

No. 09-1112,
Consolidated with No. 10-1058

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION, AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders
of the Nuclear Regulatory Commission

PETITIONER'S OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Petitioner Blue Ridge

Environmental Defense League certifies as follows:

A. Parties and Amici: Petitioner is the Blue Ridge Environmental Defense League (hereinafter “BREDL”). Respondents are the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) and the United States of America. The Tennessee Valley Authority (“TVA”) has been granted Intervenor-Respondent status.

B. Rulings Under Review: In these two consolidated cases, two agency actions are under review. In No. 09-1112, Petitioner challenges the February 19, 2009 decision of the NRC to reinstate two construction permits formerly held by TVA. This ruling is reproduced in the Joint Appendix at J.A..

In No. 10-1058, Petitioner challenges the February 19, 2009 decision of the NRC rejecting Petitioner’s legal claims and reaffirming its decision to reinstate the construction permits in question. *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, CLI-10-6 (January 7, 2010), AR # 63. This ruling is reproduced in the Joint Appendix at J.A..

C. Related Cases: Petitioner is not aware of any related cases.

Respectfully submitted,

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Dated: January 28, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioner Blue Ridge Environmental Defense League states that it is a not-for-profit charitable organization; it has no parent companies, subsidiaries or affiliates that issue shares to the public; and there are no publicly-owned companies that have an ownership share in BREDL.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Petitioners request oral argument.

GLOSSARY OF TERMS AND ABBREVIATIONS

AEA	Atomic Energy Act of 1954, as amended
AR	Administrative Record
BREDL	Blue Ridge Environmental Defense League
Commission	United States Nuclear Regulatory Commission
JA	Joint Appendix
QA	Nuclear Quality Assurance or Quality Assurance
NRC	United States Nuclear Regulatory Commission

STATEMENT REGARDING JOINT APPENDIX

Pursuant to D.C. Circuit Rule 30(c), the parties are utilizing the deferred appendix option described in Rule 30(c) of the Federal Rules of Appellate Procedure.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 2342(4) (2006), 42 U.S.C. § 2239(a) (2006), and 28 U.S.C. § 2344 (2006). The Administrative Orders Review Act, also known as the Hobbs Act, 28 U.S.C. §§ 2341-2351 (2006), gives federal courts of appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Atomic Energy Commission [now the NRC] made reviewable by section 2239 of title 42.” 28 U.S.C. § 2342(4). The provision of the AEA cited in the Hobbs Act applies to any proceeding “for the granting, suspending, revoking, or amending of any license . . . [and] for the issuance or modification of rules and regulations dealing with the activities of licensees” 42 U.S.C. § 2239(a)(1)(A)(2006).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the NRC had the statutory authority to summarily reinstate construction permits for two partly-completed nuclear power plants when, years earlier, it had definitively terminated those permits and withdrawn its jurisdiction over the facilities at the request of the Tennessee Valley Authority, the permit holder.
2. Whether, if the NRC did have such authority, it was required by § 189(a) of the Atomic Energy Act to afford Petitioner an opportunity for a hearing in advance of its decision.
3. Whether, if the NRC was required to afford Petitioner such a hearing, the NRC violated § 189(a)'s hearing requirement in this case by restricting the substantive scope of the hearing to the question whether there was "good cause" for reinstatement of the permits.

**STATEMENT OF RELEVANT FACTS
AND SUMMARY OF PROCEEDINGS BELOW**

FACTUAL BACKGROUND

Thirty-eight years ago, in May of 1973, the Tennessee Valley Authority (“TVA”) applied to the NRC for a permit to construct Bellefonte Units 1 and 2 at a site located on the Tennessee River in northwestern Alabama, approximately seven miles northeast of Scottsboro. The Atomic Safety & Licensing Board (“ASLB”) issued a favorable decision the next year, and the NRC issued the construction permits (“CPS”) on December 24, 1974. Administrative Record (“AR #”) #03.

Construction of the two reactors proceeded unevenly; after five years TVA required and obtained an extension of the deadline for completion of construction. AR # 5. Eight years later it sought and received another extension of the construction deadline. AR # 7. In 1988, after 14 years, TVA determined that it would suspend construction of the reactors altogether. By this point, Units 1 and 2 were 88 percent complete and 58 percent complete, respectively. *See Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, CLI-10-6 at 3 (January 7, 2010) AR # 63, J.A.). With the NRC’s blessing, the two plants were placed in “deferred” status pursuant to the Commission’s 1987 “Policy Statement on Deferred Plants.” 52 Fed. Reg. 38,077 (Oct. 14, 1987). “Deferred” status imposed significant maintenance, inspection and reporting responsibilities on both TVA and the NRC – with which they presumptively complied for 17 years.

But in 2005 TVA threw in the towel altogether. It renounced its intent to resume construction of the plant – or to pay for maintaining it in “deferred” status. It requested termination of the two permits as well as cessation of the maintenance and licensing process. This request was granted by the NRC on September 14, 2006, when it “terminated” and “withdrew” the permits. AR # 16, J.A. ____.

The two reactors, thus unmoored from the NRC’s regulatory apparatus, then slipped into a nether world. Major components were removed and sold off, including the main cooling systems serving the reactor cores, and tubing from the enormous “steam generators” that help convert thermal energy to electricity. AR # 17, J.A. . “Water intrusion,” anathema in operating reactors as they are made largely from steel, was observed. Id. at ____.

After a two-year period in which TVA cannibalized these vital nuclear safety systems and otherwise “allowed the facility to degrade”^{1/} without adherence to quality assurance standards and with no regulatory oversight, TVA changed its mind once again. In 2008, TVA management determined that they could make one or both of the two reactors profitable by resuming construction. In a **9-page letter** to the NRC, AR # 17, J.A. , TVA sought “reinstatement” of the CPS. expressed confidence that it could reverse the damage done by cannibalization of the plants’

^{1/} See Non-concurrence By Joseph Williams Regarding Staff Approach, TVA Request to Reinstate Construction Permits, Bellefonte Nuclear Plant, Units 1 and 2, AR # 24, at 4.

components, control the water-intrusion problem, and reduce interior moisture levels with new dehumidifying systems. Id.

THE PROCEEDING BELOW

TVA's request for reinstatement of the CPs was supported by the NRC Staff in a memorandum to the Commission. *See* COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008) AR # 23. The Staff recommended that the Commission approve TVA's request expeditiously – and to announce an opportunity for a public hearing at some point **after** the Commission's decision had been reached. The Staff suggested that the scope of any such hearing be limited to whether TVA had shown "good cause" for the reinstatement request. AR # 23.

However, a courageous, "whistleblowing" engineer by the name of Joseph Williams dissented loudly and formally. AR # 24, J.A.. Mr. Williams argued that granting TVA's reinstatement request posed enormous safety risks, due to TVA's removal of much of the plants' central core cooling systems, the withdrawal of major reactor components "from preservation and maintenance programs," *id.* at Attachment 1, p. 3 (margin notes), and the failure of the NRC Staff to conduct a "construction permit review." He urged that TVA's request for summary permit reinstatement be denied.

Over these objections, TVA's request for permit reinstatement was granted by the Commission in January of 2009 before offering the public an opportunity for a hearing or conducting an environmental review. This led to the filing of the Petition for Review in 09-1112.^{2/} Subsequently, the NRC invited interested members of the public to petition to participate in a public hearing process, the subject of which would be whether TVA had demonstrated that there was "good cause" supporting its request for CP reinstatement. 74 Fed. Reg. 10,969 (Mar. 13, 2009).

BREDL, along with others, petitioned to intervene in that proceeding. In addition to raising a number of technical issues (such as TVA's inability to rehabilitate its all-important "quality assurance" program), Petitioners argued that the Commission, by holding a public hearing after-the-fact and artificially limiting

^{2/} Notably, Commissioner (now Chairman) Jaczko filed an extensive and strongly-worded dissent from the Commission's action. See AR # 25, J.A.. Among the many points made in the dissent were:

- 1 - permitting TVA to put the two reactors back on a construction track poses great risks to public safety, chiefly because the units' two-year absence from the agency's monitoring and oversight is not readily remediable;
- 2 - the majority's decision represents bad policy, as it encourages utilities, rather than placing troubled reactors in "deferred" status, to remove them from the NRC's regulatory ambit altogether, thus enabling them to avoid maintenance and layup costs until such time, perhaps many years later, as they may decide to obtain reinstatement of their construction permits;
3. - Reinstating the permits without first affording the affected public an opportunity for a hearing violates § 189(a) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a).

the issues to questions of “good cause” had violated BREDL *et al.*’s public hearing rights under AEA § 189.

With respect to the BREDL’s legal contentions, the Commission determined that it, rather than a panel of the Atomic Safety & Licensing Board, should address them. It invited briefing from all parties. Consideration of BREDL’s pending technical contentions was held in abeyance.

In its decision of January 7, 2010, J.A. , the NRC rejected the legal argument of BREDL *et al.* across the board. It ordered resumption of the Licensing Board’s consideration of BREDL’s technical contention, based on the “good cause” standard. Then-Chairman Jaczko again dissented strongly and extensively. *Id.* at 21. Among other things, he argued that it is one thing to extend the life of a permit that is in existence, but it is quite another thing to breathe new life into a prior permit that has been terminated, withdrawn, extinguished. In such a case, he argued, the permit holder is required by the AEA to seek and obtain a new CP.

BREDL appeals this NRC decision in #10-1058.

In the final phase of the administrative proceeding, a panel of the Licensing Board considered and rejected all of BREDL *et al.*’s technical contentions, concluding that the Petitioners had not met their threshold burden of proof under the “good cause” standard. There had been a substantial dispute between the

parties as to the meaning of the “good cause” standard. Petitioners argued that the standard had no plausible root in the AEA; TVA and the NRC Staff argued that the meaning of the term could be ascertained by reference to its use in § 185 of the AEA – dealing with situations where utilities building reactors need to obtain additional time in which to complete construction. Ultimately the Licensing Board Panel sided with TVA and the NRC Staff. And, as the Panel interpreted and applied the standard in this unprecedented contest, it found that none of the Petitioners’ seven contentions made the grade. The petition to intervene was dismissed. *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, LBP-10-07 at 22-38, _ NRC _ (April 2, 2010).

Petitioners’ appeal to the NRC was denied. *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, CLI-10-26 at 14-15, _ NRC _ (Sept. 29, 2010). AR # 31.

SUMMARY OF THE ARGUMENT

Petitioner BREDL submits that the NRC’s summary reinstatement of the disputed construction permits violated the AEA in three respects.

First, the NRC’s reinstatement of the permits, based on little more than an exchange of letters with TVA, is not authorized by anything in the text of the Atomic Energy Act, the case law, or sound policy. If the Commission can summarily authorize resumption of construction of half-built and then half-

destroyed reactors after they have been sitting for more than two years, dark, wet, corroding and unregulated, it can do so for reactors that have been in that condition for 20 years.

Even if it were conceded that the NRC did have such authority, it was required by § 189(a) of the Atomic Energy Act to afford Petitioner an opportunity for a hearing in advance of its decision. In this case the NRC authorized TVA immediately to begin the process of getting the construction process back on track. The hearing opportunity that was offered the public was merely an afterthought.

Finally, even if the NRC can justify its after-the-fact hearing, it violated § 189(a)'s hearing requirement in this case by restricting the substantive scope of the hearing to the question whether there was "good cause" for reinstatement of the permits. This term is virtually meaningless in the abstract as well as in this context. That all of Petitioner's technical contentions, some of which were supported by declarations submitted by acknowledged experts in the field, were deemed inadmissible says more about this unprecedented "standard" than it does about the merit in Petitioner's contentions.

STANDING OF PETITIONER

BREDL has standing to bring this challenge to the NRC orders on review because it meets the criteria for associational standing set forth by this Court: 1) its members would have standing to sue in their own right; 2) the interests that BREDL seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires that an individual member of the Associations participate in the lawsuit. *Sierra Club v. EPA*, 292 F.3d 895, 899, 901 (D.C. Cir. 2002); *API v. U.S. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000); *see also Friends of the Earth v. Laidlaw Environmental Serv. (TOC)*, 528 U.S. 167, 180-181 (2000), *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-343 (1977); *Sierra Club v. Morton*, 405 U.S. 727, 738-40 (1972).

BREDL is a not-for-profit, 501(c)(3)-certified, environmental advocacy organization that seeks protection and improvement of the environment in the southeastern United States.^{3/} It has approximately 2,500 members that share the organization's environmental values. In connection with the proceeding below, BREDL filed with the NRC 88 "standing affidavits" which attested that those 88 individuals were members of BREDL and that they had authorized BREDL to represent their interests in the NRC's licensing proceeding. Virtually all alleged that they lived within 50 miles of the Bellefonte power plants; at least two, Gerry

^{3/} See Blue Ridge Environmental Defense League, <http://www.bredl.org>, page last visited January 28, 2011.

L. Morgan and John Snodgrass, Jr., alleged that they lived with five miles of the reactors. Copies of their standing affidavits are included within the Addendum to this brief. It is clear that the health and safety interests of these members of BREDL are put at risk by the close proximity of their residents to these nuclear reactors, and that errors made by the NRC during the course of its licensing review could lead to the injury or death of these individuals.

In NRC licensing proceedings, intervenors who live within 50 miles of a proposed nuclear power plant are presumed to have standing in reactor construction permit and operating license cases, because there is an “obvious potential for offsite consequences” to those residing within that radius. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426 (2002), citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

In the proceedings below, BREDL’s standing was not contested by TVA or the NRC Staff. The Licensing Board determined the BREDL had satisfied the applicable standards for standing-to-sue. *See Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, LBP-10-07 at 14-15, _ NRC _ (April 2, 2010).

ARGUMENT

A. Standard of Review

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, requires a court to “hold unlawful and set aside agency action” if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A) (2006). An agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automatic stay. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency’s decision can be upheld only on the basis of the reasoning contained within that decision. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998). Issues of law are reviewed *de novo*. *Chevron v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984).

B. Under the AEA, a Terminated Construction Permit Cannot be “Reinstated;” It Can be Rehabilitated only via Submission of an Application for a Construction Permit

When the NRC is dealing with companies that **already possess** licenses or permits, the AEA gives the agency a wide variety of tools that it can use in conducting its business. Section 185(a), 42 U.S.C. § 2245(a) authorizes

extensions of construction permits. Section 186, 42 U.S.C. § 2246, authorizes their **revocation**, and § 187, 42 U.S.C. § 2247, authorizes their **modification**. The NRC can issue “shutdown orders” and it can lift them. *See, e.g., In re Three Mile Island Alert, Inc.*, 771 F.2d 720 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S. Ct. 1460, 1520-21, 89 L. Ed. 2d 717 (1986); *see also San Luis Obispo Mothers for Peace v. NRC*, 243 U.S. App. D.C. 68, 751 F.2d 1287, 1314 (D.C. Cir. 1984) (lifting of a license suspension), *reh'g en banc on other grounds*, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923 (1986).

But when the NRC confronts an entity that lacks legal authority to construct or operate reactors, the Act gives it only a single tool – the “granting” of a permit or license. Nothing in the Act authorizes “**reinstatement**” of forfeited permits or licenses. Research reveals no evidence, in the Act or elsewhere, of congressional intent to authorize the Commission to “reinststate,” “restore,” “revive,” “resuscitate,” or otherwise breathe new life into a permit that previously has been voided by Commission action. The text of the Act prescribes only one way in which the Commission may authorize a party to construct a nuclear power plant where that party currently possesses no such authority – by “granting” that party a permit.

Petitioner endorses and proffers to this Court the reasoning of NRC Chairman Jaczko in his multiple dissents to the Commission decisions below. *See, e.g.:*

I believe that reinstatement contradicts the clear meaning of the Atomic Energy Act, which requires forfeiture of all CP rights upon termination. As implemented by our regulations, guidance and procedures, and under longstanding Commission policy, if a utility changes its mind, a new CP application must be filed and a new permit granted. Once terminated, a CP cannot simply be resurrected.

This interpretation is supported by compelling policy considerations. For the 18 years in which TVA maintained Units 1 and 2 in “deferred” status, it undoubtedly spent vast sums on continuous maintenance of systems, structures and components, as it undoubtedly did on reporting and otherwise maintaining relationships with its regulatory overseers at the NRC. Had it known in 1988 that it could simply have terminated its permit and then, decades in the future, jump from “deferred status” to “construction status” by doing little more than sending a 9-page request letter to the NRC, it very conceivably would have opted for the “low-road,” *i.e.*, the low-cost, unsafe path.

It would be contrary to sound public policy to create or endorse financial incentives of this kind. It’s a matter of common sense that nuclear power reactors are refined and highly sensitive pieces of equipment. Unanticipated or undiscovered corrosion or other forms of degradation could have unimaginably

lethal consequences down the road. The incentives created by Congress, the Commission, and the courts should be such that when plants are mothballed midway through their construction the NRC's oversight remains **continuous**. If utilities could turn out the lights, walk away, and/or wantonly remove, modify or replace critical components outside of the view of the government, it would open Pandora's Box. Such a "wild west" system could not have been foreseen by the drafters of the Act, nor should it be established by a decision of this Court.

These policy concerns are underscored by the requirement in NRC regulations that "Nuclear Quality Assurance" ("QA") be maintained continuously throughout the process of constructing and operating nuclear power plants. The important role of uninterrupted QA in the nuclear context was explained in the affidavit of Arnold Gunderson, an expert hired by BREDL to support its technical contentions before the Licensing Board Panel. In the words of Mr. Gunderson:

13. The hallmark of any nuclear power plant construction, in fact the item that most distinguishes a nuclear plant construction process from a coal or oil construction process is its Nuclear Quality Assurance. Nuclear Quality Assurance is codified in law in numerous places within 10 C.F.R. § 50. The single most important reference to Nuclear Quality Assurance is within the General Design Criteria (GDC) in 10 C.F.R. § 50 Appendix A.

14. Criterion 1 of the GDC demands Quality Assurance. It is critical to note that of all 64 General Design Criteria, regulators deliberately chose Nuclear Quality Assurance to be the first Criterion. Without Criterion 1, without nuclear grade quality, there can be no nuclear construction. Moreover, Criterion 1 demands that "Appropriate records...shall be maintained by or under the control of the nuclear power unit licensee

throughout the life of the unit". Given TVA's three-year hiatus of Nuclear Quality Assurance at the Bellefonte Units, TVA does not comply with Criterion 1.

15. Criterion 1 of the GDC is not the only quality related federal regulation with which Bellefonte Units 1 and 2 have not complied. 10 C.F.R. § 50 Appendix B also applies in its entirety to Quality Assurance for Nuclear Plants such as Bellefonte. According to 10CFR50 Appendix B: Criterion 1:

"The applicant shall be responsible for the establishment and execution of the quality assurance program."

16. To reinstate the Construction Permit license more than three years after it was terminated implies that the quality assurance program at Bellefonte was continuously executed while its construction permit was not in force. Instead of following regulations during the past three years, the plant stripped and cannibalized its equipment and the NRC stopped inspecting the Bellefonte site activities. Therefore, it is a fact that due to the lack of ongoing audits and inspections, neither the NRC nor the licensee TVA is able to confirm compliance with strict requirements of TVA's Nuclear Power Plant Construction Permit for Bellefonte Units 1 and 2 and in my opinion rendering "reinstatement" impossible.^{4/}

^{4/} Declaration of Arnold Gundersen, submitted in support of BREDL *et al.*'s Petition to Intervene, May 6, 2009, AR # 35, J.A..

See also Chairman Jaczko's comments regarding the importance of continuously-maintained QA:

... when TVA decided to discontinue lay-up and quality assurance activities without first obtaining agency approval, they no longer adhered to the Commission's regulations and terms for their construction permits. Therefore, the certification and pedigree of any QA system have been lost. Although records may remain, the NRC can no longer be assured of the quality of the equipment since the QA program was halted. The potential that undocumented work activities, introduction of unapproved chemicals, corrosion and other unknown degradation may have occurred calls into question the integrity and reliability of safety related structures, systems and components. It is not a trivial matter to merely resume a quality assurance program and preventative maintenance activities. With Bellefonte, the QA program has become invalidated. The most direct way to restore the program is to vet the QA program through the Part 50 Construction Permit process or

C. Even If the NRC Was Authorized to Reinstate the Bellefonte CPs, Doing So Without Offering Petitioner a Hearing, in Advance of the NRC's Decision, Violated Petitioner's Hearing Rights under AEA § 189.

Assuming *arguendo* it was within the Commission's organic statutory power to reinstate the Bellefonte CPS without requiring TVA to apply for a new CP, the Commission's failure to hold a public hearing in advance of its decision deprived BREDL, and other interested members of the public, of their procedural rights under § 189(a). Further, because the Commission confined the scope of the hearing to the narrow question of "good cause," that proceeding did not meet § 189(a)'s substantive requirements.

Of the spectrum of permitting and regulatory actions that the Commission is statutorily empowered to take when regulating nuclear power plants, the most substantive Commission actions have attached to them a public hearing requirement. Section 189(a) provides that:

in any proceeding under this chapter, for the **granting, suspending, revoking, or modification** of any license or construction permit, or application to **transfer control**, and in any proceeding for the **issuance or modification of rules** and regulations dealing with the activities of licensees, and in any proceeding for the **payment of compensation, an award or royalties** under Sections 2183, 2187, 2236(c) or 2238 of this title,

the Part 52 COL process to be able to have a more formal and transparent consideration of these issues.

NRC Decision on Reinstatement, February 18, 2009, AR # 24, J.A.. (separate statement of Cmr. Jaczko at 3.) *See also* CLI-10-6 at 23-25, AR # 63, J.A.. (similar).

the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.^{5/}

In a case like this one, where the Commission action in question is not specifically delineated as one of those to which hearing rights attach under § 189, it must be determined whether the permitting action should be deemed to fall within or without the § 189 list. This analysis requires this Court to make a judgment call as to whether the action (in this case “permit reinstatement”) is largely similar to or largely different from those enumerated in § 189.

The question is clearly not semantic. The Commission cannot exclude an action from the ambit of § 189's hearing requirement merely by attaching to it a creative label (*e.g.*, “reinstatement”) that is found nowhere in the text of the statute. Instead, the question should be answered based on the significance of the regulatory action. This was made clear by the First Circuit Court of Appeals in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), where petitioners situated much like the Petitioners here argued that an NRC decision allowing removal of reactor component parts fell within the scope of the § 189 list of actions that require hearings because it was, in reality, a license “amendment.” The NRC Staff countered that because it referred to the proposed action not as a “license amendment” but as a “component removal plan” – an action not specifically

^{5/} Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a). Addendum (“Add..”) at 1.

denominated in § 189 – hearing rights did not attach. The court rejected this linguistic slight-of-hand summarily:

The Commission elevates labels over substance. It would have us determine that a "proceeding" specifically aimed at excusing a licensee from filing a petition to amend its license is not the functional equivalent of a proceeding to allow a de facto "amendment" to its license. As this construct would eviscerate the very procedural protections Congress envisioned in its enactment of section 189a, we decline to permit the Commission to do by indirection what it is prohibited from doing directly. *Id.* at 295.

The overarching lesson of *Citizens Awareness Network* is that “it is the substance of the NRC action that determines entitlement to a section 189a hearing, not the particular label the NRC chooses to assign to its action.”^{6/}

The same question was examined in more detail by this Court in *San Luis Obispo Mothers for Peace v. NRC*, 243 U.S. App. D.C. 68, 751 F.2d 1287 (D.C. Cir. 1984), *reh'g en banc on other grounds*, 252 U.S. App. D.C. 194, 789 F.2d 26 (D.C. Cir.), *cert. denied*, 479 U.S. 923, 107 S. Ct. 330, 93 L. Ed. 2d 302 (1986). In that case Petitioners sought review of a number of permitting actions that the NRC had taken with regarding to the Diablo Canyon power plant, *e.g.*, the “lifting of a license suspension” and the “extension of an operating license.” 751 F.2d at 1314. The NRC had rejected the Petitioners’ demand for hearings on these actions, arguing that such actions could not be found among those listed in § 189(a).

^{6/} *Id.* (citations omitted).

Despite Judge Wilkey's observation that § 189(a)'s list of NRC actions to which public hearing rights attach is "to be construed quite literally," the Court did just the opposite. Neither the "lifting of a license suspension" nor the "extension of an operating license" are enumerated in § 189(a). Therefore, a "quite literal" interpretation would require the conclusion that neither permitting action would be deemed to trigger the hearing requirement. But the court found that while the "lifting of a license suspension" did not require a hearing, the "extension of an operating license" **did**. 751 F.2d at 1314. This was based on the Court's functional evaluation of the importance of the two permitting actions. Extending the term of a license was deemed important enough to require a hearing, the other was deemed insufficiently important:

This court held in *Brooks v. Atomic Energy Commission*¹⁵⁵ that the extension of the term of a construction permit constitutes an "amendment" within the meaning of section 189(a).¹⁵⁶ We see no reason for treating extensions of an operating license differently... *Id.* at 1314.

The Court went on to explain that all "amendments" to permits and licenses presumably trigger the hearing requirement:

We believe, however, that the reference to "amendments" in section 189(a) means *all* amendments, and not just those which effect a substantive change in a plant's status. *Id.* at 1314-15 (emphasis in original).

San Luis Obispo controls here. An objective look at the Commission's "reinstatement" of the Bellefonte CPs demonstrates that it was not only an "amendment," it was an **extension** – precisely the type of license alteration that

requires a public hearing, according to *San Luis Obispo*. Indeed, Petitioners (and presumably Chairman Jaczko) would argue that given the Bellefonte reactors' long period of unregulated dormancy and considerable internal dismantling, and the enormous challenges faced by TVA and the NRC in attempting to restore "quality assurance" for either reactor, extending their CPs was the functional equivalent of the "granting" of two new permits. Indeed, it is hard to conceive of a licensing action outside the 189(a) list that would have graver implications for public safety and environmental quality.

D. If Affording Petitioners a Hearing Opportunity Following its Decision to Reinstate the Construction Permits was Consistent with the Act's Requirements, the NRC Nevertheless Violated the Act by Artificially Constraining the Scope of That Hearing

The NRC's first written decision reinstating the CPs was actually a composite of four separate writings by each of the then-four Commission members. Thus, there was no single, clear mandate that either articulated the Commission's rationale or served to guide the proceedings that were to follow. What it did instead was to approve, on a three-to-one vote, recommendations that had been presented by the NRC Staff. *See* COMSECY-08-0041, AR # 22.

In that document the Staff proposed that, following Commission approval, the Staff would publicly announce an opportunity for a hearing. The scope of the hearing would be to determine whether TVA's request for reinstatement of the permits was "supported by good cause, considering the totality of the

circumstances.” *Id.* at 3. Evidently, the unprecedented facts of this case led to the deployment of an unprecedented legal standard. Ultimately, this legal standard proved to be essentially indecipherable as well as fatal to Petitioner’s hopes of getting a fair hearing.

As to the meaning or practical application of the “good cause” standard, Petitioners were provided precious little to go by. The term has no intrinsic meaning,^{7/} and neither the Staff nor the Commission provided a gloss. If it means that TVA has the burden to show that its decision to seek reinstatement was reasonable, what factors might this turn on? Whether there is a need for power from this plant in the relevant service areas? Whether TVA can earn a sound financial return on its investment? Nothing in the “good cause” standard seems to relate to the considerations that typically govern NRC licensing proceedings, which concern matters of environmental protection and public safety.^{8/}

^{7/} Black's Law Dictionary defines "good cause" as "a legally sufficient reason to show why a request should be granted or an action excused," Black's Law Dictionary 235 (8th ed. 2004).

^{8/} *See, e.g.*, 10 § 50.40 **Common standards:**

In determining that a construction permit or operating license in this part, or early site permit, combined license, or manufacturing license in part 52 of this chapter will be issued to an applicant, the Commission will be guided by the following considerations:

...

(c) The issuance of a construction permit, operating license, early site permit, combined license, or manufacturing license to the applicant will not, in the opinion of the Commission, be inimical to the common defense and security or to the health and safety of the public.

The Licensing Board Panel charged with reviewing BREDL's Petition to Intervene, in an early order governing the scope of the "pre-hearing conference," listed this topic as the first to be addressed by counsel at the conference.^{9/} Based on arguments presented in the briefs of TVA and the NRC Staff, the Panel assumed^{10/} that the "good cause" standard is similar to that which is found in § 185(a) of the Act, 42 U.S.C. § 2245(a), which governs requests for time-extensions to construction permits, and reads in part:

Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

This "good cause" standard would seem to encompass considerations such as whether the permit holder had been dilatory in constructing the project. Yet this consideration could have no meaningful relevance to the question whether TVA's CPs should be reinstated.

This made for an awkward discussion at the pre-hearing conference, as Petitioner's counsel, seeking to justify BREDL's contention that the glaring breakdown in QA at the two plants would create unacceptable safety and

^{9/} *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2, ASLBP No. 10-896-01-CP-BD01 at 5 (February 18, 2010).

^{10/} In its Pre-Hearing Conference order, *id.*, the Panel directed counsel to address the "Application of Atomic Energy Act section 185's "Good Cause" standard in a CP Reinstatement Proceeding."

environmental risks, then was asked what this had to do with the “good cause” standard. This unavoidable confusion ultimately led the Licensing Board Panel to conclude that none of Petitioner’s proffered contentions had met the “good cause” standard, adding:

We do so, however, with some trepidation. In this instance, the combination of the AEA section 185a “good cause” standard as applied to this proceeding; ... the apparent absence of any AEA adjudicatory process applicable to the already-approved TVA request to place the units in deferred status as well as any forthcoming TVA request to resume plant construction, see Tr. at 49-51; and the application of the largely-superseded Part 50 CP/OL reactor licensing process have the overall effect of “backloading” a number of issues of potential significance to the safe and environmentally-responsible operation of Units 1 and 2. Joint Petitioners’ contentions certainly suggest several possible areas of concern, one of the most prominent undoubtedly being whether the facilities, which were not subject to the NRC’s deferred plant maintenance and preservation requirements for several years and from which various safety-related items such as steam generator tubing and reactor coolant piping have been removed, ultimately can be restored and completed in a manner that is fully consistent with the agency’s QA/QC and safety requirements.

Ultimately, the Commission’s awkward if not meaningless “good cause” standard left Petitioner with no means of redressing its many claims. Petitioner submits that this amounted to a violation of § 189’s hearing requirements.

CONCLUSION

Nuclear power plants have been a part of the domestic energy mix for some 50 years. Though it was originally thought that these plants would be operated for 30 or, at most, 40 years past their initial permitting, the lives of these plants are

now being extended in several ways. Doing so creates risks to public safety and the environment that were never envisaged by the drafters of the Atomic Energy Act. Managing these risks will require special vigilance by the NRC.

No one ever dreamed that the Bellefonte reactors, which were designed in the 1960's, might be asked to generate electricity until the mid-21st century – or that they would spend years standing idle in the dark and wet, outside the regulatory jurisdiction of the federal government. This circumstance creates unique and unforeseen challenges for the NRC. If this agency is to meet its statutory responsibilities, it cannot take shortcuts like those that it took below. Petitioner BREDL has demonstrated that the NRC's actions were not only reckless but illegal.

Respectfully submitted,

/s/ James B. Dougherty

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Dated: January 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I filed the foregoing Petitioner BREDL's Initial Brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties in this matter.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Petitioner's Counsel hereby certifies that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) in that it contains, exclusive of the items excluded by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), xxx words of proportionally spaced, 14 point Times New Roman text.

In making this certification, Petitioner's Counsel has relied on the word count function of WordPerfect 12, the word-processing system used to prepare this brief.

Respectfully submitted,

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Dated: January 28, 2011

ADDENDUM A

PERTINENT STATUTORY PROVISIONS

42 U.S.C. § 185(a)

42 U.S.C. § 189(a)(1)

STANDING AFFIDAVITS

Garry L. Morgan
John Snodgrass, Jr.

Atomic Energy Act § 185(a):

Sec. 185. Construction Permits and Operating Licenses.

a. All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. For all oth

Atomic Energy Act § 189(a)(1)(A):

Sec. 189. Hearings and Judicial Review.

(a)(1)(A) In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of)
Tennessee Valley Authority)
Bellefonte Nuclear Plant Units 1 and 2)
Dockets No. 50-438 and 50-439)

DECLARATION OF STANDING

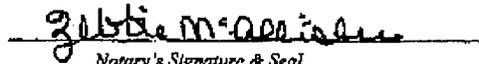
Under penalty of perjury, I Garry L. Morgan declare as follows:

1. My name is Garry L. Morgan and I am a member of the Blue Ridge Environmental Defense League.
2. I live at 130 Rome St., Scottsboro, Alabama, 35769.
3. My home lies within 4.5 miles of the site in Jackson County Alabama where the Tennessee Valley Authority has partially constructed two nuclear power plants and for which the U.S. Nuclear Regulatory Commission has reinstated two construction permits.
4. The Nuclear Regulatory Commission issued its final environmental statement for these reactors in 1974. During the last 35 years, conditions have changed including hydrology, ecology, meteorology, population, nuclear waste management, costs and the need for power.
5. Based on historical experience with nuclear reactors to date, I believe that these facilities are inherently dangerous. The reactor design the Tennessee Valley Authority began to construct at this site has never been completed anywhere in the United States. The construction of these nuclear reactors so close to my home could pose a grave risk to my health and safety. In particular, I am concerned that if an accident involving atmospheric release of radiological material were to occur, I could be killed or become very ill.
6. Therefore, I have authorized Blue Ridge Environmental Defense League to represent my interests in this proceeding as to whether good cause exists for the reinstatement of the construction permits to the Tennessee Valley Authority.


(Signature)
STATE OF ALABAMA
JACKSON COUNTY

Date 4-22-2009

Sworn to and subscribed before me this 23rd day of April, 2009.


Notary's Signature & Seal

My commission expires: 10/23/2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

_____)
In the Matter of _____)
Tennessee Valley Authority _____)
Bellefonte Nuclear Plant Units 1 and 2 _____)
Dockets No. 50-438 and 50-439 _____)

DECLARATION OF STANDING

Under penalty of perjury, John Snodgrass Jr. declares as follows:

1. My name is John Snodgrass Jr. Your Name and I am a member of the Blue Ridge Environmental Defense League.

2. I live at 1105 Cimarron Drive, Scottsboro, Alabama 35769 Physical address

3. My home lies within 5 miles of the site in Jackson County Alabama where Tennessee Valley Authority has partially constructed two nuclear power plants and for which the U.S. Nuclear Regulatory Commission has reinstated two construction permits.

4. The Nuclear Regulatory Commission issued its final environmental statement for these reactors in 1974. During the last 35 years, conditions have changed including hydrology, ecology, population, waste management, costs and the need for power.

5. Based on historical experience with nuclear reactors to date, I believe that these facilities are inherently dangerous. The reactor design Tennessee Valley Authority began to construct at this site has never been completed anywhere in the United States. The construction of these nuclear reactors so close to my home could pose a grave risk to my health and safety. In particular, I am concerned that if an accident involving atmospheric release of radiological material were to occur, I could be killed or become very ill.

6. Therefore, I have authorized Blue Ridge Environmental Defense League to represent my interests in this proceeding as to whether good cause exists for the reinstatement of the construction permits to the Tennessee Valley Authority.

[Signature] Date 4/27/09
(Signature)

090501

Dusty Matthews, Notary Public
7-8-09