

Todd Blankenship

December 7, 2020

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**Subject: Reply to a Notice of Violation, IA-20-020**

Dear Director of Enforcement:

This letter is in response to the NRC's Notice of Violation ("NOV") issued to me on November 6, 2020 by Mr. Kenneth O'Brien. The NOV states that I violated the license issued to me on December 14, 2010<sup>1</sup> when I failed to follow TVA Procedure NPG-OPDP-1, Conduct of Operations ("OPDP-1").<sup>2</sup> The NRC characterized this as a nonwillful Severity Level III violation.

According to the NOV, when faced with an emerging issue, I did not practice conservative decision-making by proceeding in the face of uncertainty, by not verifying and validating available information, and by allowing production and cost to override safety. The NOV further alleges that in order to stay on schedule, personnel in the Outage Control Center ("OCC") and Main Control Room ("MCR"), including me, decided to continue with the reactor heat-up, including removal of the residual heat removal system from service, with the normal letdown system out of service. The NOV states that my actions did not constitute deliberate misconduct, but that the failure to follow OPDP-1 is a violation of my reactor operator license. The NOV also states that my failure to follow OPDP-1 did not cause any actual consequences, but that the potential consequences could have been significant under different circumstances.

I strenuously contest the NOV and respectfully submit that it is not supported by the facts and is inconsistent with NRC policies. The cover letter accompanying the NOV states that the NRC has concluded that information regarding the violations is already adequately addressed on the docket in the transcript of my PEC, dated July 14, 2020, and that, therefore, I am not required to respond to the NOV. The NOV provides that if I contest the enforcement action, I may submit

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<sup>1</sup> My operator license was issued on October 14, 2010.

<sup>2</sup> The effective version of OPDP-1 on November 11, 2015 was Revision 36, which became effective on November 10, 2015. The Apparent Violation issued to me stated that I violated Revision 29 of OPDP-1 and the Notice of Violation issued to me states that I violated Revision 35 of OPDP-1.

a response. This letter describing the reasons that I am contesting the NOV constitutes my response and request for withdrawal of the NOV. I request that the Office of Enforcement respond to this letter within 45 calendar days.

## **BACKGROUND**

### **A. NRC Enforcement Proceedings**

On March 9, 2020, I was issued an Apparent Violation by Mr. O'Brien. On July 14, 2020, I participated in a Pre-Decisional Enforcement Conference ("PEC") that was led by Mr. O'Brien. At the PEC, I explained how I acted in a conservative manner on November 11, 2015, never let production or cost to override safety, verified that the MCR could proceed with the evolution, and otherwise acted in compliance with OPDP-1.

Additionally, on July 21, 2020, TVA provided a written response to Apparent Violation 4 (in which I was included) explaining that its investigation of the November 11, 2015 incident revealed that I had complied with procedure. As TVA explained, I complied with OPDP-1 and its direction that operators "stop when unsure and proceed in a deliberate and controlled manner." While TVA acknowledged that the Shift Manager's actions were non-conservative, TVA explicitly rejected this finding for my actions, instead finding that I believed that the Shift Manager had addressed my expressed concerns with the assistance of the OCC and engineering and that the determination had been made that the heat-up could be performed.

Moreover, TVA acknowledged that my actions were the result of management's failures and specifically stated that even if the NRC were to determine that my actions violated enforceable provisions in OPDP-1 (contrary to express NRC policy), that the NRC should refrain from taking enforcement action against me because my actions were taken in compliance with express direction from my supervisor.

### **B. Events of November 11, 2015**

While I already provided my recollection of the events of November 11, 2015, I believe that it is important for me to reiterate what happened that day, because it shows that I acted conservatively and followed all applicable procedures.

On the morning of November 11, 2015, I assumed the position of Operator at the Controls of Watts Bar Nuclear ("WBN") Plant Unit 1. It was not typical for me to be in the MCR during an outage, as my normal position was on the secondary side of the plant. Still, I was prepared to act as the Operator at the Controls and had the support of the crew of operators in the MCR as well as two supervisors, the Unit Supervisor and the Shift Manager. The MCR was also receiving support from the OCC, which was staffed by senior WBN personnel and representatives from various departments. As I explained during my PEC, we worked as a team

in the MCR, but also followed the chain of command dictated in OPDP-1, as prescribed by the NRC.<sup>3</sup>

On that morning, I reviewed the procedure that was being followed to heat-up the unit, which was TVA General Operating Instruction, 1-GO-1, Unit Startup from Cold Shutdown to Hot Standby. I found that an upcoming step in the procedure directed that the Residual Heat Removal (“RHR”) system be placed in ECCS-Standby mode, thus taking it out of service. I knew that the chemical and volume control system (“CVCS”) was already out of service and, therefore, we did not have normal letdown available. While I believed that 1-GO-1 contemplated that normal letdown would be in service at that time, there was no note or procedure requirement stating that we could not proceed without normal letdown.<sup>4</sup> Still, I was questioning whether this alignment would make maintaining an acceptable pressurizer level more difficult. But I also knew that by minimizing charging through the seals and maximizing excess letdown, a rise in pressurizer level could be limited.

It was at this time that I raised my question with the other operators, the Unit Supervisor, and the Shift Manager. OPDP-1, Section 3.3.3, Subpart A directs operators to “stop when unsure and proceed in a deliberate and controlled manner.” In accordance with this direction, I stopped what I was doing and raised my question so that the entire MCR could proceed in a deliberate and controlled manner. At that point, the Shift Manager left the horseshoe area of the MCR and I was given the impression that he was discussing the heat-up and next steps with personnel in the OCC. The NOV issued to the Shift Manager by the NRC quotes him as stating that he talked to the Operations Representative in the OCC at least three times about his concerns with the heat-up. I also overheard the Operations OCC Representative in the MCR discussing how to divert and increase flow for excess letdown (which would assist with maintaining pressurizer level). I was also given the impression that engineering had gotten involved and was evaluating the evolution using data regarding the ability of excess letdown to control the pressurizer level. All of this led me to understand that my question was being evaluated and addressed.

I was continuing with my duties to monitor the unit when the Shift Manager returned to the horseshoe and directed the operators to proceed with the heat-up. At that time, I was given the direct impression and belief that the upcoming evolution would be successful and that the Shift Manager, Operations OCC Representative, engineering department, and personnel in the OCC had all evaluated my question and determined based on their more experienced understanding of the systems and engineering data that pressurizer level could be controlled without normal letdown or the RHR system and that it had been verified through the proper scope control process.<sup>5</sup> My understanding was reasonable because I knew that there were

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<sup>3</sup> NUREG-0800, NRC Standard Review Plan, 13.1.1 Management and Technical Support Organization, Revision 6, at 13.1.1-10 (“Clear management control and effective lines of authority and communication exist among the organizational units involved in managing, operating, and providing technical support for the facility.”).

<sup>4</sup> Apparent Violation 3 issued to TVA asserted that 1-GO-1 was violated when the Shift Manager approved heating-up the unit from Mode 5 to Mode 4 without the CVCS operable. TVA explained in their PEC why that was not a violation and the NRC did not issue an NOV for Apparent Violation 3.

<sup>5</sup> More contemporaneous documentation of my understanding supports my belief that my questions were being evaluated by engineering. The TVA Office of Inspector General’s memorandum of a September 29, 2016

systems we could use to control the pressurizer level. I also knew that the safety of the plant would not be at issue because the RHR system could always be put back into service.

At this point, I had complied with my duties under OPDP-1 to stop when unsure and to proceed in a deliberate and controlled manner. Once I had raised my question and had it addressed by management, in particular the Shift Manager, I was obligated to recognize that the Shift Manager had the command function, pursuant to OPDP-1,<sup>6</sup> and that I needed to proceed with his direction along with the input from management. I had responsibilities as the Operator at the Controls and could not leave those responsibilities to also talk to the OCC and the engineering department to confirm that the Shift Manager had done enough to address my question nor did I have any indication at that time that my concern had not been thoroughly vetted. I had to accept that the Shift Manager, along with the Operations OCC Representative and others, had reviewed the issue I had raised and were giving proper direction to proceed. Additionally, I was not being given the direction to remove the RHR system from service; I believe that the direction was given to the Control Room Operator (“CRO”) who logged removing RHR from service.<sup>7</sup> As a result, I did not make any decision to proceed with the heat-up while harboring concerns, rather I participated in the crew’s work as the Shift Manager directed the operators to proceed under 1-GO-1, which by that point, I believed had been thoroughly reviewed and planned.

### **ARGUMENTS SUPPORTING WITHDRAWAL OF THE NOV**

#### **A. My Actions on November 11, 2015 Were in Compliance with Procedure and My Reactor Operator License**

My actions on November 11, 2015 were in complete compliance with OPDP-1 and as a result I did not violate my reactor operator license as alleged in the NOV. The NRC Staff asserts that when faced with an emerging issue, I failed to perform conservative decision-making by proceeding in the face of uncertainty and by allowing production and cost to override safety. However, I did not proceed in the face of certainty. By all accounts, I stopped when I became uncertain whether removing RHR from service per the upcoming steps in 1-GO-1 would cause an undesirable rise in pressurizer level. My stopping at this point aligned with OPDP-1’s direction to stop when unsure and to avoid hasty decisions.<sup>8</sup>

Rather than proceed in the face of my uncertainty at that time, I stopped to consult with the other operators and my supervisors. Since my immediate responsibilities required me to maintain my position at the controls and protocol dictated that the Shift Manager communicate with the OCC, I relied on those in oversight roles, as recommended in OPDP-1, to verify

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interview of me states that I “felt the people outside the control room were helping the crew research [the rise in pressurizer level],” that I could remember overhearing [the Operations Representative] talking which led [me] to believe it was being researched,” and that the “crew did not know how much excess letdown [we] could get out [but we] believe engineering was working on it.”

<sup>6</sup> See OPDP-1, Section 3.1.6, Subpart B.

<sup>7</sup> See MCR Log Entries Report at Nov. 11, 2015, 13:47:16.

<sup>8</sup> See NPG Standard Dept. Procedure, Conduct of Operations, OPDP-1, Rev. 0036, Section 3.3.3, Subpart A [hereinafter referred to as “OPDP-1”].

whether pressurizer level would be an issue.<sup>9</sup> It appears that my recollection is consistent with the record that my Shift Manager and the Operations OCC Representative both considered the question that I had raised. Also, as I have explained, I understood that engineering was being consulted regarding whether excess letdown would be sufficient to control pressurizer level. Eventually, when my Shift Manager directed the MCR to proceed with the heat-up per 1-GO-1, I took that as verification that my question had been addressed, that pressurizer level could be maintained, and that we were authorized to continue with normal operating procedures using only excess letdown.

It is important to point out that OPDP-1 does not require operators to independently obtain and confirm data that positively refutes any concern. Rather, OPDP-1 directs operators to “verify and validate available information.”<sup>10</sup> The information I had available to me was that my Shift Manager, with the cooperation of the OCC and engineering, had evaluated the evolution and determined it would be successful. By citing the Shift Manager for failing to properly address the concerns of myself and my follow operators, the NRC Staff acknowledges that if my express concerns had been acted upon then, the Shift Manager would have acted appropriately and conservatively.

Further, there is absolutely no evidence that at any point I allowed production or cost to override safety. If I had prioritized production and cost over safe operation of the plant, then I would not have raised my question and asked my supervisors to vet it. The NRC has stated that a chilled work environment existed at WBN at that time, such that operators did not feel free to raise concerns. But I did raise my concern. Moreover, I never considered the safety of the plant to be at issue because I knew that there were multiple ways of controlling pressurizer level.

Finally, I was not the operator who removed RHR from service. As the Operator at the Controls, my “primary focus [was] the monitoring of the critical parameters necessary to support safe reactor operation (typically power, level, pressure and other critical parameters determined by Operations or Shift Management).”<sup>11</sup> Consequently, my primary responsibility and attention was in monitoring the boards. The Shift Manager’s direction to remove RHR from service was carried out by the CRO. My duties as the Operator at the Controls did not mean that I was responsible for all manipulations of the controls, had the command function (which under OPDP-1 is the responsibility of the Shift Manager<sup>12</sup>), or had the oversight responsibility (given by OPDP-1 to the Shift Manager and the Unit Supervisor<sup>13</sup>).

Based on my recollection of events, TVA’s investigation of the events of November 11, 2015, and the record before the NRC there is no indication that I failed to follow OPDP-1. It is unclear upon which basis the Staff has determined that my actions to stop, raise an issue, and obtain direction from my supervisors constituted non-conservative decision-making. Accordingly, I ask that the Staff reevaluate the factual basis upon which my NOV was issued.

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<sup>9</sup> See OPDP-1, Section 3.3.3, Subpart E.

<sup>10</sup> *Id.*

<sup>11</sup> See OPDP-1, Section 3.4.1, Subpart A.

<sup>12</sup> See OPDP-1, Section 3.1.6, Subpart B.

<sup>13</sup> *Id.* at Sections 3.1.6 and 3.1.7.

## **B. The NOV Attempts to Make TVA Safety Culture Traits Enforceable NRC Requirements**

The NOV is based on my alleged violation of provisions in OPDP-1 promoting conservative decision-making. But the Staff's citing my violation of these provisions is contrary to the Commission's decision to not enforce safety culture on licensees. The provisions in OPDP-1 allegedly violated are recitals of traits that support the maintenance of a positive safety culture consistent with the Commission's Safety Culture Policy Statement. The Commission has expressly stated that its Safety Culture Policy Statement is not enforceable and therefore my NOV is in direct contravention of the Commission's current policy. Unless and until the Commission expressly changes its policy, it would be improper for the Staff to impose a violation based upon an alleged violation of the provisions at issue in OPDP-1.

The NOV states that I violated my NRC license when I failed to follow OPDP-1, Section 3.3.3, "Conservative Decision Making," Subpart A, stating, "Stop when unsure and proceed in a deliberate and controlled manner." It also states that I failed to follow OPDP-1, Section 3.3.3, Subpart E, stating, in part, "when the control room team is faced with an emerging issue: ...do not allow production and cost to override safety; question, verify and validate available information; and do not proceed in the face of uncertainty." These provisions of OPDP-1 cited by the Staff directly correspond to traits of a positive safety culture described in the Commission's Safety Culture Policy Statement. Since the NRC has stated that it will not enforce these safety culture traits, they cannot form the basis of a NOV.

### **1. The Provisions That I Allegedly Violated in OPDP-1 Are Safety Culture Traits Reflected in the Commission's Safety Culture Policy Statement**

The Safety Culture Policy Statement sets forth the Commission's expectation that licensees establish and maintain a positive nuclear safety culture, which it defines as "the core values and behavior resulting from a collective commitment by leaders and individuals to emphasize safety over competing goals to ensure protection of people and the environment."<sup>14</sup> The Safety Culture Policy Statement identifies traits that support positive nuclear safety culture values, including an environment for raising concerns and using a questioning attitude.<sup>15</sup> The Safety Culture Policy Statement also states that it is the Commission's expectation that licensees will "take the necessary steps to promote a positive safety culture by fostering these traits as they apply to their organizational environments."<sup>16</sup> The NRC Staff has also indicated that it expects that these safety culture traits will be reflected in a licensee's procedures.<sup>17</sup>

As TVA explained in their PEC, consistent with these expectations from the Commission and the Staff, OPDP-1 includes safety culture traits. TVA explained that their incorporation of

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<sup>14</sup> Final Safety Culture Policy Statement, 76 Fed. Reg. 34,773 (June 14, 2011).

<sup>15</sup> *Id.* at 34,777-78.

<sup>16</sup> *Id.* at 34,778.

<sup>17</sup> *See e.g.*, NRC Inspection Procedure 95003.02, Guidance for Conducting an Independent NRC Safety Culture Assessment.

the safety culture traits into OPDP-1 is reflected in its purpose, which is “to ensure shift operations are conducted in a safe and conservative manner” and “to describe how the Operations Organization ensures a site operational focus through leadership, roles and responsibilities and expectations in implementing our key site processes.”<sup>18</sup> In following the NRC’s Policy Statement and the traits that the Commission has said it wants licensees to promote, OPDP-1 incorporates the following traits:

- Avoid hasty decisions. Stop when unsure and proceed in a deliberate and controlled manner. There are few time critical actions that require immediate response.<sup>19</sup>
- When the control room team is faced with an emerging issue:
  - Do not allow production and cost to override safety.
  - Do not challenge the safe operating envelope.
  - Question, verify and validate available information.
  - Do not proceed in the face of uncertainty.
  - Human Performance (HU) tools like, advocating your position, peer checking, oversight, questioning attitude are utilized and traps (group think) are avoided when reaching operating decisions.<sup>20</sup>

That these safety culture traits incorporated into OPDP-1 reflect TVA’s efforts to meet the NRC’s expectations that licensees promote a positive safety culture is evident through the corresponding language between OPDP-1 and the NRC’s Safety Culture Common Language in NUREG-2165. NUREG-2165 “describes the [Staff’s] implementation of the Commission’s Safety Culture Policy Statement.”<sup>21</sup> NUREG-2165 provides the following language for traits, attributes, and examples of a positive safety culture:

Challenge the Unknown: Individuals stop when faced with uncertain conditions. Risks are evaluated and managed before proceeding.

Examples:

- (1) Leaders reinforce expectations that individuals take the time to do the job right the first time, seek guidance when unsure, and stop if an unexpected condition or equipment response is encountered.
- ...
- (5) Individuals stop work activities when confronted with an unexpected condition, communicate with supervisors, and resolve the condition prior

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<sup>18</sup> OPDP-1, Section 1.0.

<sup>19</sup> See OPDP-1, Section 3.3.3, Subpart A.

<sup>20</sup> See OPDP-1, Section 3.3.3, Subpart E.

<sup>21</sup> NUREG-2165 at v.

to continuing work activities. When appropriate, individuals consult system and equipment experts.

...

Conservative Bias: Individuals use decision making practices that emphasize prudent choices over those that are simply allowable. A proposed action is determined to be safe to proceed, rather than unsafe in order to stop.

Examples:

...

- (2) Leaders take a conservative approach to decision making, particularly when information is incomplete or conditions are unusual.

The language in these traits, attributes and examples mirrors the provisions in OPDP-1, Section 3.3.3, Subparts A and E. Additionally, NUREG-2165 provides that licensee executives and senior managers should establish strategic and business plans that reflect the importance of nuclear safety over production.<sup>22</sup> This directly correlates to OPDP-1's direction that "when the control room team is faced with an emerging issue . . . do not allow production and cost to override safety."<sup>23</sup>

Overall, it is readily apparent that the provisions in OPDP-1 that I am cited as having violated—related to conservative decision-making and stopping when unsure to verify and validate available information—are reflective of the expectations of the Safety Culture Policy Statement and the Safety Culture Common Language in NUREG-2165.

## **2. The Commission Has Expressly Stated that the Safety Culture Policy Statement and Safety Culture Traits Therein Are Not Enforceable Requirements**

The Commission has explained that the Safety Culture Policy Statement does not create enforceable requirements for licensees. The Policy Statement includes an express statement that: "The NRC will not monitor or trend values. These will be the organization's responsibility as part of its safety culture program."<sup>24</sup> The Safety Culture Policy Statement further provides:

Policy statements help to guide the activities of the NRC staff and can express the Commission's expectations of others; however, they are not regulations or rules and are not accorded the status of a regulation or rule within the meaning of the Administrative Procedure Act. . . . Additionally, policy statements cannot be

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<sup>22</sup> NUREG-2165 at 8.

<sup>23</sup> See OPDP-1, Section 3.3.3, Subpart E.

<sup>24</sup> 76 Fed. Reg. at 34,777.

considered binding upon, or enforceable against, NRC or Agreement State licensees and certificate holders.<sup>25</sup>

The Commission has also clarified that it is the facility licensee's responsibility for enforcing its safety culture. The Policy Statement states:

Individuals and organizations performing regulated activities bear the primary responsibility for safety and security. The performance of individuals and organizations can be monitored and trended and, therefore, may be used to determine compliance with requirements and commitments and may serve as an indicator of possible problem areas in an organization's safety culture. The NRC will not monitor or trend values. These will be the organization's responsibility as part of its safety culture program.<sup>26</sup>

As a result, once a facility licensee incorporates the safety culture traits into its policies, guidelines, and procedures, the traits do not become NRC enforceable requirements, but rather are to be monitored and enforced by the licensee. Thus, even though a reactor operator license may require an operator to comply with a facility's procedures, the fact that safety culture traits have been incorporated into a procedure does not make them requirements enforceable by the NRC.

Beyond the explicit statements in the Safety Culture Policy Statement that it does not create standards or requirements that are enforceable against licensees, statements from NRC commissioners at the time the Policy Statement was adopted made the record clear that the NRC Staff should not enforce safety culture on licensed individuals.

Commissioner Svinicki explained that the proposed Federal Register notice for the Policy Statement included a statement that the NRC will include appropriate means to monitor safety culture in its oversight programs and internal management processes, but that this statement was "fundamentally inconsistent" with the policy that safety culture traits "are not necessarily inspectable and were not developed for that purpose."<sup>27</sup> As a result, the statement regarding monitoring safety culture was removed. Other commissioners expressed similar views regarding NRC enforcement of safety culture over time. In 2003, Commissioner Jeffrey Merrifield opposed a proposed rulemaking for oversight of a safety conscious work environment. He articulated that such a rule would be subjective in nature and would likely intrude on management prerogatives and could even have a chilling effect on the commitment of management to a safety conscious work environment.<sup>28</sup>

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<sup>25</sup> *Id.* at 34,775.

<sup>26</sup> *Id.* at 34,777.

<sup>27</sup> Commission Voting Record on Proposed Final Safety Culture Statement, SECY-11-0005, March 7, 2011 (Commissioner Svinicki's Comments on SECY-11-0005).

<sup>28</sup> *See* Commission Voting Record re SECY-02-0166, March 26, 2003 (Statement of Commissioner Jeffrey Merrifield).

The reasons for not enforcing safety culture on licensees continue to be important today. The Staff's subjective decision that I failed to act conservatively enough—even though I raised the issue and awaited a considered decision from my superiors while I continued operation of the unit—may cause operators to be wary of raising concerns out of fear that the NRC Staff will later impose their retrospective judgment that they did not do enough to address their concerns. Additionally, facility licensees may remove safety culture traits from their procedures in order to avoid such subjective enforcement decisions by the Staff. For these reasons and more, the Commission has appropriately refrained from enforcing safety culture, and even if the NRC were to decide to enforce safety culture traits, licensees would be legally entitled to advanced notice that the NRC was changing its policy.<sup>29</sup>

Despite it being apparent that the provisions in OPDP-1 that I allegedly failed to follow are non-enforceable safety culture traits, the Staff has chosen to use these provisions as the basis for my NOV. While I object to that assessment and believe that my actions clearly complied with OPDP-1, I also object to the NOV on the basis that it relies on enforcement of safety culture traits incorporated into OPDP-1, which according to the Commission are not enforceable and, therefore, cannot legally stand as the basis for an NOV.

### **C. The NOV Is Inconsistent with the NRC's Enforcement Policy and the Staff's Enforcement Manual**

The NOV is also contrary to the NRC's Enforcement Policy and Enforcement Manual, which provide that a violation that is committed at the direction of a shift supervisor or due to management failures are appropriately assessed against the facility and not the individual. The NRC Staff has acknowledged that my nonwillful action that allegedly caused the violation of my license was performed pursuant to direction from my chain of command, and therefore, I should not be individually cited for a violation.

The NRC's Enforcement Policy sets forth the principles governing the NRC's enforcement program and "the Commission's expectations regarding the process to be used by the NRC to assess and disposition violations of NRC requirements."<sup>30</sup> The Enforcement Policy states that, "[t]ypically, the NRC will not take enforcement action against the employee or contractor if failures of licensee management . . . are responsible for the individual's improper actions."<sup>31</sup> The Enforcement Policy further provides that considerations as to whether to issue a

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<sup>29</sup> In *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012), the Supreme Court found that the FCC's failure to provide regulated entities with advanced notice that it would consider fleeting expletives as indecent material and subject to penalty violated those entities' constitutional due process rights. The Court explained:

This regulatory history, however, makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation. The Commission's lack of notice to Fox and ABC that its interpretation had changed to the fleeting moments of indecency contained in their broadcasts were a violation of [the statute] as interpreted and enforced by the agency failed to provide a person or ordinary intelligence fair notice of what is prohibited.

<sup>30</sup> U.S. Nuclear Regulatory Commission, Office of Enforcement, NRC Enforcement Policy, Jan. 15, 2020, at 4 [hereinafter the "NRC Enforcement Policy."]

<sup>31</sup> NRC Enforcement Policy at 38-39.

violation against an individual include whether the violation was the result of deliberate misconduct and the degree of management responsibility or culpability.<sup>32</sup> Even outside of these considerations, the Enforcement Policy's section on Notices of Violation and Orders to Individuals states that "actions against licensed individuals for nonwillful violations are rare."

The policies of rarely issuing an NOV to a licensed individual for a nonwillful violation and for refraining from bringing an enforcement action against a licensed individual acting at the direction of management are also embodied in the NRC Enforcement Manual. The Enforcement Manual states that the "NRC will normally take an enforcement action against an individual only if the Staff is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew or should have known, the required actions; and knowingly or with careless disregard (i.e. with more than mere negligence) failed to take required actions which have actual or potential safety significance."<sup>33</sup>

Further, the Enforcement Manual states that "[a]ction against an individual will not be taken if the individual's improper action was caused by management failures."<sup>34</sup> The Enforcement Manual gives, as an example, "[a] case in which compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation."<sup>35</sup> This is directly applicable, as the Shift Manager expressly directed the control room operators to proceed with the heat up. Moreover, the Enforcement Manual specifically provides that "[m]ost transgressions of individuals involving Severity Level III or IV violations will be handled by citing only the facility licensee."<sup>36</sup>

The situations in which a violation should be issued to an individual licensee and a facility licensee, according to the Enforcement Manual, are almost entirely instances where the individual acted willfully. The other situations not requiring willfulness are: (i) unauthorized abandoning of reactor controls; (ii) dereliction of duty; (iii) falsifying records required by NRC regulations or by the facility license; and (iv) submitting false information designed to allow a person to gain access to a licensee facility or, as a result, allowed a person to gain unescorted access to a licensee facility.<sup>37</sup> The alleged violation against me is nothing like these violations, which are considerably more severe.

The nonwillful violation cited in my NOV does not fall into any of these cases that would be cause for one of the "rare" citations to an individual for a nonwillful violation. Also, by the NRC's own admission, the decision to continue with the heat-up was not my decision, but rather was direction that was given to the MCR operators by the Shift Manager and the result of management failures. The NOV issued against the Shift Manager states that he "directed the

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<sup>32</sup> NRC Enforcement Policy at 39.

<sup>33</sup> Nuclear Regulatory Commission Enforcement Manual, Revision 11, Oct. 1, 2019, at 16-17 [hereinafter the "NRC Enforcement Manual."]. (Change 7 to Revision 11 of the Enforcement Manual was issued on Dec. 1, 2020, however, none of the changes affect the provisions cited in this letter).

<sup>34</sup> *Id.* at 302.

<sup>35</sup> *Id.* at 303.

<sup>36</sup> *Id.* at 302.

<sup>37</sup> Enforcement Manual at 303-304.

MCR operators to continue with the heat-up and remove RHR letdown from service . . . .”<sup>38</sup> Additionally, the notice of violation issued against TVA along with the accompanying cover letter expressly state that the failures associated with the evolution on November 11, 2015 were the result of management failures:

- “WBN-1 management’s failure to ensure the primacy of safe operations led to several occasions during [the period around November 11, 2015] in which TVA staff failed to follow procedures . . . .”<sup>39</sup>
- “On November 11, 2015, the Outage Control Center (OCC), with the awareness of site management, wanted the MCR to continue with WBN-1 heat-up without the normal letdown portion of the chemical volume control system (CVCS) in operation, thus challenging pressurizer level.”<sup>40</sup>
- “In order to stay on schedule, Outage Control Center (OCC) personnel urged the Shift Manager to proceed, and the Shift Manager decided to proceed and directed MCR operators to continue with startup activities . . . .”<sup>41</sup>

Further, the NOV issued to me specifically quotes my statements from the PEC on this point. The NOV highlights the following statement from my PEC:

[W]e were being directed by two levels of the chain of command who had far more training and experience than me and while I believe that using a questioning attitude and raising concerns is important, I think it’s equally important that a shift manager should have the confidence that when he gives a direction, it will be followed.

If the NRC is relying on this statement to find that I violated OPDP-1, then the NRC must also acknowledge that I and the other operators were following direction from my shift supervisor and management to allow the heat-up to proceed.

TVA also found that my actions were taken pursuant to direction from management. TVA’s response to Apparent Violation 4 states that, “Mr. Blankenship was directed by [the Shift Manager] to proceed with the heat-up . . . .”<sup>42</sup> TVA also highlighted the fact that the Unit Supervisor on duty at the time also stated the Shift Manager had given the direction to proceed.<sup>43</sup>

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<sup>38</sup> Notice of Violation (IA-20-017), November 6, 2020.

<sup>39</sup> Letter to Jim Barstow, EA-19-092, Tennessee Valley Authority – Notice of Violation and Proposed Imposition of Civil Penalty - \$903,471; NRC Office of Investigations Report Number 2-2016-042, NRC Inspection Report No. 05000390/2020013, and Withdrawal of Previously Documented Non-Cited Violations, Nov. 6, 2020, pg. 2.

<sup>40</sup> *Id.*

<sup>41</sup> Notice of Violation and Proposed Imposition of Civil Penalty to TVA, Docket No. 05000390, EA-19-092, Nov. 6, 2020, pg. 1.

<sup>42</sup> TVA Response to Apparent Violation 4 at 17.

<sup>43</sup> TVA Response to Apparent Violation 4 at 17.

Moreover, the fact that I and other operators did not object further is consistent with OPDP-1. OPDP-1 makes clear that the Shift Manager has the control room command function and that in his absence the Unit Supervisor has the command function.<sup>44</sup> OPDP-1 states that “[a]s the senior management representative on shift, the [Shift Manager] is in *direct charge* of plant operations and is responsible through the Operations Superintendent and Operations Manager to the Plant Manager for safe and reliable operation of the nuclear plant.”<sup>45</sup>

It is clear that, based on NRC policy, I should not have been cited with an individual NOV. It was a nonwillful Severity Level III violation that resulted from following a Shift Manager’s direction after having raised appropriate concerns and following consultation with management. As a result, the alleged violation hits all of the criteria for excluding it from being addressed against an individual.

Additionally, the NRC Staff does not have the authority to deviate from these enforcement policies without further action. The Enforcement Manual states that if the NRC deviates from the Enforcement Policy and its implementing procedures, that the Administrative Procedure Act requires that decision have a reasonable basis and may not be done arbitrarily or capriciously.<sup>46</sup> However, the NRC Staff provided no rationale for deviating from the enforcement policies when issuing my NOV, and certainly has failed to provide the requisite “reasonable basis.”

#### **D. The NOV May Discourage Operators from Raising Concerns in Control Rooms Across the Country**

I would like to offer my sincere concerns regarding the impacts that my NOV will have on how operators act in the future. On November 11, 2015, I raised a question and highlighted a potential concern with my fellow operators and with my supervisors. I was given the understanding that my concerns were being relayed and discussed with personnel in the OCC. I then later told the NRC that I had maintained those concerns when interviewed by the Office of Investigations a month later. The NRC is now punishing me because I raised those concerns and did not get them addressed to the satisfaction of Staff’s post hoc judgment about how conservative I should have been and how much detail I should have obtained from my supervisor to alleviate my questions. Based on my conversations with those in the nuclear industry, many are now concerned that if they raise questions or issues during operations that they too may be cited with a violation by the NRC if the Staff later determines that they did not get a sufficient answer. There is concern that no one knows what the NRC Staff considers to be conservative enough. The less risky path becomes keeping your head down, following direction, and not raising questions that the NRC can later use to say you knew that you were not acting conservatively. As such, the NOV creates a perverse incentive for operators to not raise concerns. The Safety Culture Policy Statement provides that a safety conscious work environment is maintained where personnel feel free to raise safety concerns without fear of

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<sup>44</sup> OPDP-1, Sections 3.1.6 and 3.1.7.

<sup>45</sup> OPDP-1, Section 3.1.6, Subpart A (emphasis added).

<sup>46</sup> NRC Enforcement Manual at 3.

retaliation, intimidation, harassment, or discrimination. Unfortunately, I believe the NOV undermines that principle.

I am also concerned that the NRC's actions against me will undermine the advancements in safety culture that have occurred at WBN since 2015. TVA has been committed to improving the safety culture environment at WBN and the current management is supportive of operators raising concerns. In fact, through the process of working with the NRC on safety culture, TVA reaffirmed that the Shift Manager is the controlling officer in charge of reactor operations. But those efforts are undermined when operators see that since I was the most outspoken in raising concerns,<sup>47</sup> I am the subject of NRC enforcement efforts. The consequences have been extremely damaging to my career, personal reputation, and my family. For example, a Chattanooga Times Free Press article stated that the NRC banned me from any licensed nuclear work for five years for failing to adequately investigate and report regulatory violations.<sup>48</sup> Even though this article was blatantly wrong, other operators can see the consequences of raising concerns to supervisors during operations (even when those concerns are seemingly addressed). And although management has fostered improvements, it will take all operators being willing to exercise their questioning attitude to ensure safe operations.

While I continue to be dedicated to the safe operation of any facility at which I work and will continue to use a questioning attitude and raise concerns when they arise, just as I did on November 11, 2015, I am fearful that my NOV will set a bad precedent. As a result, I believe the Staff should reconsider my NOV, not only because I acted conservatively with a questioning attitude, but also as a matter of enforcement discretion.

### **CONCLUSION**

For the reasons articulated in this letter, I ask that the Staff withdraw the NOV. While my career has already been negatively impacted due to these allegations and the NOV, I am hopeful that the Staff will reconsider their decision and withdraw the NOV.

Thank you for your consideration in this matter.

Sincerely,



Todd Blankenship

Cc: U.S. Nuclear Regulatory Commission, Document Control Desk, Washington, DC 20555-0001

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<sup>47</sup> During my Dec. 12, 2015 interview with the NRC's Office of Investigations ("OI"), I explained that it was the control room staff that were raising questions regarding the ability of excess letdown to control pressurizer level and acknowledged that while all of the control room staff were raising concerns, it was mostly me. Transcript of Dec. 18, 2015 Interview of Todd Blankenship by NRC Office of Investigations at 15:7-19.

<sup>48</sup> TVA says safety culture has changed at Watts Bar nuclear plant, acknowledge problems in past that led to record fines, Chattanooga Times Free Press, Nov. 20, 2020. (This article was subsequently changed to reflect that the NRC considered banning me from licensed activity).