

November 30, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

_____)	
In the Matter of	)	Docket Nos. 50-259, 50-260, 50-296, 50-
	)	327, 50-328, 50-390, 50-391
	)	License Nos. DPR-33, DPR-52, DPR-68,
Tennessee Valley Authority	)	DPR-77, DPR-79, NPF-90, NPF-96
Chattanooga, Tennessee	)	EA-20-006, EA-20-007
_____)	

Erin Henderson’s Request for a Hearing of the NRC Staff’s October 29, 2020 Order or, in the Alternative, Discretionary Intervention

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I. Introduction

Pursuant to 10 C.F.R. § 2.202(a)(3) and Section V of the October 29, 2020 Order Imposing Civil Monetary Penalty (“Order”)¹ on the Tennessee Valley Authority (“TVA”), for the reasons set forth below, Ms. Erin Henderson hereby requests a hearing in the above-captioned proceeding as an individual “adversely affected by the order.” If the Commission denies that request, Ms. Henderson seeks leave to intervene in the hearing requested by TVA in its proceeding.²

As the Commission is aware, Ms. Henderson already has a Request for Hearing pending in a separate proceeding before the Commission regarding her own Notice of Violation (“NOV”), which arises out of facts similar to those at issue in this proceeding.³ However, her harm and

¹ The Order was accompanied by an Appendix (hereinafter referred to as “Order Appendix”) providing the NRC Staff’s “Evaluation and Conclusion” of TVA’s responses to the initial proposed Order.

² See Tennessee Valley Authority’s Answer and Request for Hearing (Nov. 30, 2020).

³ Erin Henderson’s Request for a Hearing (Sept. 13, 2020) (ADAMS Accession No. ML20259A299). In addition, this Request for a Hearing references, but does not attach due to privacy and other concerns, (1) other exhibits provided

interests in TVA’s proceeding are distinctly different from those arising in her NOV proceeding. Ms. Henderson’s NOV harmed her reputation with unfounded Severity Level II violations and findings of deliberate misconduct against her, which also placed her liberty interests at stake by enabling the Staff to pursue future escalated enforcement on the basis of those unfounded findings.⁴ As Ms. Henderson explained in that case, under U.S. Supreme Court precedent she has a *right* to challenge her NOV in order to protect her constitutionally protected interests from harm.⁵

Ms. Henderson’s Request for a Hearing remains pending before the Commission. However, to ensure she is able to protect at least some of her rights, and to remedy some of her reputational harms, Ms. Henderson is also seeking a hearing on TVA’s Order here. This Order and its underlying Violations harm her reputation with an unfounded finding of deliberate misconduct, an alleged violation of 10 C.F.R. § 50.7, and a new unsubstantiated claim (not raised by the NRC Staff in her NOV proceeding) that Ms. Henderson filed a complaint as a “pretext” in order to violate NRC rules. The TVA Order also could chill the nuclear workforce from raising concerns of harassment, including Ms. Henderson, by issuing violations against a company for investigating, substantiating, and taking action against improper conduct in the workplace.

Ms. Henderson is requesting a hearing on both her NOV and TVA’s Order in an effort to fully remedy the Staff’s harms against her and to be made whole. However—to be clear—allowing her a hearing or intervention solely on TVA’s Order, even with a successful substantive outcome, would *not* make Ms. Henderson whole. It would leave in place against her both an unfounded

to the NRC at Ms. Henderson’s Pre-decisional Enforcement Conference (“PEC”), (2) the transcript of Ms. Henderson’s June 23, 2020 PEC, and (3) the transcript of TVA’s June 30, 2020 PEC. All of this record evidence is available to the Commission.

⁴ *Id.* at 24-29.

⁵ *Id.*

Severity Level II violation and the Staff's threat of future escalated enforcement.⁶ Thus, Ms. Henderson respectfully requests that if the Commission grants her request here for a hearing (or intervention) on TVA's Order, that it continue to independently consider Ms. Henderson's request for a hearing on her NOV—and the unique liberty and separate reputational injuries at stake there—without crediting a hearing (or intervention) on TVA's Order as an adequate remedy for all of the harms she has suffered and the differing allegations she faces.

II. Request for Hearing on the Staff Order Pursuant to 10 C.F.R. § 2.202(a)(3)

A. Legal Requirements

As Section V of the Order provides, Ms. Henderson is requesting a hearing because she is “adversely affected” by it.⁷ Specifically, Ms. Henderson is suffering both a reputational injury and a chilling effect from the Order sufficient to satisfy 10 C.F.R. § 2.202(a)(3).⁸ However, regardless of the fact that Ms. Henderson meets the criteria of 10 C.F.R. § 2.202(a)(3) to request a hearing based on the Order, recent precedent indicates that the Commission may still require her (as a third-party) to satisfy the requirements for a petition to intervene under the Commission's generally applicable rules.⁹ This includes satisfying both the standing criteria in 10 C.F.R.

⁶ And the converse would also be true. If, following TVA's hearing, TVA's NOV remained unchanged and TVA is assessed a civil penalty and a Severity Level II violation for Ms. Henderson's alleged violation, engagement in a “pretext,” and deliberate misconduct, Ms. Henderson's professional reputation would still be harmed despite a successful outcome in her own proceeding.

⁷ See also 10 C.F.R. § 2.202(a)(3). 10 C.F.R. § 2.202(a)(3) states that adversely affected persons may seek a hearing of orders within twenty days of the date of the order or such other time as maybe be specified in the order. The Order at issue here specifies that such petitions are to be filed within thirty days. Thirty days from October 29, 2020 falls on November 28, 2020, a Saturday. Therefore, in accordance with Commission rules, the deadline to request a hearing on the Order is November 30, 2020.

⁸ See *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-5, 79 NRC 254, 255 (2014) (noting the Staff did not oppose a third-party's demand for a hearing on an enforcement proceeding prohibiting the licensee from operating a research reactor where the third party's hearing demand—who sought to purchase the reactor—did not discuss the standing and contention requirements of 10 C.F.R. § 2.309 or the zone of interest test).

⁹ *Exelon Generation Company, LLC* (Dresden Nuclear Power Station, Units 2 and 3), LBP-14-4, 79 NRC 319, 325 (2014) (“Although on its face the language of 10 C.F.R. § 2.202(a)(3) might be ambiguous, its regulatory history makes clear that the Commission did not intend to relieve third-party individuals who are not the subject of an

§ 2.309(d) and the contention admissibility criteria in 10 C.F.R. § 2.309(f).¹⁰ Here, Ms. Henderson satisfies both.

B. Ms. Henderson has Standing to Request a Hearing

To reiterate, regardless of the traditional rules of standing, Section V of the Order and 10 C.F.R. § 2.202(a)(3) allow Ms. Henderson to request a hearing if she is “adversely affected by” the Order. In addition to being adversely affected by the Order, Ms. Henderson also meets traditional standing requirements.¹¹ As the Commission has noted in prior enforcement proceedings, “[a]t the heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.”¹² To determine such a “personal stake,” the Commission applies contemporaneous judicial concepts of standing.¹³ Accordingly, a petitioner must (1) allege an “injury in fact” that is (2) “fairly traceable to the challenged action” and (3) is “likely” to be “redressed by a favorable decision.”¹⁴ In some third-party intervention cases, a

enforcement order (but who nonetheless seek a hearing on the order) from satisfying the requirements for a petition for intervention set forth in 10 C.F.R. § 2.309.”); *Exelon Generation Company, LLC* (Dresden Nuclear Power Station, Units 2 and 3), CLI-16-6, 83 NRC 147, 156-57 (2016) (declining to decide the issue of a hearing as of right under § 2.202(a)(3) where the underlying dispute was moot); *see also Consumers Power Company* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 249 (1981) (subjecting a third-party union’s request for a hearing to the requirements of 10 C.F.R. § 2.714, the then-equivalent to the current 10 C.F.R. § 2.309); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980) (examining a third-party request for hearing on an enforcement order under the generally applicable rules governing intervention, i.e., standing and discretionary intervention standards).

¹⁰ *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 719 (2006) (“NRC procedural rules require a petitioner seeking to intervene as of right in NRC adjudication to demonstrate standing and to offer an admissible contention.”).

¹¹ The requirements for standing in an enforcement proceeding are no stricter than those in the usual licensing proceeding. *Dairyland Power Coop.* (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 66-67 (1994).

¹² *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978)); *see also Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

¹³ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994).

¹⁴ *Id.* at 71-72 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

Board has also required petitioners to meet prudential standing requirements—that is to show that their interest in the proceeding is within the “zone of interests” as contemplated by the Atomic Energy Act.¹⁵ Ms. Henderson satisfies these requirements.

As the Supreme Court and other federal courts have recognized, a concrete and particularized reputational injury is an “injury in fact” which gives rise to standing.¹⁶ In this proceeding, Ms. Henderson will suffer reputational injury if the Board decides against TVA. And the injury to Ms. Henderson is plainly particularized, i.e. it is related to her as an individual and not “shared in substantially equal measure by all of a large class of citizens.”¹⁷

The NRC Staff has now alleged that Ms. Henderson engaged in a “pretext” to retaliate, violated the Commission’s rules as to retaliation, and engaged in deliberate misconduct.¹⁸ The Commission has written that, under its deliberate misconduct rule, “the range of actions that would subject an individual to action by the Commission does not differ significantly from the range of

¹⁵ *Compare Exelon Generation Company, LLC* (Dresden Nuclear Power Station, Units 2 and 3), LBP-14-4, 79 NRC 319, 328 (2014) (applying the “zone of interest” test to a union affected by an enforcement order) *with Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-5, 79 NRC 254, 255 (2014) (noting the Staff did not oppose a third-party’s demand for a hearing on an enforcement proceeding prohibiting the licensee from operating a research reactor where the third party’s hearing demand—who sought to purchase the reactor—did not discuss the standing requirements of 10 C.F.R. § 2.309 or the zone of interest test).

¹⁶ *Meese v. Keene*, 481 U.S. 465, 476 (1987) (exhibitor of foreign films had standing to challenge statute labeling certain films “political propaganda” where showing those films would have damaged his reputation); *Parsons v. U.S. Dep’t of Justice*, 801 F.3d 701, 711 (6th Cir. 2015) (“Reputational injury, on the other hand, is sufficient to establish an injury in fact.”); *Foretich v. United States*, 351 F.3d 1198, 1211 (D.C. Cir. 2003) (“Appellees concede, as they must, that injury to reputation can constitute a cognizable injury sufficient for Article III standing.”) (citing cases); *Shukh v. Seagate Tech., LLC*, 803 F.3d 659, 663 (Fed. Cir. 2015) (“Today, we hold that concrete and particularized reputational injury can give rise to Article III standing.”).

¹⁷ *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982).

¹⁸ Order Appendix at 1, 3 (“After becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel (TVA OGC). This action was based, at least in part, on the former employee engaging in protected activity.”); Order Appendix at 2-4 (“The NRC staff determined that filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.”).

actions that might subject the individual to criminal prosecution.”¹⁹ Thus, the Commission has acknowledged the gravity of being found to have acted deliberately, and the industry understands that being assessed a violation for deliberate misconduct is akin to a criminal offense. The Order tarnishes Ms. Henderson’s reputation by equating her conduct with a criminal offense. Additionally, the Staff took the step of widely publicizing this case in a press release.²⁰ And mainstream Tennessee and national press outlets have written widely about Ms. Henderson on multiple occasions.²¹

¹⁹ Revisions to Procedures to Issue Orders, Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,675 (Aug. 15, 1991).

²⁰ NRC Press Release, *NRC Fines TVA More than \$600,000 for Discrimination Violations; Cites Two Managers for Their Roles* (Aug. 25, 2020), available at <https://www.nrc.gov/reading-rm/doc-collections/news/2020/20-042.pdf>. In addition to this case, Ms. Henderson has had further false statements made about her in the press based on the false allegations of the complainants. *See, e.g.,* 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/> (reporting that Ms. Henderson had a “remarkably fast promotion trajectory” because her father was a “good friend” of a TVA executive, when her father did not know the alleged TVA executive and is not even in the nuclear industry).

²¹ *See, e.g.,* Jamie Satterfield, *Nuclear Regulatory Commission Bans TVA Executive Over Whistleblower Retaliation*, KNOXVILLE NEWS SENTINEL (Aug. 30, 2020), <https://www.knoxnews.com/story/news/crime/2020/08/31/nuclear-regulatory-commission-bans-tva-executive-joseph-shea-over-whistleblower-retaliation/3442778001/> (claiming the NRC is “is considering sanctions against TVA executive Erin Henderson, who is accused of retaliating against Wetzel and soliciting Shea’s aid in getting her fired.”); Dave Flessner, *NRC Fines TVA for Firing Engineers After They Raised Safety Concerns*, CHATTANOOGA TIMES FREE PRESS (Aug. 25, 2020), <https://www.timesfreepress.com/news/business/aroundregion/story/2020/aug/25/nrc-fines-tva-firing-engineers-after-they-raised-safety-concerns/530734/>; WAFF 48 Digital Staff, *Nuclear Regulatory Commission Fines TVA, Cites Former Employees for Discrimination Violations*, WAFF-48 (Aug. 25, 2020) (“The NRC said in a press release that . . . Former Director of Corporate Nuclear Licensing, Erin Henderson, violated NRC employee protection rules and engaged in deliberate misconduct.”); Nuclear News Staff, *NRC Proposes Six-Figure Fine to TVA; Cites Two Former Execs*, AMERICAN NUCLEAR SOCIETY (Aug. 27, 2020), <https://www.ans.org/news/article-473/nrc-proposes-six-figure-fine-to-tva-cites-two-execs/> (“TVA’s director of corporate nuclear licensing, Erin Henderson, filed a complaint against the employee, triggering an investigation that placed the employee on paid administrative leave.”); Guy Burdick, *NRC Fines TVA ‘Highly Unusual’ \$600,000 Fine for Worker Retaliation After Safety Complaints*, UTILITYDIVE (Aug. 27, 2020), <https://www.utilitydive.com/news/nrc-fines-tva-highly-unusual-600000-fine-for-worker-retaliation-after-s/584210/> (“A penalty to a single site on the order of the TVA penalty is highly unusual.”); Jamie Satterfield, *TVA Fined \$900K Fine For Covering Up Unsafe Start-Up of Watts Bar Nuclear Reactor*, KNOXVILLE NEWS SENTINEL (Nov. 11, 2020), <https://www.knoxnews.com/story/news/crime/2020/11/11/nrc-fines-tva-900-000-covering-up-unsafe-reactor-start-up/6233410002> (“[The NRC] is considering sanctions against TVA executive Erin Henderson, who is accused of retaliating against Wetzel and soliciting Shea’s aid in getting her fired.”).

The injury to Ms. Henderson is also concrete, and not “conjectural” or “hypothetical.”²² As federal courts have previously found, even where sanctions result in damage to only professional reputation, the injured party has standing.²³ There is no question that the broad publication of Ms. Henderson’s alleged deliberate misconduct amounts to reputational injury. The nuclear industry is heavily regulated with understandably severe consequences for those found to have violated Commission requirements, including permanent damage to one’s professional reputation in addition to damage to future employment opportunities. Indeed, any cursory internet search of Ms. Henderson’s job history—which any future employer would undertake—results in the headline, “TVA Fined 606K, Two Executives Reprimanded Over Actions Against Former Employees.”²⁴ Ms. Henderson’s reputation is inexorably tied to this Order and TVA’s case. Therefore, if the Board rules against TVA in this proceeding it would result in an “injury in fact” to Ms. Henderson.²⁵ Additionally, Ms. Henderson’s name will continue to exist on the NRC’s website as having engaged in deliberate misconduct until this matter is resolved.

In addition, upholding the Order results in a chilling effect for Ms. Henderson, as she will no longer feel secure in raising concerns or filing complaints—lest her actions be construed as retaliation by the NRC Staff. The chilling effect is also particularized. Ms. Henderson’s sole act of merely filing a formal harassment complaint forms the basis for TVA Violations 1 and 3. While

²² *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

²³ See *Sullivan v. Comm. on Admissions & Grievances of U. S. Dist. Court for D.C.*, 395 F.2d 954, 956 (D.C. Cir. 1967) (finding that an attorney charged with misconduct has standing on the basis of reputational injury to appeal a judgment, even though they were assessed no fine, service, or other punishment); *Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) (same).

²⁴ John North, *TVA Fined 606K, Two Executives Reprimanded Over Actions Against Former Employees*, 10News (Aug. 25, 2020), <https://www.wbir.com/article/news/local/tva-fined-606k-two-executives-reprimanded-over-actions-against-former-employees/51-9e53db95-c8c6-48d0-8751-e0ef7dc9be34> (“The NRC found essentially that Henderson . . . discriminated against the two unnamed employees who raised concerns about a chilled work environment that discouraged them from talking about safety concerns.”).

²⁵ *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 112-13 (1979).

this chilling effect may permeate across the industry, no one will be more discouraged from ever again filing a complaint than Ms. Henderson.

The chilling effect is also concrete. As Ms. Henderson stated during her PEC, “I am frustrated at the NRC’s actions and the potential it might cause others who feel harassed to be chilled from raising their own concerns.”²⁶ As others have already recognized, the Staff’s actions have the perverse effective of indicating that “TVA should have properly binned one concern as protected and the other as retaliatory even before investigating, because the act of investigating itself was an adverse action,”²⁷ which places both would-be complainants and licensees in an impossible position.

Ms. Henderson’s injuries are also directly traceable to the Order. As stated above, it is Ms. Henderson’s conduct alone that the Order cites as the “escalating factor” for Violations 1 and 3. Finally, a favorable outcome is likely to redress Ms. Henderson’s injury as it would demonstrate that (1) her conduct was not, in fact, a deliberate attempt at retaliation for protected activities, a pretext, or otherwise a violation of NRC rules, and permit her to clear her name in the press and within the industry; and (2) employees and their employers should not fear reprimand from the NRC for merely filing concerns.

The next question is whether the asserted harm arguably falls within the zone of interests of the Atomic Energy Act.²⁸ The Supreme Court has traditionally construed the zone-of-interests

²⁶ Transcript of Pre-decisional Enforcement Conference Re Erin Henderson, No. IA-20-009 at 33 (June 23, 2020) (Hereinafter “Henderson PEC Tr.”); *see also* Henderson PEC Tr. at 94 (“[W]hat I have taken from this apparent violation is this, i[s] that [a] minority leader, one of only two female directors in a business unit of over 3500 people should not have raised a valid and substantiated complaint of harassment.”).

²⁷ Conner & Winters, *Nuclear Employer Alert* (Aug. 25, 2020), <https://www.cwlaw.com/newsletters-128>.

²⁸ *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 8 (1998), *petition for review denied*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999); *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272-73 (2001).

test liberally, stating that it “is not meant to be especially demanding.”²⁹ The Court looks for “‘some indication’ that the petitioner’s interest is arguably among those interests protected by the relevant statute.”³⁰ As at least one Commissioner has previously stated, “[i]n the enforcement context, one way in which an injury can fall within the zone of interests protected by the Atomic Energy Act is where it is ‘based on the premise that [the Order’s] terms, if carried out, would be affirmatively contrary to the public health and safety.’”³¹

Here, the chilling effect and reputational injury to Ms. Henderson fall within the NRC’s zone of interest because there is even more than “some indication” that it directly implicates public health and safety. The Order has the serious potential to silence individuals who are being harassed and subjected to an unprofessional, hostile environment. Rather than file a complaint and risk career-threatening reputational injury, individuals will instead keep silent, thus empowering bad actors. As the Commission has recognized, such a workplace, where people are permitted to act unprofessionally and not treat others with respect, directly impacts public health and safety.³² In the nuclear industry, zero tolerance for bullying and harassment is essential to ensure a Respectful Work Environment (one of the Commission’s own established Positive Traits of a Nuclear Safety Culture)³³ where trust and respect permeate an organization and are critical to maintaining a safety conscious work environment.

²⁹ *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399 (1987).

³⁰ *Ambrosia Lake*, CLI-98-11, 48 NRC at 10 (citing *Nat’l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 494 n.7 (1998)).

³¹ *Exelon Generation Company* (Dresden Nuclear Power Station Units 2 and 3), CLI-16-6, 83 NRC 147, 163 (2016) (Commissioner Baran, dissenting) (quoting *State of Alaska Dep’t of Transportation & Public Facilities*, CLI-04-26, 60 NRC 399, 406 n.28 (2004)).

³² Nuclear Regulatory Commission Safety Culture Policy Statement Educational Resource (Oct. 7, 2015) (ADAMS Accession No. ML15280A097) (Outlining the traits of a Respectful Work Environment and noting “[t]rust and respect are among the most frequently discussed concepts in studies of organizational and safety culture.”).

³³ NRC Traits of a Positive Safety Culture, available at <https://www.nrc.gov/about-nrc/safety-culture/sc-policy-statement.html#traits>.

For these reasons, Ms. Henderson has met the standing requirements of 10 C.F.R. § 2.309(d), and also has established that she is adversely affected by the Order as required under 10 C.F.R. § 2.202(a)(3).

C. Ms. Henderson Proffers Two Admissible Contentions

Ms. Henderson proffers two admissible contentions against the TVA Order. In order to be admissible, a contention must fall within the scope of a proceeding. Moreover, under Commission precedent, “enforcement orders limit adjudication to two issues only - whether the facts as stated in the order are true, and whether the proposed sanction is supported by those facts.”³⁴ “For instance, an enforcement contention might appropriately address the factual underpinnings of the NRC Staff’s finding of violation or the mitigating factors to be considered in determining the penalty.”³⁵ Consistent with these requirements, Ms. Henderson sets forth the following contentions:

- 1) The facts do not support the Staff’s conclusion in Violations 1 and 3 that Ms. Henderson’s Complaint was filed for prohibited reasons.
- 2) The facts do not support escalating TVA’s Violations 1 and 3 to Severity Level II because Ms. Henderson did not engage in deliberate misconduct.

The bases and support for these contentions are set forth below.

1. Contention 1: The facts do not support the Staff’s conclusion that Ms. Henderson’s Complaint was filed for prohibited reasons.

a. Specific Statement of the Issue of Law or Fact³⁶

In Violations 1 and 3, the Order alleges that Ms. Henderson filed her complaint based in part on Mr. McBrearty’s and Ms. Wetzel’s engagement in alleged protected activity, and that her

³⁴ *Siemaszko*, CLI-06-16, 63 NRC at 720.

³⁵ *Id.*

³⁶ 10 C.F.R. § 2.309(f)(1)(i).

complaint was a “pretext” for a subsequent investigation.³⁷ Ms. Henderson disputes that she filed her Complaint for prohibited reasons. She also disputes that her Complaint was a “pretext” for any subsequent investigation. Thus, the Staff’s factual basis for Violation 1 and 3 is incorrect and the underlying facts are in dispute.

b. Basis for Contention 1³⁸

Regarding Violation 1, as set forth in great detail in TVA’s pre-decisional enforcement conference (“PEC”),³⁹ Ms. Henderson’s own PEC,⁴⁰ and Ms. Henderson’s Request for a Hearing on her own Notice of Violation,⁴¹ the facts clearly show that Ms. Henderson had ample non-prohibited justifications for filing her Complaint against Mr. McBrearty (the former Sequoyah employee) and to include Ms. Wetzel as a potential co-conspirator. Mr. McBrearty’s inappropriate behavior—which began soon after Ms. Henderson had raised an ethics concern against Mr. McBrearty—included disparaging Ms. Henderson to her subordinates, berating Ms. Henderson in emails to a large audience, leaving Ms. Henderson out of key meetings and communications on important regulatory decisions, openly refusing to talk to Ms. Henderson about regulatory issues, creating a challenging work environment for Ms. Henderson’s subordinates, and otherwise preventing Ms. Henderson from carrying out her job functions. And Ms. Henderson included Ms. Wetzel in the Complaint because she believed that Ms. Wetzel was conspiring with Mr. McBrearty to prevent her from attending industry meetings, undermining her supervisor’s instructions, being dishonest about what was stated in closed door meetings, and spreading false rumors about Ms.

³⁷ Order Appendix at 2, 4.

³⁸ 10 C.F.R. § 2.309(f)(1)(ii).

³⁹ Transcript of Pre-Decisional Enforcement Conference Re Tennessee Valley Authority, Nos. EA-2020-06 & EA-2020-07 at 58-66 (June 30, 2020) (Hereinafter “TVA PEC Tr.”).

⁴⁰ See generally Henderson PEC Tr.

⁴¹ Erin Henderson’s Request for a Hearing (Sept. 13, 2020) (ADAMS Accession No. ML20259A299).

Henderson in her workplace.⁴² Ms. Henderson was encouraged to include the names of anyone she thought was contributing to the challenges in the work environment she was experiencing and that is what she did. As such, the Staff incorrectly asserts that Ms. Henderson filed her complaint for prohibited reasons in violation of 10 C.F.R. § 50.7.

In addition to disputing the Staff’s overarching conclusion that her Complaint violated 10 C.F.R. § 50.7, Ms. Henderson also disputes the Staff’s unsupported claim that Ms. Henderson’s Complaint was a “pretext for gathering evidence to retaliate.”⁴³ Ms. Henderson’s Complaint served one purpose and one purpose only: to ask for help from TVA in addressing the inappropriate behavior and conduct directed towards her after she raised an ethics concern in 2016.⁴⁴ Indeed, the first step she took was to try to quit her job—not file a complaint.⁴⁵ She got as far as turning in her badge until the then-Chief Nuclear Officer (“CNO”), as set forth in his sworn affidavit,⁴⁶ intervened and asked her to stay.⁴⁷ According to the CNO “Erin appeared distraught. She was very emotional, sobbing and in despair. Erin told me that she could not put up with the continual harassment from Mike McBrearty. She told me that she had chosen to walk away from it and quit. I told Erin that if she felt harassed that she could file a complaint. I told Erin that if she felt that she had to file a claim of harassment, that I would be supportive of that.”⁴⁸

⁴² Henderson PEC Tr. at 117 (“I too had heard that she had been saying things around the office about, that I initiated investigations into people, because of those things.”); *see also* Formal Complaint of Erin Henderson at 6-8 (Mar. 9, 2018) (Available as Exhibit 10 to NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (ADAMS Accession No. ML20272A298) (Hereinafter “Henderson Complaint”).

⁴³ Order Appendix at 2, 4.

⁴⁴ Henderson PEC Tr. at 92 (“I had no reason at that point to believe that Mike would ever stop. I had previously raised my concerns and I believe there would never be a resolution. I filed my complaint so that it could be formally reviewed and to stop this harassment.”).

⁴⁵ Henderson PEC Tr. at 30.

⁴⁶ Henderson PEC Exhibit 1. Provided at Attachment 1 is a redacted excerpt from Henderson PEC Exhibit 1.

⁴⁷ Henderson PEC Tr. at 31.

⁴⁸ Henderson PEC Exhibit 1. Provided at Attachment 1 is a redacted excerpt from Henderson PEC Exhibit 1. .

In addition, specifically regarding Violation 3, Ms. Henderson disputes the Staff's unsupported claim that Ms. Wetzel "[c]ontacting the NRC with concerns of a chilled work environment . . . was a contributing factor in the decision to include the former corporate employee in the formal complaint."⁴⁹ As Ms. Henderson established in her PEC, that is not the case. The facts show that Ms. Henderson included Ms. Wetzel's name as a potential co-conspirator (among other individual's names) because she had reason to believe that Ms. Wetzel was coordinating with Mr. McBrearty.⁵⁰ Among other reasons, as Ms. Henderson explained in her Complaint, and at her PEC,⁵¹ she included Ms. Wetzel as a potential co-conspirator because Ms. Henderson believed Ms. Wetzel was conspiring with Mr. McBrearty to prevent Ms. Henderson from attending industry meetings, undermining Ms. Henderson's supervisor's instruction, and being dishonest about what Ms. Henderson stated in closed door meetings.⁵² Ms. Henderson was aware that the two were in close communication.⁵³ Ms. Wetzel's name was not included for prohibited reasons.

Thus, a plain reading of Ms. Henderson's Complaint and the information Ms. Henderson provided at her PEC demonstrates that the Staff's allegations in the Order are not supported by the facts.

⁴⁹ Order Appendix at 3.

⁵⁰ See Henderson PEC Tr. at 118-19; Henderson Complaint at 6-8.

⁵¹ Henderson PEC Tr. at 118-19 ("I included that specific statement to demonstrate that the Sequoyah employee specifically thought that there was an increase and noted, observed this increase in communication between Mike and Beth at that time. That, and I stated for the record today that I did not think that that employee was correct with regard to the nature of, or the initiation of the NRC inspection in my organization that took place in September of 2017. But I included that information here to demonstrate that another employee had noted an increase in the amount of communication between them.").

⁵² Henderson Complaint at 6-8.

⁵³ Henderson PEC Tr. at 118-19.

c. The Issues Raised in Contention 1 Are Within the Scope of This Proceeding⁵⁴

Because Ms. Henderson is disputing “the factual underpinnings of the NRC Staff’s finding of violation,” Contention 1 is squarely within the scope of this proceeding, pursuant to Commission precedent.⁵⁵

d. The Issues Raised in Contention 1 Are Material to the Findings the NRC Must Make⁵⁶

In addition, Contention 1 is material to the findings that the decisionmaker must make in order to further support Violations 1 and 3.⁵⁷ Under Atomic Energy Act Section 186(a), the test for materiality is whether the information is capable of influencing the decisionmaker.⁵⁸ Here, if Ms. Henderson is permitted to prove her Contention 1 and can demonstrate that she filed her Complaint for nonprohibited reasons, then there is no underlying basis for Violation 1 or 3. In addition, if Ms. Henderson can demonstrate that she did not deliberately intend to cause TVA to violate Commission requirements, then there is no basis for escalating Violations 1 and 3, as set forth in more detail below in Contention 2. Thus, the dispute at hand is critical to the Staff’s decision-making supporting the Order.

e. Concise Statement of Facts Supporting Contention 1⁵⁹

Ms. Henderson’s Contention 1 is also well supported by facts laid out in extensive detail during TVA’s PEC, Ms. Henderson’s PEC, and Ms. Henderson’s Request for a Hearing. In the

⁵⁴ 10 C.F.R. § 2.309(f)(1)(iii).

⁵⁵ *Siemaszko*, CLI-06-16, 63 NRC at 720.

⁵⁶ 10 C.F.R. § 2.309(f)(1)(iv).

⁵⁷ *Id.*

⁵⁸ *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-691, 16 NRC 897, 910 (1982) (citing *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), CLI-76-22, 4 NRC 480 (1976)), *aff’d sub nom. Virginia Elec. & Power Co. v. NRC*, 571 F.2d 1289 (4th Cir. 1978).

⁵⁹ 10 C.F.R. § 2.309(f)(1)(v).

interest of complying with 10 C.F.R. § 2.309(f)(1)(v), which requires a *concise* statement of the facts supporting the contention, some of the more pertinent facts are set forth as follows.⁶⁰

The events underlying Violations 1 and 3 started in 2016, early in Ms. Henderson’s tenure, when Ms. Henderson raised valid concerns of an inappropriate relationship between Mr. McBrearty and another employee. The ethics investigation performed by TVA’s office Human Resources (“HR”) department into Ms. Henderson’s concerns proved inconclusive. Critically, though, the existence of the investigation (although it was supposed to be confidential) became known to Mr. McBrearty. Mr. McBrearty also learned that Ms. Henderson was the one who initially raised concerns about the relationship.⁶¹ The facts show that Mr. McBrearty was outraged at the investigation and directed his anger toward Ms. Henderson.⁶² The facts also show that almost immediately thereafter Mr. McBrearty began a sustained, two-year campaign of inappropriate behavior targeting Ms. Henderson.

Mr. McBrearty’s inappropriate behavior included:

- Disparaging Ms. Henderson to her subordinates. For example, on February 14 and 15, 2017, Ms. Henderson’s subordinates told her that Mr. McBrearty’s openness about his hostility toward her speaks very negatively about her;⁶³ on March 29, 2017 Ms. Henderson’s subordinate told her that Mr. McBrearty “has been expressing his issues with [her] to people and making it difficult to work with him,⁶⁴ and on April 7, 2017 Ms. Henderson’s subordinate told her that Mr. McBrearty’s hostility toward her

⁶⁰ Due to the requirement for a concise statement of facts, Ms. Henderson is not providing an exhaustive list of facts at this time but is instead merely a set of facts sufficient to support admission of a contention on the matter. The specific instances of inappropriate conduct are set out in detail, with the dates each instance occurred, in Ms. Henderson’s own request for a hearing. *See* Erin Henderson’s Request for a Hearing at 11-19 (ADAMS Accession No. ML20259A299).

⁶¹ Henderson PEC Tr. at 72-73.

⁶² Henderson PEC Tr. at 73; TVA OGC Report at 27 (Aug. 10, 2018) (Available as Exhibit 14 to NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (ADAMS Accession No. ML20272A298) (Hereinafter “TVA OGC Report”).

⁶³ TVA PEC Tr. at 59; Henderson PEC Exhibit 30 (Henderson PEC Exhibit 30 consists of excerpts of the contemporaneous notes Ms. Henderson kept, which documented her interactions with the former Sequoyah employee and others).

⁶⁴ TVA PEC Tr. at 61; Henderson PEC Exhibit 30.

stemmed from Mr. McBrearty's perception of how Ms. Henderson had treated the other employee;⁶⁵

- Disparaging Ms. Henderson's husband to his subordinates. On March 17, 2017, Ms. Henderson learned that Mr. McBrearty was complaining to her husband's subordinates about her husband's use of personal leave, though it had been approved by his supervisor;⁶⁶
- Berating Ms. Henderson in emails to a large audience and forwarding her emails on to a broad audience, including those outside her organization. For example, on February 13, 2017 Ms. Henderson's supervisor texted to her, "Are you tracking that each reply you are sending is getting rebroadcast to an expanding audience, which you are not being cc'd on?";⁶⁷ on March 2, 2018, Mr. McBrearty sent an email to a wide audience with bold, red font, berating Ms. Henderson for having a phone call with the NRC and claiming that the call was unauthorized by the site, even though he was aware beforehand that she would be making the call;⁶⁸
- Refusing to talk to Ms. Henderson about regulatory issues. For example, in February 2017, Mr. McBrearty told Ms. Henderson's supervisor he was unwilling to speak to Ms. Henderson to develop a proposed plan on a licensing issue, apparently for the simple reason he just did not like her.⁶⁹
- Leaving Ms. Henderson out of communications on key regulatory decisions and key meetings. For example, in October 2017, Mr. McBrearty left Ms. Henderson off of key communications related to a Sequoyah Nuclear Plant mock drill for a 95001 inspection and regulatory conference;⁷⁰
- Creating a very unprofessional challenging work environment for Ms. Henderson's subordinates. For example, in March 2017 Ms. Henderson's subordinates told her that Mr. McBrearty "was extremely confrontational and defensive while her subordinate was at the site" the prior week and took a hostile tone on calls with Ms. Henderson's group;⁷¹ as Ms. Henderson wrote to her supervisor in April 2017, Mr. McBrearty's "ongoing hostility directed toward me . . . is impacting our staff's interaction with the site and putting them in a tough position."⁷²

⁶⁵ TVA PEC Tr. at 61; Henderson PEC Exhibit 83.

⁶⁶ TVA PEC Tr. at 60; Henderson PEC Exhibit 30.

⁶⁷ Henderson PEC Tr. at 78; Henderson PEC Exhibit 82.

⁶⁸ Henderson PEC Exhibit 91.

⁶⁹ Henderson PEC Tr. at 76-77; Henderson PEC Exhibit 30.

⁷⁰ Henderson PEC Exhibit 76.

⁷¹ Henderson PEC Exhibit 30.

⁷² Henderson PEC Exhibit 83.

Mr. McBrearty was repeatedly counseled on these behaviors by his direct supervisor and by his Site Vice President, yet this did not deter his misconduct.⁷³ The work environment eventually got so bad that Ms. Henderson's managers limited her duties which involved Mr. McBrearty.⁷⁴ This included limiting her interactions with the peer team and limiting her involvement in Sequoyah licensing matters because of Mr. McBrearty's hostility.⁷⁵

Following years of Mr. McBrearty's inappropriate behavior, Ms. Henderson attempted to resign. As she explained at her PEC:

It was known that I had expressed a concern that Mike was creating a hostile work environment for me on numerous occasions during the previous year, to ECP, to HR, and to my management and Mike. I believed that the ongoing hostility from Mike was never going to stop and I had nowhere else to turn. So I quit.⁷⁶

But TVA's then-CNO asked Ms. Henderson to stay and suggested that she file a formal harassment complaint.⁷⁷ As the former CNO explained in his sworn affidavit filed with Ms. Henderson's PEC:

The idea that Erin Henderson filed a harassment claim calculated to retaliate against an individual for raising concerns - is, in my opinion, ludicrous. I was there on that day when she expressed her decision to give up and resign. She gave me no impression that she was brainstorming on how to retaliate or get even. I believe this to be true because her reaction to my informing her of her right to report alleged harassment. Her facial expression gave me the impression that she had previously not thought of that as an option. As a result, I do not believe that Erin's complaint was a means of retaliation. I believe that she was seeking help.

I also recall telling Erin that if she felt strongly that she was being harassed, in accordance with Company Policy, if a claim were to be filed it would be investigated. I never discussed any potential outcomes from such an investigation

⁷³ Henderson PEC Exhibit 88. Notably, Mr. McBrearty admitted during the TVA PEC on June 30, 2020 that he was spoken to about his behaviors and conduct towards Ms. Henderson. TVA PEC Tr. at 134 ("Mr. Shea also noted that, with respect to the ongoing tension between myself and Ms. Henderson, I needed to own the problem.").

⁷⁴ Henderson PEC Exhibit 30.

⁷⁵ Henderson PEC Tr. at 83.

⁷⁶ Henderson PEC Tr. at 30.

⁷⁷ Henderson PEC Exhibit 1. Provided at Attachment 1 is a redacted excerpt from Henderson PEC Exhibit 1.

with her. Erin is a bright, talented woman, and I encouraged her not to give up on all she had worked for in her career.⁷⁸

The then-CNO encouraged Ms. Henderson to file a complaint and include all the details she could think of in her complaint. Ms. Henderson was encouraged by the CNO and her supervisor to include any and all relevant information in her complaint, along with the names of anyone who may have been involved in creating a challenging work environment for her as a result of the 2016 ethics investigation.⁷⁹

The egregious level of conduct by Mr. McBrearty toward Ms. Henderson was repeatedly corroborated:

- TVA’s Office of General Counsel (“OGC”) substantiated Mr. McBrearty’s hostile behavior following a lengthy investigation when they concluded that “Ms. Henderson’s allegation of harassment and retaliation is substantiated, and Mr. McBrearty’s conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies.”⁸⁰
- TVA’s HR department corroborated Mr. McBrearty’s behavior following a review of the OGC investigation report when a TVA HR Director concluded that Mr. McBrearty’s “egregious behavior . . . has been long-term and substantiated.”⁸¹
- TVA’s HR corroborated Mr. McBrearty’s hostile behavior again following a separate independent evaluation of the evidence underlying OGC’s investigation report when TVA’s Site Manager, HR Business Partner for Watts Bar Nuclear Plant determined that the conduct and behaviors exhibited were not aligned with TVA values, beliefs, competencies or leadership expectations. Her conclusion was that Mr. McBrearty’s behavior was unbecoming of a leader at TVA and warranted termination. She stated, “It is not a single egregious occurrence but the culmination of the time and type of behavior that occurred that contributes to this conclusion.”⁸²
- Multiple TVA senior managers agreed that Mr. McBrearty’s behavior was serious, including Mr. McBrearty’s direct supervisor, who, upon confronting Mr. McBrearty about this behavior, told him he had received a complaint of harassment by Mr.

⁷⁸ *Id.*

⁷⁹ Henderson PEC Tr. at 115, 120.

⁸⁰ TVA OGC Report at 39.

⁸¹ TVA PEC Tr. at 75 (quoting a May 30, 2018 email from Director, Enterprise HR Business Partnerships) (note the transcript mis-quotes “and substantiated” as “insubstantiated”).

⁸² TVA PEC Tr. at 74 (quoting a June 21, 2018 email from the Watts Bar HR Manager).

McBrearty towards another employee and that the facts of that complaint have been substantiated by independent investigation. Mr. McBrearty's supervisor stated, "[Mr. McBrearty] asked how serious this is and I told him it's very serious."⁸³

- Mr. McBrearty's Site Vice President also agreed Mr. McBrearty's behavior was inappropriate, stating that Mr. McBrearty's actions were not appropriate and that "[Mr. McBrearty] should not have made the aggressive comments about [Ms. Henderson] in the work place" and should have kept his opinions to himself and maintained a professional environment.⁸⁴

Finally, Mr. McBrearty himself admitted to his misbehaviors. Upon being confronted by his supervisor with the results of OGC's investigation, Mr. McBrearty "knew what this was about without prompting. . . . did not offer a defense and stated that 'I think I let my ego get out of control and will not do that again.'"⁸⁵

As a result of following her CNO's advice to file a complaint, Ms. Henderson has now been accused of violating NRC rules, taking such action as a "pretext" for gathering evidence to retaliate, and engaging in the alleged deliberate misconduct that underlies Violations 1 and 3. But the irrefutable facts—the countless examples of inappropriate conduct directed toward Ms. Henderson because she herself engaged in her own protected activity—clearly support Ms. Henderson's Contention 1, which claims the Staff erred when it found that Ms. Henderson's Complaint was filed for prohibited reasons.

f. A Genuine Dispute Exists on a Material Issue of Law or Fact⁸⁶

Ms. Henderson also has a genuine dispute on a material issue of fact with Violations 1 and 3 in the Order: specifically she disputes the factual accuracy of the Staff's findings that 10 C.F.R. § 50.7 was violated, and the Staff's underlying conclusion that Ms. Henderson's Complaint was

⁸³ Henderson PEC Tr. at 43 (quoting a May 25, 2018 email from Mr. McBrearty's supervisor).

⁸⁴ TVA PEC Tr. at 111 (quoting a May 24, 2018 text message from the Sequoyah Site Vice President).

⁸⁵ TVA PEC Tr. at 71 (quoting a May 25, 2018 email from Mr. McBrearty's supervisor).

⁸⁶ 10 C.F.R. § 2.309(f)(1)(vi).

merely a “pretext.” Ms. Henderson has provided the supporting reasons for her dispute, including the information she presented at her PEC as well as related materials and affidavits. This is sufficient factual evidence to show that an “inquiry in depth” is appropriate.⁸⁷

For the reasons set forth in subsections (a)-(f) above, Contention 1 satisfies the admissibility requirements set forth in 10 C.F.R. § 2.309(f).

2. Contention 2: The facts do not support escalating TVA’s violation to Severity Level II because Ms. Henderson did not engage in deliberate misconduct.

a. Specific Statement of the Issue of Law or Fact⁸⁸

As set forth above, and in greater detail in TVA’s PEC, Ms. Henderson’s PEC, and Ms. Henderson’s Request for a Hearing, Ms. Henderson did not engage in deliberate misconduct, and there is no evidence of Ms. Henderson’s intent to violate NRC rules by filing her Complaint. Indeed, there is only evidence of the exact opposite: Ms. Henderson tried to quit her job in an effort to escape Mr. McBrearty’s harassing, unprofessional, and inappropriate workplace behavior, before being convinced by the then-CNO to file a complaint instead. The facts show that whether Mr. McBrearty or Ms. Wetzel engaged in protected activity had nothing to do with her decision to file the Complaint. Accordingly, Ms. Henderson’s alleged deliberate misconduct cannot provide the basis for escalating TVA’s Violations 1 and 3 to Severity Level II.

b. Basis for Contention 2 and Concise Statement of Facts Supporting the Contention⁸⁹

⁸⁷ *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989), quoting *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980)).

⁸⁸ 10 C.F.R. § 2.309(f)(1)(i).

⁸⁹ 10 C.F.R. § 2.309(f)(1)(ii), (v).

Instead of providing actual evidence supporting deliberate misconduct, the Staff misapplied the NRC’s Enforcement Policy to fit Ms. Henderson’s case. The Staff cited Ms. Henderson’s deliberate misconduct as the “unique escalating factor” for Violations 1 and 3.⁹⁰ And on page 5 of the Order’s Appendix, the Staff stated that “[i]n making its determination for violations 1 and 3 the Staff used example b.3 from Section 6.10 of the NRC Enforcement Policy.”

This section of the Enforcement Policy provides examples that can justify escalating violations in discrimination cases. Specifically, it states that, “[i]n certain cases, the severity level of a violation may be escalated based on unique escalating factors such as . . . whether the applicable NRC employee protection regulation . . . was deliberately violated.”⁹¹ The specific example which the Order cited states:

A mid- or senior-level plant manager (or equivalent) or a corporate-level line manager (or equivalent) *is the decisionmaker* or plays a significant role in the adverse action *decisionmaking process*; the employment action is relatively less adverse to the employee’s terms, conditions, compensation, or privileges of employment (e.g., verbal counseling); and either a.1(a) or a.1(b) above is cited, or other unique escalating factors are present.⁹²

The Staff made several errors when it applied this example. First, while Ms. Henderson is a corporate-level line manager, as she has demonstrated repeatedly she was not the decisionmaker regarding the employment actions and she had absolutely no role, much less a “significant” one, in the “adverse action decisionmaking process.” As Ms. Henderson stated at her PEC, “When TVA completed its review of my complaint, I had no input into what to do with the investigation findings or the decision-making over the discipline proposed for Mike or Beth.”⁹³ Ms. Henderson

⁹⁰ Order Appendix at 5.

⁹¹ NRC Enforcement Policy Manual at 66 (Jan. 15, 2020) (ADAMS Accession No. ML19352E921).

⁹² *Id.* at 66-67 (emphasis added).

⁹³ Henderson PEC Tr. at 33.

was not part of any disciplinary meetings and played no role in the actions taken against Mr. McBrearty or Ms. Wetzel.

The Staff itself recognizes this factual distinction, but nevertheless “determined that filing the formal complaint that triggered an investigation is considered an adverse action in this case” and that “[w]hen an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.”⁹⁴ Leaving aside the fact that the Staff has presented no actual evidence whatsoever supporting its “pretext” theory, the Staff clearly erred in its attempt to stretch the language of the Enforcement Policy far beyond its obvious intent, to now find that someone whose only act was to raise a workplace concern somehow participated in the adverse action decision or the decision-making process. Indeed, filing a complaint *which then* “triggers” an investigation *which then* results in an adverse action is a far cry from “play[ing] a significant role in the adverse action *decisionmaking process*.”⁹⁵ Furthermore, the Staff’s guidance to the nuclear industry does not include filing a harassment complaint as an adverse action.⁹⁶ Thus, there is no basis in the Enforcement Policy or Commission precedent for escalating Violations 1 and 3.

Second, the Staff alleged that Ms. Henderson’s deliberate misconduct is the “escalating factor” for Violations 1 and 3.⁹⁷ But the Staff provides no evidence substantiating that deliberate misconduct took place. The Commission has deemed deliberate misconduct to be “an intentional act or omission that the person *knows* . . . [w]ould cause a licensee . . . to be in violation of any

⁹⁴ Order Appendix at 2-4.

⁹⁵ NRC Enforcement Policy Manual at 66-67 (Jan. 15, 2020) (ADAMS Accession No. ML19352E921).

⁹⁶ See NRC Regulatory Issue Summary 2005-18, Guidance for Establishing and Maintaining A Safety Conscious Work Environment (Aug. 25, 2005) at 15, *available at* <https://www.nrc.gov/reading-rm/doc-collections/gen-comm/reg-issues/2005/ri200518.pdf>.

⁹⁷ Order Appendix at 5.

[Commission] rule, regulation, or order”⁹⁸ that applies only to “individuals who deliberately set in motion events that would cause a violation.”⁹⁹ A finding of deliberate misconduct requires that “[a]n individual acting in this manner has the requisite *intent* to act in a wrongful manner.”¹⁰⁰ Indeed, deliberate misconduct under 10 C.F.R. § 50.5 “does not differ significantly from the range of actions that might subject the individual to criminal prosecution.”¹⁰¹ This is vastly different from Ms. Henderson’s actual action, which was to file a complaint with the intent of putting an end to the harassing, unprofessional and inappropriate workplace behavior to which she had been subjected, with no knowledge or control over the eventual outcome.

As an ASLB has recently held, “adequate evidence of an ‘intentional act or omission’ that causes a Commission violation is insufficient to demonstrate adequate evidence of a [deliberate misconduct] violation if the Staff does not also show that the alleged wrongdoer “knowingly” engaged in deliberate misconduct.”¹⁰² Yet the Staff has provided no evidence of Ms. Henderson’s intent or state of mind, while also seemingly ignoring all of Ms. Henderson’s evidence to the contrary.

c. The Issues Raised in Contention 2 Are Within the Scope of This Proceeding¹⁰³

In Contention 2, Ms. Henderson is disputing “the factual underpinnings of the NRC Staff’s finding of violation.”¹⁰⁴ Specifically here, Ms. Henderson disputes the “escalating factor” of deliberate

⁹⁸ 10 C.F.R. § 50.5(c) (emphasis added).

⁹⁹ Revisions to Procedures to Issue Orders, Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,679 (Aug. 15, 1991).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.* at 40,675.

¹⁰² Joseph Shea, LBP-20-11, 90 NRC ____ (Nov. 3, 2020) (slip op. at 9) (ADAMS Accession No. ML20308A739).

¹⁰³ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁰⁴ *Siemaszko*, CLI-06-16, 63 NRC at 720.

misconduct that the NRC Staff cites for Violations 1 and 3.¹⁰⁵ Accordingly, Contention 2 is squarely within the scope of this proceeding.

d. The Issues Raised in Contention 2 Are Material to the Findings of the NRC¹⁰⁶

In addition, Contention 2 is material to the findings that the NRC must make in order to further support the penalty for Violations 1 and 3. Indeed, if Ms. Henderson can show her conduct was not deliberate, that would remove the escalating factor for Violation 1 and 3, and the associated penalties would be reduced.

e. A Genuine Dispute Exists on a Material Issue of Law or Fact¹⁰⁷

Ms. Henderson also has a genuine dispute on a material issue of fact underlying Violations 1 and 3. Specifically, she disputes the accuracy of the Order's finding that she engaged in deliberate misconduct, which was the basis upon which the Staff escalated the violation to Severity Level II.

For the reasons set forth in Sections (a)-(e) above, the deliberate misconduct escalating factor applied to Violations 1 and 3 in the Order is unwarranted and should be rescinded. Moreover, the escalating factor applied to Violations 1 and 3 of the Order is detrimental to the public health and safety by chilling any person in the nuclear industry from filing a complaint, lest they become the next target of the NRC Staff.

¹⁰⁵ Order Appendix at 5.

¹⁰⁶ 10 C.F.R. § 2.309(f)(1)(iv).

¹⁰⁷ 10 C.F.R. § 2.309(f)(1)(vi).

III. Request for Discretionary Intervention

If the Board denies Ms. Henderson’s hearing request due to a lack of standing (which it should not), Ms. Henderson requests, as a matter of discretion pursuant to 10 C.F.R. § 2.309(e), leave to intervene in the hearing being sought in this proceeding by TVA.

A. Legal Requirements

Where a petitioner has failed to demonstrate standing, it “may nevertheless be permitted to participate as a matter of discretion, where it can ‘make some contribution to the proceeding.’”¹⁰⁸ The NRC has “broad discretion to provide hearings or permit interventions in cases where these avenues for public participation would not be available as a matter of right,” otherwise known as discretionary intervention.¹⁰⁹ “The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held.”¹¹⁰

In considering whether to grant a request for discretionary intervention, the Commission considers the following six factors as set out in 10 C.F.R. § 2.309(e).

(1) Factors weighing in favor of allowing intervention—

- (i) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record;
- (ii) The nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding; and
- (iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest;

(2) Factors weighing against allowing intervention—

¹⁰⁸ *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 77 (1979) (quoting *Portland General Electric Company* (Pebble Springs Nuclear Plant, Units I and 2), CLI-76-27, 4 NRC 610, 612 (1976)).

¹⁰⁹ *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 442 (1980), *aff’d. Save the Valley v. NRC*, 714 F.2d 142 (6th Cir. 1983) (Table).

¹¹⁰ 10 C.F.R. § 2.309(e).

- (i) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and
- (iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.¹¹¹

The Commission requires a petitioner to address these factors in its initial petition.¹¹² Moreover, the consideration and balancing of the factors is a fact-based inquiry. As the Commission has previously stated, “the practice of granting or denying discretionary intervention should develop ‘not through precedent, but through attention to the concrete facts of particular situations.’”¹¹³ However, precedent does indicate that the primary consideration in determining whether to grant discretionary intervention is the extent to which the petitioner's participation may reasonably be expected to assist in developing a “sound record.”¹¹⁴

B. Factors in Favor of Granting Discretionary Intervention

Ms. Henderson meets the requirements of 10 C.F.R. § 2.309(e). TVA is already requesting a hearing by right, providing a preexisting hearing. Ms. Henderson has also offered two admissible contentions and, as described in further detail below, she also satisfies the balancing test set forth in 10 C.F.R. § 2.309(e).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Siemaszko*, CLI-06-16, 63 NRC at 717 (quoting *Pebble Springs*, CLI-76-27, 4 NRC at 617).

¹¹⁴ *See Pebble Springs*, CLI-76-27, 4 NRC at 616; *see also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).

1. **Ms. Henderson’s Participation Will Assist in Developing a Sound Record.**

While all of the factors cited above are considered, it has long been recognized that the petitioner’s ability to contribute to the record is “foremost in importance” in deciding whether to allow discretionary intervention.¹¹⁵ Indeed, the Commission has stated that it “may . . . allow discretionary intervention to a person who does not meet standing requirements, where there is reason to believe the person’s participation will make a valuable contribution to the proceeding and where a consideration of the other criteria on discretionary intervention shows that such intervention is warranted.”¹¹⁶ This is not a question of “generalized expertise,” but instead requires “particularized knowledge of the issues actually in dispute,” and the ability to provide “specific contributions”¹¹⁷ to the record on “substantial issues of law or fact.”¹¹⁸

Because the NRC Staff claims that the “adverse action” in Violations 1 and 3 was Ms. Henderson’s filing of the Complaint, there is no person with a greater knowledge of the relevant facts. Ms. Henderson knows all of the non-prohibited considerations driving her submission of the Complaint, and she can contribute directly to the record regarding her state of mind (and lack of intent to commit wrongdoing).

Moreover, Ms. Henderson has first-hand knowledge of *all* the facts and issues that the Staff got wrong when assessing Violations 1 and 3 and escalating the civil penalty. She could contribute all of that information to the record in this case. It is plainly apparent that Ms. Henderson is a key party with particularized knowledge of the issues in dispute here, and that she would make a

¹¹⁵ See *Siemaszko*, CLI-06-16, 63 NRC at 722 n.47.

¹¹⁶ Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,724 (Dec. 3, 1998).

¹¹⁷ See *Siemaszko*, CLI-06-16, 63 NRC at 721.

¹¹⁸ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 357 (1998) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981)).

“valuable contribution” to TVA’s hearing on a “substantial issue of . . . fact” given her “pertinent experience” with the issues at hand.¹¹⁹

Boards have previously permitted discretionary intervention where the petitioner has unique knowledge of the facts. For example, in *Virginia Electric Power Co.*, the Board permitted Sun Ship—the fabricator of North Anna’s steam generator and coolant pump supports—to intervene in an operating license proceeding because they had specific knowledge of the fabrication and integrity of the materials.¹²⁰ The Board concluded that while Sun Ship could “furnish some measure of assistance without formal intervention” it would instead “be in a position to make a significantly greater contribution if clothed with the full rights of an intervenor – including the entitlement to present evidence of its own and to cross-examine the witnesses of other parties.”¹²¹ The Commission has also permitted discretionary intervention where an organization’s members could “measurably assist in developing an adequate decisional record” because they could “provide a unique contribution” to the proceeding.¹²² The same analysis is present here. Indeed, it is even stronger. Because Ms. Henderson was the person who actually wrote the formal complaint at issue in Violations 1 and 3, she is obviously in the best position to provide details regarding her intent on March 9, 2018, which will be a critical issue in TVA’s proceeding.

¹¹⁹ *Id.*

¹²⁰ *Virginia Electric and Power Co.* (North Anna Power Station, Units I and 2), ALAB-363, 4 NRC 631, 633-34 (1976).

¹²¹ See *Virginia Electric Power Co.* (North Anna Power Station Units 1 and 2), ALAB-342, 4 NRC 98, 107-09 & n.12 (1976) (analyzing the factors relevant to both late and discretionary intervention but deferring judgment pending the Commission’s answer to a certified question); *Virginia Electric and Power Co.* (North Anna Power Station, Units I and 2), ALAB-363, 4 NRC 631, 633-34 (1976) (granting discretionary intervention based on Commission responses to the certified questions).

¹²² *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 88 (1979).

2. Ms. Henderson Has Property and Financial Interests or Other Interests in this Proceeding.

Ms. Henderson’s future economic interest is at stake in this proceeding. Any cursory internet search of Ms. Henderson’s work history—which a future employer would undertake—results in the headline: “TVA Fined 606K, Two Executives Reprimanded Over Actions Against Former Employees”¹²³ or “Nuclear Regulatory Commission Bans TVA Executive Over Whistleblower Retaliation,”¹²⁴ among others. Additionally, her name is published on the NRC’s website as having engaged in deliberate misconduct. As described above, the text of those articles specifically name Ms. Henderson and describe how she intentionally violated NRC requirements which led to the termination of employees for engaging in protected activities. Ms. Henderson’s reputation and future employment opportunities are inextricably tied to this Order and TVA’s case.

3. The Potential Effect of an Order on Ms. Henderson’s Interests Are Significant.

The Order’s impacts on Ms. Henderson’s interests are already, and will continue to be, significant. Her name has been repeated in the news media as having deliberately retaliated against a whistleblower where the NRC Staff has yet to offer any evidence of Ms. Henderson’s actual intent. Reading through the articles available regarding this case leads one to believe that Ms. Henderson is an unqualified manager who retaliated against her employees for raising safety concerns. In fact, contrary to the NRC’s allegations, Ms. Henderson encouraged her employees

¹²³ John North, *TVA Fined 606K, Two Executives Reprimanded Over Actions Against Former Employees*, 10News (Aug. 25, 2020), <https://www.wbir.com/article/news/local/tva-fined-606k-two-executives-reprimanded-over-actions-against-former-employees/51-9e53db95-c8c6-48d0-8751-e0ef7dc9be34> (“The NRC found essentially that Henderson . . . discriminated against the two unnamed employees who raised concerns about a chilled work environment that discouraged them from talking about safety concerns.”).

¹²⁴ Jamie Satterfield, *Nuclear Regulatory Commission Bans TVA Executive Over Whistleblower Retaliation*, KNOXVILLE NEWS SENTINEL (Aug. 30, 2020), <https://www.knoxnews.com/story/news/crime/2020/08/31/nuclear-regulatory-commission-bans-tva-executive-joseph-shea-over-whistleblower-retaliation/3442778001/> (claiming the NRC is “is considering sanctions against TVA executive Erin Henderson, who is accused of retaliating against Wetzell and soliciting Shea’s aid in getting her fired.”).

to raise safety concerns and saw an overall improvement in raising issues in her organization as a result.¹²⁵

As Ms. Henderson stated during her PEC, “I firmly believe that the improvement in CNL was a direct reflection of my encouragement and support for raising and documenting issues. I was thoughtful in my approach, modified it when needed, sought out external feedback, encouraged individuals to raise concerns, took action on them, and deeply valued continuous improvement feedback in safety culture monitoring.”¹²⁶ Ms. Henderson has a significant interest in vindicating her professional reputation in this proceeding, which the NRC Staff has tarnished with no evidence of her alleged wrongdoing, a finding inconsistent with their own guidance and policies, and a strained reading of its Enforcement Policy.

C. Factors Against Granting Discretionary Intervention

1. There Are No Other Means by which Ms. Henderson’s Interest Will Be Protected.

While Ms. Henderson was issued her own NOV for actions similar to those underlying TVA’s Order, she does not have an automatic hearing right as a result of those sanctions. Ms. Henderson has filed a request for a hearing in that matter, which is still pending before the Commission so it may not be granted. Should the Commission decline Ms. Henderson’s hearing request there, her sole opportunity to protect any of her interests will be in TVA’s proceeding on this Order.

In fact, even if the Commission grants Ms. Henderson’s hearing request on her own NOV, and even if that NOV is subsequently found to be invalid, Ms. Henderson would still have the need to protect her interest in TVA’s case. If, following TVA’s hearing, TVA’s NOV remained

¹²⁵ Henderson PEC Tr. at 51.

¹²⁶ Henderson PEC Tr. at 56.

unchanged and TVA is assessed a civil penalty and a Severity Level II violation for Ms. Henderson's alleged violation, engagement in a "pretext," and deliberate misconduct, Ms. Henderson's professional reputation would still be harmed despite a successful outcome in her own proceeding. In addition, Ms. Henderson would also feel the chilling effect arising from the NRC Staff's actions in this case. For this reason, Ms. Henderson's interests cannot be completely protected without both her intervention in this proceeding and a separate hearing regarding her own NOV.

2. Ms. Henderson's Interests May Not Be Adequately Represented by the Existing Parties.

Ms. Henderson's interests may not be adequately represented by the existing parties to TVA's proceeding. The NRC Staff obviously will not be seeking to protect Ms. Henderson's interests in overturning the Order. And while TVA's position in this proceeding will be consistent with Ms. Henderson's (*i.e.*, Violations 1 and 3 are unfounded), TVA's primary concern will be defending itself against those violations and two others. Ms. Henderson should not be required to rely on another party to adequately represent and defend her uniquely personal interest in her reputation and future career prospects while that party is focusing on its own case.¹²⁷

3. Ms. Henderson's Participation Will Not Inappropriately Broaden the Scope of, or Delay, this Proceeding.

Allowing Ms. Henderson to intervene in TVA's hearing will not inappropriately broaden or delay the proceeding. As noted above, her interests are specific and narrowly focused upon her

¹²⁷ See, e.g., *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 215 (1979) (noting that while the Staff would be protecting similar interests as the intervenor, "it cannot be expected to pursue all issues with the same diligence as an intervenor would pursue its own issue"); *Virginia Electric Power Co.* (North Anna Power Station Units 1 and 2), ALAB-342, 4 NRC 98, 109 (1976) (noting that while other parties may be as qualified as an intervenor to develop the evidentiary record "it is at least possible that Sun Ship's interest will not be fully represented by existing parties"); see also *United States v. Kemper Money Mkt. Fund, Inc.*, 704 F.2d 389, 392 (7th Cir. 1983) (permitting taxpayers to intervene in a proceeding against certain financial institutions where there was no prejudice in "allowing the taxpayers to represent their own interests").

filing a complaint allegedly as a “pretext” for retaliation in violation of 10 C.F.R. § 50.7, her having allegedly engaged in deliberate misconduct, and the Staff’s reliance upon her supposed deliberate misconduct to escalate the Severity Level of Violations 1 and 3. These issues are within the scope of the hearing.

To the extent that Ms. Henderson’s contentions raise issues particular to her, any broadening of the proceeding will be minimal but not inappropriate given that her actions are inextricably tied to TVA’s Violations 1 and 3. Ms. Henderson is also one individual, and not an organizational representative that must coordinate schedules with many members. Thus, she and her counsel can timely appear, respond to requests, and participate in discovery without delay.

In sum, the interests weigh heavily in favor of granting Ms. Henderson’s request for discretionary intervention based on the six factors in 10 C.F.R. § 2.309(e). Ms. Henderson’s unique knowledge of the facts at hand satisfies the most important factor for a discretionary intervenor—the ability to contribute to a sound record and make a valuable contribution to the Board’s decision-making process.

D. Ms. Henderson Has Proffered Two Admissible Contentions

Although under the Commission’s rules the “standing” requirement does not apply to petitions for discretionary intervention, the “admissible contention” requirement does.¹²⁸ Thus, to qualify for discretionary intervention, Ms. Henderson must submit “at least one admissible contention.”¹²⁹ Here, Ms. Henderson has submitted two admissible contentions, and hereby incorporates her contentions and arguments set out in Section II.C above to satisfy the requirements of 10 C.F.R. § 2.309(f).

¹²⁸ *Siemaszko*, CLI-06-16, 63 NRC at 719.

¹²⁹ *Id.*

IV. Conclusion

For the foregoing reasons, Ms. Henderson respectfully requests that the Commission grant her a hearing on the Order and the matters described herein. If that request is denied, Ms. Henderson respectfully requests that she be granted leave to intervene in the hearing that TVA is requesting today in this proceeding.

Respectfully submitted,

/Electronically signed by Timothy J. V. Walsh/

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Dated: November 30, 2020

Counsel for Erin Henderson

November 30, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

_____)	
In the Matter of	)	Docket Nos. 50-259, 50-260, 50-296, 50-
	)	327, 50-328, 50-390, 50-391
	)	License Nos. DPR-33, DPR-52, DPR-68,
Tennessee Valley Authority	)	DPR-77, DPR-79, NPF-90, NPF-96
Chattanooga, Tennessee	)	EA-20-006, EA-20-007
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Erin Henderson's Request for a Hearing of the NRC Staff's October 29, 2020 Order or, in the Alternative, Discretionary Intervention has been served through the E-Filing system in the above-captioned proceeding this 30th day of November, 2020.

/Electronically signed by Timothy J. V. Walsh/

Timothy J. V. Walsh

Attachment 1

Affidavit of Michael Balduzzi

1. My name is Michael A. Balduzzi. I am currently retired from the Nuclear Industry and reside at 409 W River Rd, Hamilton, MT 59840.
2. I am the former Chief Nuclear Officer (“CNO”) of Tennessee Valley Authority. I was the CNO in March 2018 when Erin Henderson filed her harassment complaint.
3. To the best of my recollection, in early March 2018, [REDACTED], the licensing administrative assistant, came to my office area and expressed with urgency that Erin Henderson had asked her, [REDACTED], to escort her out of the building so Erin could surrender her badge because she was going to resign from the company. On hearing this, I sought out Erin who was in her office. I sat down and asked her what was going on.
4. Erin appeared distraught. She was very emotional, sobbing and in despair. Erin told me that she could not put up with the continual harassment from Mike McBrearty. She told me that she had chosen to walk away from it and quit. I told Erin that if she felt harassed that she could file a complaint. I told Erin that if she felt that she had to file a claim of harassment, that I would be supportive of that.
5. The idea that Erin Henderson filed a harassment claim calculated to retaliate against an individual for raising concerns – is, in my opinion, ludicrous. I was there on that day when she expressed her decision to give up and resign. She gave me no impression that she was brainstorming on how to retaliate or get even. I believe this to be true because her reaction to my informing her of her right to report alleged harassment. Her facial expression gave me the impression that she had previously not thought of that as an option. As a result, I do not believe that Erin’s complaint was a means of retaliation. I believe that she was seeking help.
6. I also recall telling Erin that if she felt strongly that she was being harassed, in accordance with Company Policy, if a claim were to be filed it would be investigated. I never discussed any potential outcomes from such an investigation with her. Erin is a bright, talented woman, and I encouraged her not to give up on all she had worked for in her career.

I, Michael A. Balduzzi, swear under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Michael Balduzzi

6/15/2020

Date