

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

BEYOND NUCLEAR, INC.,)	
Petitioner,)	
)	
v.)	No. 18-1340
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION and)	
the UNITED STATES OF AMERICA,)	
Respondents.)	

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

The United States Nuclear Regulatory Commission (“NRC”) and the United States (collectively, “Federal Respondents”) object to the motion of Petitioner, Beyond Nuclear, Inc. (“Beyond Nuclear”), to hold Beyond Nuclear’s petition for review in abeyance because Federal Respondents intend to move to dismiss the petition for lack of a final reviewable order.

The basis for the petition for review is Beyond Nuclear’s assertion that the Commission itself, *i.e.*, the five-member collegial body that administers the agency, must resolve Beyond Nuclear’s arguments arising under the Nuclear Waste Policy Act and the Administrative Procedure Act concerning two pending applications for licenses to construct and operate spent fuel storage facilities. Beyond Nuclear challenges the reference of these arguments by the Commission to the NRC’s Atomic Safety and Licensing Board, but it asserts that the petition

should be held in abeyance because the proceedings before the Board “may resolve, narrow, or clarify the claims that apply to the [p]etition.” Motion at 5.

This explanation, which is the only one Beyond Nuclear supplies for its motion, does not warrant holding the case in abeyance. In fact, it only underscores the basis for the motion to dismiss that Federal Respondents intend to file—*i.e.*, that the proceedings before the agency are not sufficiently complete as to constitute a final order within the meaning of the Atomic Energy Act, 42 U.S.C. § 2239; the Hobbs Act, 28 U.S.C. § 2342; the Administrative Procedure Act, 5 U.S.C. § 702; or the Nuclear Waste Policy Act, 42 U.S.C. § 10139, the statutory provisions that Beyond Nuclear has invoked in its petition. Beyond Nuclear will be afforded the opportunity to raise the merits of its legal challenges to the license applications before the Board and, if it is dissatisfied with the result, before the Commission. *See* 10 C.F.R. § 2.341. And the possibility of “resolv[ing], narrow[ing], or clarify[ing]” Beyond Nuclear’s claims during that process, Motion at 5, is precisely the reason that the finality requirement applies to appellate review of agency action in the first place. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (finality requirement satisfied where agency action is not “merely tentative” and is one from which “rights or obligations have been determined, or from which legal consequences will flow”).

Federal Respondents believe that the goal of “lessening the burden on this Court,” Motion at 5, would be better served by removing a petition for review of demonstrably nonfinal agency action from the Court’s docket. Such an approach will afford Beyond Nuclear the opportunity, if it is dissatisfied with the NRC’s decision, to challenge the NRC’s final determination in an orderly fashion, without the need for the Court to maintain two cases on the docket.

Moreover, if the Court grants the relief that Beyond Nuclear requests—*i.e.*, to hold the case in abeyance “pending the resolution of the administrative proceedings” before the agency, Motion at 5-6—it is difficult to conceive of any way in which the controversy that Beyond Nuclear identifies in its petition will still be live. Either Beyond Nuclear will have prevailed in its arguments on the merits, or it will have had the opportunity to present its arguments to the Commission on appeal. Holding the case in abeyance will have no effect other than to moot the underlying dispute (to the extent one exists at all).

Accordingly, Beyond Nuclear’s motion to hold its petition for review in abeyance should be denied. Assuming that the Court does not grant Beyond Nuclear’s motion, Federal Respondents intend to file a motion to dismiss in accordance with the schedule issued by the Court.

Respectfully submitted,

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January 7, 2019

CERTIFICATE OF COMPLIANCE

I certify that FEDERAL RESPONDENTS' RESPONSE TO PETITIONER'S MOTION TO HOLD PETITION FOR REVIEW IN ABEYANCE complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The motion was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word 2013, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The response contains 608 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

/s/ Andrew P. Averbach

Andrew P. Averbach

Solicitor

U.S. Nuclear Regulatory Commission

January 7, 2019

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on January 7, 2019, I filed FEDERAL RESPONDENTS' RESPONSE TO PETITIONER'S MOTION TO HOLD PETITION FOR REVIEW IN ABEYANCE with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court's CM/ECF system.

/s/ Andrew P. Averbach

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