

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 15-1363 and Consolidated Cases

(15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398)

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

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WEST VIRGINIA, et al.,

*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY  
AND REGINA A. MCCARTHY, ADMINISTRATOR,

*Respondents.*

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**UNOPPOSED MOTION OF 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  
FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Calpine Corporation (“Calpine”), the City of Austin d/b/a Austin Energy (“Austin Energy”), the City of Seattle, by and through its City Light Department (“Seattle City Light”), National Grid Generation, LLC (“National Grid

Generation”), and Pacific Gas and Electric Company (“PG&E”) (collectively, referred to herein as the “Power Companies”) respectfully request leave to intervene in support of the United States Environmental Protection Agency (“EPA”) and its Administrator, Regina A. McCarthy (collectively, “Respondents”) in the above-captioned and consolidated petitions for review of the final rule of Respondents entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units”, 80 Fed. Reg. 64,662 (October 23, 2015) (hereinafter “Clean Power Plan” or “CPP”). Pursuant to Circuit Rule 15(b), this motion constitutes a motion to intervene in all existing and future cases before this court involving the same agency action.

Counsel for the Power Companies consulted with counsel for Petitioners, Respondents, and Movant-Intervenors in this case and the consolidated cases on November 4 by 1:32 PM Eastern. Counsel for Respondents and Movant-Intervenors for Respondents have stated that they do not oppose the motion. Counsel for Petitioners in cases 15-1363, 15-1365, 15-1367, 15-1368, 15-1370, 15-1373, 15-1374, 15-1375, 15-1380, 15-1382, and 15-1386 have stated that they take no position on the motion at this time. Counsel for Petitioners in cases 15-1364 and 15-1393 have stated that they do not oppose the motion. Not all counsel for the remaining Petitioners and Movant-Intervenor for Petitioners had responded to the Power Companies’ request for position at the time of this filing.

## I. INTRODUCTION AND INTEREST OF POWER COMPANIES

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. Together, they possess an extensive history of investing in clean generation and supporting the EPA's efforts to reduce emissions of hazardous, criteria, and greenhouse gas ("GHG") pollutants under the Clean Air Act ("CAA"). 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<sub>2</sub>") 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<sub>2</sub> emissions within their respective generation fleets and portfolios. Their collective experience achieving those reductions demonstrates the achievability and reasonableness of the CPP.

Calpine is the largest generator of electricity from both natural gas and geothermal resources in the United States ("U.S."), owning 83 natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering nearly 27,000 megawatts ("MW") of electricity to customers in the U.S. *See* Attach. A, Decl. of J.D. Furstenwerth (hereinafter, "Decl.") at 2. Of the ten largest electricity generators in the U.S., Calpine ranks as having the

lowest overall emissions intensity for nitrogen oxides (“NO<sub>x</sub>”) and sulfur dioxide (“SO<sub>2</sub>”) and the lowest emissions intensity for CO<sub>2</sub> among those same ten generators’ fossil fuel fleets.<sup>1</sup> This is a direct reflection of the investments in clean generation technology Calpine routinely undertakes in developing and maintaining its fleet. Complementing these investments, Calpine has consistently supported the EPA in its efforts to reduce emissions in the power sector, including its intervention in support of the EPA in defense of the Mercury and Air Toxics Standards<sup>2</sup> and the Cross-State Air Pollution Rule,<sup>3</sup> and its participation as *amicus curiae* in support of the EPA’s authority to require that CAA permits for large sources include GHG emission controls.<sup>4</sup> Together, these efforts reflect Calpine’s belief that strong environmental objectives can operate in tandem with sound business objectives.

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<sup>1</sup> See Decl. at 3; Natural Resources Defense Council et al., *Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States*, at 10 (2015), *available at*: <http://www.nrdc.org/air/pollution/benchmarking/files/benchmarking-2015.pdf> (emissions and generation data from 2013).

<sup>2</sup> See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev’d sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015).

<sup>3</sup> See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014).

<sup>4</sup> See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2447 (2014) (citing brief for Calpine as *amicus curiae* in upholding EPA’s authority to mandate that prevention of significant deterioration permits for so-called “anyway” sources require the best available control technology for GHGs).

Austin Energy is the nation's eighth largest municipally-owned electric utility providing electricity to more than 448,000 customers and a population of nearly one million. Founded by the City of Austin in 1895, Austin Energy's annual revenues exceed \$1.29 billion, which entirely fund its operations and provide a return to the City of Austin. Overseeing a diverse mix of nearly 3,500 MW of total generation and purchased power capacity, Austin Energy operates several gas-fired EGUs—some of which constitute affected EGUs subject to the CPP—at the 927-MW Decker Creek Power Station and the 570-MW Sand Hill Energy Center. Austin Energy also owns a share of a coal-fired and nuclear power plant (the Fayette Power Project and South Texas Power Project, respectively). Austin Energy's generation portfolio also includes nearly 1,000 MW of renewable generation capacity, including utility-scale wind, solar, and biomass resources. In managing this diverse portfolio, Austin Energy has implemented an aggressive GHG-reduction plan, with aims of meeting 35 percent of all energy needs through renewable resources and reducing CO<sub>2</sub> power plant emissions by 20 percent below 2005 levels by 2020, and even greater reductions and renewable goals in later years.

Seattle City Light is the tenth largest municipally-owned electric utility in the United States and provides electricity to approximately 415,000 customers in the Seattle area. Ninety percent of Seattle's electricity is generated through

hydroelectric operations, much of which are owned and operated by Seattle City Light. The remainder of Seattle City Light's portfolio consists of purchases from a diverse mix of sources, including nuclear, wind, coal and landfill gas generation. Seattle City Light is the first utility in the nation to achieve net-zero GHG emissions, first achieving this accomplishment in 2005 and repeating it each year since then. This commitment and achievement reflect Seattle City Light's experience with, and understanding of, the opportunities and challenges faced by the power sector in a carbon-regulated environment.

National Grid Generation is an electric company based in the northeast United States. National Grid Generation owns and operates 50 natural gas- and oil-fired electric generating units capable of delivering approximately 3,800 MW of electricity to consumers throughout Long Island, New York, including a number of EGUs directly subject to regulation under the Clean Power Plan. The majority of these units participate in the Regional Greenhouse Gas Initiative ("RGGI") and it is anticipated that they will continue to participate in RGGI as part of CPP implementation. National Grid Generation and its affiliates are leaders in energy efficiency and support the Clean Power Plan for the role that both energy efficiency and renewable energy can play in attaining its goals.

PG&E provides electric and gas service to Northern and Central California, serving approximately 16 million people throughout a 70,000-square-mile service

area. Incorporated in California in 1905, PG&E is among the largest combined natural gas and electric utilities in the United States. PG&E owns and operates more than 7,500 MW of generating capacity across a diverse mix of hydropower, gas-fired, renewable and nuclear generating units. Among its fleet, PG&E owns and operates two highly efficient gas-fired combined cycle power plants, the 657-MW Colusa Generating Station and the 580-MW Gateway Generating Station, each of which consists of affected EGUs subject to the CPP. PG&E has long been committed to reducing GHG emissions across its generation portfolio and has a CO<sub>2</sub> emissions rate for delivered electricity that is roughly two thirds cleaner than the national utility average. Additionally, PG&E's overall generating fleet has the lowest carbon intensity among the 25 largest generators (excluding federal operators of hydropower projects).<sup>5</sup> Significantly, over 50 percent of PG&E's delivered electricity comes from renewable or CO<sub>2</sub>-free resources.

As a coalition of entities which own and operate affected EGUs subject to the Clean Power Plan and manage diverse generation portfolios consisting of electricity generated by both affected EGUs and renewable resources, the Power Companies have a distinct, significant interest in ensuring that the CPP is upheld

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<sup>5</sup> See Natural Resources Defense Council, et al., Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States, *supra* note 1 at 10 (indicating that PG&E was the 24th largest generator based on 2013 generation data, with a carbon intensity for all generating sources lower than all others among the 25 largest generators, except for the U.S. Army Corps of Engineers).

and timely implemented. As a result of their extensive experience and investments in developing and procuring generation from low-emitting sources, the Power Companies are well positioned to comply with and benefit from the Clean Power Plan and support its objectives of reducing CO<sub>2</sub> emissions from the power sector.

The Power Companies' interest in the CPP has been well demonstrated through their active efforts in support of the EPA, including the submission of an extensive collection of comments on the proposed rule.<sup>6</sup> The Power Companies' interest is further demonstrated by their history of participation before this Court in support of the proposed rule and other recent challenges to CAA rulemakings aimed at reducing pollutant emissions from the power sector. Calpine in particular was granted leave to participate by this Court as *amicus curiae* in support of the

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<sup>6</sup> *See, e.g.*, Letter from J.D. Furstenwerth, Senior Director, Environmental Services, Calpine to EPA (Nov. 26, 2014), EPA-HQ-OAR-2013-0602; Letter from Kathleen Garrett, Director of Environmental Services, Austin Energy to EPA (Dec. 1, 2014), EPA-HQ-OAR-2013-0602; Letter from Jorge Carrasco, General Manager and CEO, Seattle City Light, to EPA (Dec. 1, 2014), EPA-HQ-OAR-2013-0602; Letter from Edward White, Vice President Environmental, National Grid to EPA (Nov. 25, 2014), EPA-HQ-OAR-2013-0602; Letter from Janet Loduca, Vice President, Safety, Health, and Environment, Pacific Gas and Electric Company, et al. to EPA (Dec. 1, 2014) EPA-HQ-OAR-2013-0602 (joint comments on proposed CPP by several California utilities, including PG&E); Letter from Dave Robertson, Portland General Electric, VP, Public Policy, et al. to EPA (Nov. 25, 2014) EPA-HQ-OAR-2013-0602 (joint comments on proposed CPP by several utilities, including Seattle City Light and PG&E); Letter from Calpine Corporation et al. to EPA (Dec. 1, 2014) EPA-HQ-OAR-2013-0602 (joint comments on proposed CPP by companies including Calpine, National Grid, and Seattle City Light); Letter from Michael J. Bradley, Director, The Clean Energy Group to EPA (Dec. 1, 2014) EPA-HQ-OAR-2013-0602 (comments on proposed CPP by the Clean Energy Group, a diverse coalition including many of the Power Companies).



EPA in the premature litigation brought by several of the Petitioners seeking to prevent the EPA from finalizing the CPP.<sup>7</sup> Further, National Grid Generation has previously intervened before this Court in support of the EPA in defense of the Mercury and Air Toxics Standards.<sup>8</sup> Calpine has also been granted leave to participate in recent challenges to rulemaking under the CAA in both this Court and the U.S. Supreme Court and, in those cases, offered an authoritative perspective on subjects germane to the outcome of the litigation, such as power market dynamics, reliability of the electricity grid and how competitive markets can be utilized to drive reductions in emissions from the electricity sector.<sup>9</sup> The Power Companies anticipate providing similar perspectives in this case.

For these reasons and as described below, the Power Companies have significant interests in the outcome that will be harmed if the challenged action is reversed, and those interests will not adequately be represented by the other parties in this case. The Court should grant this motion.

## II. GROUNDS FOR INTERVENTION

Under Rule 15(d), a motion to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest

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<sup>7</sup> Brief for Calpine as Amicus Curiae Supporting Respondents, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

<sup>8</sup> See *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015).

<sup>9</sup> See *id.*; *supra* notes 2-4 and accompanying text.

of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). The Power Companies’ motion is timely because it was filed within 30 days after the petition for review was filed. *Id.*

The Power Companies have a substantial interest in the outcome of this case as owners and operators of affected EGUs and as managers of generation portfolios that consist of both affected EGUs subject to the CPP and low- and zero-carbon sources that can be relied upon to achieve the CPP’s goals. As outlined above, the Power Companies have taken significant, early steps to reduce CO<sub>2</sub> emissions from affected units and across their generation portfolios, undertaking substantial investments to provide clean, affordable electricity to their customers. Calpine, for instance, has invested billions of dollars in building and improving its fleet of natural gas generating units—investments made in anticipation of increasingly stringent emissions requirements. Decl. at 4. Calpine anticipates that its long-term investments in clean generation technology will be rewarded through implementation of the CPP. These rewards would be severely diminished or in some instances lost entirely if the CPP is invalidated. *Id.* at 8. Thus, the Power Companies have an interest in the timely and full implementation of the Clean

Power Plan, and disposition of these petitions may impair or impede their ability to protect that interest.<sup>10</sup>

The Power Companies' interests are unique and distinct from those of Respondents, whose interests are in the proper administration and implementation of the CAA.<sup>11</sup> Additionally, the Power Companies' interests and perspective are unique from those of other intervenors in support of the EPA. As a coalition of many of the nation's largest and most forward-thinking electric generators and utilities, the Power Companies possess special expertise and valuable experience regarding how the electricity markets function, how the costs associated with new emissions requirements are incorporated into electricity prices and how CO<sub>2</sub> emission have been reduced within their respective generating fleets and portfolios without impairing the efficient functioning of the power markets or their ability to continue delivering clean, affordable electricity to their customers. The Power Companies intend to bring this expertise and experience to bear in this litigation. For example, as the owner of the largest fleet of existing natural gas combined

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<sup>10</sup> See, e.g., *Huron Env'tl. Activist League v. U.S. Env'tl. Protection Agency*, 917 F. Supp. 34, 43 (D. D.C. 1996) (intervention of industry groups granted where relief could establish rule of law unfavorable to intervenors).

<sup>11</sup> See *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) ("A government entity . . . is charged by law with representing the public interest of its citizens"); see also *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (finding the EPA did not adequately represent interests of proposed industry intervenors where appellants' interest was more narrow and focused than the EPA's).

cycle units, Calpine has a special and distinct interest in defending the second of the CPP's "building blocks" ("[s]ubstituting increased generation from lower-emitting existing [NGCC] units for generation from higher-emitting affected steam generating units"<sup>12</sup>), as well as the CPP's leakage provisions,<sup>13</sup> which will assure the integrity of reductions achieved in states implementing mass-based plans. The Power Companies are also strongly interested in this Court upholding the flexibility afforded by the CPP for states to utilize market-based mechanisms to achieve the required reductions in CO<sub>2</sub> emissions in the most cost-effective manner. The Power Companies have significant experience complying with other market-based programs designed to reduce emissions from the power sector under the CAA and correlative state programs, such as the cap-and-trade programs implemented by states that are part of the Regional Greenhouse Gas Initiative and California. The Power Companies advocated in their comments for the EPA to provide flexibility for states to utilize emissions trading to achieve the CPP's goals, including mass-based goals, and seek to defend the flexibility afforded by the Clean Power Plan in this respect.

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<sup>12</sup> Clean Power Plan, 80 FR at 64667; *see also* Decl. at 7.

<sup>13</sup> *See* Clean Power Plan, 80 FR at 64949, 40 C.F.R. § 60.5790(b)(5) (requiring state plans that set a mass-based emission trading program for the state's affected EUGs to include, *inter alia*, "[r]equirements that address potential increased CO<sub>2</sub> emissions from new sources, beyond the emissions expected from new sources if affected EGU were given emission standards in the form of the subcategory-specific CO<sub>2</sub> emission performance rates.").

Importantly, the Power Companies' participation will provide a useful counterbalance for the Court in evaluating the industry Petitioners' claims of the CPP's unreasonableness. The Power Companies provided strong and authoritative voices on the reasonableness of the CPP in the comments they submitted on the proposed rule, which both supported the proposed rule and offered numerous revisions to bolster its flexibility and preserve the integrity of the reductions to be achieved through its implementation.<sup>14</sup> Later, when the proposed rule was prematurely challenged by several parties, including Petitioners in these proceedings, Calpine was the sole energy producer or member of private industry to support the EPA by filing an *amicus curiae* brief, wherein it urged the Court to dismiss those challenges and refrain from short-circuiting the ordinary rulemaking process.<sup>15</sup> Now that the Clean Power Plan is final, the Power Companies wish to defend the reasonableness of the CPP, the achievability of its goals and the flexibility afforded by it for states to utilize the most cost-effective means available to achieve the required reductions from the affected EGUs.

Given the early stage of this litigation, participation by the Power Companies will cause neither delay nor undue prejudice to the parties. Moreover, the Power Companies are willing to coordinate with the EPA and other intervenors

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<sup>14</sup> See *supra* note 6.

<sup>15</sup> Brief for Calpine as Amicus Curiae Supporting Respondents, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015).

for Respondents to avoid duplicative briefing, and will follow any schedule issued by this Court.

### III. CONCLUSION

For the foregoing reasons, the Power Companies respectfully request that the Court enter an order granting leave to intervene in support of Respondents.

Dated: November 5, 2015

Respectfully submitted,

/s/ Kevin Poloncarz

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*Light Department, National Grid*

*Generation, LLC and Pacific Gas*

*and Electric Company*

**ORAL ARGUMENT NOT YET SCHEDULED**

Nos. 15-1363 and Consolidated Cases

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**IN THE UNITED STATES COURT OF APPEALS  
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*Respondents.*

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**RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 27, Proposed Intervenor-Respondents Calpine Corporation (“Calpine”), National Grid Generation, LLC (“National Grid Generation”) and Pacific Gas and Electric Company (“PG&E”) provide the following disclosure statements.

**Calpine** states that it is a major U.S. power company which owns 83 primarily low-carbon, natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering nearly 27,000

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 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.

**National Grid Generation** states that it is a limited liability company organized under the laws of the State of New York that owns and operates 50 natural gas- and oil-fired electric generating units capable of delivering approximately 3,800 megawatts of electricity. All of the outstanding membership interests in National Grid Generation LLC are owned by KeySpan Corporation. All of the outstanding shares of common stock of KeySpan Corporation are owned by National Grid USA, a public utility holding company with regulated subsidiaries engaged in the generation of electricity and the transmission, distribution and sale of natural gas and electricity. All of the outstanding shares of common stock of National Grid USA are owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid



(US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange.

**PG&E** states that it is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. PG&E and its subsidiaries are subsidiaries of PG&E Corporation, an energy-based holding company organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E Corporation, PG&E's parent corporation, is the only publicly held corporation owning ten percent or more of PG&E's stock.

/s/ Kevin Poloncarz  
Kevin Poloncarz

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*Respondents.*

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**CERTIFICATE AS TO PARTIES AND AMICI CURIAE**

Pursuant to Circuit Rules 15, 27(a)(4) and 28(a)(1)(A), Proposed Intervenor-Respondents submit the following Certificate as to Parties and *Amici Curiae*. The Petitioners in the above-captioned cases are:

**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<sub>2</sub> 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

### 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, and NextEra Energy, Inc.

Movant-*Amicus Curiae* is Philip Zoebisch.

/s/ Kevin Poloncarz  
Kevin Poloncarz

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of November, 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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/s/ Kevin Poloncarz  
Kevin Poloncarz

# Attachment A

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 15-1363 and Consolidated Cases

(15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398)

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

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WEST VIRGINIA, et al.,

*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY  
AND REGINA A. MCCARTHY, ADMINISTRATOR,

*Respondents.*

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**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 83 natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering nearly 27,000 megawatts of electricity to customers in the United States (“U.S.”).

3. Of the 10 largest U.S. electricity generators, Calpine has the lowest emissions intensity for both nitrogen oxides and sulfur dioxide.<sup>1</sup> Calpine also has the lowest emissions intensity for carbon dioxide (“CO<sub>2</sub>”) among the fossil fleets of those 10 largest electricity generators.<sup>2</sup>

4. Calpine owns and operates the largest fleet of natural gas-fired combined cycle (“NGCC”) and combined heat and power facilities in the U.S. Calpine has invested billions of dollars in building and improving its fleet of NGCC units, in the anticipation that increasingly stringent emissions standards imposed under the Clean Air Act and correlative state programs would drive a shift away from higher-emitting electric generating units, towards Calpine’s younger fleet of cleaner, flexible NGCC units.

5. Calpine submitted extensive comments on the rule proposed by the U.S. Environmental Protection Agency (“EPA”) entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating

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<sup>1</sup> Natural Resources Defense Council et al., *Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States*, at 10 (2015), *available at*: <http://www.nrdc.org/air/pollution/benchmarking/files/benchmarking-2015.pdf> (emissions and generation data from 2013).

<sup>2</sup> *Id.*

Units, 79 FR 34,830 (Jun. 18, 2014) (“Proposed Rule”).<sup>3</sup> Calpine’s comments both supported the Proposed Rule and offered suggestions on how the EPA might further bolster its flexibility and preserve the integrity of reductions achieved through its implementation.

6. Calpine supports the final rule issued by the EPA entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” 80 FR 64662 (Oct. 23, 2015) (hereinafter “Clean Power Plan”). By hastening trends already occurring in the electricity sector towards increased dispatch of lower-emitting and renewable generation sources, the Clean Power Plan will reward Calpine’s forward-looking investments in clean generation technology.

7. The Clean Power Plan establishes uniform emission performance rates that must be met for two subcategories of affected electric generating units (“EGUs”). It also establishes statewide rate- and mass-based goals, which reflect application of the two uniform emission performance rates to each state’s mix of affected EGUs. These rates and the corresponding state goals were calculated based on three “building blocks”, the second of which includes reductions that can be achieved at affected EGUs by substituting increased generation from lower-

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<sup>3</sup> Letter from J.D. Furstenwerth, Senior Director, Environmental Services, Calpine to EPA (Nov. 26, 2014), EPA-HQ-OAR-2013-0602 (comments on Proposed Rule).

emitting NGCC units, for reduced generation from higher-emitting steam generating units. *See* Clean Power Plan, 80 FR at 64667. Calpine's fleet of flexible low-emitting NGCC units stands ready to increase dispatch and thereby achieve significant reductions in emissions, while maintaining reliability. If dispatch of Calpine's NGCC units does increase as a result of implementation of the Clean Power Plan, Calpine will experience an increase in revenue.

8. Although Calpine is poised to benefit from implementation of the Clean Power Plan, Calpine's NGCC units themselves constitute affected EGUs, which will be subject to requirements under the state or federal plans implemented pursuant to the Clean Power Plan. Until state plans are developed or a federal plan is imposed, it is unclear what form these requirements will take or how exactly they will impact Calpine's fleet.

9. If the Clean Power Plan were to be invalidated in whole or in part, Calpine would fail to realize the full scope of benefits that it may derive upon implementation of the Clean Power Plan.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on November 5, 2015.



J.D. Furstenwerth