

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

PETITIONER’S OPPOSITION TO FEDERAL RESPONDENTS’ MOTION TO DISMISS

Federal Respondents, the United States Nuclear Regulatory Commission (“NRC” or the “Commission”) and the United States (collectively, “Federal Respondents”) err in disputing the finality of the NRC order of which Petitioner seeks review and the ripeness of the petition. The order is reviewable and the petition is ripe for review.

I. FACTUAL BACKGROUND

Petitioner seeks review of an October 29, 2018 order by the Commission (the “Order”), refusing to dismiss two licensing proceedings initiated by the agency in violation of the Nuclear Waste Policy Act (“NWPA”) and the Administrative Procedure Act (“APA”). In its motion to dismiss the licensing

proceedings, Petitioner contended the proceedings must be dismissed because the central premise of both license applications – that the U.S. Department of Energy (“DOE”) will be responsible for the “spent” or used nuclear reactor fuel that is transported to and stored at the proposed facilities – violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143. And the APA’s prohibition on agency actions “not in accordance with law” prohibits the NRC from reviewing and issuing licenses premised on NWPA violations. 5 U.S.C. § 706(2)(A).

Acting for the Commission, the NRC Secretary denied Petitioner’s motion to dismiss the licensing proceedings or open a separate proceeding to consider Petitioner’s claims, on the ground that NRC regulations do not provide for the filing of threshold “motions to dismiss” licensing proceedings and that Petitioner must instead submit hearing requests in those proceedings. Order at 2. Thus, the Order referred Petitioner’s claims to the Atomic Safety and Licensing Board panels that had been appointed to entertain hearing requests regarding the adequacy of the license applications. *Id.*

While the Secretary asserted that she was denying the motion to dismiss the proceedings “on procedural grounds, without prejudice to the underlying merits of the legal arguments embedded within the motions” (*id.*), the Order did not give the

Licensing Board panels any authority to consider the lawfulness of their act of conducting the licensing proceedings. As stated in the Order, the only permissible subject of the licensing proceedings is the license application itself. *Id.* (“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.”). *See also* 10 C.F.R. § 2.309(f)(1)(vi) (hearing requests must “show that a genuine dispute exists *with the applicant or licensee* on a material issue of law or fact.”)(emphasis added). Further, the scope of NRC licensing 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. Petitioner’s questions regarding compliance with the NWPA and APA are not considered licensing issues by the Commission and therefore are beyond the Licensing Board’s regulatory purview.

Nevertheless, pursuant to the Order, the Licensing Board panels in both proceedings are now considering whether to grant hearings on Petitioner’s claim that the license applications violate the NWPA. While the Licensing Board panels will not reach the issues raised by Petitioner regarding the lawfulness of the NRC’s initiation and conduct of the licensing proceedings under the APA, the Licensing Board panels’ rulings may narrow or clarify the issues before this court. Therefore,

Petitioner has moved to hold its petition for review in abeyance pending those rulings from the Licensing Board panels.

II. ARGUMENT

A. The Order on Appeal is Final.

Federal Respondents do not dispute that the Hobbs Act gives this court jurisdiction over final orders in NRC licensing proceedings. Motion to Dismiss at 1 (citing Hobbs Act, 42 U.S.C. § 2342(4) and Atomic Energy Act, 42 U.S.C. §§ 2239(a) and 2239(b)(1)). But they contend the Order on review was not final because the Commission did not address the merits of Petitioner's motion to dismiss the licensing proceedings and instead referred Petitioner's claims to the agency's Atomic Safety and Licensing Board for consideration in two licensing proceedings. Motion to Dismiss at 3-4. According to Federal Respondents, Petitioner must wait until the Licensing Board panels have decided the claims, and then appeal those decisions. *Id.* at 5-7.

But the Licensing Board cannot decide Petitioner's claim that *the Commission* is prohibited by the NWPA and the APA from instituting licensing proceedings to review applications that explicitly contemplate violations of federal law as part of their operational schemes. Only the Commission has the authority to decide whether a licensing proceeding should go forward. 10 C.F.R. § 2.104(a) (providing that hearing notices are issued by the Secretary). Once established, a

Licensing Board panel has no authority to question its own existence. By refusing to dismiss the licensing proceedings and instead “channel[ing]” Petitioner’s claims to the unlawful proceedings themselves (*see* Motion to Dismiss at 4), the Commission thus deprived Petitioner of its right to dismissal of the proceedings and obligated Petitioner to commit time and resources to a process that blatantly violates federal law. *Adenariwo v. Federal Maritime Comm’n*, 808 F.3d 74, 78 (D.C. Cir. 2015) (holding that a decision is final when “rights or obligations have been determined or legal consequences will flow from the agency action.”).

While the Licensing Board panels now have before them the question of whether the *applications* violate the NWPA, that question is distinct from the now-resolved question of whether the *Commission* violated the NWPA and the APA in reviewing the applications at all. Petitioner need not wait until the conclusion of a proceeding whose very conduct flouts governing federal law before challenging its conformance to the APA. “[I]t is one thing to anticipate minor statutory additions to fill gaps, and quite another to proceed on the premise of a wholesale reversal of a statutory scheme. The latter is flatly unreasonable.” *See Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 736 F.3d 517, 519-20 (D.C. Cir. 2013).

Federal Respondents also argue that the Order is not final because the motion to dismiss the licensing proceedings, to which the Order responds, was not

contemplated by NRC procedures for adjudications. Motion to Dismiss at 7-8 (citing *Brodsky v. NRC*, 578 F.3d 175, 177 (2d Cir. 2009)). In *Brodsky*, the court held that the Hobbs Act did not apply to a challenge to an order granting an exemption from NRC regulations, because exemptions are not listed among the types of proceedings covered by the Atomic Energy Act, 42 U.S.C. § 2239(a). *Id.* The *Brodsky* court also pointed out, however, that “the jurisdictional element and hearing requirement of [42 U.S.C.] § 2239(a) are not coextensive, because we have Hobbs Act jurisdiction over ‘all final orders in licensing proceedings whether or not a hearing before the Commission occurred or could have occurred.’” *Brodsky*, 578 F.3d at 180 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)). Here, there is no question that the Order on review was issued in NRC licensing proceedings. The fact that Petitioner’s motion to dismiss those proceedings was not contemplated by the NRC’s hearing regulations does not deprive the court of jurisdiction.

B. Petitioner’s Claims Are Ripe for Review.

Federal Respondents also argue that Petitioner’s claims “can be dismissed under the related doctrine of ripeness, as the petitioner faces no imminent hardship in having to raise its claims in the normal course of proceedings before the Board, and its claim ‘rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.’” Motion to Dismiss at 8 (quoting *Atl. States Legal*

Found. v. E.P.A., 325 F.3d 281, 284 (D.C. Cir. 2003)). But Petitioner's claims do not rest on contingent future events that have not yet taken place or whose outcome is uncertain. The licensing proceedings to which Petitioner objects are occurring now – and thus they are neither contingent future events, nor is their occurrence uncertain.

Federal Respondents also charge that by submitting a motion to hold this proceeding in abeyance, Petitioner has effectively conceded that this case is not ripe. Their argument is incorrect. It is reasonable to anticipate that the Licensing Board panels' threshold determinations regarding Petitioner's claims regarding the unlawfulness of the license applications may clarify the issues raised by this petition for review regarding the lawfulness of the NRC's own actions. For instance, the Licensing Board panels may reject Petitioner's claims as outside the scope of the licensing proceedings, or question the lawfulness of the proceedings. Thus, holding this proceeding in abeyance may assist the court. However, the Commission's refusal to grant Petitioner's motion to dismiss remains a final, appealable decision that is ripe for review.

III. CONCLUSION

For the foregoing reasons, Federal Respondents' Motion to Dismiss should be denied.

Respectfully submitted,

s/Diane Curran

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April 10, 2019

CERTIFICATE OF COMPLIANCE

I certify that PETITIONER'S OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS 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 Opposition contains 1,551 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

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CERTIFICATE OF SERVICE

I, Diane Curran, hereby certify that on April 10, 2019, I served PETITIONER'S OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS and CERTIFICATE REGARDING WORD COUNT on the parties by posting them on the U.S. Court of Appeals' ECF website

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