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January 30, 2023

VIA CM/ECF

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the
Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130

Re: *State of Texas et al. v. Nuclear Regulatory Commission, et al.*,
No. 21-60743

Dear Mr. Cayce:

On behalf of Intervenor/Respondent Interim Storage Partners, LLC (ISP), this is a response to the letter dated January 27, 2023, by counsel for the Texas Petitioners, regarding the decision in *Don't Waste Michigan v. NRC*, No. 21-1048 (D.C. Cir.). *Don't Waste Michigan* confirms that dismissal of Texas's petition is warranted. That is not called into question by Texas's letter.

First, Texas is incorrect when it claims that “[i]f the NRC’s procedural arguments prevail there would remain no evident way to challenge the NRC’s unauthorized answer to this major question.” As the Commission and ISP have previously explained, Texas could have properly challenged whatever purported statutory authority or other questions it desired to in this Court on the merits by simply doing what parties have consistently been doing under settled law for decades—that is, taking the required steps to invoke judicial review under the Hobbs Act. See ISP Rule 28(j) Letter (November 21, 2022), *citing Merchants Fast Motor Lines v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993); Commission Br. at 32-33. In *Don't Waste Michigan* the D.C. Circuit fully addressed the merits of claims that did so, but correctly

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dismissed the claims of petitioners that—just like Texas here—did not.

Second, Texas continues to cite and rely upon provisions of the Nuclear Waste Policy Act (NWPA), but, as explained by the Commission and ISP, and as confirmed by the D.C. Circuit in *Don't Waste Michigan*, “[s]torage and disposal” of spent nuclear fuel are “different concepts.” The NWPA, properly construed and at the end of the day, has nothing to do with this case. ISP Br. at 24-29; Commission Br. at 6-7; Oral Arg. 41:05-42:11. The NWPA issues were correctly resolved by the D.C. Circuit on the merits; there is no basis for a different conclusion here.

For the reasons previously explained by the Commission and ISP, and reaffirmed in *Don't Waste Michigan*, the Court should dismiss or deny the petitions in this case.

Respectfully submitted,

/S/ Brad Fagg

Brad Fagg
Counsel of Record for Intervenor
Interim Storage Partners, LLC

cc: counsel of Record (via CM/ECF)