UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of TENNESSEE VALLEY AUTHORITY (Enforcement Action)	Docket Nos. EA-20-006 EA-20-007

NRC STAFF ANSWER TO THE TENNESSEE VALLEY AUTHORITY'S MOTION REGARDING DISCLOSURES

BACKGROUND

On March 1, 2021, the Tennessee Valley Authority (TVA) filed a motion pursuant to 10 C.F.R. § 2.323 seeking relief regarding three documents that the NRC Staff produced in discovery.[1] The Staff made these documents publicly available in ADAMS as part of its initial disclosures on February 18, 2021.[2] Two of the three documents[3] originated with TVA and were obtained by the Staff in May 2019 during its investigation; the Staff received the third document from the Department of Labor in July 2019.[4] On February 19-20, 2021, TVA informed the Staff that it objected to the public disclosure of the three documents and demanded their removal from public access as well as the return or destruction of two of the three documents that it

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1 Motion for Return and Protection of Privileged and Confidential Documents (Mar. 1, 2021) (ADAMS Accession Nos. ML21060B598 (public), ML21060B597 (non-public)) (TVA Motion).

2 NRC Staff Initial Disclosures (Feb. 18, 2021) (ADAMS Accession No. ML21049A372).

3 . As TVA describes in its Motion at 2, the two documents for which it claims attorney-client privilege are "an August 30, 2018 memorandum prepared by TVA Office of General Counsel . . . attorneys Christopher Chandler and Jennifer Grace entitled "Investigation into Harassment and Hostile Work Environment Allegations in Nuclear Licensing Organization — Involvement of Beth Wetzel" . . . and (2) an August 10, 2018 Letter from TVA General Counsel Sherry Quirk to TVA Vice President Joseph Shea . . . communicating [TVA] OGC's legal conclusion and recommendation about employment action related to Michael McBrearty." The Staff will refer to these documents as the "TVA OGC memorandum" and the "Quirk Letter," respectively.

4 The third document is an agreement between TVA and an individual, which the Staff will refer to herein as the "Settlement Agreement." The Staff has omitted the individual's name associated with the Settlement Agreement because TVA redacted it in the public version of its Motion but notes that it is included in many documents in this proceeding, including TVA's request for hearing.

claims are protected by the attorney-client privilege.[5] On February 22, the Staff informed TVA that, while it firmly believes the documents should be public for the reasons discussed below, it would reprofile them as nonpublic pending resolution of this matter (and has done so).[6] Pursuant to 10 C.F.R. § 2.323(c), the Staff now responds to TVA's motion.

ARGUMENT

I. TVA's Claims of Attorney-Client Privilege

The protection afforded to communications between an attorney and a client for the purpose of giving or obtaining legal advice is not unlimited.[7] A waiver of attorney-client privilege precludes a party from shielding a communication from an opposing party. Regarding the two documents that TVA asserts are covered by attorney-client privilege, and as further discussed below, TVA has waived that privilege in two ways. First, TVA did not take reasonable measures to recover the documents it claims are privileged once it discovered that the Staff possessed them. Second, the doctrine of implied waiver precludes TVA from simultaneously asserting a reliance on the advice of counsel, as embodied in the two documents, in its defensive response to the Staff's enforcement process leading to Order issuance, while also insisting that the documents must be shielded from scrutiny in litigating those violations. Thus, for the reasons detailed below, a Board finding that TVA has waived the attorney-client privilege with respect to the Quirk Letter and the TVA OGC memorandum is appropriate.

A. Background regarding TVA's claims of privilege

On May 23, 2019, the NRC staff obtained the Quirk Letter and TVA OGC memorandum from Deanna Fults, Senior Program Manager for TVA's Nuclear Employee Concerns Program,

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5 TVA Motion Attachment E at 1, 5.

6 *Id.* at 3.

7 *United States v. Oloyede,* 982 F.2d 133, 141 (4th Cir. 1993) (The attorney-client privilege is narrowly construed.).

when she provided them by email to NRC Senior Special Agent (SSA) Scott Luina in response to a request[8] for documents related to the investigation of alleged violations of the employee protection rule (10 C.F.R. § 50.7). Subsequently, on November 20, 2019, at an interview of TVA Senior Attorney John Slater with TVA counsel Tim Walsh present, SSA Luina questioned Mr. Slater about his familiarity with the TVA OGC memorandum. The interview transcript indicates that Mr. Walsh stated "I was not aware that you had this information" when the TVA OGC memorandum was raised in the interview, but the transcript does not reflect that Mr. Walsh raised the issue of the document being covered by the attorney-client privilege at Mr. Slater's interview.[9]

On Wednesday, December 11, 2019, counsel for TVA Todd Presnell sent a letter to SSA Luina "to formally request that the. . . [NRC staff]. . . immediately return a privileged document that it obtained without TVA's knowledge or consent during the Wetzel Investigation."[10] Five days later, on Monday, December 16, 2019, counsel for NRC staff Sara Kirkwood responded to Mr. Presnell's letter that if TVA "would like us to consider your request to return the document to TVA, and not further rely on it" TVA was requested to "provide legal authority justifying the demand to return the document."[11] Since that time—now nearly a year and three months later—TVA has never responded to the Staff's request for a legal basis supporting its request.[12]

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8 *See* Official Transcript of Proceedings, *Interview of Deanna Fults* at 56, 58, 77, 80 (May 23, 2019) (Ex. 24 Office of Investigations (OI) Report) (ADAMS Accession No. ML21043A053) (multiple OI requests for documents from Deanna Fults, including a copy of the OGC recommendation to terminate Mr. McBrearty (the Quirk Letter) and the TVA OGC memorandum related to Ms. Wetzel).

9 *See* Official Transcript of Proceedings, *Interview of John E. Slater* at 57-58, 116-17 (Nov. 20, 2019) (Ex. 39 OI Report) (ADAMS Accession Nos. ML21043A269 [pp. 1-59] and ML21043A291 [pp. 60-119]) (portions of Slater interview during which the TVA OGC memorandum are discussed).

10 *See* Presnell Letter, TVA Motion Attachment B.

11 *See* Kirkwood Letter, TVA Motion Attachment C.

12 TVA did not again raise its claim of attorney-client privilege with respect to the TVA OGC memorandum until February 19, 2021, when TVA counsel sent an email to Staff counsel demanding that the two documents be made non-public because of TVA's claim of attorney-client privilege. Counsel for NRC staff requested that the documents of concern to TVA be made non-public within one business day of TVA counsel sending his email request. *See* TVA Motion Attachment E.

Pursuant to Section 1.2.15 of the NRC Enforcement Manual,[13] the Staff held a pre-decisional enforcement conference (PEC) on June 30, 2020 to address TVA's apparent violations.[14] TVA representatives and counsel presented information in response to the apparent violations and answered Staff questions to provide information for the Staff to consider in determining whether to issue violations to TVA. During the pre-decisional enforcement conference, counsel for TVA repeatedly referred to the TVA OGC memorandum and its subject matter, and at no point during the PEC did TVA assert a claim of attorney-client privilege with respect to that document.[15] Additionally, during the PEC, NRC staff counsel directly questioned TVA representatives about the contents of the Quirk Letter, and at no point during the PEC did TVA assert a claim of attorney-client privilege with respect to that document.[16]

B. TVA did not take reasonable measures to rectify the release of documents it claims are protected by attorney-client privilege

In considering whether a party has waived the attorney-client privilege, courts have considered the reasonableness of a party's conduct under the circumstances, including its efforts to rectify the release.[17] Here, the relevant question is whether TVA's efforts to rectify the disclosure of the documents for which it claims privilege were reasonable. If the Board concludes that TVA's efforts were not reasonable, on that basis alone it should find that TVA

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13 *Nuclear Regulatory Commission Enforcement Manual*, Rev. 11, Change 7 (Dec. 1, 2020) (ADAMS Accession No. ML20329A339).

14 *See* Official Transcript of Proceedings, *Pre-Decisional Enforcement Conference Re Tennessee Valley Authority* (June 30, 2020) (ADAMS Accession No. ML21069A106).

15 TVA PEC Tr. at 83, 89, 92, 113; *see* discussion *infra* at 7-8.

16 TVA PEC Tr. at 168; *see* discussion *infra* at 9-10.

17 *See Felman Production Inc. v. Indus. Risk Insurers*, No. 3:09-0481, 2010 WL 2944777, at *3-4 (S.D. W. Va. July 23, 2010) (Reasonableness is a factor to consider in evaluating whether inadvertent disclosure results in a waiver of attorney-client privilege; moreover, consistent with Federal Rule of Evidence 502(b), a party who makes an inadvertent release escapes waiver only if it took prompt steps to rectify the error.) (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008)).

waived the attorney-client privilege with respect to the Quirk Letter and the TVA OGC memorandum.

After TVA counsel sent the December 11, 2019 letter to the NRC staff requesting the return and destruction of copies of the TVA OGC memorandum, NRC staff counsel replied by letter inviting TVA to provide a legal basis in support of the request. It was reasonable for NRC staff counsel to make this request. The NRC staff must comply with records retention requirements that proscribe the unauthorized destruction of federal records.[18] Also, the burden of demonstrating the applicability of the attorney-client privilege falls on its proponent.[19] In any case, the failure of TVA counsel to engage with NRC staff counsel following her outreach—to fall silent instead of responding with supporting authority or explaining why none need be provided—is a failure to act in a manner reasonably calculated to recovering the documents. It is facially unreasonable to forgo the opportunity to resolve a privilege dispute with opposing counsel who expressed an openness to doing so and, instead, eliding the issue for well over a year.[20]

This lapse is underscored by TVA's failure to renew its discussions with the NRC staff about any claims of privilege for the two documents when it had the further opportunity to do so during the June 30, 2020, PEC. Instead, TVA counsel repeatedly referred to the substance of the TVA OGC memorandum—not guarding information that it claims is privileged, but openly discussing it to construct a defense to the apparent violations. And while TVA claims in its

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[18] *See, e.g.*, NRC Management Directive 3.53, *NRC Records Management Program, Handbook 1 of MD 3.53* at 11-12 (Mar. 15, 2007) (ADAMS Accession No. ML071160026) (identifies responsibilities of NRC employees to comply with records management requirements and to avoid destruction of files or records; describes broad criteria for defining federal records).

[19] *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) ("The burden is on the proponent of the attorney-client privilege to demonstrate its applicability.") (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)).

[20] *See Baxter Travenol Labs, Inc. v. Abbott Labs*, 117 F.R.D. 119, 121 (N.D. Ill. 1987) (A failure to assert the privilege for several months in the face of an opposing party's repeated use of and reliance on the document waives the privilege.).

Motion that it was unaware that Staff possessed the Quirk Letter until the Staff's initial disclosures on February 18, 2021, Staff counsel questioned TVA on the content of the Quirk Letter at the PEC, eight months earlier.[21] Yet TVA raised no claim of privilege during or following the PEC, until its February 19, 2021, email to Staff counsel. With regard to both documents, TVA's actions are consistent with an intentional waiver of any objections to an opposing party possessing and using this information, not with taking reasonable measures to rectify an inadvertent disclosure of it.[22]

Taken together, TVA's actions effect a waiver of attorney-client privilege with respect to both documents in question. The rationale of the privilege is to promote "full and frank communication between attorneys and their clients."[23] It is, however, to be narrowly construed, as it "'impedes [the] full and free discovery of the truth.'"[24] Therefore, it does not serve the interests of justice[25] to allow a party that does not take reasonable measures to protect or recover disclosed attorney-client confidences to nevertheless reserve for itself the insulation from scrutiny of such information in litigation.[26] As discussed above, TVA did not take reasonable measures to preserve its claim to attorney-client privilege for the TVA OGC memorandum and the Quirk Letter. Accordingly, the Board should find that TVA waived the privilege with respect to both documents.

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21 *See* discussion *infra* at 7-9 (including PEC quotations).

22 *Id*.

23 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

24 *In re Grand Jury Proceedings,* 727 F.2d 1352, 1355 (4th Cir. 1984) (quoting *Weil v. Investment/Indicators, Research & Mgmt.,* 647 F.2d 18, 24 (9th Cir. 1981)).

25 *See Victor Stanley*, 250 F.R.D. at 259 (A court should also consider whether waiver of privilege is consistent with the overriding interests of justice.).

26 *See Chevron Corp. v. Pennzoil Co*., 974 F.2d 1156, 1162-63 (9th Cir. 1992) (A party that claims that it acted pursuant to the advice of counsel cannot use the privilege to immunize that advice from scrutiny.).

C. TVA's use of the information in the subject documents in its defense during the NRC's enforcement proceeding is an implied waiver of attorney-client privilege

A party waives the attorney-client privilege under the doctrine of implied waiver if the party seeks to use its reliance on the advice of counsel in its defense—i.e., if it places the advice of counsel into issue in litigation.[27] The Commission recognizes the doctrine of implied waiver in NRC proceedings when a "company claims that. . .[an] internal investigation establishes it has met its obligation. . .[t]he company cannot then use the attorney-client privilege to withhold details of the investigation."[28] Such is the present case with TVA. Moreover, a waiver of privilege is not "confined to the particular words used to express the communication's content but extends to the substance of a communication, since the disclosure of 'any significant part' of a communication waives the privilege."[29] When TVA repeatedly discussed the contents of the TVA OGC memo and responded to questions on the Quirk Letter as part of its defense to the apparent violations discussed at the PEC, it placed the advice of counsel embodied in the two documents into issue. If the Board concludes that TVA placed the information that it claims is protected by attorney-client privilege into issue, it should conclude on that basis alone that TVA waived its claim of privilege for both documents.

TVA has placed into issue its reliance on the advice of counsel in its internal investigation of Ms. Wetzel and Mr. McBrearty, as embodied in the two TVA OGC documents, for its defense to the Staff's investigation of and the enforcement process springing from the discrimination alleged in this proceeding. During the June 30, 2020 PEC, counsel for TVA repeatedly raised the legal advice from the TVA OGC memorandum:

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[27] *Peterson v. Wallace Computer Servs., Inc.*, 984 F. Supp. 821, 825 (D. Vt. 1997). *See also United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir. 1991) ("Thus, the privilege may be waived when [a party] asserts a claim that in fairness requires examination of protected communications.").

[28] *Daryl M. Shapiro*, CLI-08-6, 67 N.R.C. 179, 184 (2008).

[29] *In re Grand Jury Proceedings*, 727 F.2d at 1356 (citing *United States v. Cote,* 456 F.2d 142, 145 (8th Cir. 1972).

- Mr. Shea terminated Ms. Wetzel and "because he knew the oral and email statements were false and because of OGC's recommendation, the termination was appropriate."[30]
- "On August 30, 2018, OGC issued a supplemental memorandum and recommendation with respect to Ms. Wetzel. OGC recommended that Ms. Wetzel be separated from the company, either by a no-fault separation agreement or termination, because it found that Ms. Wetzel's pattern of behaviors violated multiple TVA policies and federal law. With this recommendation in my [sic] mind, which comported with its own determination that Ms. Wetzel's statements crossed an unacceptable line, Mr. Shea decided to separate Ms. Wetzel from the company."[31]
- Mr. Shea's action terminating Ms. Wetzel "was supported by an OGC recommendation that independently evaluated Ms. Wetzel's conduct and concluded termination was legally supportable."[32]
- "Furthermore, and finally, TVA and the individual cases are supported by overwhelming evidence. . . . We have the Office of the General Counsel's recommendation that Mr. McBrearty be terminated for his behavior. . . . We have the Office of the General Counsel's supplemental analysis, concluding that Ms. Wetzel's disrespectful conduct violated TVA's policies, which recommended that Ms. Wetzel be separated from the company."[33]

Thus, while TVA has liberally relied on information it asserts is protected by privilege to advance its defensive theory, it now insists that the documents containing that information must be shielded from scrutiny in litigation. The attorney-client privilege, however, may not be used as both sword and shield.[34] "The privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former."[35] TVA seeks to use the TVA OGC memorandum and Quirk Letter as both sword and shield, and this necessarily results in an implied waiver of privilege.[36]

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30 TVA PEC Tr. at 83 (Rimon speaking).

31 *Id*. at 89 (Rimon speaking).

32 *Id*. at 92 (Rimon speaking).

33 *Id*. at 111-13 (Walsh speaking).

34 *Bilzerian,* 926 F.2d at 1292; *see also Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D.Fla. 1973) ("Where a party ultimately intends to waive the privilege at trial, disclosure in advance thereof will cause no injury to the relation between attorney and client and can only benefit the correct disposal of litigation.").

35 *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982).

36 *Shapiro*, CLI-08-6, 67 NRC at 184.

The same logic applies to TVA's privilege claim regarding the Quirk Letter. At the PEC, Staff counsel referred to an OGC opinion "signed out by Ms. Quirk" and, in attempting to elicit information about why Ms. Quirk was involved, stated, "what we're struggling with here is on the one hand, you've talked about this as being a routine disciplinary matter. On the other hand, we see a memo I believe from your General Counsel recommending terminating Mr. McBrearty."[37] TVA Chief Nuclear Officer Tim Rausch replied, "I would say, to answer the question, given the nature of the investigation being a harassment investigation, that would justify the level of review you're describing."[38] TVA counsel then added "[i]n addition, Jim, I would also offer that the high level of the employees involved in the personnel issues, managers in the organizations . . . ."[39] TVA, responding to Staff counsel's direct reference to a document signed by Ms. Quirk recommending Mr. McBrearty's termination, thus placed the Quirk Letter into issue in this proceeding by acknowledging TVA General Counsel Ms. Quirk's involvement in the disciplinary proceeding, stating that it was justified by the circumstances and level of the employees involved in the personnel issues, and relying on the conclusions of TVA OGC as justification for the actions against Mr. McBrearty. Fundamental fairness therefore requires that Staff be able to scrutinize this piece of evidence.[40]

TVA has placed the TVA OGC memo and the Quirk Letter into issue by using their content as the basis for its defense against the violations in this proceeding. Indeed, TVA appears to consider the possibility that it may expressly choose to produce the two documents to "use these materials in litigation," indicating that it would make such a decision "upon

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37 TVA PEC Tr. at 167-68 (Kirkwood speaking).

38 *Id*. at 168. Although the transcript indicates that the speaker was TVA Vice President of Nuclear Regulatory and Support Services Jim Barstow, the context suggests that the speaker was Tim Rausch.

39 *Id*.

40 *See Bilzerian,* 926 F.2d at 1292. (Fairness dictates that when a claim is based on documents held as secret, those documents should be subject to examination.).

completion of discovery.[41] This position is untenable, however, because TVA has already relied on these documents at the PEC, the record of which is admissible evidence in this proceeding.[42] Accordingly, the Board should find that TVA has waived, by implication, its claim of attorney-client privilege for these documents.[43]

II. The Protective Order Does Not Apply to These Documents

TVA inaccurately asserts that the Staff violated the Protective Order with respect to the three documents TVA seeks to withhold.[44] In this Subpart G proceeding,[45] the parties exchange documents pursuant to the applicable discovery provisions in 10 C.F.R. §§ 2.704 and 2.709 and the Protective Order. The Protective Order provides that: "The provisions of this protective

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41 TVA Motion at 2, 12. Such a position is patently unreasonable and is further evidence of an implied waiver of privilege. *See International Telephone,* 60 F.R.D. at 186. (Waiver results when the decision to waive the privilege is nothing more than a matter of timing for strategic advantage at trial.).

42 In TVA's Answer and Request for Hearing, filed on November 30, 2020, TVA frequently cites the PEC transcript regarding reliance on the advice of counsel in setting out its position in this proceeding. Positions taken at the PEC are positions taken in this proceeding, as TVA implicitly concedes. *See, e.g.*, TVA Answer at 18 n.59. In the separate individual action against him, Mr. Shea also extensively relied on an "advice of counsel" defense in response to the violation of 10 C.F.R. § 50.5 against him. *See generally*, Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him From Engaging in NRC-Licensed Activities, Answer, and Request for Hearing (Sept. 22, 2020) (ADAMS Accession No. ML20266G394). The Commission also explicitly acknowledged this reliance in its decision on immediate effectiveness. *See Joseph Shea* (Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective), CLI-21-3, 93 NRC __, __ (Jan. 15, 2021) (slip op. at 3, 11, 13).

43 TVA goes to great lengths to argue that Ms. Fults was not an official who was authorized to waive TVA's attorney-client privilege. Given TVA's waiver of the privilege through its subsequent actions and inactions, as explained above, the Board need not reach this issue. The Staff notes, however, that Ms. Fults was provided these documents in accordance with her job duties. She provided the documents to the Office of Investigations in response to its request to her for copies of the documents she was discussing in her interview. *See supra* note 8. Ms. Fults's cooperation with the investigator is consistent with TVA's policy on differing views, which states that all TVA employees should cooperate and participate in the investigation of concerns. *See* Ex. 19, *NRC Office of Investigations, Report of Investigation - Watts Bar Nuclear Plant Discrimination Against a Former Manager for Raising Nuclear Safety Concerns*, "TVA Standard Programs and Processes – Expressing Concerns and Differing Views, rev. 9" at 45 (Adams Accession No. ML21043A117).

44 *See* TVA Motion at 1, 6, 14-16.

45 TVA requested and was granted an evidentiary hearing. As such, this proceeding is governed by the hearing procedures set forth in 10 C.F.R. Part 2, Subpart G, "Rules of Formal Adjudications." *See* Notice of Hearing (Jan. 21, 2021) (ADAMS Accession No. ML21021A124); Tennessee Valley Authority's Answer and Request for Hearing (Nov. 30, 2020), at 3 (ADAMS Accession No. ML20335A574).

order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to Subpart G and this Protective Order."[46] The Staff did not receive the documents at issue "solely pursuant to Subpart G and this Protective Order." As TVA acknowledged,[47] the Staff obtained these documents in 2019 during its investigation, well before parties began discovery in this proceeding. Thus, the assertion that the Staff violated the Protective Order by disclosing these documents is unfounded.[48]

III. NRC Adjudicatory Proceedings Are Conducted in Public, thus the Settlement Agreement Is Not Exempt from Public Disclosure

TVA alleges that the Settlement Agreement was improperly disclosed, in violation of the protective order in this proceeding. However, and as further discussed below, TVA fails to acknowledge the NRC's long standing policy of openness in NRC proceedings, and that thus, the Settlement Agreement is not exempt from public disclosure.

As stated in 10 C.F.R. § 2.328, all hearings at the NRC will be public unless certain national security exceptions apply.[49] The NRC has a strong policy in favor of openness and transparency, and boards have typically worked to ensure that a broad cloak of secrecy is not cast over adjudicatory proceedings that are required to be public.[50] A party who wishes to withhold a document from the public or exclude members of the public from a hearing before an

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46 Protective Order (Feb. 8, 2021), at 1 n.2 (ADAMS Accession No. ML21039A629).

47 TVA Motion at 2, 5.

48 *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (allowing dissemination of "identical information covered by the protective order as long as the information is gained through means independent of the court's processes").

49 *See* 10 C.F.R. § 2.328. The regulation provides an exception for hearings regarding restricted data, defense, or safeguards information, and also allows the Commission to order a hearing closed.

50 See *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant), LBP-11-5, 73 NRC 131, 133 (2011) (citing *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 478 n.23 (2010); *cf.* Enhancing Public Participation in NRC Meetings; Policy Statement, 67 Fed. Reg. 36,920 (May 28, 2002); *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) ("The principle that justice cannot survive between walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" (citation omitted)).

adjudicatory board bears the burden of proving that the document it is seeking to withhold fits into one of the specifically enumerated exceptions to the general public availability rule.[51] Withholding a document from the public necessarily means that any portions of the hearing regarding that document must be closed to the public, thus the Board must ensure that documents are not inappropriately withheld from public disclosure.[52] The Commission has consistently emphasized providing broad public access to relevant documents in the hearing process.[53] Despite TVA's observation that NRC rules provide for the protection of certain information,[54] open disclosure and public access to a wide range of information and documents are "[a]t the foundation of the Commission's approach[,]" absent a clear reason to withhold the information.[55]

The Supreme Court has held that there is a presumption of openness grounded in the First Amendment allowing public access to adjudicatory proceedings.[56] The Supreme Court seminal case, *Richmond Newspapers*, has been held to apply to administrative proceedings which are quasi-judicial in nature.[57] In a dispute about access to documents, the *South Texas* Board cited *Richmond Newspapers* and found that Subpart L proceedings must be open to the public absent one of the § 2.328 national security exceptions, and that curtailing the public

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51 *See S. Tex. Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-10-2, 71 NRC 190, 198 (2010).

52 *Id.* at 206-07.

53 *See South Texas*, LBP-10-2, 71 NRC at 208 ("Clearly, then, the NRC 'experience' with adjudicatory hearings is one of openness to the public.").

54 TVA Motion at 13 (citing Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg 2,182, 2,195 (Jan. 14, 2004)).

55 69 Fed. Reg at 2,195 (stating that "[a]t the foundation of the Commission's approach are the provisions in Subparts C and G which provide for mandatory disclosure of a wide range of information, documents, and tangible things relevant to the contested matter in the proceeding, and the NRC's provisions for *broad public access* to documents in § 2.390.").

56 *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

57 *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002).

availability of documents, would have the impact of curtailing the public access to the adjudicatory proceeding. The case for requiring openness in this type of Subpart G proceeding is even more compelling given how Subpart G bears even more quasi-adjudicatory characteristics.

A dispute involving the employee protection regulations necessarily involves a substantial number of personal details regarding the individuals involved; such disputes have been adjudicated in open hearings.[58] Indeed, by definition, an employee protection case involves an employee of a nuclear licensee who was subject to an adverse action by their employer. One of the defenses available to the employer is that it would have taken the same action against the employee regardless of that employee's involvement in protected activity. Thus, such actions involve a substantial number of documents that discuss interactions between individuals, as well as personnel documents.

A. The Settlement Agreement is not exempt from public disclosure

TVA claims that the NRC's public disclosure of TVA's Settlement Agreement is contrary to 10 C.F.R. § 2.390(a)(6), which exempts from public disclosure "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[59] Specifically, TVA claims the document falls within the exemption "prohibiting public disclosure of 'personnel … files.'"[60] The NRC disclosed the Settlement Agreement as part of its mandatory initial disclosures submitted on February 18, 2021.[61]

In making a disclosure determination under its discovery obligations, the Staff appropriately considered the Settlement Agreement's "relevan[ce] to disputed issues alleged

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58 *See, e.g.*, *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), LBP-03-10, 57 NRC 553 (2003).

59 TVA Motion at 13.

60 *Id*. at 14.

61 The Staff since made the Settlement Agreement, like the two other documents at issue, non-public in ADAMS, within one business day of TVA's request, pending resolution of this matter.

with particularity in the pleadings."[62] Personnel information in the Settlement Agreement is undoubtedly relevant to the disputed issues in this case. As discussed *supra,* the Staff also takes seriously its legal mandate to hold hearings in public and generally avoids making relevant documents confidential, absent a clear protection privilege.[63] In a proceeding on an enforcement action where employee discrimination is at the heart of the case, personnel information naturally holds greater relevance, which tends to support its public disclosure to ensure that the case is litigated in public.

B. TVA fails to meet its "heavy burden" to show a privacy interest outweighs public disclosure

When more than a *de minimis* privacy interest exists in the nondisclosure of a document, courts apply a balancing test to determine "whether the public interest in disclosure outweighs the individual privacy concerns" against disclosure.[64] The Supreme Court has held that a "blanket exemption for personnel files" does not apply, rather "only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy" qualify for an exemption from public disclosure.[65] The U.S. Court of Appeals for the District of Columbia Circuit has held that the "clearly unwarranted" language "instructs us to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure," which places a "heavy burden" on the agency seeking nondisclosure.[66]

TVA fails to demonstrate a "clearly unwarranted" invasion of personal privacy by the public disclosure of the Settlement Agreement. Contrary to TVA's assertions, and consistent

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62 10 C.F.R. § 2.709(a)(6)(i)(A).

63 *See id.* § 2.328.

64 *Multi Ag Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002)).

65 *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372, 382 (1976) (referring to the Freedom of Information Act (FOIA) Exemption 6 at 5 U.S.C. § 552(b)(6), the identical language of which is found in 10 C.F.R. § 2.390(a)(6)).

66 *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982)).

with the FOIA personal privacy information exemption, the Staff took reasonable precautions to prevent public disclosure of personal privacy information in its disclosures pursuant to 10 C.F.R. § 2.390(a)(6).[67] TVA asserts that the Staff did not follow agency guidance for the disclosure exemption, but the Staff did fully consider and follow its internal guidance.[68] In its deliberations, the Staff determined that performance and disciplinary information, which TVA claims warrant the personal privacy exemption,[69] bear directly on the disputed issues in this proceeding and, on balance, warrant disclosure. Moreover, TVA does not provide any details as to how the Settlement Agreement's disclosure presents a real privacy concern. The Staff is required to disclose documents in its possession that are relevant to the disputed issues; the Settlement Agreement falls within this parameter. While it is true that the Settlement Agreement provides information specific to an individual, it is simply one of many documents that will provide such information in this proceeding given that the proceeding revolves around personnel actions. Balanced against the strong interest in public disclosure, TVA's vague assertions of individual privacy concerns fail to tip the scales in favor of nondisclosure.

The notion that TVA now seeks to protect a non-employee's privacy interests rings hollow. TVA quotes *Kowack* for the proposition that the public interest in a single employee's settlement agreement could not outweigh even a minimal privacy interest of that employee.[70] In *Kowack*, the U.S. Court of Appeals for the Ninth Circuit held that the U.S. Forest Service properly applied the FOIA personal privacy exemption to a certain employee's pre-grievance

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67 TVA Motion at 14, 16. *See* 5 U.S.C. § 552(b)(6). As a general practice, as part of its investigations or enforcement activities, the NRC Staff does not collect personal privacy information unless relevant to the case. Pursuant to 10 C.F.R. § 2.390(a)(6), Staff worked diligently to redact personal privacy information from its public disclosures, which primarily consisted of home addresses, personal email addresses, and personal cell phone numbers not used for work.

68 *See* U.S. Nuclear Regulatory Commission, *Freedom of Information Act Guide*, https://www.nrc.gov/reading-rm/foia/freedom-info-act-guide.pdf.

69 TVA Motion at 15.

70 *Id.* at 14 (quoting *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1136 (9th Cir. 2014)).

settlement agreement that another employee (with a grievance complaint) wanted publicly disclosed, because that single agreement was "greatly limit[ed] in its ability to reveal anything significant" about how the agency generally operated.[71] But the facts in *Kowack* are distinguishable from this proceeding because the Settlement Agreement TVA seeks to protect here concerns not its general operations but rather its actions specifically related to the discrimination underlying the employee protection violations TVA challenges in this proceeding. This direct nexus to the conduct underlying the violation favors public disclosure of the document "to open agency action to the light of public scrutiny" absent TVA showing a clearly unwarranted personal privacy concern.[72] Thus, in considering the potential privacy concerns balanced against the public interest, and given that this case necessarily includes personal details of the individuals involved, public disclosure prevails.

In sum, the ultimate decision over whether to publicly disclose the Settlement Agreement comes down to a balancing of the interests in public disclosure against personal privacy concerns. TVA fails to meet its heavy burden to demonstrate that the Settlement Agreement's public disclosure creates a clearly unwarranted invasion of personal privacy because TVA has not demonstrated that it is harmed by the disclosure, and it cannot assert harm on another's behalf. Thus, the strong presumption in favor of public disclosure of the Settlement Agreement must prevail, and the Board should rule accordingly.[73]

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[71] *Kowack*, 766 F.3d at 1136.

[72] *Rose*, 425 U.S. at 372.

[73] *U.S. Dept. of State v. Ray*, 502 U.S. 164, 177 (1991).

CONCLUSION

For the reasons stated above, TVA has not identified a legally sufficient basis for its requests for the destruction, return, or withholding of these three documents. Consistent with both caselaw and NRC policy, the Staff appropriately included the documents in its initial public disclosures. The Board should therefore deny TVA's motion.

Respectfully submitted,

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Dated in Falls Church, VA
this 11th day of March 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of TENNESSEE VALLEY AUTHORITY (Enforcement Action)	Docket Nos. EA-20-006 EA-20-007

Certificate of Service

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC Staff Answer to TVA Motion Regarding Disclosures," dated March 11, 2021, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 11th day of March 2021.

/Signed (electronically) by/
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Dated in Falls Church, VA
this 11th day of March 2021