

## ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1363 and Consolidated Cases

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

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STATE OF WEST VIRGINIA, ET AL.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

*Respondents.*

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**Response of Advanced Energy Associations In  
Opposition to Motion for Stay**

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Lawrence S. Robbins  
Jennifer S. Windom  
Daniel N. Lerman  
ROBBINS, RUSSELL, ENGLERT,  
ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, D.C. 20006  
Telephone: (202) 775-4500  
Facsimile: (202) 775-4510  
lrobbins@robbinsrussell.com  
*Counsel for Advanced Energy Economy*

Gene Grace  
AMERICAN WIND ENERGY  
ASSOCIATION  
1501 M St., N.W., Ste. 1000  
Washington, D.C. 20005  
Telephone: (202) 383-2500  
Facsimile: (202) 290-9404  
ggrace@awea.org  
*Counsel for American Wind Energy  
Association*

Richard Ayres  
Jessica Olson  
John Bernetich  
AYRES LAW GROUP LLP  
1707 L Street, N.W., Suite 850  
Washington, D.C. 20036  
Telephone: (202) 452-9200  
ayresr@ayreslawgroup.com  
*Counsel for Solar Energy Industries  
Association*

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**TABLE OF CONTENTS**

	<b>Page</b>
ARGUMENT .....	2
A. Movants have not established that the Rule will cause them irreparable harm during the pendency of this litigation.....	2
B. A stay would harm the advanced energy industry. ....	7
CONCLUSION .....	8

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ambach v. Bell</i> , 686 F.2d 974 (D.C. Cir. 1982) .....	7
* <i>Cuomo v. NRC</i> , 772 F.2d 972 (D.C. Cir. 1985) .....	1
<i>Wis. Gas Co. v. FERC</i> , 758 F.2d 669 (D.C. Cir. 1985) .....	3
<b>Regulations</b>	
* 80 Fed. Reg. 64,662 (Oct. 23, 2015) .....	4

\* Authorities chiefly relied upon are marked with an asterisk.

## **GLOSSARY**

CO<sub>2</sub>: Carbon Dioxide

EPA: Environmental Protection Agency

Proposed respondent-intervenors Advanced Energy Economy, American Wind Energy Association, and Solar Energy Industries Association (collectively, “Advanced Energy Associations”) represent more than 3,000 companies and organizations in the advanced energy industry that, in 2014, constituted a \$200 billion industry in the U.S. alone. Advanced Energy Associations’ member companies manufacture, fund, develop, purchase, and operate advanced energy solutions that will reduce CO<sub>2</sub> emissions from existing fossil-fuel-fired power plants to meet the requirements of the Clean Power Plan (“the Rule”). Members range from companies that produce and supply electricity from natural gas, solar, and wind projects, to companies that improve the performance of the electricity distribution grid and increase the efficiency of energy use, to large electricity consumers with an interest in a robust and reliable electricity system.

Movants allege harms that are wholly speculative and not causally related to the Rule, and fail to demonstrate irreparable harm during the short period of judicial review. Industry Movants, in particular, contend that they must make imminent business and investment decisions in reliance on the hypothetical requirements of state plans. But, with a readily available extension, those final plans are not due to EPA until September 2018 (EPA Br. at 10), and compliance obligations will not be triggered until at least 2022. By contrast, as explained below, a stay would inflict real and substantial harm on the advanced energy industry. Movants have utterly failed to establish grounds for this Court to exercise its “extraordinary injunctive powers” to stay the Rule. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

## ARGUMENT<sup>1</sup>

### A. Movants have not established that the Rule will cause them irreparable harm during the pendency of this litigation.

1. *Movants' alleged harms are too speculative to warrant a stay.* Industry Movants speculate that the Rule will cause coal plants to close imminently. But the Rule does not mandate that plant owners and operators take *any* particular compliance measures—much less that they shutter coal plants, develop infrastructure, or take other specific actions. And Movants have no obligations to phase in moderate emission reductions until at least 2022, with full compliance deferred until 2030. Indeed, given that final state plans need not be submitted until September 2018, any near-term plant retirement would be a voluntary, forward-looking business decision, based on factors other than the Rule, and a stay would not prevent it.<sup>2</sup> Movants' alleged harms—which do not result from the Rule in any event—would not be prevented by a stay of this litigation.

Movants' claims about coal plant retirements and other changes in the power sector allegedly resulting from the Rule ignore the myriad factors that have contributed to these changes, including increasing cost-competitiveness of electricity from renewable sources (Goggin Decl. ¶ 49 (D110-111); Baca Decl. ¶¶ 4-5 (D11); Woolf Decl. ¶¶ 38-46 (D279-2867); historically low natural gas prices (Woolf ¶ 39

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<sup>1</sup> The Advanced Energy Associations join EPA's arguments regarding the likelihood of success on the merits and public interest factors. EPA Br. at 11-49, 67-70.

<sup>2</sup> Movants concede that affected companies cannot now predict what specific actions will be required to comply with state plans. *See, e.g.*, Harbert Decl. ¶ 16, Ex. 7-A to Cham. of Comm. Mtn. ("Businesses are simply unable to predict with any degree of certainty which of the many compliance pathways . . . will be chosen by their States.").

(D280-281); Tierney Decl. ¶ 57); other, independent regulations (Tierney ¶ 60); rising deployment of low-cost energy efficiency (Woolf ¶¶ 47-54 (D286-292)); and increasing demand for advanced energy from consumers (Demasi Decl. ¶¶ 4, 7 (D48-49)). To demonstrate irreparable harm, however, claimed injury “must be both certain and great.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Movants have not shown, and cannot show, that any plant retirements during this litigation will be the *certain* and *direct* result of the Rule, as opposed to these other factors.

This Court rejected similar claims of irreparable harm in *Wisconsin Gas*, observing that, to justify a stay, irreparable harm must “directly result from the action which the movant seeks to enjoin,” and that movants’ alleged injury was conjecture dependent on “innumerable variables including . . . overall demand and the price of alternative fuels.” 758 F.2d at 674, 676. “Bare allegations of what is likely to occur,” however, “are of no value since the court must decide whether the harm will *in fact* occur.” *Id.* at 674. “The movant must provide proof that . . . the harm is certain to occur in the near future.” *Id.* Here, it is sheer speculation that Movants’ claimed harms will occur in the near future and, to the extent they do, they have no causal relationship whatsoever to the Rule they seek to enjoin.

2. *Movants have sufficient time to comply with the Rule without a stay.* Movants contend that a stay is necessary because they must take compliance steps immediately, given the lead times for new generation projects. That premise is flawed. Renewable energy projects can be developed quickly from initial assessment to completion—often in less than two years, even for utility-scale plants. Goggin ¶¶ 21-22 (D97-98); Gallagher Decl. ¶ 21 (D60-61); Condo Decl. ¶ 6 (D33); Alonso Decl. ¶ 11 (D3-4). New gas-fired

plants, too, can be developed much quicker than the decades-long time scale posited by Movants. Condo ¶ 7 (D33-34). And for both gas and renewables, infrastructure changes already in development can accommodate any generation changes associated with the Rule, further undermining Movants' exaggerated lead-time arguments. Goggin ¶¶ 24-35, 57-63 (D98-104, D115-120); Woolf ¶ 78 (D304-305).

Movants entirely ignore other compliance options that can be deployed almost immediately. For example, the Rule contemplates increased use of *existing* natural-gas-fired plants, which can happen now. The Rule also recognizes that utilities can comply through energy efficiency and other demand-side measures (80 Fed. Reg. at 64,901), many of which can be deployed rapidly and achieve significant emission reductions. Woolf ¶¶ 57-67 (D293-298); Whitman Decl. ¶ 10 (D249-250); Caperton Decl. ¶ 8 (D21-22); Simon Decl. ¶ 10 (D233). Because Movants can wait until completion of litigation to take compliance actions, they have failed to show that a stay is required.<sup>3</sup>

3. *Movants mischaracterize the availability and economic impacts of renewable energy, energy efficiency, and natural gas deployment.* Even if solar, wind, and natural gas resources did need to be developed during this litigation to achieve compliance (and they do not), such circumstances would not harm either utilities or consumers. Renewable energy

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<sup>3</sup> Movants also can achieve rapid compliance with the Rule through emissions-trading programs. *See* 80 Fed. Reg. at 64,733-35. Although Movants contend that such trading is not feasible, that claim is belied by analogous Clean Air Act programs in which regulated entities met or exceeded emission targets by trading with other sources. In such cases, trading systems arose rapidly in the market and were extremely successful in reducing regulated emissions of sulfur dioxide, nitrogen oxide, and other pollutants. Movants offer no reason to assume that, contrary to this experience, the trading of carbon emissions will not serve as an equally successful, rapidly deployable, and cost-effective method for complying with the Rule. *See* Woolf ¶¶ 83-101 (D308-319).

made up 50% of all capacity added to the grid from 2012-2014, and 55% of all capacity added in 2014. Gallagher ¶ 9 (D54-55). Wind, solar, and gas already dominate the market for new generation—as a result of market forces unrelated to the Rule—and can be deployed rapidly and cost-effectively to achieve compliance. Woolf ¶ 45.

Contrary to Movants' claims, advanced energy and energy efficiency measures are cost-competitive—indeed, they are often the *lowest-cost* generation methods. Gallagher ¶ 6 (D53-54); Baca ¶¶ 6-7 (D12); Goggin ¶ 50 (D111). From 2009 to 2014, the cost of utility-scale wind and solar power declined by 58% and 82%, respectively. Goggin ¶ 49 (D110-111); Meehan Decl. ¶ 16 (D205-206); Woolf ¶¶ 38-42 (D279-283). Renewable energy is generally subject to less price volatility than fossil-fuel generation (Baca ¶ 8 (D12-13); Gallagher ¶ 19 (D59-60); Goggin ¶ 51 (D112)), providing a significant benefit to large energy consumers seeking to reduce exposure to price volatility. Demasi ¶ 10 (D50-51). Natural gas prices also have come down significantly. Woolf ¶ 39 (D280-281). And, once again, Movants ignore entirely energy efficiency measures, which can achieve significant reductions—all while *reducing* electricity bills. Woolf ¶¶ 47-54 (D286-292); Caperton ¶ 5 (D20-21); Chapin Decl. ¶ 5 (D26-27); Counihan Decl. ¶ 12 (D42).

Movants are therefore wrong to assert—particularly prior to knowing what will be required in final state plans—that compliance will be costly. But they are doubly wrong to assert that *states and utilities* will incur any immediate costs of compliance. To the extent that solar, wind, and natural gas resources are developed in the near future, development costs will not be borne by utilities or states. Nearly all associated project costs are incurred by private developers, with no cost or risk incurred by utilities until

they purchase the output of a renewable project or sign a contract to purchase the output. Goggin ¶¶ 7-12 (D90-93); Condo ¶¶ 7-10 (D33-35); Alonso ¶ 12 (D4-5).

4. *Reliance on advanced energy solutions does not create reliability problems.* Movants also contend that the Rule will impair energy reliability. Again, Movants are not obligated to take *any* immediate action under the Rule, much less actions that will affect reliability. Roth Decl. ¶¶ 8-11 (D217-219); Gaw Decl. ¶ 10 (D67).

Regardless, Movants' concerns are contradicted by utilities' real-world experience with reliably integrating large amounts of renewable energy into the grid. Goggin ¶¶ 90-91 (D134-135); Woolf ¶¶ 68-82 (D299-307); Horsman Decl. ¶¶ 12-15 (D177-179). Numerous analyses have shown that increased integration of renewable energy does *not* impair reliability and that the U.S. can obtain a much higher share of its electricity from wind and solar energy. Simon ¶ 8 (D232); Meehan ¶¶ 11-14 (D202-205); Baca ¶¶ 10-13 (D13-16); Goggin ¶ 99-100 (D139-141); Alonso ¶ 22 (D7-9). In fact, the experience of states that receive the highest percentage of electricity generation from renewable energy demonstrates that integration of renewable energy can *improve* reliability. Gallagher ¶¶ 15-18 (D57-59); Goggin ¶ 96 (D137-138). Electricity consumers that depend on an extremely reliable electricity supply, including Google, have located facilities in regions with high renewable penetration without experiencing problems with the stability of that supply. Demasi ¶¶ 3, 9 (D47-48, D50).

Technological advances and economies of scale have driven innovation—including controls in renewable generators, demand-response technology, flexible gas generation, storage, and energy efficiency—that pair with renewable energy to further

bolster reliability. Woolf ¶ 53 (D291); Meehan ¶ 15 (D205); Chapin ¶ 4 (D25-26); Horsman ¶ 12 (D177); Goggin ¶ 102 (D141-145). A well-balanced portfolio of low and zero-emitting sources, coupled with energy efficiency and other demand-side measures, also increases reliability. Woolf ¶ 73 (D301-302); Whitman ¶¶ 6-7 (D247-248); Geller Decl. ¶¶ 4-5 (D79-80). And, contrary to Movants' assertions, existing and planned infrastructure *can* accommodate temporary increases in natural gas demand. Woolf ¶ 78-79 (D304-305). Movants' reliability arguments do not withstand scrutiny.

**B. A stay would harm the advanced energy industry.**

The Court must consider the harms that a stay would impose on the Advanced Energy Associations' members and similarly-situated parties. *See, e.g., Ambach v. Bell*, 686 F.2d 974, 988 (D.C. Cir. 1982) (denying stay where there was "close balance of equities" between the harm to petitioners and the harm to respondents).

A stay of the Rule would chill the continued growth of the \$200 billion advanced energy market—including the businesses of the Advanced Energy Associations' members—below what would otherwise occur by introducing uncertainty among investors.<sup>4</sup> Investors rely on policy certainty in deciding whether to finance advanced energy projects. A stay could shake that reliance, making it more difficult to secure affordable project-level debt and equity, which are essential to developing, constructing, and operating solar, wind, and energy efficiency projects.<sup>5</sup>

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<sup>4</sup> As one example, such uncertainty could delay projects until past the phasedown of the Federal Investment Tax Credit. Mendelsohn Decl. ¶¶ 20-21 (D213-214).

<sup>5</sup> By contrast, electricity generator Movants would not be similarly harmed if a stay were not issued, because they typically do not finance new construction through the private capital markets. Nor would the coal industry be affected, because its members are already largely unable to raise capital, owing to factors unrelated to the Rule.

Storch Decl. ¶ 18 (D241-242); Mendelsohn ¶ 9 (D209-210); Woolf ¶ 104 (D320-321). Uncertainty or slowing growth in the renewable energy market also could harm consumers planning to make long-term purchases of additional renewable energy. Demasi ¶ 11 (D51).

A stay would also likely diminish the benefit to investors of the Rule's Clean Energy Incentive Program ("CEIP"), a voluntary early action program. To be eligible for marketable CEIP emission credits, a facility must be constructed after the relevant state submits its final plan. The facility can then earn salable credits for clean power generated or saved in 2020 and 2021. A stay that delayed the submission of state plans would delay construction of wind and solar facilities, or development of energy efficiency projects, which could in turn constrict or even eliminate the opportunity to earn such credits. Mendelsohn ¶ 19 (D212-213); Storch ¶ 17 (D241); Woolf ¶ 105 (D321); Lehr Decl. ¶ 32 (D193).

These harms will be felt beyond the Advanced Energy Associations and their members. A stay would, for example, delay the CEIP's double-crediting for energy efficiency projects in low-income communities and diminish the incentive to work in these disadvantaged areas. Woolf ¶ 105 (D321); Hladik Decl. ¶¶ 11, 18 (D167, D170-171). A stay would also slow job growth in the solar and wind industries (Luecke Decl. ¶ 11 (D198); Mendelsohn ¶¶ 10-12; Goggin ¶ 137 (D161)), which collectively employ more than twice as many workers as the coal industry. Luecke ¶¶ 6-7; Mendelsohn ¶ 10 (D210).

## CONCLUSION

For the foregoing reasons, the Court should deny the motions to stay the Rule.

Dated: December 8, 2015

/s/ Lawrence S. Robbins

Lawrence S. Robbins  
Jennifer S. Windom  
Daniel N. Lerman  
ROBBINS, RUSSELL, ENGLERT, ORSECK,  
UNTEREINER & SAUBER LLP  
1801 K Street, N.W., Suite 411  
Washington, D.C. 20006  
Telephone: (202) 775-4500  
Facsimile: (202) 775-4510  
lrobbins@robbinsrussell.com  
*Counsel for Advanced Energy Economy*

/s/ Gene Grace

Gene Grace  
AMERICAN WIND ENERGY ASSOCIATION  
1501 M St., N.W., Ste. 1000  
Washington, D.C. 20005  
Telephone: (202) 383-2500  
Facsimile: (202) 290-9404  
ggrace@awea.org  
*Counsel for American Wind Energy Association*

/s/ Richard Ayres

Richard Ayres  
Jessica Olson  
John Bernetich  
AYRES LAW GROUP LLP  
1707 L Street, N.W., Suite 850  
Washington, D.C. 20036  
Telephone: (202) 452-9200  
ayresr@ayreslawgroup.com  
*Counsel for Solar Energy Industries Association*

**CERTIFICATE OF COMPLIANCE**

The foregoing Response of Advanced Energy Associations in Opposition to Motions for Stay complies with the type-volume and type-space requirements of Fed. R. App. P. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point font. The combined pages of this brief and those filed by the State Intervenors, NGO Intervenors, and Power Company Intervenors does not exceed the 50-page limit set by the Court in its November 17, 2015, Order (Doc. # 1583948).

Dated: December 8, 2015

/s/ Lawrence S. Robbins

Lawrence S. Robbins

## 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 Inc.

15-1372 – CO<sub>2</sub> Task Force of the Florida Electric Power Coordinating Group,

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/ Lawrence S. Robbins  
Lawrence S. Robbins

**CERTIFICATE OF SERVICE**

I hereby certify that on December 8, 2015, I electronically filed the foregoing Advanced Energy Associations in Opposition to Motions for Stay by using the appellate CM/ECF system, which will send notice of such filing to all registered counsel. I also caused the foregoing to be served via U.S. Mail 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/ Lawrence S. Robbins

Lawrence S. Robbins