

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT,)
GOVERNOR OF TEXAS; and)
TEXAS COMMISSION ON)
ENVIRONMENTAL QUALITY,)
Petitioners,)
v.)
NUCLEAR REGULATORY)
COMMISSION and)
UNITED STATES OF AMERICA,)
Respondents.)

No. 21-60743

**MOTION TO STAY BRIEFING PENDING DISPOSITION OF
RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION**

The U.S. Nuclear Regulatory Commission (“NRC”) and the United States of America (together, “Respondents”) jointly move to stay briefing in this matter pending resolution of their motion to dismiss for lack of jurisdiction, which they have filed today (“Motion to Dismiss”). Counsel for Respondents have contacted all parties to this action concerning this motion. Respondent-Intervenor Interim Storage Partners LLC (“ISP”) supports this motion but will not be filing a response; Petitioners oppose this motion and will file a response.

On September 13, 2021, the NRC issued a license granting Intervenor ISP authorization to operate a consolidated interim storage facility to store spent nuclear fuel. Petitioners filed this Petition for Review on September 23, 2021. On

November 3, 2021, the NRC filed the certified list of the contents of the administrative record. Later that same day, the Court issued a briefing notice setting a December 13, 2021, deadline for Petitioners to file their opening brief. On November 4, 2021 (earlier today), Respondents filed the Motion to Dismiss. The Motion contends that Petitioners are not “parties” who have been “aggrieved” by the NRC’s issuance of the license, as required by the Atomic Energy Act and Hobbs Act, and this Court therefore lacks jurisdiction over the Petition for Review. *See* Motion to Dismiss at 11-20.

This Court must assure itself of its subject matter jurisdiction before addressing the merits of the Petition for Review. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)); *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 (5th Cir. 1999)). Here, the Motion to Dismiss raises a serious jurisdictional defect in the Petition for Review. The jurisdictional question is purely legal in nature and does not require resolution of any factual disputes. Under these circumstances, the interests of judicial economy and the conservation of governmental resources of both the State

and Federal Governments would be best served by allowing the Court to first consider the jurisdictional issue before proceeding to merits briefing and argument.

Petitioners will not be prejudiced by the Court's deferral of briefing while it considers the jurisdictional issue raised by the Motion to Dismiss. Although the NRC has issued a license to ISP to possess spent nuclear fuel, neither construction nor operation of the proposed facility is imminent. There is thus no risk during this period that Texas could be injured by the proposed facility.

In sum, the interests of judicial economy, conservation of State and Federal Government resources, and the lack of prejudice resulting from a deferral of merits briefing all militate in favor of a stay of briefing pending the Court's resolution of the Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Respondents request that the Court stay briefing of this Petition for Review pending resolution of Respondents' Motion to Dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ Justin D. Heminger

TODD KIM
Assistant Attorney General
JUSTIN D. HEMINGER
Attorney
Environment and Natural Resources
Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
justin.heminger@usdoj.gov
(202) 514-5442

/s/ Andrew P. Averbach

ANDREW P. AVERBACH
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
andrew.averbach@nrc.gov
(301) 415-1956

November 4, 2021

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 523 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Andrew P. Averbach

Andrew P. Averbach

Counsel for Respondent
U.S. Nuclear Regulatory Commission