

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

PETITIONER’S REPLY TO FEDERAL RESPONDENT’S RESPONSE TO PETITIONER’S MOTION TO HOLD PETITION FOR REVIEW IN ABEYANCE

Federal Respondents, the United States Nuclear Regulatory Commission (the “Commission”) and the United States (collectively, “Federal Respondents”) err in arguing that holding Petitioner’s petition for review of the Commission’s October 29, 2018 Order in abeyance is unwarranted because the Order is not final. To the contrary, the Order denying Petitioner’s motion to dismiss is final. And holding the petition for review in abeyance remains reasonable and prudent.

Federal Respondents argue that Petitioner, by the very act of seeking to hold its petition for review in abeyance pending the outcome of the Atomic Safety and Licensing Board’s consideration of Petitioner’s Nuclear Waste Policy Act (“NWPA”) and Administrative Procedure Act (“APA”) claims on the merits, has

demonstrated 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.”

Response at 2. In making this argument, Federal Respondents overlook the fact that the agency proceedings are, in fact, “complete” with respect to the question of whether the Commission must immediately dismiss the Licensing Board proceedings for noncompliance with the NWPA and APA, or alternatively open a new proceeding to consider that issue. In a “procedural” ruling in the Order, the Commission both denied Petitioner’s motion to dismiss the Licensing Board proceedings and forbade the Licensing Board from considering the motion:

The NRC’s regulations allow interested persons to file petitions to intervene and requests for hearing in which they can raise concerns regarding a particular license application. *These regulations do not, however, 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. I therefore deny both motions to dismiss on procedural grounds, without prejudice to the underlying merits of the legal arguments embedded within the motions.*

Order at 2 (emphasis added).

The effect of the Commission’s procedural ruling was to ensure that the Licensing Board, in addressing the “underlying merits” of Petitioner’s motion, would *not* decide the additional question of whether the NWPA and APA claims

should be resolved in a separate proceeding before the Commission. That determination was made once and for all against Petitioner in the Order, and Federal Respondents have failed to identify any additional proceedings in which the issue will be addressed.

Accordingly, contrary to the Federal Respondents' suggestion, there is nothing "tentative" about the Commission's decision to deny Petitioner's motion to dismiss; nor is there anything "tentative" about its refusal to open a separate proceeding to consider the NWPA and APA claims raised in that motion. *See* Response at 2 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Instead, by denying Petitioner's motion to dismiss, the Order conclusively denied Petitioner's right to dismissal of the licensing proceeding or commencement of a new and separate proceeding to consider Petitioner's claims of noncompliance with the NWPA and APA. *Sierra Club v. NRC*, 862 F.2d 222, 225 (9th Cir. 1989) (finding that denial of a hearing request constituted final agency action and setting forth the general test for finality that "generally, administrative orders are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."). The Order is therefore final.

Federal Respondents also contend that holding the case in abeyance "will have no effect other than to moot the underlying dispute (to the extent that one exists at all)." Response at 3. But the Order provides that the Licensing Board may

not address the dispute raised by Petitioner regarding whether the Commission should have dismissed the licensing proceedings or alternatively commenced a separate proceeding. Thus, it is not inevitable that all of Petitioner's claims will be mooted by the outcome of the Licensing Board proceedings.

Because the full outcome of the Licensing Board proceedings remains unknown, Petitioner continues to believe it would be prudent to hold its petition for review in abeyance pending completion of those proceedings. For instance, although the Commission has precluded the Licensing Board from deciding whether to dismiss its own licensing proceedings or commence a separate proceeding, it may decide whether the scope of its proceedings includes Petitioner's claims of NWPA non-compliance by the license applications under its review. *See* 10 C.F.R. § 2.309(f)(1)(iii). The Licensing Board may also decide whether Petitioner's claims regarding the applications' non-compliance with the NWPA are "material" to the findings the Commission must make in order to issue the requested licenses. *See* 10 C.F.R. § 2.309(f)(1)(iv). These determinations may help clarify the issues on review. Accordingly, holding this petition for review in abeyance remains prudent and reasonable.

For the foregoing reasons, Petitioner's motion to hold its petition for review in abeyance should be granted.

Respectfully submitted,

___/signed electronically by/___

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January 14, 2019

CERTIFICATE OF COMPLIANCE

I certify that PETITIONER'S REPLY TO FEDERAL RESPONDENT'S 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 in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The response contains 925 words and therefore complies with Fed. R. App. P. 27(d)(2)(C).

___/signed electronically by/___

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January 14, 2019

CERTIFICATE OF SERVICE

I, Diane Curran, hereby certify that on January 14, 2019, I filed PETITIONER'S REPLY TO FEDERAL RESPONDENT'S 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 on the Court's ECF website.

____/signed electronically by/____

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