to do with showing adequate evidence to support

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[7] Answer at 5.

[8] Answer at 5.

[9] Order at 2.

[10] Answer at 5 and nn. 22-24 (citing *Tenn. Valley Auth*. (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 N.R.C. 160 (2004)).

the immediate effectiveness of an order, an industry ban for an individual, or deliberate misconduct. The cited caselaw, therefore, fails to support the Staff's position in its Answer.

In fact, the Answer is applying the wrong standard. A *prima facie* showing of a Section 50.7 violation by a licensee company is not sufficient to support an immediately effective ban of an individual alleged to have engaged in deliberate misconduct under Section 50.5. According to the Commission, "the NRC staff ultimately bears the burden of persuasion that immediate effectiveness is warranted."[11] And as the Commission clarified in a 1992 rulemaking,

> The response by the staff will *present evidence* supporting the order *and its immediate effectiveness*. The presiding officer will then decide, on the basis of the information presented by the parties, whether *adequate evidence to support the order and its immediate effectiveness exists warranting the staff's action*.[12]

Yet, in its Answer the Staff still has not provided any evidence supporting the necessity of an immediately effective order based on a Section 50.5 deliberate misconduct violation, which is the violation at issue here.

The Answer claims that the "immediate effectiveness of the Order is also premised on the public health and safety concerns of the underlying violation, i.e. discrimination against an employee for engaging in protected activities."[13] However, such a broad and generic statement that discrimination impacts public health and safety is not adequate evidence specific to Mr. Shea's case. It is a vague and undefined claim that the Staff could use to justify making an order immediately effective in *every* discrimination case, with only a minimal *prima facie* showing of potential merits from the Staff.

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[11] Hearings on Challenges to the Immediate Effectiveness of Orders, 80 Fed. Reg. 63,409, 63,409 (2015).

[12] Revisions to Procedures To Issue Orders: Challenges to Orders That Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,196 (1992).

[13] Answer at 13.

Under the Staff's reasoning in its Answer, any *prima facie* case of discrimination involving an employee with a "broad sphere of influence"[14] would provide sufficient justification for an immediate ban, without the need to provide evidence of intent or an actual health and safety impact, and the burden is then on the employer to refute the discrimination claim. This legal position, set forth for the first time in the Answer, would render any immediately effective Staff order for a Section 50.5 deliberate misconduct violation immune to challenge.

B. Because the Order Specifies a Finding of Deliberate Misconduct Under Section 50.5, the Staff Cannot Retroactively Change the Order to Allege a *Prima Facie* Violation Under Section 50.7 to Support the Immediately Effective Ban.

The Answer's new apparent conclusion that the immediate ban is proper because the Staff has made a *prima facie* showing that Mr. Shea violated 50.7[15] also directly contradicts the language of the Order. Again, the Order alleges that Mr. Shea violated 10 C.F.R. § 50.5, and that TVA violated 10 C.F.R. § 50.7.[16] The NRC Staff simply cannot use its Answer to change the alleged violation after an Order has been issued, particularly where, as here, Mr. Shea's violation requires a showing of intent, whereas a violation of Section 50.7 does not.

Indeed, Section 234(b) of the AEA requires that the Order provide notice to Mr. Shea "specifically identifying the particular provision or provisions of the section, rule, regulation, order, or license involved in the violation."[17] As the Commission has previously found "notice

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[14] Order at 3.

[15] Answer at 5.

[16] Order at 2.

[17] "Whenever the Commission has reason to believe that a person has become subject to the imposition of a civil penalty under the provisions of this section, it shall notify such person in writing (1) setting forth the date, facts, and nature of each act or omission with which the person is charged, (2) *specifically identifying the particular provision or provisions of the section, rule, regulation, order, or license involved in the violation*, and 3) advising of each penalty which the Commission proposes to impose and its amount." AEA § 234(b). 42 USC § 2282(b).

of, and opportunity to comment on, the fundamental bases for an enforcement action is analogous to our policy in licensing adjudications that '[a]n intervenor may not freely change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention.'"[18] Tellingly, in a prior case, where the Staff attempted to argue a *per se* violation after the Notice of Violation was issued, the Commission rejected that argument as an improper attempt to change the bases of a violation.[19] In Mr. Shea's case, the Staff similarly should be barred from using its Answer to change the bases of Mr. Shea's violation. Instead, to uphold the immediate effectiveness of the Order, the Staff is required to provide adequate evidence that Mr. Shea engaged in deliberate misconduct (in violation of 10 C.F.R. § 50.5) as alleged in the Order. And the Staff has not done so in its Answer (or in its Order as set forth in Mr. Shea's Motion).

C. Because Mr. Shea Is an Unlicensed Individual, the NRC Staff Must Provide Evidence of Deliberate Misconduct to Support the Immediately Effective Ban, But It Has Not.

To meet its burden to present adequate evidence supporting an immediately effective ban for a Section 50.5 violation, the Staff must demonstrate that adequate evidence "i.e., reliable, probative, and substantial (but not preponderant) evidence" supports the alleged violation.[20] In the case of Mr. Shea, who is an unlicensed individual, this means that the Staff must show

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[18] *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 N.R.C. 160, 202 (2004) (*quoting Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citation and internal quotation marks omitted)).

[19] *Watts Bar* at 220-221 (rejecting the Staff's argument for a *per se* violation when a *per se* violation was not included in the NOV).

[20] *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 N.R.C. 53, 61 (2005) (internal citations omitted) (Materials License Suspension). The Atomic Safety and Licensing Board decision in *Safety Light* is precedent defining adequate evidence as that which is "reliable, probative, and substantial." But the case itself concerned a licensee company's violation of its materials licenses, *id.* at 55, and not an unlicensed individual's deliberate misconduct violation. While the two-part test described in *Safety Light* (i.e., that adequate evidence exists showing that a licensee violated Commission regulation, and that the violation was willful or poses a risk to public health and safety or interest that requires immediate action) may well apply to a licensee company, it does not apply to an unlicensed individual such as Mr. Shea.

reliable, probative, and substantial evidence of a violation of 10 C.F.R. § 50.5, the deliberate misconduct rule.

The Staff now appears to allege that the violation against Mr. Shea is not for deliberate misconduct, but rather is for willful misconduct (or less).[21] For example, the Staff asserts that it had "determine[ed] that there was sufficient evidence of both discrimination and Mr. Shea's willfulness."[22] Willful misconduct is a lesser standard than deliberate misconduct because willful misconduct includes conduct in careless disregard for applicable requirements, as the Staff admits.[23] When the Commission first created its rule extending the Staff's authority to enforcement actions over unlicensed individuals such as Mr. Shea, the Commission specifically recognized the difference between the two and expressly declined to extend that enforcement authority to "willful misconduct," including careless disregard. Instead, the Commission redrafted the final rule to specify that the rule applies "only to any person who engages in deliberate misconduct."[24] Specifically, the Commission stated:

> As the rule was originally proposed, it would be utilized only in those cases involving willfullness, defined by Commission policy as including deliberate actions and those violations resulting from careless disregard. *In light of the comments received and further consideration of the desirable scope of the rule, the Commission has modified the rule to apply only to any person who engages in deliberate misconduct*, or deliberately submits incomplete or inaccurate information, as provided in the rule.[25]

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[21] Answer at 6; Echavarria Affidavit, ¶ 25 ("In most cases, there is no admission of a deliberate violation by an alleged wrongdoer, and the conclusion is based on other direct or indirect evidence of *willfulness*.") (emphasis added).

[22] Answer at 6.

[23] Answer at 13 n.55 ("NRC's Enforcement Policy defines a 'willful' violation as one that involves either a deliberate violation of NRC requirements *or careless disregard* of NRC requirements." (emphasis added)).

[24] Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,670, 40,675 (1991).

[25] *Id.*, 56 Fed. Reg. at 40,675.

In the 1998 update to the Enforcement Policy after the 1998 Deliberate Misconduct Rule update, the Commission reiterated that

> If the actions described in these examples are taken by a licensed operator or taken *deliberately* by an unlicensed individual, enforcement action may be taken directly against the individual. However, violations involving willful conduct not amounting to deliberate action by an unlicensed individual in these situations may result in enforcement action against a licensee that may impact an individual.[26]

The Staff's Enforcement Manual also recognizes the difference, stating: "Actions can be taken directly against individuals either because they are individually licensed or because they violated the rules on deliberate misconduct"[27] and "[i]t is important to recognize that careless disregard is not a subset of deliberate conduct."[28]

Accordingly, the Staff's attempt to now reframe Mr. Shea's violation as "willful", and to base the immediate effectiveness of the Order on alleged willful misconduct, is contrary to Commission regulations and guidance. The Staff cannot in the Answer circumvent its burden of having to demonstrate adequate evidence to sustain an immediately effective order based on deliberate misconduct by purporting to meet the lesser showing of willfulness.

Finally, the Staff's new arguments and new "evidence" in the Answer do not make any showing of deliberate misconduct. The deliberate misconduct rule "appl[ies] only to any person who engages in deliberate misconduct . . . Under this narrower rule, the range of actions that would subject an individual to action by the Commission does not differ significantly from the range of actions that might subject the individual to criminal prosecution."[29] This standard clearly requires a finding of *intent*. For example, when promulgating the deliberate misconduct

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[26] Policy and Procedure for Enforcement Actions; Deliberate Misconduct Rule, 63 Fed. Reg. 1982, 1984 (1998).
[27] Nuclear Regulatory Commission Enforcement Manual at 17 (ADAMS Accession No. ML19274C228).
[28] *Id.* at 244.
[29] 56 Fed. Reg. at 40,675.

rule, the Commission explained that an individual who engages in deliberate misconduct "has the requisite *intent to act in a wrongful manner* such that application of enforcement sanctions may be warranted."[30] Thus, the Staff must show that adequate evidence exists to show that Mr. Shea, as an unlicensed individual, had the intent to cause a wrongdoing.

Indeed, to find deliberate misconduct, "it is necessary that the person recognized that the action was improper and it related to an activity associated with licensed activity."[31] "This enforcement action turns on [Mr. Shea's] state of mind: whether he knew" the adverse action against Ms. Wetzel was improper.[32] The Staff's Answer and its Affidavits do not contain evidence, let alone adequate evidence, that Mr. Shea recognized his action was improper. Indeed, the Staff does not even attempt to show evidence of intent. In its Answer, the Staff merely makes the brand new and conclusory assertion that "[r]etaliation in violation of 10 C.F.R. 50.7 is, by its nature, an intentional act" and "Mr. Shea was aware of Ms. Wetzel's protected activity and intentionally terminated her at least in part because of the activity."[33] Such circular reasoning is not evidence of intent.

Moreover, the facts and circumstances of this case belie the Answer's new assertion that retaliation under Section 50.7 (which in any event is not the violation of which the Order accuses Mr. Shea) is by its nature intentional. As the Staff knows very well, the Staff initially issued deliberate misconduct apparent violations to three TVA employees: one to Mr. Shea, two to Ms.

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[30] *Id.*, 56 Fed. Reg. at 40,679 (emphasis added). *See also id.* at 40,670 ("If a person with the requisite knowledge intentionally acts in a way that causes, or that, but for detection, would have caused a licensee to be in violation of an NRC requirement, that person is now on notice that he or she may be subject to individual enforcement action.")

[31] *Id.*, 56 Fed. Reg. at 40,681 (emphasis added).

[32] *In the Matter of David Geisen*, CLI-10-23, 72 N.R.C. 210, 226 (2010) (affirming the licensing board decision setting aside an enforcement order for deliberate misconduct under 10 C.F.R. § 50.5).

[33] Answer at 11 (citing Gifford Affidavit, ¶ 7).

Henderson, and one to another TVA senior manager. The same day, the Staff issued to TVA four apparent violations of 10 C.F.R. 50.7, with each one of TVA's apparent violations based on the alleged actions of Mr. Shea, Ms. Henderson, and the TVA senior manager.[34] The Staff ultimately concluded that the TVA senior manager did not engage in deliberate misconduct. But the Staff still issued to TVA four violations of Section 50.7,[35] notwithstanding the Staff's determination that one of the four violations was not based on deliberate misconduct. Thus, the Staff's own enforcement actions in this case show that it can find a violation of Section 50.7 with no underlying deliberate misconduct finding.

Mr. Gifford's Affidavit also makes the conclusory assertion that Mr. Shea engaged in deliberate misconduct,[36] but nowhere cites to evidence of Mr. Shea's intent (or even mentions intent), nor does it assert that Mr. Shea knew his actions were improper. All of the direct evidence shows that Mr. Shea thought he was doing the right thing, through obtaining the advice of counsel, gaining consensus of the Executive Review Board, and engaging with Human Resources.[37] Moreover, while the Staff now (erroneously) argues that all of Ms. Wetzel's emails

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[34] Letter from NRC to TVA, EA-20-06 & EA-20-07, Apparent Violations of Employee Protection Requirements (Office of Investigations Report Nos. 2-2018-033 and 2-2019-015) (Mar. 2, 2020) (ADAMS Accession No. ML20058G833).

[35] Letter from NRC to TVA, EA-20-06 & EA-20-07, Notice of Violation and Proposed Imposition of Civil Penalty (Aug. 24, 2020) (ADAMS Accession No. ML20218A568).

[36] Gifford Affidavit, ¶ 7.

[37] *E.g.*, Motion at 2 ("Mr. Shea received and agreed with the Office of General Counsel's recommendation to separate the individual from the company because of her conduct."); Motion at 9 ("Mr. Shea . . . approached OGC and HR again—this time for advice on how to evaluate the former corporate employee's assertions."); Motion at 11 ("On August 30, 2018, OGC recommended that the former corporate employee be separated from the company, either by a no-fault separation agreement or termination, because it found that the former corporate employee's pattern of behaviors towards Ms. Henderson as described above violated multiple TVA policies and federal law"); Motion at 14 ("Mr. Shea's action was supported by an OGC recommendation that independently evaluated the former corporate employee's conduct and concluded that termination was legally supportable."); Shea Affidavit, ¶ 8 ("the results of the independent investigation assured me that any subsequent adverse action would be based on nonprohibited considerations, and *not because* the former corporate employee had participated in a protected activity. I further was assured by the review conducted by TVA's executive review board, whose function is to confirm that adverse actions are not taken based on protected activity.").

and texts were protected activities, there is still no evidence that *Mr. Shea* recognized them as protected, and thus there is no evidence that he intended to retaliate because of protected activity.

Sustaining the immediate ban based on the Answer's purported "evidence" that attempts to meet the wrong standard is clear legal error and contrary to the "adequate evidence" standard. The adequate evidence test is intended as a preliminary procedural safeguard against the ordering of immediately effective action based on clear error, unreliable evidence, or unfounded allegations. The Staff does not even attempt to show evidence of intent, either in the Answer's new information (or in the Order, as set forth in Mr. Shea's Motion), and therefore the Order's immediate effectiveness cannot be sustained.

III. The Staff's New Characterization of Protected Activity Is Clear Legal Error and Does Not Constitute Adequate Evidence Supporting the Immediately Effective Ban.

For the first time in this proceeding, the NRC Staff has finally explained to Mr. Shea the basis for the Staff's allegation that Ms. Wetzel was engaged in protected activity. According to the Answer, Ms. Wetzel's protected activity was her "fear of retaliation, not the details of how vouchers are processed."[38] This argument is fatally flawed for multiple reasons.

First, this argument is internally inconsistent with other statements in the Answer. The Answer emphasizes "the context of the concerns."[39] Here, the context of Ms. Wetzel's concerns was the processing of her expense vouchers while she was on assignment to an industry trade association and far removed from any of TVA's NRC-licensed activities.

Second, Ms. Wetzel's alleged fear of an expense voucher review is untethered from any nuclear safety concern and cannot be considered protected activity. Nearly twenty-five years

[38] Answer at 9 n. 38.

[39] Answer at 10.

ago, the Commission issued its Policy Statement on the Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation.[40] In that Policy, the Commission stated its "expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation."[41] The Commission made explicit that the concerns individuals must feel free to raise without fear of retaliation pertain exclusively to nuclear safety. The Commission stated:

> Throughout this Policy Statement the terms "concerns," "safety concerns" and "safety problem" refer to potential or actual issues within the Commission's jurisdiction involving operations, radiological releases, safeguards, radiation protection, and other matters relating to NRC-regulated activities.[42]

While Ms. Wetzel may well have told Mr. Shea that she "anticipated" that her supervisor would use her "travel vouchers as an investigative tool,"[43] Ms. Wetzel nowhere asserted that she feared retaliation for raising nuclear safety concerns. Nor did her emails and other communications to Mr. Shea claim that her supervisor had retaliated against her or anyone else for raising nuclear safety concerns. In fact, Ms. Wetzel admitted that she did not know why her supervisor supposedly might investigate her travel vouchers. In her June 9, 2018 email to Mr. Shea, she wrote that she "[does not] even try to understand my boss and why she does what she does."[44] Ms. Wetzel made no assertion that she anticipated an investigation into her travel vouchers because she had engaged in nuclear safety-related protected activities. And, given the context of these assertions—her travel voucher expenses while she was on loan to an industry

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[40] Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation; Policy Statement, 61 Fed. Reg. 24,336 (1996).

[41] *Id.*, 61 Fed. Reg. at 24,336.

[42] *Id.*, 61 Fed. Reg. at 24,336 n.1.

[43] Shea Motion, Attachment 1 at p. 2 (Ms. Wetzel's May 7, 2018 email to Mr. Shea).

[44] Shea Motion, Attachment 2 at p. 1 (Ms. Wetzel's June 9, 2018 email to Mr. Shea).

trade association—it is not reasonable for Mr. Shea to infer that she was making a claim related to nuclear safety-related protected activities.

Apparently recognizing the astonishingly thin rationale for claiming that Mr. Shea (or anyone else) would *know* that Ms. Wetzel was engaging in protected activity within the Commission's jurisdiction based on emails that never mentioned such activities, the newly provided Gifford Affidavit and Echavarria Affidavit purport to infer such knowledge by Mr. Shea based on investigation reports prepared by the TVA Employee Concerns Program (ECP) and of which Mr. Shea was aware.[45] The Staff's reliance on these ECP reports, however, is not probative evidence of Mr. Shea's state of mind at the time he confronted Ms. Wetzel's disrespectful and unprofessional conduct.

First, the ECP Reports are not temporally proximate to when Ms. Wetzel made her disrespectful and unprofessional comments to Mr. Shea, or when Mr. Shea made the decision to separate Ms. Wetzel from the company. In fact, the ECP Report primarily quoted by Mr. Gifford in his affidavit (NEC-16-00638)[46] is dated September 2016[47]—*twenty months before* Ms. Wetzel sent her May 7, 2018 email to Mr. Shea, and a full two years before Mr. Shea decided to separate Ms. Wetzel from the company. Mr. Shea did not know and could not possibly have known that emails and texts regarding Ms. Wetzel's travel vouchers were related to issues raised in 20-month old reports.

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[45] Gifford Affidavit, ¶ 7 ("given the documentation by TVA's ECP of a precursor to a chilled work environment in CNL and a perception of retaliation . . . the NRC staff determined that Mr. Shea's reasons for terminating Ms. Wetzel do not present clear and convincing evidence to show that Ms. Wetzel was terminated for nonprohibited considerations"); Echavarria Affidavit, ¶ 23 ("Mr. Shea also had knowledge of the previous ECP investigations related to Ms. Henderson and Ms. Henderson's potential harassing behavior. Despite this understanding, Mr. Shea decided not to report Ms. Wetzel's concerns to ECP or HR, but instead provided Ms. Wetzel's concerns to TVA OGC"); Answer at pp. 10, 11.

[46] Gifford Affidavit, ¶ 7.

[47] NRC Report of Investigation ("ROI") Exhibit 7, page 3 of 24 (letter to Joseph W. Shea dated September 6, 2016, regarding ECP Concern No. NEC-16-00638).

Second, there is no implicit or explicit connection between Ms. Wetzel and the ECP Reports' findings on which the Staff relies. *Ms. Wetzel did not raise the concerns investigated in those reports.* Furthermore, not one of the ECP Reports mentions Ms. Wetzel by name or otherwise attributes any findings to her.

Third, the ECP Reports confirm that a chilled work environment did *not* exist in Corporate Nuclear Licensing. The September 2016 report did find "conditions [that] represent a precursor that *could* lead to a work environment that *could* be found to be chilled," but ECP did "not substantiate that there was a chilled work environment in the department" because *"[a]ll* [Corporate Nuclear Licensing] employees indicated a willingness to raise nuclear safety or quality-related concerns."[48] Furthermore, the ECP investigation that concluded nine months after this first report confirmed that the precursor conditions did not evolve into a chilled work environment. ECP again found in June 2017 that "*all* [employees interviewed in the Corporate Nuclear Licensing department] would raise nuclear safety or quality issues."[49]

Moreover, the Staff overlooks its own inspection findings of no chilled work environment in Corporate Nuclear Licensing, which findings were reported even closer in time to when Mr. Shea confronted Ms. Wetzel's statements. The NRC reported in a publicly available *November 2017* inspection report addressed directly to Mr. Shea that TVA Corporate Nuclear Licensing employees "felt free to raise safety and regulatory issues, and that management encouraged employees to place issues into the [Corrective Action Program] for resolution."[50] The NRC inspection "did not identify any reluctance on the part of the licensee

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[48] NRC ROI Exhibit 7, page 3 of 24 (emphasis added).

[49] NRC ROI Exhibit 7, page 16 of 24.

[50] Watts Bar Nuclear Plant – Nuclear Regulatory Commission Integrated Inspection Report 05000390/2017003, 05000391/2017003 (Nov. 22, 2017), Enclosure at p. 22 (ADAMS Accession No. ML17326A222) *available at* https://www.nrc.gov/docs/ML1732/ML17326A222.pdf.

staff to report safety concerns."[51] Thus, even if the findings from independent evaluations of the safety conscious work environment in the Corporate Nuclear Licensing department were probative to infer Mr. Shea's state of mind when he read Ms. Wetzel's emails and texts many months later, the most contemporaneous conclusions—from the NRC itself—found no reluctance by anyone to report nuclear safety concerns.

In sum, the ECP Reports referenced in the Affidavits from Messrs. Gifford and Echavarria and in the Answer are neither temporal nor substantive evidence that Mr. Shea recognized in May 2018 and thereafter that his actions with respect to Ms. Wetzel were improper. The ECP Reports say nothing about Ms. Wetzel, and otherwise provide no foundation for inferring that her communications many months later to Mr. Shea pertained to a chilled work environment (that never existed in the department). Accordingly, this "evidence" is not adequate, under any legal standard, to support the immediately effective ban.

IV. The Echavarria Affidavit Is Not Reliable, Much Less Adequate Evidence, to Support the Immediately Effective Ban.

The Answer contains several documents that Mr. Shea has not previously seen and therefore has not had a chance to address. One such document is the Affidavit of Mr. Echavarria. The Echavarria Affidavit, however, is unreliable (and therefore inadequate) "evidence" because it contains clear legal and factual errors that call into question the credibility of all of its statements.[52]

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[51] *Id.*

[52] While the observations of the NRC Staff are normally deemed reliable, a showing of "bias or mistake" can provide "reasonable cause to believe that, because of bias or mistake, the government official involved cannot be considered a credible observer." *Eastern Testing and Inspection, Inc.*, LBP-96-09, 43 N.R.C. 211, 225 (1996).

- As previously discussed, Mr. Echavarria erroneously conflates willful misconduct and deliberate misconduct.[53] Purported evidence of willful misconduct is not evidence of deliberate misconduct.
- Mr. Echavarria repeatedly claims that Ms. Wetzel raised "chilled work environment" concerns, including in her emails to Mr. Shea.[54] However, Ms. Wetzel never claimed the work environment was chilled, or otherwise stated that she was unwilling or reluctant to raise nuclear safety concerns out of fear of retaliation.[55] Ms. Wetzel's emails to Mr. Shea make no nuclear safety claim, nor do they allege that Ms. Wetzel is unwilling to raise them. She "anticipated" that her travel vouchers might be used as an investigative tool but could not "even try to understand" why, much less did she claim that such investigation would be in retaliation for nuclear safety concerns. There is no evidence to suggest that Ms. Wetzel's travel voucher concerns could be safety related. Nor is there evidence to suggest that they could impact a safety conscious work environment, which by its nature involves "matters relating to NRC-regulated activities."[56] Furthermore, in the excerpt from Ms. Wetzel's interview transcript attached to the Answer—which is another document that Mr. Shea is seeing for the first time—Ms. Wetzel speaks of the "work environment", but she never uses the word "chilled", never states that she thought the work environment was chilled, and never

[53] Echavarria Affidavit, ¶ 25.

[54] Echavarria Affidavit, ¶¶ 5, 12, 19, 23.

[55] As defined in the NRC's Allegation Manual, a Chilled Work Environment is a "condition where the chilling effect [A condition that occurs when an event, interaction, decision, or policy change results in a perception that the raising of ***safety concerns*** to the employer or to the NRC is being suppressed or is discouraged] is not isolated (e.g., multiple individuals, functional groups, shift crews, or levels of workers within the organization are affected)." NRC Allegation Manual at 28 (2016) (emphasis added) (ADAMS Accession No. ML17003A227).

[56] Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation; Policy Statement, 61 Fed. Reg. 24,336, 24,336 n. 1 (1996).

otherwise states that she was unwilling to raise nuclear safety concerns.[57] Mr. Echavarria's clear mistake undermines the credibility of his entire Affidavit.

- As purported evidence of Mr. Shea's intent, Mr. Echavarria erroneously relies on records relating to the Executive Review Board (ERB) that were not previously known to Mr. Shea. Mr. Shea did not receive the "General Concerns" email sent by Ms. Deanna Fults to Ms. Hagins-Dyer, nor did he have Ms. Fults' personal notes taken during the ERB.[58] Whatever concerns Ms. Fults expressed in her email or her notes, none of this information was known to Mr. Shea until he read the Echavarria Affidavit last week. Accordingly, it did not play a role in Mr. Shea's state of mind (intent) at the time he terminated Ms. Wetzel. At best, this information is prejudicial and not probative. At worst, it is evidence of another mistake by the investigator.
- Mr. Echavarria also erroneously relies on discussions that occurred during the ERB as evidence of Mr. Shea's purported intent, notwithstanding the fact that Mr. Echavarria knows that Mr. Shea was not present for that portion of the ERB discussion. The Echavarria Affidavit states in part, "As documented in ROI, Exhibit 16, questions fourteen through nineteen of the TVA Executive Review Board (ERB) package that was prepared as justification for Ms. Wetzel's termination were completed by Joselito O. Calle, Director of Organizational Effectiveness Programs, and the core ERB members, *not including Mr. Shea.*"[59] As Mr. Shea was the presenter of the proposed adverse action against Ms. Wetzel, he was "excused from the remaining portions of the ERB review to prevent inadvertent

[57] *See* NRC ROI Exhibit 3, Excerpted Pages 1, 11, 28-41, 48-53.
[58] Echavarria Affidavit, ¶¶ 15-17; NRC ROI Exhibit 17.
[59] Echavarria Affidavit, ¶ 13 (emphasis added).

disclosure of sensitive information" as stated on the ERB Proposed Adverse Action Review Form.[60] Mr. Echavarria's Affidavit then purports to summarize information discussed by the ERB relevant to these questions when Mr. Shea was not a participant to the discussion.[61] Such evidence is therefore not probative of Mr. Shea's state of mind.

- Mr. Echavarria claims that "Mr. Shea decided not to report Ms. Wetzel's concerns to ECP or HR, but instead provided Ms. Wetzel's concerns to TVA OGC to investigate as potential harassing conduct by Ms. Wetzel towards Ms. Henderson."[62] However, this is also incorrect. The record evidence shows that Mr. Shea emailed both HR and OGC simultaneously on May 7, 2018, with Ms. Wetzel's claims.[63] In addition, on May 31, 2018, Mr. Shea also asked two members of TVA HR for advice on what to do with the claims, "whatever [the advice] may be."[64] Mr. Echavarria relies on this inaccurate retelling of events to make a "logical inference (e.g., that it was reasonable to assume) that Mr. Shea provided information related to Ms. Wetzel to TVA OGC with the expectation that it would lead to an employment action against Ms. Wetzel."[65] Of course, because it is based on mistakes, this "logical inference" is, in fact, also incorrect and an unfounded allegation unsupported by the record evidence. This mischaracterization of record evidence further undermines Mr. Echavarria's credibility.

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[60] NRC ROI Exhibit 16, page 8 of 27 (underlining in original).

[61] Echavarria Affidavit, ¶¶ 13-15.

[62] Echavarria Affidavit, ¶ 23.

[63] Shea Motion at Attachment 1 (Mr. Shea's May 7, 2018 email). Attachment 1 to Mr. Shea's Motion redacted the names of the individuals identified on the email out of privacy concerns. For Mr. Shea's June 25, 2020 pre-decisional enforcement conference, an unredacted copy of this email was provided to the Staff as Shea PEC Exhibit JS12. The unredacted email shows that Mr. Shea forwarded his email to a TVA Corporate Nuclear Director of Human Resources, who was interviewed by the Office of Investigations.

[64] Shea Motion at Attachment 4 (May 31, 2018 email chain, that included two members of TVA Human Resources and one member of TVA OGC, including again the TVA Corporate Nuclear Director of Human Resources). Again, an unredacted copy of this email chain was provided as an exhibit for Mr. Shea's pre-decisional enforcement conference as Shea PEC Exhibit JS16.

[65] Echavarria Affidavit, ¶ 26.

Moreover, Mr. Echavarria never states why seeking advice from internal, independent company resources, such as the TVA OGC, whose job it is to advise members of management on how to comply with applicable company policies and the law, is evidence of Mr. Shea's intent to commit wrongdoing. It is exactly the opposite. It is direct and probative evidence that Mr. Shea was seeking guidance regarding how to properly comply with company policies and the law.

- Mr. Echavarria also purports to correct an error in the Report of Investigation,[66] but his alleged correction is contrary to unambiguous record evidence, further calling into question his credibility. Mr. Echavarria concedes that a statement in the Report of Investigation that Ms. Wetzel's protected activities "were a central and required function of her job and were not protected activity[] was not a direct quote from Mr. Shea."[67] But Mr. Echavarria then claims that the statement "was an excerpt from TVA's position statement to [the Department of Labor] dated April 15, 2019."[68] TVA's April 15, 2019 position statement makes no statement asserting that Ms. Wetzel's protected activities were not protected because they were a central and required part of her job. In fact, the TVA position statement says exactly the opposite. TVA's April 15, 2019 position statement actually states:
    - "TVA does *not* take the position that protected activity occurring in the course of one's job functions cannot qualify as predicate protected activity within Section 211

[66] Echavarria Affidavit, ¶ 27.
[67] Echavarria Affidavit, ¶ 27.
[68] Echavarria Affidavit, ¶ 27.

of the ERA. Rather, there is no presumption of causation based on temporal pro[xim]ity as discussed below";[69]

- "In Wetzel's case, where her alleged protected activity is part and parcel to her central responsibilities, temporal proximity by itself, is insufficient to make a *prima facie* case"[70]; and
- "The Sixth Circuit has explained why temporal proximity *by itself* is insufficient to establish a *prima facie* case where an employee's primary job is to identify safety issues, and her performance was evaluated on that basis."[71]

Mr. Echavarria's assertion that the Report of Investigation included an "excerpt" from TVA's position statement when the position statement contains no such statement (and in facts says the opposite of what the Report of Investigation claims) is yet another mistake that undermines all of Mr. Echavarria's assertions.

In sum, Mr. Echavarria's error-filled Affidavit does not provide adequate evidence supporting the Order's immediate effectiveness.

V. The Gifford Affidavit Is Not Reliable, Much Less Adequate Evidence, to Support the Immediately Effective Ban.

The Gifford Affidavit is based on clear legal error and mistakes, and therefore is also not reliable, much less adequate, evidence to support the immediately effective ban.

As an initial matter, Mr. Gifford claims that he has "first-hand knowledge of the reasons for the decision of the Director, [Office of Enforcement], that the deliberate misconduct of the

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[69] Tennessee Valley Authority's Position Statement, Department of Labor Case No. 4-1760-19-025 (Apr. 15, 2019) at 2 n.1 (emphasis added).

[70] *Id.* at 4 (citing *Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 103 (6th Cir. 1996)).

[71] *Id.* at 4 (emphasis in original).

violation requires that the Order be immediately effective."[72] So, rather than submit an affidavit from the Office of Enforcement Director himself, the Staff has submitted an affidavit from someone attesting to the decision-maker's state of mind. This alone is a substantial basis for questioning the reliability of, if not wholly rejecting, the Gifford Affidavit.

Moreover, Mr. Gifford makes errors already detailed in this Reply. Mr. Gifford appears to claim that the Office of Enforcement Director (or the NRC Staff generally) relied on the 10 C.F.R. § 50.7 burden shifting evidentiary framework, rather than any evidence (let alone adequate evidence) that Mr. Shea knew his actions were improper.[73] Again, this is a clear legal error. Unlicensed individuals are subject to enforcement under 10 C.F.R. § 50.5 only upon a finding of *deliberate* misconduct. Mr. Gifford also purports to infer that the Director concluded that Mr. Shea knew that he was taking improper action based on ECP investigation reports that predate by 20 months Ms. Wetzel's disrespectful and unprofessional statements.[74] This is not probative evidence of Mr. Shea's intent. Moreover, Mr. Gifford, and apparently the Director, conveniently (if not intentionally) overlooks the much more recent inspection findings by the NRC itself in November 2017 that all TVA Corporate Nuclear Licensing employees were willing to report nuclear safety concerns.

Mr. Gifford also testifies that "[t]he NRC staff determined that contacting the NRC with concerns of a chilled work environment" was one of the "contributing factors in the decision to terminate Ms. Wetzel."[75] However, Mr. Gifford, the Director, and the NRC Staff are wrong. As

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[72] Gifford Affidavit, ¶ 4.

[73] Gifford Affidavit, ¶ 7 ("the NRC Staff determined that Mr. Shea's reasons for terminating Ms. Wetzel do not present clear and convincing evidence to show that Ms. Wetzel was terminated for nonprohibited considerations, in accordance with 10 C.F.R. § 50.7(d).").

[74] Gifford Affidavit, ¶ 7.

[75] Gifford Affidavit, ¶ 7.

Mr. Shea testified,[76] and consistent with the ERB documentation and Mr. Shea's communications with OGC and HR, Mr. Shea did not make the decision to terminate Ms. Wetzel based on any contact with the NRC. The disrespectful and unprofessional statements made by Ms. Wetzel, that were the actual reasons for her termination, nowhere mention that Ms. Wetzel raised concerns to the NRC.

VI. The Testimony of Ms. Wetzel and Ms. Fults is Not Reliable, Much Less Adequate Evidence, to Support the Immediately Effective Ban.

As described below, the Office of Investigations interview testimony of Ms. Wetzel and Ms. Fults provided in the Answer is wholly unreliable. This is especially the case given that the Answer releases only small excerpts of the testimony, making it more difficult for Mr. Shea and the Board to assess the witnesses' truthfulness, to understand the context of the excerpts, or to determine whether there is contradictory testimony elsewhere in the transcripts that makes the excerpts unreliable.

First, Ms. Wetzel should not be considered a reliable witness. Ms. Wetzel's employment with TVA was terminated by Mr. Shea. Therefore, her testimony against Mr. Shea is undoubtedly biased and should not be credited as adequate evidence.[77]

In addition, Ms. Wetzel was terminated for her disrespectful and unprofessional conduct, which included multiple assertions she made regarding purported facts about her supervisor, some of which were demonstrably speculative on their face, such as Ms. Wetzel's assertion that her supervisor engaged in "actions that [she was] not aware of."[78] In addition, as Mr. Shea

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[76] Motion at 46-48; Shea Affidavit, ¶¶ 5-8, 11-12.

[77] *Eastern Testing and Inspection, Inc.*, LBP-96-09, 43 N.R.C. 211, 220 (1996) (finding "serious questions about [a witness's] reliability both in terms of his general trustworthiness and his specific motivation to fabricate information regarding [his former employer]" when the witness was fired from the company for an apparent act of dishonesty, and thus not crediting the witness's testimony as adequate evidence).

[78] Motion at Attachment 1.

pointed out in his Motion, Ms. Wetzel plainly lied in filings with, and other statements to, the Department of Labor about Ms. Henderson's father and how Ms. Henderson came to be promoted within TVA.[79] The Staff responds to this demonstration of Ms. Wetzel's unreliability as a witness by falsely claiming ignorance. The Staff states that "Mr. Shea does not point to a publicly available source for these alleged statements made by Ms. Wetzel, nor does he attach the statements to his motion."[80] And the Answer implies that the Staff cannot independently verify the assertions (i.e. "assuming *arguendo*").[81]

However, the Staff already has in its possession the information that Mr. Shea cites. Indeed, the Staff need only look to its own Report of Investigation to find reference to the documents (quoted by and cited to in Mr. Shea's Motion)[82] with the false statements at issue. The first document is from December 18, 2018, and is referenced in the Agent's Note on page 9 of the Report of Investigation.[83] The second document is part of the DOL's Memoranda of Interviews ("MOIs") cited in the Report's Exhibit 20 ("DOL's MOIs, various dates, 26 pages") on page 54 of the Report. With respect to Mr. Shea's decision to withhold supporting documents—which would become publicly available—the Staff itself has provided the reason. As the Staff acknowledges on page 52 of the Report of Investigation, "Exhibit 20, contains DOL information and *only DOL can determine if the information can be released outside of NRC*."[84] Nonetheless, Mr. Shea would be happy to provide copies of the documents to the Board under a

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[79] Motion at 35-36.

[80] Answer at 20.

[81] Answer at 20.

[82] Motion at 35-36 & nn.120, 121.

[83] NRC ROI at 9 ("the following information was also contained in [Ms. Wetzel's] position statements submitted to the Department of Labor (DOL) and provided to the NRC, dated December 18, 2018 . . .").

[84] NRC ROI at 52 (emphasis added).

protective order if the Staff is unwilling to admit what the documents in its possession irrefutably state, or is otherwise unable or unwilling to provide them to the Board.[85]

Given Ms. Wetzel's proven willingness to spread false information about Ms. Henderson, Mr. Shea requests that the Board reject her testimony included in the Answer, whether from her directly, or from the agent's recollection, as unreliable. Such a determination is appropriate at this stage of the proceeding. In *Eastern Testing*, another case regarding the immediate effectiveness of an order, the ASLB decided that when the character and veracity of the source for a Staff allegation are in doubt, a presiding officer is unable to credit the source's information as sufficiently reliable to provide "adequate evidence."[86] Mr. Shea asks the Board to discredit Ms. Wetzel's testimony in the same manner.

The Staff's reliance on Ms. Deanna Fults' testimony,[87] excerpts of which were also first provided to Mr. Shea when attached to the Answer, is also unsound. Ms. Fults was notified on May 13, 2019, that she would be involuntarily reassigned from her position in the Employee Concerns Program with the opportunity to find another position within TVA. This notice occurred only ten days *prior* to her interview with the Office of Investigations, which was attended by members of her legal representation.[88] Though still employed by TVA, Ms. Fults has protested her involuntary removal from her ECP position by, among other things, filing a

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[85] The Board can also find copies of Ms. Wetzel's attorney repeating the same false claim about Ms. Henderson and her father publicly online. "Wetzel's attorney, Alan R. Kabat, alleged [Ms. Henderson] had 'a remarkably fast promotion trajectory' in part because her father was a 'good friend' of a TVA executive." Jamie Satterfield, *Labor Department Rules TVA Cooked Up Cause to Fire Nuclear Whistleblower*, KNOXVILLE NEWS SENTINEL (Jan. 3, 2020) https://www.knoxnews.com/story/news/crime/2020/01/03/labor-department-tva-cooked-up-cause-fire-nuclear-whistleblower/2794793001/.

[86] *Eastern Testing and Inspection, Inc.*, LBP-96-09, 43 N.R.C. 211, 220 (1996).

[87] Echavarria Affidavit, ¶¶ 15-17.

[88] NRC ROI Exhibit 24, page 48 of 96.

complaint with the Department of Labor.[89] Ms. Fults' potential bias against her employer cannot be discounted when evaluating her testimony.[90]

In particular, this potential bias must be considered when evaluating any concerns Ms. Fults expressed about the ERB in her testimony to the NRC on May 23, 2019, which took place after she was informed of her reassignment. Indeed, the record evidence shows that Ms. Fults (although a non-voting member of the ERB) signed off on the ERB record of action on October 16, 2018,[91] notwithstanding any concerns she expressed to her Manager (and not to Mr. Shea) after the ERB on September 19, 2018, and notwithstanding the testimony Ms. Fults provided on May 23, 2019, on which the Answer relies. The reliable evidence related to Mr. Shea's intent at the time he separated Ms. Wetzel from TVA is the signatures of all of the ERB members (including Ms. Fults) on the ERB Record of Action, and the statement that no ERB members dissented with its conclusions or actions.[92]

For these reasons, the testimony of Ms. Wetzel and Ms. Fults is not reliable and is not adequate evidence supporting the Order's immediate effectiveness.

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[89] Whistleblower Complaint of Melody Babb, Mark Richerson, and Deanna Fults v. Tennessee Valley Authority to U.S. Department of Labor, Occupational Safety and Health Administration (Nov. 8, 2019).

[90] *Eastern Testing and Inspection, Inc.*, LBP-96-09, 43 N.R.C. 211, 220 (1996).

[91] NRC ROI Exhibit 16, page 12 of 27.

[92] NRC ROI Exhibit 16, page 23 of 27.

VII. Conclusion

For the foregoing reasons, Mr. Shea respectfully requests that the Board set aside the immediate effectiveness of the Order.

Respectfully submitted,

/s Electronically Signed by Timothy J. V. Walsh/
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October 5, 2020

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October 5, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	IA-20-008
JOSEPH SHEA	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joseph Shea's Motion for Leave to Reply to the NRC Staff Answer and Joseph Shea's Reply to the NRC Staff Answer have been served through the E-Filing system on the participants in the above-captioned proceeding, this 5th day of October, 2020.

/Signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh