

November 30, 2020

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

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In the Matter of	)	Docket Nos. 50-259, 50-260, 50-296, 50-
	)	327, 50-328, 50-390, 50-391
	)	License Nos. DPR-33, DPR-52, DPR-68,
Tennessee Valley Authority	)	DPR-77, DPR-79, NPF-90, NPF-96
Chattanooga, Tennessee	)	EA-20-006, EA-20-007
_____	)	

**Tennessee Valley Authority's Answer and Request for Hearing**

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**Tennessee Valley Authority’s Answer and Request for Hearing**

Pursuant to 10 C.F.R. §§ 2.202(b), 2.205(d), and Section V of the October 29, 2020 Order Imposing Civil Monetary Penalty (the “Order”),<sup>1</sup> Tennessee Valley Authority (“TVA”) hereby provides its answer denying the violations set forth in the Order, challenging the civil penalty, and requesting that the Order be set for hearing.

As explained below, TVA did not violate the NRC’s employee protection requirements in 10 C.F.R. § 50.7. Rather, TVA took appropriate steps to place one employee (Mr. Michael McBrearty) on paid administrative leave and to terminate another employee (Ms. Beth Wetzel) for engaging in inappropriate and unprofessional workplace conduct, which was inconsistent with TVA’s code of conduct. Those decisions were supported by independent reviews and reached by consensus. For example, multiple TVA managers and experienced Human Resources personnel came to a consensus decision to place Mr. McBrearty on paid leave based on substantiated findings by an independent, internal investigation that his conduct violated multiple TVA policies.<sup>2</sup> And

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<sup>1</sup> The Order was accompanied by an Appendix (hereinafter referred to as “Order Appendix”) providing the NRC Staff’s “Evaluation and Conclusion” of TVA’s responses to the initial proposed Order.

<sup>2</sup> Transcript of Pre-Decisional Enforcement Conference Re Tennessee Valley Authority, Nos. EA-2020-06 & EA-2020-07 at 69-70 (June 30, 2020) (Hereinafter “TVA PEC Tr.”).

in Ms. Wetzel's case, the TVA Executive Review Board evaluated her conduct and concluded that her separation from TVA was based on legitimate, non-retaliatory reasons and consistent with TVA policies, procedures, and past practices.<sup>3</sup> Accordingly, the evidence in this case clearly shows that TVA's employment decisions were taken for legitimate, non-discriminatory reasons consistent with 10 C.F.R. § 50.7(d).

As detailed further below, the NRC Staff alleges that TVA violated Section 50.7 because Ms. Henderson filed a complaint to report intolerable and inappropriate behavior by other TVA employees, and because TVA managers took action to stop those behaviors based on findings that substantiated the inappropriate behavior. TVA denies that any violations of NRC requirements occurred because of those actions. 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 are victims of inappropriate conduct in the workplace.

The complaint and employment actions by TVA personnel here were necessary to foster a respectful work environment, a value that is integral to a strong nuclear safety culture and which the Commission itself has endorsed. To find fault in an employee for the simple act of claiming harassment (a concern which was ultimately substantiated) is contrary to the principles of a safety conscience work environment emphasized by both TVA and the NRC. Unfortunately, the violations set forth in the Order will discourage employees (at TVA and across the nuclear industry) from raising concerns regarding inappropriate workplace behaviors through proper channels. It will also embolden perpetrators who weaponize protected avenues for raising concerns to engage in such conduct and shield them by immunizing their misconduct. As a result, licensees and their managers are in the impossible situation of having to choose between whether

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<sup>3</sup> *Id.* at 89-91.

to even investigate a complaint and risk NRC violations and fines if they do, or to let inappropriate behaviors perpetuate if they do not, a result that would impact safety. This will impede licensees' efforts to maintain environments where personnel feel free to raise concerns and interfere with their ability to conduct their own affairs.

For these reasons and for the reasons discussed below, TVA does not consent to the Order, challenges the \$606,942 civil penalty, and requests an adjudicatory hearing seeking dismissal of the proceeding.

## **I. Procedural Background**

As explained in the Order, the NRC conducted two investigations into these events. The first, NRC OI Investigation 2-2018-033, reviewed TVA's decision to place Mr. McBrearty on paid administrative leave, and the second, NRC OI Investigation 2-2019-015, reviewed TVA's decision to terminate Ms. Wetzel.

On March 2, 2020, the NRC sent a Letter to TVA with the results of its investigations and a list of apparent violations.<sup>4</sup> The March 2 Letter "determined that the actions taken against these former employees were in apparent violations of 10 CFR 50.7, and that the apparent violations were willful."<sup>5</sup> The Letter assessed four apparent violations, the first two for alleged actions taken against Mr. McBrearty and the second two for alleged actions taken against Ms. Wetzel.<sup>6</sup>

TVA disagreed with the apparent violations and requested a Pre-Decisional Enforcement Conference ("PEC") as the Letter permitted. A remote PEC was held on June 30, 2020.<sup>7</sup>

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<sup>4</sup> Apparent Violations of Employee Protection Requirements (Office of Investigations Reports Nos. 2-2018-033 and 2-2019-015) (Mar. 2, 2020).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* Enclosure 1 "Apparent Violations" at 1-2.

<sup>7</sup> *See generally*, TVA PEC Tr.

On August 24, 2020, the NRC issued a written Notice of Violation and Proposed Imposition of Civil Penalty to TVA.<sup>8</sup> Despite TVA’s detailed PEC presentation on June 30 showing why the apparent violations were improper, the four Notices of Violations were largely the same as the apparent violations set forth in the NRC Staff’s March 2 Letter, with the exception of withdrawing the constructive discharge allegations and the determination that Violation A.2 was not based on deliberate misconduct.

According to the cover letter that accompanied the NOV, the NRC assessed Severity Levels as follows: Violations A.1 and B.1 are alleged to be Severity Level II violations “based on the deliberate action and the level of manager [former CNL Director Erin Henderson] involved,” Violation A.2 is alleged to be a Severity Level II violation based only on “the level of the manager involved,” and Violation B.2 is alleged to be a Severity Level I violation based on the “deliberate action and the level of the manager [former Regulatory Affairs Vice President Joseph Shea] involved.”<sup>9</sup> For each violation, the NRC Staff found that TVA “discriminated against [the former] employee[s] for engaging in protected activity.”<sup>10</sup> The NRC also stated that it would consider a base civil penalty in the amount of \$606,942.<sup>11</sup>

TVA replied to the Notice of Violation and answered the proposed civil penalty by letters dated September 23, 2019.<sup>12</sup> In its Reply, TVA denied the violations. As TVA’s Reply stated,

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<sup>8</sup> Tennessee Valley Authority (Sequoyah, Watts Bar, and Browns Ferry Nuclear Plants) Notice of Violation and Proposed Imposition of Civil Penalty (EA-20-006, EA-20-007) (the “NOV”).

<sup>9</sup> Letter from G. Wilson to J. Barstow, 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 (Aug. 24, 2020) at 1-2.

<sup>10</sup> NOV at 1-2.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Reply to Notice of Violation (EA-20-06 and EA-20-07) (Sept. 23, 2020) (“Reply”); Answer to Notice of Violation (EA-20-06 and EA-20-07) (“Answer”).

TVA extensively investigated these events and reached different conclusions than the NRC.<sup>13</sup> Indeed, during its PEC, TVA presented overwhelming evidence demonstrating that there was no retaliation for protected activity and these employment decisions were based on non-prohibited considerations pursuant to Section 50.7(d).<sup>14</sup> Moreover, TVA disputed the Staff's assertion that any of the violations occurred as a result of deliberate misconduct.<sup>15</sup>

In its Answer to the Violations, TVA explained its bases for denying the violations and explained why the proposed penalty should not be imposed. Alternatively, TVA requested that even if the NRC continued to believe that a violation occurred, the NRC reduce the Severity Level of the alleged violations in accordance with the NRC Enforcement Manual and commensurately reduce the civil penalty.<sup>16</sup>

On October 29, 2020, the NRC issued the Order, which assessed TVA four violations and imposed a \$606,942 civil penalty.

## **II. Answer and Request for Hearing**

TVA does not consent to the Order, and requests a hearing. TVA denies the NRC's flawed determination that adverse action was taken against the employees for engaging in protected activity. The NRC Staff has failed in its burden to demonstrate by a preponderance of evidence that protected activity contributed, in part, to the personnel actions in this case.<sup>17</sup> Further, the clear and convincing evidence demonstrates that the adverse actions in this case were taken against the

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<sup>13</sup> Reply, Enclosure at 1, 5, 8, 11.

<sup>14</sup> See, e.g., TVA PEC Tr. at 46-47, 58-66, 88-93.

<sup>15</sup> Reply, Enclosure at 1, 8.

<sup>16</sup> Answer, Enclosure at 2, 4, 6, 8.

<sup>17</sup> Section 211 establishes a two-part burden shifting framework: (1) the NRC Staff must show by preponderance of the evidence that whistleblowing activity was a "contributing factor" in an unfavorable personnel action; and (2) if that showing is made, employers still may escape liability if they demonstrate, by "clear and convincing evidence," that they would have taken the same personnel action anyway, regardless of the whistleblowing activity. *Tennessee Valley Authority* (Watts Bar Nuclear Plant), CLI-04-24, 60 N.R.C. 160, 191, 194 (2004).

former employees for permissible, non-retaliatory reasons that were an appropriate management reaction to unprofessional and inappropriate behavior. Furthermore, regarding the escalated Severity Levels of the violations, the NRC Staff has failed to demonstrate by *any* evidence (let alone a preponderance of evidence) that Ms. Henderson or Mr. Shea acted deliberately to retaliate against Mr. McBrearty or Ms. Wetzel for engaging in protected activity.

**A. TVA Denies Violation 1**

The Order Appendix restates initial Violation A.1 (now identified as Violation 1) as follows:

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.<sup>18</sup>

In addition, the Order Appendix expands on Violation 1 as initially pled by stating in the NRC Evaluation of Licensee’s Response to Violation 1:

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

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<sup>18</sup> Order Appendix at 1.



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.<sup>19</sup>

For the same reasons set forth in TVA’s Reply to the Notice of Violation and as discussed herein, TVA denies Violation 1. TVA denies that a violation of NRC requirements occurred when Ms. Erin Henderson (the former CNL Director) filed her March 9, 2018 complaint (the “Complaint”). TVA extensively investigated these events and reached different conclusions than the NRC. TVA disagrees that Ms. Henderson’s act of filing the Complaint was retaliation for others’ ostensibly protected activity. Nor was her Complaint an “adverse action” under 10 C.F.R. 50.7, NRC precedent, or under any reasonable understanding or interpretation of the phrase “adverse action.” Nor does the NRC explain the legal or factual basis for determining that a filing of a complaint *per se* constitutes an adverse action. Indeed, all of the NRC Enforcement Policy examples for what constitutes “discrimination” state that discrimination occurs where the manager is “*the decisionmaker* or plays a significant role in the adverse action *decisionmaking process*.”<sup>20</sup> But here, Ms. Henderson was not the decisionmaker and had no role in the decisionmaking process, so it is unclear how Violation 1 aligns with the NRC Enforcement Policy. The Staff itself recognizes this factual distinction, but nevertheless “determined that *filing* the formal complaint that triggered an investigation is considered an adverse action in this case” and that “[w]hen 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.”<sup>21</sup> But TVA is aware of no evidence—and the NOV includes no evidence—that the action taken against Mr. McBrearty (the former Sequoyah employee) was motivated in any way by protected activity.

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<sup>19</sup> *Id.* at 2.

<sup>20</sup> NRC Enforcement Policy Manual at 66 (Jan. 15, 2020) (ADAMS Accession No. ML19352E921) (emphasis added).

<sup>21</sup> Order Appendix at 2 (emphasis added).

As explained during the PECs for both TVA and Ms. Henderson, Ms. Henderson filed her Complaint to register her reasonable belief that she had been subjected to a sustained pattern of disrespectful, unprofessional, and otherwise inappropriate conduct directed towards her by Mr. McBrearty and others over the prior two years.<sup>22</sup> Ms. Henderson attempted to resign her position at that time but was told by TVA's then-Chief Nuclear Officer that, if she felt that she was being harassed, she could file a formal complaint.<sup>23</sup> That is what she did.

Ms. Henderson followed the process TVA emphasizes for its workforce by filing her formal Complaint. The Complaint explained her reasonable belief that Mr. McBrearty's behaviors and conduct over the prior two years were in retaliation or reprisal for her raising an ethics concern in April 2016 that involved Mr. McBrearty.<sup>24</sup>

When reading the Complaint in total, as well as the overwhelming contemporaneous documentary evidence that Ms. Henderson provided during her PEC, it is clear that Ms. Henderson reasonably believed that the behaviors she suffered for the two years preceding her Complaint were in retaliation for her own protected activity.<sup>25</sup> Moreover, the Complaint was filed after a culmination of many events and not driven by any one particular event.<sup>26</sup> Indeed, the evidence shows that Ms. Henderson had raised concerns about Mr. McBrearty's inappropriate behaviors to

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<sup>22</sup> TVA PEC Tr. at 58-66; Transcript of Pre-decisional Enforcement Conference Re Erin Henderson, No. IA-20-009 at 93 (June 23, 2020) (Hereinafter "Henderson PEC Tr.") ("want to close by saying that I believe to this day I was subjected to two years of harassment as a direct result of having done my job and raising an ethics concern.").

<sup>23</sup> Henderson PEC Tr. at 30-31 ("I packed up my office and handed my badge to our department administrative assistant. I had no job lined up. . . . In my rush to leave, I forgot something, and as I returned to my office to pick it up the Chief Nuclear Officer at the time . . . stopped me. He told me that if I was feeling harassed I should file a written complaint, and he asked me not to quit.").

<sup>24</sup> *Id.* at 69-74.

<sup>25</sup> *See* TVA PEC Tr. at 58-66; Henderson PEC Exhibits 4, 30, 70-81, 83, 85, 88-89, 91, 93.

<sup>26</sup> Henderson PEC Tr. at 26 ("No one single event could have caused me to get to that point. I was subjected to two years of harassment from Mike, all because I did my job by raising a potential ethics concern."); TVA PEC Tr. at 74 (quoting a letter from TVA HR which stated, "it is not a single egregious occurrence but the culmination of the time and type of behavior that occurred that contributes to the conclusion").

her management, which TVA management attempted to address, well before Mr. McBrearty raised concerns to the TVA Employee Concerns Program and any of his other purported protected activity.<sup>27</sup>

TVA denies that Mr. McBrearty’s “raising of concerns related to responses to non-cited violations” prompted Ms. Henderson to file her Complaint.<sup>28</sup> As Ms. Henderson explained at her PEC (and as further detailed in TVA’s response to Violation 2 below), at the time Ms. Henderson filed her Complaint there was nothing left for her or for TVA to do on these issues.<sup>29</sup>

The Complaint was appropriately referred to TVA’s Office of General Counsel (“OGC”) for an independent investigation.<sup>30</sup> The OGC investigation substantiated many of the Complaint’s allegations.<sup>31</sup> Ms. Henderson was not involved in that investigation or in the personnel decision that followed, other than to be interviewed.<sup>32</sup> Among other things, the OGC investigation found that Mr. McBrearty’s behaviors violated three TVA policies.<sup>33</sup> Based on the results of this independent investigation, Mr. McBrearty was placed on paid administrative leave pending a decision regarding next steps.<sup>34</sup>

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<sup>27</sup> Henderson PEC Tr. at 29 (“I had enough. What I had enough of, specifically, was everyone ignoring my concerns regarding Mike’s behavior. I was extremely frustrated that my leadership, Mike’s leadership, and even ECP had not taken sufficient action at that point to address my concerns related to the work environment Mike was creating for me.”); *Id.* at 30 (“It was known that I had expressed a concern that Mike was creating a hostile work environment for me during the previous year, to ECP, to HR, to my management and Mike.”).

<sup>28</sup> Order Appendix at 2.

<sup>29</sup> Henderson PEC Tr. at 63 (“There was absolutely no basis for me wanting to impede attempts to restore regulatory compliance, because at the time I filed my complaint, there was nothing left for TVA to do.”).

<sup>30</sup> Transcript of Pre-Decisional Enforcement Conference Re Joe Shea, No. IA-2020-008 at 48-49 (June 25, 2020) (Hereinafter “Shea PEC Tr.”) (“Based on discussions with human resources, the Office of General Counsel, and my management, it was determined that the Office of General Counsel, or OGC, would conduct the investigation into Erin’s complaint.”).

<sup>31</sup> *See, e.g.*, TVA PEC Tr. at 67 (“TVA’s OGC investigation substantiated in part Ms. Henderson’s allegations.”).

<sup>32</sup> *Id.* at 53 (“Ms. Henderson had no role in that investigation other than to be interviewed by HR and to provide information relevant to that investigation.”).

<sup>33</sup> *Id.* at 67.

<sup>34</sup> *Id.* at 68-70.

TVA's experienced Human Resources professionals, OGC, and various TVA executives all agreed with that decision.<sup>35</sup> Moreover, as demonstrated at TVA's and Ms. Henderson's PECs, Mr. McBrearty admitted to his misbehaviors when he was placed on paid administrative leave.<sup>36</sup> He did not claim at the time that the action was based on retaliation. Although Mr. McBrearty resigned his position before any disciplinary determination could be made, experienced TVA Human Resources professionals reviewed his conduct and found that it warranted termination.<sup>37</sup> Whatever protected activities Mr. McBrearty may have engaged in, that protected activity did not immunize him from discipline for his inappropriate conduct, as specified in 10 C.F.R. § 50.7(d).

The discussion in the NRC Evaluation of Licensee's Response to Violation 1<sup>38</sup> appears to narrow the alleged protected activity on which Violation 1 is based in at least one respect. Specifically, the "NRC Evaluation of Licensee's Response to Violation 1" eliminates the reference to "concerns regarding a chilled work environment" that was in Violation A.1. as initially pled as purported protected activity by Mr. McBrearty that allegedly prompted the Complaint. Rather, the NRC Staff now states that, "based on an evaluation of the [Report of Investigation], 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

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<sup>35</sup> *Id.* at 68 ("[T]he recommendations [to] place to Mr. McBrearty on temporary, paid administrative leave was a joint one including several other people, including the Sequoyah Site Vice President, the TVA Senior Vice President for Nuclear Operations, the Office of General Counsel, and Human Resources.").

<sup>36</sup> *Id.* at 70-71 (describing the contemporaneous email sent by Mr. McBrearty's supervisor to the Site VP, wherein Mr. McBrearty's supervisor explains that Mr. McBrearty "knew what this was about without prompting," admitted he "[let his] ego get out of control and will not do that again," and promised to "create a corrective action contract this weekend.").

<sup>37</sup> *Id.* at 74-75 (discussing the conclusion by an independent HR review that "Mr. McBrearty's behavior and conduct was unbecoming of a leader at TVA and warranted Mr. McBrearty's termination."); *id.* at 75-76 (discussing the opinion by TVA's HR Director that "in Corporate we terminate for these actions when substantiated").

<sup>38</sup> Order Appendix at 2.

are protected activities and were contributing factors to filing the formal complaint.”<sup>39</sup> The NRC Staff was correct to narrow the scope of alleged protected activity underlying Violation 1 because Mr. McBrearty’s purported chilled work environment concerns were not contributing factors to the filing of the Complaint. TVA otherwise denies that Mr. McBrearty’s purported chilled work environment concerns prompted the Complaint.

TVA also denies the Staff’s conclusion in the Order that “filing the formal complaint that triggered an investigation is considered an adverse action in this case.”<sup>40</sup> TVA disagrees that Ms. Henderson’s Complaint can constitute an adverse action under 10 C.F.R. § 50.7. Moreover, even under a Section 50.7 analysis (which TVA maintains is inapplicable to the Complaint) the evidence presented during Ms. Henderson’s and TVA’s PECs demonstrates that both the Complaint and TVA’s employment actions were based on non-prohibited reasons as permitted in Section 50.7(d). The Complaint was also consistent with TVA policies and procedures that encourage all employees to raise all types of concerns. Again, the Staff points to no legal or factual support for its new view that filing of a complaint may constitute an “adverse action,” a position the Staff embraced after the PECs.

Furthermore, under the Staff’s theory, anyone who files a complaint when they believe they have suffered misconduct could expose themselves to a potential violation from the NRC Staff, solely for the act of filing a complaint. This would be the case even if the complainant has no role in the ensuing investigation, the investigation’s conclusion, the employment decision, or the ultimate adverse action. Were the Staff’s analysis to stand, employees who are subjected to what they believe is workplace harassment or other inappropriate behavior would be chilled from

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

calling attention to such behavior. The Commission’s regulations should be read to encourage, not discourage, complaints if an employee feels harassed.

TVA also denies the Staff conclusion that, “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.”<sup>41</sup> Every investigation that substantiates harassing or unprofessional conduct is “closely related to a personnel action.” Accordingly, under the Staff’s theory every such investigation would be an adverse action under Section 50.7. But this theory is without basis or supporting precedent. The Staff’s position would place TVA and other licensees in an impossible position when an alleged harasser has also supposedly engaged in protected activity—investigate the harassment complaint and risk NRC sanction, or ignore the complaint and risk alienating its employees and emboldening workplace misconduct (which itself would raise safety concerns). Furthermore, the Staff’s conclusion places TVA and other licensees in the absurd position of having to take personnel actions without first investigating the underlying conduct.

For these reasons, TVA denies Violation 1 and requests that it be set for hearing.

## **B. TVA Denies Violation 2**

The Order Appendix restates initial Violation A.2 (now identified as Violation 2) as follows:

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

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<sup>41</sup> *Id.*

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.<sup>42</sup>

In addition, the “NRC Evaluation of Licensee’s Response to Violation 2”<sup>43</sup> expands on Violation 2 as initially pled by stating in part:

[B]ased on an evaluation of the [Report of Investigation], 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.<sup>44</sup>

For the same reasons set forth in TVA’s Reply to the Notice of Violation and as discussed herein, TVA denies Violation 2. No violation of NRC requirements occurred when Mr. McBrearty (the former Sequoyah employee) was placed on paid administrative leave on May 25, 2018. TVA has extensively investigated these events and reached different conclusions than the NRC. TVA disagrees that placing Mr. McBrearty on paid administrative leave was based in part on his engaging in protected activity. Mr. McBrearty was placed on paid administrative leave based on substantiated findings from an independent investigation conducted by TVA OGC that his conduct violated TVA policies and federal statutes.<sup>45</sup> TVA is aware of no evidence—and the NOV

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2-3.

<sup>45</sup> Reply at 2.

includes no evidence—that the action taken against Mr. McBrearty was motivated in any way by his purported protected activity.

As explained at TVA’s PEC, the recommendation to place Mr. McBrearty on temporary, paid administrative leave was a joint one, involving several people, including the Sequoyah Site Vice President, the Senior Vice President for Nuclear Operations, the Senior Vice President for Engineering, the Office of General Counsel, and Human Resources.<sup>46</sup> All of the TVA managers and HR and OGC personnel who considered the investigation’s findings agreed that Mr. McBrearty should be removed from his then-current role so that he would be separated from Ms. Henderson to ensure that his inappropriate behaviors toward her did not continue, pending a further determination as to next steps.<sup>47</sup> This was consistent with TVA policy and practice.<sup>48</sup>

Indeed, when Mr. McBrearty was placed on paid administrative leave by his supervisor, Mr. McBrearty admitted to his misbehaviors, further confirming the well-founded decision to separate him from the situation pending next steps.<sup>49</sup> And at TVA’s PEC, Mr. McBrearty again admitted that he was spoken to by his management about his conduct.<sup>50</sup>

Moreover, Mr. McBrearty’s ostensibly protected activities had nothing to do with the decision to place him on paid leave. TVA is aware of no evidence indicating that the TVA personnel involved in the consensus recommendation and decision to place Mr. McBrearty on paid

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<sup>46</sup> TVA PEC Tr. at 68 (“[T]he recommendations [to] place to Mr. McBrearty on temporary, paid administrative leave was a joint one including several other people, including the Sequoyah Site Vice President, the TVA Senior Vice President for Nuclear Operations, the Office of General Counsel, and Human Resources.”).

<sup>47</sup> *Id.* at 69.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 70-71 (describing the contemporaneous email sent by Mr. McBrearty’s supervisor to the Site VP, wherein Mr. McBrearty’s supervisor explains that Mr. McBrearty “knew what this was about without prompting,” admitted he “[let his] ego get out of control and will not do that again,” and promised to “create a corrective action contract this weekend.”).

<sup>50</sup> *Id.* at 129-30 (“I was repeatedly told by my management that Joe and Erin Henderson complained about me and I was told to minimize my interactions with them.”).



administrative leave were motivated by any of his prior alleged protected activity, or otherwise by retaliatory intent. In particular, at the time Mr. McBrearty was placed on paid administrative leave, there was nothing left for TVA to do on the Kirk Key and Service Life non-cited violations referenced in Violation 2. Indeed, the Service Life backfit and denial had already been under review with the NRC for months, and the Kirk Key license amendment request had already been the subject of an NRC pre-submittal meeting and had been submitted to the NRC.<sup>51</sup>

The available evidence indicates the TVA personnel involved in the consensus recommendation and decision to place Mr. McBrearty on paid administrative leave were motivated only by the wrongdoing substantiated in the investigation, not any protected activity (whether regarding a chilled work environment, Mr. McBrearty's ECP complaints, the Kirk Key and Service Life non-cited violations, or any other activities). Contrary to the Staff's finding that TVA violated Section 50.7, the evidence clearly shows that TVA was justified in placing Mr. McBrearty on paid leave due to non-prohibited considerations consistent with Section 50.7(d).

For these reasons, TVA denies Violation 2 and requests that it be set for hearing

### **C. TVA Denies Violation 3**

The Order Appendix restates initial Violation B.1 (now identified as Violation 3) as follows:

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."

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<sup>51</sup> *Id.* at 56-57 ("[A]t the time [Ms. Henderson] filed [her Complaint], there was nothing left for TVA to do on these issues. . . . because the service life backfit in denial had already been under review by the NRC for months. . . . [and] the Kirk Key license amendment request had already been the subject of an NRC pre-submittal meeting and was just about to be submitted.").

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.<sup>52</sup>

In addition, the “NRC Evaluation of Licensee’s Response to Violation 3”<sup>53</sup> expands on Violation 3 as initially pled in two respects by stating in part that:

[T]he 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[;]<sup>54</sup>

and

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.<sup>55</sup>

For the same reasons set forth in TVA’s Reply to the Notice of Violation and as discussed herein, TVA denies Violation 3. No violation of NRC requirements occurred when Ms. Henderson filed her Complaint. TVA has extensively investigated these events and reached different conclusions than the NRC. TVA disagrees that Ms. Henderson’s act of filing the Complaint was retaliation for others’ ostensibly protected activity. And TVA is aware of no evidence—and the

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<sup>52</sup> Order Appendix at 3.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 3-4.

NOV includes no evidence—that the action taken against Ms. Wetzel (the former corporate employee) was motivated in any way by protected activity.

As explained during the PECs for both TVA and Ms. Henderson, Ms. Henderson was encouraged to include everything in her Complaint that had occurred, so that her concerns could be investigated.<sup>56</sup> TVA is aware of no evidence indicating that Ms. Henderson included Ms. Wetzel in the Complaint because of protected activities or technical concerns. The NOV contains no such evidence; nor does it establish any unlawful motivation on the part of Ms. Henderson. Moreover, TVA is unaware of any basis for concluding that it was improper for TVA to proceed with an investigation upon receiving Ms. Henderson’s Complaint.

The Staff now claims that Ms. Wetzel’s contacting the NRC “was a contributing factor in [Ms. Henderson’s] decision to include the former corporate employee in the formal complaint.”<sup>57</sup> TVA denies that this was the case, and further notes that the Staff has provided no evidence of the motivation behind Ms. Henderson’s decisions concerning what to include in her complaint. TVA knows of no evidence indicating that TVA or Ms. Henderson was aware of Ms. Wetzel actually contacting the NRC. TVA further affirms that Ms. Henderson included Ms. Wetzel in her Complaint for only non-prohibited reasons.

In addition, as the record conclusively establishes, TVA terminated Ms. Wetzel for disrespectful and unprofessional conduct towards Ms. Henderson that occurred *after* Ms. Henderson filed her Complaint, and which did not involve chilled work environment claims.<sup>58</sup> It

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<sup>56</sup> Henderson PEC Tr. at 140 (“I was told to include everything in my complaint, and I did.”); TVA PEC Tr. at 56 (“[A]s Ms. Henderson and Mr. Shea told you last week, [Ms. Henderson] was encouraged to put in writing everything she believed was contributing to her concerns so that her concerns could be investigated.”).

<sup>57</sup> Order Appendix at 3.

<sup>58</sup> TVA PEC Tr. at 102 (“Ms. Wetzel’s emails and texts to Mr. Shea[] [and] her interview with Mr. Slater occurred after Ms. Henderson filed her complaint.”).

is simply not possible to find that the Complaint caused Ms. Wetzel to be placed on paid administrative leave or terminated when the Complaint merely raised issues that TVA appropriately investigated and substantiated, while ultimately uncovering additional wrongdoing by Ms. Wetzel. TVA’s investigation found wrongdoing by Ms. Wetzel with no connection to protected activity. Based on those findings, TVA placed her on paid administrative leave and then terminated her employment after she declined to enter into a no-fault separation agreement with the company.<sup>59</sup>

The Staff also now claims that “the formal complaint that triggered an investigation is considered an adverse action in this case.”<sup>60</sup> TVA denies that Ms. Henderson’s filing of a Complaint is an adverse action for the same reasons set forth in TVA’s above response to Violation 1. As also set forth in that response, TVA denies the Staff’s unprecedented conclusion in Violation 3 that “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.”<sup>61</sup>

For these reasons, TVA denies Violation 3 and requests that it be set for hearing.

#### **D. TVA Denies Violation 4**

The Order Appendix restates initial Violation B.2 (now identified as Violation 4) as follows:

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

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<sup>59</sup> *Id.* at 88 (“OGC recommended that Ms. Wetzel be separated from the company, either by a no-fault separation agreement or termination, because it found that Ms. Wetzel’s pattern of behaviors violated multiple TVA policies and federal law.”); *id.* at 91 (“Ms. Wetzel was offered a [no-fault] separation agreement, which she initially accepted but rescinded, as was her right. . . . TVA convened an ERB update before proceeding with terminating her from the company.”).

<sup>60</sup> Order Appendix at 3.

<sup>61</sup> *Id.* at 3-4 (emphasis added).

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.<sup>62</sup>

In addition, the “NRC Evaluation of Licensee’s Response to Violation 4”<sup>63</sup> expands on Violation 4 as initially plead by stating in part that:

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.<sup>64</sup>

For the same reasons set forth in TVA’s Reply to the Notice of Violation and as discussed herein, TVA denies Violation 4. No violation of NRC requirements occurred when Mr. Joseph Shea, the former Vice President of Regulatory Affairs, played a significant role in the decision-making process to place Ms. Wetzel (the former corporate employee) on paid administrative leave and then terminated her employment on January 14, 2019. TVA disagrees that Ms. Wetzel was separated from TVA in retaliation for engaging in protected activity. As explained in TVA’s and Mr. Shea’s PECs, TVA terminated Ms. Wetzel for making numerous disrespectful, unprofessional,

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<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

and deliberately false statements about her supervisor, Ms. Henderson (the former CNL Director).<sup>65</sup>

Mr. Shea determined that Ms. Wetzel's statements were inappropriate and unacceptable.<sup>66</sup> Consistent with Mr. Shea's own determination, the TVA OGC found that Ms. Wetzel's pattern of behavior violated multiple TVA policies.<sup>67</sup> Based on these findings, Mr. Shea decided to separate Ms. Wetzel from the company, first by offering a no-fault separation agreement that Ms. Wetzel declined, and then by termination.<sup>68</sup>

As required by TVA procedures, Ms. Wetzel's proposed separation from TVA was reviewed by TVA's Executive Review Board, or "ERB." The purpose of the ERB is to ensure that the proposed adverse employment action is consistent with company practices, and not based on retaliation for protected activities.<sup>69</sup> The ERB adds a degree of independence and deliberative input to proposed personnel actions, and is specifically focused on ensuring that activity protected under Section 50.7 does not form the basis for adverse action, and that the action is consistent with

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<sup>65</sup> TVA PEC Tr. at 82 ("[Mr. Shea] terminated Ms. Wetzel based on the following factors, his knowledge that certain of her statements and emails were in direct violation of TVA's standards and policies. Because he knew the oral and email statements were false and because of OGC's recommendation, the termination was appropriate. Specifically, Mr. Shea knew that Ms. Wetzel had violated TVA rules and policies by making unfounded and specious allegations about her supervisor in statements she repeatedly made to him."); Shea PEC Tr. at 84 ("[U]ltimately, I took action to terminate Beth Wetzel because I believed she was engaged in disrespectful and harassing conduct towards Erin Henderson.").

<sup>66</sup> Shea PEC Tr. at 21 ("[T]he statements Ms. Wetzel made to me were simply unprofessional and unacceptable for a manager to make in any workplace, much less a federal agency.").

<sup>67</sup> *Id.* at 74 ("The legal memorandum found that Ms. Wetzel engaged in harassment, retaliation, and the creation of a hostile work environment with respect to Ms. Henderson, in violation of multiple TVA policies and federal law. The memorandum recommended that Ms. Wetzel's employment with TVA be terminated as a result of her involvement in a pattern of harassment and retaliation directed at Ms. Henderson.")

<sup>68</sup> *Id.* at 33.

<sup>69</sup> *Id.* at 75.

action taken for similarly situated employees.<sup>70</sup> The ERB process also considers negative impacts to a Safety Conscious Work Environment and develops mitigation plans, as necessary.<sup>71</sup>

Over half a dozen TVA personnel participated in the ERB, including the Senior Vice President for Operations (who served as ERB Chair); a representative from the Office of General Counsel; a representative from Human Resources; the TVA Nuclear Safety Culture Monitoring Panel Chairperson; the Senior Manager of the Employee Concerns Program; and the Employee Concerns Program Manager for the Corporate office.<sup>72</sup> These individuals were completely independent of all the underlying events.<sup>73</sup>

No ERB member objected to proceeding with separating Ms. Wetzel from TVA.<sup>74</sup> The ERB members concluded that the proposed action was based on legitimate non-retaliatory reasons, and consistent with TVA policies, procedures, and past practices.<sup>75</sup> TVA convened an ERB update before proceeding with terminating Ms. Wetzel to consider legal documentation submitted by her attorney to ensure that there was no new information impacting the previous ERB conclusions.<sup>76</sup> The ERB update reached the same conclusions again unanimously—the action was based on legitimate non-retaliatory reasons, and consistent with TVA policies, procedures, and past practices.<sup>77</sup> Accordingly, the evidence clearly shows that Mr. Shea placed Ms. Wetzel on paid

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<sup>70</sup> *Id.* (“The ERB is composed of TVA personnel who are independent of the proposed adverse employment action.”).

<sup>71</sup> TVA PEC Tr. at 42 (“The Executive Review Board process includes a Safety Conscious Work Environment mitigation screening and Safety Conscious Work Environment mitigation plan, if applicable.”).

<sup>72</sup> *Id.* at 89.

<sup>73</sup> *Id.* at 90.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 91.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

administrative leave and terminated her for non-prohibited reasons in accordance with 10 C.F.R. § 50.7(d).

In the separate but related proceeding on the Enforcement Order against Mr. Shea, the NRC Staff has alleged that the OGC and ERB involvement in this personnel decision were a “cover” and “window dressing” for the personnel action here.<sup>78</sup> To the extent that the NRC Staff bases Violation 4 (or any part of Violations 1-3) on this unfounded allegation, TVA denies it. As noted by the Licensing Board majority in Mr. Shea’s proceeding, the Staff has “point[ed] to no evidence” that “either the ERB or OGC did not fulfill its professional responsibilities and act truthfully.”<sup>79</sup>

TVA further denies that “the former corporate employee’s alleged contact with the NRC regarding concerns of a chilled work environment”<sup>80</sup> was a contributing factor in the decision to terminate Ms. Wetzel. TVA is aware of no evidence supporting that assertion. TVA denies that the “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”<sup>81</sup> were protected activities. Indeed, as noted by the Licensing Board majority in Mr. Shea’s proceeding, Ms. Wetzel’s alleged statements concerning a chilled work environment were at best “opaque.”<sup>82</sup> Those statements were otherwise unrelated to nuclear safety and included demonstrable falsehoods.

For these reasons, TVA denies Violation 4 and requests that it be set for hearing.

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<sup>78</sup> LBP-20-11, \_\_ N.R.C. \_\_, \_\_ (Nov. 3, 2020) slip op. at 12-13.

<sup>79</sup> *Id.* at 13-14 (emphasis in original).

<sup>80</sup> Order Appendix at 4.

<sup>81</sup> *Id.*

<sup>82</sup> LBP-20-11, \_\_ N.R.C. \_\_, \_\_ (Nov. 3, 2020) slip op. at 12.



## E. Mitigation of the Civil Penalty Amount

The Order Appendix also includes the Staff's evaluation of TVA's request for mitigation of the civil penalty amount.<sup>83</sup> The Staff claims that "TVA did not provide an adequate basis for either a reduction of the severity levels or mitigation of the civil penalty."<sup>84</sup> TVA disagrees. First, there were no violations. Each of the employment actions taken was supported by non-prohibited considerations, so there should be no civil penalty. However, even if the Staff were able to demonstrate a violation (it cannot), the escalating factors are still incorrect, and the penalty should be reduced for the reasons set forth below.

- TVA denies that it (or its employees) violated the employee protection regulation.
- TVA denies that it should be subject to a civil penalty because TVA believes that no violations occurred.
- TVA denies that corrective actions are warranted because TVA believes that no violations occurred.
- TVA denies that it (or its employees) took an adverse action based on an employee contacting the NRC<sup>85</sup> and is unaware of any evidence supporting that assertion.
- TVA denies that Ms. Henderson's Complaint constitutes an adverse action,<sup>86</sup> and thus the Complaint cannot form the basis of Violations 1 and 3.

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<sup>83</sup> Order Appendix at 5.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ("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.'")

<sup>86</sup> *Id.*

- TVA denies that deliberate misconduct is an appropriate escalating factor for Violations 1 and 3<sup>87</sup> and is unaware of any evidence demonstrating that deliberate misconduct occurred.
  - TVA denies that deliberate misconduct is an appropriate escalating factor for Violation 4<sup>88</sup> and is unaware of any evidence demonstrating that deliberate misconduct occurred.
  - TVA denies that the alleged violations of 10 C.F.R. § 50.7 are significant “because of the potential that they may make others hesitant to raise safety issues for fear of retaliation.”<sup>89</sup>
- The employment actions in this case were based on non-prohibited considerations and therefore will not make others hesitant to raise safety concerns for fear of retaliation. TVA also is unaware of any evidence supporting the Staff’s claim.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

### III. Conclusion

For the foregoing reasons, TVA does not consent to the Order, opposes the civil penalty, and respectfully requests a hearing on the Order and the matters described herein.

Respectfully submitted,

/Electronically signed by Timothy J. V. Walsh/

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Dated: November 30, 2020

**CERTIFICATION**

I, James Barstow, am the Tennessee Valley Authority Vice President, Nuclear Regulatory Affairs and Support Services. I have reviewed the foregoing Tennessee Valley Authority's Answer and Request for Hearing. To the best of my knowledge and belief, the statements contained in this document pertaining to the Tennessee Valley Authority are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/30/2020



*Executed in Accord with 10 C.F.R. § 2.304(d)*

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November 30, 2020

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

_____	)	
In the Matter of	)	Docket Nos. 50-259, 50-260, 50-296, 50-327,
	)	50-328, 50-390, 50-391
	)	License Nos. DPR-33, DPR-52, DPR-68,
Tennessee Valley Authority	)	DPR-77, DPR-79, NPF-90, NPF-96
Chattanooga, Tennessee	)	EA-20-006, EA-20-007
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Tennessee Valley Authority's Answer and Request for Hearing has been served through the E-Filing system in the above-captioned proceeding this 30th day of November, 2020.

*/Electronically signed by Timothy J. V. Walsh/*

Timothy J. V. Walsh