ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

Nos. 14-1112, 14-1151

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

IN RE MURRAY ENERGY CORPORATION

MURRAY ENERGY CORPORATION,

Petitioner,

STATE OF INDIANA, *et al.*,

Intervenors for Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents,

STATE OF NEW YORK, *et al.*,

Intervenors for Respondents.

On Petition for Writ of Prohibition and On Petition
for Review of EPA Notice of Proposed Rulemaking

BRIEF OF CALPINE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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February 19, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, all parties, intervenors, and *amici* appearing in this case are listed in the brief for Respondent Environmental Protection Agency.

Intervenor for Petitioner: West Virginia Coal Association

References to the rulings under review and related cases also appear in Respondent's brief.

STATEMENT REGARDING SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

Under D.C. Circuit Rule 29(d), Calpine Corporation ("Calpine") states that it is aware of one other *amicus* brief in support of Respondent, to be filed by Jody Freeman and Richard J. Lazarus (hereinafter, "the Law Professor *amici*"), but that both briefs combined do not exceed the 7,000 words permitted a single *amicus* brief under agreement with counsel for the Law Professor *amici*. It is necessary for *amicus* Calpine to file a separate brief from the brief concurrently filed by the Law Professor *amici*, as the Law Professor *amici's* brief will reflect their scholarly expertise on matters of statutory interpretation and administrative law, while *amicus* Calpine's brief relies upon its stature and experience as one of the largest electricity generators in the U.S. to counterbalance the arguments presented by Petitioner and its supporters regarding the alleged immediacy of harm to particular electric generating units caused by the Proposed Clean Power Plan.[1]

Under Federal Rule of Appellate Procedure 29(c), Calpine states that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

[1] Regarding the source of its authority to file for purposes of Federal Rule of Appellate Procedure 29(c)(4), Calpine states that the unopposed motions of Calpine and the Law Professor *amici* to file their respective *amicus curiae* briefs in support of respondents were both granted by the Court on February 12, 2015 (Doc. 1537280).

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rules 26.1 and 29, *amicus curiae* Calpine Corporation respectfully submits this Corporate Disclosure Statement and states as follows:

Calpine Corporation ("Calpine") is a major U.S. power company which owns 88 primarily low-carbon, natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering over 26,500 megawatts of electricity to customers and communities in 18 U.S. states and Canada. Calpine's fleet of combined-cycle and combined heat and power plants is among the largest in the nation. Calpine is a publicly-traded corporation, organized and existing under the laws of the State of Delaware. Its stock trades on the New York Stock Exchange under the symbol CPN. Calpine has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in Calpine.

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Other Authorities

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CO_2	Carbon Dioxide
EGUs	Electric Generating Units
EPA	United States Environmental Protection Agency
MATS	Mercury and Air Toxics Standards, 77 FR 9304 (Feb. 16, 2012)
NODA	Notice of Data Availability, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 64543 (Oct. 30, 2014)
Murray	Murray Energy Corporation
UARG	Utility Air Regulatory Group

INTEREST OF *AMICUS CURIAE*

Amicus is one of the largest electricity producers in the U.S. and supports EPA's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" Proposed Rule, 79 FR 34830 (June 18, 2014) ("Proposed Rule").

Petitioner Murray challenges the Proposed Rule on a far-fetched legal theory, claiming that the proposal is "unprecedented" and Murray will suffer "irreparable injury" if this Court does not grant immediate relief. Petitioner's claims lack support and, therefore, cannot justify the extraordinary relief Petitioner seeks. Additionally, EPA has consistently demonstrated its willingness to revise proposed rules affecting the power sector to provide additional flexibility, undercutting Petitioner's assertions of irreparable injury resulting from the Proposed Rule.

Accordingly, Petitioner should not be permitted to "short-circuit", *Nebraska v. EPA*, 2014 WL 4983678, at *1 (D. Neb. 2014), EPA's ongoing rulemaking process. The writ should be denied.

ARGUMENT

Petitioner, and intervenors and *amici* in support thereof, present several specious claims regarding the purported impacts and novelty of the Proposed Rule. *See, e.g.,* Pet.Br. 41 (stating "Petitioner and others will suffer irreparable injury if this Court does not provide immediate relief").

For example, Petitioner asserts that "coal-fired power plants may shut down based on the risk that the mandate could be upheld, no matter its final form…" *Id.* at 42. Petitioner presents no evidence to support this assertion, nor could it: the notion that a power plant could be forced to close due to a proposed regulation *regardless* of "its final form" (*id.*) is illogical and cannot support a claim of irreparable harm. *See Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating, to prove "irreparable harm", "[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.") (emphasis in original). In fact, the Proposed Rule alone would not require that any particular coal-fired power plant shutdown; rather, secular changes, including lower natural gas prices, are rendering coal-fired power plants uneconomic. *See* Decl. 10-11 (Attachment A). Petitioner cannot conflate these secular changes with alleged impacts of the Proposed Rule to bolster its claim of irreparable injury. *See Wisconsin Gas Co.*, 758 F.2d at 674 (stating that "the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin").

Furthermore, EPA has consistently demonstrated its willingness to revise proposed rules to appropriately account for potential impacts on the power sector and provide regulated entities additional flexibility. *See, e.g.,* Final Rule, MATS, 77 FR 9304, 9411 (Feb. 16, 2012) (allowing "reliability critical units" to qualify for an additional year to achieve MATS compliance); Final Rule, Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and

Ozone, 77 FR 34830, 34831 (June 12, 2012) (revising certain state emissions budgets upward after Cross-State Air Pollution Rule was finalized); Final Rule, Hazardous and Solid Waste Management System; Disposal Of Coal Combustion Residuals From Electric Utilities, Pre-Publication Version, at 460 (Dec. 18, 2014) (establishing performance standard for fugitive dust control in lieu of proposed rule's numerical standard of 35 $\mu g/m^3$ for subject landfills and surface impoundments); Decl. 9. In the present context, EPA could ultimately alleviate the concerns of Petitioner and its supporters if and when it finalizes the Proposed Rule; and, indeed, EPA requested additional comment in a notice of data availability ("NODA") regarding phasing in certain reductions required by the Proposed Rule. Decl. 7.

However, even if EPA finalized the Proposed Rule as-is, Petitioner and its supporters profoundly misunderstand what such regulation would require. For instance, declarant for intervenor UARG claims that "[t]he Proposed Rule contemplates that [heat rate] improvements [at coal-fired plants] must be complete by 2020, which requires these activities to begin now." UARG Br., Att. B, at 5. However, heat rate improvements, along with other so-called "building blocks" of EPA's proposed "best system of emission reduction", only form the basis of each state's proposed emission performance goals. 79 FR 34830, 34852. States would decide which measures to employ in order to achieve their emission goals and, therefore, no affected EGU would be *per se* required to institute any building block. *See* Decl. 6.

Additionally, contrary to the assertions of the declarant for UARG above or for Petitioner (*see* Pet. Standing Add., at para.22) (stating that the Proposed Rule "will likely require Coronado [Generating Station] to cease operations in 2020"), the Proposed Rule does not mandate that *any* building block be fully implemented in 2020, which is only the first year that state plans would be in force. Rather, the Proposed Rule proposes both interim and final emission goals for each state, and proposes that compliance with the former not be judged *until 2030* (i.e., by averaging emissions for the period 2020-2029), while compliance with the latter will first be judged in 2033 (i.e., by averaging rolling 2030-2032 emissions). 79 FR 34830, 34906. Further, the interim goals that arguably mandate early reductions in certain instances may themselves be subject to significant changes, so they are not so front-loaded. *Amicus* submitted comments suggesting such changes and anticipates that, as part of the ordinary rulemaking process, EPA may reshape the interim goals. *See* Decl. 7-8. Recent remarks by EPA Administrator Gina McCarthy confirm that EPA is considering such changes. Decl. 8.

Ultimately, the significant flexibility that the Proposed Rule would provide—both in terms of the measures states can use to meet their emission goals and the timeline for compliance—undermines Petitioner's and its supporters' assertions of immediate and extraordinary harm.

CONCLUSION

Petitioner is not clairvoyant: It does not know what EPA's final rule will require or how individual states will implement it, and, therefore, Petitioner's claims of immediate harm to individual EGUs are without merit. Accordingly, Petitioner has not demonstrated that is will suffer "irreparable injury" (Pet.Br. 41) or illustrated the presence of "truly extraordinary" circumstances (*Pub. Util. Com'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985)) justifying this Court's issuance of an extraordinary writ.

Dated: February 19, 2015

Respectfully submitted,

/s/ Kevin Poloncarz

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing Brief of Calpine Corporation as *Amicus Curiae* In Support of Respondent contains 1,000 words, as counted by counsel's word processing system. Counsel further certifies that the combined words of *amicus* Calpine Corporation's brief and the brief submitted by the Law Professor *amici* do not exceed the applicable word limit established by Federal Rule of Appellate Procedure 29(d).

Dated: February 19, 2015

/s/ Kevin Poloncarz

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 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:

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ATTACHMENT A

DECLARATION OF J. D. FURSTENWERTH

I, J. D. Furstenwerth, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am Senior Director of Environmental Services with Calpine Corporation ("Calpine").

2. Calpine owns 88 natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering 26,004 megawatts of electricity to customers in the United States.

3. Of the 10 largest U.S. electricity generators, Calpine has the lowest emissions intensity for both nitrogen oxides and sulfur dioxide.[1]

4. Calpine supports the rule proposed by the U.S. Environmental Protection Agency ("EPA") entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 34,830 (Jun. 18, 2014) ("Proposed Rule").

5. While Calpine supports the Proposed Rule, Calpine has submitted extensive comments to EPA in accordance with the administrative process afforded by the Administrative Procedure Act and Section 307 of the Clean Air Act. Calpine's

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[1] Natural Resources Defense Council et al., Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States, at 28 (2014), *available at*: http://www.nrdc.org/air/pollution/benchmarking/files/benchmarking-2014.pdf (emissions and generation data from 2012).

comments, which are assigned docket identification number EPA-HQ-OAR-2013-0602-22799,[2] support the Proposed Rule in many respects. For example, as the operator of the largest fleet of natural gas-fired combined cycle ("NGCC") facilities in the U.S., Calpine spoke from its extensive experience operating such facilities in confirming that the 70 percent (%) utilization rate for NGCC facilities assumed by EPA in setting the states' goals is technically and economically feasible under a wide range of operating conditions. This assumption that existing NGCC facilities can be operated at a minimum 70% utilization rate and the reductions achieved through redispatch to such facilities at that rate are known as "building block 2" in the Proposed Rule.

6. Under EPA's proposed "building block" methodology, no state or individual electric generating unit is actually required to achieve reductions in each of the four building blocks. Rather, EPA merely assumes that a certain level of reductions can be achieved in each of the building blocks when it sets each state's respective goals, but then leaves it to the states and electric utilities to figure out what mix of measures is most appropriate to achieve the required reductions at least cost to ratepayers. Calpine strongly praised the building block methodology in this respect because it would allow market forces to determine the best means to achieve the required reductions in the most flexible manner, and would eschew the type of

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[2] *Available at*: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-22799.

"command and control" approach that often leads to inefficient outcomes, when a particular technology or reduction is required for each affected electric generating unit.

7. In other respects, Calpine's comments suggest revisions to the Proposed Rule that would further bolster its flexibility. For example, Calpine commented that, in some cases, the Proposed Rule's "interim goals" are nearly as strict as the final goals and would therefore require some states to achieve the bulk of reductions much earlier than the date for compliance with the final goals, which first apply as a rolling three-year average calculated over the years 2030-2032. To mitigate part of our concern regarding the front-loaded nature of these interim goals, Calpine is supporting a proposal described by EPA in a supplemental request for public comment it issued during the public comment period. *See* Notice of Data Availability, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 FR 64543, 64545 (Oct. 30, 2014) (hereinafter, "NODA"). Calpine supports the second means proposed by EPA in the NODA for alleviating the burdens imposed by the interim goals, whereby the reductions achievable through building block 2 (i.e., redispatch to existing NGCC facilities at up to 70% capacity) would be phased-in over time, rather than all assumed to occur in 2020. Calpine further commented that, much like the Proposed Rule allows states flexibility to establish their own "glideslope" in their respective state plans, EPA should provide

additional flexibility for states to establish their own enforceable interim goals, and not prescribe them in the final rule.

8. Based in part on EPA's solicitation of additional public comment in the NODA and on public statements that EPA officials have made since the close of the public comment period,[3] Calpine is hopeful that EPA is considering its comments on the interim goals, along with comments from many other affected stakeholders on the topic, and that any final rule will reflect EPA's careful consideration of these comments and changes to the interim goals. This is how the administrative process is designed to work and usually works, barring the type of extraordinary judicial intervention that the petitioner Murray Energy Corp. is seeking to keep that process from playing itself out in the instant case.

9. Changes to reflect the stringency of the Proposed Rule's interim goals would be consistent with EPA's track record for developing rules affecting the power sector. Time and time again, EPA has demonstrated that such rules may evolve significantly as a result of public comment, so that the final outgrowth of the original proposal ultimately provides greater flexibility, longer timelines to come into

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[3] For example, at a conference sponsored by the National Association of Regulatory Utility Commissioners on February 17, 2015, EPA Administrator Gina McCarthy offered a "big hint" with respect to changes in the interim goals that would be responsive to commenters' claims that the Proposed Rule's interim goals would require too much, too soon. *See* Mark Drajem, *EPA Considers Delaying Carbon Deadline After Utilities Object*, Bloomberg, Feb. 17, 2015, *available at*: http://www.bloomberg.com/news/articles/2015-02-17/epa-considers-revised-timing-for-complying-with-power-plant-rule.

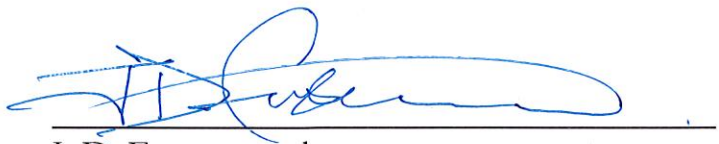
compliance without impacting electric reliability and, in some instances, reduced compliance burdens.

10. While certain representatives of the electric sector and the petitioner Murray Energy Corp. are pointing to the Proposed Rule as the cause for imminent shutdowns of coal-fired power plants, such shutdowns are reflective of secular changes throughout the electric sector, which have rendered the operation of coal-fired electric generating units uneconomic. Among the factors driving these secular changes are the abundant supply of relatively inexpensive natural gas and the fact that natural gas-fired generation produces only a fraction of the emissions generated by coal-fired generation and is better capable of supporting the integration of intermittent renewable sources to the grid.

11. It is not correct to claim that the Proposed Rule would cause any particular coal-fired power plant to shutdown. A recent analysis of the Proposed Rule prepared for the Advanced Energy Economy Institute makes clear that, "while [the Mercury Air Toxics Standards] will force coal-plant retirements unless certain capital investments are made by a specific date, the [Proposed Rule] alone will not force the retirement of any fossil generation source." *EPA's Clean Power Plan and Reliability: Assessing NERC's Initial Reliability Review*, prepared by J. Weiss, PhD, B. Tsuchida, M. Hagerty and W. Gorman, The Brattle Group, Feb. 2015, *available at*: http://info.aee.net/brattle-reliability-report, at 8. Indeed, recognizing the flexibility

built into the Proposed Rule, this analysis confirms that, under the Proposed Rule, "no specific plant needs to retire at any given time." *Id.*, at 30.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on February 19, 2015.



J. D. Furstenwerth