

**No. 09-1112, consolidated with No. 10-1058**

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

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BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE  
Petitioner

v.

NUCLEAR REGULATORY COMMISSION and the UNITED STATES  
Respondents

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**INTERVENOR TENNESSEE VALLEY AUTHORITY'S RESPONSE TO  
PETITIONER'S BRIEF**

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**ORAL ARGUMENT NOT YET SCHEDULED**

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March 28, 2011

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Intervenor Tennessee Valley Authority submits the following certificate with respect to the parties, rulings, and related cases.

**(A) Parties and Amici:**

All parties and intervenors appearing in this Court are listed in Blue Ridge Environmental Defense League's Certificate as to Parties, Rulings, and Related Cases. There are no amici.

**(B) Rulings Under Review**

References to the rulings at issue appear in the Brief for Respondents.

**(C) Related Cases**

The case on review was never previously before this Court or any other court. There are no related cases pending in any other court.

Respectfully submitted,

*s/Maria V. Gillen*

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Tennessee Valley Authority

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The Tennessee Valley Authority (TVA) is a corporate agency and instrumentality of the United States created and existing pursuant to the Tennessee Valley Authority Act of 1933, *as amended*, 16 U.S.C. §§ 831-831ee (2006 & Supp. III 2009), and has no parent corporation. No publicly held company has any ownership interest in TVA.

*s/Maria V. Gillen*  
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## **JURISDICTIONAL STATEMENT**

This Court lacks jurisdiction over the consolidated petitions because Petitioner, Blue Ridge Environmental Defense League (BREDL), does not seek review of a final order of the NRC. See Argument I below.

## **COUNTERSTATEMENT OF ISSUES**

1. Does this Court lack jurisdiction under the Hobbs Act because BREDL only seeks review of two non-final orders of the NRC?
2. Was the NRC's decision that it had the authority to reinstate TVA's construction permits within the broad discretion given to it by Congress?
3. Was BREDL afforded the hearing rights to which it was entitled, if any, under the Hobbs Act?

## **COUNTERSTATEMENT OF THE FACTS**

### **I. Regulatory History of Bellefonte Units 1 and 2 Construction Permits**

On December 24, 1974, the U.S. Atomic Energy Commission (AEC), predecessor to the Nuclear Regulatory Commission (NRC), issued Construction Permits (CPs) CPPR-122 and CPPR-123. See letter from NRC to TVA (Dec. 24, 1974). (JA \_\_\_.) The CPs authorized TVA to construct Bellefonte Nuclear Plant (BLN) Units 1 and 2. As required, each CP included the latest date for completion of construction for the respective Unit, December 1, 1979, for Unit 1, and September 1, 1980, for Unit 2. TVA began construction of both units and, as authorized by extensions of the CPs, continued construction into the mid-1980's.

On February 1, 1978, TVA filed an application for operating licenses for Units 1 and 2, which included an Operating License Final Safety Analysis Report (FSAR) and an Operating License Environmental Report. *In re Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2)*, CLI-10-06, 71 NRC \_\_\_\_ (Jan. 7, 2010) (slip op. at 2) (hereinafter “NRC’s January 7, 2010 Decision”). (JA \_\_\_\_.) NRC docketed TVA’s Operating License Application on June 6, 1978, and published a Notice of Hearing Opportunity on TVA’s Operating License Application on July 17, 1978. 43 Fed. Reg. 30,628-02. No one filed a request for hearing or petition to intervene.

As mentioned above, construction on the units continued into the mid-1980s, when TVA’s forecasted energy demand began to decrease. This diminished demand was cited, along with alternative generating capabilities and financial reasons, as bases for TVA’s decision to defer completion of the Bellefonte units. NRC’s January 7, 2010 Decision at 3. (JA \_\_\_\_.) By letter dated July 29, 1988, TVA formally notified NRC of its deferral of construction activities and the layup program TVA would implement during the deferral period. *Id.* (JA \_\_\_\_.) On October 31, 1988, the NRC agreed with TVA’s layup approach, finding it consistent with the NRC’s Policy Statement on Deferred Plants (“Policy Statement”). *Id.* (JA \_\_\_\_.) The Policy Statement was issued to provide guidance to licensees regarding actions to be taken when construction was deferred. Final

Policy Statement, Comm. Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077-01 (Oct. 14, 1987). By this time, Units 1 and 2 were estimated to be approximately 90 and 58 percent complete respectively.<sup>1</sup> Although actual construction activities were halted, the CPs remained effective and all required maintenance and preservation activities were continued in accordance with the Commission's Policy Statement. *Id.* at 38,078.

On March 23, 1993, TVA notified NRC of its plans to resume construction of both units within 120 days, noting that NRC had conducted 18 inspections at the facility since deferral, with 10 specifically pertaining to layup and maintenance. *See* NRC's January 7, 2010 Decision at 4. (JA \_\_.) In a letter dated April 19, 1994, TVA requested that the CPs for Bellefonte Units 1 and 2 be extended to October 1, 2001, and October 1, 2004, respectively. *Id.* (JA \_\_.) The NRC approved these extensions on June 27, 1994. 59 Fed. Reg. 34,874 (July 7, 1994). (JA \_\_.) In December 1994, TVA decided that Bellefonte Units 1 and 2 would not

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<sup>1</sup> The NRC's brief indicates that "[w]hen cancelled, Unit 1 was 88 percent complete and Unit 2 was 58 percent complete." *See* NRC Br, at 9. As the record shows, Units 1 and 2 were deferred in 1988 and cancelled in 2007. No estimate of percentage complete was completed at the time the plants were cancelled; the estimates recited by the NRC reflect estimates done at the time of deferral. Considering their condition after 17 years of deferral and what would be necessary to bring the units into compliance with current requirements, TVA has estimated that Unit 1 is now approximately 55% complete and Unit 2 is approximately 35% complete. Final Supplemental Environmental Impact Statement, Single Nuclear Unit at the Bellefonte Plant Site, Volume 1, page 41 (May 2010). (JA \_\_.)

be completed without additional financial support. Further construction activities were suspended pending completion of a comprehensive evaluation of TVA's power needs.

On July 11, 2001, TVA requested that the completion dates for Unit 1 and Unit 2 be extended to October 1, 2011, and October 1, 2014, respectively. NRC's January 7, 2010 Decision at 4. (JA \_\_.) TVA cited the need to maintain a robust and flexible range of generating options for future base load power supplies and competitive energy production choices as providing good cause for extending the CPs. The permit extensions were approved by the NRC on March 4, 2003. 68 Fed. Reg. 11,415 (Mar. 10, 2003). (JA \_\_.)

As completion of Bellefonte Units 1 and 2 continued to be delayed, TVA sought to terminate the layup preventative maintenance on certain equipment at the site. In part this was because TVA believed that if and when energy demand and financial considerations supported completion of the plant, upgrading or restoration of certain pieces of equipment would be preferable to continuation of the current preservation activities. Accordingly, TVA submitted a revised Nuclear Quality Assurance Plan on August 28, 2003, *see* Letter from TVA to NRC (Aug. 28, 2003) (JA \_\_\_\_), and the NRC approved the plan on May 28, 2004, *see* Letter from NRC to TVA (May 28, 2004) (JA \_\_). For those structures, systems, and components that were determined to remain viable if and when a decision to restart

construction was made, an active layup program was continued through the end of fiscal year 2005.

Throughout the years that Bellefonte Units 1 and 2 were maintained in deferred status, NRC performed regular reviews of the Bellefonte layup program. From 1995 through 2005, the NRC issued 15 inspection reports documenting that TVA had adequately maintained Bellefonte's layup and preservation program and that the program had been effective. NRC Inspection Report Nos. 50-438/95-01, 50-439/95-01; 50-438/96-01, 50-439/96-01; 50-438/96-02, 50-439/96-02; 50-438/96-03, 50-439/96-03; 50-438/97-01, 50-439/97-01; 50-438/97-02, 50-439/97-02; 50-438/98-01, 50-439/98-01; 50-438/98-02, 50-439/98-02; 50-438/99-01, 50-439/99-01; 50-438/99-02, 50-439/99-02; 50-438/00-01, 50-439/00-01; 50-438/01-01, 50-439/01-01; 50-438/02-01, 50-439/02-01; 50-438/03-01, 50-439/03-01; 50-438/04-01, 50-439/04-01; 50-438/05-01, 50-439/05-01. (JA\_\_\_\_.) In virtually every Inspection Report, the NRC stated that "[s]ite personnel have made a dedicated effort toward supporting the PM [Preventative Maintenance] Program." Following inspections in 1995 and 1996, the NRC further noted that the "knowledge and pride of ownership exhibited by plant personnel continue[s] to remain a strength." See NRC Inspection Report Nos. 50-438/95-01 and 50-439/95-01, and 50-438/96-01 and 50-439/96-01.

In 2005, TVA determined that the Bellefonte site could serve as a location for an advanced technology nuclear plant to be licensed utilizing the improved combined licensing process described in 10 C.F.R. § 52. TVA recognized that use of some existing Unit 1 and Unit 2 equipment and structures (e.g., cooling towers, intake structure, and transmission switch yards) could be incorporated into the advanced technology plant in a manner that would reduce new construction costs. In addition, the estimated cost per kilowatt of installed capacity associated with advanced reactor designs was significantly less expensive than the estimated cost of completing Units 1 and 2. Consequently, TVA decided that the Bellefonte Unit 1 and 2 Project could no longer be justified economically. TVA discontinued Bellefonte Unit 1 and 2 project activities outside of those addressed in the NRC's Policy Statement, and TVA's Board of Directors approved the cancellation of Units 1 and 2 on November 23, 2005. *See* NRC's January 7, 2010 Decision at 4-5.

By letter dated April 6, 2006, TVA requested that the NRC withdraw CPPR-122 and CPPR-123, and submitted a Site Redress Plan to the NRC along with the withdrawal request. *See* Letter from TVA to NRC, at 5-6. (JA\_\_.) NRC withdrew the permits on September 14, 2006. *See* Letter from NRC to TVA. (JA\_\_.) Notably, the CPs were withdrawn well before their scheduled expiration dates. After the CPs were withdrawn, some investment recovery activities were conducted at the site.

## **II. TVA Requests Reinstatement of the CPs.**

Coincidental with TVA's decision to withdraw the permits, the economic factors related to new reactor construction began to change significantly. The estimated cost per kilowatt of installed capacity among generation alternatives began to increase, the number of worldwide suppliers available for providing necessary reactor components began to decrease, and a relatively large number of entities began to express an interest in developing new nuclear generation capacity. These developments significantly diminished the previously identified advantages to new construction and increased the inherent value of the considerable amounts of installed concrete, steel, piping and cable in the existing major Unit 1 and 2 structures, systems, and components. As the changing environment began to suggest a significantly lower cost per installed kilowatt, a shorter schedule to start major safety-related construction, and the ability to avoid procurement bottlenecks for heavy forging and other large components, TVA determined that it was prudent and worthwhile to reconsider the possibility of once again adding Bellefonte Units 1 and 2 to its mix of base load generating options.

In November 2007, all investment recovery activities at the Bellefonte site ceased. On August 26, 2008, TVA asked the NRC to reinstate CPPR-122 and CPPR-123 in order to "(1) return the units to deferred status and resume preservation and maintenance activities as appropriate under the Deferred Plant

Policy and (2) determine, with a relative degree of certainty, whether completion of construction and operation of the units is a viable option.”<sup>2</sup> See Letter from TVA to NRC at 5-6. (JA \_\_\_\_.)

Following its review of TVA’s request for reinstatement, the NRC staff forwarded to the Commission the staff’s recommended approach for evaluating and, if acceptable, approving TVA’s request. See COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2, Enclosure 1. (JA \_\_\_\_.) The staff concluded that: (1) its required findings underlying the December 1974 issuance of the CPs would not be affected by reinstatement; (2) its prior determination that there is reasonable assurance that all safety questions will be satisfactorily resolved before completion of construction would not be affected by reinstatement; (3) the environmental impacts from construction have occurred largely because construction for most of the structures has been substantially completed;<sup>3</sup> and

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<sup>2</sup> In its brief, BREDL alleges, without support, that TVA’s withdrawal of the permits and subsequent reinstatement resulted in a “financial incentive” to TVA. See Petitioner’s Brief at 14. Nothing could be further from the truth. Should the Court wish, TVA will provide supplemental briefing with documentary support to demonstrate that the cost of maintaining the existing CPs for the short duration that they were withdrawn pales in comparison to the costs of seeking reinstatement of the CPs and returning the units to their status at the time of deferral.

<sup>3</sup> The Staff’s finding remains valid under the current “percentage complete” figures (see *supra* n.1) because the environmental impacts from construction have largely already taken place and the bulk of activities anticipated to be required to

(4) because the reinstatement action would not allow any work to be performed that was not already allowed by the original permits, the action should not have a significant environmental impact. *Id.* at 3-8. The staff also observed that there are several steps in the regulatory process that would allow for public involvement if the CPs were reinstated. *Id.* at 11.

On February 18, 2009, the Commission approved the NRC staff's recommendation to reinstate the CPs, but directed that any NRC reinstatement order must place the CPs in "terminated plant" rather than "deferred plant" status.<sup>4</sup> *See* NRC Staff Requirements Memorandum. (JA \_\_.) Notably, the Commission directed the staff to publish a notice of opportunity for hearing in association with reinstatement of CPs with the scope of the hearing limited to whether good cause exists for the reinstatement. *Id.* Thereafter, on February 24, 2009, the NRC staff issued an Environmental Assessment and Finding of No Significant Impact addressing the proposed action, in compliance with the National Environmental Policy Act and 10 C.F.R. § 51. *See* Letter from NRC to TVA. (JA \_\_.) On

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(. . . continued)

complete the units involve replacement or refurbishment within the current structures. 74 Fed. Reg. 9308 (Mar. 3, 2009). (JA \_\_.)

<sup>4</sup> The Policy Statement defines a "deferred plant" as a plant at which the licensee has ceased construction or reduced activity to a maintenance level, maintains the CP in effect, and has not announced termination of the plant. A "terminated plant" is a plant at which the licensee has announced that construction has been permanently stopped, but which still has a valid CP.

March 9, 2009, the NRC issued an Order and the associated NRC Safety Evaluation reinstating the CPs in terminated plant status, which was published in the Federal Register on March 13, 2009. 74 Fed. Reg. 10,969 (Mar. 13, 2009). The Order solicited requests for a hearing as to whether good cause exists for the reinstatement.

Immediately following reinstatement of CPPR-122 and CPPR-123, TVA resumed preservation and maintenance activities pursuant to NRC regulations and the Policy Statement. Upon reinstatement of the CPs, a Plant Equipment Policy, as described in Appendix G of Revisions 20 of TVA's Nuclear Quality Assurance Plan, was instituted. *See* Tennessee Valley Authority Nuclear Quality Assurance Plan, TVA-NQA-PLN89-A, Revision 20 (ML090760973). (JA \_\_\_.) This policy stipulated that equipment not subject to preventative maintenance under the layup program or potentially affected by investment recovery activities would be entered into TVA's Corrective Action Program and could not be placed in service until further evaluation of the need for full restoration or replacement.

In August 2009, TVA requested the NRC staff to authorize the transition of BLN Units 1 and 2 from "terminated" to "deferred" status, consistent with the terms of the Commission's March 2009 Order and the Policy Statement. Letter from TVA to NRC. (JA \_\_\_.) In response, the NRC staff issued a formal plan to assess the transition of BLN Units 1 and 2 from "terminated" to "deferred" status.

Staff Plan for Assessment of Transition to Deferred Plant Status (Oct. 5, 2009), ML092740149. (JA \_\_\_\_.) In late October 2009, the staff conducted an inspection at BLN Units 1 and 2 to identify the status of applicable program areas specified in Section III.A of the Policy Statement, including implementation of TVA's quality assurance program. On December 2, 2009, the staff published its Inspection Report, in which it concluded that "TVA has established the necessary programs to support transition to deferred status." Bellefonte Nuclear Plant Units 1 (CPPR-122) and 2 (CPPR-123)—Transition to Deferred Status—NRC Inspection Report 05000438/2009601 and 05000439/2009601 (Dec. 2, 2009). (JA \_\_\_\_.) The staff approved TVA's request to place BLN Units 1 and 2 in "deferred" status on January 14, 2010. Letter from NRC to TVA, ML093420915. (JA \_\_\_\_.)

### **III. BREDL Requests Simultaneous Administrative and Judicial Review.**

BREDL filed a petition for review of the NRC's reinstatement decision with this Court on March 30, 2009. *Petition for Review, Blue Ridge Env'tl. Def. League v. NRC*, No. 09-1112 (D.C. Cir. Mar. 30, 2009). On May 8, 2009, BREDL and the Southern Alliance for Clean Energy filed a joint request before the NRC for a hearing and a petition to intervene that raised nine contentions, including allegations that the information supporting reinstatement was deficient and that the NRC lacked authority to reinstate the CPs. *Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League, Its Chapter*

Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (May 8, 2009) (JA \_\_\_\_). By Order dated May 20, 2009, the Commission carved off Contentions 1 and 2 for immediate resolution, directed the parties to submit briefs “addressing the question whether the NRC possesses the statutory authority to reinstate the withdrawn construction permits,” and ordered the remaining contentions to be held in abeyance. *Tenn. Valley Auth. (Bellefonte Nuclear Power Plant, Units 1 and 2), Commission Order, Nos. 50-438-CP & 50-439-CP (May 20, 2009) at 1-2 (unpublished) (“May 20 Order”)* (JA \_\_\_\_.)

This Court ordered Petition No. 09-1112 to be held in abeyance until completion of the concurrent administrative review of BREDL’s separate petition before the NRC’s adjudicatory board, the Atomic Safety and Licensing Board (“ASLB”). *Order, Blue Ridge Envtl. Def. League v. NRC, Tennessee Valley Authority Intervenor, No. 09-1112 (D.C. Cir. June 11, 2009)* (JA \_\_\_\_.)

On January 7, 2010, NRC issued an interlocutory decision in which it determined that it had the authority to reinstate the Bellefonte Units 1 and 2 construction permits. *NRC’s January 7, 2010 Decision.* (JA \_\_\_\_.) Accordingly, the NRC dismissed Contentions 1 and 2 and directed the ASLB to review the remaining contentions in BREDL’s petition. On March 1, 2010, the ASLB heard oral argument on the application of the “good cause” standard and the admissibility of BREDL’s seven remaining contentions.

Just one week later, on March 8, 2010, before the ASLB had issued any decision regarding the admissibility of BREDL's remaining contentions, BREDL filed a second petition with this Court asking it to review the NRC's January 7, 2010 Order. Petition for Review, *Blue Ridge Env'tl. Def. League v. NRC*, No. 10-1058 (D.C. Cir. Mar. 8, 2010) (JA \_\_\_\_). NRC and TVA moved to dismiss the March 8, 2010 Petition, arguing that this second petition was premature because the January 7, 2010, decision by the NRC was interlocutory and the NRC had not yet taken final agency action. On July 26, 2010, this Court consolidated Petition Nos. 09-1112 and 10-1058, and instructed the parties to address the issues presented in the motions to dismiss in their merits briefs.

On April 2, 2010, the ASLB issued a decision finding that none of BREDL's remaining contentions met the criteria for admissibility. Although the time for administrative appeal to the NRC of the ASLB's April 2, 2010 Order expired on April 12, 2010, on April 20, 2010, BREDL filed with the NRC an untimely Motion for Additional Time to File an Appeal, together with an appeal brief. Both TVA and NRC submitted briefs opposing BREDL's untimely Motion for Additional Time, as well as briefs in opposition to BREDL's appeal brief. NRC Staff's Response to BREDLs' Motion for Additional Time in Which to File Appeal of LBP-10-07 and Brief in Opposition to Appeal (April 29, 2010) (JA \_\_\_\_); Tennessee Valley Authority's Answer Opposing Petitioners' Motion for

Additional Time to Appeal LBP-10-07 (April 30, 2010) and Tennessee Valley Authority's Brief in Opposition to Petitioners' Appeal of LBP-10-07 (April 30, 2010) (JA \_\_\_\_.) On September 29, 2010, the NRC denied the appeal. *In re Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 & 2)*, CLI-10-26, 71 NRC \_\_\_\_ (Sep. 29, 2010) (slip op.) (JA \_\_\_\_). The Commission noted that BREDL had not filed a timely appeal and had filed an untimely motion for extension. The Commission nevertheless addressed the merits and determined that "even had Petitioners filed a timely appeal, the outcome would be the same." *Id.* at 4. The issuance of this final order of the Commission on September 29, 2010, concluded the administrative proceeding. BREDL, however, did not file a notice of appeal of the final agency order with this Court.

### **SUMMARY OF ARGUMENT**

Neither petition filed by BREDL sought review of a final agency decision; therefore BREDL has failed to present this Court with a petition within the appellate jurisdiction created by the Hobbs Act. Petitioner's consolidated petitions should therefore be dismissed.

If this Court nevertheless finds that it possesses jurisdiction over BREDL's consolidated petitions, then those petitions should be denied as meritless. The AEA grants broad discretion to the NRC in determining matters of nuclear power, and courts review NRC's determinations with deference. There is no provision of

the Act that speaks directly to the reinstatement of two voluntarily withdrawn, but unexpired, construction permits. The NRC acted within its broad discretion to determine that because TVA had acted in conformity with NRC's Policy Statement on Deferred Plants, a reinstatement of those voluntarily withdrawn but unexpired CPs was within its discretion under the statute, particularly given that such an action would support agency efficiency, preserve safe oversight, and provide the public with ample subsequent opportunities for notice and comment and adjudicatory hearings. The Commission acted well within the broad discretion afforded it by Congress in reinstating the CPs in terminated status.

Because there are no requirements for a hearing to be granted for a permit reinstatement at all, the Commission did not err by granting BREDL a hearing after its reinstatement decision. The Commission's use of the "good cause" standard derived from the AEA, Commission regulations, and Commission licensing proceedings and was therefore was eminently reasonable and just. Moreover, the NRC is given broad discretion to formulate procedures for hearing requested by interested persons. BREDL requested a hearing; BREDL received that hearing. Its arguments that it failed to receive adequate hearing rights are without merit.

## ARGUMENT

### I. Standard of Review

TVA adopts the discussion of the Standard of Review submitted by the Respondents.

### II. This Court Does Not Have Jurisdiction Over BREDL's Appeal Because BREDL Has Not Appealed a Final Agency Action.

As the NRC cogently argues, this Court is without jurisdiction over BREDL's consolidated petitions because neither petition seeks review of a final agency order. BREDL's first petition to this Court was deficient because BREDL was pursuing administrative and judicial relief simultaneously. See NRC Br. at 28-32. BREDL's second petition to this Court sought review of a non-final order addressing only the interlocutory issue of the NRC's authority to reinstate the Bellefonte CPs in a terminated status. See NRC Br. at 32- 46. Because BREDL has not appealed a final agency order, this Court is without jurisdiction to review the petitions.

This Court has dismissed appeals pursuant to Rule 15(a) in similar circumstances. In *City of Benton*, 136 F.3d 824 (D.C. Cir. 1998) (per curiam) this Court addressed whether the petitioner had properly identified the "final" order of the Commission for review. Several utilities challenged the antitrust finding of an NRC order amending an operating license of a nuclear generating plant. *Id.* at 825. In 1993, the licensee had submitted two license amendment applications seeking to

transfer operating responsibility and management of the facility to a subsidiary of the Entergy Corporation. The NRC approved both applications, which had been opposed on safety and antitrust grounds. This Court vacated both NRC orders and remanded for further proceedings. *Id.* After the parties filed new submissions, the Director of the Office of Nuclear Reactor Regulation made a finding that there had been no significant changes in the licensee's activities that warranted an antitrust review of the proposed license amendment. *Id.* Petitioners requested a reevaluation of that determination. The Director issued an order reiterating his finding on May 30, 1995, and the NRC subsequently issued two orders on June 8, 1995, one allowing the merger of the current operator of the plant and the subsidiary of Entergy and the other permitting the transfer of operations to the Entergy subsidiary. *Id.* The petitioner asked this Court to review the Director's May 30, 1995 order and attached the order to its petition. It identified no other orders for review but did cite to one of the two NRC June 8 Orders in its docketing statement. *Id.* This Court determined that it was only when the Commission decided the antitrust and safety issues in its two June 8 orders that a "final" order had been issued by the NRC. *Id.* Although the petitioner acknowledged that it had named the wrong order in its petition, it argued that neither NRC nor Entergy was prejudiced because both knew it was challenging the order that issued the license, and that, in any case, the May 30 order could be viewed as "having consummated

the NRC's decisionmaking process regarding its antitrust analysis and thus was a final appealable order." *Id.* This Court determined that "[w]hichever order [Petitioner] intended to ask the court to review, it named the wrong order in its petition [and] FRAP 15(a) requires that [the] petition be dismissed for failing to properly designate the order to be challenged." *Id.* at 826. It dismissed the petition for lack of jurisdiction because petitioner had designated a "nonfinal interlocutory order in its petition for review and failed to designate in a timely fashion the order it intended to be reviewed." *Id.*

Similarly, in *Gottesman v. INS*, 33 F.3d 383, 388 (4th Cir. 1994), the petitioner challenged both the denial of relief from a deportation order issued by the Board of Immigration Appeals (BIA) and a related rescission order issued by the Immigration and Naturalization Service (INS). The Fourth Circuit determined that it lacked jurisdiction to review the INS decision not only because the jurisdictional appeal grant in the Immigration and Nationality Act was limited to "final orders of deportation . . . made against aliens within the United States," *id.* at 386, but also because the petitioner had failed to "properly present the issue of that order's validity" to the court, *id.* at 387. Petitioner had designated only the BIA's order denying relief from deportation, but not the INS's related rescission order; thus, the INS order had not been presented to the Fourth Circuit in accordance with Fed. R. App. P. 15(a). In so ruling, the Fourth Circuit observed

that it was not resting its decision on a “mere technicality” but was “giv[ing] effect to a jurisdictional requirement stated in Rule 15(a) that went wholly unsatisfied.” That rule, it observed, cannot be waived “even though courts are encouraged to construe the rules liberally.” *Id.* at 388.

Nor can a properly executed appeal of one order in an administrative proceeding bring all the orders in the administrative record in that proceeding before the appellate court where the other orders are not specifically designated in the petition for review. *See John D. Copanos & Sons, Inc. v. FDA.*, 854 F.2d 510, 527 (D.C. Cir. 1988) (an order that was not included in petition for review was not properly before the court because “a petition for review designating one order in a proceeding [does not suffice] to obtain review of any other order that is part of the same administrative record”).

BREDL has failed to designate the final order of the NRC for review by this Court. Accordingly, BREDL’s appeal must be dismissed for lack of jurisdiction.

## **II. The Commission Acted Within Its Discretion in Reinstating TVA’s Construction Permit in Terminated Status.**

If this Court determines that it has jurisdiction to review the Commission’s decision that it had authority to reinstate TVA’s CPs in terminated status, then that issue should be dismissed as meritless.

**A. The Commission Has Broad Legal Authority and Substantial Discretion Under the Atomic Energy Act of 1954**

“The [AEA] sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission.” *Illinois v. Gen. Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982). The exceptional breadth of the NRC’s legal authority under the AEA has been repeatedly acknowledged by the courts. *See, e.g., Vt. Yankee Power Corp. v Nat’l Res. Def. Council*, 435 U.S. 519, 525-26 (1978); *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408, (1961); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). The First Circuit summarized the breadth of the NRC’s statutory authority and discretion:

In a regulatory scheme where substantial discretion is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress. The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute’s ends. The Act’s regulatory scheme is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective. The agency’s interpretation of what is properly within its jurisdictional scope is entitled to great deference, and will not be overturned if reasonably related to the language and purposes of the statute.

*Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (internal citations and quotation marks omitted).

The AEA gives the Commission wide latitude to craft its own operating proceedings. *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995); *see also Vt. Yankee*, 435 U.S. at 543-44. The Commission's policy discretion is at its broadest, where, as here, Congress has not spoken to the specific question confronting the agency. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

Section 161.b of the AEA demonstrates the great latitude given to the Commission:

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property . . . .

42 U.S.C. § 2201(b) (2006). The Commission's March 2009 Reinstatement Order that BREDL contests is based on Section 161.b. 74 Fed. Reg. at 10,970.

Courts are "obliged to defer to the operating procedures employed by an agency when the governing statute requires only that a 'hearing' be held." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 54 (D.C. Cir. 1990). That deference is especially warranted when the NRC is "structuring its own rules of procedures and methods of inquiry." *Kelley*, 42 F.3d at 1511; *Vt. Yankee*, 435 U.S. at 543.

**B. Nothing in the AEA or NRC Regulations Precludes the Commission's Reinstatement of the BLN Construction Permits for Good Cause Shown**

In this case, the Commission has exercised its broad statutory authority and engaged in reasoned decisionmaking to "fill in the interstices left vacant by

Congress.” *Pub. Serv. Co. of N.H.*, 582 F.2d at 82. Section 185 of the AEA states, in pertinent part:

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.

42 U.S.C. § 2235 (2006).

Thus, Section 185 addresses the NRC’s initial issuance of a CP, and its extension of the construction completion date specified therein for “good cause shown.” It does not explicitly address the potential “reinstatement” of a valid CP after its withdrawal by the licensee. The action at issue here is not the initial “granting” of a CP or the reinstatement of an expired CP; rather, it is the reinstatement of two previously issued and valid CPs for good cause shown.

The Commission has implemented Section 185 at 10 C.F.R. § 50.55 (2010). Section 50.55(a) requires that each CP “state the earliest and latest dates for completion of the construction or modification.” Section 50.55(b), in turn, provides that:

If the proposed construction or modification of the facility is not completed by the latest completion date, the construction permit shall expire and all rights are forfeited. However, upon good cause shown,

the Commission will extend the completion date for a reasonable period of time.

Accordingly, the NRC's organic statute and its implementing regulations do not address, and certainly do not prohibit or limit, the NRC's authority to reinstate an otherwise valid construction permit. In this case, the Commission reasonably relied upon its authority to reinstate CPs that had not expired, but had been withdrawn for a period of time prior to their expiration dates.

**C. The Commission's Reinstatement of The BLN CPs Is Well Within Its Statutory Authority and Is Eminently Reasonable As a Matter of Law or Policy.**

Faced with TVA's request to reinstate the BLN CPs, and in the absence of any statutory impediment to the requested action, the Commission majority concluded that reinstatement of the CPs to "terminated plant" (versus "deferred plant") status was within its statutory authority under the AEA. As one Commissioner explained, "the agency can fully accomplish its regulatory role, with no loss of public involvement, through a path that utilizes reinstatement of the construction permits, but to a 'terminated status.'" *See* Commissioner Lyons' Comments on COMSECY-08-0041. (JA\_\_\_\_.) Towards that end, the Commission required TVA to demonstrate compliance with the Policy Statement on Deferred Plants – and staff verification thereof – as a prerequisite to placement of the Units in "deferred plant" status. Reinstatement Order, 74 Fed. Reg. 10,969-10,971.

(JA \_\_\_\_.) TVA's post-reinstatement activities have focused in substantial part, on the quality assurance aspects of the project. By authorizing reinstatement of the BLN CPs to "terminated plant" status, the Commission made a reasonable policy determination based on the specific facts of this case. That determination, which it fully explained in its orders, is consonant with the NRC's broad authority under the AEA, prior agency action, and principles of regulatory flexibility and efficiency.

An issue reasonably analogous to the one presented here occurred in connection with the Commission's extension of the CP for Comanche Peak Unit 1 in the mid-1980s. *See Citizens Ass'n for Sound Energy v. NRC*, 821 F.2d 725 (D.C. Cir. 1987). The Comanche Peak proceeding arose when Texas Utilities Electric Company ("TUEC") applied for an extension of its CP after the permit for Unit 1 expired. *Id.* at 726. A petitioner argued that Section 185 of the AEA mandated the initiation of a new CP proceeding, given TUEC's failure to timely apply for an extension of its construction permit. *Id.* The Commission disagreed. The Commission held that it "was not . . . barred from considering TUEC's application for extension of the latest construction date" due to the expiration of the CP, and that a "complete de novo construction permit proceeding [was] not warranted." *In re Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1)*, CLI-86-4, 23 NRC 113, 120 (1986), *aff'd*, *Citizens Ass'n for Sound Energy*, 821 F.2d 725. Notably, the Commission concluded that "the grant of the

extension results in no substantive change: the design and construction methods will be the same as provided in the original Comanche Peak construction permit.” 23 N.R.C. at 121. It also noted that “[t]he amendment granting the extension merely gives [the licensee] more time to complete construction in accordance with the previously approved construction permit.” *Id.*

In affirming the NRC’s *Comanche Peak* decision on appeal, this Court found that the Commission had “adopted a permissible interpretation of the AEA.” *Citizens Ass’n for Sound Energy*, 821 F.2d at 731. In reaching this conclusion, this Court applied the two-step *Chevron* analysis: “a reviewing court must determine whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether the agency considered the matter in a detailed and reasoned fashion.” *Id.* (internal quotation omitted). This Court found that, in extending the Comanche Peak Unit 1 completion date without a “full-scale *de novo* construction permit,” the Commission had considered the matter fully and acted consistent with the AEA. *Id.* The same conclusions apply here because the legal consequence of TVA’s request here is not materially different from the request made by TUEC in *Comanche Peak*. As with TUEC in *Comanche Peak*, TVA’s request to reinstate its CP came at a point where it no longer possessed a valid CP, and no longer had a right to perform activities otherwise authorized by a valid CP. In both cases, the Commission restored the right authorized by a valid

CP via an order issued pursuant to its “broad regulatory authority” and substantial discretion under the AEA. *Vt. Yankee*, 435 U.S. at 525-26.

This Court’s analysis of the NRC’s *Comanche Peak* decision is applicable here. The AEA is silent with respect to the reinstatement of construction permits. 42 U.S.C. § 2235 (authorizing issuance of CP’s and extension of construction completion dates, but making no mention of reinstatement of CP’s). “If a statute is silent . . . with respect to a specific issue within the general compass of the statute, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Citizens Ass’n for Sound Energy*, 821 F.2d at 731. Generally, an agency’s “construction of a statutory scheme it is entrusted to administer” is accorded “considerable weight.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). This applies *a fortiori* to the NRC, because the AEA is “hallmarked by the amount of discretion granted the Commission in working to achieve the statute’s ends,” and the “[t]he scope of review of NRC actions is extremely limited.” *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989). “The court typically defers under *Chevron* . . . to an agency’s interpretation of its own jurisdiction under a statute that it implements.” *Bullcreek v. NRC*, 359 F.3d 536, 541 (D.C. Cir. 2004).

The Commission gave full and careful thought to TVA’s request for CP reinstatement. The Commission declined to authorize reinstatement of the CPs in

“deferred” status, as TVA had requested, but concluded that reinstatement of the CPs to “terminated plant” status was a reasonable exercise of the NRC’s statutory authority under the AEA. The Commission found that its action was “consistent with the underlying statutory scheme in a substantive sense.” *Citizens Ass’n for Sound Energy*, 821 F.2d at 731. The Commission recognized the obvious potential for greater regulatory efficiency associated with reinstatement of the BLN CPs, given the extensive safety and environmental reviews previously performed by the staff. Specifically, it concluded that “the review of a new CP application would duplicate its previous review and would not result in new or different findings that could prevent issuance of a CP.” COMSECY-08-0041, Encl. 1 at 9. (JA \_\_\_.)

The Commission also recognized the limited effect of reinstating the BLN CPs to “terminated status,” and expressly conditioned any further TVA construction activities on future NRC regulatory approvals. Any transition from “terminated” to “deferred” status and reactivation of construction would require TVA to demonstrate compliance with Section III.A of the Commission’s Policy Statement on Deferred Plants. Reinstatement Order, 74 Fed. Reg. at 10,970-10,971. (JA \_\_\_.) That section requires TVA to notify the NRC in writing at least 120 days before plant construction is expected to resume. Commission Policy Statement on Deferred Plants, 52 Fed. Reg. at 38,079. Among the considerable substantive information the 120-day notification must provide is “any new

regulatory requirements applicable to the plant that have become effective since plant construction was deferred, together with a description of the licensee's proposed plans for compliance with these requirements or a commitment to submit such plans by a specified date." *Id.* The principal criteria upon which the NRC staff evaluates the acceptability of equipment upon reactivation of a deferred plant include (1) reviews of the approved preservation and maintenance program; (2) verification that any design changes, modifications, and corrective actions have been implemented in accordance with established quality control requirements; and (3) the results of baseline inspections ensuring that quality and performance requirements have not been significantly reduced below those in the original FSAR. *Id.* Finally, this and other information (e.g., security and other plans, operating procedures, technical specifications, and the final design) would be evaluated during the review of the Operating License application. *In re Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2)*, LBP-10-07, 71 NRC \_\_\_ (Apr. 20, 2010) (slip op. at 35-36). (JA\_\_\_.)

BREDL admits that in order to prevail here it must show that the actions of the Commission were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* Petitioner's Brief at 12. Nothing in the record supports this claim. On the contrary, the record demonstrates that the Commission thoroughly explored the ramifications of its action and weighed the

arguments of differing opinions, based its decision on the evidence collected by the NRC staff, and grounded its decision on precedents established in similar proceedings and situations.

Here, the Commission acted within the scope of its statutory authority and the ambit of its longstanding regulatory framework for deferred and terminated plants. Accordingly, its action is fully “consistent with the underlying statutory scheme in a substantive sense.” *Citizens Ass’n for Sound Energy*, 821 F.2d at 731. Moreover, the Commission clearly considered the legal, safety, and environmental implications of its action in a “detailed and reasoned fashion” before authorizing reinstatement of the CPs for BLN Units 1 and 2. *Id.*

### **III. The Commission Gave BREDL Ample Hearing Rights Even Though Not Required To Under Section 189.**

Section 189(a) of the AEA provides a public hearing right “upon the request of any person whose interest may be affected” by a licensing proceeding.

42 U.S.C. § 2239(a)(1)(A) (2006). Section 189(a) provides a list of actions triggering hearing rights; reinstating permits is not one of the enumerated actions.

*Id.* Accordingly, the NRC was not required to grant BREDL a hearing because “[i]f a particular form of Commission action does not fall within one of the eight categories set forth in the section, no hearing need be granted.” *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984), *reh’g en banc granted on other grounds*, 760 F.2d 1320 (1985), *aff’d on rehearing en banc*, *San*

*Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26 (D.C. Cir. 1986); *see also Massachusetts v. NRC*, 878 F.2d at 1522.<sup>5</sup>

The Commission nonetheless granted a discretionary hearing opportunity after reinstatement,<sup>6</sup> and BREDL took advantage of that opportunity. BREDL cannot now be heard to complain that the hearing was unduly constrained both

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<sup>5</sup> BREDL's citation to *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284 (1st Cir. 1995) is inapposite. (Pet. Br. at 18-19). In *Citizens Awareness*, the First Circuit ruled that by approving Yankee Atomic Energy Company's (YAEC) early component removal project pursuant to changes to existing regulations without a hearing the NRC violated Section 189's requirements. In doing so, the NRC changed an existing license provision which allowed only minor removal activities without a hearing to a provision that permitted operators to conduct major removal operations without a prior hearing. Nothing of the sort is at issue here. No amendments were made to the unexpired but voluntarily terminated CPs for Bellefonte Units 1 and 2. Those CPs were reinstated substantively intact with, if anything, more restrictions than before because they were placed in terminated rather than deferred status. Accordingly, this case is more closely aligned to *Massachusetts v. NRC* than *Citizens Awareness Network, Inc.*, 59 F.3d at 295 n.11 ("Moreover, *Commonwealth* is readily distinguishable on its facts. There, the NRC decision approving resumption of operations by a licensee, which had shut down its facility voluntarily prior to any formal suspension or revocation of its operating license by the NRC, did not implicate section 189(a). Rather, the NRC requirements for license 'reinstatement' were simply *additional interim license restrictions*-imposed pursuant to *pre-existing* Commission regulations-none of which conflicted with, or required the alteration of, any term of the original license.").

<sup>6</sup> BREDL points to no regulation requiring this hearing to have been held prior to the Commission's reinstatement order, indeed, section 189 allows for post-action hearings in other contexts where hearings are required. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1445 (D.C. Cir. 1984) ("[Congress] amend[ed] section 189(a) to allow hearings after (rather than prior to) a license amendment where the NRC determines that the amendment involves no significant hazards.").

because it failed to pursue administrative relief for this issue,<sup>7</sup> and because the AEA does not prescribe the manner in which this hearing is to be conducted. *Union of Concerned Scientists*, 920 F.2d at 54. “[A]bsent constitutional constraints or extremely compelling circumstances’ courts are never free to impose on the NRC . . . a procedural requirement not provided for by Congress.” *Id.* at 53 (quoting *Vt. Yankee*, 435 U.S. at 543). Accordingly, courts defer to the Commission’s procedural rules governing hearings. *Id.*; *San Luis Obispo Mothers for Peace v. NRC*, No. 08-75058, 2011 WL 505021 (9th Cir. Feb. 15, 2011) (AEA was within discretion to hold closed hearing where security issues were at stake); *Pub. Citizen v. NRC*, 573 F.3d 916, 918 (9th Cir. 2009); *Massachusetts v. NRC*, 878 F.2d at 1523.

In allowing a hearing to determine whether “good cause” existed, the ASLB borrowed the standard used in cases addressing the extension of permits. *In re Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2)*, LBP-10-7, 71 NRC \_\_ (Sep. 29, 2010) (slip op. at 16-22). (JA \_\_\_\_.) The Board noted that “safety and environmental issues are generally to be adjudicated in the [Operating License] proceeding” thus obviating the need to address those issues at a hearing where the “continuing viability of a previously-issued CP” was the focal point. *Id.*

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<sup>7</sup> TVA does not further address BREDL’s failure to exhaust administrative remedies on the scope of the administrative hearing because NRC has fully addressed that issue. See NRC Br. at 60-62.

at 21-22. (JA \_\_.) This decision was not only well within the agency's discretion but was an eminently sensible way to both conserve administrative resources and ensure that BREDL would receive a meaningful opportunity to air their concerns at the proper time.

**CONCLUSION**

For the foregoing reasons, this Court should dismiss BREDL's petition for lack of jurisdiction, or, alternatively, deny BREDL's petition as meritless.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) and Circuit R. 32 (a)(3) because this brief contains 7688 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it contains proportionally spaced 14 point Times New Roman type style. This brief was prepared on Microsoft Office Word 2007.

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**CERTIFICATE OF SERVICE**

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF stamp. Notice of this filing will be sent by operation of the Court's ECF system to all parties as indicated on the electronic filing receipt. Parties may access this filing through the Court's ECF system.

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