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By Electronic Mail

September 23, 2020

Mr. George A. Wilson
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
One White Flint North, 11555
Rockville, MD 20852-2738
George.Wilson@nrc.gov

SUBJECT: Answer to Notice of Violation (EA-20-06 and EA-20-07)

References: NRC Letter dated August 24, 2020, "Tennessee Valley Authority - Notice of Violation and Proposed Imposition of Civil Penalty – $606,942, NRC Office of Investigations Report Numbers 2-2018-033 And 2-2019-015"

TVA letter dated September 23, 2020, "Reply to Notice of Violation (EA-20-06 and EA-20-07)"

Dear Mr. Wilson:

On behalf of the Tennessee Valley Authority (TVA), I am submitting the enclosed Answer to Notice of Violation (EA-20-06 and EA-20-07).

By the above-referenced August 24, 2020 letter, the Nuclear Regulatory Commission (NRC) notified the Tennessee Valley Authority (TVA) of three Escalated Enforcement Severity Level II Violations and one Escalated Enforcement Severity Level I Violation, as well as a proposed Civil Penalty of $606,942.

A remote pre-decisional enforcement conference was held on June 30, 2020 in which TVA disputed the associated apparent violations.

Pursuant to 10 C.F.R. § 2.205(b), the enclosure to this letter contains TVA's bases for denying the violations and explains why the penalty should not be imposed.

This letter contains no NRC commitments.

If you have any questions, please contact me at 202-663-8455.

Respectfully,

Timothy J. V. Walsh
Counsel for TVA

Enclosure: Reply to a Notice of Violation (EA-20-06 and EA-20-07)

cc: Tennessee Valley Authority
Mr. T. Rausch, Chief Nuclear Officer
Mr. J. Barstow, Vice President, Nuclear Regulatory Affairs and Support Services

U.S. Nuclear Regulatory Commission

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Enclosure

Answer to Notice of Violation (EA-20-06 and EA-20-07)

Violation 1

Description of the Violation

NRC Notice of Violation (NOV) EA-20-06 and EA-20-07, dated August 24, 2020, cited a Severity Level II violation of 10 C.F.R. § 50.7(a), "Employee Protection," related to TVA's alleged discrimination against a former Sequoyah Nuclear Plant employee for engaging in protected activity. Specifically, the NOV alleges a former Sequoyah employee engaged in protected activity by raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program, and by raising concerns regarding the response to two non-cited violations. The NOV alleges that, after becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) filed a formal complaint against the former employee. The NOV alleges that the filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel (OGC) and that the action was based, at least in part, on the former employee engaging in protected activity.

TVA Response to the Violation

TVA disagrees that the former CNL Director's act of filing a harassment complaint was deliberate misconduct or otherwise in retaliation for others' ostensibly protected activity. The NOV contains no evidence indicating that the former CNL Director filed her March 9, 2018 complaint (the "Complaint") in retaliation for the former Sequoyah employee purportedly raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program, or raising concerns regarding the response to two non-cited violations. To the contrary, the overwhelming, clear, and convincing evidence demonstrates that the former CNL Director filed her Complaint for other, legitimate reasons, not because of the former Sequoyah employee's purported protected activities.

TVA unequivocally supports the right of every TVA employee and everyone in the nuclear industry to raise good-faith concerns if they believe they are being harassed or the victim of inappropriate conduct in the workplace. To find fault in an employee such as the CNL Director here for raising a concern worthy of investigation (and which was ultimately substantiated) is contrary to the principles of a safety conscience work environment emphasized by TVA and the NRC. The Staff's NOV will discourage employees from raising concerns regarding inappropriate workplace behaviors through proper channels and will embolden harassers to engage in such conduct, using allegedly protected activity as a shield. As a result, licensees will now be placed in the impossible situation of having to choose between whether to even investigate a harassment complaint and risk NRC violations and fines if they do, or to alienate its workforce and perpetuate inappropriate behaviors that could impact safety if they do not.

TVA is aware of no evidence—and the NOV includes no evidence—that the action taken against the former Sequoyah employee was motivated in any way by protected activity. Rather than analyze motivation or intent, the Staff based the NOV on a cursory determination that being aware of protected activity means any subsequent action was retaliatory. Indeed, the NOV appears to rely on a mere temporal proximity between the purported protected activity and the harassment complaint without any analysis of the actual facts and evidence presented. This is

entirely inconsistent with 10 C.F.R. § 50.7, which requires a demonstration that the adverse action occurred *because* an employee has engaged in protected activities. It also completely ignores the extensive evidence presented during the pre-decisional enforcement conferences (PECs) in this case showing that the employment decisions were based on non-prohibited considerations pursuant to Section 50.7(d). The NOV ignores that rule.

The Staff's new application of the rule, in contravention of all guidance and the Commission's own rulemakings, leaves the industry without any ability to predict how Section 50.7 will be applied going forward. The assumption now must be that the Staff will ignore Section 50.7(d) and that any harassment complaint that is filed in temporal proximity to alleged protected activity can now be classified as retaliation, irrespective of evidence or facts that no retaliation occurred and that the employment action was taken for appropriate reasons. Licensees would be risking an NRC violation any time that they attempt to investigate or discipline bad actors. In order to avoid violations and civil penalties, licensees and managers inevitably will consider allowing harassment to continue unchecked whenever there is any conceivable basis for finding prior protected activity. Under this standard, enforcement of Section 50.7 is nearly impossible to predict and, as a result, unconstitutionally vague. The Staff's application of the rule in this instance, contrary to established precedent and without any explanation, is also arbitrary and capricious.

For these reasons and the reasons TVA explained in detail in its referenced "Reply to a Notice of Violation (EA-20-06 and EA-20-07)" at Enclosure 1, pages 1 to 3, TVA denies the alleged violation set forth in Violation 1. Accordingly, the NRC should impose no civil penalty associated with alleged Violation 1.

In addition, the classification of this alleged Violation as Severity Level II is wholly inappropriate. Section 1.2.5 of the NRC Enforcement Manual states that Severity Level II violations "[u]sually involve actions with actual or high potential to have serious consequences on public health and safety or the common defense and security." Those circumstances are not present here. There were no actual or potential consequences—much less actual or potential "serious" consequences—to the public health and safety or common defense and security in TVA's handling of the personnel matter associated with Violation 1. Nor does the alleged Violation provide any evidence to the contrary.

As the NRC stated in its press release on this matter, TVA has made progress in addressing work environment issues and corrective actions at its corporate office and its three nuclear power plants. And no specific safety issue has been identified here.

For all of these reasons, even if the NRC continues to believe that a violation occurred, then at a minimum the NRC should reduce the Severity Level of the alleged Violation and commensurately reduce the civil penalty.

Violation 2

Description of the Violation

NRC NOV EA-20-06 and EA-20-07, dated August 24, 2020, cited a Severity Level II violation of 10 C.F.R. § 50.7(a), "Employee Protection," related to TVA's alleged discrimination against a former Sequoyah employee for engaging in a protected activity. Specifically, the NOV alleges a former Sequoyah employee engaged in protected activity by raising concerns about a chilled work environment, filing complaints with the Employee Concerns Program, and raising concerns about the regulatory response to the Kirk Key and Service Life non-cited violations. The NOV alleges that after becoming aware of this protected activity, TVA placed the former employee on paid administrative leave until the former employee resigned in August 2018. This NOV alleges this action was based, at least in part, on the former employee engaging in protected activity.

TVA Response to the Violation

TVA disagrees that placing the former Sequoyah employee on paid administrative leave was based in part on the former employee's engaging in protected activity. The consensus recommendation and decision to place the former Sequoyah employee on paid administrative leave was based on substantiated findings from an independent investigation conducted by the TVA OGC, which found that his conduct violated TVA policies and federal statutes. The NOV contains no evidence indicating that the former Sequoyah employee was placed on paid administrative leave for raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program, or raising concerns regarding the response to the Kirk Key and Service Life non-cited violations. To the contrary, the overwhelming, clear, and convincing evidence demonstrates that the former Sequoyah employee was placed on paid administrative leave for other, legitimate reasons, not the former Sequoyah employee's purported protected activities.

TVA unequivocally supports the right of every TVA employee and everyone in the nuclear industry to raise good-faith concerns if they believe they are being harassed or the victim of inappropriate conduct in the workplace. To find fault in a company for investigating and substantiating a concern worthy of investigation is contrary to the principles of a safety conscience work environment emphasized by TVA and the NRC and will undermine rather than promote licensees' abilities to maintain environments where personnel feel free to raise concerns.

TVA is aware of no evidence—and the NOV includes no evidence—that the action taken against the former Sequoyah employee was motivated in any way by his purported protected activity. Rather than analyze motivation or intent, the Staff based the NOV on a flawed, cursory determination in finding retaliation. Indeed, the NOV appears to rely on a mere temporal proximity between the purported protected activity and the harassment complaint, in addition to mere knowledge of protected activity at the time of the subsequent action. TVA respectfully disagrees with the NRC's application of the standard in this case and was unaware that the NRC could find a violation of Section 50.7 without any finding whatsoever of intent or any analysis of

the *extensive* non-prohibited considerations in this case. Moreover, the NRC's temporal analysis is not consistent with 10 C.F.R. § 50.7, which requires a demonstration that the adverse action occurred *because* an employee has engaged in protected activities.

The Staff's new application of the rule, in contravention of all guidance and the Commission's own rulemakings, leaves the industry without any ability to predict how Section 50.7 will be applied going forward. The assumption now must be that the Staff will ignore Section 50.7(d) and that any harassment complaint that is filed in temporal proximity to alleged protected activity can now be classified as retaliation, irrespective of evidence or facts that no retaliation occurred and that employment action was taken for appropriate reasons. Licensees would be risking an NRC violation any time that they attempt to investigate or discipline bad actors. In order to avoid violations and civil penalties, licensees and managers inevitably will consider allowing harassment to continue unchecked whenever there is any conceivable basis for finding prior protected activity. Under this standard, enforcement of Section 50.7 is nearly impossible to predict and, as a result, unconstitutionally vague. The Staff's application of the rule in this instance, contrary to established precedent and without any explanation, is also arbitrary and capricious.

For these reasons and the reasons TVA explained in detail in its referenced "Reply to a Notice of Violation (EA-20-06 and EA-20-07)" at Enclosure 1, pages 5 to 6, TVA denies the alleged violation set forth in Violation 2. Accordingly, the NRC should impose no civil penalty associated with alleged Violation 2.

In addition, the classification of this alleged Violation as Severity Level II is wholly inappropriate. Section 1.2.5 of the NRC Enforcement Manual states that Severity Level II violations "[u]sually involve actions with actual or high potential to have serious consequences on public health and safety or the common defense and security." Those circumstances are not present here. There were no actual or potential consequences—much less actual or potential "serious" consequences—to the public health and safety or common defense and security in TVA's handling of the personnel matter associated with Violation 2. Nor does the alleged Violation provide any evidence to the contrary.

As the NRC stated in its press release on this matter, TVA has made progress in addressing work environment issues and corrective actions at its corporate office and its three nuclear power plants. And no specific safety issue has been identified here.

For all of these reasons, even if the NRC continues to believe that a violation occurred, then at a minimum the NRC should reduce the Severity Level of the alleged Violation and commensurately reduce the civil penalty.

Violation 3

Description of the Violation

NRC Notice of Violation EA-20-06 and EA-20-07, dated August 24, 2020, cited a Severity Level II violation of 10 C.F.R. § 50.7(a), "Employee Protection," related to TVA's alleged discrimination against a former corporate employee for engaging in protected activity. Specifically, the NOV alleges the former corporate employee engaged in protected activity by raising concerns of a chilled work environment. The NOV alleges that, after becoming aware of this protected activity, the former Director of CNL filed a formal complaint against the former employee. The NOV alleges filing of a formal complaint on March 9, 2018 triggered an investigation by the TVA OGC that resulted in the former employee being placed on paid administrative leave followed by termination. The NOV alleges this action was based, at least in part, on the former employee engaging in a protected activity.

TVA Response to the Violation

TVA disagrees that the former CNL Director's act of filing a harassment complaint was deliberate misconduct or otherwise retaliation for others' ostensibly protected activity. The NOV contains no evidence indicating that the former CNL Director filed her Complaint in retaliation for the former corporate employee purportedly raising concerns regarding a chilled work environment. To the contrary, the overwhelming, clear, and convincing evidence demonstrates that the former CNL Director filed her Complaint for other, legitimate reasons, not the former corporate employee's purported protected activities.

TVA unequivocally supports the right of every TVA employee and everyone in the nuclear industry to raise good-faith concerns if they believe they are being harassed or the victim of inappropriate conduct in the workplace. To find fault in an employee for raising a concern worthy of investigation (and which was ultimately substantiated) is contrary to the principles of a safety conscience work environment emphasized by TVA and the NRC and will impede licensees' efforts to maintain environments where personnel feel free to raise concerns.

TVA is aware of no evidence—and the NOV includes no evidence—that the action taken against the former corporate employee was motivated in any way by her purported protected activity. Rather than analyze motivation or intent, the Staff based the NOV on a flawed, cursory determination that being aware of protected activity means any subsequent action was retaliatory. TVA respectfully disagrees with the NRC's application of the standard in this case and was unaware that the NRC could find a violation of Section 50.7 without any finding whatsoever of intent. Indeed, not only is the NOV missing any statement of intent in this case, the NOV also lacks any possible causal link between the Complaint and the adverse action because the adverse action was taken against the corporate employee for wrongdoing that occurred after the Complaint was filed. This cannot possibly meet the analysis required under 10 C.F.R. § 50.7, which requires a demonstration that the adverse action occurred *because* an employee has engaged in protected activities.

The Staff's new application of the rule, in contravention of all guidance and the Commission's own rulemakings, leaves the industry without any ability to predict how Section 50.7 will be applied going forward. The assumption now must be that the Staff will ignore Section 50.7(d) and that any harassment complaint that is filed in temporal proximity to alleged protected activity can now be classified as retaliation, irrespective of evidence or facts that no retaliation occurred and that employment action was taken for appropriate reasons. Licensees would be risking an NRC violation any time that they attempt to investigate or discipline bad actors. In order to avoid violations and civil penalties, licensees and managers inevitably will consider allowing harassment to continue unchecked whenever there is any conceivable basis for finding prior protected activity. Under this standard, enforcement of Section 50.7 is nearly impossible to predict and, as a result, unconstitutionally vague. The Staff's application of the rule in this instance, contrary to established precedent and without any explanation, is also arbitrary and capricious.

For these reasons and the reasons TVA explained in detail in its referenced "Reply to a Notice of Violation (EA-20-06 and EA-20-07)" at Enclosure 1, pages 8 to 9, TVA denies the alleged violation set forth in Violation 3. Accordingly, the NRC should impose no civil penalty associated with alleged Violation 3.

In addition, the classification of this alleged Violation as Severity Level II is wholly inappropriate. Section 1.2.5 of the NRC Enforcement Manual states that Severity Level II violations "[u]sually involve actions with actual or high potential to have serious consequences on public health and safety or the common defense and security." Those circumstances are not present here. There were no actual or potential consequences—much less actual or potential "serious" consequences—to the public health and safety or common defense and security in TVA's handling of the personnel matter associated with Violation 3. Nor does the alleged Violation provide any evidence to the contrary.

As the NRC stated in its press release on this matter, TVA has made progress in addressing work environment issues and corrective actions at its corporate office and its three nuclear power plants. And no specific safety issue has been identified here.

For all of these reasons, even if the NRC continues to believe that a violation occurred, then at a minimum the NRC should reduce the Severity Level of the alleged Violation and commensurately reduce the civil penalty.

Violation 4

Description of the Violation

NRC NOV EA-20-06 and EA-20-07, dated August 24, 2020, cited a violation of 10 C.F.R. § 50.7(a), "Employee Protection," related to TVA's alleged discrimination against a former corporate employee for engaging in protected activity. Specifically, the NOV alleges the former corporate employee engaged in protected activity by raising concerns of a chilled work environment to the former Vice President of Regulatory Affairs and a TVA attorney during a TVA OGC investigation. The NOV alleges that, after becoming aware of this protected activity, the former Vice President of Regulatory Affairs played a significant role in the decision making process to place the former employee on paid administrative leave and terminate the former employee on January 14, 2019. The NOV alleges these actions were based, at least in part, on the former employee engaging in a protected activity.

TVA Response to the Violation

TVA disagrees that the decisions by the former Vice President of Regulatory Affairs to place the former corporate employee on paid administrative and to terminate her employment were deliberate misconduct or otherwise retaliation for the former corporate employee's ostensibly protected activity. The decision to separate the former corporate employee from TVA was based on substantiated findings from an independent investigation conducted by TVA OGC that her conduct violated TVA policies and federal statutes. The overwhelming, clear, and convincing evidence demonstrates that the former Vice President of Regulatory Affairs separated the former corporate employee from the company for legitimate reasons, not the former corporate employee's purported protected activities. TVA's OGC and Human Resources (HR) Department agreed that non-prohibited reasons justified the personnel action consistent with 10 C.F.R. § 50.7(d). The TVA Executive Review Board (ERB) found that the personnel action was not based on protected activities.

TVA unequivocally supports the right of every TVA employee and everyone in the nuclear industry to raise good-faith concerns if they believe they are being harassed or the victim of inappropriate conduct in the workplace. To find fault in an employee for raising a concern worthy of investigation (and which was ultimately substantiated) is contrary to the principles of a safety conscience work environment emphasized by TVA and the NRC and will impede licensees' efforts to maintain environments where personnel feel free to raise concerns.

TVA is aware of no evidence—and the NOV includes no evidence—that the action taken against the former corporate employee was motivated in any way by protected activity. Rather than analyze motivation or intent, the Staff based the NOV on a cursory determination that being aware of protected activity means any subsequent action was retaliatory. But that is not consistent with 10 C.F.R. § 50.7, which requires a demonstration that the adverse action occurred *because* an employee has engaged in protected activities. Indeed, if the NRC had evaluated intent it would have found that the former Vice President of Regulatory Affairs acted in every way possible to ensure that there would not be a violation of Section 50.7, including by seeking

outside guidance from HR and OGC and by going through the ERB process (including with an independent auditor).

All of the relevant, experienced TVA personnel involved in this case agreed that the action against the former corporate employee did not constitute a violation of Section 50.7. Yet, the Staff has somehow found otherwise. The Staff's new application of the rule, in contravention of all guidance and the Commission's own rulemakings, leaves the industry without any ability to predict how Section 50.7 will be applied going forward. The assumption now must be that the Staff will ignore Section 50.7(d). Any harassment complaint that is filed in temporal proximity to alleged protected activity can now be classified as retaliation, irrespective of overwhelming evidence or facts that no retaliation occurred and that employment action was taken for appropriate reasons. Licensees would be risking an NRC violation any time that they attempt to investigate or discipline bad actors. In order to avoid violations and civil penalties, licensees and managers inevitable will consider allowing harassment to continue unchecked whenever there is any conceivable basis for finding prior protected activity. Under this standard, enforcement of Section 50.7 is nearly impossible to predict and, as a result, unconstitutionally vague. The Staff's application of the rule in this instance, contrary to established precedent and without any explanation, is also arbitrary and capricious.

For these reasons and the reasons TVA explained in detail in its referenced "Reply to a Notice of Violation (EA-20-06 and EA-20-07)" at Enclosure 1, pages 11 to 13, TVA denies the alleged violation set forth in Violation 4. Accordingly, the NRC should impose no civil penalty associated with alleged Violation 4.

In addition, the classification of this alleged Violation as Severity Level I is wholly inappropriate. Section 1.2.5 of the NRC Enforcement Manual states that Severity Level I violations "[u]sually involve actions with actual or high potential to have serious consequences on public health and safety or the common defense and security." Those circumstances are not present here. There were no actual or potential consequences—much less actual or potential "serious" consequences—to the public health and safety or common defense and security in TVA's handling of the personnel matter associated with Violation 4. Nor does the alleged Violation provide any evidence to the contrary.

As the NRC stated in its press release on this matter, TVA has made progress in addressing work environment issues and corrective actions at its corporate office and its three nuclear power plants. And no specific safety issue has been identified here.

For all of these reasons, even if the NRC continues to believe that a violation occurred, then at a minimum the NRC should reduce the Severity Level of the alleged Violation and commensurately reduce the civil penalty.