

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1173

September Term, 2017

FILED ON: NOVEMBER 27, 2017

BEYOND NUCLEAR, INC.,
PETITIONER

v.

U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

DTE ENERGY COMPANY,
INTERVENOR

On Petition for Review of an Order
of the Nuclear Regulatory Commission

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the Nuclear Regulatory Commission (NRC) and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied.

Petitioner Beyond Nuclear challenges the NRC's decision to grant DTE Electric Company a combined license to construct and operate a nuclear power plant. Specifically, it challenges NRC's denial of petitioner's: (1) request to admit for an adjudicatory proceeding an untimely contention challenging the NRC's Environmental Impact Statement (EIS); (2) request to consider that untimely contention at a contested hearing on a sua sponte basis; and (3) challenge to the adequacy of DTE's quality-assurance program. Each argument is unsuccessful.

We owe an agency's interpretations of its own procedural regulations substantial deference, giving them "controlling weight" unless "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). The NRC did not plainly err in determining that Beyond Nuclear's contention regarding the EIS was untimely under its regulations and was not based on information that was "not previously available," 10 C.F.R. § 2.309. Nor did it abuse its discretion in deciding that the issue presented by the contention was not so "serious" as to warrant sua sponte review in a contested hearing under 10 C.F.R. § 2.340, because the EIS did consider the issues presented by the contention and because the NRC had already scheduled a hearing to review the overall sufficiency of the EIS. *See Lorion v. NRC*, 785 F.2d 1038, 1042 (D.C. Cir. 1986).

Finally, we reject Beyond Nuclear's claim that the NRC was arbitrary and capricious in accepting DTE's quality-assurance program. The record does not support the claim that the NRC ignored undisputed evidence regarding the program. Rather, the record indicates that the NRC rationally considered all relevant facts before denying Beyond Nuclear's challenge to the program. Nor do the NRC's regulations support Beyond Nuclear's assertion that the NRC acted unlawfully in ruling that DTE could rely on the quality-assurance program of its contractor while preparing its license application, as long as DTE retained responsibility for that work. To the contrary, the regulations expressly permit an applicant to "delegate to others . . . the work of establishing and executing" a quality-assurance program, so long as the applicant retains final responsibility over the program. 10 C.F.R. Pt. 50 App. B.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk