

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

STATE OF TEXAS, et al.,

Petitioners,

v.

No. 16-60118

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY and
GINA McCARTHY, Administrator,
U.S. EPA,

Respondents.

**UNOPPOSED JOINT MOTION OF THE PARTIES FOR A 90-DAY
STAY OF PROCEEDINGS IN ORDER TO ACCOMMODATE
SETTLEMENT DISCUSSIONS**

All parties to these consolidated cases¹ respectfully request that
the Court stay all proceedings in these consolidated cases for a period of

¹ This joint motion is filed by all parties in these consolidated cases: Respondent U.S. Environmental Protection Agency (“EPA”) and EPA Administrator Gina McCarthy; Petitioners the State of Texas, the Texas Commission on Environmental Quality (“TCEQ”), and the Public Utility Commission of Texas (“PUCT”); Petitioners Luminant Generation Company LLC, Big Brown Power Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, and Luminant Big Brown Mining Company LLC (collectively, “Luminant Petitioners”); Petitioner the Utility Air Regulatory Group; Petitioner Southwestern Public Service Company; Petitioner Coletto Creek Power, LP; Petitioner NRG Texas Power LLC; Petitioner Nucor Corporation; Respondent Intervenor Sierra Club and National Parks Conservation Association (“NPCA”); Petitioner-Intervenor Balanced Energy for Texas and Texas

Footnote continued...

90 days in order to allow the parties to pursue settlement discussions. The requested stay includes all deadlines for briefing on the merits of the petitions for review, as well as the deadline for filing any petition for panel rehearing, or any petition for rehearing en banc, of the Court's July 15, 2016, Non-Dispositive Published Opinion ("July 15 Opinion").

The reasons for this motion are as follows:

1. Petitioners seek review of EPA's final action under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671q, titled: "Approval and Promulgation of Implementation Plans; Texas and Oklahoma; Regional Haze State Implementation Plans; Interstate Visibility Transport State Implementation Plan to Address Pollution Affecting Visibility and Regional Haze; Federal Implementation Plan for Regional Haze" (hereinafter the "Final Rule"). The Final Rule was published at 81 Fed. Reg. 296 (Jan. 5, 2016).

2. Under the CAA and EPA's regulations, States are required to submit state implementation plans ("SIPs") containing emission

Mining and Reclamation Association; Petitioner-Intervenors Texas Association of Business et al.; Petitioner-Intervenor International Brotherhood of Electrical Workers ("IBEW") Local Union 2337 (collectively, "the Parties"). A full listing of the Parties is set forth in the signature block for this motion.

limits, schedules of compliance, and other measures necessary to make reasonable progress towards the national goal of preventing future, and remedying existing, anthropogenic impairment of air visibility at certain national parks and other designated areas known as “Class I areas.” *See* 42 U.S.C. § 7491. In the Final Rule, EPA partially approved a SIP submitted by the State of Texas, but also disapproved parts of SIPs submitted by Texas and Oklahoma. Also in the Final Rule, EPA promulgated a Federal Implementation Plan (“FIP”) to replace the parts of the Texas and Oklahoma SIPs that EPA disapproved. Among other things, EPA’s FIP imposed limitations on emissions of sulfur dioxide from fifteen electric generating units in Texas.

3. Petitioners have all challenged EPA’s Final Rule, and all of the petitions for review have been docketed together with this case, No. 16-60118.² *Balanced Energy for Texas and Texas Mining and Reclamation Association, Texas Association of Business et al., and*

² Petitions for review of EPA’s Final Rule have also been filed in the United States Courts of Appeals for the D.C. Circuit and the Tenth Circuit, and the relevant parties intend to request that all proceedings in those courts, which are currently abated, remain stayed as well.

IBEW Local Union 2337 intervened as Petitioner-Intervenors. The Sierra Club and NPCA intervened as Respondent-Intervenors.

4. On March 3, 2016, Petitioners Luminant Generation Company LLC et al., Southwestern Public Service Company, and Coletto Creek Power, LP, filed a motion to stay the Final Rule and to toll all compliance deadlines pending completion of judicial review of the Final Rule. On March 17, 2016, the State of Texas, TCEQ, and PUCT also filed a motion to stay the Final Rule and to toll all compliance deadlines pending completion of judicial review of the Final Rule.

5. On March 22, 2016, EPA moved to dismiss the petitions for review in this Court for lack of jurisdiction, or, alternatively, to transfer the petitions to the District of Columbia Circuit.

6. On July 15, 2016, this Court issued its Opinion, in which it denied EPA's motion to dismiss or transfer and granted the motions to stay EPA's Final Rule in its entirety, including the emission control requirements, pending completion of judicial review.

7. Any petition for panel rehearing, or rehearing en banc, with respect to the Court's July 15 Opinion is currently due by August 29, 2016. *See* Fed. R. App. P. 35(c), 40(a)(1). In addition, on July 18, 2016,

the Court issued a briefing schedule under which Petitioners' merits briefs are due by August 29, 2016. If the present motion is granted, both of these deadlines will be stayed; any petition for panel rehearing, or rehearing en banc, would be due November 28, 2016; and the expiration of the 90-day period would trigger the beginning of merits briefing, with Petitioners' opening merits briefs due January 10, 2017.

8. The Parties desire to engage in settlement discussions regarding resolution of the litigation. The Parties are currently coordinating an in-person settlement meeting to occur within the next several weeks. The Parties do not believe that it would be possible to engage in fruitful settlement discussions at the same time they are briefing either the merits of the petitions for review or any petitions for rehearing. A stay of the proceedings is therefore necessary in order to allow settlement discussions to go forward. Any settlement will likely take some time to achieve due to the number of parties and facilities involved and the complexity of the underlying statutory and regulatory CAA scheme. In addition, any proposed settlement agreement would be subject to approval by government officials and the public notice and comment procedures set forth in CAA section 113(g), 42 U.S.C. §

7413(g) before it could be finalized. The Parties therefore request a 90-day stay of all of the proceedings, including both merits briefing and the deadline for filing any petitions for rehearing, in order to allow the Parties to focus their efforts on settlement, as opposed to active litigation.

9. The Parties' requested stay is in the interest of judicial economy. If the Parties reach a complete settlement, there may be no need for the Court to consider either the merits of the petitions for review or any petitions for rehearing of the July 15 Opinion that may be filed. The requested stay will also conserve the resources of the Parties. If the Parties are able to settle these cases, briefing on the merits or petitions for rehearing may be unnecessary. A stay of the deadline for filing any petitions for rehearing, including any petitions for rehearing en banc, is therefore warranted under the "most compelling reasons" criterion of Circuit Rule 35.4. In addition, it is possible that the type of settlement that the Parties may be able to reach in these cases would allow the Parties to avoid potential additional disputes. The requested stay is therefore especially warranted because it may obviate the need

to litigate the merits of these cases and also allow the Parties to avoid potential future litigation that might otherwise be filed in this Court.

10. In accordance with Fifth Circuit Rule 27.4, counsel for one or more of the undersigned movants has coordinated with counsel for each of the Parties and are authorized to state that this joint motion is unopposed.

For all these reasons, the Parties request that the Court stay all proceedings in these consolidated cases for 90 days, to and including November 28, 2016, in order to accommodate the Parties' settlement discussions. Should the Parties conclude that settlement discussions are advancing and fruitful, but that more time is necessary to complete discussions, they would seek an additional stay prior to November 28, 2016. The Parties further request that the Court at this time set a deadline of November 28, 2016, for the filing of any petition for rehearing or rehearing en banc of the Court's July 15 Opinion, and a deadline of January 10, 2017, for the filing of Petitioners' opening merits briefs.

Respectfully submitted,

DATED: August 17, 2016

JOHN C. CRUDEN
Assistant Attorney General

s/ David A. Carson
DAVID A. CARSON
DUSTIN J. MAGHAMFAR
U.S. Department of Justice
Environment & Nat'l Res. Div.
Environmental Defense Section
999 18th Street
Suite 370 – South Terrace
Denver, CO 80202
(303) 844-1349

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Scott A. Keller
Solicitor General

s/ Lisa A. Bennett

Lisa A. Bennett
Assistant Solicitor General
lisa.bennett@
texasattorneygeneral.gov

Kellie E. Billings-Ray
Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

*Counsel for Petitioners State of Texas,
Texas Commission on Environmental
Quality, and Public Utility
Commission of Texas*

s/ P. Stephen Gidiere III

P. Stephen Gidiere III
BALCH & BINGHAM LLP
1901 6th Ave. N., Ste. 1500
Birmingham, Alabama 35203
205-251-8100
sgidiere@balch.com

David W. Mitchell
BALCH & BINGHAM LLP
601 Pennsylvania Avenue, N.W.
Suite 825 South
Washington, D.C. 20002

Stephanie Z. Moore
Vice President and General Counsel
Luminant Generation Company LLC
1601 Bryan Street
22nd Floor
Dallas, Texas 75201

Daniel J. Kelly
Vice President and Associate General
Counsel
Energy Future Holdings Corp.
1601 Bryan Street
43rd Floor
Dallas, Texas 75201

*Counsel for Luminant Generation
Company LLC, Big Brown Power
Company LLC, Luminant Mining
Company LLC, Big Brown Lignite
Company LLC, and Luminant Big
Brown Mining Company LLC*

s/ Debra J. Jezouit

Debra J. Jezouit

DC Bar No. 433921

William M. Bumpers

DC Bar No. 385282

BAKER BOTTS L.L.P.

The Warner

1299 Pennsylvania Avenue, NW

Washington, DC 20004-2400

202-639-7728 (phone)

202-585-1032 (fax)

debra.jezouit@bakerbotts.com

william.bumpers@bakerbotts.com

Ann M. Seha

Minn. Bar No. 0157235

XCEL ENERGY SERVICES INC.

414 Nicollet Mall

5th Floor

Minneapolis, MN 55401-1993

612-215-4619 (phone)

612-215-4544 (fax)

ann.m.seha@xcelenergy.com

*Counsel for Southwestern Public
Service Company*

s/ Norman W. Fichthorn

Norman W. Fichthorn

Aaron M. Flynn

HUNTON & WILLIAMS LLP

2200 Pennsylvania Avenue, N.W.

Washington, D.C. 20037

202-955-1500

nfichthorn@hunton.com

flynna@hunton.com

*Counsel for the Utility Air Regulatory
Group*

s/ Derek R. McDonald

Derek R. McDonald

Carlos R. Romo

BAKER BOTTS L.L.P.

98 San Jacinto Boulevard

Suite 1500

Austin, Texas 78701

512-322-2667 (phone)

512-322-8342 (fax)

derek.mcdonald@bakerbotts.com

Counsel for Coletto Creek Power, LP

s/ Aaron Streett

Aaron M. Streett
Matthew L. Kuryla
Devi Chandrasekaran
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, TX 77002-4995
713-229-1855
aaron.streett@bakerbotts.com

Counsel for NRG Texas Power LLC

s/ David R. Taggart

David R. Taggart
Texas Bar No. 00793102
Natalie J. Taylor
La. Bar No. 31282
BRADLEY MURCHISON KELLY & SHEA
LLC
401 Edwards Street, Suite 1000
Shreveport, LA 71101-5529
318-227-1131 (phone)
318-227-1141 (fax)
dtaggart@bradleyfirm.com
ntaylor@bradleyfirm.com

Mark H. Allison
Ark. Bar. No. 85001
DOVER DIXON HORNE, PLLC
Suite 3700
425 West Capitol Avenue
Little Rock, Arkansas 72201
501-375-9151 (phone)
501-375-6484 (fax)
mallison@ddh-ar.com

Counsel for Nucor Corporation

s/ Mark Walters

Mark Walters

Michael Nasi

JACKSON WALKER L.L.P.

100 Congress Avenue, Suite 1100

Austin, Texas 78701

512-236-2000 (phone)

512-236-2002 (facsimile)

mwalters@jw.com

mnasi@jw.com

*Counsel for Balanced Energy for Texas
and the Texas Mining and
Reclamation Association*

s/ Eugene M. Trisko

Eugene M. Trisko

LAW OFFICES OF EUGENE M. TRISKO

P.O. Box 596

Berkeley Springs, WV 25411

Tel: (304) 258-1977

Tel: (301) 639-5238 (cell)

emtrisko7@gmail.com

*Counsel for for Local Union 2337 of
the International Brotherhood of
Electrical Workers*

s/ C. Frederick Beckner III

Roger R. Martella, Jr.

C. Frederick Beckner III

Joel F. Visser

SIDLEY AUSTIN LLP

1501 K Street, NW

Washington, DC 20005

(202) 736-8000

*Counsel for Texas Association of
Business, Bay City Chamber of
Commerce & Agriculture, Baytown
Chamber of Commerce, Cedar Park
Chamber of Commerce, Clear Lake
Area Chamber of Commerce, Corpus
Christi Chamber of Commerce, Frisco
Chamber of Commerce, Grapevine
Chamber of Commerce, Greater
Angleton Chamber of Commerce,
Greater Beaumont Chamber of
Commerce, Greater Hewitt Chamber
of Commerce, Greater Irving-Las
Colinas Chamber of Commerce,
Greater Waco Chamber of Commerce,
Henderson Area Chamber of
Commerce, Lake Houston Area
Chamber of Commerce, Lubbock
Chamber of Commerce, Mineral Wells
Chamber of Commerce, Port Arthur
Chamber of Commerce, Rockwall Area
Chamber of Commerce, San Angelo
Chamber of Commerce, South Padre
Island Chamber of Commerce, Texas
City-La Marque Chamber of
Commerce, Tyler Area Chamber of
Commerce, Victoria Chamber of
Commerce, and the Chamber of*

*Commerce of the United States of
America*

Of Counsel:

Steven P. Lehotsky
Sheldon Gilbert
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

*Counsel for Petitioner-Intervenor the
Chamber of Commerce of the United
States of America*

s/ Mary Whittle

Mary Whittle
Earthjustice
3904 Bonnell Drive
Austin, TX 78731
(512) 537-2791 (phone)
mwhittle@earthjustice.org

Matthew Gerhart
Earthjustice
633 17th St, Suite 1600
Denver, CO 80202
(303) 996-9612 (phone)
(303) 623-8083 (facsimile)
mgerhart@earthjustice.org

*Counsel for Sierra Club and National
Parks Conservation Association*

s/ Joshua D. Smith

Joshua D. Smith

Sierra Club

85 Second Street, 2nd Floor

San Francisco, CA 94105

(415) 977-5560 (phone)

(415) 977-5793 (facsimile)

joshua.smith@sierraclub.org

Elena Saxonhouse

Sierra Club

85 Second Street, 2nd Floor

San Francisco, CA 94105

(415) 977-5765 (phone)

(415) 977-5793 (facsimile)

elena.saxonhouse@sierraclub.org

Counsel for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Unopposed Joint Motion of the Parties for a 90-Day Stay of Proceedings in Order to Accommodate Settlement Discussions was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: August 17, 2016

/s/ David A. Carson
DAVID A. CARSON

Counsel for Respondent EPA