

May 14, 2019

Mark Langer, Clerk of Court
United States Court of Appeals for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

SUBJECT: *Beyond Nuclear, Inc. v. NRC, No. 18-1340*

Dear Mr. Langer:

As provided by Fed. R. App. P. 28(f) and D.C. Cir. R. 28(f), Petitioner Beyond Nuclear submits this response to the Federal Respondents' letter of May 10, 2019 ("Letter"). Contrary to their assertion, the Atomic Safety and Licensing Board's recent Memorandum and Order ("LBP-19-04") and the "possibility of an appeal" of LBP-19-04 do not demonstrate the lack of finality of the U.S. Nuclear Regulatory Commission's ("NRC's") October 29, 2018 Order ("2018 Order") that is the subject of Petitioner's petition for review. Letter at 2.

In the 2018 Order, the NRC denied Petitioner's motion to dismiss two licensing proceedings for interim spent fuel storage facilities in Texas and New Mexico. The NRC refused to consider Petitioner's claim that the agency's very conduct of the licensing proceedings violated the Nuclear Waste Policy Act ("NWPA") and the Administrative Procedure Act ("APA"). Instead, the NRC denied the motion on "procedural" grounds and sent the issue to the Licensing Board for consideration in the individual licensing proceedings.

LBP-19-04 does not show the lack of finality of the 2018 Order, because it does not address (nor could it) the central issue raised in Petitioner's motion to dismiss and petition for review: whether the NRC is violating the APA by conducting proceedings that call for violations of the NWPA (namely, ownership of the spent fuel by the U.S. Department of Energy before a national repository is in operation). Only the Commissioners may address that issue. LBP-19-04 addresses the related, but distinctly different, question of whether Petitioner has raised a "genuine and material dispute" with one of the license applicants (Holtec International) regarding the lawfulness of its license application.



By the same token, Federal Respondents err in stating that the “possibility of an appeal” of LBP-19-04 shows that the 2018 Order was not final. Letter at 2. Again, LBP-19-04 does not (and could not) address the lawfulness of the NRC’s own conduct of the Holtec International licensing proceeding. Therefore, that issue is not appealable from LBP-19-04. Instead, it was conclusively decided by the NRC in the 2018 Order, which is now properly before the court.

Sincerely,

s/Diane Curran

s/Mindy Goldstein
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Counsel to Beyond Nuclear

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 CERTIFICATE OF COMPLIANCE

I certify that the foregoing letter from Petitioner’s counsel to the court 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 letter was prepared in 14-point, double spaced, Times New Roman font, using Microsoft Word, in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The letter contains 347 words and therefore complies with Fed. R. App. P. 28(j).

s/Diane Curran
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Counsel for Petitioner

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CERTIFICATE OF SERVICE

I, Diane Curran, hereby certify that on May 14, 2019, I served the foregoing letter from Diane Curran and Mindy Goldstein to Mark Langer and Certificate of Compliance on the parties to this case by posting them on the U.S. Court of Appeals' ECF website.

s/Diane Curran
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