NOT YET SCHEDULED FOR ORAL ARGUMENT

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

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

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,

TENNESSEE VALLEY AUTHORITY,
Intervenor.

On Petition for Review of Orders Issued by the
United States Nuclear Regulatory Commission

FINAL BRIEF FOR RESPONDENTS

IGNACIA S. MORENO
Assistant Attorney General

LANE MCFADDEN
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026-3795
(202) 353-9022

STEPHEN G. BURNS
General Counsel

JOHN F. CORDES, JR.
Solicitor

GRACE H. KIM
Senior Attorney

JEREMY M. SUTTENBERG
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(301) 415-2842

July 11, 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Respondents United States Nuclear Regulatory Commission and the United States of America submit 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

Two NRC actions are under review. In No. 09-1112, Blue Ridge Environmental Defense League seeks review of the Nuclear Regulatory Commission's Order reinstating two construction permits formerly held by Tennessee Valley Authority. (JA 184). In No. 10-1058, Blue Ridge Environmental Defense League seeks review of the Nuclear Regulatory Commission's ruling in CLI-10-06 (JA 14).

(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/

Jeremy M. Suttenberg
Attorney
U.S. Nuclear Regulatory
Commission

July 11, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

** *Authorities upon which we chiefly rely are marked with asterisks.*

Federal Statutes

Administrative Decisions

Federal Register Notices

Federal Regulations

Miscellaneous

GLOSSARY

AEA .....Atomic Energy Act

BREDL ..... Blue Ridge Environmental Defense League

NRC.....Nuclear Regulatory Commission

TVA ..... Tennessee Valley Authority

JURISDICTIONAL STATEMENT

BREDL invokes the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, as the basis for this Court's jurisdiction. But the Court lacks jurisdiction to consider BREDL's two petitions for review because both petitions were filed before NRC had issued its "final order." *See* 28 U.S.C. § 2342(4). In Argument I (below) we provide a detailed justification of our finality argument.

STATEMENT OF ISSUES

1. BREDL filed one lawsuit before, and the other during, its administrative challenge at the NRC. Does this deprive the Court of jurisdiction under the Hobbs Act?

2. The Atomic Energy Act does not address construction permit reinstatement. In light of this statutory silence, did the NRC reasonably conclude that it has the authority to reinstate voluntarily withdrawn construction permits that have not yet expired?

3. The NRC offered BREDL a discretionary hearing after reinstating TVA's permits. Did the Atomic Energy Act require the NRC to offer BREDL a hearing before reinstatement?

4. The NRC limited its discretionary hearing to whether TVA had "good cause" to support its reinstatement request. Can BREDL challenge the good cause standard in this Court even though it did not raise the issue on appellate review before the Commission? Assuming BREDL can raise the good cause issue despite not exhausting agency remedies, was the NRC's decision to use a good cause standard unreasonable?

STATEMENT OF THE CASE

I. Nature of the Case

In 1974, the Atomic Energy Commission[1] issued TVA two construction permits authorizing construction of two nuclear power plants — Bellefonte Units 1 and 2. By 1988, TVA had completed substantial construction work at the two units. Over subsequent years, since TVA did not complete construction, the NRC extended the construction permits' completion dates through 2011 for Unit 1 and 2014 for Unit 2. Then, in 2006, TVA decided to cancel construction of both plants because of an anticipated decrease in

[1] The Atomic Energy Commission (AEC) became the Nuclear Regulatory Commission (NRC) on January 19, 1975. Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.*

energy demand. TVA requested that the NRC withdraw its construction permits, and the NRC granted TVA's request.

In 2008, TVA decided to change course. It asked the NRC to reinstate the construction permits for Bellefonte Units 1 and 2 because of increased economic opportunities in nuclear power generation. In 2009, the Commission ultimately authorized the NRC Staff to reinstate TVA's construction permits. The NRC Staff's reinstatement order provided an opportunity for a hearing so that interested parties could challenge the reinstatement. BREDL — along with other environmental groups — took advantage of this opportunity and filed a timely hearing request before the NRC. BREDL, however, had previously filed a petition for review in this Court (No. 09-1112) challenging the NRC's reinstatement order. In light of the pending NRC adjudication, this Court, at the parties' request, held BREDL's petition for review in abeyance.

Before the NRC, BREDL and the other environmental groups offered nine "contentions" opposing the reinstatement. Two of these contentions argued that the NRC lacked statutory authority to reinstate a withdrawn construction permit. The Commission

ordered briefing on this threshold authority question. Acting in an adjudicatory role, the Commission, on January 7th 2010, issued a formal opinion concluding that it possessed the authority to reinstate TVA's construction permits. BREDL then filed a second petition for review in this Court (No. 10-1058), challenging the Commission's decision on the authority issue. The NRC moved to dismiss BREDL's suit as premature, but a motions panel of this Court directed the parties to brief the issue before the merits panel.

Meanwhile, BREDL continued to pursue its seven other contentions before an NRC administrative-hearing tribunal — the Atomic Safety and Licensing Board. Ultimately, the Licensing Board rejected all of BREDL's contentions. BREDL took an administrative appeal to the Commission, but the Commission rejected the appeal as untimely and lacking merit. The Commission's appellate decision ended the roughly 18-month administrative challenge to the reinstatement. BREDL filed no additional petition for review in this Court.

II. Statutory and Regulatory Background

Before a company can build a nuclear power plant, it must seek permission from the NRC in the form of a construction permit.[2] The Atomic Energy Act (AEA) provides the general framework that governs construction permits. Section 185 states that all construction permits must state the earliest and latest dates for completing construction, and that the NRC can extend the construction completion date for good cause. 42 U.S.C. § 2235. Unless the NRC extends a construction permit, all rights/privileges under the permit are "forfeited" at the completion date. *Id.* Section 186, in turn, authorizes the NRC to revoke a construction permit in instances of wrongdoing or negligent construction. 42 U.S.C. § 2236. Neither section mentions "reinstating" a construction permit. Nor does either section spell out what happens if a construction permit holder voluntarily withdraws its permit.

---

[2] Today, NRC rules provide for an alternative method of permission to construct power plants through a combined construction and operating license (COL). In 1989, the NRC issued 10 C.F.R. Part 52, which authorized this one-step approach to construction and operation. TVA did not seek a COL to resume construction at Bellefonte Units 1 and 2 because TVA had started construction under the old two-step licensing system.

The AEA also provides for public involvement at various stages of the construction permit process. Before granting a construction permit, for example, § 189(a) requires the NRC to conduct a mandatory hearing with at least thirty days advance notice for potential public participation. 42 U.S.C. § 2239(a)(1)(A). And before amending a construction permit, the NRC must provide an opportunity for a hearing — although if the amendment involves "no significant hazards consideration," then the NRC can provide for a hearing opportunity *after* issuing the amendment. *Id.* Once again, though, the statute is silent with regard to what, if any, hearing rights attach to reinstating a voluntarily withdrawn construction permit.

STATEMENT OF FACTS

I. TVA receives two construction permits from the NRC that are validly extended through the early-to-mid 2010s.

Back in June 1973, TVA applied to the Atomic Energy Commission for a construction permit to build two nuclear power plants at the Bellefonte site in northwestern Alabama. Interested citizens filed intervention requests, and the Atomic Safety and Licensing Board conducted an evidentiary hearing. The Board

eventually resolved all safety issues in favor of TVA. *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), LBP-74-91, 8 AEC 1124 (1974). Then, in December 1974, the Atomic Energy Commission issued two construction permits to TVA authorizing construction of Bellefonte Units 1 and 2.[3] The permits for Units 1 and 2 originally were set to expire in December 1979 and September 1980, respectively. 39 Fed. Reg. 45,313 (Dec. 31, 1974).

With construction permits in hand, TVA began building the plants. By October 1979, however, TVA realized that it would not be able to complete construction on time. Labor shortages and delivery problems contributed to the delay. And TVA needed time to incorporate important safety modifications into their design after the then-recent Three Mile Island accident. 44 Fed. Reg. 76893 (Dec. 28, 1979). So the NRC extended both of TVA's construction permits to 1983. *Id.* But construction was still not complete by 1983. Once again, TVA submitted timely extension requests. This

---

[3] Specifically, the AEC issued Construction Permit Nos. CPPR-122 for Bellefonte Unit 1 and CPPR-123 for Bellefonte Unit 2. *See* 39 Fed. Reg. 45,313 (Dec. 31, 1974).

time, a different set of problems plagued TVA. Its revised power usage projections indicated that the Tennessee Valley would not need power from the Bellefonte plants until the early-to-mid 1990s. 52 Fed. Reg. 25676 (July 8, 1987). TVA wanted to slow the pace of the construction so that the plants came online when they were actually needed. The NRC granted TVA's requests, extending both construction permits. *Id.*

Soon after the NRC extended TVA's construction permits for the second time, TVA used the Commission's Policy Statement on Deferred Plants to place Bellefonte Units 1 and 2 into "deferred plant status." Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987) ("Policy Statement"). The Policy Statement allows construction permit holders to maintain valid permits and associated regulatory oversight, while either deferring construction ("deferred plant status") or preparing to terminate construction ("terminated plant status"). Construction may resume only after at least 120-days advance notice to the NRC, and an NRC determination that a plant's systems, structures, and components are acceptable for resuming construction. *Id.* at 38,079. While the

Bellefonte sites remained in deferred status, TVA continued to apply for, and receive, extensions for the construction permits. The NRC ultimately extended TVA's permit for Unit 1 until October 2011, and TVA's permit for Unit 2 until October 2014. 68 Fed. Reg. 11415 (Mar. 10, 2003). (JA 70).

II. TVA voluntarily withdraws its constructions permits for the two Bellefonte units and two years later asks for reinstatement.

The projected demand for electricity in the Tennessee Valley region remained low. So in 2006, TVA's Board of Directors voted to cancel construction of Bellefonte Units 1 and 2. But TVA still possessed two valid construction permits for Bellefonte. Because TVA believed that the Board of Directors' vote sounded the death knell for the Bellefonte project, it formally requested the NRC's permission to "withdraw" the construction permits. *See* Letter from TVA to NRC. (JA 74-75). After a couple of months, the NRC granted TVA's withdrawal request. *See* Letter from NRC to TVA. (JA 78). When cancelled, Unit 1 was 90 percent complete and Unit 2 was 58 percent complete. *See* Letter from TVA to NRC. (JA 84).

Two years after TVA formally withdrew its construction permits, TVA found that the economic landscape for nuclear power had started to change. Demand was increasing; the cost of alternative electrical generation was increasing; and the nascent "nuclear renaissance" created the specter of scheduling delays for the advanced nuclear reactors that TVA had planned to construct at Bellefonte in lieu of completing construction of units 1 and 2. *See* TVA Reinstatement Request. (JA 87). In response to these changing economic realities, TVA asked the NRC to reinstate its construction permits for Bellefonte Units 1 and 2. (JA 91). During the two-year period between the withdrawal and reinstatement request, TVA had started to salvage important nuclear components for future use by removing them from the nuclear sites. (JA 88). This process stopped once TVA decided to seek reinstatement of Units 1 and 2. *Id.* TVA also began to repair certain site systems and eliminate water intrusion. *Id.*

III. The NRC reinstates TVA's construction permits, subject to a hearing opportunity.

The NRC Staff analyzed the public health and safety implications of reinstating TVA's construction permits. By and

large, the NRC Staff deemed those safety implications nonexistent. *See* COMSECY-08-0041 at 2, Staff Recommendation Related to Reinstatement. (JA 93). The NRC Staff then sought Commission approval to reinstate TVA's construction permits to "deferred plant status" under the Commission's Policy Statement. *Id.* at 3 (JA 94). Joseph Williams — a senior project manager at the NRC — did not concur in the Staff's recommendation to reinstate TVA's permits. Williams Non-Concurrence. (JA 111). He preferred requiring TVA to submit a fresh construction permit application, which he believed was necessary to ensure compliance with all applicable safety requirements. (JA 126). The other NRC engineers looking at TVA's request disagreed with Mr. Williams's conclusion. They believed that TVA would have to satisfy all existing safety requirements regardless of whether it received a reinstated permit or a new permit. *See* COMSECY-08-0041, Enclosure 1 at 3. (JA 99). The Staff's memorandum to the Commission reflected their assessment of Mr. Williams's objections. The Staff's submission to the Commission included Mr. Williams's non-concurrence in its entirety.

After reviewing the Staff's memorandum and Mr. Williams's non-concurrence, the Commission approved the NRC Staff's recommendation to reinstate TVA's permits, but only to "terminated plant status" (rather than "deferred plant status"). (JA 147). Then-Commissioner (now Chairman) Jaczko voted against authorizing reinstatement, while the three other Commissioners voted in favor. (JA 4-8). Two Commissioners specifically commended Mr. Williams for offering his differing professional judgment. (JA 8, 10). The Commission also directed the Staff to offer interested parties a hearing opportunity on whether TVA had demonstrated "good cause" for the reinstatement. (JA 147). The NRC Staff announced both the reinstatement order and hearing opportunity in the same Federal Register notice. 74 Fed. Reg. 10969 (March 13, 2009). (JA 184-85).

In response to the Federal Register notice, BREDL filed a petition for review in this Court (09-1112) challenging the reinstatement order. A few months later, BREDL joined other environmental groups to request an administrative hearing before the NRC. Its hearing petition argued, among other things, that the

NRC lacked the statutory authority to reinstate a voluntarily withdrawn construction permit. (JA 198-199).

To promote efficiency and judicial economy, the NRC filed an unopposed motion asking that BREDL's previously filed lawsuit be held in abeyance pending the outcome of the NRC's adjudication. This Court did so. (Order, dated June 11, 2009).

IV. The Commission adjudicates BREDL's argument that the NRC lacks statutory authority to reinstate TVA's permits.

BREDL's argument that the NRC does not have the statutory authority to reinstate construction permits drew the quick attention of the Commission. Bypassing the usual course of administrative adjudication, the Commissioners decided to resolve this "threshold" authority issue themselves, before the Atomic Safety and Licensing Board considered BREDL's other contentions. They ordered complete briefing on the statutory authority issue. *See* Commission Order, May 20, 2009. (JA 243).

After reexamining the "underlying law and policy in depth," a 2-1 majority of the Commission ruled that the AEA gave the NRC authority to reinstate a voluntarily withdrawn construction permit. *Tennessee Valley Authority*, CLI-10-06, at 9. (JA 22). At the outset,

the Commission acknowledged that in its "supervisory-agency oversight" capacity, it had "previously authorized NRC Staff to issue an order that would reinstate the Bellefonte construction permits." *Id.* (JA 22). The Commission said that now, however, "we act as adjudicators and in that light we consider the reinstatement issue afresh, without regard for our earlier views." *Id.* (JA 22).

On the merits, the Commission first noted that the AEA contained no provisions prohibiting reinstatement. *Id.* at 9-10. (JA 22-23). Then, the Commission explained that § 185 of the AEA provides for a "forfeiture" of rights under a construction permit in just one circumstance — when that permit has "expired." *Id.* at 10-11. (JA 23-24). The Commission concluded that under the AEA a withdrawn, but unexpired, construction permit does not automatically lead to a "forfeiture." *Id.* at 11. (JA 24). The Commission also pointed out that a voluntary surrender of an unexpired construction permit does not "fit within the ordinary meaning of 'forfeiture'" — which is "generally understood as a consequence for a wrongful act." *Id.* (JA 24).

Citing several judicial cases, including one where this Court approved an NRC decision to extend the deadline for an already-expired construction permit,[4] the Commission then invoked its "broad discretion in deciding how to proceed in the face of congressional silence." *Id.* at 12. (JA 25). The Commission concluded that "statutory silence leaves the NRC room to allow reinstatement if reasonable." *Id.* (JA 25).

The Commission found reinstatement reasonable here. *Id.* at 13-16 (JA 26-31). The Commission noted that as "a general matter" of administrative law, agencies often allow reinstatement of surrendered licenses "in appropriate circumstances." *Id.* at 14-15. (JA 27-28). The Commission said that "[e]xercising reinstatement authority here promotes regulatory efficiency by allowing the agency to credit both the licensee and the NRC Staff for work already completed during the initial construction permit proceeding and subsequent construction." *Id.* at 15 (JA 28). The Commission further noted that, as a policy and legal matter, TVA would need to

---

[4] *Citizens Assoc. for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987).

show complete compliance with "all regulatory requirements" before the plant received an operating license. *Id.* (JA 28).

The Commission also explained that BREDL's post-reinstatement hearing opportunity did not violate BREDL's AEA hearing rights. *Id.* at 13. (JA 26). The Commission held that under the AEA, a prior hearing right attaches only to the initial grant of the construction permit, and that here the agency was reinstating already-approved construction permits, not granting new ones. *Id.* at 13-14. (JA 26-27). The Commission stressed that it had in fact given BREDL (and others) the right to challenge the reinstatement in a hearing — a right BREDL exercised — and that "there will be a future hearing opportunity" should TVA pursue an operating license. *Id.* at 14. (JA 27).

Now-Chairman Jaczko dissented from the majority opinion. He construed the statutory silence differently than the other two Commissioners and found that silence equated to a prohibition against reinstatement. *Id.* at 22. (JA 35). He also argued that policy considerations weighed against reinstatement —specifically, he expressed concern that the majority decision created precedent

that other utilities could use to skirt the maintenance and preservation requirements established under the Commission's Deferred Plant Policy Statement. *Id.* at 23. (JA 36). The Chairman also argued that the AEA required a hearing before reinstatement. *Id.* at 27-28. (JA 40-41).

Chairman Jaczko's legal reasoning did not persuade the other Commissioners. Although they acknowledged his policy concerns, the majority was skeptical that future parties would profit from "gaming" the system. The majority emphasized the unusual facts of this case, and noted that this confluence of facts would arise again in only the rarest of circumstances. *Id.* at 16. (JA 29). As for the dissent's hearing-rights argument, the Commission majority viewed it as begging the fundamental authority issue because BREDL's hearing-rights claim, by its nature, presumes that the AEA requires fresh construction permits after a voluntary withdrawal. *Id.* at 14. (JA 27).

After responding to the dissent, the Commission referred the remainder of BREDL's hearing petition to the Atomic Safety and Licensing Board. *Id.* at 19-20. (JA 32-33). Immediately after the

Commission's statutory-authority decision, BREDL filed a fresh petition for review in this Court (10-1058).[5]

The NRC proceeding, however, was not over. The NRC's Atomic Safety and Licensing Board began examining BREDL's seven remaining contentions against the reinstatement, including BREDL's contention that TVA lacked "good cause" for reinstatement. The Licensing Board ordered full briefing and held an oral argument on whether BREDL and its co-Petitioners deserved a full hearing. Ultimately, the Board concluded that BREDL and its co-Petitioners failed to offer an admissible contention. *Tennessee Valley Authority*, LBP-10-07. (SA 247). So there was no hearing.

BREDL then missed the deadline to file an administrative appeal to the Commission. Eventually, BREDL submitted a late appeal, limited only to the Licensing Board's rejection of BREDL's "quality assurance" contention. (SA 289-295). The Commission

---

[5] As explained in our jurisdictional argument below, the NRC (and the United States) moved to dismiss BREDL's lawsuit as premature, but a motions panel of this Court referred the jurisdictional issue to the merits panel and directed the parties to discuss it in their briefs; the motions panel also consolidated BREDL's new suit with its earlier one (No. 09-1112). (Order, July 26, 2010).

rejected BREDL's appeal on timeliness grounds, but also noted that it agreed with the Licensing Board's reasoning on the quality assurance issue. *Tennessee Valley Authority*, CLI-10-26. (SA 375-380). The second (and final) stage of BREDL's administrative challenge was thus complete. But unlike previous occasions, BREDL filed no new petition for review.

SUMMARY OF THE ARGUMENT

1. BREDL's petitions for review in Case Nos. 09-1112 and 10-1058 are fatally, and incurably, premature under the Hobbs Act. In both cases, BREDL sought judicial review of the NRC's reinstatement of TVA's permits while at the same time pursuing administrative relief on the reinstatement decisions before the NRC. BREDL's pursuit of an administrative remedy tolled the Hobbs Act 60-day limitations period, rendering the NRC's otherwise final permit reinstatement decisions non-final for the purposes of judicial review.

BREDL's second review petition (in No. 10-1058) was also fatally premature for another reason. It sought early, piecemeal judicial review of what plainly was an interlocutory agency

adjudicatory decision — the Commission's statutory authority decision. At the time BREDL filed this petition for judicial review, multiple other claims also raised by BREDL remained pending and unresolved before the NRC.

Because BREDL failed to file a fresh lawsuit after the conclusion of the administrative proceeding that BREDL itself had initiated, its opportunity to obtain judicial review of the reinstatement decisions has expired. Its earlier suits were incurably premature. They cannot serve as the basis for judicial review now.

2. Even assuming jurisdiction, this Court should still reject BREDL's petition. The main thrust of BREDL's petition is that the NRC lacks legal authority to reinstate withdrawn construction permits. Yet BREDL does not — and cannot — point to any specific statutory prohibition against reinstatement. The AEA simply does not speak to construction permit reinstatement. Because the statute is silent, this Court's inquiry, under the familiar *Chevron* approach to reviewing agency statutory interpretations, is limited to

whether the NRC's interpretation is reasonable and consistent with the overall statutory scheme.

The NRC satisfies this deferential standard. Reinstating TVA's permits does not render other AEA provisions meaningless — the NRC's decision to reinstate preserves the overall integrity of the statute. Further, the NRC possesses broad discretion under the AEA to tailor its regulatory apparatus to accommodate unusual situations in a practical fashion. Here, the Commission sensibly found that reinstating unexpired permits violated no provision of the AEA, was consistent with administrative practice generally, and would result in no diminution in health and safety protection, particularly since TVA would have to make a substantial safety showing to obtain an operating license.

BREDL's hearing-rights argument fares no better. In fact, it is cut from the same cloth as BREDL's legal-authority argument. Section 189(a) of the AEA requires the NRC to hold hearings only when the NRC takes specifically enumerated licensing actions. "Reinstatement" is not one those listed licensing actions. BREDL's hearing-rights argument presupposes that the NRC lacks statutory

authority to reinstate withdrawn permits and must grant fresh ones — BREDL believes that the NRC, in effect, "granted" TVA fresh permits. But the NRC can be said to have "granted" TVA new permits only if it lacked the legal authority to reinstate those permits. BREDL's argument is circular, and must fail unless this Court agrees with BREDL that the NRC illegally reinstated TVA's permits.

Finally, BREDL's challenge to the supposedly overly narrow "good cause" scope of the NRC hearing misses the mark. The NRC offered a *discretionary* "good cause" hearing opportunity. BREDL sought intervention before the Licensing Board but was not able to satisfy the good-cause standard for some of its contentions. After the Licensing Board's adverse decision, BRJEDL did not follow the usual course of NRC adjudications and seek Commission reversal of the Licensing Board's "good cause" approach on administrative appeal. Because BREDL failed to exhaust this potential remedy, this Court should reject BREDL's good-cause argument.

Also, BREDL does not show how the NRC's use of the good-cause standard prejudiced its hearing opportunity. BREDL says

that the Licensing Board rejected all of its contentions because of the good-cause standard. Yet the one specific contention — quality assurance — that BREDL highlights in its brief was rejected by the Licensing Board because it was moot; in fact, the Licensing Board suggested that if properly supported, BREDL's quality-assurance contention *could* have satisfied the good-cause standard.

In any event, the NRC's use of a good-cause standard was entirely permissible. BREDL and other interested parties will have an opportunity to fully litigate generic safety, technical, and environmental issues when TVA applies for an operating license. Such issues also might have been litigated (and some were) in the original Bellefonte construction permit hearings decades ago. So the NRC focused the discretionary reinstatement hearing opportunity on the one issue that is unique to this proceeding — good cause for reinstating the withdrawn permits. That decision is well within the bounds of reasoned decisionmaking.

ARGUMENT

Standard of Review

Whether BREDL has invoked this Court's jurisdiction under the Hobbs Act is a question subject to *de novo* review. *See, e.g., Benoit v. Dep't of Agric.*, 608 F.3d 17, 20 (D.C. Cir. 2010). The merits of this case are governed by the judicial review provisions of the Administrative Procedure Act. Those provisions require a court to "set aside any agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). To survive arbitrary and capricious review, the agency must provide a "rational connection between the facts found and choice made" and its explanations must not run "counter to the evidence before the agency, or [be] so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

In this case, BREDL requests that this Court overturn the NRC's interpretation of its statutory authority under the AEA. To obtain such relief, BREDL must jump over two large hurdles.

The first hurdle is the two-part *Chevron* framework, which courts use to determine whether agencies acted arbitrarily and capriciously in interpreting statutes entrusted to their administration. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Entergy Servs., Inc. v. FERC*, 568 F.3d 978, 981-82 (D.C. Cir. 2009). *Chevron* applies when Congress delegates lawmaking authority to an agency, and the agency then exercises that authority through a process of rulemaking or adjudication. *United States v. Mead Corp.*, 533 U.S. 218, 228-29 (2001). Here, the NRC implements the AEA. And the NRC articulated its interpretation of the AEA in a formal adjudicatory decision, after full briefing by the concerned parties. The NRC's decision has the full force and effect of law. *Chevron*, therefore, provides the framework for reviewing BREDL's claims that the NRC violated, or misconstrued, various sections of the AEA.

BREDL believes that courts review issues of law *de novo* under *Chevron*. Pet. Br. 12. But that is only half the story. True, under *Chevron* step one, "the court examines the statute *de novo*, and if the intent of Congress is clear, then the court's task is at an end."

Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 626 F.3d 84, 90 (D.C. Cir. 2010) (internal quotations omitted). But if the statute is silent or ambiguous, then the court "must defer to the agency's interpretation unless it is manifestly contrary to the statute." *Id.* (internal citations omitted). A court cannot "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. To pass muster on judicial review, the agency's interpretation need only be "permissible;" it need not be the only possible interpretation or even the one preferred by the reviewing court. *Id.*

The second hurdle facing BREDL is the exceptionally large statutory grant of NRC discretion embedded within the AEA. As this Court previously recognized, Congress created in the AEA a "regulatory scheme which 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 objectives." *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968).

A statute "free of close prescription" will naturally be susceptible of competing plausible interpretations. But given the *Chevron* framework, BREDL cannot just offer its own conceivable interpretation — it must show that the NRC's statutory interpretation is beyond reason.

I. BREDL's Petitions For Review Should Be Dismissed Because Of BREDL's Failure To Seek Review Of A Final Agency Decision Under The Hobbs Act.

The Hobbs Act, which governs judicial review of NRC licensing decisions, including the construction permit reinstatements that are the subject of BREDL's petitions for review, limits judicial review to a "final order" of the agency. 28 U.S.C. § 2342(4). Neither Case No. 09-1112 nor Case No. 10-1058 satisfies this jurisdictional prerequisite. BREDL's request for an agency adjudicatory hearing on the NRC's reinstatement of the TVA construction permits rendered the reinstatements non-final, requiring BREDL to await the outcome of the NRC hearing process before bringing suit in this Court. BREDL did not do that. Both of its lawsuits were filed prematurely.

A. *BREDL's administrative challenge to the NRC's reinstatement of TVA's construction permits rendered the agency's action non-final for purposes of judicial review*

In both Case No. 09-1112 and Case No. 10-1058, BREDL petitioned this Court for review of the NRC's reinstatement of TVA's construction permits while also pursuing an administrative remedy before the NRC.[6] In Hobbs Act cases, "'it is well-established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order.'" *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998) (*quoting Tenn. Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980 (D.C. Cir. 1993)); *see also Gorman v. NTSB*, 558 F.3d 580, 586 (D.C. Cir. 2009). If "'a party pursues administrative and judicial relief concurrently,'" its petition for judicial review must be dismissed for lack of jurisdiction. *City of New Orleans*, 137 F.3d at 639 (citation omitted).

---

[6] In both cases, the Statement of Issues To Be Raised lists issues that are essentially identical to those BREDL was simultaneously litigating at the NRC. *Compare* BREDL's Petition to Intervene and Request for a Hearing (JA 187-224) *with* Statement of Issues in No. 09-1112 (April 30, 2009) and Statement of Issues in No. 10-1058 (April 9, 2010).

In essence, the "Hobbs Act embrace[s] a tolling rule." *Stone v. INS*, 514 U.S. 386, 392 (1995). Once "a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered nonfinal as to that party." *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994). This "'stay[s] the running of the Hobbs Act's limitation period,'" *Stone*, 514 U.S. at 391 (*quoting ICC v. Locomotive Eng'rs*, 482 U.S. 270, 277 (1987)), until a "final order" is issued at the end of the administrative proceeding. *See, e.g.*, *Stone*, 514 U.S. at 392 ("party who has sought rehearing cannot seek judicial review until the rehearing has concluded").

Judicial economy dictates this result. "Permitting simultaneous jurisdiction raises the possibility that a court of appeals will expend extensive judicial time on a case only to have agency reconsideration nullify its efforts." *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989).

It does not matter whether agency reconsideration is sought before or after a lawsuit is filed. For jurisdictional purposes, a party's request for agency reconsideration "render[s] the underlying agency action nonfinal regardless of the order of filing." *Wade v.*

FCC, 986 F.2d 1433, 1434 (D.C. Cir. 1993). *Accord City of New Orleans*, 137 F.3d at 639. The "danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction . . . arises whether a party seeks agency reconsideration before, simultaneous with, or *after* filing an appeal or petition for judicial review." *Wade*, 986 F.2d at 1434 (citations omitted) (emphasis added).

Moreover, there is no "qualitative difference" between a "reconsideration" request and BREDL's request in this case that the NRC convene an adjudicatory hearing to consider the validity of the initial permit-reinstatement order. "The initial agency decision may be modified or reversed in both types of administrative review." *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407-08 (9th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997).

Here, this Court's lack of jurisdiction over BREDL's petition for review is clear-cut. In No. 09-1112, BREDL sought an NRC hearing on the permit reinstatements after filing for judicial review. In No. 10-1058, following the Commission's interlocutory adjudicatory decision regarding its authority to reinstate previously withdrawn

construction permits, BREDL filed a second review petition while at the same time continuing to challenge the permit reinstatements before the NRC on multiple other grounds. (JA 200-224). For jurisdictional purposes, BREDL cannot "be in two places at the same time," *Bellsouth Corp.*, 17 F.3d at 1489, any more than the permit reinstatements can "be considered nonfinal for one purpose and final for another," *id.*

Although the NRC, on September 29, 2010, ultimately issued a final decision disposing of the last of the issues raised by BREDL in its administrative challenge (CLI-10-26) (SA 375), such ultimate "agency action does not cure the jurisdictional defect." *City of New Orleans*, 137 F.3d at 639. The Hobbs Act creates a "filing window," requiring a suit to be filed "within" sixty days "after" final agency action. 28 U.S.C. § 2343; *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985) (Hobbs Act sixty-day period for filing petitions for review establishes both a "commencement date" and a "termination date" for judicial jurisdiction). Subsequent agency action does not revive a suit brought too early. *Pub. Citizen v. NRC*,

845 F.2d 1105, 1109 (D.C. Cir. 1988); *W. Union Tel. Co. v. FCC*, 773 F.2d at 378.

In short, both of BREDL's pending petitions for review were "incurably" premature. *See Wade*, 986 F.2d at 1434 ("So long as a request for agency reconsideration remains pending, [a party's] attempt to seek judicial review must be dismissed as 'incurably premature.'" (citations omitted)); *accord Gorman*, 558 F.3d at 586; *Pub. Citizen v. NRC*, 845 F.2d at 1109; *W. Union Tel. Co. v. FCC*, 773 F.2d at 378; *Riffin v. Surface Transp. Bd.*, 331 F. App'x 751 (D.C. Cir. 2009). BREDL filed no fresh petition for review at the close of the NRC adjudicatory proceedings. Its earlier lawsuits were premature and must be dismissed.

B. *BREDL's petition for review of the NRC's January 7, 2010 "Authority" ruling was premature because that ruling was not a final agency decision to reinstate the construction permits.*

In its petition for review in Case No. 10-1058, BREDL asked this Court to "review the final determination by [the NRC] to reinstate construction permits that had previously been issued by the NRC to [TVA]." BREDL designated the Commission's January 7, 2010, order as the NRC's "final action reinstating the construction

permits." But the January 7th ruling was simply an intermediate ruling on one issue — whether the NRC has the statutory authority to reinstate withdrawn construction permits — necessary for ultimate approval of the permit reinstatements. Multiple claims unrelated to the January 7th ruling, all raised by BREDL itself in its request for an administrative hearing, remained pending before the NRC for resolution when BREDL filed its second review petition. So to the extent that BREDL, in Case No. 10-1058, was attempting to seek piecemeal review of the January 7th ruling alone, that petition for review was, again, fatally premature.

Courts exercising Hobbs Act jurisdiction have "narrowly construed the term 'final order.'" *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982) (citation omitted). A final order normally "is one that disposes of all issues as to all parties," *Citizens for a Safe Env't v. AEC*, 489 F.3d 1018, 1021 (D.C. Cir. 1973), "'usually at the consummation of an administrative process.'" *NRDC*, 680 F.2d at 815 (citation omitted); *see also, e.g., Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010). Piecemeal review — "judicial intervention in uncompleted administrative proceedings" — is

"strongly disfavored" because "further agency action might render the case moot and judicial review completely unnecessary." *Sierra Club v. NRC*, 825 F.2d 1356, 1361 (9th Cir. 1987).

"The standard for determining whether an agency has taken final action within the meaning of the [APA] is set forth in *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic* [400 U.S. 62 (1970)]." *Massachusetts v. NRC*, 878 F.2d 1516, 1519-20 (D.C. Cir. 1989); *see also, e.g., Village of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006) (using the *Port of Boston* test to determine finality). Under *Port of Boston*, the "relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Id.* at 71 (citations omitted).

By its own terms, the January 7th ruling concluding that the NRC has the statutory authority to reinstate withdrawn construction permits did not "dispose of all issues" or mark the

"consummation" of the administrative process. The NRC Commissioners addressed the "authority" question only, and expressly referred the remainder of BREDL's claims to the NRC's Licensing Board for further proceedings. CLI-10-06 at 19. (JA 32). Those claims had not yet even started through the adjudicatory process, much less been resolved, when the review petition in No. 10-1058 was filed in this Court. Thus, the process of administrative decisionmaking was not at a "stage where judicial review [would] not disrupt the orderly process of adjudication." *Port of Boston*, 400 U.S. at 71.

Nor did "'legal consequences [] flow'" from the NRC's January 7th authority ruling. *NRDC*, 680 F.2d at 816 (quoting *Port of Boston Marine Terminal Ass'n*, 400 U.S. at 71). The ruling merely resolved a threshold legal issue as to the NRC's authority under the AEA to reinstate a previously withdrawn construction permit. Because the decision concluded that NRC possesses such authority, the agency then had to consider BREDL's remaining issues as to the validity of the permit reinstatements.

The Commission's January 7th decision, in effect, simply "mark[ed] the very beginning of the adjudicatory process." *NRDC*, 680 F.2d at 816. It had no irreversible legal consequences. To the contrary, since the ruling involved a pure question of law, BREDL had "the availability of relief on review of a final order," if necessary, to vindicate its contrary legal view. *Id.* at 816-17 ("availability of relief" on judicial review of final agency decision dictates against finding that "legal rights or obligations have been determined" under *Port of Boston* standard); *see also Citizens for a Safe Env't v. AEC*, 489 F.2d 1018, 1022 (D.C. Cir. 1974); *Thermal Ec. Must be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970).

This Court's decision in *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998), is instructive. In *City of Benton*, the NRC considered both the safety and antitrust implications of a proposed license amendment that it had previously issued and made effective as permitted under the AEA. *Id.* at 825. The antitrust review was completed on May 30, 1995, but the safety issues were still pending before the NRC's adjudicatory tribunal when the petitioners sought judicial review, designating only the May 30th antitrust ruling in

their petition. This proved fatal. This Court concluded that the antitrust ruling was unreviewable under the Hobbs Act because it was not a final decision on the proposed license amendment. *Id.*

Like the antitrust ruling in *City of Benton*, the Commission's January 7th ruling on NRC's statutory reinstatement authority resolved only part of the administrative adjudication. The rest of BREDL's claims were still pending before the NRC at the time BREDL filed its petition for review in No. 10-1058, rendering the review petition "incurably premature" under the Hobbs Act.

C. *BREDL failed to show, either in its opening brief or in its opposition to the government's motion to dismiss, that this Court has jurisdiction over its petitions for review.*

BREDL vigorously opposed our original Motion to Dismiss. *See* Petitioner's Opposition to Respondents' Motion to Dismiss Petition for Review (May 10, 2010). This Court, by Order dated July 26, 2010, explicitly directed the parties "to address in their briefs the issues presented in the motions to dismiss rather than incorporate those arguments by reference." In its opening brief, though, BREDL ignored this Court's directive, and merely asserted,

without argument, that this Court has jurisdiction under the Hobbs Act. Pet. Br. 1.

We expect, however, that BREDL will use its reply brief to again oppose our jurisdictional arguments. Because we will not have the opportunity to respond to BREDL's jurisdictional arguments, its failure to follow the Court's directive has put us at a disadvantage. Nevertheless, we can anticipate at least some of BREDL's responses to our jurisdictional arguments based on its Opposition to our Motion to Dismiss.

1. Regarding its petition for review of the Commission's January 7th ruling, BREDL argued in its Opposition that various court decisions hold that NRC interlocutory decisions can be reviewed before the conclusion of an administrative proceeding. BREDL relied chiefly on *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), for the proposition that "NRC orders that are given 'immediate effect' constitute an exception to the [final order] rule. Opposition at 9-10. But *Massachusetts* is inapposite. In that case, the NRC's Licensing Board authorized a full-power license for the proposed Seabrook power plant. 924 F.2d at 318. Under a special

procedure, the Commission then allowed for "immediate effectiveness" of the Licensing Board's decision.[7] *Id.* at 319. This Court viewed the Commission's "immediate effectiveness" ruling as a final agency order, even though there were pending administrative appeals on other matters. The Court found that "significant legal consequences" — *i.e.*, authorizing commencement of operation at full power — attached to the Commission's "immediate effectiveness" ruling. *Id.* at 322.

As this Court explained in a subsequent opinion, the order at issue in *Massachusetts* was "akin to a district court's grant or denial of a preliminary injunction." *Shoreham-Wading River Cent. Sch. Dist. v. NRC*, 931 F.2d 102, 105 (D.C. Cir. 1991). That is why the scope of this Court's review in *Massachusetts* was "exceedingly limited" — "only to the extent necessary to review the Commission's exercise of discretion in allowing immediate effectiveness."

---

[7] *Massachusetts* arose under a regulatory scheme (no longer in effect) quite different from the one governing this case. That scheme provided for the Commission, "upon receipt of the Licensing Board decision authorizing issuance of an operating license . . . [to] review the matter on its own motion to determine whether to stay the effectiveness of the decision." *See* the former 10 C.F.R. § 2.764 (f)(2) (1988).

Massachusetts, 924 F.2d at 322. Indeed, in *City of Benton*, 136 F.3d at 825-26, this Court observed that "immediately effective" rulings like the one at issue in *Massachusetts* "constitute an exception" to the rule that a "final order" is ordinarily "the order granting or denying the license."

The Commission's January 7th ruling resolving part of BREDL's hearing petition was not at all akin to an "immediate effectiveness" ruling. As a result of the NRC's ruling in *Massachusetts*, the licensee had permission to start operating Seabrook at full power. By contrast, the Commission's January 7th statutory authority ruling did not immediately alter BREDL or TVA's legal rights or have any irreversible consequences. Only in special cases, where an agency's interlocutory decision causes immediate, on-the-ground effects that cannot effectively be remedied by later judicial review can a petitioner resort to the courts before an ongoing agency adjudication is over. *See NRDC v. NRC*, 680 F.2d at 816 ("availability of relief on review of a final order . . . dictates against judicial review" of interlocutory decision).

All that the Commission's January 7th ruling accomplished was a *narrowing* of the legal issues before NRC. Agencies — and district courts — narrow legal issues all the time. But this did not make the Commission's January 7th ruling a "final order." This Court has stated that the "final order" requirement in the Hobbs Act is functionally the same as the "final decision" requirement in the statute governing general appellate jurisdiction. *Cmty. Broad. of Boston, Inc. v. FCC*, 546 F.2d 1022, 1024 (D.C. Cir. 1976). In that regard, the NRC's January 7th ruling on the scope of its legal authority is analogous to a district court's partial summary judgment decision. Like a partial summary judgment decision, the Commission's ruling resolved some, but not all, of BREDL's claims, and thus is not immediately reviewable. *Cf., e.g., Citizens for Responsibility and Ethics in Washington v. DHS*, 532 F.3d 860, 862 (D.C. Cir. 2008) ("[A]s a general rule, we lack jurisdiction to hear an appeal of a district court's denial of summary judgment, partial or otherwise." (internal citations and quotations omitted)).

BREDL's reliance on *Massachusetts*, therefore, was misplaced. *All* interlocutory NRC orders have "immediate effect" in

the sense of disposing of one issue or another. If this Court accepts BREDL's overbroad reading of *Massachusetts*, then the losing party could seek piecemeal appellate review every time the Commission issues a ruling on a legal issue. Such an approach would certainly "disrupt the orderly process of adjudication." *Port of Boston*, 400 U.S. at 71.

The remaining cases BREDL cited in support of its position are equally inapplicable. *See* Opposition at 10-11. *Oyster Shell Alliance v. NRC*, 800 F.2d 1201, 1203 (D.C. Cir. 1986), like *Massachusetts*, involved review of an NRC "immediate effectiveness" ruling for a full-power license. *Ecology Action v. AEC*, 492 F.2d 998, 1000 (D.C. Cir. 1974), recognized that an order denying a party's right to participate in a hearing altogether—"an order denying intervention"—is an example of an agency order that is final even if it is not the last one entered. And *Seacoast Anti-Pollution League v. NRC*, 690 F.2d 1025, 1028 (D.C. Cir. 1982), involved review of a *final* NRC order — an order refusing to initiate an enforcement hearing.

2. In its Opposition, BREDL attempted to distinguish between the Commission's January 7th authority ruling and the purported "subsequent skirmishing over technical questions" that were still pending at the NRC at the time BREDL filed its review petition in No. 10-1058. Opposition at 7-8. Both the challenged Commission ruling, however, and the then-pending "technical questions" arose from BREDL's *own* hearing petition before NRC. The January 7th ruling extinguished just two of nine contentions submitted by BREDL. The Commission ruling specifically referred the remaining seven to the NRC's Licensing Board to decide "whether reinstatement on the particular facts presented here is lawful and proper." CLI-10-06 at 19. (JA 32).

BREDL, therefore, apparently misunderstood the jurisdictional issue when it labeled its remaining administrative claims mere "technical questions" or so-called "vestigial remnants." Opposition at 8. Seven out of nine contentions were not "vestigial," but rather the bulk of BREDL's hearing petition. And any one of the contentions, if sustained on the merits, would have defeated the construction-permit reinstatement.

3. In its Opposition, BREDL suggested that its pursuit of an administrative hearing on the initial permit reinstatement order did not delay its right to judicial review because "obligations have been determined" and "legal consequences will flow" from the reinstatements. Opposition at 12. In support, BREDL stated that TVA has invested "considerable sums of money" to bringing the reactors further toward completion, speculating that the reactors "may be approaching full completion now." Opposition at 12.

But, as we demonstrated in Point A above, it is a party's own decision to pursue an administrative remedy — here, a request for an NRC hearing — that renders an "otherwise final" agency decision non-final for purposes of judicial review. *See, e.g., United Transp. Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989). The "tolling" of the Hobbs Act limitation period is not limited to agency decisions that have not been made effective or have been stayed.

This is in contrast to the requirement under § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704, enunciated in *Darby v. Cisneros*, 509 U.S. 137, 152 (1993), that an agency must, by rule, provide for a final initial decision to be "inoperative" in order to

r*equire* persons aggrieved by an initial decision to exhaust administrative remedies before seeking judicial review. Indeed, the distinction recognized by the Supreme Court between APA § 10(c) and cases like the one here, where a party chooses to pursue an administrative appeal of an otherwise final agency decision, is instructive:

> Th[e] language [of APA § 10(c)] has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . , but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.

Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 284-85 (1987) (emphasis in original); *see also Stone*, 514 U.S. at 391; *Acura of Bellevue*, 90 F.3d at 1407; *United Transp. Union*, 871 F.2d at 1117.

In any event, the permit reinstatements did not authorize immediate commencement of construction (and TVA has not re-commenced construction, which requires additional regulatory approval). Moreover, TVA would not have needed the permits to be reinstated in order to expend funds. Since the permits were only reinstated to non-construction ("terminated") status under the

NRC's Policy Statement on Deferred Plants, the most significant and immediate consequence of the permit reinstatements was to restore regulatory oversight over the reactor sites.

If BREDL believed that the permit reinstatements had immediate and irreversible consequences, it could have asked the NRC or this Court to stay the effectiveness of the reinstatements. The fact that it never sought such a stay, either before this Court or before the NRC, but chose instead to pursue an administrative hearing, belies any claims that consequences flowed from the permit reinstatements that could not have been remedied by later judicial review. BREDL's request for judicial review has thus far been confined to the merits of the reinstatement decisions. It is far too late for BREDL now to claim that either of its review petitions somehow amounts to a stay request or a *Massachusetts*-like "immediate effectiveness" challenge.

D. ***BREDL failed to preserve its right under the Hobbs Act to obtain judicial review of the NRC's permit reinstatements.***

To preserve its right under the Hobbs Act to obtain judicial review of the NRC's permit reinstatements, and the NRC adjudicatory decision upholding the reinstatements, BREDL would

have had to file a new petition for review within sixty days after the NRC's September 29, 2010, final decision on BREDL's administrative challenge — in effect "supplementing its premature petition[s] with a later protective petition." *W. Union Tel. Co.*, 773 F.2d at 380. Indeed, our original Motion to Dismiss expressly alerted BREDL to the jurisdictional deficiencies of both of its pending review petitions, and of the need to file a new review petition upon the conclusion of the administrative proceeding. But BREDL failed to file a fresh review petition within sixty days after the NRC's September 29, 2010 decision. Because the already-pending review petitions were incurably premature, and because BREDL failed to file a protective review petition upon final agency action, BREDL has missed the Hobbs Act "filing window" for seeking judicial review of the permit reinstatements.

In sum, the relevant statutory language, case law, and related policy considerations call for dismissing BREDL's prematurely filed petitions for review for lack of jurisdiction.

II. The NRC Reasonably Concluded That It Possessed Statutory Authority To Reinstate TVA's Withdrawn Construction Permits.

A. *The Atomic Energy Act does not prohibit reinstatement.*

Both BREDL and the NRC agree that the AEA does not address the reinstatement question. Section 185 — the only statutory provision that specifically addresses construction permits — does not mention "reinstatement" or "withdrawal." 42 U.S.C. § 2235. Under the long-established *Chevron* approach, when a statute is silent, this Court's review is limited to whether the agency's interpretation is a permissible one. *See Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 719 (D.C. Cir. 2009) ("[I]f the statute *is silent* or ambiguous *with respect to the specific issue*, the court must uphold the agency's interpretation as long as it is reasonable." (emphasis added; quotes and internal citations omitted)); *see also Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711-12 (2011) (explaining that when the plain text of the statute does not "speak" to the issue, courts should proceed to *Chevron* step two). The Commission's decision here satisfies this deferential standard.

Section 185 of the AEA, 42 U.S.C. § 2235, governs construction permits. It stipulates that all construction permits must state the earliest and latest dates for completion of construction. *Id.* And if construction is not finished by the completion date, then all rights under the construction permit are "forfeited." *Id.* The statute contains only one pathway to a "forfeiture" — expiration. Because the "forfeiture" clause is specifically yoked to expiration, the Commission concluded that a *voluntary* surrender of an *unexpired* construction permit does not amount to a forfeiture of that permit under section 185. *Tennessee Valley Authority*, CLI-10-06 at 10-11 (2010). (JA 23-24).

The Commission rightly pointed out that its understanding of "forfeiture" is buttressed by the ordinary legal meaning of the word "forfeit," which has connotations of wrongdoing, misfeasance, or negligence. *See Black's Law Dictionary* 722 (9th ed. 2009) (defining forfeiture as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty"); *see also* CLI-10-06 at 11 (JA 24). Here, TVA did not negligently let its permits expire or commit some other form of wrongdoing. Rather, TVA merely made

a business determination that it should voluntarily surrender its construction permits. Given this, the Commission's conclusion that § 185's forfeiture clause did not prohibit reinstatement is a permissible — indeed a literal — construction of the statute. It cannot be "manifestly contrary to the statute," *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. at 711, to read it literally.

B. *The NRC has broad discretion under the Atomic Energy Act to regulate construction permits.*

After parsing the text of § 185, the Commission turned to its broad discretion under the AEA. *Tennessee Valley Authority*, CLI-10-06 at 12. (JA 25). Courts have long recognized the NRC's large degree of discretion in the face of congressional silence. *See, e.g., Siegel*, 400 F.2d at 783 (D.C. Cir. 1968) (explaining that Congress enacted "a regulatory scheme which 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 objectives").

Indeed, this Court has previously approved the NRC's exercise of its broad statutory discretion vis-à-vis construction permits. In *Citizens Ass'n for Sound Energy v. NRC*, a construction permit holder failed to request an NRC extension before the completion date for construction. 821 F.2d at 726. The NRC eventually extended the expired permit, even though § 185 does not say, one way or the other, whether the NRC can extend an already-expired permit. *Id.* This Court applied *Chevron* and upheld the NRC's view that § 185 does not require new construction permits once a licensee's existing ones expire. *Id.* at 730-31.

To be clear, the analogy with *Citizens Association* is not exact. The facts are different, and the Court relied, in part, on the NRC's timely renewal regulations.[8] But the larger message from *Citizens Association* is that the NRC has wide latitude under § 185 to tailor its regulatory apparatus for construction permits and to accommodate unexpected contingencies in a practical fashion. If

[8] Under the NRC's "timely renewal" regulation, licenses and permits remained in force even after their expiration date so long as a licensee filed its renewal application at least thirty days before the expiration date. *Citizens Ass'n*, 821 F.2d at 731. This Court used that regulation to support its holding that § 185 did not require an "automatic forfeiture." *Id.*

the NRC can extend an expired permit in the absence of a clear statutory directive, then it was reasonable for the Commission to conclude that it could, likewise, reinstate an unexpired permit in the absence of a clear statutory directive.

The Commission decision, of course, relies on more than statutory silence and broad Commission discretion. The Commission also points to consistency with administrative law generally and sound policy reasons for reinstating construction permits in the circumstances of this case. *See* CLI-10-06, at 14-16 (JA 27-29), and further discussion, *infra.* In its opening brief, though, BREDL does not grapple with any of the reasons the Commission gave for its decision and makes no effort to explain why the Commission interpretation reflects an impermissible interpretation of § 185. Instead, BREDL merely offers its own alternate interpretation that § 185 should be read to prohibit reinstating withdrawn permits. Pet. Br. 12-14.

But the most BREDL has shown is that § 185 might be susceptible of multiple interpretations. BREDL needs to do more than just show why its own statutory interpretation is plausible. It

must prove that the Commission's construction is "manifestly contrary to the statute." *Mayo Found.*, 131 S. Ct. at 711. That is BREDL's burden under *Chevron*. And that is what BREDL's opening brief fails to do. BREDL, of course, should not be permitted to raise new challenges to the Commission's rationale for the first time in its upcoming reply brief. *See Coal. for Noncommercial Media v. FCC*, 249 F.3d 1005, 1010 (D.C. Cir. 2001) (stressing that it "is too late for a new argument" in a reply brief).

C. *The NRC's decision to reinstate is sound policy.*

BREDL also offers policy arguments against reinstatement, replete with vivid warnings and metaphors. Pet. Br. 15. As we noted above, BREDL again fails to challenge or address the Commission's own policy findings as set forth in its decision. *Tennessee Valley Authority*, CLI-10-06 at 14-16. (JA 27-29). And, more importantly, BREDL's extended policy argument does not address the fundamental legal-authority question. BREDL's policy arguments presuppose that the NRC does indeed possess legal authority to reinstate, but argue that the NRC erred by exercising

that authority. So BREDL's policy arguments lack weight unless they show that the NRC acted arbitrarily and capriciously. 5 U.S.C. § 706(2)(A). BREDL does not meet this burden.

BREDL's principal policy argument is that TVA *might* have withdrawn its construction permits eighteen years ago, obtained a reinstated permit today, along with an ensuing operating license, and then started splitting atoms. *See* Pet. Br. 14-15. If that scenario in fact had happened, then BREDL might have had a stronger case that the NRC acted in an arbitrary and capricious way. But the reality is that in *this* case there was only a two-year gap between permit withdrawal and permit reinstatement. Previously, the NRC and TVA had had an extensive regulatory relationship at Bellefonte covering nearly forty years. In light of this lengthy relationship, the Commission reasonably concluded that crediting the NRC Staff and TVA for work already completed made more sense, from a policy standpoint, than going back to square one. CLI-10-06 at 15. (JA 28).

Further, as the Commission pointed out, reinstating withdrawn permits, where equities warrant, is commonplace in

administrative practice. *Id.* at 14-15 (JA 27-28). And more particular to this case, as the Commission also emphasized, TVA cannot operate Bellefonte until the NRC is satisfied that TVA safely constructed the plants and will safely operate them. *Id.* at 15 (JA 28). BREDL (and other members of the public) will have every opportunity to seek a hearing and otherwise participate in any operating-license decision.

Given this set of facts, the NRC's decision to reinstate TVA's permits is rooted in sound reasons and easily satisfies the APA's arbitrary-and-capricious standard of review. It was not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43.

III. The NRC did not violate BREDL's § 189 hearing rights.

A. *BREDL's claim that it was entitled to a "prior" hearing is circular because it presumes that the NRC had to grant TVA new construction permits.*

The NRC offered BREDL and other interested parties an opportunity for an administrative hearing after it reinstated TVA's permits. BREDL argues that this deprived them of their hearing

rights under § 189(a) of the AEA because it was not offered a hearing opportunity *before* the NRC reinstated TVA's permits. *See* Pet. Br. 17-18; 42 U.S.C. § 2239(a). BREDL presents this as an "assuming *arguendo*" argument. That is, BREDL believes that this issue is separate and distinct from the authority-to-reinstate issue. But these two arguments are actually co-dependent. BREDL's § 189(a) "hearing" argument depends on its statutory authority argument.

Section 189(a), 42 U.S.C. § 2239(a), provides a comprehensive list of NRC actions that trigger hearing rights. Those actions include, among others, granting, suspending, revoking, or amending licenses or construction permits. *Id.* But "reinstating" permits or licenses is not one of the listed NRC actions. Nor, contrary to what BREDL's brief implies, is there a residual catch-all category requiring hearings for any "significant" NRC licensing action. *See 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*, 789 F.2d 26 (1986) (rejecting the argument that any significant change

in the licensing status of a power plant triggers § 189(a)). As this Court has held, "[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 by the Commission." *Id.*[9] BREDL's hearing-rights argument, therefore, begs the legal-authority

---

[9] The Second Circuit recently held that Hobbs Act jurisdiction does not attach to exemption proceedings because exemptions are not one of the licensing activities listed in § 189(a). *Brodsky v. NRC*, 578 F.3d 175 (2d Cir. 2009). Because the Hobbs Act, 28 U.S.C. § 2342(4), grants courts of appeals exclusive jurisdiction over final orders entered in any proceeding specified in § 189, 42 U.S.C. § 2239, and because § 189 specifies which actions require a hearing, the *Brodsky* court believed that it lacked jurisdiction over a final order in a proceeding that did not give rise to a hearing. *Id.* at 180 (citing 42 U.S.C. § 2239(a)(1)(A). In this case, though, the Hobbs Act grants exclusive jurisdiction to this Court even though § 189(a) does not specify that reinstatement of a permit triggers a right to a hearing. The Supreme Court previously held that "Congress intended to provide for initial court of appeals review of all final orders in [NRC] *licensing proceedings whether or not a hearing before the Commission occurred or could have occurred.*" *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 736-37 (1985) (emphasis added). The Court emphasized that the jurisdictional grant extends to NRC orders, like this one, involving matters "preliminary or ancillary" to one of the licensing actions (here, a construction permit) specified in § 189(a). *Id.* at 743. Thus, this case is not like *Brodsky*, which declined jurisdiction over an exemption that was unrelated to those licensing activities listed in § 189. *See Honeywell*, 628 F.3d at 575-76.

question, as the Commission held (CLI-10-6, at 14 (JA 27), because it necessarily presumes that the NRC cannot reinstate TVA's permits, and instead must grant fresh permits, with a fresh hearing opportunity.

In short, § 189(a) entitles BREDL to a "prior" hearing only if the NRC had to grant TVA new construction permits. But if the NRC has the authority to reinstate permits, then § 189(a) does not require any sort of hearing because "reinstatement" is not one of the listed NRC actions.

B. *BREDL's attempt to avoid circularity is not persuasive.*

BREDL latches on to this Court's conclusion in *San Luis Obispo Mothers for Peace v. NRC* that license "extensions" essentially amount to license "amendments" — thus triggering §189(a). Pet. Br. 20; *San Luis Obispo*, 751 F.2d at 1314-15.[10] BREDL characterizes the permit reinstatements at issue here as

[10] *San Luis Obispo* was not breaking new ground. The view that license or permit extensions equal license amendments has been established, at least in this Circuit, since the early 1970s. *See Brooks v. AEC*, 476 F.2d 924 (D.C. Cir. 1973) (holding that construction permit extensions constitute amendments for purposes of § 189(a)).

permit extensions, which, in turn, makes them "amendments" for purposes of the AEA hearing requirement, § 189. But BREDL's tortuous path to § 189 relies on a fundamental misunderstanding of what the NRC did when it reinstated TVA's construction permits. The NRC did not "extend" TVA's permits, which remain set to expire in 2011 and 2014. Nor did the NRC "amend" the terms of TVA's construction permits — TVA cannot perform any construction activities that were outside of the scope of its original permits. If at some future point the NRC decides to extend TVA's permits, or amend that permit, *then* § 189(a)'s procedural scheme would apply.

Ultimately, BREDL itself seemingly recognizes the difficulty of its § 189(a) argument. It acknowledges that reinstatement is outside the scope of § 189(a) licensing actions. Pet. Br. 21. But as a last-ditch effort, BREDL argues that reinstatement is *sui generis* due to its "grave" public health and safety implications. *Id.* For starters, BREDL is overstating the public safety concerns associated with reinstatement — TVA cannot operate the plant, nor perform any activities that were not authorized by the original, duly issued

permits. Nor can TVA resume actual construction without additional regulatory approval.

BREDL also errs by insinuating that courts have never confronted similar licensing actions. For example, this Court held that lifting a license-suspension order — which presumably has public safety effects comparable to or greater than those that follow a reinstatement[11] — does not trigger § 189(a). *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d at 1314. And the First Circuit has dealt with a set of facts even closer to the contested action here. In *Massachusetts v. NRC*, 878 F.2d 1516 (1989), the Pilgrim Nuclear Plant voluntarily shut down and stopped operating. *Id.* at 1518. The NRC eventually authorized a restart of Pilgrim, and Massachusetts argued that it was entitled to a § 189 hearing before the restart. *Id.* 1521. The First Circuit even labeled this a license "reinstatement" because the NRC was reinstating Pilgrim's right to operate. *Id.* at 1522. Yet despite the NRC's "reinstatement" of Pilgrim's ability to *operate*, the First Circuit held that § 189 did not require a hearing because the restart was not a license amendment

[11] In both instances, the licensee was authorized to act, stopped acting, and then resumed acting.

or one of the other hearing-triggering events specified in § 189. *Id.* Here, the NRC's reinstatement of TVA's right to *construct* is not functionally different from the circumstances that the First Circuit confronted in *Massachusetts.*

The NRC takes its public participation obligations seriously. *See* CLI-10-6 at 14. (JA 27). That is why the agency offered a discretionary hearing opportunity after reinstatement. And that is why the public will be involved if TVA decides to proceed to the operating license phase.

IV. To the extent that BREDL properly exhausted its administrative remedies on this issue, the NRC reasonably used its good-cause standard to adjudicate BREDL's hearing request.

The NRC offered BREDL a hearing opportunity on whether TVA established "good cause" for the reinstatement. BREDL took advantage of that opportunity, but did not receive a full-blown hearing because the NRC's Licensing Board found that none of BREDL's contentions were admissible for hearing. *Tennessee Valley Authority*, LBP-10-07. (SA 247). Now, BREDL argues that the NRC "artificially constrained" the scope of its hearing by

applying an "unprecedented" good-cause standard.[12] Pet. Br. 21-23. BREDL's protestations are misplaced.

A. *BREDL did not exhaust its administrative remedies.*

As a preliminary matter, BREDL should not be permitted to pursue its challenge to the NRC's use of the good-cause standard because BREDL failed to exhaust its administrative remedies on this specific issue.

After the NRC reinstated TVA's permits in March 2009, BREDL decided to seek an administrative remedy at the NRC. BREDL's decision to seek agency reconsideration not only terminated this Court's jurisdiction,[13] but also gave BREDL an obligation to fully prosecute its claims. Parties cannot half-engage agencies. Nor can

---

[12] BREDL's good-cause argument reinforces the jurisdictional defects in its two petitions for judicial review. The Licensing Board rejected BREDL's contentions on April 2, 2010. LBP-10-10-07 (SA 257). And the Commission turned down BREDL's final appeal on September 29, 2010. CLI-10-26 (SA 375). Yet BREDL filed its second and last petition for judicial review in this Court on March 8, 2010 — roughly a month *before* the Licensing Board decision and nearly seven months *before* the Commission's final decision. For the reasons set forth in Section I, BREDL's "gun-jumping" deprives this Court of jurisdiction, and obviates the need for this Court to consider BREDL's good-cause argument or any of BREDL's other merits arguments.

[13] See *supra* Argument, Section I.

parties short-circuit the administrative review process once it begins. *Cf. Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009) (noting that prudential exhaustion "serves the twin purposes of protecting agency authority and promoting judicial efficiency" (internal quotes omitted)).

Here, BREDL never appealed the Licensing Board's use of the good-cause standard to the Commission. If BREDL believes that the Licensing Board misinterpreted or misapplied the good-cause standard, then it should have brought that issue to the Commission's attention. BREDL did, in fact, file an untimely appeal. But that appeal challenged only a separate and distinct aspect of the Licensing Board's decision. *See* BREDL's Brief on Appeal of LBP-10-07 at 4-5. (SA 292-293). BREDL's appeal neither mentions nor addresses the Board's application of the good-cause standard. *Id.* The Commission decision expressly stated that "[t]he scope of the hearing offered in this proceeding is not at issue in the instant appeal." CLI-10-26 at 5 n.23. (SA 379).

BREDL, in short, did not offer the Commissioners a chance to weigh in on the appropriateness of the Board's good-cause

standard. BREDL, therefore, did not fully exhaust its administrative remedies. This alone provides an adequate basis for this Court to deny BREDL's requested relief on this issue. *See Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 875 (D.C. Cir. 2009) (explaining that it would not address the merits of Tesoro's argument because Tesoro failed to exhaust its administrative remedies).

B. *The NRC's reasonably used a good-cause standard in this proceeding.*

Assuming that exhaustion was not required, BREDL's good-cause challenge still fails. BREDL argues that the standard "proved fatal" to BREDL's "hopes of getting a fair hearing." *See* Pet. Br. at 22. But the only specific claim that BREDL mentions in its "good-cause" portion of its brief is a "quality-assurance" contention, and the Board (and Commission) rejected that claim as *moot*, not as failing the good cause standard. CLI-10-26 at 4 (SA 378); LBP-10-07 at 32-34 (SA 278-280). Indeed, the Board suggested that BREDL's quality-assurance claim, if adequately supported, might well have met the good cause standard. LBP-10-07 at 33 n.13. (SA 279). BREDL, therefore, does not show any prejudice from the

NRC's use of the good-cause standard. *See* 5 U.S.C. § 706 (on judicial review, "due account shall be taken of the rule of prejudicial error").

Other than this quality-assurance contention, BREDL's brief is entirely vague about what other kinds of issues it wished to pursue before the Licensing Board. It is difficult, therefore, for us to respond to BREDL's argument that it was stymied by the good-cause standard. *Cf. Village of Bensenville v. FAA*, 457 F.3d 52, 72 (D.C. Cir. 2006) (noting that the court had difficulty responding to vague and conclusory assertions in petitioners' brief).

Moreover, notwithstanding the supposedly too-narrow good-cause standard, the Commission considered and decided BREDL's fundamental statutory authority claim *on the merits.* And when the Commission referred BREDL's remaining claims to the Licensing Board, the Commission instructed the Board to assess "whether reinstatement on the particular facts presented here is *lawful and proper* — that is, whether there is 'good cause' for reinstatement." CLI-10-6 at 19 (emphasis added). (JA 32). Contrary to BREDL's argument, a "lawful and proper" test does not sound like a

"meaningless ... standard" that "left Petitioner with no means of redressing its many claims." Pet. Br. 24.

It is true that the Licensing Board took a somewhat narrow view of the "good-cause" standard, likening it to the same standard applied in extension-of-permit cases. *See* LBP-10-07 at 16-22. (SA 262-268). The Board relied on the "tenet" that "safety and environmental issues are generally to be adjudicated in the OL [operating license] proceeding" rather than in a good-cause proceeding "regarding the continued viability of a previously-issued CP [construction permit]." *Id.* at 21-22. (SA 267-268). BREDL's brief in this Court offers no reason why this "tenet" is not a sensible one. The NRC surely is not obliged to conduct essentially duplicate inquiries, once at the reinstatement (or extension)-of-permit stage and again at the operating-license stage.

The Commission here took the cautious step of offering a discretionary hearing on reinstatement. That hearing does not lose its legality just because it fails to address every issue that the hearing participant might have wished to litigate. Otherwise, agencies would have an incentive to *never* hold discretionary

hearings. BREDL has not shown that NRC's administration of the hearing it offered was arbitrary or capricious.

CONCLUSION

For the foregoing reasons, this Court should dismiss BREDL's petition for review for lack of jurisdiction, or in the alternative deny the petition for lack of merit.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

/S/
LANE MCFADDEN
Attorney
Appellate Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, DC 20026-3795
(202) 353-9022

STEPHEN G. BURNS
General Counsel

/S/
JOHN F. CORDES
Solictor

/S/
GRACE H. KIM
Senior Attorney

/S/
JEREMY M. SUTTENBERG
Attorney
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Mailstop 15D21
Rockville, MD 20852
(301) 415-2842

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains 12, 191 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 Bookman Old Style type style. This brief was prepared on Microsoft Office Word 2007.

/S/_____
Jeremy M. Suttenberg
Counsel for Respondent NRC

CERTIFICATE OF SERVICE

I certify that on this date, July 11, 2011, I filed the foregoing brief with the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served opposing counsel of record.

As required by the rules, I have also caused an original and eight paper copies of this brief to be filed with the Court.

/S/

Jeremy M. Suttenberg
U.S. Nuclear Regulatory Commission
Mail Stop 15D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
(301) 415-2842

STATUTORY ADDENDUM

Atomic Energy Act § 185(a); 42 U.S.C. § 2235(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 other purposes of this Act, a construction permit is deemed to be a "license."

Atomic Energy Act § 189(a)(1)(A); 42 U.S.C. 2239 §(a)(1)(A)

Sec. 189: Hearings And Judicial Review

(A)(1)(A) In any proceeding under this chapter, 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 2183, 2187, 2236(c) or 2238 of this title, 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 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title 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.

UNPUBLISHED DECISIONS

United States Court of Appeals,
District of Columbia Circuit.

James RIFFIN, Petitioner
v.
SURFACE TRANSPORTATION BOARD and United States of America, Respondents

City of Norfolk, Virginia and Norfolk Southern Railway Company, Intervenors.

No. 07-1483.
April 22, 2009.
Rehearing En Banc Denied June 18, 2009.

Before: SENTELLE, Chief Judge, GARLAND and BROWN, Circuit Judges.

PER CURIAM.

This petition for review was considered on the record from the Surface Transportation Board ("STB" or "Board") and on the briefs filed by the parties. See FED. R.APP. P. 34(a)(2); D.C. CIR. R. 34(j). The issues have been accorded full consideration by the Court and occasion no need for a published opinion. See D.C. CIR. R. 36(b). It is

ORDERED and ADJUDGED that the petition be dismissed on the ground that it is incurably premature.

James Riffin challenges the Board's decision to exempt Norfolk Southern Railway Company from the forced-sale provisions that apply when an offer of financial assistance has been made in a rail line abandonment proceeding. Following that decision, Riffin filed a petition to reopen with *752 the Board, see Petitioner's Supp. Br. 2-3, 8-9 (confirming that the filing was intended as a petition to reopen, despite being mislabeled), and then filed the instant petition for judicial review while the petition to reopen was still pending. Although the Board's regulations generally allow reopening petitions

to be filed at any point, 49 C.F.R. § 1115.4, they require such petitions to be filed within 15 days of service of a final rail line abandonment decision if the petitioner wants the Board to consider his or her request before the abandonment authorization becomes effective, id. § 1152.25(e)(2)(i); see also id. § 1152.60(a) (providing that the special rules applicable to abandonment proceedings "control in case of any conflict with the general exemption rules"); id. § 1152.25(e)(1) (same). Riffin's petition met this 15-day requirement, as well as the generic 20-day requirement for petitions for reconsideration, id. § 1115.3(e).

By filing a timely petition to reopen, Riffin rendered the Board's decision nonfinal-and hence nonreviewable-with respect to him. "Our caselaw treats a [timely] petition for review filed during the pendency of a request for administrative reconsideration as 'incurably premature,' and in effect a nullity." Gorman v. NTSB, 558 F.3d 580, 586 (D.C.Cir.2009) (internal quotation marks and brackets omitted); see Clifton Power Corp. v. FERC, 294 F.3d 108, 110-12 (D.C.Cir.2002) (summarizing and applying incurable prematurity doctrine). The fact that the petition sought reopening rather than reconsideration is of no moment. See United Transp. Union v. ICC, 871 F.2d 1114, 1116-18 (D.C.Cir.1989) (finding incurable prematurity when petitioners had a pending request to "reopen" the record before the STB's predecessor); cf. ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 284-86, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987) (holding that an administrative petition which was "in effect a petition to reopen" tolled the Hobbs Act time limits for seeking judicial review); Stone v. INS, 514 U.S. 386, 391, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) (stating that the Court's holding in Locomotive Engineers applies when "there is a motion to reconsider or reopen an agency's order") (emphasis added). Nor is it of any moment that Riffin's petition to reopen has by now been denied by the Board. See Clifton Power Corp., 294 F.3d at 112; TeleSTAR, Inc. v. FCC, 888 F.2d 132, 134 (D.C.Cir.1989) (per curiam). And because the petition met the 15-day requirement of 49 C.F.R. § 1152.25(e)(2)(i), we need not decide whether the incurable prematurity doctrine would apply to a litigant who files a petition to reopen with the Board more than 15 days after service of an abandonment decision.

**2 The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See FED. R.APP. P. 41(b); D.C. CIR. R. 41.