

No. 23-60377

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FASKEN LAND AND MINERALS, LTD., and
PERMIAN BASIN LAND AND ROYATY OWNERS,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action
by the Nuclear Regulatory Commission

**FEDERAL RESPONDENTS' MOTION FOR A TEMPORARY
STAY OF PROCEEDINGS OR IN THE ALTERNATIVE FOR A
30 DAY EXTENSION OF TIME TO FILE RESPONSE BRIEF**

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CERTIFICATE OF INTERESTED PERSONS

No. 23-60377

Fasken Land & Minerals, Ltd.
v.
Nuclear Regulatory Commission

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners
 - a. Fasken Land and Minerals, Ltd.
 - b. Permian Basin Land and Royalty Owners
2. Counsel for Petitioners
 - a. Allan L. Kanner, Kanner & Whiteley, L.L.C.
 - b. Annemieke M. Tennis, Kanner & Whiteley, L.L.C.
 - c. Monica Renee Perales. Fasken Land & Minerals Ltd.
3. Respondents
 - a. United States Nuclear Regulatory Commission
 - b. United States of America

4. Counsel for Respondents
 - a. Andrew P. Averbach, U.S. Nuclear Regulatory Commission
 - b. Marian L. Zobler, U.S. Nuclear Regulatory Commission
(retired)
 - c. Brooke P. Clark, U.S. Nuclear Regulatory Commission
 - c. Todd Kim, U.S. Department of Justice
 - d. Jennifer Scheller Neumann, U.S. Department of Justice
 - e. Justin D. Heminger, U.S. Department of Justice
5. Respondent-Intervenor
 - a. Holtec International
6. Counsel for Respondent-Intervenor
 - a. Jay E. Silberg, Pillsbury Winthrop Shaw Pittman, LLP
 - b. Anne R. Leidich, Pillsbury Winthrop Shaw Pittman, LLP
 - c. Benjamin L. Bernell, Pillsbury Winthrop Shaw Pittman,
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/s/ Andrew P. Averbach
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Attorney of Record for Respondent
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INTRODUCTION

The Nuclear Regulatory Commission and United States of America (Federal Respondents) respectfully request that the Court temporarily stay proceedings in this case pending resolution of Federal Respondents' petition for en banc rehearing in a related and controlling case decided by this Court, *Texas v. Nuclear Regulatory Commission*, 78 F.4th 827 (5th Cir. 2023).

This case raises the same core issues as *Texas*. In *Texas*, this Court rejected Federal Respondents' jurisdictional arguments, including an argument identical to a jurisdictional argument that Federal Respondents raised in a motion to dismiss in this case that has been carried with the case and would intend to raise in its merits brief. In *Texas*, this Court also held that the Commission lacked statutory authority to issue the type of license at issue in this case. Petitioners (together, Fasken) and Federal Respondents were also parties in *Texas*. Earlier today, October 24, 2023, Federal Respondents sought en banc rehearing in *Texas*.

To conserve judicial and party resources, this case should be stayed until the rehearing process concludes in *Texas*. No party will be

prejudiced by a stay of proceedings. If the Court declines to stay this case, Federal Respondents request a 30-day extension of time to file their brief, from the current deadline of November 1, 2023, to December 1, 2023.

Intervenor Holtec International consents to this relief. Fasken opposes a stay of proceedings and intends to file a response to this motion. Fasken also opposes Federal Respondents' alternative request for a 30-day extension of the briefing deadline but does not oppose a 21-day extension.

BACKGROUND

Proceedings in *Texas*. In 2021, the Commission granted a license to Interim Storage Partners to temporarily store spent nuclear fuel at a facility to be constructed in Andrews County, Texas. *See Texas*, 78 F.4th at 831, 834. In 2021, Texas and Fasken challenged that license, and in August 2023, this Court issued a published decision granting the petitions and vacating the license. *Id.* at 831, 844.

Earlier today, on October 24, 2023, Federal Respondents filed a petition for en banc rehearing in *Texas*.

Proceedings in this case. In 2023, the Commission granted a license to Intervenor Holtec International to temporarily store spent nuclear fuel at a facility to be constructed in Lea County, New Mexico. In July 2021, Fasken challenged that license by filing a petition for review in this Court. Federal Respondents moved to dismiss the petition for lack of subject-matter jurisdiction. ECF No. 18 (motion); ECF No. 29 (Fasken opposition); ECF No. 42 (reply).

After this Court issued the *Texas* decision, Federal Respondents advised the Court that they were considering whether to seek further review in *Texas*. ECF No. 44. Thus, Federal Respondents requested that the Court either (1) carry the motion to dismiss with the case, or (2) defer the motion until the mandate issues in *Texas*. ECF No. 44. The Court ordered the motion be carried with the case. ECF No. 49.

On October 2, 2023, Fasken filed its opening brief in this case. ECF No. 51. In that brief, Fasken contended that this Court in *Texas* “recently addressed the precise issues presented here.” Fasken Br. 15. Federal Respondents’ brief is currently due November 1, 2023.

ARGUMENT

I. A temporary stay of proceedings will promote efficient use of party and judicial resources.

Courts have “broad discretion to stay proceedings.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995). This authority is “incidental to the power inherent in every court to control” its docket. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Court may grant a stay when it would serve “economy of time and effort for itself, for counsel, and for litigants.” *Id.*

This Court recognizes that a “stay pending the outcome of litigation between the same parties involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery.” *ACF Indus., Inc. v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967) (citing *Landis*). Because *Texas* is controlling on the core issues in this case and because this case involves several of the same parties as *Texas* (Fasken and Federal Respondents), this Court should stay the case until the rehearing process concludes in *Texas*.

Federal Respondents agree with Fasken that *Texas* addressed the same core issues raised in this case—Article III standing, subject-

matter jurisdiction, and statutory authority. *See* Fasken Br. 15. And although the license in this case was issued to a different party (Holtec) than in *Texas* (Interim Storage Partners), the licenses and the extent to which Petitioners are “parties aggrieved” within the meaning of the Hobbs Act are materially similar. Thus, *Texas* is controlling on the core issues in this case. But Federal Respondents are seeking rehearing en banc in *Texas*. That process should conclude before this Court and the parties here determine how *Texas* applies to this case.

A temporary stay will conserve party and judicial resources. *See Landis*, 299 U.S. at 254. “The economic waste involved in duplicating litigation is obvious.” *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941). “Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other’s work in cases involving the same issues and the same parties.” *Id.* Here, this Court already decided the main issues in this case in *Texas*. Neither the Court nor the parties should duplicate that work by relitigating these same issues in this case while the rehearing process is ongoing in *Texas*. *See ACF Indus.*, 384 F.2d at 19. Once the Court resolves the petition for en banc rehearing in *Texas*,

the parties in this case will be able to advise this Court on how to efficiently resolve this case.

No party will be prejudiced by a temporary stay. Federal Respondents understand from counsel for Holtec International that construction at the site has not begun and that additional permits remain to be issued by the State of New Mexico.

Counsel for Fasken has asserted that (1) a stay of proceedings would deny Petitioners the efficient resolution and closure on the issues in this case, and (2) Petitioners' property values and mineral rights are stigmatized and thus of lesser value pending resolution of these issues. The first interest is inchoate and inherent in the judicial process. The second interest is unsupported and speculative, given that Holtec has not begun construction and needs additional permits from New Mexico. Neither asserted interest will be harmed by a temporary stay of proceedings while the en banc Court considers the pending rehearing petition in *Texas*. Once the en banc Court resolves the rehearing petition, the parties in this case should be able to expeditiously conclude this case by applying either *Texas* or a superseding decision by this

Court sitting en banc, or if a party chooses to seek certiorari in *Texas*, this Court would evaluate any stay of proceedings request at that time.

II. The Court alternatively should grant a 30-day extension of time for Federal Respondents to file their brief.

If the Court does not grant a stay of proceedings here, Federal Respondents request a 30-day extension of the current deadline for Federal Respondents' brief, from November 1, 2023, to December 1, 2023. Good cause exists for this extension because absent a stay, Federal Respondents will need additional time to draft their brief.

Drafting the brief will be complicated because *Texas* addresses the same issues as this case, but Federal Respondents are presently seeking en banc rehearing in *Texas*. Federal Respondents therefore would need to draft a brief that addresses different hypothetical future scenarios in which *Texas* remains binding precedent or, alternatively, the en banc Court rehears the petition and reaches potentially different conclusions on one or more of the relevant issues. Because the Nuclear Regulatory Commission is a Hobbs Act agency, the Commission is represented by its own lawyers, while the Justice Department represents Respondent United States of America. Drafting the brief therefore requires

additional coordination and review by lawyers at both the Commission and the Justice Department.

CONCLUSION

For these reasons, the Court should stay proceedings in this case pending issuance of the mandate in *Texas*. The Court also should direct the Federal Respondents to file, within 15 days after issuance of the mandate in *Texas*, a statement advising the Court of the parties' positions on how to proceed in this case.

If the Court denies a stay of proceedings, Federal Respondents respectfully request in the alternative that the Court grant a 30-day extension of the current deadline for Federal Respondents' brief, from November 1, 2023, to December 1, 2023.

Respectfully submitted,

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October 24, 2023

CERTIFICATE OF SERVICE

I certify that on October 24, 2023, I served a copy of the foregoing upon counsel for the parties in this action by filing the document electronically through the CM/ECF system.

/s/ Andrew P. Averbach _____
ANDREW P. AVERBACH

Attorney of Record for Respondent
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CERTIFICATE OF COMPLIANCE

I certify that:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the parts of the of the filing exempted by Rule 32(f), the body of the document contains 1,440 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

/s/ Andrew P. Averbach

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