

APPENDIX

EVALUATION AND CONCLUSION

On August 24, 2020, a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for four violations identified during two NRC investigations: Report of Investigation (ROI) No. 2-2018-033, completed on October 3, 2019, and ROI No. 2-2019-015, completed on January 21, 2020. Tennessee Valley Authority (TVA) (Licensee) responded to the Notice on September 23, 2020. The Licensee denied all four violations and stated that if the NRC continues to believe that the violations occurred, then at a minimum the NRC should reduce the severity levels of the alleged violations and commensurately reduce the civil penalty. The NRC's evaluation and conclusion regarding the Licensee's requests are as follows:

Restatement of Disputed Violation 1

Title 10 of the *Code of Federal Regulations* (10 C.F.R.) § 50.7(a) states, in part, that "Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment."

Contrary to the above, on March 9, 2018, TVA discriminated against a former Sequoyah employee for engaging in protected activity. Specifically, the former Sequoyah employee engaged in protected activity by raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program (ECP), and by raising concerns regarding the response to two non-cited violations. After becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel (TVA OGC). This action was based, at least in part, on the former employee engaging in protected activity.

Summary of Licensee's Response to Violation 1

TVA disagrees that the former Director of CNL's act of filing a formal complaint was in retaliation for the former Sequoyah employee's protected activity. Rather, TVA states that the former Director of CNL filed the formal complaint for other, legitimate reasons, not because of the former Sequoyah employee's purported protected activities. Specifically, TVA states that the former Director of CNL filed the formal complaint to address the "sustained pattern of disrespectful, unprofessional, and otherwise inappropriate conduct directed towards her by the former Sequoyah employee and others over the prior two years." TVA goes on to state that "the Complaint was filed after a culmination of many events and not driven by any one event in particular."

TVA states that the formal complaint was appropriately referred to the TVA OGC for an independent investigation and the former Director of CNL "had no involvement in that investigation or in the personnel decision that followed."

TVA also disagrees that filing a formal complaint constitutes an adverse action under 10 C.F.R. § 50.7.

NRC Evaluation of Licensee's Response to Violation 1

TVA attributes the former Director of CNL's decision to include the former Sequoyah employee in the formal complaint to nonprotected activities, specifically a "sustained pattern of disrespectful, unprofessional, and otherwise inappropriate conduct." However, based on an evaluation of the ROI, the formal complaint filed by the former Director of CNL, and exhibits and statements during the predecisional enforcement conference (PEC), the NRC staff determined that the former Sequoyah employee's raising of concerns related to responses to non-cited violations and contacting the ECP are protected activities and were contributing factors to filing the formal complaint. NRC staff determined that TVA's reasons do not present clear and convincing evidence to show that filing the formal complaint against the former Sequoyah employee was for nonprohibited considerations, in accordance with 10 C.F.R. § 50.7(d).

The NRC staff determined that filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.

Restatement of Disputed Violation 2

10 C.F.R. § 50.7(a), states, in part, that "Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment."

Contrary to the above, on May 25, 2018, TVA discriminated against a former Sequoyah employee for engaging in a protected activity. Specifically, the former Sequoyah employee engaged in protected activity by raising concerns about a chilled work environment, filing complaints with the ECP, and raising concerns about the regulatory response the Kirk Key and Service Life non-cited violations. 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 action was based, at least in part, on the former employee engaging in protected activity.

Summary of Licensee's Response to Violation 2

TVA disagrees that placing the former Sequoyah employee on paid administrative leave was based in part on the former Sequoyah employee engaging in protected activity. Rather, TVA states that the former Sequoyah employee was placed on paid leave due to nonprohibited considerations that violated TVA policies and federal statutes.

NRC Evaluation of Licensee's Response to Violation 2

TVA attributes the decision to place the former Sequoyah employee on paid administrative leave to nonprotected activities. However, based on an evaluation of the ROI, the formal complaint filed by the former Director of CNL, exhibits and statements during the PEC, and the TVA OGC Report, the NRC staff determined that the former Sequoyah employee's raising of concerns related to responses to non-cited violations, filing complaints with the ECP, and raising concerns of a chilled work environment to TVA management and a TVA attorney during a TVA OGC investigation are protected activities and were contributing factors to placing the former

Sequoyah employee on paid administrative leave. NRC staff determined that TVA's reasons do not present clear and convincing evidence to show that placing the former Sequoyah employee on paid administrative leave was for nonprohibited considerations, in accordance with 10 C.F.R. § 50.7(d).

Restatement of Disputed Violation 3

10 C.F.R. § 50.7(a), states, in part, that "Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment."

Contrary to the above, on March 9, 2018, TVA discriminated against a former corporate employee for engaging in protected activity. Specifically, the former corporate employee engaged in protected activity by raising concerns of a chilled work environment. After becoming aware of this protected activity, the former Director of CNL filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA OGC that resulted in the former employee being placed on paid administrative leave followed by termination. This action was based, at least in part, on the former employee engaging in a protected activity.

Summary of Licensee's Response to Violation 3

TVA disagrees that the former Director of CNL's act of filing a formal complaint was in retaliation for the former corporate employee's protected activity and states that they are unaware of any evidence indicating that the former Director of CNL included the former corporate employee in the formal complaint because of protected activities or technical concerns. TVA states that the former corporate employee was terminated for "disrespectful and unprofessional conduct" that occurred after the formal complaint was filed and, therefore, the formal complaint cannot be linked to the adverse action. TVA also states that the formal complaint ultimately uncovered additional wrongdoing by the former corporate employee.

TVA also disagrees that filing a formal complaint constitutes an adverse action under 10 C.F.R. 50.7.

NRC Evaluation of Licensee's Response to Violation 3

While TVA states that they are unaware of any evidence indicating that the former Director of CNL included the former corporate employee in the formal complaint because of protected activities, the NRC staff reviewed the former Director of CNL's formal complaint that identifies the former corporate employee as the potential source of an allegation to the NRC that triggered a chilled work environment inspection. Contacting the NRC with concerns of a chilled work environment is a protected activity and was a contributing factor in the decision to include the former corporate employee in the formal complaint. NRC staff determined that TVA's reasons do not present clear and convincing evidence to show that the former corporate employee's inclusion in the formal complaint was for nonprohibited considerations, in accordance with 10 C.F.R. § 50.7(d).

The NRC staff determined that filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a

personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action.

Restatement of Disputed Violation 4

10 C.F.R. § 50.7(a), states, in part, that “Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment.”

Contrary to the above, on January 14, 2019, TVA discriminated against a former corporate employee for engaging in protected activity. Specifically, 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. After becoming aware of this protected activity, the former Vice President of Regulatory Affairs played a significant role in the decisionmaking process to place the former employee on paid administrative leave and terminate the former employee. These actions were based, at least in part, on the former employee engaging in a protected activity.

Summary of Licensee's Response to Violation 4

TVA disagrees that placing the former corporate employee on paid administrative and terminating her employment were based in part on protected activity. Rather, TVA states that the decision to terminate the former corporate employee was based on “numerous disrespectful, unprofessional, and deliberately false statements about her supervisor, the former Director of CNL.” TVA states that the termination was reviewed by the Executive Review Board to ensure that the proposed adverse action was consistent with TVA practices and not based on retaliation for protected activities.

NRC Evaluation of Licensee's Response to Violation 4

TVA attributes the decision to terminate the former corporate employee to nonprotected activities. However, based on an evaluation of the ROI, the formal complaint filed by the former Director of CNL, exhibits and statements during the PEC, and the TVA OGC Report, the NRC staff determined that the former corporate employee’s alleged contact with the NRC regarding concerns of a chilled work environment, statements to the former Vice President of Regulatory Affairs regarding concerns of retaliation by the former Director of CNL, and statements made to a TVA attorney during an investigation about the work environment within CNL are protected activities and were contributing factors in the decision to terminate the former corporate employee. NRC staff determined that TVA’s reasons for terminating the former corporate employee do not present clear and convincing evidence to show that the termination was for nonprohibited considerations, in accordance with 10 C.F.R. § 50.7(d).

Summary of Licensee's Request for Mitigation of Civil Penalty Amount

TVA denies all alleged violations and states that the NRC should impose no civil penalty. TVA states that, if the NRC continues to believe that violations occurred, then at a minimum the NRC should reduce the severity level of the alleged violations and commensurately reduce the civil penalty.

As TVA believes that no violations of NRC requirements occurred, TVA has taken no corrective steps. However, TVA has identified some areas that need managerial improvement notwithstanding that TVA does not believe any NRC requirements were violated. TVA has taken the following steps: (1) future revision to the adverse action procedure to ensure that temporary suspension with pay will constitute a non-Executive Review Board action, (2) implementation of a pilot Nuclear Investigation Protocol, and (3) communication from the TVA Chief Nuclear Officer to TVA's nuclear workforce providing TVA's position on the violations and reinforcing commitment to a healthy and sustainable nuclear safety culture and safety-conscious work environment.

NRC Evaluation of Licensee's Request for Mitigation of Civil Penalty Amount

The NRC staff determined that TVA did not provide an adequate basis for either a reduction of the severity levels or mitigation of the civil penalty. The NRC staff's categorization of the severity levels and civil penalties is in accordance with the NRC Enforcement Policy and, therefore, remain as stated in a letter dated August 24, 2020.

Section 6.10 of the NRC Enforcement Policy states that "the severity level of a violation may be escalated based on unique escalating factors such as whether the adverse action was taken because the employee had contacted the NRC or whether the applicable NRC employee protection regulation (e.g., 10 C.F.R. § 50.7 or similar NRC employee protection regulations) were deliberately violated."

In making its determination for violations 1 and 3, the NRC staff used example b.3 from Section 6.10 of the NRC Enforcement Policy, which provides that a Severity Level II violation involves, for example "[a] mid- or senior-level plant manager (or equivalent) or a corporate-level line manager (or equivalent) is the decisionmaker or plays a significant role in the adverse action decisionmaking process; the employment action is relatively less adverse to the employee's terms, conditions, compensation, or privileges of employment (e.g., verbal counseling); and either a.1(a) or a.1(b) above is cited, or other unique escalating factors are present." Deliberate misconduct was cited as the escalating factor.

In making its determination for violation 2, the NRC staff used example b.1 from Section 6.10 of the NRC Enforcement Policy, which provides that a Severity Level II violation involves, for example "[a]n executive-level corporate manager (or equivalent) (which for this definition includes a site vice president) is the decisionmaker or plays a significant role in the adverse action decisionmaking process regardless of the severity of the adverse action but without an escalating factor present."

In making its determination for violation 4, the NRC staff used example b.1 from Section 6.10 of the NRC Enforcement Policy, which provides that a Severity Level II violation involves, for example "[a]n executive-level corporate manager (or equivalent) (which for this definition includes a site vice president) is the decisionmaker or plays a significant role in the adverse action decisionmaking process regardless of the severity of the adverse action but without an escalating factor present." This Severity Level II violation example was then escalated to a Severity Level I violation because of the deliberate misconduct escalating factor.

The NRC considers violations of 10 C.F.R. § 50.7 significant because of the potential that they may make others hesitant to raise safety issues for fear of retaliation.

Civil Penalty

In accordance with the NRC Enforcement Policy, a base civil penalty in the amount of \$240,000 is considered for each Severity Level II violation and a base civil penalty in the amount of \$300,000 is considered for the Severity Level I violation of 10 C.F.R. § 50.7. The NRC staff considered whether credit was warranted for identification and corrective action. Credit is not warranted for identification, as the violations were identified by the NRC.

Credit for corrective action is also not warranted in this case. The Licensee's actions are neither comprehensive to address the broader environment for raising concerns, nor do they address the root cause of the retaliation and discrimination. The communications issued by the TVA Chief Nuclear Officer are transparent in alerting TVA staff to the concerns raised by the NRC but fail to communicate corrective actions and state that TVA disagrees with the findings. No training is provided to increase awareness of a safety-conscious work environment and the failure to implement recommendations by the ECP is not addressed. The corrective actions outlined by TVA regarding updates to the non-Executive Review Board adverse action procedure and the pilot nuclear investigation protocol may be effective; however, their long-term impact and broad applicability throughout the nuclear fleet are not sufficient to credit as corrective actions when determining the civil penalty. Additionally, TVA did not present sufficient information that an extent of cause and extent of condition had been evaluated and addressed to preclude recurrence of the violations.

Because identification and corrective action credit are not warranted, the civil penalty of \$606,942 remains as proposed.

NRC Conclusion

Based on its evaluation, the NRC staff concluded that the violations occurred as stated and that an adequate basis does not exist for either a reduction of the severity levels or the mitigation of the civil penalty. Consequently, the proposed civil penalty in the amount of \$606,942 should be imposed.