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November 21, 2022

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, this is a response to the letter dated November 18, 2022, by counsel for the Texas Petitioners, regarding the decision in *Ohio Nuclear-Free Network v. NRC*, No. 21-1162 (D.C. Cir. Nov. 15, 2022).

First, Texas seeks to distinguish *Ohio Nuclear* upon the grounds that that decision was “focused on the Commission’s NEPA obligations,” but Texas makes no effort to explain why *Ohio Nuclear* does not, at a minimum, control the APA and NEPA claims that Texas asserts. *See* Commission Br. at 33; Texas Br. at 27-47.

Second, although Texas recites that it “would have been futile” for it to participate at the agency level, *Ohio Nuclear* clearly turned upon jurisdictional grounds under the Hobbs Act. Jurisdiction, of course, cannot be waived or excused—there is no “futility” exception to such jurisdictional requirements.

Third, although Texas purports to rely upon *Am. Trucking Ass’ns, Inc. v. ICC*, 673 F.2d 82 (5th Cir. 1982), in its letter Texas invokes a “materially similar statutory authority argument” raised by other parties before the Commission. There is no reason why Texas could not have availed itself of that same opportunity. Whatever the import of *American Trucking*, the law in this Circuit is that where, as here, the agency has initial authority to determine its own jurisdiction at the behest of a party, the “exceedingly narrow” exception of *American Trucking* is rendered inapplicable. *Merchants Fast Motor Lines v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). *See* Commission Br. at 32-33.

For the reasons explained by the Commission, *Ohio Nuclear* supports dismissal of Texas’ appeal on

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jurisdictional grounds. Nothing about Texas' response calls that conclusion into doubt.

Respectfully submitted,

/s/ Brad Fagg

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cc: counsel of Record (via CM/ECF)