September 13, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	IA-20-009
ERIN HENDERSON	)	

ERIN HENDERSON'S REQUEST FOR A HEARING

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I. Introduction

The Staff's August 24, 2020 Notice of Violation[1] to Ms. Erin Henderson establishes a dangerous new precedent that has already sent a chill through the nuclear workforce. The Staff issued a Severity Level II violation to Ms. Henderson because she filed a harassment complaint, which was investigated and substantiated by an experienced, independent TVA attorney. The consequences of the Staff's action cannot be understated. The Staff's NOV has the serious potential to silence victims of harassment. It creates a perverse incentive for management to turn a blind eye to unacceptable workplace behavior. And it empowers harassers, giving them license to weaponize protected activity against their victims. This cannot be the Commission's intent.

Today's leaders, no matter the industry, are required to take harassment claims seriously and investigate them. In the nuclear industry, zero tolerance for bullying and harassment is essential to ensure a Respectful Work Environment (one of the Commission's own established

[1] Notice of Violation to Ms. Erin Henderson, Nuclear Regulatory Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (the "NOV" or "Violation"). As required by the NOV, Ms. Henderson will separately submit her Reply to the Notice of Violation to the Director of Enforcement, along with a copy of this Request for Hearing.

Positive Traits of a Nuclear Safety Culture)[2] where trust and respect permeate an organization and are critical to maintaining a safety conscious work environment. But according to the Staff, an investigation and any subsequent personnel action may now constitute retaliation—even if the investigation confirms that actual, serious misbehaviors occurred as it did in Ms. Henderson's case—if the Staff believes a victim's complaint included any allegedly protected activity. In an era of increased focus on harassment and victims' rights, the Staff's new precedent is a decided step backwards.

This is not speculation or conjecture. In the case at hand, the primary individual (a former Sequoyah employee) who engaged in a sustained campaign of disrespectful conduct towards Ms. Henderson over nearly two years has renewed his inappropriate behaviors, this time directed at other TVA employees involved in or with knowledge of the underlying events. On August 26, 2020, two days after the violations against Ms. Henderson, TVA, and another TVA executive were announced, the former Sequoyah employee texted a different TVA employee, stating "You are as guilty and complicit as all of them." The TVA employee appropriately did not respond to this text message. Without prompting, the former Sequoyah employee texted the TVA employee again the next morning, stating in part:

> Hopefully you will develop some minimum level of backbone and ethics, considering you are working in nuclear power…hard to believe you were ever any type of military leader. I'm guessing you would have switched sides as soon as conditions necessitated. Decisions in nuclear power are much more important than your career aspirations.

The same day, the former Sequoyah employee also sent an obviously sarcastic message to Ms. Henderson's supervisor, Mr. Joseph Shea, saying "Thanks for all you did."

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[2] NRC Traits of a Positive Safety Culture, *available at* https://www.nrc.gov/about-nrc/safety-culture/sc-policy-statement.html#traits.

These text messages are indicative of the types of inappropriate and unprofessional behaviors suffered by Ms. Henderson at the hands of the former Sequoyah employee for nearly two years. Not only do these text messages demonstrate the type of provocation that the former Sequoyah employee engages in (and which prompted Ms. Henderson's March 9, 2018 complaint), they show the stark consequences that immediately resulted from the NOV. It *emboldened* the perpetrator to continue his disrespectful and unprofessional conduct. More egregious is the fact that he directed it at someone who was interviewed as part of the NRC Staff investigations into these matters, and who was involuntarily mobilized in support of the Department of Defense's Covid-19 operations and is presently serving in a senior leadership capacity protecting the nation.

As presented at Ms. Henderson's PEC at length,[3] Ms. Henderson filed her March 9, 2018 complaint because of an extensive campaign of disrespectful behaviors directed towards her over nearly two years.[4] Prior to filing her complaint, Ms. Henderson—and others—raised the former Sequoyah employee's inappropriate behaviors to senior TVA leaders.[5] Even TVA's Employee Concerns Program documented the former Sequoyah employee's inappropriate conduct towards Ms. Henderson long before she filed her March 9, 2018 complaint. But the inappropriate behaviors did not stop, to the point where Ms. Henderson attempted to quit her job.[6] The Chief

[3] This request for a hearing references evidence provided at the June 23, 2020 PEC for Ms. Henderson, the June 30, 2020 PEC for TVA and the June 24, 2020 PEC for another individual involved in these matters. While we have not attached these exhibits to this Request for Hearing due to privacy concerns, the exhibits were provided to the NRC Staff for the PECs and are available to the Commission for review. We will also reference statements made at Ms. Henderson's PEC itself, which is available to the Commission for review from the NRC Office of Enforcement.

[4] Transcript of Pre-decisional Enforcement Conference Re Erin Henderson, No. IA-20-009 at 26 (June 23, 2020) (Hereinafter "Henderson PEC Tr.").

[5] Henderson PEC Tr. at 81.

[6] *Id.* at 31.

Nuclear Officer at the time intervened and told Ms. Henderson she could file a complaint if she thought she was being harassed.[7] The company independently investigated her complaint and substantiated it. Ms. Henderson explained to the Staff the numerous legitimate and nondiscriminatory reasons that formed the basis for her complaint.

In fact, when the former Sequoyah employee was being placed on paid administrative leave as a result of the substantiated findings against him, he *admitted* to his misbehaviors, stating that he "let [his] ego get out of control," and even *he* proposed taking corrective actions to address his conduct.[8] He did not claim retaliation at that time. Numerous TVA managers and experienced human resources professionals reviewed his conduct, concluded it was inappropriate, if not egregious, and determined that disciplinary action was warranted. Some TVA managers and experienced human resources professionals believed he should be terminated.

Despite this well-documented history of disrespectful conduct, and contemporaneous documentary evidence of the numerous TVA managers and human resources professionals who found that disciplinary action was required (all of which was provided to the NRC Staff at Ms. Henderson's, TVA's, and other individuals' pre-decisional enforcement conferences), the Staff still inexplicably determined that Ms. Henderson's *filing a complaint* constituted "deliberate misconduct" under 10 C.F.R. § 50.5. Ms. Henderson's NOV is a disturbing departure from the Commission's policies encouraging nuclear plant employees to raise concerns and its regulations governing employment actions.

[7] *Id.* at 31.

[8] *Id.* at 43.

The violation against Ms. Henderson is even more absurd because of the Staff's conclusions related to the former corporate employee, who was one of several individuals Ms. Henderson identified in her complaint as contributing to the issues she faced. As will be detailed below, the former corporate employee was terminated for disrespectful and unprofessional conduct towards Ms. Henderson that occurred *after* Ms. Henderson filed her complaint. It is simply not possible to find that Ms. Henderson's complaint was deliberate misconduct with respect to the former corporate employee when, according to the NRC Staff, her complaint merely triggered the investigation that ultimately revealed the former corporate employee's wrongdoing.

Ms. Henderson has a clear constitutional *right* to an adjudicatory hearing, notwithstanding the fact that the Staff issued no order to her. As discussed in detail below, recent Supreme Court precedent in *FCC v. Fox Television Stations*[9] provides Ms. Henderson with a due process *right* to an adjudicatory hearing to challenge the NRC Staff's enforcement action because the NOV results in legal consequences and significant reputational injury to Ms. Henderson. In addition, as explained below, the Commission must also grant Ms. Henderson a hearing because the NRC Staff's enforcement action is unconstitutionally vague, and arbitrary and capricious. The NRC Staff's enforcement action against Ms. Henderson contradicts years of Commission policy, guidance, and prior agency action (providing her with no notice of a potential violation) and muddies the waters for licensees going forward, potentially chilling the expression of concerns. The Staff has unilaterally departed from its own guidance, without explanation, and declared that the filing of a complaint is now an "adverse action" because the complaint "triggered" an investigation which resulted in employment consequences.

[9] *FCC v. Fox Television Stations*, 567 U.S. 239 (2012).

Finally, even if the Commission believes that Ms. Henderson's due process rights have been satisfied, the Commission should nevertheless exercise its discretionary authority and order a hearing under the circumstances of this case. As discussed herein, the Staff has departed significantly from past practice by (1) issuing an NOV based on a person merely filing a complaint; (2) relying exclusively on an inappropriate "nexus" standard for finding deliberate misconduct (which finding requires a far greater showing) and which was raised for the first time following the PEC; and (3) entirely ignoring the applicable legal standards set forth in 10 C.F.R. §§ 50.5 and 50.7. In addition, the NOV must be reviewed in a discretionary hearing because it clearly relies on false assumptions and factual errors, rather than actual evidence or legal foundation.

For these reasons, Ms. Henderson respectfully requests that the Commission grant Ms. Henderson an adjudicatory hearing on the NOV.

II. Procedural Background

On March 2, 2020, the NRC Staff issued to Ms. Henderson a Notice of Apparent Violation, No. IA-20-008 ("NOAV"). The NOAV stated that based on two recent investigations, the NRC Staff had reason to believe Ms. Henderson engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5 which caused TVA to "discriminate against a former Sequoyah employee and a former corporate employee for engaging in protected activities"[10] in violation of 10 C.F.R. § 50.7. The NRC Staff provided to Ms. Henderson heavily redacted copies of the Office of Investigation ("OI") Reports of Investigation numbers 2-2018-033 (the "OI Report 2-2018-033," related to the former Sequoyah employee) and 2-2019-015 (the "OI Report 2-2019-015," related to the former corporate employee).

[10] Letter to Erin Henderson re: Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Mar. 2, 2020) (hereinafter the "Notice of Apparent Violation" or "NOAV").

On June 23, 2020, Ms. Henderson participated in a Pre-Decisional Enforcement Conference ("PEC") at which she provided overwhelming evidence demonstrating that she did not engage in deliberate misconduct with the intent to cause TVA to violate the Commission's requirements, or otherwise engage in retaliation against anyone for participating in protected activities.[11] She demonstrated that her complaint to TVA was submitted based on legitimate and nondiscriminatory reasons. In addition, Ms. Henderson identified numerous factual and legal errors in both OI Report 2-2018-033 and OI Report 2-2019-015.

Despite this evidence, the NRC Staff nevertheless chose to issue Ms. Henderson a Severity Level II NOV. According to the NOV, the Staff determined that the former Sequoyah employee "engaged in protected activity when raising concerns regarding the regulatory response to the Kirk Key and Service Life Non-Cited Violations (NCVs) and when filing Employee Concerns Program (ECP) complaints alleging that [Ms. Henderson] created a chilled work environment."[12] The NOV further stated there was a "nexus" between the complaint and the former Sequoyah employee's protected activities.[13] Regarding the former corporate employee, the NOV stated that the former corporate employee "engaged in protected activity when expressing concerns regarding the chilled work environment that [Ms. Henderson] w[as] creating."[14] The NOV stated that Ms. Henderson identified the former corporate employee as the source of these concerns in her complaint, and because the complaint "triggered the [former corporate employee] investigation," the complaint "demonstrates the nexus between the protected activity and the adverse action."[15] The Staff's "findings" concerning "triggering" an

[11] *See, e.g.*, Henderson PEC Tr. at 32.
[12] NOV at 1.
[13] *Id.* at 1-2.
[14] *Id.* at 2.
[15] *Id.* at 2.

investigation and the purported "nexus" between Ms. Henderson's complaint and the allegedly protected activities were not previously raised in the investigative reports or the NOAVs.

III. Factual Background

The NOV stems from a harassment and hostile work environment complaint Ms. Henderson filed with Human Resources and with her supervisor, Mr. Joe Shea (then the Vice President of Regulatory Affairs and Support Services at TVA), on March 9, 2018.[16] In her complaint, Ms. Henderson identified certain TVA employees, including the former Sequoyah employee and the former corporate employee, who were "complicit in workplace bullying and creating a hostile work environment for [Ms. Henderson]."[17] Ms. Henderson filed her complaint in an attempt to stop a two-year campaign of harassment and other inappropriate behavior directed towards her that began in approximately April 2016 after she raised an ethical concern related to a potentially inappropriate relationship between two other TVA employees, one of which was the former Sequoyah employee.[18]

A. Ms. Henderson's April 2016 Ethics Concern

In April 2016, Ms. Henderson raised an ethical concern over whether the Corporate Functional Area Manager, or "CFAM" could provide unbiased oversight of the Sequoyah Nuclear Plant. This concern arose from an instance when the CFAM displayed partiality towards the former Sequoyah employee.

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[16] Formal Complaint filed by Erin Henderson dated March 9, 2018 (attached as Exhibit 16 to OI Report 2-2018-033 and Exhibit 10 to OI Report 2-2019-015) (referred to hereafter as the "Henderson Complaint").

[17] *Id.* at 1.

[18] Henderson PEC Tr. at 26 ("I was subjected to two years of harassment from [the former Sequoyah employee], all because I did my job by raising a potential ethics concern to [the former Sequoyah employee's] supervisor and HR, which led to an ethics investigation, in April 2016.").

Specifically, in April 2016 the Sequoyah plant failed to make a timely 8-hour report to the NRC when the plant determined that the high-pressure fire protection system was isolated to a major portion of the site.[19] Ms. Henderson challenged this in an email to the CFAM, one of Ms. Henderson's subordinates, who had oversight of licensing at the nuclear plant sites.[20] The CFAM became defensive of the former Sequoyah employee's failure to make the timely 8-hour report, even though such report was required (and was ultimately provided).[21] The CFAM's defensive reaction, specifically in protection of the former Sequoyah employee, made Ms. Henderson question whether the CFAM was capable of providing unbiased oversight of Sequoyah's compliance activities.[22] During Ms. Henderson's subsequent discussions about this with Human Resources, Ms. Henderson learned of other data points indicating that the CFAM and the former Sequoyah employee might have a close personal relationship, such that it presented a potential conflict of interest.[23]

Ms. Henderson raised these issues with her supervisor, Mr. Shea.[24] In conjunction with Human Resources, it was collectively determined that Human Resources should investigate the potential ethics concern.[25] However, while the Human Resources' ethics investigation into the former Sequoyah employee was supposed to be confidential, it was not.[26] The former Sequoyah

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[19] Henderson PEC Tr. at 72.

[20] Henderson PEC Exhibit 66 (April 7, 2016 email from Ms. Henderson to Mr. Shea explaining how she had challenged the former Sequoyah employee on the lack of documentation for critical thinking regarding the failure to make the 8-hour report); Henderson PEC Tr. at 70.

[21] The NRC was notified on April 7, 2016 at 6:01PM. Henderson PEC Exhibit 67 (April 7, 2016 email from the Nuclear Duty Officer regarding SQN's 10 C.F.R. § 50.72 notification to the NRC); *see also* Henderson PEC Exhibit 69, which notes the significance of the event (April 7, 2016 email from Ms. Henderson to Mr. Shea regarding the 50.72 notification).

[22] *Id.* at 72.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

employee and the CFAM became aware of the investigation almost immediately after it commenced. In addition, the former Sequoyah employee and the CFAM learned that records of their gate logs (i.e., when they entered and left a protected area of the site) were obtained and reviewed by Human Resources during its investigation.[27]

The former Sequoyah employee erroneously believed Ms. Henderson was responsible for having his gate logs reviewed, even though that action was the sole responsibility of Human Resources. As the investigation into Ms. Henderson's complaint ultimately concluded, the former Sequoyah employee remained "ticked" over the next two years that his gate log records were pulled, causing him to engage in a pattern of disrespectful conduct towards Ms. Henderson.[28]

In summary, it was Ms. Henderson who first engaged in protected activity by filing a legitimate ethics concern. In response, as detailed below, she was subjected to a sustained campaign of retaliatory disrespectful and unprofessional conduct by the former Sequoyah employee.

B. Ms. Henderson Suffered Disrespectful And Unprofessional Conduct Over Nearly Two Years Before Filing Her March 9, 2018 Complaint

The former Sequoyah employee's nearly two year pattern of disrespectful and unprofessional behaviors and actions directed towards Ms. Henderson included leaving Ms. Henderson out of key meetings and communications on important regulatory decisions; openly refusing to talk to Ms. Henderson about regulatory issues; disparaging Ms. Henderson to her

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[27] *Id.* at 73.

[28] Report of Investigation of Erin Henderson's Allegations of Harassment and Hostile Work Environment by the Tennessee Valley Authority, dated May 25, 2018, at page 28 (attached as Exhibit 17 to OI Report 2-2018-033). The May 25, 2018 TVA Investigation Report was finalized on August 10, 2018 and is attached as Exhibit 18 to OI Report 2-2018-033 and Exhibit 14 to OI Report 2-2019-015).

subordinates; berating Ms. Henderson in emails to a large audience; creating a very challenging work environment for Ms. Henderson's subordinates; and otherwise preventing Ms. Henderson from being able to do her job.[29]

During their PECs, both Ms. Henderson and TVA provided the NRC Staff with detailed information and contemporaneous documentary evidence demonstrating the disrespectful behavior and inappropriate conduct suffered by Ms. Henderson. We summarize below representative examples of the conduct Ms. Henderson suffered and the actions TVA management took to address these issues.[30] To be clear, these are not all the examples. But they are many of the examples for which Ms. Henderson has documentation. Indeed, as Ms. Henderson explained during her PEC, she did not begin taking notes on these instances of disrespectful conduct until early 2017.

1. The Former Sequoyah Employee Disparaged Ms. Henderson To Her Subordinates

- On February 14, 2017, one of Ms. Henderson's subordinates told Ms. Henderson that the former Sequoyah employee was open about his hostility toward her.[31]
- On February 16, 2017, one of Ms. Henderson's subordinates told Ms. Henderson that the former Sequoyah employee puts him in a bad place by speaking very negatively about Ms. Henderson, and that if the former Sequoyah employee is that open with him, he could only imagine what else the former Sequoyah employee is saying about Ms. Henderson. Ms. Henderson told this to Mr. Shea the next day, February 17.[32]

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[29] Henderson PEC Tr. at 73-74.

[30] The PEC transcripts and PEC exhibits provide a more complete discussion of all of the inappropriate behaviors suffered by Ms. Henderson and TVA management's actions to address them.

[31] Henderson PEC Exhibit 30 (Henderson PEC Exhibit 30 consists of excerpts of the contemporaneous notes Ms. Henderson kept, which documented her interactions with the former Sequoyah employee and others).

[32] *Id.*

- On March 16, 2017, two of Ms. Henderson's subordinates noted that the former Sequoyah employee had a hostile tone on phone calls lately. One subordinate stated that his hostility is directed toward Ms. Henderson, not the group. Both subordinates agreed that the hostility is because the former Sequoyah employee believed that "[the CFAM] was done wrong" and one subordinate stated that the former Sequoyah employee discusses that frequently.[33]
- On March 17, 2017, Ms. Henderson learned that the former Sequoyah employee was complaining to her husband's subordinates about her husband's use of personal leave around the time of an NRC inspection even though it was approved by her husband's supervisor. The former Sequoyah employee also brought Mr. Henderson's leave up with Ms. Henderson's subordinate.[34]
- On March 27, 2017, Ms. Henderson's subordinate told her that the former Sequoyah employee "was extremely confrontational and defensive while her subordinate was at the site" the prior week.[35]
- On March 29, 2017, an individual contributor in Corporate Nuclear Licensing (CNL) told an administrative assistant in the group that he heard that the former Sequoyah employee "has been expressing his issues with [Ms. Henderson] to people and making it difficult to work with him."[36]

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

- On April 7, 2017, Ms. Henderson's subordinate told her that the former Sequoyah employee's hostility regarding Ms. Henderson stems from his belief that Ms. Henderson "ruined" the CFAM's career and life.[37]
- That same day, April 7, 2017, Ms. Henderson e-mailed the former Sequoyah employee saying "the ongoing adversarial commentary is not helpful to any of us. We have a responsibility to help our respective groups get to the right place together and ensure a respectful work environment. If you'd like to discuss how we can better do that, I'd be happy to come to the site to talk about it."[38] As Ms. Henderson explained at her PEC, the former Sequoyah employee ignored Ms. Henderson's offer.
- On July 3, 2017, Mr. Shea told Ms. Henderson that the former Sequoyah employee sent an email "whining" about her. Ms. Henderson responded to Mr. Shea that the former Sequoyah employee's behavior is never going to end and no one is doing anything about it.[39]

2. The Former Sequoyah Employee Left Ms. Henderson Out Of Communications And Meetings, And Even Refused To Speak With Her

- On January 28, 2017, Ms. Henderson was left off of an e-mail the former Sequoyah employee sent to other CNL personnel regarding a Sequoyah Notice of Enforcement Discretion, on which she should have been included.[40] This was not a one-off or unique

[37] Henderson PEC Exhibit 83 (April 7, 2017 email from Ms. Henderson to Mr. Shea, documenting the former Sequoyah employee's hostility toward employees in Ms. Henderson's organization. The email also includes Ms. Henderson's email to the former Sequoyah employee requesting a reduction in the ongoing adversarial commentary and a request to work towards ensuring a respectful work environment).

[38] *Id.*

[39] Henderson PEC Exhibit 30.

[40] Henderson PEC Exhibit 71 (January 28, 2017 email from the former Sequoyah employee regarding a Notice of Enforcement Discretion (NOED) on which he excludes Ms. Henderson).

event, or even the first time that this occurred, as demonstrated by Ms. Henderson's subordinate taking special note of an occasion when Ms. Henderson *was* included on an email from the former Sequoyah employee one month earlier.[41]

- On January 29, 2017, after the former Sequoyah employee sent a licensing email to Mr. Shea and one of Ms. Henderson's subordinates, but not her, Ms. Henderson e-mailed the former Sequoyah employee noting that she was often not included on Sequoyah licensing correspondence and asking that he include her on relevant communications.[42] Ms. Henderson informed the former Sequoyah employee's supervisor of this request.
- On February 15, 2017, Mr. Shea told Ms. Henderson that the former Sequoyah employee was "unwilling to talk" to Ms. Henderson at all to develop a proposed plan on a licensing issue. Mr. Shea explained to Ms. Henderson that the former Sequoyah employee "would like to express all of the reasons that he does not like" her.[43]
- On September 6, 2017, the former Sequoyah employee created a draft plan for submitting and communicating the denial/backfit letter for the service life Non-Cited Violation ("NCV"), assigning action items to Ms. Henderson but not informing Ms. Henderson.[44]
- On October 3, 2017, the former Sequoyah employee failed to include Ms. Henderson, or her team, on an e-mail regarding a root cause analysis team for a security issue.[45]

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[41] Henderson PEC Exhibit 70 (December 7, 2017 email to Ms. Henderson from her subordinate, commenting on the fact that the former Sequoyah employee had actually included her on an email distribution).

[42] Henderson PEC Exhibit 72 (January 29, 2017 email from the former Sequoyah employee to Mr. Shea and Ms. Henderson's subordinate on the NOED issue, not including Ms. Henderson on distribution).

[43] Henderson PEC Exhibit 30.

[44] Henderson PEC Exhibit 78 (September 8, 2017 email from Mr. Shea's assistant to Ms. Henderson forwarding the former Sequoyah employee's draft submittal/communication plan, which the former Sequoyah employee had not distributed to Ms. Henderson).

[45] Henderson PEC Exhibit 73 (October 3, 2017 email from Ms. Henderson's subordinate to Ms. Henderson, forwarding information from the former Sequoyah employee on the planned RCA team, which the former Sequoyah employee had not distributed to Ms. Henderson).

- On October 4, 2017, the former Sequoyah employee emailed individuals in CNL asking "corporate licensing to weigh-in" on an issue but did not include Ms. Henderson, who was the Senior Manager of CNL.[46]
- On October 4, 2017, Mr. Shea noted that the former Sequoyah employee was leaving Ms. Henderson off emails again related to a security issue. Ms. Henderson told Mr. Shea that one of her subordinates must have also noticed since that subordinate is forwarding the emails to her, including one related to a critical decision-making phone call. Ms. Henderson told Mr. Shea that she did not mention it because she "didn't want to keep coming to him on it." Mr. Shea and Ms. Henderson also agreed that "although the peer team was not high performing, for the foreseeable future [Ms. Henderson] needed to limit [her] interaction with the peer team so as to minimize the interface with [the former Sequoyah employee]."[47]
- On that same day, the former Sequoyah employee did not invite Ms. Henderson to a meeting on the topic of requesting a Regulatory Conference or providing a written response. He did include Mr. Shea, and one of Ms. Henderson's direct reports.[48]
- On October 19, 2017, Mr. Shea e-mailed the former Sequoyah employee telling him that it was Mr. Shea's "expectation" that Ms. Henderson "would be with" the former

[46] Henderson PEC Exhibit 74 (October 4, 2017 email from Ms. Henderson's subordinate to Ms. Henderson, forwarding an email from the former Sequoyah employee with his request for CNL to weigh in on a technical issue, on which he had not included Ms. Henderson.).

[47] Henderson PEC Exhibit 30.

[48] Henderson PEC Exhibit 77 (October 5, 2017 email from Ms. Henderson's subordinate to Ms. Henderson, forwarding a meeting invite from the former Sequoyah employee for a discussion on the Regulatory Conference, on which the former Sequoyah employee had not included Ms. Henderson).

Sequoyah employee at a meeting, about which meeting the former Sequoyah employee had not informed Ms. Henderson.[49]

- On October 26, 2017, Ms. Henderson sent an e-mail to Mr. Shea stating that she "continue[s] to be a little frustrated with the lack of communication coming out of SQN," after Sequoyah licensing scheduled a mock inspection without informing Ms. Henderson's team, even though Ms. Henderson had assigned someone to track progress on the inspection.[50]
- On November 17, 2017, Mr. Shea directed the former Sequoyah employee to coordinate with Ms. Henderson on a strategy on backfit issues. The former Sequoyah employee responded that he would call Ms. Henderson that afternoon, but never did.[51]

3. The TVA Employee Concerns Program Documented The Former Sequoyah Employee's Inappropriate Behaviors

- During February and March of 2017, Ms. Henderson spoke to the former Sequoyah employee's then-supervisor, Mr. Shea, and the Employee Concerns Program (ECP) Senior Manager, about the former Sequoyah employee's behavior, and explained to them that she felt that the former Sequoyah employee's was creating a hostile work environment for her.[52]
- On April 10, 2017, Mr. Shea met with the Site Vice President of Sequoyah, and discussed the former Sequoyah employee's behavior with him.[53]

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[49] Henderson PEC Exhibit 76 (October 19, 2017 email from Mr. Shea to the former Sequoyah employee noting expectation that Ms. Henderson will be at briefing with the CNO).

[50] Henderson PEC Exhibit 75 (October 26, 2017 email from Ms. Henderson to the former Sequoyah employee asking for a status update on the 95001 inspection, and subsequent email from Ms. Henderson to Mr. Shea expressing frustration at the lack of communication from SQN).

[51] Henderson PEC Exhibit 79 (Nov. 17, 2017 email from Ms. Henderson to Mr. Shea stating that "of course" the former Sequoyah employee did not call her).

[52] Henderson PEC Exhibit 30.

[53] *Id.*

- On April 17, 2017, only a week later, the former Sequoyah employee filed a concern with ECP, alleging instead that it was Ms. Henderson who had been harassing him, and that she had created an environment that could have a negative impact on the Safety Conscious Work Environment.
- On June 13, 2017, ECP issued its report investigating the former Sequoyah employee's ECP concerns. ECP did not substantiate the former Sequoyah employee's concerns. However, the report did find that individuals reported that *the former Sequoyah employee* was engaging in inappropriate behaviors, which these individuals attributed to Ms. Henderson's 2016 ethics concern.[54] More specifically, the ECP report stated that: "Interviews further confirmed the belief that the [Concerned Individual, the former Sequoyah employee] has not been able to move past actions that occurred to his friend as the result of the friend's conflict with the [Senior Manager, Ms. Henderson]"; "One individual stated that [the former Sequoyah employee] is rational, and middle of the road on all issues unless they involved [Ms. Henderson]. Others were aware of instances where [the former Sequoyah employee] had deleted [Ms. Henderson] from emails chains on which [Ms. Henderson] had originally been included. One described [the former Sequoyah employee] as digging in whenever [Ms. Henderson] was involved and recalled that he had stated his preference for not working with [Ms. Henderson]."[55]

[54] Henderson PEC Exhibit 4 (June 13, 2017 ECP Summary of Investigation Report No. NEC-17-00410 into the former Sequoyah employee's allegations that Ms. Henderson was harassing him and had created an environment that could negatively impact SCWE, which ECP did not substantiate).

[55] *Id.*

4. The Former Sequoyah Employee's Behaviors Were Repeatedly Raised To TVA Management

- On February 23, 2017, Ms. Henderson spoke with the former Sequoyah employee's supervisor.[56]
- On February 27, 2017, Ms. Henderson spoke with the former Sequoyah employee's supervisor again. The supervisor told Ms. Henderson that he had spoken to the former Sequoyah employee. The supervisor attributed the former Sequoyah employee's behavior to the CFAM.[57]
- On April 10, 2017, Mr. Shea discussed the former Sequoyah employee's behavior with the Site Vice President of Sequoyah.[58]
- On June 15, 2017, Mr. Shea held a discussion with the Site Vice President of Sequoyah and the former Sequoyah employee's supervisor regarding his concern about the ongoing antagonistic relationship by the former Sequoyah employee towards Ms. Henderson.[59]
- On July 25, 2017, Ms. Henderson spoke with Site Vice President of Sequoyah, who stated that he spoke with the former Sequoyah employee. The Site Vice President added that the CFAM is "clearly disgruntled" and that she was constantly in the former Sequoyah employee's ear and that the former Sequoyah employee had not considered how that could be impacting how he interfaced with Ms. Henderson.[60]

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[56] Henderson PEC Exhibit 30.

[57] *Id.*

[58] Henderson PEC Exhibit 85 (Mr. Shea's notes and calendar notice from April 10, 2017, indicating that he raised the former Sequoyah employee's behaviors to the SQN Site VP).

[59] Henderson PEC Exhibit 88 (Mr. Shea's contemporaneous handwritten and later typed notes from June 15, 2017, indicating that he had raised the former Sequoyah employee's behaviors to the SQN Site VP and the employee's direct supervisor).

[60] *Id.*

- On October 11, 2017, Mr. Shea met with the former Sequoyah employee and discussed with him that any manager would have been obligated to seek an investigation into the potential conflict of interest involving him and the CFAM based on the information received.[61]

C. Ms. Henderson Attempted To Resign But Instead Followed Her CNO's Advice To File A Complaint

The inappropriate conduct towards Ms. Henderson culminated in early March 2018. On March 2, 2018, the former Sequoyah employee sent an email to a wide audience with bold, red font, berating Ms. Henderson for having a phone call with the NRC Staff and claiming that the call was unauthorized by the site, even though he was aware beforehand that she would be making the call.[62] This prompted Mr. Shea to directly email the former Sequoyah employee to remind him that he was involved in the discussion where it was decided that Ms. Henderson would do outreach to the NRC Staff, and that fact should not have been unexpected.[63] The former Sequoyah employee's berating email also prompted one of Ms. Henderson's subordinates to reach out to the former Sequoyah employee's supervisor to inform him that the email had an "attacking tone towards Corporate" and was "over the top."[64] This same subordinate had an hours-long closed door meeting with the former Sequoyah employee on March 6, 2018, that

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[61] Henderson PEC Exhibit 89 (Mr. Shea's October 11, 2017 contemporaneous handwritten and later typed notes regarding his meetings with the SQN Site VP and the former Sequoyah employee, stating that he spoke to the former Sequoyah employee about the ongoing issues between him and Ms. Henderson. In response, the former Sequoyah employee "revisited HR investigation," and in reply Mr. Shea "re-explained how [it] had occurred" and stated that "multiple inputs had driven to joint decision with HR that investigation was appropriate").

[62] Henderson PEC Exhibit 91 (March 2, 2018 email from Mr. Shea to former Sequoyah employee, reminding him that Mr. Shea had spoken to him about Ms. Henderson doing outreach to the NRC. This email includes the March 2, 2018, email from the former Sequoyah employee stating in bold red text that "Corporate Regulatory Affairs should not discuss site specific issues with NRC management without first consulting/communicating with the affected site").

[63] *Id.*

[64] Henderson PEC Exhibit 92 (March 2, 2018 text messages between Ms. Henderson and her subordinate discussing her subordinate's conversation with the former Sequoyah employee's supervisor).

included discussion of his irrational behaviors towards Ms. Henderson. Following this meeting, the subordinate texted Ms. Henderson that it was his worry that the former Sequoyah employee "has not yet boiled over."[65]

Following these events, Ms. Henderson attempted to resign.[66] She did not attempt to retaliate against the former Sequoyah employee, nor did she set forth to engage in deliberate misconduct or to cause the company to violate any Commission rule.[67] She sought to escape from the former Sequoyah employee's conduct and was willing to give up her job as the price.[68]

After Ms. Henderson turned in her badge to her secretary, the Chief Nuclear Officer ("CNO") intervened and told Ms. Henderson "if she felt harassed that she could file a complaint" and that "if she felt that she should file a claim of harassment, that [he] would be supportive of that."[69] After additional encouragement from Mr. Shea, Ms. Henderson decided not to resign, and instead submitted a formal complaint to have the company investigate the former Sequoyah employee's pattern of inappropriate and disrespectful conduct.[70] Ms. Henderson was encouraged by the CNO and Mr. Shea[71] to include any and all relevant information in her complaint, along with the names of anyone who may have been involved in creating a challenging work environment for her as a result of the 2016 ethics investigation.

Accordingly, Ms. Henderson identified the former Sequoyah employee, the former corporate employee, and several others in her complaint. Ms. Henderson included the former

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[65] Henderson PEC Exhibit 93 (excerpts of March 6, 2018 text messages between Ms. Henderson and her subordinate, regarding the former Sequoyah employee's text messages to her subordinate).

[66] Henderson PEC Tr. at 30.

[67] *Id.* at 32.

[68] *Id.* at 92 ("I had no reason at that point to believe that [the former Sequoyah employee] would ever stop.").

[69] Henderson PEC Exhibit 1 (Affidavit of CNO).

[70] Henderson PEC Tr. at 31.

[71] *Id.* at 115, 120.

corporate employee in the complaint because she reasonably believed that the former corporate employee was contributing to the work environment issues.[72] Ms. Henderson was aware of an increase in communication between the former corporate employee and the former Sequoyah employee (and others) related to her.[73] In addition, the former corporate employee had taken other (more transparent) actions, such as appearing to work with the former Sequoyah employee to prevent Ms. Henderson from attending an industry meeting.[74]

Ms. Henderson also alleged in her complaint that the former Sequoyah employee and others had made repeated, unfounded assertions that Ms. Henderson was negatively impacting the work environment.[75] Ms. Henderson alleged that such assertions "were filed as a means of retaliation/intimidation" against her after she had raised individual performance issues or behaviors.[76] For example, Ms. Henderson stated that "[a]fter several months of [Ms. Henderson] engaging with site and corporate leadership related to [the former Sequoyah employee's] behaviors, he filed an ECP complaint that [Ms. Henderson] was creating a hostile work environment."[77] The former Sequoyah employee's complaint was not substantiated by TVA's ECP.[78]

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[72] Henderson PEC Tr. at 117-18.

[73] *Id.* at 120.

[74] During preparations for Ms. Henderson's PEC, TVA uncovered emails between the former corporate employee and a former TVA employee that confirmed Ms. Henderson's reasonable beliefs that the former corporate employee was complicit in contributing to the work environment issues suffered by Ms. Henderson. For example, Ms. Henderson's PEC Exhibit 94 is an email between the former corporate employee and the former TVA employee in which the former TVA employee asks the former corporate employee for information related to Ms. Henderson and the CFAM. The former TVA employee explicitly stated that he wanted this information so that he could provide it to another individual currently employed in TVA's Nuclear Licensing group. Instead of refusing to be complicit in the spread of such information, as would be expected of a Manager and leader within TVA, the former corporate employee responded, "[w]e should talk. I've got the rest of the story." Henderson PEC Exhibit 94 (April 26, 2017 emails between former TVA employee and former corporate employee).

[75] *See* Henderson Complaint at p. 3.

[76] *Id.*

[77] *Id.*

[78] *See* Henderson PEC Exhibit 4 (ECP Summary of Investigation NEC-17-00410, dated June 13, 2017).

For another example, Ms. Henderson alleged in her complaint that the March 6, 2018 text messages sent by the former Sequoyah employee to her subordinate claiming (again) that Ms. Henderson was negatively impacting the work environment were part of the retaliation against her because they were not true, as shown by objective data from NRC Staff inspections and Employee Concerns Program surveys demonstrating the work environment was healthy.[79] Indeed, as documented in OI Report 2-2018-033, ECP reviewed these text messages and concluded that "this was not a new issue or a specific concern and therefore did not warrant an ECP investigation."[80]

After Ms. Henderson submitted her complaint on March 9, 2018, she was not otherwise involved in the investigation (other than to be interviewed by the TVA attorney investigator).[81] Nor was she involved in any of the ultimate decisions reached or actions taken by the company following their investigation.[82]

Claims in Ms. Henderson's complaint were ultimately substantiated in part by an independent investigation conducted by the TVA Office of General Counsel ("OGC"). On May 25, 2018, OGC issued its findings that "*Ms. Henderson's allegation of harassment and retaliation is substantiated, and [the former Sequoyah employee's] conduct and behavior violated two Federal statutes, a Federal regulation, and three TVA policies.*"[83] In particular, the investigation found: "[the former Sequoyah employee] is open about his hostility toward Ms.

[79] Henderson Complaint at pp. 3-4.

[80] OI Report 2-2018-033 at p. 28.

[81] Henderson PEC Tr. at 33.

[82] *Id.* at 33.

[83] Exhibit 17 to OI Report 2-2018-033 at 32 (as noted *supra* n. 27, this report was attached as Exhibit 17 to OI Report 2-2018-033).

Henderson"[84]; "[the former Sequoyah employee] says some pretty awful things about Ms. Henderson and he speaks negatively to Ms. Henderson's direct reports"[85]; "[the former Sequoyah employee] remains ticked that Ms. Henderson had him investigated and had his gate records pulled,"[86]; and "[i]n [the investigator's] view, the grudge [the former Sequoyah employee] has against Ms. Henderson is still alive and well."[87]

That same day (May 25, 2018), the former Sequoyah employee's supervisor placed him on paid leave pending further determination of next steps, and the former Sequoyah employee *admitted* to his inappropriate behaviors and disrespectful conduct. Specifically, the former Sequoyah employee's supervisor summarized his discussion with the former Sequoyah employee in an e-mail, stating in part that "[the former Sequoyah employee] knew what this was about without prompting," and "He did not offer a defense other than saying he did not realize he had crossed a line and was sorry if he had done so." In addition, the former Sequoyah employee conceded, "I think I let my ego get out of control and will not do that again. I will create a corrective action contract this weekend."[88]

The May 25, 2018 investigation report was further revised based on questions from management, but the final report of investigation (dated August 10, 2018) reached the same conclusion.[89] However, before any final disciplinary action could be taken based on the Report, the former Sequoyah employee voluntarily resigned on August 16, 2018.

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[84] Exhibit 17 to OI Report 2-2018-033 at 19.

[85] *Id.*

[86] *Id.* at 28.

[87] *Id.*

[88] Henderson PEC Exhibit 2 (May 25, 2018 email from the former Sequoya employee's direct supervisor to the Sequoyah Site Vice President and a Senior Vice President).

[89] The finalized TVA Investigation Report was attached as Exhibit 18 to OI Report 2-2018-033 and Exhibit 14 to the OI Report 2-2019-015.

While the investigation into Ms. Henderson's complaint was ongoing, the former corporate employee made unfounded, disrespectful, and specious allegations about Ms. Henderson directly to Mr. Shea on no less than four separate occasions (March 29, May 7, June 9, and late June/July 2018) and to the attorney investigator, all of which occurred *after* Ms. Henderson filed her March 9, 2018 complaint.[90] These comments were not even known to Ms. Henderson at the time they were made. These comments were further reviewed by TVA. TVA ultimately concluded that the former corporate employee's conduct constituted a sustained campaign of disrespectful conduct directed at Ms. Henderson. TVA then terminated the former corporate employee on January 14, 2019.

IV. Argument

A. Ms. Henderson Has A Constitutional Due Process Right To A Hearing

1. Ms. Henderson Is Entitled To Due Process Because The NOV Subjects Her To Potential Legal Consequences And Causes Her Reputational Injury

While the Commission has previously declined to grant individuals with a Notice of Violation (and no Order) the right to an adjudicatory hearing,[91] more recent Supreme Court precedent controverts that practice in circumstances directly applicable to Ms. Henderson's case. The Supreme Court has found that, even in cases where an agency action does not impose a sanction, an offense (or violation) triggers a right to review, especially when there is a "legal consequence" to the violation. As the Supreme Court explained in the past:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which *directly affect the legal*

[90] Henderson PEC Tr. at 60. In OI Report 2-2019-015, the investigator's analysis of whether protected activity was a contributing factor to adverse action shows that all of the former corporate employee's alleged protected activities occurred after the March 9, 2018 complaint. OI Report 2-2019-015 at 44-49.

[91] *See* Letter from R. A. Meserve to R. Grant (Jan. 18, 2002) (ADAMS Accession No. ML020080088).

> *rights of individuals*, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.[92]

More recently, and directly on point, the Supreme Court has found that there is a sufficient "legal consequence" triggering an individual's due process right when the agency has the "authority to use its [violation] to increase any future penalties" for the recipient.[93] In *FCC v. Fox Television Stations*, the FCC had the statutory authority to use a violation they had issued against Fox as the basis for increasing penalties in the event of future violations, even though the FCC promised that it would not do so. The Court found that even the *possibility* that the FCC could so rely in the future on this past violation amounted to a "legal consequence" such that the original violation entitled Fox to due process.[94]

Precisely the same "legal consequence" is at issue in Ms. Henderson's case. Ms. Henderson's NOV explicitly states that Ms. Henderson "should be aware that if [she is] involved in NRC-licensed activities in the future, *additional* deliberate violations could result in *more significant* enforcement action or criminal penalties."[95] Thus, the NOV on its face results in a clear legal consequence for Ms. Henderson—the potential for more significant future penalties if additional deliberate violations occur—triggering in this proceeding due process protections required by Supreme Court precedent.

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[92] *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (emphasis added).

[93] *FCC v. Fox Television Stations*, 567 U.S. 239, 255 (2012).

[94] *Fox Television Stations*, 567 U.S. at 255.

[95] NOV at 2.

Such a "legal consequence" combined with "reputational injury" provides further reason for granting relief.[96] As the Supreme Court in *Fox* observed, reputational injury can be based on permanent, widely publicized records that adversely impact reputation:

> findings of wrongdoing can result in harm to a broadcaster's "reputation with viewers and advertisers." This observation is hardly surprising given that the challenged orders, which are contained in the permanent Commission record, describe in strongly disapproving terms the indecent material broadcast by Fox, and Fox's efforts to protect children from being exposed to it. Commission sanctions on broadcasters for indecent material are widely publicized. The challenged orders could have an adverse impact on Fox's reputation that audiences and advertisers alike are entitled to take into account.[97]

Consistent with this concept, Circuit courts have similarly nearly uniformly held that public reprimands of misconduct, including reprimands without monetary sanction, violate due process rights if an opportunity to be heard is not provided.[98] In *Adams v. Ford Motor Co*., the Third Circuit found that the magistrate judge denied an individual's due process rights by "failing to give [the individual] sufficient notice and an opportunity to be heard prior to finding misconduct and imposing sanctions."[99] The court explained that an individual's professional reputation and standing in the community is "one of his/[her] most important professional assets[,]" and thus, the importance of the individual's "'professional reputation, and the imperative to defend it when

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[96] *Fox Television Stations*, 567 U.S. at 255–56 (citing *Paul v. Davis*, 424 U.S. 693, 708-709 (1976)) ("explaining that an 'alteration of legal status . . . combined with the injury resulting from the defamation' justifies the invocation of procedural safeguards").

[97] *Id.* at 256 (citations omitted).

[98] *See, e.g.*, *Adams v. Ford Motor Co*., 653 F.3d 299, 304-05 (3rd Cir. 2011) (quoting *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 543 (3d Cir. 2007), *amended on reh'g* (Mar. 8, 2007)) ("On the other hand, courts nearly uniformly have held that an order rising to the level of a public reprimand qualifies as a sufficient sanction" that would "constitute[] 'a legally sufficient injury to support appellate jurisdiction.'").

[99] *Id.* at 302.

necessary, *obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct*.'"[100]

Ms. Henderson's case is nearly identical to the caselaw on this point. In *Fox*, the violation was part of the "permanent Commission record" and was "widely publicized." In Ms. Henderson's case, the NOV is part of the Commission's permanent publicly available record[101] and the NRC took the additional step of widely publicizing the outcome in a press release.[102] Indeed, there is no question that the NOV in Ms. Henderson's case amounts to reputational injury. The nuclear industry is heavily regulated with understandably severe consequences for those found to have violated Commission requirements, including permanent damage to one's professional reputation. "Compliance with NRC requirements plays a critical role in giving the NRC confidence that safety and security are being maintained."[103] Accordingly, "the NRC considers enforcement actions against individuals to be significant actions that will be closely evaluated and judiciously applied."[104]

Furthermore, the NRC will take an enforcement action involving an individual, either licensed or nonlicensed, only when the violation has actual or potential safety or security significance."[105] Because the NRC considers enforcement actions against individuals

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[100] *Id.* at 305 (citations omitted) (emphasis added); *see also United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment[.]").

[101] Ms. Henderson's NOV is available through the NRC website at https://www.nrc.gov/about-nrc/regulatory/enforcement/current/individual-actions/2020.html and available at ADAMS Accession No. ML20218A584.

[102] NRC Press Release, *NRC Fines TVA More than $600,000 for Discrimination Violations; Cites Two Managers for Their Roles* (Aug. 25, 2020), *available at* https://www.nrc.gov/reading-rm/doc-collections/news/2020/20-042.pdf.

[103] NRC Enforcement Policy, at 7 (Jan. 15, 2020) (Accession No. ML19352E921).

[104] *Id.* at 38.

[105] *Id.*

"significant" and because they are only taken "when the violation has actual or potential safety or security significance," such actions obviously will have a long-lasting effect on an individual's professional reputation and employability.

Consistent with Commission policy,[106] Ms. Henderson's NOV has been placed on the Commission's public website. Any potential future employer of Ms. Henderson in the nuclear industry will surely consult her past record. In fact, many (if not all) nuclear industry employers require that employees disclose a finding of deliberate misconduct or other escalated enforcement action on their plant access authorization questionnaires, and Ms. Henderson may be denied access at nuclear power plants based on the NOV. Future employers will know that the NRC Staff has found Ms. Henderson deliberately violated the Commission's requirements.

The Commission has written that, under its deliberate misconduct rule, "the range of actions that would subject an individual to action by the Commission does not differ significantly from the range of actions that might subject the individual to criminal prosecution."[107] Thus, the Commission has acknowledged the gravity of being found to have acted deliberately,[108] and the industry understands that being assessed a violation for deliberate misconduct is akin to a criminal offense. Additionally, the Commission has further damaged Ms. Henderson's reputation by issuing to her a Severity Level II violation, the second-most serious of four levels of safety significance.[109] Given the public attention due to the unusual significance of this NOV,

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[106] *See id.* ("Enforcement actions issued to individuals will normally be placed on the NRC OE Web site.").

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

[108] In its letter of August 24, 2020, the Commission stated that Ms. Henderson was found to have been in violation of 10 CFR 50.5, "Deliberate Misconduct." It also stated that, "Given the significance of the underlying issue and the deliberate nature of your actions, this violation has been categorized in accordance with the NRC Enforcement Policy at Severity Level II."

[109] *Id.*

Ms. Henderson has been subjected to national news coverage that has caused damage to her professional reputation if she pursues opportunities outside of the nuclear industry.

Surely, the Commission cannot deny that receiving an NOV for deliberate misconduct and a Severity Level II violation is an extremely serious matter. It is a highly critical statement from the Staff of the industry's top regulator about Ms. Henderson's integrity and calls into question whether she acts in accordance with Commission requirements. There can be little doubt in the Commission's mind that Ms. Henderson's NOV will have a tangible effect upon her chosen career.[110] Indeed, the purpose of making the NOV public is to put the industry on notice about the sanctions against her.

In sum, due to the legal consequence of the NOV and the public damage to Ms. Henderson's professional reputation, failing to provide her with an adjudicatory hearing and the possibility of subsequent judicial review would violate Ms. Henderson's due process rights under the Supreme Court's decision in *Fox Television Stations*.[111]

2. The NRC Staff's Enforcement Action In This Case Is Unconstitutionally Vague And Arbitrary And Capricious

[110] *See Talao,* 222 F.3d at 1138 (noting that a formal finding of misconduct carries the same consequences as a reprimand, as it "is likely to stigmatize [an individual] among her colleagues and potentially could have a serious detrimental effect on her career.").

[111] *C.f. In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 278 F.3d 175, 191 (3rd Cir. 2002) ("An opportunity to be heard is especially important where a lawyer or firm's reputation is at stake, because sanctions act as a symbolic statement about the quality and integrity of an attorney's work—a statement which may have a tangible effect upon the attorney's career.") (internal quotations omitted); *Fellheimer, Eichen & Braverman, P. C., v. Charter Technologies, Inc.*, 57 F.3d 1215, 1227 (3rd Cir. 1995) ("The requirements of due process also require a meaningful opportunity to be heard. This requirement is especially important in cases such as this where a law firm's reputation is at stake.") (internal citations omitted); *Becker v. Illinois Real Estate Admin. and Disciplinary Bd*., 884 F.2d 955, 958 (1989) ("Having found a constitutionally protected interest, it is necessary to consider what due process requires to protect that interest. … Minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures it may deem adequate for determining the preconditions to adverse official action.") (internal quotations and citations omitted).

Given the legal consequences and reputational harm suffered by Ms. Henderson, the NRC Staff should not be permitted to apply a new standard to Ms. Henderson without fair notice.[112] Yet, that is what the Staff has done. The NRC Staff's enforcement action against Ms. Henderson is contrary to years of Commission policy, guidance, and prior agency action. There is simply no way that Ms. Henderson could have known that she could receive a NOV for the content of her harassment complaint. Even aside from notice, the NRC Staff's enforcement action in this case has muddied the waters to such an extent that it is impossible for individuals in the industry to determine what is protected and what is not, undoubtedly creating a chilling effect on a willingness to bring complaints industry-wide. Because of these issues, the NRC Staff's enforcement action must be deemed unconstitutionally vague and—given the lack of explanation for the change in interpretation—arbitrary and capricious. In addition, because this is a matter of constitutional rights—the right to be subject to regulations that are fair and predictable, especially when it may infringe on other rights—Ms. Henderson must be granted the due process right to challenge the NRC Staff's enforcement action in an adjudicatory proceeding.

As the Supreme Court has recently reiterated, agency enforcement actions that contradict prior agency action and guidance can be deemed unconstitutionally vague and overturned. "A fundamental principal in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[113] Indeed, "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is

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[112] *See, e.g.*, *Hurley Medical Center* (One Hurley Plaza, Flint, MI), ALJ-87-2, 25 N.R.C. 219, 236-37 & n.5 (1987) (NRC Staff cannot apply a comparative performance standard in civil penalty proceedings absent fair notice to licensees about the parameters of that standard).

[113] *Fox Television Stations*, 567 U.S. at 253.

so standard less that it authorizes or encourages seriously discriminatory enforcement.'"[114] The issue implicates two separate due process concerns: "regulated parties should know what is required of them so they may act accordingly,"[115] and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[116] Although this standard applies to all cases, "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[117]

Yet, it is clear in this case that Ms. Henderson had no notice that filing a harassment complaint was proscribed by Commission regulations and could result in a finding of deliberate misconduct pursuant to 10 C.F.R. § 50.5 causing TVA to violate 10 C.F.R. § 50.7. To the best of Ms. Henderson's and her counsel's knowledge, the Commission has never before deemed a formal complaint or the mere act of raising a concern (or any other form of speech) to be deliberate misconduct under section 50.5. And such an interpretation is inconsistent with the Commission's published framework for deliberate misconduct.

The Commission has deemed deliberate misconduct, "an intentional act or omission that the person *knows* . . . [w]ould cause a licensee . . . to be in violation of any [Commission] rule, regulation, or order"[118] that applies only to "individuals who deliberately set in motion events that would cause a violation[.]"[119] A finding of deliberate misconduct requires that "[a]n individual acting in this manner has the requisite *intent* to act in a wrongful manner."[120] Indeed,

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[114] *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 253-254.
[118] 10 C.F.R. § 50.5(c) (emphasis added).
[119] 56 Fed. Reg. at 40,679.
[120] *Id.* (emphasis added).

deliberate misconduct under 50.5 "does not differ significantly from the range of actions that might subject the individual to *criminal prosecution*."[121] Filing a complaint or raising any other concern is not criminal-like conduct. Nor does the NOV anywhere explain how a complaint or concern could be.

Nor is the NRC Staff's current action consistent with other guidance, in which the Commission itself says that individuals should not "demonstrate or tolerate bullying or humiliating behaviors[,]" that "[i]ndividuals treat decision-makers with respect, even when they disagree with a decision[,]" and that "[i]ndividuals should have confidence that conflicts will be resolved respectfully and professionally."[122]

The Notice of Violation is also inconsistent with the Staff's guidance to nuclear licensees on what constitutes an "adverse action." The Notice of Violation states that the former corporate employee and the former Sequoyah employee "suffered an adverse action" when Ms. Henderson "filed a complaint . . . triggering an investigation into whether the employee harassed"[123] Ms. Henderson. The Staff's guidance to the nuclear industry, however, does not include "filing a harassment complaint" as an adverse action. Rather, the Staff's "Guidance for Establishing and Maintaining A Safety Conscious Work Environment" defines "adverse action" as

> An employer-initiated action that detrimentally affects an employee's compensation terms, conditions, or privileges of employment. Such actions include but are not limited to termination, demotion, denial of a promotion, an unfavorable performance appraisal, transfer to a less desirable job, and denial of access.[124]

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[121] *Id.* (emphasis added).

[122] NRC, *Safety Culture Trait Talk* at 2 (ADAMS Accession No. ML15041A187).

[123] NOV at 1, 2.

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

Filing a complaint or raising any other concern is not identified as an adverse action. Nor would a reasonably objective person read the Staff's guidance to include that filing a complaint (or any other such notice that something is wrong that needed the company's attention) could be an "adverse action." Nor can the phrase "[s]uch actions include but are not limited to" be reasonably stretched, without explanation, to include filing a complaint or raising a concern. But that is what the Staff has done here.

It is worth also noting that the Commission's own internal agency guidance on "adverse action" similarly does not identify filing a harassment complaint or raising any other type of concern as an "adverse action." The Commission's Directive Handbook 10.99, Discipline and Adverse Actions, defines "Formal Corrective (Disciplinary and Adverse) Actions" as follows:

> 1. Disciplinary actions: Actions taken against an employee to address misconduct. These corrective actions include suspensions of 14 calendar days or less, reprimands, and admonishments.
>
> 2. Adverse actions: Actions taken against an employee to address severe, repeated, or egregious misconduct. These corrective actions include suspensions of 15 calendar days or more, demotions (reductions in grade), and removals.
>
> 3. Admonishments: Disciplinary memoranda issued to the employee to address misconduct. Admonishments are retained in an eOPF for up to 6 months.
>
> 4. Reprimands: Disciplinary memoranda issued to the employee to address misconduct. Letters of reprimand are retained in an eOPF for up to 2 years.
>
> 5. Suspension: Placement of an employee in a temporary non-pay and non-duty status as a result of misconduct. Suspensions can be classified as either disciplinary or adverse depending on the length of the suspension.
>
> 6. Demotion: Adverse action that involuntarily moves an employee to a position of lower grade.
>
> 7. Removal: Adverse action that results in separation from the Federal service.[125]

[125] U.S. Nuclear Regulatory Commission Directive Handbook (DH) 10.99, Discipline and Adverse Actions, DT-20-08, Vol. 10, Personnel Management, Part 4: Labor Relations, Discipline, Grievances, Appeals, RIFs (Jul. 7, 2020) at p. 4, *available at* https://www.nrc.gov/docs/ML2016/ML20169A245.pdf.

Filing a harassment complaint or raising any other concern about the conduct of a coworker simply is not understood in the nuclear industry, by Ms. Henderson, or by the Commission itself to be an adverse action.

But inexplicably and without notice, the Staff has equated Ms. Henderson's raising of a concern—i.e., notice to TVA that wrongdoing may be occurring and should be looked into—to actions with direct and tangible consequences on the terms and conditions of an individual's employment. This is a radical departure from the commonly understood meaning of adverse action. And the lack of notice to Ms. Henderson of such intent requires that she be afforded the opportunity to challenge her NOV.

This inconsistency in the Office of Enforcement's application of Commission regulations and guidance is made all the more critical in this case because of its implications to individuals' speech. The Supreme Court has determined that an agency's enforcement of its rules cannot "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited,"[126] especially "for regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'"[127] While 50.5 and 50.7 are not normally content-based regulations of speech, the Staff has used them to regulate Ms. Henderson's speech in this case. As such, the vagueness in the Staff's enforcement of this case, inconsistent with the Commission's rules as written, "raises special First Amendment concerns because of its obvious chilling effect[.]"[128] Ms. Henderson, and others in the industry, face the unenviable and impossible choice between speaking up in the face of bullying and risking a notice of violation from the NRC Staff, or suffering in silence.

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[126] *Fox Television Stations*, 567 U.S. at 253.

[127] *Id.* at 254.

[128] *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–72 (1997).

The Staff's enforcement action in this case is also arbitrary and capricious for many of the same reasons that it is void for vagueness, because it is a significant change in policy with no notice, and because the Staff failed the explain or justify the change. As stated above, the Staff's enforcement action is inconsistent with its prior application of the deliberate misconduct rule and its own definition of an adverse action, and the agency has never previously found deliberate misconduct based solely on a complaint or other speech. This is a clear change in policy, and the Commission "should acknowledge that it is in fact changing its position and 'show that there are good reasons for the new policy.'"[129] Yet, the NRC Staff has not addressed or even acknowledged the change in its position. Without any such justification, in addition to being void for vagueness, the agency's enforcement action is arbitrary and capricious. Due process requires that Ms. Henderson be granted an adjudicatory hearing to address these issues.

3. The NRC Staff's Enforcement Procedures Fall Far Short Of Satisfying Ms. Henderson's Due Process Rights

To the extent that the NRC Staff attempts to claim that Ms. Henderson's PEC was sufficient due process to remedy the constitutional infirmities of the NOV in this case, that is clearly not the case. The Staff conducting the enforcement conference consisted mainly of the same individuals who investigated and prepared Ms. Henderson's Apparent Violations. In fact, the person who lead the PEC *is the same person* who issued the Apparent Violation *and* who issued the NOV.

In addition, the information provided by the Staff to Ms. Henderson on her alleged wrongdoing was far from adequate. Ms. Henderson's Apparent Violations consisted of only a short, one-paragraph summary of her alleged violations. The Staff provided Ms. Henderson only

[129] *Fox Television Stations*, 567 U.S. at 250 (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

heavily redacted copies of the OI Reports and none of the supporting exhibits (save for Ms. Henderson's own interview transcripts). This falls far short of minimum due process requirements.[130] Further, at the PEC, Ms. Henderson's counsel had no right or opportunity to cross-examine her accusers, including the NRC Staff and the former employees. Indeed, the NRC Staff itself made clear during Ms. Henderson's PEC that the PEC was "not to debate the facts with you but to receive and process information that is presented."[131] It was *not* intended to be, nor was it, an adjudicatory hearing.[132] Accordingly, Ms. Henderson clearly has not been provided with "procedures which have traditionally been associated with the judicial process."[133]

In addition, the Staff's new theory that there was a "nexus" between Ms. Henderson's complaint and purported activity, because her complaint "triggered" an investigation was raised for the first time in the NOV, and therefore Ms. Henderson could not address that theory at her PEC. Due process demands that she be afforded the opportunity to confront that theory.

To the extent that the NRC Staff argues that the "answer" Ms. Henderson is required to provide in response to the NOV[134] is sufficient due process, that also is clearly not the case. Again, the same person who issued the Apparent Violation, led the PEC, and issued the NOV

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[130] *See Dey v. NRC*, 264 Fed.Appx. 889, 891 (Fed. Cir. 2008) (finding that an NRC employee's minimum due process rights were met when he lost his security clearance because he "was specifically informed of the relevant allegations in a memorandum … which set forth 'at length, and in detail, the derogatory information ... consist[ing] of fifty-five separate alleged incidents'" and where the memorandum "contained nineteen pages setting forth the exact dates and the conduct alleged in connection with each allegation").

[131] Henderson PEC Tr. at 7. The NRC Staff also had many months to conduct interviews and compile its case. But the Staff has not allowed Ms. Henderson to review all of that information and challenge it, much less engage in discovery. Among the information *not* provided to Ms. Henderson are dozens of witness interview transcripts on which testimony the NRC Staff relied.

[132] *See also* NRC Enforcement Manual, at 14 (Oct. 1, 2019) (Accession No. ML19274C228) ("The purpose of the PEC is to obtain information that will assist the NRC in determining the appropriate enforcement action. The decision to hold a PEC does not mean that the agency has determined that a violation has occurred or that enforcement action will be taken."); NRC Enforcement Policy, at 83 (Jan. 15, 2020) (Accession No. ML19352E921) ("The purpose of a PEC is to obtain information that will assist the NRC in determining the appropriate enforcement action, if any.").

[133] *Hannah*, 363 U.S. at 442.

[134] NOV at p. 2.

will be the same person that receives Ms. Henderson's response. Neither he, nor the other members of the Staff who were involved in all these actions, are objective decision-makers at this point. Further, the NRC Staff is not obligated under any rule or guidance to reconsider the NOV based on Ms. Henderson's response. Indeed, they are not required to do anything with Ms. Henderson's response.

Moreover, the NRC Staff's Office of Enforcement created the constitutional infirmity here by regulating Ms. Henderson's right to file a complaint with no notice, no explanation, and no discernable reasoning. The NRC Staff cannot adequately resolve this constitutional question on its own. A neutral third-party must provide a check on this unconstitutional overreach.

In addition to the constitutional questions raised by the NRC Staff's enforcement action in this case, there is one additional matter supporting Ms. Henderson's request for hearing. The NRC Staff issued an NOV to Ms. Henderson because she filed a complaint, but did not issue her an order imposing a penalty "because [she was] not the decisionmaker that placed the former employees on paid administrative leave or terminated the former corporate employee." In short, the NRC Staff issued an NOV without an order because Ms. Henderson's alleged violation was based *solely* on her complaint without action. This reasoning would apply to any alleged violation based solely on the content of a complaint. Thus, the agency's regulation of speech by issuing NOVs that are not appealable, would always evade the judicial process.

B. The Facts And Circumstances Of This Case Demand That, At A Minimum, The Commission Exercise Its Discretion To Grant Ms. Henderson A Hearing

Even if the Commission were to conclude that Ms. Henderson is not entitled to due process—or that her due process rights have somehow been satisfied—the Commission at a minimum should exercise its discretion under section 161(c) of the Atomic Energy Act to grant Ms. Henderson an adjudicatory hearing.

Section 161(c) provides the Commission with "the inherent discretion to institute a proceeding even where none is required by law."[135] And it authorizes the Commission to "hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority."[136] Although the Commission exercises this power infrequently, the Commission has found that the institution of such a proceeding is appropriate where the petition alleges the activities conducted "pose any unusual unexamined issues significant enough to warrant the grant of a discretionary hearing."[137]

This case presents such significant issues. The NOV departs from past Commission practice, ignores applicable legal standards, and relies on assumptions and factual errors rather than actual evidence—all of which result in ruining a person's professional career. A discretionary hearing is clearly warranted.

1. The Commission Should Grant A Hearing Because The Staff Ignored The Commission's Deliberate Misconduct Standard And Instead Created A New One

According to the NOV, the former Sequoyah employee "suffered an adverse action when [Ms. Henderson] filed a complaint . . . triggering an investigation as to whether the former employee harassed you. There is a nexus between the former employee raising concerns and your filing a complaint, which triggered the investigation."[138] The NRC Staff also claims it found "a nexus between the former corporate employee's protected activity of raising concerns about a chilled work environment and [Ms. Henderson] filing a complaint."[139] However, this determination fails to address, (let alone satisfy) the evidentiary standard under Commission

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[135] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station) CLI-94-3, 39 N.R.C. 95 (citing 42 U.S.C. § 2201(c)).
[136] 42 U.S.C. § 2201(c).
[137] *Yankee Nuclear*, CLI-34-3, 39 N.R.C. at 103.
[138] NOV at 1.
[139] *Id.* at 1, 2.

precedent for a finding of deliberate misconduct under 10 C.F.R. § 50.5 or retaliation under 10 C.F.R. § 50.7.

In order to find deliberate misconduct, one must engage in "an intentional act or omission that the person *knows* . . . [w]ould cause a licensee . . . to be in violation of any [Commission] rule, regulation, or order"[140] that applies only to "individuals who deliberately set in motion events that would cause a violation." [141] A finding of deliberate misconduct requires that "[a]n individual acting in this manner has the requisite *intent* to act in a wrongful manner."[142] Indeed, the deliberate misconduct under 50.5 rule "does not differ significantly from the range of actions that might subject the individual to *criminal prosecution*."[143] Filing a complaint or raising any other concern that is substantiated is not criminal-like conduct. Nor does the NOV anywhere explain how a complaint or concern can be.

Indeed, nuclear industry personnel are encouraged to raise concerns, and in fact do raise them, *all the time*. Such concerns "trigger" investigations *all the time*. And such investigations uncover wrongdoing *all the time*. Nuclear industry personnel submit Condition Reports that document issues in a licensee's corrective action program for further investigation, follow up, and action. Concerns are raised to Employee Concerns Programs, which investigate those concerns, make findings, and reach conclusions. Must all of the avenues for filing complaints and raising concerns now come with a warning, "use at your own risk of a deliberate misconduct finding by the NRC Staff?" Must licensee managers turn away concerns out of fear that they might get a violation because they took action based on substantiated findings of wrongdoing, as

[140] 10 C.F.R. § 50.5(c) (emphasis added).
[141] 56 Fed. Reg. at 40,679.
[142] *Id*.
[143] *Id.* (emphasis added).

happened in this case? Surely this is not what the Commission intended. But the Staff's action, if unchecked, will lead to these results.

The Staff appears to believe that showing a supposed "nexus" between protected activity and employment decisions can provide the basis for deliberate misconduct. But that is clearly not the correct legal standard. There simply is no equating the high standard for finding deliberate misconduct under 10 C.F.R. § 50.5—akin to criminal intent—and the Staff's finding of a mere supposed "nexus" between Ms. Henderson's March 9, 2018 complaint and the purported protected activity by either the former corporate employee or the former Sequoyah employee.[144] Just because two things happened—the complainant was aware of and included the individuals' ostensibly protected activity in a wide-ranging complaint and the individuals were either placed on leave or terminated—does not prove there is any actual connection between the two. Furthermore, it does not show that Ms. Henderson deliberately intended to retaliate against anyone *because* they engaged in protected activity. Ms. Henderson filed a complaint that, in part, referenced individuals' ostensibly protected activity because she reasonably believed it was in retaliation against her for raising an ethical concern about one of her subordinates in April 2016.[145] Ms. Henderson explained all of this in her complaint, putting in as much information as possible, so that the information could be fully considered by the investigator, whether he agreed with her claims or not. The subsequent investigation of her complaint substantiated that she raised legitimate concerns about harassment and disrespectful conduct that required further action.

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[144] In fact, the Office of Enforcement has not even shown that a "nexus" exists. The definition of nexus is "a connection or series of connections linking two or more things." The NOV merely alleges that two things occurred— the former corporate employee engaged in protected activity and her employment was terminated. It has not shown that these two things were connected in any way.

[145] Henderson Complaint at 3-4.

Relying on a "nexus" is especially egregious in the former corporate employee's case. Ms. Henderson barely mentioned the former corporate employee in her complaint, and TVA terminated the former corporate employee for misconduct she engaged in *after* Ms. Henderson filed her complaint. It is beyond the pale to believe that Ms. Henderson initiated a harassment complaint with the intent to retaliate against the former corporate employee for any of those alleged subsequent protected activities.

In addition, even if a "nexus" exists between the protected activity and an adverse action, that is still not enough to demonstrate a violation of 10 C.F.R. § 50.7. This is because that regulation also contains subsection 50.7(d), which states in relevant part that "[a]n employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations."[146] In a 2004 discrimination case, the Commission deemed a nexus argument as bearing on the *first* prong of the two-part Energy Reorganization Act, Section 211 evidentiary framework,[147] but also made clear that satisfying the first prong does not end the analysis.[148] As the Commission stated,

> Our own whistleblower protection regulation, section 50.7, while not setting out an evidentiary framework of its own, makes clear that engaging in protected activities does not immunize employees "from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations." To give life to this provision, *we must give employers defending whistleblower discrimination charges an opportunity to prove that "legitimate reasons" or "non-prohibited considerations" justified their actions*.
>
> * * * *
>
> Congress was careful in section 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace. .

[146] 10 C.F.R. § 50.7(d).

[147] 42 U.S.C. § 5851(b)(3). [the citation is correct]

[148] *Tennessee Valley Authority*, CLI-04-24, 60 N.R.C. 160, 194-95 (2004).

> . . This tough-minded approach to employer claims of legitimate, nondiscriminatory motives effectuates the policy of Congress (and the NRC) both to encourage nuclear whistleblowers to come forward with safety-related information and not to interfere unduly with employers' prerogative to manage their workers.[149]

This regulation provides all nuclear licensees and their employees explicit direction that the mere existence of protected activity does not shield misconduct. Accordingly, it is not enough for the NRC Staff to rely on a supposed on a "nexus" because individuals who engaged in protected activities were later subject to adverse action. The Commission's regulations clearly require an analysis as to whether the action was justified by "legitimate reasons" or "non-prohibited considerations."[150] But the NOV does not even address the substantial evidence that Ms. Henderson presented at her PEC demonstrating the legitimate reasons why she filed her complaint, and why filing her complaint was clearly not the behavior of someone intending to retaliate or engage in criminal-like behaviors. An adjudicatory hearing is necessary to ensure that the regulation is properly applied.

2. The Commission Should Grant A Hearing Because The NOV And Its Underlying OI Reports Are Fundamentally Flawed

A discretionary hearing under Section 161 of the AEA is also appropriate here because the Staff is issuing an intentional Severity Level II violation that will destroy Ms. Henderson's career, based on an NOV and underlying investigation reports that rely on incorrect assumptions and errors rather than actual evidence.

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[149] *Tennessee Valley Authority*, 60 N.R.C. at 191-93.

[150] *Id.*

a. Ms. Henderson's Severity Level II Violation Is Based On Assumptions, Not Evidence

Ms. Henderson's Severity Level II NOV states that it is based on the findings of two NRC Office of Investigations Reports.[151] But those investigations heavily relied on purported "reasonable assumptions" for issuing Ms. Henderson the NOV. Assumptions—reasonable or otherwise—are not evidence. Rather, they are the complete *absence* of evidence, and cannot justify damaging Ms. Henderson's career without a full and fair hearing.

For example, pages 42-49 of OI Report 2-2019-015 provide the "Agent's Analysis" of the investigation, including a section entitled "Employee's Protected Activity." This section identifies e-mails dated May 7, 2018 and June 9, 2018 from the former corporate employee to Mr. Shea, and a July 2 phone call between the former corporate employee and Mr. Shea, as the specific instances where the former corporate employee engaged in purported protected activity with Mr. Shea. Redacted OI Report 2-2019-015 then appears to state on pages 48-49 that

> Based upon her complaint and testimony to OI, it is reasonable to assume that [Ms. Henderson] had knowledge of the concerns [the former corporate employee] provided to [Mr. Shea] (i.e., a fear of retaliation from [Henderson]). It is also reasonable to assume that this information contributed to [Ms. Henderson's] decision to include [the former corporate employee's] behavior in her complaint . . . .[152]

The above language makes a finding that simply is not possible. Ms. Henderson filed her complaint on March 9, 2018. The former corporate employee raised her alleged "concerns" weeks and months later. Unless Ms. Henderson has a time machine, the OI Report's "assumption" that Ms. Henderson had knowledge about the former corporate employee's concerns—before the former corporate employee raised them—is anything but "reasonable." It

[151] NOV at 1-2.

[152] OI Report 2-2019-015 at 48-49.

is impossible. Ms. Henderson identified this inexcusable error at her PEC. But the Office of Enforcement proceeded nonetheless and issued the NOV "based on" the OI report.

Similarly, the OI Report 2-2018-033 states that it is "reasonable to assume" Ms. Henderson filed her complaint to stop the former Sequoyah employee from raising certain technical concerns. The Report provided to Ms. Henderson was heavily redacted, but appears to state on page 48:

> It is reasonable to assume that [Ms. Henderson], with the acknowledgement and encouragement of [Mr. Shea] submitted [her] complaint in an effort to impede or stop [the former Sequoyah employee's] actions or behaviors, part of which were protected activities (i.e., address the [Non-Cited Violations] to restore regulatory compliance with the NRC).

This is not a reasonable assumption. In fact, looking again at the timing of events, it is patently untrue.

As Ms. Henderson explained in detail during her PEC, filing her complaint had anything to do with impeding or stopping the former Sequoyah employee from raising technical or compliance issues, such as the Service Life or Kirk Key Non-Cited Violations ("NCVs").[153] There was absolutely nothing for Ms. Henderson to impede because, at the time Ms. Henderson filed her complaint, there was nothing left for TVA to do with respect to these NCVs. By that time, the Service Life backfit and denial had already been under review with the NRC for months.[154] Further, the Kirk Key license amendment request had already been the subject of an NRC pre-submittal meeting and was to be submitted imminently.[155] In fact, Ms. Henderson and her staff helped to develop the submittals to the NRC in order to resolve those issues. The Staff's reliance on this assumption is all the more objectionable because certainly the Office of

[153] Henderson PEC Tr. at 63-64.
[154] *Id.* at 63.
[155] *Id.*

Enforcement was capable of easily discerning that the regulatory submittals had already been made or had already been briefed to the Staff. Nonetheless, the Staff has doubled down on this (false) assumption in the NOV, again alleging that Ms. Henderson's complaint was based in part on the former Sequoyah employee raising concerns about the Kirk Key NCV.[156]

The Staff's assumption is also directly refuted by TVA's former Chief Nuclear Officer. He stated in an affidavit provided at Ms. Henderson's PEC that the "idea that Erin Henderson filed a harassment complaint calculated to retaliate against an individual for raising concerns – is, in my opinion, ludicrous."[157] The former Chief Nuclear Officer also stated that he found Ms. Henderson "distraught," "sobbing," and "in despair" on March 7, 2018, the day on which she intended to quit her job.[158] Ms. Henderson gave no impression to him that she had previously thought of filing a complaint as even an option.[159] The NOV completely ignores this evidence, which demonstrates that Ms. Henderson's complaint was not submitted to deliberately violate any rule or regulation.

Not only do the Reports that form the basis for the NOV rely merely on assumptions, they also rely on subjective judgments that are completely at odds with societal norms and the evidence.

For example, the OI Report 2-2018-033 concludes that the former Sequoyah employee's behavior was not "excessive or even harassing and intimidating."[160] Whether or not an OI investigator would himself have felt harassed by the former Sequoyah employee's behaviors is beside the point. It is critical what *Ms. Henderson* felt. If Ms. Henderson believed those

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[156] NOV at 1-2.
[157] Henderson PEC Exhibit 1 (affidavit of CNO) at ¶ 5.
[158] *Id.* at ¶ 4.
[159] *Id.* at ¶ 5.
[160] OI Report 2-2018-033 at 49.

behaviors were harassing, excessive, and intimidating, she had every justification for filing a complaint to stop them and to be open and honest with her employer. For the Staff to second guess that belief two years later, and to issue a Severity Level II violation to Ms. Henderson for having the audacity to *seek help* in dealing with actions and behaviors that she perceived to be harassment, is unconscionable and completely at odds with what is taking place in this era of the #MeToo movement.

Moreover, Ms. Henderson's complaint was demonstrably not frivolous. It was substantiated by an independent TVA investigation. TVA's Human Resources professionals, TVA's Office of General Counsel, Senior TVA Executives, and the three TVA individuals in . the former Sequoyah employee's immediate chain of command all agreed with Ms. Henderson that the behavior was unacceptable conduct by a senior manager—a TVA leader—and ought to be addressed by some form of disciplinary action.[161]

For example, an independent TVA Human Resources evaluation of the evidence underlying OGC's investigation concluded that the former Sequoyah employee's behavior and conduct was unbecoming of a leader at TVA and warranted the former Sequoyah employee's termination. The independent Human Resources evaluator explained that,

> My conclusion is the behavior/conduct is unbecoming of a leader at TVA and warrants termination. It is not a single egregious occurrence but the culmination of the time and type of behavior that occurred that contributes to this conclusion. In addition, violation of TVA policy and expectations related to professional/respectful workplace behaviors.[162]

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[161] The fact that numerous senior TVA officials agreed that the former Sequoyah employee had engaged in inappropriate workplace behavior and merited some form of disciplinary action was discussed extensively at the June 24, 2020 PEC for another individual involved in these matters.

[162] June 24, 2020 PEC Exhibit 22. (June 21, 2018 email from Human Resources Site Manager, HR Business Partner, summarizing her independent review of the evidence underlying TVA OGC's investigation into Ms. Henderson's allegation of a hostile work environment).

In another example, when objecting to a suggestion of giving the former Sequoyah employee a written warning for his misbehaviors, a TVA Human Resources Director wrote

> Seems light given the egregious behavior that has been long term and substantiated. Final written warning with required respectful workplace training would be the minimum I would propose. For your reference, in corporate we terminate for these actions when substantiated and I could support that as well if you choose that path.[163]

And upon reading the TVA OGC investigation report, the Sequoyah Site Vice President stated:

> I agree that [the former Sequoyah employee's] action was not appropriate. There was one statement that I found interesting, ECP told [Ms. Henderson] that [the former Sequoyah employee] filed an ECP claim against her and that in their opinion they found [the former Sequoyah employee] more at fault. I don't know if that help [sic] fueling the fire between these two or not. It reads like all these available programs at TVA are being used to file anonymous claims but everyone knows who they are. I wonder if that perpetuates the problem. Regardless [the former Sequoyah employee] should not have made the aggressive comments about [Ms. Henderson] in the work place. He should have kept his opinions to himself and maintained a professional environment.[164]

Accordingly, the Staff's apparent conclusion, in reliance on the flawed OI Report, that Ms. Henderson was not justified in filing her complaint is utterly at odds with the irrefutable record evidence.

For these reasons, a discretionary hearing is required to resolve the significant issue of whether a complaint by a person who believes she has been harassed can result in an NOV for deliberate misconduct based on assumptions and subjective judgments rather than actual facts.

[163] June 24, 2020 PEC Exhibit 22.

[164] June 24, 2020 PEC Exhibit 11 (May 24, 2018 text message from Sequoyah Site Vice President to TVA Senior Vice President, Engineering).

b. A Discretionary Hearing Is Appropriate Because The NOV Is Based On Numerous Legal And Factual Errors In The NOV And The Staff's OI Reports

Ms. Henderson should also be granted a discretionary hearing because the NOV is based on obvious legal and factual errors.

For example, OI Report 2-2018-033 erroneously states that an Employee Concerns investigation demonstrated retaliatory animus by Ms. Henderson towards the former Sequoyah employee. This simply is not true. OI Report 2-2018-033 states on page 49:

> The ECP Investigation (17-00683) demonstrated retaliatory animus by [Ms. Henderson] towards [the former Sequoyah employee].

The ECP Investigation 17-000683 report says no such thing.[165] In fact, the report states exactly the opposite. The ECP investigation report states that

> [t]his investigation could find no intent on the part of [Ms. Henderson] to retaliate against [the former Sequoyah employee] . . .[166]

The purported finding in the OI Report is irreconcilable with what the ECP investigation report actually states. This gross error by the NRC Staff is particularly egregious where this alleged finding appears to be the only basis on which the Staff claims to have found retaliatory animus by Ms. Henderson.

Also in error is the alleged "nexus" the Staff has divined between Ms. Henderson's complaint and the former Sequoyah employee's and the former corporate employee's alleged protected activities.[167] The NOV essentially claims that Ms. Henderson filed her complaint because of the former Sequoyah employee's and the former corporate employee's protected

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[165] Henderson PEC Exhibit 5 (Sept. 12, 2017 Requirement to Act Letter from ECP to Mr. Shea, including ECP Investigation Report into July 2017 allegations by the former Sequoyah employee (Investigation No. NEC-17-00638)).

[166] Henderson PEC Exhibit 5 at 1.

[167] NOV at 1-2.

activities. That is not true, as even a cursory review of Ms. Henderson's complaint reveals. Ms. Henderson legitimately believed that the ostensibly protected concerns raised by them and others were raised as a direct result of Ms. Henderson's own protected activity, and the Staff cites no evidence to the contrary.

As previously noted, Ms. Henderson's complaint specifically alleges that certain actions were a "means of retaliation/intimidation" against Ms. Henderson for legitimate concerns she raised.[168] Ms. Henderson further explained that she "perceive[d] that there are demonstrating behaviors that are, at the very minimum, inconsistent with TVA competencies and core values in an attempt to continuously undermine, harass and intimidate" Ms. Henderson because of the ethics issue Ms. Henderson raised in April 2016.[169] The Staff has failed to confront (or has deliberately ignored) that Ms. Henderson did not file her complaint after any one particular event. When reading her complaint in total, it is clear that Ms. Henderson reasonably perceived that all of the examples cited and behaviors she suffered for the two years preceding her complaint were in retaliation for her own protected activity. As she described at the PEC, Ms. Henderson documented all of this so an investigator had sufficient background to understand the full context of the issues for the previous two years, and to reach his own conclusions. That is what reasonable, non-retaliating people do in these circumstances: ask for help, explain everything, and accept the results, whatever they may be, just as Ms. Henderson did here.

[168] Henderson Complaint at 3.

[169] *Id.*

V. Conclusion

For the foregoing reasons, the Commission must grant Ms. Henderson an adjudicatory hearing on her Notice of Violation. Significant policy considerations warrant a hearing. The compelling facts and circumstances of Ms. Henderson's case (and the egregious Staff errors undermining its case) demand a hearing. And Constitutional due process requires one.

Respectfully submitted,

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September 13, 2020

Counsel for Ms. Erin Henderson

September 13, 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	IA-20-009
ERIN HENDERSON	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Erin Henderson's Request For A Hearing has been served through the E-Filing system on the participants in the above-captioned proceeding, this 13th day of September, 2020.

/Signed electronically by Timothy J. V. Walsh/
Timothy J. V. Walsh