

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)

Tennessee Valley Authority)
Chattanooga, Tennessee)

) Docket Nos. EA-20-006, EA-20-007

**TVA’s Answer to Erin Henderson’s Request for a Hearing
or, in the Alternative, Discretionary Intervention**

Pursuant to 10 C.F.R. § 2.309(i)(1), Tennessee Valley Authority (“TVA”) hereby submits its Answer to Erin Henderson’s November 30, 2020 Request for a Hearing of the NRC Staff’s October 29, 2020 Order (“Order”) or, in the Alternative, Discretionary Intervention (“Hearing Request”).¹

The Order states that “any other person adversely affected by this Order may request a hearing on this Order.”² Commission rules permit “[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party” to “file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing.”³ The Board must grant Henderson’s request for a hearing if she “has standing” under 10 C.F.R. § 2.309(d) and “has proposed at least one admissible contention” under 10 C.F.R. § 2.309(f).

¹ Under 10 C.F.R. § 2.309(i)(1), parties may file answers to hearing requests within twenty-five days of service. Twenty-five days from November 30, 2020 falls on Friday, December 25, 2020, a federal holiday. Therefore, in accordance with Commission rules, TVA’s deadline to file its answer is December 28, 2020.

² Order at 3.

³ 10 C.F.R. § 2.309(a).

Alternatively, if the Board determines that Henderson lacks standing, she has requested discretionary intervention.

10 C.F.R. § 2.309(d) enumerates factors the Board must consider when deciding whether Henderson has standing. Those factors include, among other things, the: (1) “nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding”; (2) “nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding”; and (3) “possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.”⁴ In addition to the standing requirements contained in 10 C.F.R. § 2.309(d), the Board may also require Henderson to satisfy contemporaneous judicial concepts of standing: “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.”⁵ Prudential standing requirements may also apply, namely that “[t]he injury must be to an interest that is arguably within the zone of interests protected by the governing statute,”⁶ here, the Atomic Energy Act (“AEA”). Ultimately, the Board must determine whether Henderson “has an interest affected by the proceeding.”⁷

On August 24, 2020, the NRC issued Henderson a written Notice of Violation and accompanying letter (“Henderson NOV”) stating its finding that Henderson’s “deliberate actions placed TVA in violation of 10 CFR 50.7, ‘Employee Protection,’ and [her] in violation of 10 CFR 50.5, ‘Deliberate Misconduct.’”⁸ The Henderson NOV did not include an order prohibiting

⁴ 10 C.F.R. § 2.309(d)(1).

⁵ *In the Matter of Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site)*, 40 N.R.C. 64, 71–72 (Aug. 23, 1994) (internal quotation marks and citations omitted).

⁶ *In the Matter of Gulf States Utilities Co., et al. (River Bend Station, Unit 1)*, 40 N.R.C. 43, 47 (Aug. 23, 1994).

⁷ 10 C.F.R. § 2.309(d)(2).

⁸ Notice of Violation to Ms. Erin Henderson, Nuclear Regulatory Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020).

Henderson from engaging in NRC-licensed activities, nor did it include any formal penalties.⁹ The letter stated, however, that Henderson “should be aware that if [she is] involved in NRC-licensed activities in the future, additional deliberate violations could result in more significant enforcement action or criminal penalties.”¹⁰ In other words, she now faces more significant enforcement action or criminal penalties than other employees who have not received such a finding. Nevertheless, Henderson has no automatic right to a hearing on her NOV because the NRC issued no order against her.

TVA believes that its employees should not be subject to such a consequential finding by the NRC without an opportunity to be heard related to the basis for that finding.¹¹ The Board should grant Henderson’s request for a hearing because she “has an interest affected by [TVA’s] proceeding” and therefore “has standing” under 10 C.F.R. § 2.309(d), and she “has proposed at least one admissible contention” under 10 C.F.R. § 2.309(f).

Specifically, as a TVA employee who has received an NOV with a finding of deliberate misconduct under 10 C.F.R. § 50.5 relating to contentions at issue in this matter, Henderson has an important interest affected by TVA’s proceeding and therefore has standing. TVA also notes that for nuclear employees a finding like Henderson’s by the NRC of deliberate misconduct is of immense significance. Not only may it have an impact on her future employment and her ability to obtain unescorted access authorization, but the NRC has explicitly warned Henderson that this finding could be the basis for more significant enforcement action or penalties in the future.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Henderson’s conduct underlies Violations 1 and 3 against TVA. *See* Erin Henderson’s Request for a Hearing of the NRC Staff’s October 29, 2020 Order or, in the Alternative, Discretionary Intervention (Nov. 30, 2020) (ADAMS Accession No. ML20335A576) (“Henderson Petition”) at 8.

Additionally, as an employee whose conduct was faulted in connection with a position engaged in NRC-licensed activities, TVA believes her interests in a hearing are consistent with the “zone of interest” test for prudential standing requirements under the AEA. On this basis, it would be appropriate for the Board to grant Henderson’s request for a hearing in this matter.

Further, Henderson’s two contentions—(1) “[t]he facts do not support the Staff’s conclusion in Violations 1 and 3 that Ms. Henderson’s Complaint was filed for prohibited reasons” and (2) “[t]he facts do not support escalating TVA’s Violations 1 and 3 to Severity Level II because Ms. Henderson did not engage in deliberate misconduct”—are both within the scope of the proceeding and material to the potential findings,¹² as they overlap entirely with issues that are already going to be litigated in TVA’s proceeding regardless of whether Henderson is found to have standing.¹³

If, however, the Board determines that Henderson lacks standing, it would be appropriate to grant her application for discretionary intervention based on the significance of her above-described interests in the proceeding and the fact that the outcome of this hearing on her contentions would have a substantial effect on her personal interests in that regard.¹⁴ In addition, we note that Henderson is uniquely positioned to assist in the development of a sound hearing record. Specifically, Violations 1 and 3 of the Order are escalated to Severity Level II due to Henderson’s alleged deliberate misconduct—a violation based on her alleged intent.¹⁵ Although the addition of Henderson as a party may have some slight impact on the proceedings, a factor

¹² 10 C.F.R. § 2.309(f)(1)(iii) & (iv).

¹³ See Request for Hearing at 10–24.

¹⁴ See 10 C.F.R. § 2.309(e) (“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.”); see also *id.* (listing, as factors “weighing in favor of intervention,” the (1) “nature and extent of the requestor’s/petitioner’s property, financial or other interests in the proceeding” and (2) the “possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest”).

¹⁵ 10 C.F.R. § 50.5(c) (“[D]eliberate misconduct by a person means any intentional act or omission . . .”).

minimized by the alignment of her issues with TVA's own, TVA believes that such considerations do not outweigh the substantial interest of one of its employees who has been the subject of such a serious finding by the NRC with no opportunity to engage in a full hearing on the subject.

Dated: Washington, DC
December 28, 2020

Respectfully submitted,
O'MELVENY & MYERS LLP

By: */Electronically signed by Laurel Loomis Rimon/*

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CERTIFICATE OF SERVICE

I hereby certify that, on December 28, 2020, I served copies of the foregoing TVA’s Answer to Erin Henderson’s Request for a Hearing or, in the Alternative, Discretionary Intervention on all parties through the NRC’s E-Filing system in the above-captioned proceeding.

/Electronically signed by Laurel Loomis Rimon/

Laurel Loomis Rimon