

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

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| BEYOND NUCLEAR, INC., |) | |
| |) | |
| Petitioner, |) | Case No. <u>18-1340</u> |
| |) | |
| v. |) | |
| |) | |
| UNITED STATES NUCLEAR |) | |
| REGULATORY COMMISSION and the |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Respondents. |) | |
| |) | |

**PETITIONER’S MOTION TO HOLD PETITION
FOR REVIEW IN ABEYANCE**

I. INTRODUCTION

Pursuant to Fed. R. App. P. 27, Petitioner Beyond Nuclear, Inc., hereby moves to hold in abeyance the attached Petition for Review pending resolution of administrative proceedings addressing the merits of Petitioner’s claims, as discussed more fully below. The Petition should be held in abeyance because there is a strong likelihood that, during the course of the requested abeyance, issues raised by the Petition could be eliminated, narrowed, or clarified by administrative decisions, potentially precluding the need for further litigation.

II. BACKGROUND

Beyond Nuclear's Petition for Review relates to actions taken by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") regarding two applications for consolidated interim storage facilities for spent nuclear reactor fuel (together, the "Applications"). On July 16, 2018, the NRC published notice of a licensing proceeding for Holtec International's application to construct and operate an interim storage facility, 83 Fed. Reg. 32,919 (July 16, 2018); on August 29, 2018, the NRC published notice of a licensing proceeding for Interim Storage Partners' application to construct and operate a separate interim storage facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018) (together, the "Licensing Proceedings"). The Licensing Proceedings will each be conducted by a panel of the NRC's Atomic Safety and Licensing Board ("ASLB").

On September 14, 2018, Petitioner submitted to the Commission a Motion to Dismiss the Licensing Proceedings because the Applications and the NRC's conduct of the Licensing Proceedings violate the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. §§ 10222(a)(5)(A) and 10143, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A) and (C). Petitioner asserted that the key condition of both Applications – federal acquisition of title of commercially-generated spent nuclear fuel prior to the opening of a permanent repository – is contrary to the NWPA, which bars licensees from transferring title of spent fuel to

the federal government until a repository has opened. *See* 42 U.S.C. §§ 10131, 10143, 10222(a)(5)(A); *Indiana Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996) (holding that the federal obligation to take title to spent fuel does not begin until a repository is opened).

Further, Petitioner asserted that its NWPA and APA claims could not be resolved in the Licensing Proceedings because the scope of such proceedings is limited to considering whether an application satisfies the Atomic Energy Act (“AEA”), the National Environmental Policy Act (“NEPA”), and NRC’s regulations for implementing those statutes. 10 C.F.R. §§ 72.40, 51.101. Questions regarding compliance with the NWPA and APA are not considered licensing issues by the Commission and therefore are beyond the ASLB’s regulatory purview. Accordingly, Petitioner requested a proceeding before the Commission (separate from the Licensing Proceedings) to consider its Motion to Dismiss.

In an abundance of caution, and to preserve its claim in the event that the Commission found that the Licensing Proceedings constitute the only forums in which the NRC would consider whether the Applications violate the NWPA and APA, Petitioner also filed hearing requests and petitions to intervene (“Hearing Requests”) in both Licensing Proceedings. In each Hearing Request, Petitioner submitted only a single contention, incorporating by reference its Motion to Dismiss.

On October 29, 2018, the Commission denied Petitioner's Motion to Dismiss on the "procedural grounds" that NRC regulations for consideration of hearing requests and petitions to intervene "do not . . . provide for the filing of threshold 'motions to dismiss' a license application; instead, interested persons must file petitions to intervene and be granted a hearing." Order at 2. Without reaching the merits of Petitioner's claim, the Commission referred the matter to the separate Licensing Proceedings.

Concurrent with this Motion to Hold in Abeyance, Petitioner has filed a Petition for Review of the Commission's Order. As stated in the Petition for Review, Petitioner believes the Order is reviewable because it makes a final determination that the ASLB may consider Petitioner's NWPA and APA-based claims in the Licensing Proceedings. Because the ASLB must first address the merits of Petitioner's claims, Petitioner has also filed this Motion.

III. ARGUMENT

Petitioner requests that the attached Petition for Review be held in abeyance, pending the outcome of the Licensing Proceedings. Every court has the inherent authority to hold proceedings in abeyance to manage its docket in the interest of judicial economy. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court may hold a proceeding in abeyance while waiting on the outcome of another matter that may modify or affect it and render judicial review unnecessary. *Id.*

Here, Petitioner maintains that its NWPA and APA claims are not within the scope of the Licensing Proceedings and that they must be resolved in a separate proceeding before the Commission on the Motion to Dismiss. Because the Commission's Order conclusively resolved this issue, the Order is final. The Petition for Review is therefore properly before this Court now.

Notwithstanding the finality of the Order with respect to this procedural issue, the merits questions raised by Petitioner's Motion to Dismiss – *i.e.* whether the Applications and the Licensing Proceedings violate the NWPA and the APA – are now pending before the ASLB for consideration in the Licensing Proceedings. Thus, Petitioner is forced to request this Court hold the Petition for Review in abeyance pending the administrative review of the merits of Petitioner's claims. Briefing in those proceedings may resolve, narrow, or clarify the claims that apply to the Petition. To ensure a robust record and to lessen the burden on this Court, the Petition for Review should therefore be held in abeyance.

Petitioner has consulted with the NRC and the United States regarding this motion. Counsel for the NRC stated that neither the NRC nor the Department of Justice believes it would be appropriate to hold the case in abeyance, and therefore they do not consent to the motion.

Accordingly, Petitioner respectfully requests that this Court hold the attached Petition for Review of the NRC's final NRC Order in abeyance pending

the resolution of the administrative proceedings. Petitioner further requests that, at the conclusion of the abeyance period, the parties be permitted to file a motion to inform the Court whether they wish to either continue the abeyance or to re-establish litigation deadlines in this case.

Respectfully submitted,

___/signed electronically by/___

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December 27, 2018

CERTIFICATE OF SERVICE

I, Diane Curran, hereby certify that on December 27, 2018, I posted Petitioner's Petition for Review; Rule 26.1 Disclosure Statement; Certificate as to Parties, Rulings, and Related Cases; and Motion to Hold Petition for Review in Abeyance on the Court's ECF website. I also sent copies of those documents to the following by first-class mail:

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