

**CASE BEING CONSIDERED FOR TREATMENT
PURSUANT TO RULE 34(j) OF THE COURT'S RULES
No. 21-1134**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE BERKA
Petitioner,

v.

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

On Petition for Review of the Denial of a Petition for Rulemaking
by the United States Nuclear Regulatory Commission

BRIEF OF FEDERAL RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Respondents United States Nuclear Regulatory Commission and the United States of America submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici.

Petitioner is George Berka. Respondents are the United States of America and the United States Nuclear Regulatory Commission.

(B) Rulings under Review.

The ruling under review is a decision by the United States Nuclear Regulatory Commission to deny a request for rulemaking from petitioner George Berka. *Criteria To Return Retired Nuclear Power Reactors to Operations*, 86 Fed. Reg. 24,362 (May 6, 2021).

(C) Related Cases.

The case on review was not previously before this Court or any other court. There are no related cases pending in this Court or any other court.

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INTRODUCTION

This case concerns a decision by the Nuclear Regulatory Commission (NRC) to deny a request for rulemaking from petitioner George Berka. In December 2018, Mr. Berka requested that the NRC revise its regulations to establish criteria that would allow retired nuclear power plants to return to operation. Mr. Berka argues that the NRC erred in denying his petition for rulemaking because “returning shuttered nuclear power reactors to service represents the most economical and cost-effective means to deal with the pressing, imminent, and existential threat of climate change, and to return our vulnerable, electrical grid to the robust status that it once had.” Opening Brief at 4.

As explained below, Mr. Berka lacks Article III standing because he has not demonstrated that the denial of his petition for rulemaking caused him an injury-in-fact. Further, even if this Court had jurisdiction to review the NRC’s denial of the petition for rulemaking, Mr. Berka’s arguments are without merit. The record shows that the NRC provided a reasoned basis for denying Mr. Berka’s petition. Mr. Berka’s policy disagreements with the NRC’s decision do not establish that NRC acted arbitrarily and capriciously, particularly given the deference given to an agency’s decision not to undertake rulemaking. The Petition for Review should therefore be dismissed or, in the alternative, denied.

JURISDICTIONAL STATEMENT

This Court generally has subject matter jurisdiction over the NRC's denial of a petition for rulemaking under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, as it represents a final order in a proceeding under Section 189 of the Atomic Energy Act, *id.* § 2342(4); 42 U.S.C. § 2239(a), (b)(1). Here, however, as discussed in Argument section below, the Court lacks jurisdiction because Mr. Berka has not established standing.

STATEMENT OF THE ISSUES

1. Whether the petitioner has failed to establish Article III standing when he has offered no evidence of a concrete and personal injury from the rulemaking denial.
2. Whether the NRC reasonably denied a petition for rulemaking to create a new regulatory framework to allow retired nuclear power plants to return to operational status when the NRC can address requests for reauthorizing operation of retired nuclear power plants within its existing regulatory framework, the petition for rulemaking did not raise a significant safety or security issue, and to undertake such a rulemaking would entail significant agency resources while the nuclear industry expressed minimal interest in a new regulatory framework.

STATUTES AND REGULATIONS

The text of pertinent statutes and regulations is contained in the addendum to this brief.

STATEMENT OF THE CASE

I. The NRC's process for reviewing rulemaking petitions

Under 10 C.F.R. § 2.802, any interested person may petition the NRC to issue, amend, or rescind any regulation. Upon receipt of a petition for rulemaking, the NRC first reviews the petition to determine if it is acceptable for docketing. 10 C.F.R. § 2.803(b).

For a petition to be docketed, it must provide the information required by 10 C.F.R. § 2.802(c), including that the petition “[p]resent the specific problems or issues that the petitioner believes should be addressed through rulemaking”; reference publicly available information “supporting the petitioner’s assertion of the problems or issues”; and “[p]resent the petitioner’s proposed solution to the problems or issues raised in the petition for rulemaking.” *Id.* §§ 2.802(c), 2.803(c)(1)(i). In addition, the regulatory change sought must be within the NRC’s legal authority, and the petition must raise “a potentially valid issue that warrants further consideration.” *Id.* § 2.803(c)(1)(ii)-(iii). If these requirements are met, the NRC publishes a notice of docketing in the *Federal Register*

informing the public that the NRC is reviewing the merits of the petition. *Id.*
§ 2.803(c)(2).

After a petition has been docketed, the NRC determines the appropriate regulatory action in response to the petition based on, but not limited to, the following considerations:

- (i) The merits of the petition;
- (ii) The immediacy of the safety, environmental, or security concern raised;
- (iii) The availability of NRC resources and the priority of the issues raised in relation to other NRC rulemaking issues;
- (iv) Whether the problems or issues are already under consideration by the NRC in other NRC processes;
- (v) The substance of any public comment received, if comment is requested; and
- (vi) The NRC's relevant past decisions and current policies.
10 C.F.R. § 2.803(h).

If the NRC decides not to undertake a rulemaking to address the issue raised by a petition, the NRC informs the petitioner in writing of the grounds for the denial and publishes in the *Federal Register* a notice of the petition's resolution. *Id.*
§ 2.803(h)(2).

II. Mr. Berka's petition for rulemaking

In December 2018, Mr. Berka submitted a petition for rulemaking requesting that the NRC revise its regulations in 10 C.F.R. Part 52 to establish

criteria that would allow retired nuclear power plants to return to operational status. AA3.¹ Specifically, Mr. Berka proposed that the NRC revise 10 C.F.R. § 52.110(b) to allow nuclear power reactors to return to operational status, if “the facility had been in an operational condition at the time of retirement, had last operated no more than twenty-one (21) calendar years prior to the retirement date,” the facility “remain[ed] intact,” and the facility passed a “general safety inspection.” AA3. Alternatively, Mr. Berka proposed that if the nuclear power reactor “had not been in an operational condition at the time of retirement, had last operated more than twenty-one (21) calendar years prior to the retirement date, [was] not intact, and/ or [] had significant decommissioning and/ or dismantling activities commence,” the facility be repaired or rebuilt “to the safety standards that had been in place at the time the facility had last operated,” and pass a safety inspection “appropriate to the degree of repairs or reconstruction that had been performed.” *Id.*

Mr. Berka also requested that the NRC generally provide “a fair, reasonable, and unobstructed opportunity to return a retired facility to full operational status, even if the operating license for the facility had previously been surrendered,” and

¹ We refer to pages of the appendix filed by Mr. Berka as AA__.

that a facility “only have to meet the safety standards that had been in place at the time the facility had last operated, and not the latest standards.” *Id.* at AA3-AA4.

Mr. Berka asserted that his requested change to 10 C.F.R. § 52.110(b) “may potentially enable previously-shuttered nuclear generating stations to be returned to service, without imposing unreasonable cost burdens on their operators” and, therefore, potentially allow “several gigawatts of ultra-clean, and very low-carbon, electrical generating capacity [to] be restored to the electrical grid.” *Id.* at AA4.

In support of his petition, Mr. Berka provided his own basic calculations purporting to compare the cost and time of his proposal to the cost and time required for replacing similar electrical generating capacity with renewables or new nuclear power plant facilities. *Id.* at A5-A6. Mr. Berka pointed to these calculations in arguing that allowing shuttered nuclear power plants to return to operation would “would restore a significant amount of clean, carbon-free capacity to the grid . . . for literally ‘pennies on the dollar’, compared to building new nuclear, or trying to replace the same capacity with wind or solar sources.” *Id.* at AA5.

Lastly, Mr. Berka asserted that “there does not appear to be any good or legitimate reason for [the NRC’s existing] policy,” which he claimed prohibited previously retired nuclear power plants from returning to operational status, and

that such a policy “runs counter to the original principles upon which the Atomic Energy Commission, the predecessor to the [NRC], was founded.” *Id.* at AA6.

III. NRC’s consideration of the petition for rulemaking

A. NRC’s engagement with the public

The NRC docketed Mr. Berka’s Petition in February 2019 and assigned the Petition Docket No. PRM-50-117. Criteria To Return Retired Nuclear Power Reactors to Operations, 84 Fed. Reg. 36,036, 36,036 (July 26, 2019); AA9.

Thereafter, in July 2019, the NRC published a notice of docketing of Mr. Berka’s petition in the *Federal Register* with a request for public comment. 84 Fed. Reg. at 36,036; AA9. The NRC received 33 comment submissions on the petition, of which 30 supported the petition and 3 opposed it. Criteria To Return Retired Nuclear Power Reactors to Operations, 86 Fed. Reg. 24,362, 24,363 (May 6, 2021) (Denial of Petition); AA17, AA19.

After review of the public comments, the NRC “identified the need to further engage the public to understand the degree to which the nuclear industry would use a new regulatory process for reauthorizing operation of decommissioning power reactors.” Denial of Petition, 86 Fed. Reg. at 24,363; AA20. Accordingly, on February 25, 2020, the NRC held a public meeting to collect more public input on Mr. Berka’s petition for rulemaking and, more generally, input on the potential creation of regulatory frameworks for the

resumption of operation for decommissioning power reactors, deferred status for operating reactors, and reinstatement of terminated combined licenses. Denial of Petition, 86 Fed. Reg. at 24,363; AA20. The public meeting was attended by a total of 41 individuals, including Mr. Berka, representatives from public interest groups, representatives of nuclear power plant licensees, and other members of the public. Denial of Petition, 86 Fed. Reg. at 24,363; AA20. The public comments at the public meeting were generally opposed to the petition for rulemaking and the creation of any new regulatory frameworks for the resumption of operation for decommissioning power reactors. Denial of Petition, 86 Fed. Reg. at 24,363; AA20.

B. NRC's denial of the petition for rulemaking

On May 6, 2021, the NRC published in the *Federal Register* a notice of the denial of Mr. Berka's petition for rulemaking. Denial of Petition, 86 Fed. Reg. at 24,362; AA17. The NRC explained that it had decided to deny the petition because (1) the agency can address requests for reauthorizing operation of retired nuclear power plants within its existing regulatory framework; (2) the petition did not raise a significant safety or security issue; and (3) proceeding with a rulemaking to create new regulatory framework would not be a prudent use of agency resources given that the nuclear industry expressed minimal interest in

returning retired plants to operational status. Denial of Petition, 86 Fed. Reg. at 24,363-64; AA20-AA21.

The NRC explained that under the agency's regulations, once a power reactor licensee has submitted written certifications to the NRC for both the permanent cessation of operations and the permanent removal of fuel from the reactor vessel, and the NRC has docketed those certifications, the power reactor license no longer authorizes operation of the reactor. Denial of Petition, 86 Fed. Reg. at 24,363 (citing 10 C.F.R. §§ 50.82, 52.110); AA20. The NRC indicated that as of the date of the denial of the petition, no nuclear power plant licensee had requested reauthorization of operation after filing both certifications. Denial of Petition, 86 Fed. Reg. at 24,363; AA20.

The NRC acknowledged that the agency's current regulatory framework does not specify a particular mechanism for reauthorizing operation of a nuclear power plant after both written certifications are submitted. Denial of Petition, 86 Fed. Reg. at 24,363; AA20. But the NRC determined that it could still address such requests under the existing regulatory framework as there is no statute or regulation prohibiting the NRC from considering and reviewing such requests. *See* Denial of Petition, 86 Fed. Reg. at 24,363; AA20-AA21. The NRC also pointed to past instances where the agency had previously discussed this same position. Denial of Petition, 86 Fed. Reg. at 24,363; AA20-AA21.

Next, the NRC explained that the petition for rulemaking did not raise safety or security concerns given that the agency’s “current regulations and processes provide reasonable assurance of adequate protection of public health and safety for both operating and decommissioning power reactors.” Denial of Petition, 86 Fed. Reg. at 24,364; AA21. The NRC then concluded that the benefits of the rulemaking would not be expected to outweigh the costs. Denial of Petition, 86 Fed. Reg. at 24,364; AA21. The NRC explained that the rulemaking contemplated by the petition “would entail a significant expenditure of NRC resources” because the rulemaking would have to address a wide variety of technical and regulatory topics and there was little interest from power reactor licensees in using such a new regulatory framework. Denial of Petition, 86 Fed. Reg. at 24,364; AA21.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction because Mr. Berka has not demonstrated standing. Petitioners seeking judicial review have the burden to show standing unless their standing is readily discernible from the record. Mr. Berka has not satisfied this burden. At most, Mr. Berka asserts generalized, policy-based concerns about climate change to argue that the NRC should have granted his petition for rulemaking. These broad concerns, however, do not constitute particularized injury, actual or imminent, from the NRC’s denial of his rulemaking petition.

2. Even if this Court were to reach the merits, the NRC's denial of Mr. Berka's petition was reasonable. The NRC provided a reasoned basis for denying Mr. Berka's petition, concluding that the agency could address issues raised by the petition for rulemaking within its existing regulatory framework, the petition for rulemaking did not raise a significant safety or security issue, and proceeding with a rulemaking would not be a prudent use of agency resources. Mr. Berka's concerns and policy preferences do not outweigh the NRC's technical judgment and do not demonstrate that the NRC acted arbitrarily or capriciously in denying the petition for rulemaking.

ARGUMENT

I. Despite Mr. Berka's participation in the underlying agency proceeding and his general policy concerns, he lacks Article III standing.

"[A]s a matter of constitutional duty," the Court "must assure itself of its jurisdiction to act in every case." *CTS Corp. v. EPA*, 759 F.3d 52, 57 (D.C. Cir. 2014). The Court's jurisdiction depends on at least one petitioner satisfying the "irreducible constitutional minimum" requirements of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A petitioner must demonstrate standing in its opening brief. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012); *see also* D.C. Cir. R. 28(a)(7). Participation in the underlying agency proceeding, however, is not itself sufficient grounds to establish standing. *See Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 738 (D.C. Cir. 2008)

(“[P]etitioners do not have a right to seek court review of administrative proceedings merely because they participated in them.” (quoting *Competitive Enter. Inst. v. U.S. Dep’t of Transp.*, 856 F.2d 1563, 1565 (D.C. Cir. 1988))).

For constitutional standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). As the party invoking federal jurisdiction, Mr. Berka bears the burden of establishing standing. *Spokeo, Inc. v. Robins*, 578 U.S. 856, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Further, “[t]he Supreme Court has stated that standing is ‘substantially more difficult to establish’ where, as here, the party invoking federal jurisdiction is not ‘the object of the government action or inaction’ they challenge.” *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289-90 (D.C. Cir. 2007) (quoting *Lujan*, 504 U.S. at 562). When a petitioner’s standing is not self-evident from the administrative record, “the petitioner in its opening brief ‘must support each element of its claim to standing by affidavit or other evidence.’” *Nat’l Ass’n of Regulatory Util. Comm’rs*

v. FCC, 851 F.3d 1324, 1327 (D.C. Cir. 2017) (per curiam) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898, 899 (D.C. Cir. 2002)); *see also* D.C. Cir. R. 28(a)(7).

Here, Mr. Berka's standing is not apparent from the administrative record. As noted, the fact that NRC denied Mr. Berka's rulemaking petition does not itself demonstrate standing. *See Klamath Water Users*, 534 F.3d at 738; *Illinois Mun. Gas Agency v. FERC*, 258 F. App'x 336, 337 (D.C. Cir. 2007) (per curiam) ("Denial of a petition for rulemaking does create a cause of action, but does not necessarily confer standing."); *see also Crane v. NRC*, 344 F. App'x. 316, 317 (9th Cir. 2009) (holding that the court lacked jurisdiction over a petitioner's appeal of the NRC's denial of his rulemaking petition concerning the standards for release of patients treated with unsealed byproduct material because the court had no basis to evaluate the petitioner's risk of cancer recurrence and likelihood of treatment and, therefore, the petitioner did not show the requisite injury-in-fact to establish standing).

Mr. Berka also did not submit any declarations or present any evidence showing specific injuries to himself from the NRC's denial of his petition for rulemaking. Instead, Mr. Berka primarily sets forth various policy-based disagreements with the NRC's decision to deny his rulemaking petition. Opening Brief at 4-8, 10-16. At no point, however, does Mr. Berka identify a concrete, particularized, and immediate injury-in-fact to himself from the NRC's denial.

At most, Mr. Berka ties his interest in the denial of his petition for rulemaking to concerns about the general effects of climate change. *See, e.g.*, Opening Brief at 4 (stating that “returning shuttered nuclear power reactors to service represents the most economical and cost-effective means to deal with the pressing, imminent, and existential threat of climate change”); *id.* at 5 (arguing that the NRC should “rise to the challenge” to allow shuttered nuclear power plants to restart because “[c]limate change is no longer an ‘abstract, high level concern,’ but a real and tangible condition with physical consequences”). Yet, the generalized, policy-based concerns about climate change of the type that Mr. Berka advances here are insufficient to establish standing. *See, e.g., WildEarth Guardians v. Jewell*, 738 F.3d 298, 307 (D.C. Cir. 2013) (“Appellants likewise cannot establish standing based on the effects of global climate change.”); *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (“[C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world’s population. Therefore Petitioners’ alleged injury is too generalized to establish standing.”). Rather, to establish standing, Mr. Berka “still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Other than detailing his policy disagreements with the NRC, Mr. Berka has not explained how he has been harmed by the denial of his petition for rulemaking. Accordingly, Mr. Berka has not met his burden to “establish a real and immediate threat” of injury, *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), that is “more than speculation.” *Id.* at 108. As such, the Court should dismiss the Petition for Review because Mr. Berka lacks standing.

II. The NRC provided a reasoned basis for its denial of the petition for rulemaking.

Even if this Court were to reach the merits, the Petition for Review should be denied because the NRC provided a reasoned basis for the denial of Mr. Berka’s rulemaking petition, and Mr. Berka has failed to demonstrate that the agency’s decisionmaking was arbitrary and capricious.

Judicial review of an agency’s denial of a petition for rulemaking is “‘extremely limited’ and ‘highly deferential.’” *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014) (quoting *Mass. v. EPA*, 549 U.S. 497, 527-28 (2007)). “[A]n agency’s refusal to institute rulemaking proceedings is at the high end of the range of levels of deference [courts] give to agency action under [the] arbitrary and capricious [standard of] review.” *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation marks omitted). “Where, as here, the proposed rule pertains to a matter of policy within the agency’s expertise and discretion,” the scope of the Court’s review is “limited” to “whether the

agency employed reasoned decisionmaking in rejecting the petition.” *Id.* (internal quotation marks omitted).

Here, NRC did not simply deny the petition out of hand with little or no explanation. Rather, NRC seriously considered Mr. Berka’s petition by setting up a docket, soliciting public comments, and holding a public meeting to gather even more input, before ultimately deciding not to pursue a rulemaking. And, the NRC’s denial of the rulemaking petition itself provided a reasoned basis for the agency’s decision.

As the NRC explained, it denied Mr. Berka’s petition for rulemaking because (1) it can address requests for reauthorizing operation of retired nuclear power plants within its existing regulatory framework; (2) the petition for rulemaking did not raise a significant safety or security issue; and (3) proceeding with a rulemaking to create new regulatory framework would not be a prudent use of agency resources given that the nuclear industry expressed minimal interest in returning retired plants to operational status. Denial of Petition, 86 Fed. Reg. at 24,363-64; AA20-21. Mr. Berka fails to grapple with any of these explanations and supplies no explanation as to why any, let alone all, of these independent justifications for denying his petition fails to evidence reasoned decisionmaking.

To be sure, Mr. Berka offers policy disagreements with the NRC’s technical judgments. But, as set forth below, his arguments fail to demonstrate that the NRC

acted arbitrarily or capriciously in denying his petition. *See WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (1981) (declining to disturb the Federal Communications Commission’s decision not to proceed with rulemaking in part because “to seriously indulge petitioners’ claims in this case would be to ignore the institutional disruption that would be visited on the Commission by our second-guessing its ‘expert’ determination not to pursue a particular program or policy at a given time”).

Despite acknowledging that his petition “did not cite anything such as [a] serious technical issue at a reactor, an imminent accident, or a danger of a meltdown,” Mr. Berka argues that his petition “was written due [to] a broader safety or security concern—climate change.” Opening Brief at 5. The NRC, however, provided the requisite reasoned basis for the denial, including its determination that the petition “does not raise a safety or security concern.” Denial of Petition, 86 Fed. Reg. at 24,363-64; AA21. Mr. Berka offers no basis to depart from this conclusion.

Similarly, Mr. Berka takes issue with the NRC’s determination that granting his rulemaking petition would “not be a prudent use of resources” given the lack of industry interest in returning retired nuclear power plants to operational status and given that such a rulemaking “would entail a significant expenditure of NRC resources.” Denial of Petition, 86 Fed. Reg. at 24,363-64; AA20-21. Mr. Berka

claims that his petition for rulemaking was “not asking the [NRC] to immediately embark on a massive campaign to overhaul its entire regulatory structure” but was “simply asking that the ‘door be left more open’ for operators to try [to restart retired nuclear power plants].” Opening Brief at 6.

Notwithstanding Mr. Berka’s stated disagreements with the NRC’s conclusion about the complexity of the proposed rulemaking, the NRC provided a reasonable explanation for why such a rulemaking would involve a significant expenditure of agency resources. *Cf. WildEarth Guardians*, 751 F.3d at 651 (upholding EPA’s denial of a petition for rulemaking because “EPA has discretion to determine the timing and priorities of its regulatory agenda” and “EPA provided a reasonable explanation as to why it cannot or will not exercise its discretion”) (internal quotation marks omitted). The NRC, exercising its technical judgement, determined that a rulemaking addressing the issues raised by Mr. Berka in his petition would involve significant NRC resources because “[a]ny such rulemaking effort would likely address a wide variety of technical and regulatory topics including, but not limited to, decommissioning status, aging management, quality assurance, equipment maintenance, personnel, license expiration, hearing process, and appropriate licensing basis.” Denial of Petition, 86 Fed. Reg. at 24,364; AA21.

It is axiomatic that “[a]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities’ and thus to determine its own regulatory agenda.” *Flyers Rts. Educ. Fund, Inc. v. U.S. Dep’t of Transp.*, 957 F.3d 1359, 1363 (2020) (quoting *Mass. v. EPA*, 549 U.S. at 527); *see also Carstens v. NRC*, 742 F.2d 1546, 1551 (D.C. Cir. 1984) (recognizing that the Atomic Energy Act constitutes a regulatory scheme that is “virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives” (quoting *Siegel v. Atomic Energy Comm’n*, 400 F.2d 778, 783 (D.C. Cir. 1968))). Mr. Berka provides no basis to disturb the agency’s considered conclusion here.

Finally, many of Mr. Berka’s assertions are premised on a misunderstanding of the NRC’s statutory authority. In attempting to rebut the NRC’s rationale for denying his petition, Mr. Berka repeatedly calls upon the NRC to “revise its scope and jurisdiction” to do more to promote nuclear power, Opening Brief at 5; *see also id.* at 10-11, 15-17. In particular, Mr. Berka points to the mission of the NRC’s predecessor, the Atomic Energy Commission, to assert that the NRC should again “encourage [nuclear energy’s] use.” Opening Brief at 10, *see also id.* at 15-17.

Contrary to Mr. Berka's characterization, however, the NRC's role as a non-promotional health and safety regulator is not the result of a policy judgment by the NRC, but rather, its adherence to the instructions of Congress. In 1974, Congress enacted the Energy Reorganization Act, which abolished the Atomic Energy Commission and established the NRC as an independent regulatory agency. 42 U.S.C. §§ 5801, 5814, 5841; *see* S. Rep. No. 93-980, *as reprinted in* 1974 U.S.C.C.A.N. 5470, 5471 (June 27, 1974) ("The reorganization established by [the Energy Reorganization Act of 1974] has the additional purpose of separating the regulatory functions of the [Atomic Energy Commission] from its developmental and promotional functions—a response to growing criticism that there is a basic conflict between the [Atomic Energy Commission's] regulation of the nuclear power industry and its development and promotion of new technology for the industry."). The responsibility for the development and promotion of nuclear technology in both the civilian and military sectors was ultimately transferred to the Department of Energy. *See* 42 U.S.C. §§ 5801(b), 5811, 5814, 5841 (transferring certain responsibilities, including the promotion of nuclear technology, from the Atomic Energy Commission to the Energy Research and Development Administration); *id* § 7151(a) (transferring the functions of the Energy Research and Development Administration to the Department of Energy). Accordingly, under its current statutory authority, which the NRC cannot alter, the

NRC's mission is neither to regulate the economic viability of nuclear power nor to promote the nuclear industry. It therefore lacks the statutory authority to assume the role that has been urged by Mr. Berka in his Opening Brief and that forms the basis of many of his policy disagreements with the NRC's decision to deny his rulemaking petition.

In summary, even assuming that Mr. Berka has demonstrated standing, this Court should deny Mr. Berka's Petition for Review because NRC's decision to deny Mr. Berka's petition for rulemaking was within the scope of the agency's statutory authority, consistent with the record, and supported by reasoned decisionmaking.

CONCLUSION

For the reasons discussed above, the Petition for Review should be dismissed for lack of jurisdiction or, in the alternative, denied on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28(b) and 32(g)(1), I hereby certify:

The foregoing Brief of Federal Respondents complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 4,608 words, as calculated by the word processing software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in 14-point Times New Roman, a proportionally spaced font.

/s/ Jennifer Scro

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2021, the undersigned counsel for Respondent U.S. Nuclear Regulatory Commission caused to be served by first class mail a copy of the foregoing brief to George Berka, 57 Concord Street Waterbury, CT 06710.

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ADDENDUM

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28 U.S.C. § 2342**Jurisdiction of Court of Appeals**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
- (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
- (3) all rules, regulations, or final orders of—
 - (A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and
 - (B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;
- (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
- (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;
- (6) all final orders under section 812 of the Fair Housing Act; and
- (7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

42 U.S.C. § 2239 (excerpted)**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.

...

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

- (1) Any final order entered in any proceeding of the kind specified in subsection (a).
- (2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.
- (3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].
- (4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities

leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

42 U.S.C. § 5801

Congressional declaration of policy and purpose

(a) Development and utilization of energy sources

The Congress hereby declares that the general welfare and the common defense and security require effective action to develop, and increase the efficiency and reliability of use of, all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy and strengthen its position in regard to international trade, to make the Nation self-sufficient in energy, to advance the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety.

(b) Necessity of establishing Energy Research and Development Administration

The Congress finds that, to best achieve these objectives, improve Government operations, and assure the coordinated and effective development of all energy sources, it is necessary to establish an Energy Research and Development Administration to bring together and direct Federal activities relating to research and development on the various sources of energy, to increase the efficiency and reliability in the use of energy, and to carry out the performance of other functions, including but not limited to the Atomic Energy Commission's military and production activities and its general basic research activities. In establishing an Energy Research and Development Administration to achieve these objectives, the Congress intends that all possible sources of energy be developed consistent with warranted priorities.

(c) Separation of licensing and regulatory functions of Atomic Energy Commission

The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission, and that this separation be effected in an orderly manner, pursuant to this chapter, assuring adequacy of technical and other resources necessary for the performance of each.

(d) Small business participation

The Congress declares that it is in the public interest and the policy of Congress that small business concerns be given a reasonable opportunity to participate, insofar as is possible, fairly and equitably in grants, contracts, purchases, and other Federal activities relating to research, development, and demonstration of sources of energy efficiency, and utilization and conservation of energy. In carrying out this policy, to the extent practicable, the Administrator shall consult with the Administrator of the Small Business Administration.

(e) Priorities

Determination of priorities which are warranted should be based on such considerations as power-related values of an energy source, preservation of material resources, reduction of pollutants, export market potential (including reduction of imports), among others. On such a basis, energy sources warranting priority might include, but not be limited to, the various methods of utilizing solar energy.

42 U.S.C. § 5811**Establishment of Energy Research and Development Administration**

There is hereby established an independent executive agency to be known as the Energy Research and Development Administration (hereinafter in this chapter referred to as the “Administration”).

42 U.S.C. § 5814 (excerpted)**Abolition and transfers****(a) Abolition of Atomic Energy Commission**

The Atomic Energy Commission is hereby abolished. Sections 2031 and 2032 of this title are repealed.

(b) Transfer or lapse of functions of Atomic Energy Commission

All other functions of the Commission, the Chairman and members of the Commission, and the officers and components of the Commission are hereby transferred or allowed to lapse pursuant to the provisions of this chapter.

(c) Functions of Atomic Energy Commission transferred to Administrator

There are hereby transferred to and vested in the Administrator all functions of the Atomic Energy Commission, the Chairman and members of the

Commission, and the officers and components of the Commission, except as otherwise provided in this chapter.

...

42 U.S.C. § 5841 (excerpted)

Establishment and transfers

(a) Composition; Chairman; Acting Chairman; quorum; official spokesman; seal; functions of Chairman and Commission

(1) There is established an independent regulatory commission to be known as the Nuclear Regulatory Commission which shall be composed of five members, each of whom shall be a citizen of the United States. The President shall designate one member of the Commission as Chairman thereof to serve as such during the pleasure of the President. The Chairman may from time to time designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all meetings of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information relating to the performance of his duties or responsibilities, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or Acting Chairman in the absence of the Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, persons, or the public, and, on behalf of the Commission, shall see to the faithful execution of the policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct. The Commission shall have an official seal which shall be judicially noticed.

...

(f) Transfer of licensing and regulatory functions of Atomic Energy Commission

There are hereby transferred to the Commission all the licensing and related regulatory functions of the Atomic Energy Commission, the Chairman and members of the Commission, the General Counsel, and other officers and components of the Commission--which functions officers, components, and

personnel are excepted from the transfer to the Administrator by section 5814(c) of this title.

...

42 U.S.C. § 7151 (excerpted)

General transfers

(a) Except as otherwise provided in this chapter, there are transferred to, and vested in, the Secretary all of the functions vested by law in the Administrator of the Federal Energy Administration or the Federal Energy Administration, the Administrator of the Energy Research and Development Administration or the Energy Research and Development Administration; and the functions vested by law in the officers and components of either such Administration.

...

10 C.F.R. § 2.802 (excerpted)

Petition for rulemaking—requirements for filing.

(a) *Filing a petition for rulemaking.* Any person may petition the Commission to issue, amend, or rescind any regulation in 10 CFR chapter I. The petition for rulemaking should be addressed to the Secretary, Attention: Rulemakings and Adjudications Staff, and sent by mail addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; by email to *Rulemaking.Comments@nrc.gov*; or by hand delivery to 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern time) on Federal workdays.

...

(c) *Content of petition.* (1) Each petition for rulemaking filed under this section must clearly and concisely:

(i) Specify the name of the petitioner, a telephone number, a mailing address, and an email address (if available) that the NRC may use to communicate with the petitioner;

(ii) If the petitioner is an organization, provide additional identifying information (as applicable) including the petitioner's organizational or corporate status, the petitioner's State of incorporation, the petitioner's registered agent, and the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner.

- (iii) Present the specific problems or issues that the petitioner believes should be addressed through rulemaking, including any specific circumstances in which the NRC's codified requirements are incorrect, incomplete, inadequate, or unnecessarily burdensome;
- (iv) Cite, enclose, or reference publicly-available technical, scientific, or other data or information supporting the petitioner's assertion of the problems or issues;
- (v) Present the petitioner's proposed solution to the problems or issues raised in the petition for rulemaking (e.g., a proposed solution may include specific regulations or regulatory language to add to, amend in, or delete from 10 CFR chapter I);
- (vi) Provide an analysis, discussion, or argument that explains how the petitioner's proposed solution solves the problems or issues identified by the petitioner; and
- (vii) Cite, enclose, or reference any other publicly-available data or information supporting the petitioner's proposed solution; and
- (viii) If required by 10 CFR 51.68 of this chapter, submit a separate document entitled "Petitioner's Environmental Report," which contains the information specified in 10 CFR 51.45.

(2) To assist the NRC in its evaluation of the petition for rulemaking, the petitioner should clearly and concisely:

- (i) Explain why the proposed rulemaking solution is within the authority of the NRC to adopt; and
 - (ii) Explain why rulemaking is the most favorable approach to address the problem or issue, as opposed to other NRC actions such as licensing, issuance of an order, or referral to another Federal or State agency.
- (3) If the petition is signed by multiple petitioners, the petition must designate a lead petitioner who is responsible for disseminating communications received from the NRC to co-petitioners.

...

10 C.F.R. § 2.803

Petition for rulemaking—NRC action.

(a) *Notification of receipt.* Following receipt of a petition for rulemaking, the NRC will acknowledge its receipt to the petitioner.

(b) *Docketing review.* (1) The NRC will evaluate the petition for rulemaking, including supporting data or information submitted under § 2.802(c), for sufficiency according to the review criteria in § 2.803(b).

(2) If the NRC determines that the petition for rulemaking does not include the information set out in § 2.802(c), that the regulatory change sought by the petitioner is not within the legal authority of the NRC, or that the petition for rulemaking does not raise a potentially valid issue that warrants further consideration, then the NRC will notify the petitioner in writing and explain the deficiencies in the petition for rulemaking.

(3) The petitioner may resubmit the petition for rulemaking without prejudice.

(c) *Docketing.* (1) The NRC will docket a petition for rulemaking and assign a docket number to the petition if the NRC determines the following:

- (i) The petition for rulemaking includes the information required by paragraph § 2.802(c),
- (ii) The regulatory change sought by the petitioner is within the NRC's legal authority, and
- (iii) The petition for rulemaking raises a potentially valid issue that warrants further consideration.

(2) A copy of the docketed petition for rulemaking will be posted in the NRC's Agencywide Documents Access and Management System (ADAMS) and on the Federal rulemaking Web site at: <http://www.regulations.gov>. The NRC will publish a notice of docketing in the FEDERAL REGISTER informing the public that the NRC is reviewing the merits of the petition for rulemaking. The notice of docketing will include the docket number and explain how the public may track the status of the petition for rulemaking.

(d) *NRC communication with petitioners.* If the petition is signed by multiple petitioners, any NRC obligation to inform a petitioner (as may be required under 10 CFR part 2, subpart H) is satisfied, with respect to all petitioners, when the NRC transmits the required notification to the lead petitioner.

(e)–(f) [Reserved]

(g) *Public comment on a petition for rulemaking; hearings.* (1) At its discretion, the NRC may request public comment on a docketed petition for rulemaking.

(2) The NRC will post all comment submissions at <http://www.regulations.gov> and enter the comment submissions into ADAMS, without removing identifying or contact information from comment submissions. Anyone requesting or aggregating comments from other persons for submission to the NRC is responsible for informing those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submissions.

(3) No adjudicatory or legislative hearing under the procedures of 10 CFR part 2 will be held on a petition for rulemaking unless the Commission determines to do so, at its discretion.

(h) *Determination on a petition for rulemaking; Closure of docket on a petition for rulemaking—*(1) *Determination.* Following docketing of a petition for rulemaking, the NRC's determination on the petition for rulemaking may be based upon, but is not limited to, the following considerations:

- (i) The merits of the petition;
- (ii) The immediacy of the safety, environmental, or security concern raised;
- (iii) The availability of NRC resources and the priority of the issues raised in relation to other NRC rulemaking issues;
- (iv) Whether the problems or issues are already under consideration by the NRC in other NRC processes;
- (v) The substance of any public comment received, if comment is requested; and
- (vi) The NRC's relevant past decisions and current policies.

(2) *Petition for rulemaking docket closure.* After the NRC determines the appropriate regulatory action in response to the petition for rulemaking, the NRC will administratively close the docket for the petition. The NRC will publish a notice describing that action with any related Docket Identification number (Docket ID), as applicable, in the FEDERAL REGISTER. The

NRC may make a determination on a petition for rulemaking and administratively close the docket for the petition for rulemaking by:

(i) Deciding not to undertake a rulemaking to address the issue raised by the petition for rulemaking, and informing the petitioner in writing of the grounds for denial.

(ii) Initiating a rulemaking action (e.g., initiating a new rulemaking, addressing the petition for rulemaking in an ongoing rulemaking, addressing the petition for rulemaking in a planned rulemaking) that considers the issues raised by a petition for rulemaking, and informing the petitioner in writing of this decision and the associated Docket ID of the rulemaking action, if applicable.

(i) *Petition for rulemaking resolution*—(1) *Petition for rulemaking resolution published in the Federal Register*. The NRC will publish a FEDERAL REGISTER notice informing the public that it has concluded all planned regulatory action with respect to some or all of the issues presented in a petition for rulemaking. This may occur by adoption of a final rule related to the petition for rulemaking, denial by the NRC of the petition for rulemaking at any stage of the regulatory process, or the petitioner's withdrawal of the petition for rulemaking before the NRC has entered the rulemaking process. As applicable, the FEDERAL REGISTER notice will include a discussion of how the regulatory action addresses the issue raised by the petitioner, the NRC's grounds for denial of the petition for rulemaking, or information on the withdrawal. The notice will normally include the NRC's response to any public comment received (if comment is requested), unless the NRC has indicated that it will not be providing a formal written response to each comment received.

(2) *NRC decision not to proceed with rulemaking after closure of a petition for rulemaking docket*. If the NRC closes a petition for rulemaking docket under paragraph (h)(2)(ii) of this section but subsequently decides not to carry out the planned rulemaking to publication of a final rule, the NRC will notify the petitioner in writing of this decision and publish a notice in the FEDERAL REGISTER explaining the basis for its decision. The decision not to complete the rulemaking action will be documented as denial of the petition for rulemaking in the docket of the close petition for rulemaking, in the Web sites, in the Government-wide *Unified Agenda of Federal Regulatory and Deregulatory Actions*, online in ADAMS, and at <http://www.regulations.gov> as described in paragraph (j) of this section.

(j) *Status of petitions for rulemaking and rulemakings.* (1) The NRC provides current information on rulemakings and petitions for rulemaking in the NRC Library at <http://www.nrc.gov/about-nrc/regulatory/rulemaking.html>.

(2) The NRC includes a summary of the NRC's planned and ongoing rulemakings in the Government-wide *Unified Agenda of Federal Regulatory and Deregulatory Actions* (the Unified Agenda), published semiannually. This Unified Agenda is available at <http://www.reginfo.gov/public/do/eAgendaMain/>.

(3) All docketed petitions, rulemakings, and public comments are posted online in ADAMS and at <http://www.regulations.gov>.

10 C.F.R. § 50.82 (excerpted)

Termination of license.

For power reactor licensees who, before the effective date of this rule, either submitted a decommissioning plan for approval or possess an approved decommissioning plan, the plan is considered to be the PSDAR [post-shutdown decommissioning activities report] submittal required under paragraph (a)(4) of this section and the provisions of this section apply accordingly. For power reactor licensees whose decommissioning plan approval activities have been relegated to notice of opportunity for a hearing under subpart G of 10 CFR part 2, the public meeting convened and 90-day delay of major decommissioning activities required in paragraphs (a)(4)(ii) and (a)(5) of this section shall not apply, and any orders arising from proceedings under subpart G of 10 CFR part 2 shall continue and remain in effect absent any orders from the Commission.

(a) For power reactor licensees—

(1)(i) When a licensee has determined to permanently cease operations the licensee shall, within 30 days, submit a written certification to the NRC, consistent with the requirements of § 50.4(b)(8);

(ii) Once fuel has been permanently removed from the reactor vessel, the licensee shall submit a written certification to the NRC that meets the requirements of § 50.4(b)(9) and;

(iii) For licensees whose licenses have been permanently modified to allow possession but not operation of the facility, before the effective date of this

rule, the certifications required in paragraphs (a)(1) (i)–(ii) of this section shall be deemed to have been submitted.

(2) Upon docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, or when a final legally effective order to permanently cease operations has come into effect, the 10 CFR part 50 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

...

10 C.F.R. § 52.110 (excerpted)

Termination of license.

(a)(1) When a licensee has determined to permanently cease operations the licensee shall, within 30 days, submit a written certification to the NRC, consistent with the requirements of § 52.3(b)(8);

(2) Once fuel has been permanently removed from the reactor vessel, the licensee shall submit a written certification to the NRC that meets the requirements of § 52.3(b)(9); and (3) For licensees whose licenses have been permanently modified to allow possession but not operation of the facility, before September 27, 2007, the certification required in paragraph (a)(1) of this section shall be deemed to have been submitted.

(b) Upon docketing of the certifications for permanent cessation of operations and permanent removal of fuel from the reactor vessel, or when a final legally effective order to permanently cease operations has come into effect, the 10 CFR part 52 license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

...