ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1363 and Consolidated Cases

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINISTRATOR,

Respondents.

RESPONSE OF POWER COMPANIES IN OPPOSITION TO MOTIONS FOR STAY

Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

Counsel for NextEra Energy, Inc.

Kevin Poloncarz
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com

Counsel for Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas And Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

III. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

* Cuomo v. NRC,
772 F.2d 972 (D.C. Cir. 1985) 3, 4, 5

Small Refiner Lead Phase-down Task Force v. EPA,
705 F.2d 506 (D.C. Cir. 1983) 5

Wisconsin Gas Co. v. FERC,
758 F.2d 669 (D.C. Cir. 1985) 2, 3

FEDERAL REGISTER

* 80 Fed. Reg. 64,662 (Oct. 23, 2015) 7

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CO_2	Carbon Dioxide
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission

I. INTRODUCTION

The Power Companies are among the nation's largest and most forward-thinking electric utilities and owners of generating units subject to the Clean Power Plan.[1] Together, they own and operate nearly 100,000 megawatts of generating capacity and serve millions of customers in 19 states across the country. The Power Companies support the Clean Power Plan because it will harness market forces to hasten trends that are already occurring in the electricity sector and thereby achieve significant reductions in carbon dioxide ("CO_2") emissions. Through their investment in low- and zero-emissions generation capacity and their procurement of electricity generated by such sources, the Power Companies have reduced CO_2 emissions within their respective generation fleets and portfolios, while continuing to provide reliable and affordable power to their customers.[2] Their collective experience doing so demonstrates the achievability and reasonableness of the Clean Power Plan.

II. ARGUMENT

Movants are incorrect when they describe the alleged harms they say will immediately befall electric generators and utilities because the Rule requires nothing of affected sources until 2022 (at the earliest). Furstenwerth Decl. ¶ 19 (C16). They claim that, in the absence of a stay, they will be forced to make decisions *now* about

[1] The Power Companies include Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, NextEra Energy, Inc., Pacific Gas and Electric Company, Sacramento Municipal Utility District and Southern California Edison Company.

[2] Gianunzio Decl. ¶ 3 (C25); LaBauve Decl. ¶ 22 (C43); Mele Decl. ¶ 4 (C51); Nichols Decl. ¶ 4 (C54-55).

retirements of existing coal-fired power plants and investments in new natural gas-fired combined cycle and renewable generation capacity and related infrastructure. These charges are unfounded.

First, Movants wrongly attribute the many ills affecting domestic coal mining and coal-fired power generation to the Rule. In fact, reductions in coal-fired generation are being driven by independent changes in the electricity sector that predate the Rule, which are causing shifts towards increased generation from gas-fired and renewable power plants. Furstenwerth ¶¶ 16-17 (C14-15). These changes include the abundant supply of relatively inexpensive natural gas and the increasing competitiveness of electricity from renewable generation sources. *Id.*; Kelliher Decl. ¶ 13 (C33-34). Movants cannot conflate these secular changes with alleged impacts of the Rule. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that, "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin").

Second, Movants have failed to point to any specific coal plants that would not otherwise retire that will do so during the litigation period because of the Rule. Furstenwerth ¶ 23 (C18). No one would retire a financially viable source in the near term merely because its retirement was predicted by an EPA model designed to illustrate the long-term impacts of regulation on the power sector as a whole, assuming perfect foresight. *Id.* ¶ 22 (C17-18). Any near-term decisions to retire particular coal-fired power plants would be purely economic decisions and not due to any regulatory mandate imposed by the Rule. *Id.* ¶ 20 (C16). These economic decisions, made years in advance of any regulatory obligation applicable to the

affected EGUs, constitute self-imposed actions and do not fulfill the requirements for granting a stay. *See Cuomo v. NRC*, 772 F.2d 972, 977 (D.C. Cir. 1985) (stating "self-imposed costs are not properly the subject of inquiry on a motion for stay."). Further, in light of the tremendous flexibility afforded by the Rule, it is still too early to determine what will ultimately be required in 2022 for any individual unit by the relevant state plan. Furstenwerth ¶ 19 (C16); Kelliher ¶ 13 (C33-34). Accordingly, it is inaccurate and conjectural to allege that the Rule *requires* coal-fired power plants to retire now. Such speculative harm cannot provide the basis for a stay. *See Wisconsin Gas Co.*, 758 F.2d at 674 (stating, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.").

Third, because there are still more than six years before the Rule actually requires any reductions from the affected units, Movants can wait until the Court decides this case on the merits, if they choose, before seeking the necessary permits and financing to build any new capacity that may be needed to achieve the Rule's goals. Furstenwerth ¶ 27 (C20-22). The lead time for new solar and wind generating capacity can be significantly shorter than five years absent the need for new transmission to deliver power from these resources to the load. *Id.* Likewise, although the construction of new natural gas-fired combined cycle capacity is not a component of the Rule's "best system of emission reduction", if such capacity should ultimately be needed, it can be built in as little as four years, often without requiring new transmission infrastructure. *Id.* Additionally, existing gas-fired combined cycle plants can be operated at substantially greater utilization rates, avoiding the need for

the number of new gas-fired units Movants suggest that they must construct to meet load in 2022. *Id.* ¶ 26 (C20).

Further, the substantial costs that Movants assert would be incurred in the next two years would either be voluntary—such as costs associated with achieving early reductions pursuant to the Clean Energy Incentive Program—or inconsistent with the Power Companies' extensive experience developing new generation capacity. Furstenwerth ¶ 28 (C22) (significant costs not incurred and financing not obtained until after permits issued). Such voluntarily incurred costs cannot provide the basis for a stay. *See Cuomo*, 977 F.2d at 977.

Movants claim they must start incurring costs now because there is no guarantee emissions trading will be available as a compliance pathway or the price of allowances or emission rate credits will be exorbitantly expensive. These highly speculative assertions are unsupported by the Power Companies' collective experience. Functioning emissions markets have consistently developed under other emissions standards affecting the power sector and provided a pathway for compliance, without impairing the functioning of the underlying electricity markets or the supply of reliable and affordable power. Furstenwerth ¶¶ 9-14 (C11-14); Kelliher ¶¶ 7-8 (C30-31). The Power Companies anticipate that, in addition to state and regional carbon markets that already exist and will likely be relied upon by several states to achieve the Rule's goals, emissions markets will develop throughout the rest of the country and provide a pathway to compliance for their affected units. Baggs Decl. ¶ 7 (C3-4); Furstenwerth ¶ 14 (C13-14); Gianunzio ¶ 8 (C26-27); Lavinson Decl. ¶ 7 (C48-49); Welz Decl. ¶ 7 (C58). Thus, Movants' speculation that emissions

trading will not be available and that they must therefore take immediate action to shut down plants and build new ones provides no basis for staying the Rule. *See Cuomo*, 772 F.2d at 976-77 (movant's costs must be both "certain to occur in the near future" and not "self-imposed" to justify stay); *Small Refiner Lead Phase-down Task Force v. EPA*, 705 F.2d 506 (D.C. Cir. 1983) (upholding standard for lead in gasoline where record demonstrated trading program would develop so all refiners could comply).

Finally, granting a stay would not remove the uncertainty surrounding the future regulation of CO_2 emissions or the Rule, which Movants claim is preventing them from moving forward with major investments at this time or causing them to factor the risks associated with the Rule's implementation into their decisions and contracts. Irrespective of the Rule's implementation, it would be unreasonable and imprudent *not* to address the Rule's implementation and the possibility of future carbon regulations in major investment decisions and contracts. The Power Companies regularly manage uncertainty—and, in particular, uncertainty surrounding future regulation of CO_2 emissions—through negotiation of specific commercial terms. Furstenwerth ¶¶ 10, 24 (C11, 18-19); *see also* Baggs ¶ 3 (C2). That is the ordinary means of addressing regulatory risk within the power sector; it is unrealistic for Petitioners to suggest they should be forever insulated from the risk of future CO_2 regulation. Furstenwerth ¶ 24 (C18-19). That risk will remain regardless of the Rule's implementation or the Court's grant of a stay. Thus, a stay cannot provide the relief Movants seek, but would only deepen uncertainty about when and how power-sector CO_2 emissions will ultimately be regulated. As a consequence, granting a stay could itself cause harm to the Power Companies and others who are investing in clean

generation technology today in anticipation of future CO_2 regulation. *See* Kelliher ¶ 18 (C35-36); LaBauve ¶ 23 (C43-44).

Contrary to Movants' assertions that the Rule would reconfigure the entire national electric grid, the Rule applies to affected units no differently than other regulations implemented under the Clean Air Act to reduce power sector emissions, which operate by limiting emissions from affected units and thereby creating incentives to shift dispatch from higher- to lower-emitting units. Furstenwerth ¶ 10 (C11); *see also* Kelliher ¶ 16 (C34-35). The Power Companies are accustomed to coordinating with the nation's independent system operators and regional transmission organizations to meet new Clean Air Act requirements without impairing the reliability of the electricity grid. Furstenwerth ¶ 11 (C12). They also regularly incorporate costs for compliance with emissions standards into wholesale power prices and commercial terms (*id.* ¶ 10); this has not interfered with the operation of the power markets (*id.*); nor has it been found to usurp a state's authority over its intrastate generation or FERC's jurisdiction under the Federal Power Act. In fact, the Rule does not subject the electricity sector, renewable power generation, or wholesale markets to the EPA's jurisdiction any more than the Cross-State Air Pollution Rule or other emissions standards. Kelliher ¶¶ 7-11 (C30-32).

The Power Companies' experience confirms that the Rule's required reductions could, in fact, be achieved by individual sources, but at significantly greater cost than if sources rely upon the flexible generation-shifting and trading mechanisms afforded by the Rule instead. *See* Furstenwerth ¶ 18 (C15); LaBauve ¶¶ 9-10 (C40-41). For the same reason, Movants are wrong to contend that the Rule is unlawful because it

allows the flexibility of trading to meet its goals. Emissions trading is a demonstrated means of achieving cost-effective reductions from the power sector (*see* 80 Fed. Reg. 64662, 64709); this fact is confirmed by the Power Companies' experience complying with other Clean Air Act emission reduction programs and state and regional programs to reduce CO_2 emissions. *See* Gianunzio ¶ 8 (C26-27); Lavinson ¶ 6 (C48); Nichols ¶ 7 (C55); Welz ¶ 7 (C58). The Power Companies and the power sector therefore advocated in their comments on the proposed rule for the EPA to incorporate the flexibility of emissions trading into the Rule. *See* 80 Fed. Reg. at 64733, note 380 (summarizing industry comments supportive of trading). While Movants now portray the Rule's flexibility in this regard as a straightjacket, their portrayal contradicts the Power Companies' experience and the express preferences of the electricity sector.[3]

III. CONCLUSION

Faced with a Rule that requires *nothing* of affected sources until 2022 at the earliest, Movants seek to blame the Rule, not only for the many ills facing the coal industry, but for a series of speculative harms as well. They incorrectly suggest that many coal-fired power plants will retire as soon as next year, but make no claim that any particular plant will retire because of the Rule. They contend they must begin

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[3] The Power Companies also agree that staying the Rule would not be in the public interest. *See*, *e.g.*, Resp. of Env. & Pub. Health Intervenors at 13-14. In particular, "a stay of the [Rule] would likely cast doubt on the ability of the United States to achieve domestic emission reductions and lead other nations to delay implementing emission reductions." *Id.*, Albright Decl. ¶ 9 (B106). Stalling the momentum and opportunity that the Rule represents to address CO_2 emissions would therefore result in irreparable harm. *See* Albright ¶ 10 (B106).

incurring significant costs now, years in advance of the date when the first emissions reduction obligations under the Rule will go into effect. These claims of immediate harm are without merit.

Any near-term retirements or costs would be due to Movants' own economic decisions and not to any imminent regulatory mandate imposed by the Rule. The regulatory uncertainty Movants contend is created by the Rule's obligation to reduce CO_2 emissions is already a fact of life for the electricity sector, one that the Power Companies regularly manage in the ordinary course of business and that would not be alleviated by the grant of a stay in any event. Finally, assertions that the Rule is unlawful because it allows the flexibility of trading contradict, not only the Power Companies' and the electricity sector's express preference, but the long history of relying upon emissions trading to create incentives to shift dispatch from higher- to lower-emitting units and thereby reduce power sector emissions under the Clean Air Act.

The Power Companies' experience reducing CO_2 emissions demonstrates that the Rule's flexible goals can be met by the nation's utilities, even if they should wait until the Court decides this case on the merits to make decisions on retirements and begin building out new generation capacity. For these reasons, the Court should deny Movants' motions for stay of the Rule.

Dated: December 8, 2015

Respectfully submitted,

/s/ Richard Ayres
Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

Counsel for NextEra Energy, Inc.

/s/ Kevin Poloncarz
Kevin Poloncarz
Counsel of Record
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com

Counsel for Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas And Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response of Power Companies in Opposition to Motions for Stay complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court. I further certify that the combined pages of this brief and those filed by State Intervenors, NGO Intervenors, and Trade Association Intervenors does not exceed the 50 page limit set by the Court in its November 17, 2015 Order (Document #1583948).

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 28(a)(1) and 28(a)(1)(A), Intervenor Power Companies state as follows:

Parties:

Petitioners:

15-1363 – States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming, the State of Arizona Corporation Commission, the Commonwealth of Kentucky, the State of Louisiana Department of Environmental Quality, Attorney General Bill Schuette on behalf of the People of Michigan, and the State of North Carolina Department of Environmental Quality

15-1364 – State of Oklahoma and the Oklahoma Department of Environmental Quality

15-1365 – International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO

15-1366 – Murray Energy Corporation

15-1367 – National Mining Association

15-1368 – American Coalition for Clean Coal Electricity

15-1370 – Utility Air Regulatory Group and American Public Power Association

15-1371 – Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

15-1372 – CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc.

15-1373 – Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

15-1374 – Tri-State Generation and Transmission Association, Inc.

15-1375 – United Mine Workers of America

15-1376 – National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., Big Rivers Electric Corporation, Brazos Electric Power Cooperative, Inc., Buckeye Power, Inc., Central Montana Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power Cooperative, Inc., East River Electric Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric Cooperative,

Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative, and Wolverine Power Supply Cooperative, Inc.

15-1377 – Westar Energy, Inc.

15-1378 – NorthWestern Corporation

15-1379 – National Association of Home Builders

15-1380 – State of North Dakota

15-1382 – Chamber of Commerce of the United States of America, National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, National Federation of Independent Business, American Chemistry Council, American Coke and Coal Chemicals Institute, American Foundry Society, American Forest & Paper Association, American Iron & Steel Institute, American Wood Council, Brick Industry Association, Electricity Consumers Resource Council, Lignite Energy Council, National Lime Association, National Oilseed Processors Association, and Portland Cement Association

15-1383 – Association of American Railroads

15-1386 – Luminant Generation Company, Oak Grove Management Company LLC, Big Brown Power Company LLC, Sandow Power Company LLC, Big Brown Lignite Company LLC, Luminant Mining Company LLC, and Luminant Big Brown Mining Company LLC

15-1393 – Basin Electric Power Cooperative

15-1398 – Energy & Environment Legal Institute

15-1409 – Mississippi Department of Environmental Quality

15-1410 – International Brotherhood of Electrical Workers, AFL-CIO

15-1413 – Entergy Corporation

15-1418 – LG&E and KU Energy LLC

15-1422 – West Virginia Coal Association

15-1432 – Newmont Nevada Energy Investment, LLC and Newmont USA Limited

Respondents

Respondents are Regina A. McCarthy, Administrator, United States Environmental Protection Agency and the United States Environmental Protection Agency.

Intervenors and *Amici Curiae*

Movant-intervenors are American Wind Energy Association, Advanced Energy Economy, American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, Peabody Energy Corporation, Solar Energy Industries Association, the States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, Broward County, Florida, NextEra Energy, Inc., Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City

Light Department, National Grid Generation, LLC, and Pacific Gas and Electric Company, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corp., Joy Global Inc., Gulf Coast Lignite Coalition, West Virginia Highlands Conservancy, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, the Kanawha Forest Coalition, Mon Valley Clean Air Coalition, Keepers of the Mountains Foundation, New York Power Authority, Sacramento Municipal Utility District and Southern California Edison Company.

Amicus Curiae are William D. Ruckelshaus and William K. Reilly.

Movant-*Amicus Curiae* is Philip Zoebisch.

Rulings under Review:

The final agency action under review is "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units", 80 Fed. Reg. 64,662 (October 23, 2015).

Related Cases:

The following consolidated cases pending before this Court challenge a related agency action: *State of North Dakota v. EPA*, No. 15-1381; *Murray Energy Corporation v. EPA, et al.*, No. 15-1396; *Energy & Environment Legal Institute v. EPA*, No. 15-1397; *State of West Virginia, et al. v. EPA, et al.*, No. 15-1399; and *Peabody Energy Corporation v. EPA, et al.*, 15-1438.

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via overnight delivery on counsel for the following parties at the following addresses:

Ms. Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397
Counsel for Movant-Intervenor State of New Hampshire

Patrick Burchette
Holland & Knight LLP
800 17th Street, NW
Suite 1100
Washington, DC 20006-6801
Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; Tex-La Electric Cooperative of Texas, Inc.

William F. Cooper
State of Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for Movant-Intervenor State of Hawaii

David Finley Crabtree
Vice President, General Counsel
10714 South Jordan Gateway
South Jordan, UT 84092
Counsel for Petitioner Deseret Generation & Transmission Co-operative

Tannis Fox
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for Movant-Intervenor State of New Mexico

Ms. Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004
Counsel for Petitioner National Federation of Independent Business

Jacob Larson
Environmental Law Division
321 E. 13th Street, Room 18
Des Moines, IA 50319
Counsel for Movant-Intervenor State of Iowa

Mr. Karl Roy Moor
Southern Company Services, Inc.
600 18th Street, North 15N
Birmingham, AL 35203
Counsel for Petitioner Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

Carrie Noteboom
New York City Law Department
100 Church Street
New York, NY 10007
Counsel for Movant-Intervenor City of New York

Steven J. Oberg
Lynn, Jackson, Shultz & Lebrun, P.C.
PO Box 8250
Rapid City, SD 57709
Counsel for Petitioner Rushmore Electric Power Cooperative, Inc.

Mr. Gary Vergil Perko
Hopping Green & Sams
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
Counsel for Petitioner Gulf Power Company

Mr. Lee Philip Rudofsky
Office of the Attorney General, State of Arkansas
323 Center Street
Suite 200
Little Rock, AR 72201
Counsel for Petitioner State of Arkansas

Bill Spears
Segrest & Segrest, P.C.
18015 West Highway 84
McGregor, TX 76657
Counsel for Petitioner Brazos Electric Power Cooperative, Inc.

Mr. Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel for Petitioner Mississippi Power Company

Luther J. Strange, III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

Laurence H. Tribe
Harvard Law School
Griswold 307
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Movant-Intervenors Peabody Energy Corporation, Dixon Bros., Inc., Nelson Brothers, Inc., Western Explosive Systems Company, Norfolk Southern Corporation, Joy Global Inc., and Gulf Coast Lignite Coalition

Thiruvendran Vignarajah
Office of the Attorney General, State of Maryland
200 St. Paul Place
20th Floor
Baltimore, MD 21202-2021
Counsel for Movant-Intervenor State of Maryland

Ms. Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Philip Zoebisch
28 W Madison Avenue
Collingswood, NJ 08108
Movant-Amicus Curiae

/s/ Kevin Poloncarz
Kevin Poloncarz