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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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ORAL ARGUMENT

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In the Matter of: : Docket Nos.

TENNESSEE VALLEY : EA-20-006 and

AUTHORITY : EA-20-007

(Enforcement Action) : ASLBP No.

-----x 21-969-01-EA-BD01

Wednesday, February 17, 2021

Teleconference

BEFORE:

PAUL RYERSON, Chair

E. ROY HAWKENS, Administrative Judge

DR. SUE H. ABREU, Administrative Judge

1 APPEARANCES:

2 Counsel for the Petitioners

3 TIMOTHY WALSH, ESQ.

4 of: Pillsbury Winthrop Shaw Pittman, LLP

5 1200 Seventeenth Street, NW

6 Washington, DC 20036-3006

7 202-663-8455

8 [timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)

9

10 On Behalf of the Nuclear Regulatory Commission

11 SARA KIRKWOOD, ESQ.

12 of: U.S. Nuclear Regulatory Commission

13 Office of the General Counsel

14 Mail Stop O-14A44

15 Washington, DC 20555-0001

16 301-287-9187

17 [sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)

18

19 On Behalf of Tennessee Valley Authority

20 LAUREL RIMON, ESQ.

21 of: O'Melveny & Myers, LLP

22 1625 Eye Street, NW

23 Washington, DC 20006

24 202-383-5335

25 [lrimon@omm.com](mailto:lrimon@omm.com)

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P-R-O-C-E-E-D-I-N-G-S

9:59 a.m.

CHAIR RYERSON: Good morning, again. We're here on an aspect of a proceeding in which TVA is challenging an NRC civil enforcement order. Specifically, we're here today on Erin Henderson's petition for a related hearing or to intervene in TVA's hearing.

I'm Judge Ryerson. I chair the particular Atomic Safety Licensing Board that the NRC has assigned to this case. Also on the line are the two other Board Members, Judge Hawken and Judge Abreu.

Before we take appearances, I'd like to go over just a few administrative matters. Most important of which is please identify yourself when speaking. It will make things much easier for the reporter.

This proceeding will be transcribed. And a transcript should be available on the NRC's website within a few days.

And we've also made available listen only telephone lines so that interested members of the public can follow along in real-time.

I'll go over how we intend to proceed after we take appearances. With that in mind, Judge

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1       Hawkins, do you have anything at this point?

2               JUDGE HAWKENS: I do not, Judge Ryerson.

3       Thank you.

4               CHAIR RYERSON: Thank you. And Judge

5       Abreu?

6               JUDGE ABREU: I do not. Thank you, Judge

7       Ryerson.

8               CHAIR RYERSON: Thank you. Well, let's

9       take appearances, starting with Counsel for Ms.

10       Henderson.

11               MR. WALSH: Thank you, Your Honor. This

12       is Tim Walsh. I'm with Pillsbury Winthrop Shaw

13       Pittman. And also with me here today is my colleague

14       Michael Lepre.

15               CHAIR RYERSON: Thank you. And will you

16       be conducting the argument, Mr. Walsh?

17               MR. WALSH: Yes, Your Honor. I will.

18               CHAIR RYERSON: Thank you. And for the

19       NRC staff, who do we have today?

20               MS. KIRKWOOD: Good morning, Your Honors.

21       Sara Kirkwood for the NRC staff. And I have my co-

22       counsel, Kevin Roach and Thomas Steinfeldt listening.

23       And also Ian Gifford, our enforcement specialist, is

24       with us.

25               CHAIR RYERSON: Okay, thank you. And, Ms.

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1 Kirkwood, will you be conducting the argument for the  
2 staff?

3 MS. KIRKWOOD: I will.

4 CHAIR RYERSON: Okay, thank you. And do  
5 we have an appearance by TVA counsel? I don't believe  
6 TVA counsel contemplates arguing today, but is someone  
7 here who would like to be on the record?

8 MS. RIMON: Yes, Your Honor. Good  
9 morning. This is Laurel Rimon with O'Melveny & Myers.  
10 And my colleague, Mary Pat Brown, is also here. And  
11 we don't intend to present an argument, but we are  
12 here to represent TVA.

13 CHAIR RYERSON: Thank you. Well, the  
14 purpose of today's call is to hear oral argument on  
15 the sufficiency of Ms. Henderson's hearing petition.

16 Based on the pleadings, there appear to be  
17 two principal issues. The first is whether Ms.  
18 Henderson has standing as of right, and the second is,  
19 if she doesn't, should the Board choose to grant her  
20 discretionary intervention.

21 Since the pleadings were filed, and  
22 actually since we sent out an order setting up this  
23 argument, there have also been developments that  
24 arguably raise a third issue. Which is both mootness,  
25 I guess in its entirety, and also some of the effect,

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1 perhaps, of recent developments on the arguments that  
2 have been made in favor of granting the petition.

3 As set forth in our January 14th order, we  
4 will begin with counsel for Ms. Henderson, which will  
5 be Mr. Walsh, who shall have up to 30 minutes. And he  
6 may reserve some of that time for rebuttal. Then  
7 we'll hear for counsel for the NRC staff, who likewise  
8 will have 30 minutes to respond.

9 I expect the board will have questions  
10 throughout the arguments. And that we will not  
11 reserve all of our questions, at least, until after  
12 counsels' presentations.

13 I apologize in advance if in this format  
14 we stumble over each other a little bit while we do  
15 that, but the Board's view is that the argument will  
16 be more productive if we address issues as they're  
17 being discussed rather than trying to reserve all of  
18 our questions and pose them at the end.

19 With that said, Judge Hawkens, anything  
20 before we hear from Mr. Walsh?

21 JUDGE HAWKENS: No. I'm ready to proceed,  
22 Judge Ryerson. Thank you.

23 CHAIR RYERSON: Thank you. And, Judge  
24 Abreu?

25 JUDGE ABREU: No. I'm ready to proceed as

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1 well, Judge Ryerson.

2 CHAIR RYERSON: Okay, thank you. Well,  
3 Mr. Walsh, you may begin. And let us know how much  
4 time that you would like to reserve for rebuttal?

5 MR. WALSH: Thank you, Your Honor. I will  
6 certainly announce when I have completed my statement,  
7 at the end of it. But I think I will probably reserve  
8 ten to 15 minutes of time for rebuttal, as needed.

9 And again, thank you, Your Honors. We  
10 appreciate the opportunity to further demonstrate why  
11 Ms. Henderson's hearing request should be granted.

12 Violations 1 and 3, on which TVA's order  
13 is based in part, identify Ms. Henderson and claim  
14 that she filed a complaint as a pretext that caused  
15 TVA's alleged violations of 10 CFR Section 50.7.

16 These allegations are directed at, and  
17 personal to, Ms. Henderson. And impugn all of her  
18 true and legitimate reasons for filing her complaint.

19 Ms. Henderson is therefore adversely  
20 affected by the order and seeks a hearing on it, to  
21 defeat the staff's false accusations against her. And  
22 to correct the real and ongoing reputational harm she  
23 has suffered because of this enforcement action.

24 The Board should grant Ms. Henderson's  
25 hearing request because she meets the criteria for

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1 such hearing. Ms. Henderson has standing, because she  
2 has demonstrated a concrete and particular injuries of  
3 reputational harm and ongoing chilling effects that  
4 are a direct result of the staff's order.

5 She has also demonstrated that her  
6 injuries are within the applicable zone of interest.  
7 In addition, Ms. Henderson has proffered at least one  
8 admissible contention articulating her challenges to  
9 the order, which the staff did not contest.

10 And even if the Board were to question Ms.  
11 Henderson's standing, she has demonstrated the  
12 criteria for discretionary intervention weigh heavily  
13 in her favor. In particular, she has the indisputable  
14 ability to uniquely contribute her firsthand knowledge  
15 to a sound record regarding Violations 1 and 3, which  
16 are expressly based on her actions.

17 For these reasons, Ms. Henderson  
18 respectfully requests that the Board grant her request  
19 for a hearing, or in the alternative, grant her  
20 requests for discretionary intervention.

21 CHAIR RYERSON: Mr. Walsh, let me stop you  
22 right there for a moment. I'd just like to clarify  
23 the status of, really two petitions, that Ms.  
24 Henderson had.

25 She has her petition in front of this

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1 Board, and does she not also have a pending petition  
2 before the Commission?

3 MR. WALSH: That is correct, Your Honor.

4 CHAIR RYERSON: Okay.

5 MR. WALSH: And the Commission has  
6 requested, or I should be more accurate, the  
7 Commission's Secretary has requested that the parties,  
8 i.e. Ms. Henderson and the staff, submit information  
9 to the Secretary and the Commission. I believe the  
10 deadline for that is March 1st on the status of her  
11 petition before the Commission.

12 CHAIR RYERSON: Right. And you will be  
13 contending that that petition is still a live  
14 proceeding or will you be asserting that it's moot?

15 MR. WALSH: The position will be stated in  
16 our filing that we make on March 1. To be determined  
17 at this point.

18 But I think at this point we're certainly  
19 leaning in the moot direction, but I don't want to get  
20 too far ahead of ourselves here, Your Honor.

21 CHAIR RYERSON: Okay.

22 MR. WALSH: That directive just came out  
23 last week.

24 CHAIR RYERSON: Right. Okay, I  
25 understand. But I guess I am interested, of course,

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1 in the relationship between the two petitions are not  
2 identical, I understand that, but they're obviously  
3 somewhat similar.

4 Let's supposed you didn't agree that the  
5 petition in front of the Commission is moved. If that  
6 were to proceed and the Commission were to grant a  
7 hearing, in front of them, what would that mean in  
8 terms of the petition in front of us?

9 MR. WALSH: Those violations concerned  
10 allegations of deliberate misconduct which, again, the  
11 staff is no longer pursuing. But there is a different  
12 standard at play then in this proceeding where  
13 apparently the violations are limited to violations of  
14 50.7.

15 But the reputational harm is the same, or  
16 our reputational harms are similar across the interest  
17 there. Whether she engaged in deliberate misconduct  
18 or whether she caused TVA to violate 50.7. Or whether  
19 she, Ms. Henderson filed a complaint as a pretext or  
20 had retaliatory intent.

21 All of those issues affect her reputation.  
22 And she is very interested in defeating all of them.  
23 In whichever proceeding they are litigated.

24 CHAIR RYERSON: Okay. But my question is,  
25 supposed the Commission grants you a hearing, you

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1 still want a hearing in front of us?

2 MR. WALSH: That is correct, Your Honor.

3 CHAIR RYERSON: Okay. All right. I'm  
4 sorry to interrupt, but please continue.

5 MR. WALSH: Not a problem, Your Honor.  
6 Thank you.

7 JUDGE HAWKENS: Excuse me, Mr. Walsh?  
8 Judge Hawken here.

9 Can you tell me your view of the legal  
10 effects in the context of this case rescinding the  
11 NOV?

12 MR. WALSH: Thank you, Your Honor. Yes,  
13 I was going to get to that, and I'm happy to address  
14 it now.

15 So, Ms. Henderson proffered two  
16 contentions initially in her initial petition. One of  
17 them challenging the allegation of the facts,  
18 Contention 1.

19 And Contention 2 was squarely focused on  
20 the escalation of the severity levels of the  
21 violations based on her alleged deliberate misconduct.

22 Since the staff has decided unilaterally  
23 to no longer pursue claims of deliberate misconduct,  
24 and has unilaterally de-escalated the severity levels  
25 of the violations pertaining to Ms. Henderson, our

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1 position is that Contention 2 is now moot.

2 But Ms. Henderson's live contention,  
3 Contention 1, is absolutely still alive and kicking.  
4 And we're going to be pursuing that.

5 JUDGE HAWKENS: All right. So it's,  
6 again, Judge Hawkens here, it's your view that the  
7 rescission effectively vacated the finding of  
8 deliberate misconduct by Ms. Henderson?

9 MR. WALSH: As far as the staff is arguing  
10 that Ms. Henderson intended to cause TVA to violate  
11 50.7 at the time she filed her complaint, yes, that's  
12 my understanding. Always subject to the staff's  
13 interpretation of what the Commission decision means.  
14 But yes, that is my understanding of the effect that  
15 there is no deliberate misconduct at play any longer.

16 JUDGE HAWKENS: All right. Thank you,  
17 sir.

18 MR. WALSH: Thank you, Your Honor.  
19 Turning to the issue of harm to Ms. Henderson's  
20 reputation, there is no dispute that Violations 1 and  
21 3 directly implicate Ms. Henderson.

22 The staff issued its notice of violation  
23 to TVA on August 24th, 2020. The notice of violation  
24 was placed on the NRC website where it remains  
25 available to the public.

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1           Violations 1 and 3 state, in relevant  
2 part, that after becoming aware of protected  
3 activities, the former director of corporate nuclear  
4 licensing filed a formal complainant against two  
5 former employees which the complaint triggered an  
6 investigation by the TVA Office of General Counsel.  
7 In which action was based, at least in part, on the  
8 former employees engaging in protected activity.

9           Following issuance of the violations, the  
10 staff publicized them in a press release stating that,  
11 stating in part that "the NRC found that TVA's former  
12 director of corporate nuclear licensing violated the  
13 NRC's employee protection rule and engaged in  
14 deliberate misconduct."

15           As shown in Ms. Henderson's request, these  
16 violations were the subject of multiple press articles  
17 that identified Ms. Henderson by name. On September  
18 23rd --

19           CHAIR RYERSON: Mr. Walsh, this is Judge  
20 Ryerson again.

21           MR. WALSH: Yes, Your Honor.

22           CHAIR RYERSON: Let me ask you about the  
23 reputational injury that you're alleging. Let's  
24 assume for the moment that it's within the scope of  
25 the statute, or statutes, that are relevant here.

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1           But I mean, is it something that this  
2 Board can remedy at this point?

3           I mean, beyond rescinding the notice of  
4 violation, what can the NRC do?

5           Those press releases went out, they are  
6 what they are. Ms. Henderson is not the direct  
7 subject of the order that's at issue here.

8           And I'm not asking what you would settle  
9 the case for, I'm simply asking, what, in a perfect  
10 world, what would the NRC do now that would cure the  
11 reputation injury, other than what's already done,  
12 which is rescinding the notice of violation?

13           MR. WALSH: Your Honor, thank you. I  
14 appreciate the question.

15           In this case here, a ruling by this Board,  
16 or the Commission or the federal courts, in Ms.  
17 Henderson's favor, finding that Violations 1 and 3 are  
18 unfounded, or otherwise unsupported by law, will go a  
19 long way toward restoring her reputation.

20           It's always the case that once allegations  
21 are levied, reputation is harmed. And it's always the  
22 burden on the accused to correct the record as best as  
23 he or she possibly can.

24           In this case, Ms. Henderson wants the  
25 world to know that she did not do what the NRC staff

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1 claims that she did. And so the best that we can get  
2 out of this proceeding is a ruling from an  
3 appropriate, impartial authority, stating that she did  
4 no wrong.

5 CHAIR RYERSON: All right. And you are  
6 not satisfied, Ms. Henderson is not satisfied, that  
7 the explicit withdrawal of the notice of violation  
8 does that?

9 MR. WALSH: No, Your Honor, that is  
10 correct. Again, the violations issued to TVA  
11 specifically identify her.

12 She is the former director of corporate  
13 nuclear licensing. And even just this past weekend,  
14 if you type that phrase, former director of corporate  
15 nuclear licensing into Google, just as I did, the  
16 first hit you get is an article from WBIR (audio  
17 interference).

18 The article states in part, that the  
19 Federal Nuclear Regulatory Commission is assessing a  
20 penalty of almost \$607,000 against TVA and punishing  
21 two TVA executives after an investigation found they  
22 sought to punish two employees who came forward to  
23 express legally protected concerns.

24 The actions follow in an NRC investigation  
25 into the conduct of Joseph Shea, identified as vice

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1 president of nuclear technology and innovation at  
2 TVA's corporate office, and Erin Henderson, then the  
3 director of corporate nuclear licensing at TVA.

4 So it is our contention, Your Honor, that  
5 as long as these violations stand, and if anybody ever  
6 wants to look up this information that's stated in the  
7 violation, they will think Erin Henderson did wrong,  
8 which is not true. And the only way to help correct  
9 that, is to get on the record either a withdrawal of  
10 the violations by the staff, as they have previous  
11 done in the other proceedings, or to defeat them after  
12 hearing.

13 CHAIR RYERSON: Thank you, Mr. Walsh.  
14 Please proceed.

15 MR. WALSH: Thank you. As I was stating,  
16 Your Honor, when the TVA replied to the violation, TVA  
17 denied them.

18 Among other things, TVA explained, that it  
19 disagreed that Ms. Henderson's complaint constituted  
20 an adverse action under Section 50.7. And also that  
21 the overwhelming evidence demonstrated that she filed  
22 her complaint for legitimate reasons.

23 The staff however disagreed with TVA. And  
24 in so doing, the staff doubled down on its assertion  
25 that Ms. Henderson filed her complaint for nefarious

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1 reasons.

2 In the staff's October 29th order imposing  
3 the civil penalty, the staff asserted that it had  
4 "determined that the filing of a formal complaint that  
5 triggered an investigation is considered an adverse  
6 action in this case. When an investigation is so  
7 closely related to a personnel action that it could be  
8 a pretext for gathering evidence to retaliate, it is  
9 an adverse action."

10 In short, the staff has labeled Ms.  
11 Henderson as an individual who takes action as a  
12 pretext to subvert the Commission's requirements. And  
13 there could be no credible dispute that these  
14 assertions by the staff, which are widely reported in  
15 the press, as I just quoted a moment ago, have harmed  
16 Ms. Henderson's reputation.

17 In addition to reputational harm, Ms.  
18 Henderson also demonstrated direct and particularized  
19 harm to her because she is chilled with respect to  
20 raising similar concerns in the future.

21 JUDGE HAWKENS: Excuse me, Mr. Walsh?  
22 Judge Hawkens here again.

23 MR. WALSH: Yes, Your Honor.

24 JUDGE HAWKENS: Before getting into the  
25 chilled aspect of the injury, can you address how your

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1 argument that reputation injury falls within zone of  
2 interest can be squared with the Appeal Board's  
3 decision in North Anna?

4 MR. WALSH: Yes, Your Honor. I appreciate  
5 the question.

6 North Anna involved a case where a  
7 contractor supplier alleged it could suffer  
8 reputational injury or an accident might occur related  
9 to re-work that the utility had performed on work that  
10 the contractor had previously done. That's not the  
11 circumstance here.

12 This is an enforcement action issued by  
13 the staff to TVA, that directly implicates Ms.  
14 Henderson. There is nothing speculative about the  
15 wording that the staff used in its violation issued to  
16 Ms. Henderson.

17 And nor is there anything speculative  
18 about the reputational harm that has occurred to Ms.  
19 Henderson because of the news articles and other press  
20 publications that have been issued in this.  
21 Furthermore, the Commission has since explained that  
22 reputational injury is squarely within the zone of  
23 interests of the Atomic Energy Act.

24 In our reply brief to the staff, we  
25 explained that when promulgating the rule on

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1 deliberate misconduct in 1991, over three decades ago,  
2 the Commission stated that making employers aware of  
3 a wrongdoer's reputation was one of the key bases for  
4 mending its rules to permit issuing enforcement  
5 actions to unlicensed persons.

6 In fact, the Commission made numerous  
7 statements to that effect in the rulemaking statement  
8 of considerations. There the Commission said that  
9 rule "would provide some assurance that should the  
10 person be employed to performed licensed activities in  
11 the future, the new employer would be aware of the  
12 person's past conduct and ensure that appropriate  
13 oversight is in place."

14 The Commission also stated that "while the  
15 NRC has preferred not to be involved in licensee's  
16 employment decision, it has become apparent that  
17 licensees need more background information about  
18 prospective employees to make better employment  
19 decisions. Often checking previous employment can be  
20 thwarted because employers are reluctant to divulge to  
21 prospective employers any derogatory information about  
22 the former employees."

23 And according to the Commission, its  
24 rulemaking "will provide greater assurance that  
25 licensees will be aware of persons who have been the

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1 subject of an NRC enforcement order. These actions  
2 should provide better accountability for employees,  
3 consultants, contractors and vendors in the nuclear  
4 industry and thus improve the quality of performance,  
5 and therefore the protection of the public health and  
6 safety."

7 In light of all of these --

8 CHAIR RYERSON: Mr. Walsh? Mr. Walsh,  
9 Judge Ryerson again.

10 MR. WALSH: Yes, Judge.

11 CHAIR RYERSON: Let me ask you this. What  
12 you're reading from occurred after the North Anna  
13 decision, right? The North Anna decision was in the  
14 '70s.

15 But didn't the Commission issue a decision  
16 in Palisades, which I think was around 2008 or so,  
17 after this, where the Commission still found that  
18 reputational injury was not within the zone of  
19 interest of the Atomic Energy Act?

20 MR. WALSH: Your Honor, I'm not sure if I  
21 can speak to the Palisades case directly in that  
22 respect. I know that we cited a couple of decisions  
23 involving Palisades, but perhaps not that one.

24 But in any event, in this case, the  
25 reputational injury here is not to a third-party

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1 contractor, a third-party vendor, it is to a person  
2 directly identified in the violations that the staff  
3 has issued to TVA.

4 And in this case, the reputational harm,  
5 the reputational situation here, is clearly within the  
6 zone of interest of the Atomic Energy Act because the  
7 Commission made it abundantly clear that it's  
8 concerned about the reputation of employees in the  
9 nuclear industry. As explained explicitly in the  
10 statement of considerations for the statement of  
11 considerations for the deliberate misconduct  
12 rulemaking.

13 And I think it may be the case that the  
14 Palisades case was citing to the North Anna decision  
15 at the time. But again, I don't have that case at my  
16 fingertips so I apologize for not being able to answer  
17 your question directly.

18 CHAIR RYERSON: All right, thank you, Mr.  
19 Walsh. Now you may continue if you wish. You have  
20 about ten minutes left.

21 MR. WALSH: Yes, thank you, Your Honor.  
22 I think --

23 JUDGE HAWKENS: Mr. Walsh, this is Judge  
24 Hawkens again. And sorry to interrupt. And I'm sure  
25 given all the interruptions, if you need extra time

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1 Judge Ryerson will allow you to go over in light of  
2 all the interruptions.

3 But you're mentioning this deliberate  
4 misconduct, 50.5, that's no longer on the table in  
5 this case, is it, in light of the vacate or recession  
6 of the NOV?

7 MR. WALSH: Yes, Your Honor, you are  
8 correct, it's no longer on the table. But the point  
9 is, this is the question of whether or not  
10 reputational harm falls within the zone of interest of  
11 the Atomic Energy Act here. And here --

12 JUDGE HAWKENS: Right. And that's, I'm  
13 sorry to interrupt again, but lately I'm following a  
14 little bit on Judge Ryerson's question, the Palisades  
15 case, which was a 2008 case.

16 And in that, the Commission quoted  
17 verbatim the Appeal Boards, the pertinent language  
18 that it used. In particular, the Commission quoted  
19 there is no relationship at all between the  
20 legislative purpose underlying the safety provisions  
21 of the Atomic Energy Act and petitioner's interest in  
22 protecting its reputation.

23 And there is no apparent effort to  
24 distinguish the source of the damage to the  
25 reputation. In other words, the fact that

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1 reputational harm came from another member of the  
2 industry or whether the reputational harm came from  
3 the agency.

4 The Commission spoke very broadly that  
5 there is simply no connection between reputation,  
6 alleged reputational harm and the purpose of the  
7 underlying safety provisions of the Atomic Energy Act.  
8 And if you could address that, and again, try to make  
9 a meaningful distinction.

10 MR. WALSH: Thank you, Your Honor. I  
11 appreciate the question.

12 Meaningful distinction here is that the  
13 reputational harm is stemming directly from  
14 enforcement action issued by the NRC staff. This is  
15 not reputational harm that might occur to a union who  
16 thinks that their worker's integrity is going to be  
17 impacted somehow by actions taken by a licensee.

18 This is not reputational harm that will  
19 come to Sun Ship, the intervener in the North Anna  
20 proceeding. That was a contractor who was concerned  
21 that if an accident occurred at the plant, its  
22 reputation might be harmed because its welds were  
23 reworked by the utility in that case.

24 In this case, the NRC staff has labeled  
25 Ms. Henderson as someone who has, engages in the

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1 pretext, and otherwise subverts the Commission's  
2 requirement.

3 And as the Commission made clear in its  
4 rulemaking on deliberate misconduct, the professional  
5 reputation of personnel who work in the nuclear  
6 industry is paramount when protecting the public  
7 health and safety. People need to know what other  
8 people have done over time, whether it's wrongdoing or  
9 people who have stellar careers.

10 Ms. Henderson is faced with the  
11 circumstance that her reputation may be forever  
12 tainted because of these allegations by the staff.  
13 And that's why she is harmed by them. It will impact  
14 her economic ability to seek future opportunities in  
15 the nuclear industry.

16 If anyone can either search by her name or  
17 by her former title and discover her name that she was  
18 alleged to have engaged in wrongdoing. That will call  
19 into question her integrity.

20 And therefore we are seeking to challenge  
21 and intervene in this proceeding, to make sure the  
22 record is clear with respect to Ms. Henderson's  
23 conduct. She did not violate Commission requirements  
24 or engage in any sort or pretext to cause any  
25 violation of those requirements.

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1 JUDGE HAWKENS: Thank you.

2 JUDGE ABREU: Mr. Walsh, this is Judge  
3 Abreu.

4 MR. WALSH: Yes, Your Honor.

5 JUDGE ABREU: In your brief you also  
6 mentioned the Energy Reorganization Act as being a  
7 factor in this. Could you relate that to what you've  
8 been talking about?

9 MR. WALSH: Your Honor, the point was  
10 simply that the Energy Reorganization Act was cited by  
11 the Commission when promulgating 50.7. And was simply  
12 the note that it wasn't just the Atomic Energy Act  
13 zone of interests that are at play here, it's the  
14 Energy Reorganization Act as well.

15 The Energy Reorganization Act was the  
16 genesis of the employee protection regulations in  
17 50.7. So, all I would say is that it's that the,  
18 although public health and safety is squarely  
19 implicated in Ms. Henderson's reputational interests,  
20 the zone of interest, which is derived from the  
21 statutes that were, from which the regulations derive,  
22 makes it a little bit broader. It's not just the  
23 Atomic Energy Act, it's also the Energy Reorganization  
24 Act.

25 JUDGE ABREU: Thank you, Mr. Walsh.

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1 MR. WALSH: Thank you, Your Honors.

2 CHAIR RYERSON: Mr. Walsh?

3 MR. WALSH: Go ahead.

4 CHAIR RYERSON: Mr. Walsh, I want to,  
5 we'll give you another ten minutes. Do you want to  
6 save that or use some of it now?

7 MR. WALSH: Let me just, I'll skip ahead,  
8 really just to the -- your questions anticipated what  
9 I was going to say so I will just return, briefly now,  
10 to the criteria for discretionary intervention.

11 Again, we think the reputational harm is  
12 clear to Ms. Henderson, as well as the chilling effect  
13 and potential risks to her future reputation if she is  
14 declared to be filing complaints for nefarious  
15 reasons, again. And we do strongly believe that her  
16 reputation, her interest and her professional history  
17 is squarely within the Atomic Energy Act's zone of  
18 interest.

19 But also, in the case where the Board  
20 decides that Ms. Henderson does not have standing, we  
21 of course argued that she meets the criteria for  
22 discretionary intervention.

23 And I think it's just worth briefly  
24 mentioning, before I reserve the remainder of my time,  
25 that the staff seems to argue that Ms. Henderson has

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1 not meet the criteria, or at least the criteria weigh  
2 against her discretionary intervention. And we want  
3 to just make clear that we vehemently disagree with  
4 that.

5 Ms. Henderson clearly meets the criterion  
6 given the most weight. The reasonable expectation of  
7 contributing to a sound record.

8 And again, the cases on which the staff  
9 rely, in particular the Siemaszko ruling. In that  
10 case, the reliance is inapt. The Commission remanded  
11 back to the Board the question of whether the Union of  
12 Concerned Scientists and Ohio Citizen Action had  
13 demonstrated a capability to contribute to a sound  
14 record in an enforcement proceeding against an  
15 individual.

16 And so, in that case the Commission called  
17 into question whether or not these third-party public  
18 advocacy groups would contribute in any meaningful way  
19 to a sound record based on their general background  
20 knowledge or expertise or their policy preferences.

21 Here Ms. Henderson is not seeking  
22 intervention based merely on generalized background  
23 knowledge or expertise or to express general policy  
24 interests or to raise generalized concerns, as was the  
25 case with the Petitioners in Siemaszko.

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1           In addition, the enforcement action there  
2           didn't identify either of those potential  
3           discretionary interveners. But here the violation is  
4           issued to TVA do identify Ms. Henderson.

5           And they are expressly directly at Ms.  
6           Henderson's action and the reputational harm from  
7           those violations is Ms. Henderson, and Ms. Henderson's  
8           alone. She will bring to this proceeding not only  
9           useful, but indeed unique firsthand knowledge and  
10          insights, about her action. And she will make a  
11          genuinely significant contribution to the resolution  
12          of Violations 1 and 3.

13          And we strongly believe that Ms. Henderson  
14          should be permitted to protect her own interests and  
15          defend her own reputation directly in this proceeding.

16          And again, Your Honors, in response to one  
17          of your earlier questions I noted that we're no longer  
18          contesting Contention Number 2. Again, just to note  
19          that that contention was squarely focused on the  
20          escalation of the violations based on alleged  
21          deliberate misconduct. And that that escalation has  
22          been unilaterally withdrawn by the NRC staff.

23          So in brief conclusion, for all the  
24          reasons I have discussed, we believe that Ms.  
25          Henderson has satisfied the criteria for a hearing on

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1 the order in her own rights. And if for some reason  
2 the Board were to question her standing, she more than  
3 meets the criteria for discretionary intervention.

4 CHAIR RYERSON: Thank you, Mr. Walsh.  
5 This is Judge Ryerson again. Let me ask you two quick  
6 questions, on my time, not on yours.

7 The Commission, I believe, has  
8 characterized discretionary intervention in an  
9 enforcement proceeding as an extraordinary procedure.  
10 Do you agree with that standard, and have you  
11 addressed it in your pleadings?

12 MR. WALSH: Your Honor, to the extent it's  
13 extraordinary, it might be extraordinary in that  
14 discretionary intervention has been rarely granted,  
15 but again, I don't think that's reason enough. The  
16 failure of it being invoked is not reason enough to  
17 deny it here.

18 And although I can't, whether or not we  
19 explicitly address the use of the term extraordinary  
20 in our briefs, Your Honor, I'll say this. To the best  
21 of my knowledge, this is the only case where an  
22 enforcement action has been issued by the staff  
23 against the licensee, where the licensee employee  
24 specifically identified in the enforcement action is  
25 seeking discretionary intervention to challenge that

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1 action.

2 This is a rare case indeed. And again,  
3 all the more reason why it ought to be granted. Ms.  
4 Henderson was specifically implicated in the  
5 violations.

6 The staff knows how to write violations.  
7 And if they wanted to draft them otherwise, they  
8 certainly could have.

9 But they have doubled down under  
10 assertions that Ms. Henderson caused violation of  
11 regulations and engages in pretext. This is an  
12 extraordinary case indeed and therefore she should be  
13 granted a discretionary intervention should you find  
14 that she does not meet the criteria for a hearing as  
15 a right.

16 CHAIR RYERSON: Thank you. And my second  
17 question. Suppose hypothetically we were to deny Ms.  
18 Henderson's petition, would you still represent her?

19 MR. WALSH: You mean represent her in the  
20 TVA proceeding?

21 CHAIR RYERSON: Well, you are currently  
22 counsel to both TVA, and actually Mr. Shea and Ms.  
23 Henderson as I recall, relevant here, you're counsel  
24 to both, you would presumably, I assume, continue to  
25 participate as counsel for TVA.

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1                   And my question is, could you tell us a  
2                   few things you would do differently if Ms. Henderson  
3                   were not a formal party but you were still  
4                   representing the interests, at least of TVA directly,  
5                   and I suppose without her being a party, if she's  
6                   still your client, you would be representing her  
7                   interests, wouldn't you?

8                   MR. WALSH: Your Honor, I don't know that  
9                   that's the case, Your Honor. If TVA has a hearing  
10                  here, and if Ms. Henderson is not admitted in the  
11                  party, and I will be representing TVA's interests in  
12                  the proceeding.

13                  If Ms. Henderson is admitted at the party,  
14                  then yes, my joint representation of both TVA and Ms.  
15                  Henderson would continue. To be honest, Your Honor,  
16                  I don't know if I would need ethical advice if I could  
17                  continue representing Ms. Henderson's interest in a  
18                  proceeding for which she is not a party. That strikes  
19                  me as odd.

20                  So I don't think I would be able to  
21                  represent Ms. Henderson's interest in a proceeding in  
22                  which she is not a party. It's not typically my  
23                  practice, or any other practice, that I am aware of.

24                  CHAIR RYERSON: Okay, thank you. Again,  
25                  we'll give you up to a full ten minutes for reply.

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1 Unless either of my colleagues, the other judges have  
2 questions at this point, we'll have a chance,  
3 obviously, to ask questions during the end of your  
4 rebuttal presentation, we can proceed then to Ms.  
5 Kirkwood.

6 JUDGE HAWKENS: Judge Ryerson, may I ask  
7 two quick questions before we go to --

8 CHAIR RYERSON: Certainly, Judge Hawkens.

9 JUDGE HAWKENS: -- Ms. Kirkwood please?

10 CHAIR RYERSON: Certainly.

11 JUDGE HAWKENS: Mr. Walsh, if we were to  
12 accept your test for distinguishing the North Anna  
13 case and hold that, if the source of the reputational  
14 harm is the NRC, then a petitioner in the context of  
15 Ms. Henderson is, can bring a claim as of right based  
16 on reputational injury, would that open the door, for  
17 example in this case, for a number of other  
18 interveners as of right?

19 If you look through the record in this  
20 case it looks like the NRC staff's allegations  
21 implicate misconduct by TVA vice presidents, by the  
22 Office of General Counsel within TVA, by Human  
23 Resources Office in TVA, by the executive review board  
24 of TVA. It seems to me that individuals and officials  
25 within those offices all could allege reputational

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1 harm caused by the NRC staff's action.

2 Would they, under your theory of zone of  
3 interest, be entitled to intervene as of right?

4 MR. WALSH: The argument here, Your Honor,  
5 is limited to Ms. Henderson. It is Ms. Henderson who  
6 the staff has identified as specifically violating  
7 50.7 by filing an internal complaint that apparently  
8 was done so as a pretext.

9 These facts are very unique here to Ms.  
10 Henderson. And it is those allegations that have  
11 harmed Ms. Henderson.

12 None of those other entities that you  
13 mentioned, or at least as best as I can tell, have  
14 received or have been identified as violating 50.7.  
15 And this case is unique to Ms. Henderson.

16 Her act of filing a formal complaint, as  
17 legally unsound as that allegation is, but it has been  
18 deemed by the NRC staff as a violation of 50.7. In  
19 fact, when the NRC issued its press release it said,  
20 the NRC staff has found that the former director of  
21 corporate nuclear licensing violated NRC's employee  
22 protection rule.

23 So in this case we're limiting it to Ms.  
24 Henderson's interest. And I don't --

25 JUDGE HAWKENS: No, I understand that, Mr.

1 Walsh. But to the extent the NRC staff has sent the  
2 reviews by all those other entities within the chain,  
3 corporate chain of command at TVA, were window  
4 dressings. An argument conceivably, could be made, I  
5 understand it's not being made, but I'm trying to look  
6 at the extent of your argument. What impact it could  
7 have on future cases.

8 Is it your position that in civil  
9 enforcement actions, if individuals reading the record  
10 can reasonably assert that their reputations have been  
11 harmed by the NRC staff's action, isn't it true that  
12 your theory would allow them to intervene as of right  
13 in civil penalty enforcement actions?

14 MR. WALSH: Ms. Henderson is named, or is  
15 identified in the violations, Your Honor. That's why  
16 this is so of serious concern to her reputation.

17 When the apparent violations were issued  
18 to TVA in March, the apparent violation said a  
19 corporate manager did X. But now they have come out,  
20 when they issued the violations, they specifically  
21 singled her out as the former director of corporate  
22 nuclear licensing in which title, is enshrined in the  
23 internet at this time as being attributed to her.

24 The other entities that you mentioned are  
25 not identified in the TVA violations. Here, it's

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1 specific to her.

2 JUDGE HAWKENS: So individuals who can be  
3 reasonably identified would have the right to  
4 intervene, like Ms. Henderson?

5 MR. WALSH: In this case, yes. Where Ms.  
6 Henderson is identified in the violation itself.

7 JUDGE HAWKENS: All right, thank you. Oh,  
8 and one further claim. Or one further question.

9 If the Board were to conclude that Ms.  
10 Henderson could not participate as a party, do you  
11 have any view on whether she could bring an APA claim  
12 to vindicate her rights?

13 MR. WALSH: Do you mean Administrative  
14 Procedure Act, Your Honor?

15 JUDGE HAWKENS: Correct.

16 MR. WALSH: Your Honor, that's not a  
17 question that I have contemplated at this point. If  
18 Ms. Henderson's request to intervene is denied she has  
19 appeal rights. And those appeal rights would go to  
20 the Commission, where we to pursue them.

21 JUDGE HAWKENS: All right, thank you.

22 MR. WALSH: Thank you, Your Honors.

23 CHAIR RYERSON: Okay, thank you. Judge  
24 Abreu, did you have any questions at this point? We  
25 will have another opportunity, of course, with Mr.

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1 Walsh.

2 JUDGE ABREU: I do not at this time.

3 CHAIR RYERSON: Okay. Then I think we're  
4 ready to hear from Ms. Kirkwood.

5 MS. KIRKWOOD: Thank you, Your Honors. I  
6 am Sara Kirkwood, representing the NRC staff.

7 Ms. Henderson has argued that she should  
8 be allowed to intervene in this proceeding regarding  
9 the order the staff issued to TVA imposing a civil  
10 penalty. As we stated in our answer to her  
11 intervention petition, Ms. Henderson has no  
12 entitlement to a hearing in this matter.

13 Ms. Henderson does not have standing to  
14 intervene in this matter and Ms. Henderson does not  
15 meet the standards for discretionary intervention.

16 Ms. Henderson is not the subject of the  
17 order. The order does not name Ms. Henderson, require  
18 her to do anything or require TVA to take any action  
19 regarding Ms. Henderson.

20 JUDGE ABREU: This is Judge Abreu. I have  
21 a question for you. You note that Ms. Henderson is  
22 not named, but we have heard from her Counsel how she  
23 is identified. Do you consider that a significant  
24 difference between being named and being uniquely  
25 identified?

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1 MS. KIRKWOOD: Your Honor, I do. An order  
2 that names her would most likely require some action  
3 on her part. Whereas she is identified in the notice  
4 of violation, an identification which I believe is  
5 necessary in order to give the notice of violation  
6 sufficient specificity to litigate it and to put TVA  
7 on notice of what they were being accused of.

8 JUDGE ABREU: But by her, but when we're  
9 addressing injury, when the order identifies a  
10 specific job at a specific location, and in press  
11 releases has identified her as filling that job, do  
12 you contend the fact that her name isn't in the order  
13 makes a significant difference on whether she has  
14 suffered an injury?

15 MS. KIRKWOOD: Yes, I do believe that it  
16 makes a significant difference as to whether she has  
17 suffered an injury that is cognizable in NRC  
18 proceedings. Going again to what is before this Board  
19 is the requirements of the order. And there is  
20 nothing in the order which compels any action about --

21 JUDGE ABREU: Yes. We've read those words  
22 in your brief. But what I'm asking is, well, first  
23 let's clarify. Are you saying she has not suffered an  
24 injury or that the injury she has suffered is not  
25 within the zone of interest?

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1 MS. KIRKWOOD: I would say both, Your  
2 Honor. I think it is arguable whether she has  
3 suffered an injury on the part of the NRC staff.

4 JUDGE ABREU: And why do you think her  
5 reputation has not suffered?

6 MS. KIRKWOOD: Well, Your Honor, when you  
7 look at the case law for what is a reputation injury,  
8 and now I'm going outside of the NRC, given that the  
9 NRC finds that that's not a cognizable injury, it  
10 looks for distinct and palpable harm coming from the  
11 injury itself.

12 So, like for example. I think this case  
13 was cited in both of our briefs, the Juggalo case.  
14 Which is Parsons v. the Department of Justice.

15 The plaintiffs in that case had been  
16 pulled over multiple times and detained by law  
17 enforcement because of their placement on a gang list  
18 by the Department of Justice.

19 Or Ms. Henderson cited the Foretich case  
20 where Mr. Foretich had been labeled as a child abuser  
21 by Congress. And then he was able to point to a 30  
22 percent reduction in his business, being asked to  
23 resign as a region of the American College of Oral and  
24 Maxillofacial Surgeons and being explicitly denied a  
25 position.

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1           Here Ms. Henderson points to newspaper  
2           articles, which are generally surrounding both these  
3           events, and also I would add, the Department of Labor  
4           proceeding that found retaliation against Ms. Wetzel.  
5           And so --

6           JUDGE HAWKENS: Ms. Kirkwood, excuse me to  
7           interrupt. It's Judge Hawkens. I'm sorry to also  
8           interrupt my colleague, Judge Abreu, but I want to get  
9           this clarified.

10           Would you concede that when this all  
11           started there was an NOV in place accusing Ms.  
12           Henderson of deliberate misconduct.

13           MS. KIRKWOOD: Yes.

14           JUDGE HAWKENS: Now, you've got it back by  
15           rescinding that, but if that, the NOV was still in  
16           existence, would you then concede she suffered  
17           reputational injury?

18           MS. KIRKWOOD: No, Your Honor. Although  
19           I would rest more on that this reputational injury, to  
20           the extent it exists, falls outside the zone of  
21           interest.

22           But I still think, when you look at the  
23           case law for reputational injury, when courts have  
24           found there is reputational injury, there has been a  
25           very distinct injury that they are able to tangible

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1 point to. This happens because of this.

2 And here Ms. Henderson points to newspaper  
3 articles surrounding this situation, but she is still  
4 employed by TVA. She has not proffered any evidence  
5 of how it has actually impacted her. I think it's all  
6 very speculative.

7 JUDGE HAWKENS: So, to be clear, it's your  
8 position that public and official charges by the NRC  
9 of serious misconduct does not derive to reputational  
10 injury? Article 3, reputational injury?

11 MS. KIRKWOOD: Without any resulted  
12 palpable harm from it, yes, Your Honor.

13 JUDGE HAWKENS: All right, thank you.

14 JUDGE ABREU: Mr. Kirkwood, this is Judge  
15 Abreu. You mentioned cases cited. So you cite, as I  
16 believe the Petitioner did as well, the Virginia  
17 Electric ALB-342.

18 That talks about reputational injury in  
19 zone of interests. But on Page 105 of that case it  
20 says that Sun Ship has alleged sufficient facts to  
21 establish that it may be in fact, that it may in fact  
22 be injured if the North Anna facility is placed in  
23 operation.

24 So there the contractor was concerned  
25 about things that could happen that could injury his

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1 reputation, but had not yet directly occurred, yet the  
2 board found that they had alleged sufficient facts to  
3 establish reputational injury. Why would that not be  
4 relevant to the discussion you just had?

5 MS. KIRKWOOD: Well, Your Honor, I would  
6 respond in two different ways. One, there had been,  
7 in the VEPCO case, Sun Ship had manufactured the welds  
8 and all of the welds manufactured by Sun Ship had been  
9 removed. And there was an ongoing lawsuit for breach  
10 of contract.

11 So, Sun Ship had already suffered some  
12 palpable harm from that event and could foresee  
13 additional harm coming.

14 I would also add that ultimately the  
15 Appeal Board found that that was not a cognizable  
16 claim under the Atomic Energy Act. So --

17 JUDGE ABREU: We'll stick with injury for  
18 now. Let's decide is there an injury or not first,  
19 and we'll separately address zone of interest.

20 MS. KIRKWOOD: Okay. But I would suggest  
21 that in a decision that ultimately finds that the  
22 injury is not cognizable, the discussion of the injury  
23 is somewhat dicta.

24 JUDGE ABREU: So, let's talk about  
25 reputation injury. You say because she is still at

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1 the same company she doesn't necessarily suffer from  
2 any reputational injury? Is that part of what you're  
3 saying?

4 MS. KIRKWOOD: Your Honor, I think it is  
5 Ms. Henderson's burden to present how her reputation  
6 has been palpably harmed. And --

7 JUDGE ABREU: So, if I were to say that an  
8 attorney at the NRC who led the TVA enforcement action  
9 case was, this would be a pure hypothetical of course,  
10 but if said attorney was identified by the NRC in a  
11 publish as having presented false information, do you  
12 think that would impact that attorney's ability to get  
13 a job in the future?

14 MS. KIRKWOOD: Potentially, Your Honor.  
15 But I think for that to be a cognizable claim of  
16 reputational harm, that attorney would have to show a  
17 distinct and palpable injury arising out of that.

18 So, a job that she did not get or some  
19 action flowing from it.

20 JUDGE ABREU: So you're saying that right  
21 now, while Ms. Henderson's action pending that  
22 implicates her, she'd have to go try and get another  
23 job and give up the one she has to be able to defend  
24 herself?

25 MS. KIRKWOOD: Well, Your Honor, I think

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1 that for her to show a distinct and palpable harm, she  
2 would have to show that it has actually made a  
3 concrete difference. So, I again go to, and again, I  
4 will note, I know that you want to separate them, but  
5 it becomes somewhat of a not relevant discussion given  
6 the zone of interest test. But --

7 JUDGE ABREU: We'll get to that. We will  
8 get there. But humor me about reputational injury.

9 When you look through, you mentioned the  
10 Foretich case I believe.

11 MS. KIRKWOOD: Yes.

12 JUDGE ABREU: And do you think all of the  
13 examples that showed up in there were things that  
14 people could show something specific happening beyond  
15 the fact that they have been declared a bad actor,  
16 let's say, to just kind of lump it all together by  
17 some government action?

18 MS. KIRKWOOD: Yes. I think that the case  
19 law shows that just being identified as, in a  
20 complaint, isn't enough. That they need to show some  
21 specific harm coming from that.

22 JUDGE ABREU: All right, thank you.

23 CHAIR RYERSON: Please continue, Ms.  
24 Kirkwood.

25 MS. KIRKWOOD: Thank you. The order

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1 requires TVA, the subject of the order, to pay a civil  
2 penalty. Pursuant to longstanding Commission policy,  
3 the only issue in an enforcement proceeding is whether  
4 the order should be sustained.

5 As part of this enforcement matter, the  
6 staff had initially issued a notice of violation to  
7 Ms. Henderson. The staff then rescinded the notice of  
8 violation upon further review of the facts of the case  
9 and in light of the Commission's decision in the Shea  
10 proceeding.

11 Ms. Henderson asserts that she is still  
12 suffering a reputational injury. An injury that it  
13 was apparently not addressed by the rescission of the  
14 NOV.

15 In CLI-04-05, the State of Maine  
16 challenged an order issued to the Maine Yankee Atomic  
17 Power Station regarding security measures. The state  
18 claimed that the order could put a burden on the  
19 state's resources.

20 The Commission found that Maine was  
21 speculating on the burdens that might be placed on the  
22 state. And that even though the terms of the order  
23 impose no burden or obligation on Maine.

24 The Commission found that the State of  
25 Maine had not shown how it would be better off if the

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1 order was vacated. And that Maine was really seeking  
2 additional measures that went beyond the order. Thus  
3 the Commission found that Maine did not have standing  
4 to seek a hearing.

5 Here, Ms. Henderson asserts that her  
6 reputational injury will be redressed in this hearing  
7 with TVA, but the same injury was apparently not  
8 redressed by the rescission of the NOV to Ms.  
9 Henderson.

10 Much like the State of Maine, Ms.  
11 Henderson has no requirements placed on her by the  
12 order of TVA. She has not shown how she will be  
13 better off if the order to TVA imposing a civil  
14 penalty was rescinded.

15 And it's not clear what remedy she is  
16 seeking. And how such a remedy would be within the  
17 scope of the hearing. In light of the fact that she  
18 did not find the rescission of the NOV to be of  
19 sufficient, a sufficient remedy.

20 She stated --

21 CHAIR RYERSON: Ms. Kirkwood? Ms.  
22 Kirkwood, this is Judge Ryerson.

23 Let's talk a little bit, if we may, about  
24 the hearing that you anticipate in this case. Which  
25 is about whether a fine, a penalty to TVA should be

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1       sustained.

2                   I mean, corporations, of course, are legal  
3       fictions. They all have arms or legs or mouths, but  
4       they only operate through their officers and  
5       employees.

6                   And I guess what I was expecting we would  
7       see in the hearing on this case, is a great deal of  
8       information about the conduct, probably of several  
9       people, but certainly, primarily, the conduct of Ms.  
10      Henderson and the conduct of Mr. Shea.

11                   Now I see that the NRC has blocked its  
12      separate claim against Mr. Shea and has rescinded the  
13      notice of violation that issued to Ms. Henderson. So  
14      I guess my question for you is, what does the hearing,  
15      what do you anticipate the hearing will look like in  
16      this case?

17                   MS. KIRKWOOD: Your Honor, I would,  
18      assuming that we do not reach any stipulations with  
19      TVA, and it's a full scope hearing, I would anticipate  
20      that we will present evidence that Ms. Wetzel and Mr.  
21      McBrearty engaged in protected activity and that Ms.  
22      Henderson and Mr. Shea, with the involvement of some  
23      others at TVA, took an action against both of those  
24      individuals in reprisal for their protective activity.

25                   So yes, I --

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1 CHAIR RYERSON: If I may interrupt. So  
2 you contemplate at present presenting factually,  
3 essentially the same case that you were going to  
4 present before you dropped the independent action  
5 against Mr. Shea and rescinded the notice of violation  
6 by Ms. Henderson, is that correct?

7 MS. KIRKWOOD: That is largely correct.  
8 The difference is, I mean, we specifically did not  
9 change the notice of violation we issued to TVA. The  
10 difference is that there was a violation to Ms.  
11 Henderson and there was the order to Mr. Shea, based  
12 on 10 CFR 50.5, deliberate misconduct.

13 And we had initially escalated TVA's civil  
14 penalty because of that deliberate misconduct. We  
15 have rescinded the deliberate aspect of this case.  
16 But that rescission goes to the requirements of 10 CFR  
17 50.5 as interpreted by the Commission in the Shea  
18 decision.

19 CHAIR RYERSON: Right. And again, you  
20 contemplate, I mean, you're not totally changing the  
21 theory of your case I take it.

22 Essentially the staff contemplates it will  
23 present at the evidentiary hearing a case which will  
24 show misconduct --

25 MS. KIRKWOOD: Right.

1 CHAIR RYERSON: -- by Ms. Henderson and by  
2 Mr. Shea, is that correct?

3 MS. KIRKWOOD: It will show a violation of  
4 10 CFR 50.7. Which, yes, you could say a violation of  
5 NRC requirements is misconduct. It will not show --

6 CHAIR RYERSON: Okay.

7 MS. KIRKWOOD: -- deliberate misconduct.

8 CHAIR RYERSON: Thank you. Please  
9 proceed.

10 MS. KIRKWOOD: Well established precedence  
11 states that in order to establish standing in an NRC  
12 proceeding, an injury must be within the zone of  
13 interests protected by the statute. E.g. the AEA.

14 Ms. Henderson alleges a reputational  
15 injury. She does not have --

16 JUDGE ABREU: Ms. Kirkwood?

17 MS. KIRKWOOD: Yes.

18 JUDGE ABREU: This is Judge Abreu. You  
19 just equated the zone of interest to the AEA. You  
20 recently said that this enforcement action is based on  
21 50.7. And in what act is 50.7 grounded?

22 MS. KIRKWOOD: The Energy Reorganization  
23 Act.

24 JUDGE ABREU: So why isn't that the zone  
25 of interest for this proceeding?

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1 MS. KIRKWOOD: Your Honor, I think you can  
2 interpret the zone of interest as including the Energy  
3 Reorganization Act. The only note I would make on  
4 that is that it's a civil penalty case. And our  
5 authority to issue civil penalties comes from the  
6 Atomic Energy Act.

7 JUDGE ABREU: But the violation itself is  
8 based in 50.7?

9 MS. KIRKWOOD: Correct. And in her reply,  
10 Ms. Henderson suggested that the hearing was based off  
11 of Section 211 of the Energy Reorganization Act.

12 What I would note about that, however, is  
13 that there is nothing in the Energy Reorganization Act  
14 that suggests that vindicating, Ms. Henderson stated  
15 that but she didn't cite any legal support for a  
16 proposition that Section 211 of the Energy  
17 Reorganization Act provides a manager standing to  
18 intervene in that proceeding.

19 JUDGE ABREU: But if her contention is  
20 that the facts of the order are wrong and those facts  
21 are what establish the violation, why wouldn't that be  
22 significant to finding that her alleged injury to her  
23 reputation, or the chilling effect, were grounded in  
24 50.7? Since that's the source of the false claim, as  
25 she would address it.

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1 MS. KIRKWOOD: I'm not entirely sure I'm  
2 following your question.

3 JUDGE ABREU: So it's her, the violation  
4 is grounded in 50.7, correct?

5 MS. KIRKWOOD: Correct.

6 JUDGE ABREU: And in the violation the NRC  
7 said she was, I'll just call it bad actor. She did  
8 something wrong that led to the cascade of events that  
9 caused this violation. Is that correct?

10 MS. KIRKWOOD: That's a fair  
11 interpretation.

12 JUDGE ABREU: Okay. I'm just simplifying  
13 a little here.

14 MS. KIRKWOOD: Yes.

15 JUDGE ABREU: So, if her contention is  
16 that the facts are wrong, it would have seemed to be  
17 intimately involved with the act upon which the  
18 violation is based. What's wrong with that reasoning?

19 MS. KIRKWOOD: Well, Your Honor, I agree  
20 with you that she is saying the facts are wrong, but  
21 in doing so she is no different than any other manager  
22 who was involved in a violation that says the facts  
23 are wrong.

24 Similarly, she is no different than any  
25 whistleblower who attempts to seek a hearing on a

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1 confirmatory order issued by the NRC saying that we  
2 recited the facts wrong in the case.

3 I would actually note that nearly that  
4 exact factual situation occurred in the Alaska DOT  
5 case where the whistleblower stated that the NRC  
6 should not have withdrawn, I believe in that case it  
7 was also the deliberate misconduct aspect of the  
8 order.

9 JUDGE ABREU: So was that whistleblower  
10 named as being a bad actor in the case?

11 MS. KIRKWOOD: No.

12 JUDGE ABREU: Okay. So we have a relative  
13 -- just as a side question, do you know of any other  
14 cases where a non-licensee is uniquely identified, for  
15 practical purposes named, in the case in an  
16 enforcement order and where they weren't given their  
17 own enforcement order, that they were identified as a  
18 bad actor in the licensee's enforcement order, are you  
19 aware of other cases like that?

20 MS. KIRKWOOD: Your Honor, I think that  
21 that would be true of nearly all notices of violation  
22 in civil penalties that we issue.

23 See, I guess it depends on exactly what  
24 the circumstances are, but we always try to provide  
25 enough specificity.

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1 I mean as compared to the apparent  
2 violation, before we have really gone out with it, we  
3 have to provide enough specificity in the notice of  
4 violation and especially in position of the civil  
5 penalty so as to put the licensee on notice of what  
6 they are defending against.

7 So if it's a violation that involves  
8 people, as sort of a colloquial term, it's going to  
9 have that kind of identifications.

10 JUDGE ABREU: But are they with this  
11 specificity generally?

12 MS. KIRKWOOD: I mean, again, it goes  
13 somewhat to the specifics of it, but I mean I would be  
14 -- I know the Reed College case had that kind of  
15 specificity.

16 In I think certainly a discrimination it  
17 would have to be because it so closely involves people  
18 and the actions of people.

19 JUDGE ABREU: And was the individual who  
20 discriminated in the Reed College case, was any action  
21 taken against that person individually?

22 MS. KIRKWOOD: Reed College was not a  
23 discrimination case. I am hoping --

24 (Simultaneous speaking.)

25 JUDGE ABREU: Well let's just say the bad

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1 actor, since we don't have specifics of the case, the  
2 individual who did something that was not within  
3 regulation, was it only the college who was named or  
4 was the individual?

5 MS. KIRKWOOD: No, it was a technical  
6 case, but, yes, the individual was identified who was  
7 involved in that case. There was other actions,  
8 another action --

9 (Simultaneous speaking.)

10 JUDGE ABREU: And what action was taken  
11 against them?

12 MS. KIRKWOOD: There was another action  
13 taken against them.

14 JUDGE ABREU: Which is different with this  
15 case now.

16 MS. KIRKWOOD: Yes. But certainly I mean  
17 I would actually note that in terms of an action Ms.  
18 Henderson didn't have an action taken against her.  
19 She had an NOV that it was ultimately rescinded.

20 JUDGE ABREU: So if -- Since she didn't  
21 have that action taken, since an enforcement order was  
22 not issued directly against her, but she was  
23 identified in this one, does she have any other  
24 recourse than to intervene in this proceeding to have  
25 her side of the story heard?

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1 MS. KIRKWOOD: Well, Your Honor, I think  
2 she has the same recourse, if you will, as any  
3 manager. So I would note that as part of our  
4 enforcement process first we issue an apparent  
5 violation.

6 The licensee, and in this case the  
7 individual, Ms. Henderson, as well as some of other  
8 individuals responded to that, had a pre-decisional  
9 enforcement conference before the staff --

10 JUDGE ABREU: But how does she go, how  
11 does she defend herself with this enforcement order  
12 that has been issued now that it has been issued?

13 MS. KIRKWOOD: Well, Your Honor, the fact  
14 is not all injuries, and I am going to put a quotation  
15 around the term "injuries," are significant enough to  
16 entitle somebody to redress.

17 The Commission has a longstanding policy  
18 that somebody who is issued a notice of violation  
19 alone does not get to seek a hearing on that notice of  
20 violation.

21 Here Ms. Henderson doesn't even have a  
22 notice of violation anymore and she is essentially  
23 attempting to seek a hearing on a --

24 JUDGE ABREU: Right. So my question is if  
25 she wants to defend herself because she feels she has

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1       been wronged by the wording of the enforcement order  
2       by identifying her as doing something wrong what is  
3       her route to defend herself at this point?

4               MS. KIRKWOOD:   Well, she has a similar  
5       route as to any other person who is tangentially  
6       impacted by a hearing proceeding at the NRC.

7               She could seek to file a limited  
8       appearance statement, she could seek leave to file an  
9       amicus brief, she could, she is almost certainly going  
10      to be called to testify, but if not she could ask the  
11      Board explicitly to allow her to testify.

12              But the NRC's hearings are not -- The NRC  
13      doesn't broadly grant hearings to anyone who wants  
14      them.  They are --

15              (Simultaneous speaking.)

16              JUDGE ABREU:  So it's her recourse then if  
17      she wants to defend herself directly to go to federal  
18      court?  Is that her only legal proceeding option?

19              MS. KIRKWOOD:  Yes, I don't believe she  
20      would have --

21              (Simultaneous speaking.)

22              JUDGE ABREU:  Well, that's up to that  
23      court decide whether --

24              MS. KIRKWOOD:  Correct.  But I don't  
25      believe she would have standing in federal court.

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1 JUDGE ABREU: But that's the place she  
2 could try to defend herself, is that -- There is no  
3 other NRC level route to defend against the NRC  
4 action?

5 MS. KIRKWOOD: Your Honor, yes. And she  
6 can decide what further recourse she wants to seek,  
7 but right now what is at issue is whether or not she  
8 is entitled to intervene in this proceeding and --

9 JUDGE ABREU: And I'm just looking for  
10 whether she has other options at the NRC where she can  
11 be represented and defend herself and from what I am  
12 hearing the answer is, well, she can issue statements  
13 and try to provide information, which she has already  
14 done, but if she still feels she has been wronged she  
15 would have to go to another forum, is that correct?

16 MS. KIRKWOOD: Your Honor, I think that's  
17 fair, but I would also note she did have a full  
18 pre-decisional enforcement conference in front of --

19 JUDGE ABREU: Yes. We are aware of the  
20 pre stuff but now we are at the point of the order  
21 having been issued and so we have to deal with where  
22 we are.

23 MS. KIRKWOOD: Yes. What she wants is a  
24 hearing. She wants to be allowed into the TVA's civil  
25 penalty hearing.

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1 JUDGE ABREU: Mm-hmm.

2 MS. KIRKWOOD: And I don't think she is  
3 entitled to that.

4 JUDGE ABREU: Thank you.

5 JUDGE HAWKENS: Ms. Kirkwood, Judge  
6 Hawkens here. Can you please address Mr. Walsh's  
7 arguments regarding distinguishing the North Anna case  
8 and the fact that Sun Ship fell outside the zone of  
9 interest as opposed to his argument that Ms.  
10 Henderson, because the source of a reputational  
11 injury, was the NRC staff she falls within the zone of  
12 interest?

13 MS. KIRKWOOD: Your Honor, I would say  
14 that the North Anna case, the Sun Ship case, and the  
15 Palisades Commission case citing it were not so  
16 constrained.

17 They very explicitly stated that a  
18 reputational injury was outside of the zone of  
19 interest of the Atomic Energy Act.

20 JUDGE HAWKENS: I agree with you, but he  
21 says this case is distinguished on the facts and that  
22 makes all the difference for falling within the zone  
23 of interest. Why is he wrong?

24 MS. KIRKWOOD: Your Honor, the cases were  
25 simply not constrained in a way that -- I mean if I

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1 look specifically at Palisades there is no  
2 relationship at all between the legislative purpose  
3 underlining the safety provisions of the Atomic Energy  
4 Act and petitioner's interest in protecting its  
5 reputation and avoiding damage suits.

6 There is no relationship at all. I don't  
7 believe that that gives daylight to find that when an  
8 NRC, when it's an NRC enforcement case that there is  
9 a broader way of interpreting the Atomic Energy Act to  
10 include reputational injuries to management officials  
11 at a licensee involved in an enforcement case.

12 And it is certainly inconsistent with the  
13 Commission's longstanding policy that enforcement  
14 proceedings are narrowly constrained.

15 JUDGE HAWKENS: All right. Thank you.

16 JUDGE ABREU: Ms. Kirkwood, this is Judge  
17 Abreu again. So back to the Energy Reorganization  
18 Act, you have said that that would come into play here  
19 because it's an enforcement action based on 50.7,  
20 correct?

21 MS. KIRKWOOD: Correct.

22 JUDGE ABREU: Okay. And when the courts  
23 have talked about zone of interest they have talked  
24 about that the -- and when a person is aggrieved by an  
25 agency action within the meaning of a relevant

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1 statute.

2 So you would consider the relevant statute  
3 here to include the Energy Reorganization Act and the  
4 Atomic Energy Act or would it be just one of those?

5 MS. KIRKWOOD: I think it's fair to  
6 consider it both.

7 JUDGE ABREU: And yet you think her -- And  
8 it is correct that you still contend that her  
9 complaint that she was aggrieved by the enforcement  
10 order is not, and that that is related to the Energy  
11 Reorganization Act, as they have mentioned in their  
12 pleadings, so you don't think that that fits here?

13 MS. KIRKWOOD: Correct, Your Honor. I  
14 think that that is a -- One, I think she still has to  
15 show a distinct and palpable harm flowing from the  
16 order that falls within the zone of interest of --

17 (Simultaneous speaking.)

18 JUDGE ABREU: So if she could demonstrate  
19 that reputational injury is in fact an injury, let's  
20 just take that as an assumption for a hypothetical,  
21 and if that injury is based in the words of the  
22 enforcement order that are grounded in 50.7 would that  
23 put it within the zone of interest?

24 MS. KIRKWOOD: No, Your Honor. I don't  
25 think there is anything in the Energy Reorganization

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1 Act to suggest that vindicating a licensee's  
2 employee's reputation is within the zone of interest  
3 of the Energy Reorganization Act.

4 JUDGE ABREU: Why wouldn't getting the  
5 facts right in a violation be part of it?

6 MS. KIRKWOOD: Well, Your Honor, if  
7 getting the facts right in a violation gives an  
8 individual standing I think that is inconsistent with  
9 the Commission's findings in Alaska DOT where the  
10 whistleblower in the case sought standing, and  
11 actually this was just reaffirmed in a Vogtle case  
12 last year where another whistleblower sought standing.

13 JUDGE ABREU: But those weren't cases  
14 where an individual was alleging harm to them directly  
15 from the order, that the order itself directly harmed  
16 them.

17 MS. KIRKWOOD: Well, Your Honor, Alaska  
18 DOT the whistleblower did allege that the order  
19 directly harmed him.

20 JUDGE ABREU: But not as -- but they said  
21 he was a bad actor in that case?

22 MS. KIRKWOOD: No, he was a whistleblower.

23 JUDGE ABREU: Right. That's my -- I'm --  
24 so maybe I should rephrase, that the order defines the  
25 petitioner as a bad actor?

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1 MS. KIRKWOOD: Your Honor, I am a little  
2 hesitant to agree with your characterization that we  
3 have defined Ms. Henderson as a bad actor.

4 JUDGE ABREU: You are saying the order  
5 doesn't imply she did anything wrong?

6 MS. KIRKWOOD: I -- the order states, the  
7 NOV does state that she --

8 JUDGE ABREU: We're not -- we're just  
9 talking about the order now. Stick with the order for  
10 me, please, since that's what we are basing our --

11 (Simultaneous speaking.)

12 MS. KIRKWOOD: The order does identify her  
13 by title and does state that she was part, that she  
14 played a role in a violation that we have provided to  
15 TVA, but she is not on any sort of bad list.

16 And if I go back to the rulemaking, the  
17 deliberate misconduct rulemaking, the Commission has  
18 made clear that the staff doesn't do that.

19 JUDGE ABREU: No, we're beyond deliberate  
20 misconduct. We're just saying that in this violation  
21 -- her attorney has told us today how the order says  
22 she did something wrong.

23 You are saying the order does not say  
24 that, is that correct?

25 MS. KIRKWOOD: No. The order does say

1 that she violated 10 CFR 50.7, I agree.

2 JUDGE ABREU: Okay. So she did something  
3 bad? She did something wrong?

4 MS. KIRKWOOD: Yes. She -- well, she  
5 violated 10 CFR 50.7.

6 JUDGE ABREU: Okay. Let's -- I want to  
7 make sure we were all talking the same way here,  
8 because for a moment there I thought maybe we were  
9 going a new direction.

10 MS. KIRKWOOD: No. I'm just a little  
11 skittish about calling somebody a bad actor.

12 JUDGE ABREU: Okay. Pardon me for my  
13 characterization in a term that has special meaning to  
14 you for NRC purposes.

15 She did something wrong and she wants to  
16 defend herself. That wrong is based in 50.7, but you  
17 are saying that doesn't matter because it's a  
18 reputation problem, correct?

19 MS. KIRKWOOD: Yes. She disagrees with  
20 the facts of the notice of violation, but that still  
21 doesn't get her standing to intervene in the hearing.

22 JUDGE ABREU: All right. Thank you for  
23 clarifying your position.

24 CHAIR RYERSON: All right. Ms. Kirkwood,  
25 your time is officially up and it's usually not a bad

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1 thing to spend your time responding to what the Board  
2 is interested in.

3 I will still give you another minute or  
4 two if you would like to wrap up.

5 MS. KIRKWOOD: Your Honor, I am primarily  
6 interested in responding to the questions that are on  
7 the mind of the Board.

8 The only thing that I would add briefly is  
9 on discretionary intervention, which is that the  
10 Commission has made clear that discretionary  
11 intervention is an extraordinary procedure intended to  
12 be used extremely rarely.

13 Ms. Henderson is asserting that she is  
14 entitled to discretionary intervention because of her  
15 knowledge of the facts of the case because of her  
16 involvement in those facts.

17 But if you interpret discretionary  
18 intervention to mean that somebody who is involved in  
19 the facts of the case is entitled to discretionary  
20 intervention than rather it being an extraordinary  
21 procedure used rarely I believe it would become just  
22 practically automatic entry into an enforcement  
23 proceeding for an employee of a licensee who had been  
24 involved in the facts of the case.

25 CHAIR RYERSON: All right. Thank you, Ms.

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1 Kirkwood. Well, Mr. Walsh, you have up to ten  
2 minutes.

3 MR. WALSH: Thank you, Your Honor. There  
4 are a few things I would like to say in response to  
5 the staff's arguments.

6 First, with respect to what Ms. Henderson  
7 is required to show to articulate an injury that would  
8 confer Article 3 standing it is certainly not the case  
9 that Ms. Henderson has to go out and try and find a  
10 job and get denied before she can claim Article 3  
11 standing. That seemed to be the implication of  
12 staff's counsel.

13 Quoting from the Foretich case that we  
14 cited, it says "Case law is clear that where  
15 reputational injury derives directly from an unexpired  
16 and unretracted government action that injury  
17 satisfies the requirements of Article 3 standing to  
18 challenge that action."

19 That is the case here. The violation is  
20 specific to Ms. Henderson, identifies her directly,  
21 and that Violations 1 and 3 have not been retracted,  
22 though we certainly believe they should be, but they  
23 remain the case.

24 If the staff continues to pursue them in  
25 the present form then Ms. Henderson's reputational

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1 harm is concrete and particularized.

2 My second point I would like to make, Your  
3 Honors, is with respect to naming individuals in NRC  
4 enforcement actions and whether or not that is staff  
5 practice or identifying individuals.

6 I want to direct your attention to  
7 Violation 2 for TVA. That violation does not  
8 specifically identify anyone. That violation says  
9 "After becoming aware of this protected activity TVA  
10 placed the former employee on paid administrative  
11 leave until the former employee resigned in August  
12 2018."

13 That violation had its genesis in an  
14 earlier parent violation that did specifically  
15 identify a TVA employee and following the  
16 pre-decisional enforcement conference the staff opted  
17 not to issue him any violation for alleged deliberate  
18 misconduct.

19 And, accordingly, you can see where the  
20 staff finds that individual actors are not engaging in  
21 deliberate misconduct the staff knows how to draft a  
22 violation that does not implicate a particular person  
23 and they use the generic term "TVA placed an employee  
24 on paid leave."

25 Contrast that here where the Violations 1

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1 and 3, although the staff has withdrawn the deliberate  
2 misconduct allegations against Ms. Henderson, they  
3 still identify her specifically.

4 With respect to the concerns about the  
5 legislative purpose of the Atomic Energy Act, again,  
6 I think the Commission made abundantly clear when it  
7 was acting pursuant to its authority under the Atomic  
8 Energy Act to be able to issue orders to unlicensed  
9 persons.

10 It specifically identified its obligations  
11 to protect the public health and safety as a basis for  
12 its authority to be able to issue orders to personnel  
13 because it wanted to be able to tarnish people's  
14 reputations so that people would know that they had  
15 engaged in wrongdoing.

16 Here it's the opposite circumstance. Ms.  
17 Henderson wants to resuscitate her reputation so that  
18 people do not believe that she engaged in wrongdoing  
19 so that she will not be encumbered in any future  
20 employment prospects she may have, and so in this case  
21 the issues are squarely within the zone of interest.

22 And, lastly, with respect to Ms.  
23 Henderson's involvement at any potential hearing, you  
24 know, the staff seems to make a lot of the argument  
25 that she should be denied discretionary intervention

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1 because she would merely be a witness.

2 Well, if that were the rule for excluding  
3 people from participating in hearings on a  
4 discretionary basis no one would get in. In fact, in  
5 the Detroit Edison case, which is 9 NRC 73 from 1979,  
6 the Board there said that the intervener was granted  
7 discretionary intervention because it had identified  
8 one of its members who was a construction worker and  
9 who will testify as to the alleged construction  
10 defects and defective practices.

11 Such a witness can foreseeably provide a  
12 unique contribution to identifying and perhaps  
13 resolving any construction quality control problems  
14 which may exist.

15 Therefore, in this case Ms. Henderson may  
16 well be called to testify and she should also  
17 participate as a party on a discretionary basis if  
18 needed for the same exact reasons.

19 She will be able to speak to exactly why  
20 she filed her complaint. No one else can. Thank you,  
21 Your Honors. That's all I have.

22 CHAIR RYERSON: Thank you, Mr. Walsh. Do  
23 either of my colleagues have any further questions?

24 JUDGE ABREU: This is Judge Abreu. I do  
25 for the staff. We didn't get around to discussing the

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1 chilled injury. Do you have any discussion on that  
2 topic?

3 MS. KIRKWOOD: Sure, Your Honor. What I  
4 would note is that Ms. Henderson has a very vague  
5 claim that she is chilled from raising nuclear safety  
6 concerns and it does not support her standing.

7 Her case law to support that a chill  
8 provides standing is only when it's been coupled with  
9 a reputational injury, which we have already  
10 established is not a cognizable interest in NRC  
11 proceedings.

12 And then she appears to be taking a view  
13 that because she works in nuclear and has nuclear  
14 responsibilities any workplace environment concerns  
15 she had are nuclear safety concerns.

16 A chilled work environment means an  
17 environment where employees are not free to raise  
18 nuclear safety concerns. Ms. Henderson did not claim  
19 she was being harassed because of raising nuclear  
20 safety concerns, rather she claims that the nuclear  
21 safety concerns her employers raised about her were a  
22 harassment of her. There is no basis --

23 JUDGE ABREU: I --

24 MS. KIRKWOOD: Go ahead.

25 JUDGE ABREU: So her position dealt with

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1 nuclear regulations, is that fair to say?

2 MS. KIRKWOOD: Yes.

3 JUDGE ABREU: And the people who she was  
4 having trouble with also were involved with nuclear  
5 regulation compliance, is that correct?

6 MS. KIRKWOOD: Correct.

7 JUDGE ABREU: So is it important that they  
8 have a good working relationship for there to be good  
9 nuclear regulatory compliance?

10 MS. KIRKWOOD: Your Honor, I would be  
11 hesitant to speculate on that.

12 JUDGE ABREU: But since they are dealing  
13 with nuclear compliance that's an important thing for  
14 nuclear safety, would you agree with that?

15 MS. KIRKWOOD: Your Honor, I guess I am  
16 just struggling because a good working relationship is  
17 so vague. The NRC is --

18 JUDGE ABREU: Let's take the second part.  
19 If they deal with nuclear regulation compliance that  
20 would be important for safety?

21 MS. KIRKWOOD: Nuclear regulation  
22 compliance is important for safety, absolutely.

23 JUDGE ABREU: All right. So if what she  
24 is asserting is that she filed a complaint, I'll call  
25 it an HR-type complaint, about some employees that --

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1 I am correct that she did not directly supervise those  
2 employees, but they were people she had to work with,  
3 correct?

4 MS. KIRKWOOD: She directly supervised at  
5 least four of them.

6 JUDGE ABREU: Well, I'm only aware of two.  
7 I don't have the full record, so -- we haven't been  
8 given the full record, so they mentioned a couple of  
9 people.

10 MS. KIRKWOOD: She didn't directly  
11 supervise Beth Wetzel.

12 JUDGE ABREU: Okay. So one of the people  
13 she didn't directly supervise that was mentioned in  
14 the order, is that correct?

15 MS. KIRKWOOD: Correct.

16 JUDGE ABREU: Okay. But if she had an  
17 HR-type problem, we'll just for argument sake assume  
18 it's not related to the whistleblower side, and she  
19 has now been criticized that she did wrong, did  
20 something wrong, the NRC said she did something wrong  
21 by filing a complaint about the people who deal with  
22 compliance, why would that not potentially chill her  
23 willingness to deal with these types of personnel  
24 issues in the future which could affect compliance if  
25 the people aren't performing their jobs adequately?

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1 MS. KIRKWOOD: Well, Your Honor, I think  
2 unfortunately you do have to look at the very detailed  
3 facts of this case.

4 JUDGE ABREU: Which we do not have --  
5 (Simultaneous speaking.)

6 JUDGE ABREU: They're not part of our  
7 record we have at this point.

8 MS. KIRKWOOD: In this case she claimed  
9 that she was being harassed because employees raised  
10 nuclear safety concerns about her to the extent that  
11 she feels chilled from retaliating against employees  
12 for raising nuclear safety complaints.

13 JUDGE ABREU: But isn't that the crux of  
14 the issue, the NRC considers it retaliating but she  
15 considers it having nothing to do with nuclear safety  
16 issues? That's the crux of her argument, is that  
17 correct?

18 MS. KIRKWOOD: Yes. At this stage it's  
19 her burden to show how this chills her in an  
20 inappropriate way.

21 JUDGE ABREU: And that would hinge on the  
22 facts of the case that she says are in dispute,  
23 correct?

24 MS. KIRKWOOD: Well, I think, again, you  
25 don't even have to reach this issue because the --

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1 JUDGE ABREU: That's a different topic.

2 MS. KIRKWOOD: Yes. Well, but it --  
3 because it --

4 JUDGE ABREU: Let's -- we're dealing with  
5 this issue at the moment, the chill concept. Just so  
6 we have your position clear, and I understand you  
7 believe it's not relevant to the decision we have to  
8 make because you feel that it's not, that her position  
9 wasn't well stated enough and that it's not relevant  
10 to begin with, is that fair?

11 MS. KIRKWOOD: Yes. But I believe the  
12 actual complaint itself is attached -- her "HR  
13 Complaint" is attached to her filing or our filing and  
14 it clearly states in the complaint that one of the  
15 ways she felt harassed by her employees was them  
16 raising nuclear safety concerns about her.

17 JUDGE ABREU: Which, again, whether or not  
18 they were legitimate complaints would be a fact to be  
19 determined at a hearing. So back to the issue, it's  
20 just still --

21 MS. KIRKWOOD: Your Honor, I would issue  
22 the position that --

23 JUDGE ABREU: Say that again, please.

24 MS. KIRKWOOD: I would take the position  
25 and the longstanding NRC position is raising nuclear

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1 safety complaints is protected activity even if they  
2 are ultimately found to not have merit.

3 JUDGE ABREU: But, again, we're getting  
4 into the merits of the facts of the case. Right now  
5 we are trying to determine could she have been chilled  
6 in a way that could be an injury, right, isn't that  
7 the determination you expect us to make?

8 MS. KIRKWOOD: The determination that I  
9 expect you to make is whether or not she has standing  
10 to intervene in this proceeding.

11 JUDGE ABREU: And one aspect that she has  
12 raised is an injury that is the chilled work  
13 environment that the NRC action creates for her, is  
14 that -- do you have an understanding that is  
15 different?

16 MS. KIRKWOOD: Right. But that is -- it's  
17 several -- she has to show, one, she has to show that  
18 she is raising a chilled work environment that is,  
19 one, a cognizable injury within the zone of interest  
20 protected by the statutes.

21 Nothing in her pleading states clearly how  
22 she has been chilled from engaging in NRC protected  
23 activity.

24 JUDGE ABREU: Thank you. Mr. Walsh, do  
25 you have any response to that?

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1 MR. WALSH: Yes. Thank you, Your Honor.  
2 Again, as you correctly noted Ms. Henderson is  
3 claiming a chilling effect from the staff action  
4 coupled with her reputational injury.

5 With respect to the chilling effect I  
6 think it is worth emphasizing, as we noted in our  
7 initial request for a hearing, that a respectful work  
8 environment is one of the nine traits identified by  
9 the Commission that characterize a positive nuclear  
10 safety culture.

11 And Ms. Henderson's complaint, contrary to  
12 the egregious mischaracterizations made by the staff  
13 just now, which, again, is furtherance of the harm  
14 against Ms. Henderson, she filed her complaint to put  
15 an end to two years of misconduct directed towards  
16 her, that she reasonably believes that she was  
17 suffering all because she engaged in her own protected  
18 activity in April 2016 by filing an ethics complaint.

19 Therefore, if the Commission can identify  
20 a respectful work environment as one of the nine  
21 traits of a positive nuclear safety culture then  
22 certainly a formal complaint that was filed to ensure  
23 such a respectful environment within a nuclear  
24 licensing organization falls within the Atomic Energy  
25 Act's zone of interest. Thank you.

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1 CHAIR RYERSON: All right. We thank both  
2 counsel. Unless there are any further questions I  
3 think that concludes today's argument. While we have  
4 all the parties is there anything else we should be  
5 taking up today?

6 I guess discovery officially begins  
7 tomorrow and hopefully that will go smoothly without  
8 the need for intervention. Anything else we should be  
9 talking about today?

10 COURT REPORTER: Your Honor, just to  
11 clarify, do you want this on the record?

12 CHAIR RYERSON: Pardon? Oh yes, continue  
13 on the record. Thank you.

14 COURT REPORTER: Very well. Please  
15 proceed.

16 CHAIR RYERSON: All right. Well, we will  
17 take this issue under advisement and I hope we will  
18 issue a timely decision.

19 It appears there is nothing else the  
20 parties want to discuss on the record or otherwise  
21 right now. Judge Hawkens, do you have anything  
22 further?

23 JUDGE HAWKENS: Nothing else here, Judge  
24 Ryerson. Thank you.

25 CHAIR RYERSON: Thank you. Judge Abreu?

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1 JUDGE ABREU: Nothing else from me. Thank  
2 you, Judge Ryerson.

3 CHAIR RYERSON: Thank you, Judge Abreu.  
4 All right, we stand adjourned. Thank you.

5 MR. WALSH: Thank you, Your Honors.

6 (Whereupon, the above-entitled matter went  
7 off the record at 11:38 a.m.)

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