

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

STATE OF TEXAS *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
and GINA McCARTHY, Administrator, U.S.
Environmental Protection Agency,

Respondents.

Case No. 16-60118

**MOTION OF COALITION OF 25 ASSOCIATIONS OF TEXAS
BUSINESSES FOR LEAVE TO INTERVENE ON BEHALF OF
PETITIONERS**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. The representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

- Allison, Mark (Counsel for Petitioner Nucor Corporation)
- ANP ERCOT Acquisitions, LLC (parent company of Petitioner Coledo Creek Power, LP)
- Baker Botts L.L.P. (Counsel for Petitioners Coledo Creek Power, NRG Texas Power LLC, and Southwest Public Service Company)
- Balanced Energy for Texas (Petitioner-Intervenor)
- Balch & Bingham LLP (Counsel for 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)
- Bay City Chamber of Commerce & Agriculture (Movant-Intervenor)

The Bay City Chamber of Commerce & Agriculture is a non-profit, tax-exempt organization incorporated in Texas. The Bay City Chamber of Commerce & Agriculture has no parent corporation, and no publicly held company has 10% or greater ownership in the Bay City Chamber of Commerce & Agriculture.

- Baytown Chamber of Commerce (Movant-Intervenor)

The Baytown Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Baytown Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Baytown Chamber of Commerce.

- Beckner, C. Frederick III (Counsel for Movant-Intervenors)
- Bennett, Lisa A. (Counsel for Petitioners State of Texas, Texas Commission on Environmental Quality, and the Public Utility Commission of Texas)
- Big Brown Power Company LLC (Petitioner)
- Billings-Ray, Kellie E. (Counsel for Petitioners State of Texas, Texas Commission on Environmental Quality, and the Public Utility Commission of Texas)
- Big Brown Lignite Company LLC (Petitioner)
- Bumpers, William (Counsel for Petitioner Southwest Public Service Company)
- Carson, David Aiken (Counsel for Respondents)
- Cedar Park Chamber of Commerce (Movant-Intervenor)

The Cedar Park Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Cedar Park Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Cedar Park Chamber of Commerce.

- Clear Lake Chamber of Commerce (Movant-Intervenor)

The Clear Lake Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Clear Lake Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Clear Lake Chamber of Commerce.

- Coletto Creek Power, LP (Petitioner)
- Coletto GP, LLC (a general partner and an owner of Petitioner Coletto Creek Power, LP)
- Coletto LP, LLC (parent company of Petitioner Coletto Creek Power, LP)

- Corpus Christi Chamber of Commerce (Movant-Intervenor)

The Corpus Christi Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Corpus Christi Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Corpus Christi Chamber of Commerce.

- Cruden, John C., Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice (Counsel for Respondents)
- Chamber of Commerce of the United States of America (Movant-Intervenor)

The Chamber of Commerce of the United States of America (“Chamber”) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

- Chandrasekaran, Devi (Counsel for Petitioner NRG Texas Power LLC)
- Curry, Ron, Regional Administrator, United States Environmental Protection Agency, Region 6
- Electrabel S.A. (parent company of Petitioner Coletto Creek Power, LP)
- Energy Future Holdings Corp. (parent company of one or more of 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)
- Engie, S.A. (a publicly traded company with 10% or greater ownership interest in Petitioner Coletto Creek Power, LP)
- Fichthorn, Norman W. (Counsel for Petitioner Utility Air Regulatory Group)
- Flynn, Aaron M. (Counsel for Petitioner Utility Air Regulatory Group)

- Frisco Chamber of Commerce (Movant-Intervenor)

The Frisco Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Frisco Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Frisco Chamber of Commerce.

- Garbow, Avi S. (General Counsel for Respondent United States Environmental Protection Agency)
- GDF SUEZ Energy North America, Inc. (parent company of Petitioner Coletto Creek Power, LP)
- GDF SUEZ IP Luxembourg S.A.R.L. (parent company of Petitioner Coletto Creek Power, LP)
- Genfina S.C.R.L. (parent company of Petitioner Coletto Creek Power, LP)
- Gerhart, Matthew (Counsel for Respondent-Intervenors)
- Gidiere, P. Stephen III (Counsel for 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)
- Gilbert, Sheldon (Counsel for Movant-Intervenor the Chamber of Commerce of the United States of America)
- Grapevine Chamber of Commerce (Movant-Intervenor)

The Grapevine Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Grapevine Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Grapevine Chamber of Commerce.

- Greater Angleton Chamber of Commerce (Movant-Intervenor)

The Greater Angleton Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Greater Angleton Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Angleton Chamber of Commerce.

- Greater Beaumont Chamber of Commerce (Movant-Intervenor)

The Greater Beaumont Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Greater Beaumont Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Beaumont Chamber of Commerce.

- Greater Hewitt Chamber of Commerce (Movant-Intervenor)

The Greater Hewitt Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Greater Hewitt Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Hewitt Chamber of Commerce.

- Greater Irving-Las Colinas Chamber of Commerce (Movant-Intervenor)

The Greater Irving-Las Colinas Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Greater Irving-Las Colinas Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Irving-Las Colinas Chamber of Commerce. Greater Waco Chamber of Commerce (Movant-Intervenor)

The Greater Waco Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Greater Waco Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Greater Waco Chamber of Commerce.

- Henderson Chamber of Commerce (Movant-Intervenor)

The Henderson Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Henderson Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Henderson Chamber of Commerce.

- Hunton & Williams LLP (Counsel for Petitioner Utility Air Regulatory Group)
- International Power America, Inc. (parent company of Petitioner Coletto Creek Power, LP)
- International Power Ltd. (parent company of Petitioner Coletto Creek Power, LP)
- International Power (Zebra) Limited (parent company of Petitioner Coletto Creek Power, LP)
- IPA Holding, Inc. (parent company of Petitioner Coletto Creek Power, LP)
- Jezouit, Debra J. (Counsel for Petitioner Southwest Public Service Company)
- Kelly, Daniel J. (Counsel for 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)
- Kuryla, Matthew Lynn (Counsel for NRG Texas Power LLC) Lake Houston Area Chamber of Commerce (Movant-Intervenor)

The Lake Houston Area Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Lake Houston Area Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Lake Houston Area Chamber of Commerce.

- Lehotsky, Steven (Counsel for Movant-Intervenor the Chamber of Commerce of the United States of America)

- Local Union 2337 of the International Brotherhood of Electrical Workers (Petitioner-Intervenor)
- Lubbock Chamber of Commerce (Movant-Intervenor)

The Lubbock Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Lubbock Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Lubbock Chamber of Commerce.

- Luminant Big Brown Mining Company (Petitioner)
- Luminant Mining Company (Petitioner)
- Lynch, Loretta E., Attorney General, U.S. Department of Justice (Counsel for Respondents)
- Maghamfar, Dustin (Counsel for Respondents)
- Martella, Roger R., Jr. (Counsel for Movant-Intervenors)
- McCarthy, Gina, Administrator, United States Environmental Protection Agency (Respondent)
- McDonald, Derek Raymond (Counsel for Petitioner Coletto Creek Power, LP) Mineral Wells Chamber of Commerce (Movant-Intervenor)

The Mineral Wells Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Mineral Wells Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Mineral Wells Chamber of Commerce.

- Mitchell, David W. (Counsel for 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)
- Moore, Stephanie Zapata (Counsel for 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 and Vice President and General Counsel for Petitioner Luminant Generation Company LLC)

- Nasi, Michael (Counsel for Petitioner-Intervenors Balanced Energy for Texas and Texas Mining and Reclamation Association)
- National Parks Conservation Association (Respondent-Intervenor)
- NRG Energy, Inc. (parent company of Petitioner NRG Texas Power LLC)
- NRG Texas Power LLC (Petitioner)
- NRG Texas LLC (parent company of Petitioner NRG Texas Power LLC)
- Nucor Corporation (Petitioner)
- Port Arthur Chamber of Commerce (Movant-Intervenor)

The Port Arthur Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Port Arthur Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Port Arthur Chamber of Commerce.

- Public Utility Commission of Texas (Petitioner)
- Rockwall Area Chamber of Commerce (Movant-Intervenor)

The Rockwall Area Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Rockwall Area Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Rockwall Area Chamber of Commerce.

- Romo, Carlos Ricardo (Counsel for Petitioner Coletto Creek Power, LP)
- San Angelo Chamber of Commerce (Movant-Intervenor)

The San Angelo Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The San Angelo Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the San Angelo Chamber of Commerce.

- Saxonhouse, Elana (Counsel for Respondent-Intervenor Sierra Club)

- Seha, Ann M. (Counsel for Petitioner Southwest Public Service Company)
- Sidley Austin LLP (Counsel for Movant-Intervenors)
- Sierra Club (Respondent-Intervenor)
- Smith, Joshua (Counsel for Respondent-Intervenor Sierra Club)
- South Padre Island Chamber of Commerce (Movant-Intervenor)

The South Padre Island Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The South Padre Island Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the South Padre Island Chamber of Commerce.

- Southwestern Public Service Company (Petitioner)
- State of Texas (Petitioner)
- Streett, Aaron Michael (Counsel for Petitioner NRG Texas Power LLC)
- T. Rowe Price Associates, Inc. (an entity with 10% or greater ownership interest in NRG Energy, Inc.)
- T. Rowe Price Group, Inc. (parent company of T. Rowe Price Associates, Inc.)
- Taggart, David Richard (Counsel for Petitioner Nucor Corporation)
- Taylor, Natalie J. (Counsel for Petitioner Nucor Corporation)
- Texas Association of Business (Movant-Intervenor)

The Texas Association of Business is a non-profit, tax-exempt organization incorporated in Texas. The Texas Association of Business has no parent corporation, and no publicly held company has 10% or greater ownership in the Texas Association of Business.

- Texas City-La Marque Chamber of Commerce (Movant-Intervenor)

The Texas City-La Marque Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Texas City-La Marque Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Texas City-La Marque Chamber of Commerce.

- Texas Commission on Environmental Quality (Petitioner)
- Texas Competitive Electric Holdings Company LLC (parent company of one or more of 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)
- Texas Mining and Reclamation Association (Plaintiff-Intervenor)
- Trisko, Eugene M. (Counsel for Petitioner-Intervenor Local Union 2337 of the International Brotherhood of Electrical Workers)
- Tyler Area Chamber of Commerce (Movant-Intervenor)

The Tyler Area Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Tyler Area Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Tyler Area Chamber of Commerce.

- United States Environmental Protection Agency (Respondent)
- Utility Air Regulatory Group (Petitioner)
- Victoria Chamber of Commerce (Movant-Intervenor)

The Victoria Chamber of Commerce is a non-profit, tax-exempt organization incorporated in Texas. The Victoria Chamber of Commerce has no parent corporation, and no publicly held company has 10% or greater ownership in the Victoria Chamber of Commerce.

- Walters, Mark L. (Counsel for Petitioner-Intervenors Balanced Energy for Texas and Texas Mining and Reclamation Association)

- Whittle, Mary (Counsel for Respondent-Intervenors)
- Xcel Energy Inc. (parent company of Petitioner Southwestern Public Service Company)

Respectfully submitted,

/s/ C. Frederick Beckner III

Counsel for Movant-Intervenors

MOTION FOR LEAVE TO INTERVENE

Pursuant to Fed. R. App. P. 15(d) and 27 and Fifth Circuit Rules 15 and 27, Movant-Intervenors¹ respectfully move to intervene in support of Petitioners in *State of Texas, et al. v. United States Environmental Protection Agency*, Case No. 16-60118. The petitions for review in Case No. 16-60118 challenge a final action of the United States Environmental Protection Agency (“EPA”) entitled *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* (“Rule”). 81 Fed. Reg. 296 (Jan. 5, 2016). Movant-Intervenors meet the standard for intervention as of right and permissive intervention based on their interests in the subject matter of this

¹ Movant-Intervenors are the 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 (“U.S. Chamber”). The U.S. Chamber has many members headquartered or with substantial operations in Texas.

rulemaking and the impact that the Rule will have on regulated generating units, their customers, and their local communities.

Counsel for Movant-Intervenors has conferred with counsel for all other parties to this petition. Petitioners and Petitioner-Intervenors do not oppose the motion. Respondents do not oppose the motion, but reserve the right to challenge Movant-Intervenors' standing later in these proceedings if the motion is granted. Respondent-Intervenors take no position, but reserve the right to oppose once they review Movant-Intervenor's supporting brief.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Congress first adopted regional haze provisions in 1977 to address visibility in national parks and other federal "Class I areas" by adding Section 169A to the Clean Air Act ("CAA"). *See* 42 U.S.C. § 7491. That provision requires EPA to "promulgate regulations to assure ... reasonable progress toward meeting the national goal" of visibility. *Id.* § 7491(a)(4). Those regulations require states to prepare plans that make "reasonable progress" over ten-year intervals. 40 C.F.R. § 51.308(f). State regional haze plans must have three primary components: (1) reasonable progress goals for Class I areas in the State; (2) a long-term strategy; and (3) implementation of "best available retrofit technology" ("BART") for certain stationary sources.²

² BART determinations are not at issue in this case and are not discussed further.

Reasonable Progress. The CAA requires States to submit plans that contain “emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal.” 42 U.S.C. § 7491(b)(2). States have considerable discretion in establishing goals because the CAA “requires only that a state establish reasonable progress, not the most reasonable progress.” *North Dakota v. EPA*, 730 F.3d 750, 768 (8th Cir. 2013). States must evaluate four statutory factors when establishing reasonable progress goals: (1) “costs of compliance”; (2) “the time necessary for compliance”; (3) “the energy and nonair quality environmental impacts of compliance”; and (4) “the remaining useful life of any [potentially affected sources].” 42 U.S.C. § 7491(g)(1). When setting a reasonable progress goal, a state must “[a]nalyze and determine the rate of progress needed to attain natural visibility conditions by the year 2064.” 40 C.F.R. § 51.308(d)(1)(i)(B).

Long Term Strategy. States are also required to develop long-term strategies to address visibility impairment for all Class I areas “which may be affected by emissions from the State.” *Id.* § 51.308(d)(3). Long-term strategies must “include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals established by States having mandatory Class I Federal areas.” *Id.* EPA regulations require that each State “consult with the other State(s) in order to develop coordinated emission management strategies.” *Id.* § 51.308(d)(3)(i). “If the State has participated in a regional planning process, the State must ensure it has included all measures needed to achieve its apportionment of

emission reduction obligations agreed upon through that process.” *Id.*

§ 51.308(d)(3)(ii).

II. EPA’S FEDERAL IMPLEMENTATION PLAN AND SUBSEQUENT LITIGATION

On March 31, 2009, Texas submitted to EPA its regional haze plan for 2008-2018. 79 Fed. Reg. 74,818, 74,818 (Dec. 16, 2014). Since that time, Texas has been implementing its plan and reducing regional haze. In fact, Texas’ actions have already reduced regional haze below the reasonable progress goals in EPA’s regional haze plan. *See* 81 Fed. Reg. at 341. After more than six years, EPA disapproved Texas’ plan and imposed a federal plan in its place. *Id.* at 296. EPA found that Texas’ reasonable progress goals were deficient because Texas did not analyze the required statutory factors on a “source-by-source” basis. 79 Fed. Reg. at 74,838-39. Further, despite long-standing cooperation between Texas and Oklahoma as part of the Central Regional Air Planning Association, EPA also found that Texas and Oklahoma failed to adequately consult about their plans. *Id.* at 74,823.

In response, EPA established a federal plan that includes reasonable progress goals that are virtually identical to those in Texas’ plan.³ However, to achieve those

³ EPA’s reasonable progress goals are between 0.03 and 0.14 deciviews lower than those established by the states. *See* Joint Motion to Stay Final Rule of the U.S. Environmental Protection Agency By Luminant Generating Company LLC, Southwestern Public Service Company, and Coletto Creek Power LP (“Utility Petitioners’ Stay Motion”), Doc. No. 513405269 at 12-17. As EPA recognizes, visibility differences of less than one deciview are imperceptible to the naked eye. 77 Fed. Reg. 30,248, 30,250 (May 22, 2012).

goals, EPA imposed more stringent emissions limitations on 14 generating units in Texas. Seven generating units were required to install new emission controls for sulfur dioxide (“SO₂”), while seven others were required upgrade existing emission controls for SO₂. The total cost of these emission controls is projected to be \$2 billion. 79 Fed. Reg. at 74,867-77. EPA acknowledges that these emissions controls cannot be implemented by 2018 and instead sets emissions limits beginning in 2019 (for upgraded controls) and 2021 (for new controls).

Several of the regulated generating units as well as the state of Texas petitioned for review of the Rule. Petitioners subsequently sought a stay of the Rule, demonstrating, among other things, that (1) the CAA does not require a source-by-source analysis when setting reasonable progress goals; (2) EPA unlawfully required emission controls that cannot be implemented during the current 2008-2018 planning period; and (3) EPA failed to conduct a rational cost-benefit analysis when it required the regulated generating units to expend \$2 billion to produce imperceptible changes in visibility.⁴

The Utility Petitioners also show in their motion that they will be irreparably harmed by the Rule. Implementing the emissions controls required by the Rule will require immediate and substantial investments that cannot be recovered if the Rule is

⁴ Utility Petitioners’ Stay Motion at 12-17; Motion of Petitioners State of Texas, Texas Commission on Environmental Quality, and Public Utility Commission of Texas for Stay of Final Rule, Doc. No. 513428276 at 10-13.

vacated. Utility Petitioners’ Stay Motion at 18 (projecting \$450 million in compliance costs in 2016 and 2017). In addition, generating units are being threatened with premature retirement as a result of the Rule given the economic challenges in the Electric Reliability Council of Texas (“ERCOT”) market. *Id.* at 19. The impacts of the Rule are not limited to the generating units themselves. Instead, the Rule will result in “increase[d] costs to consumers,” “substantial job losses,” and “economic harm to the surrounding local communities.” *Id.*

III. MOVANT-INTERVENORS’ INTEREST IN THE RULE

Movant-Intervenors represent members across a range of manufacturing, energy, and industrial sectors in Texas, including generating units that are directly regulated by the Final Rule, large-scale electricity consumers, and many businesses located in communities where the regulated generating units operate. Movant-Intervenor U.S. Chamber filed comments on EPA’s proposed rule that described its and its members’ interests in this rulemaking.⁵ Specifically, Movant-Intervenors have interests in the direct impact that the Rule will have on regulated generating units, the impact of higher electricity prices on manufacturing and industrial sectors in Texas resulting from generating units’ increased compliance costs, and the impact of potential generating unit closures on grid reliability and local economies. Movant-Intervenors also have an interest in ensuring that the CAA’s venue provisions are

⁵ See Comments of the Chamber of Commerce of the United States of America, *et al.* (U.S. Chamber Comments”), Docket ID No. EPA-R06-OAR-2014-0754-0059 (April 20, 2015).

complied with so that locally applicable rules that specifically affect Texas can be litigated in the Fifth Circuit rather than in the D.C. Circuit.

First, Movant-Intervenors have a strong interest in protecting the rights of their members who are directly regulated by the Rule. Several of Movant-Intervenors' members are represented among the 14 regulated generating units that, collectively, must spend \$2 billion to implement the emission controls required by EPA. This represents a significant and wholly unnecessary cost as Texas has already achieved the numeric reasonable progress goals assigned by EPA in the Rule. Further, the costs are so significant that several generating units may be forced to retire prematurely. Doc. No. 513406105 at 79-80, Frenzel Decl. ¶¶ 27-28 ("Frenzel Decl."); *Id.* at 86, Hudson Decl. ¶ 8 ("Hudson Decl."). EPA's regulations are unlawful and Movant-Intervenors have a strong interest in ensuring that EPA is prevented from imposing unlawful and unnecessary regulatory requirements on their members.

Second, Movant-Intervenors have an interest in ensuring that their members have access to affordable electricity. The Rule will impose \$2 billion in compliance costs on regulated generating units, which is likely to result in increased costs to consumers of electricity. In addition, electricity consumers will ultimately bear the cost of any stranded assets caused by the premature closures of generating units in response to the Rule. Hudson Decl. ¶ 16. Movant-Intervenors' members depend on electricity from regulated generating units and will be harmed if their electricity costs increase. For some members, electricity costs are among the largest expenses required

to produce their products. These members will be directly harmed by increased electricity prices which will make their products less competitive in national or international markets where they must compete with companies that have access to lower-cost electricity from generating units that are not encumbered by unlawful and unnecessary regulations such as those imposed by the Rule.

Third, Movant-Intervenors' members have a strong interest in maintaining a reliable electricity grid that produces the electricity required to operate their businesses. Texas is in the midst of an unprecedented period of economic growth which has dramatically increased demand for electricity. Texas has responded by increasing supply using a variety of energy sources. However, if the Rule is upheld, it could result in the closure of several generating units. Frenzel Decl. ¶¶ 27-28; Hudson Decl. ¶ 8. The closure of those generating units would raise significant concerns regarding grid reliability in some parts of Texas. ERCOT, *Impacts of Environmental Regulations in the ERCOT Region*, at ii, Doc. No. 513406105 at 172 (Dec. 16, 2014) ("The retirement of existing capacity in ERCOT could result in localized transmission reliability issues due to the loss of fossil fuel-fired generation resources in and around major urban centers, and will strain ERCOT's ability to integrate new intermittent renewable generation resources."). Movant-Intervenors' members require a reliable supply of electricity to maintain their businesses.

Fourth, Movant-Intervenors have a strong interest in the economic health of the local communities in which the regulated generating units and associated Texas

coal mines are located because many of their members are located there. Closure of generating units as a result of the Rule would result in the loss of a significant number of jobs. Doc. No. 513406105 at 103, Pierce Decl. ¶ 10 (“Pierce Decl.”). In addition to the generating units themselves, the Rule could also result in the closure of associated coal mines that exclusively serve individual generating units. *Id.* These job losses would significantly affect the local economy, including Movant-Intervenors’ members who are located in those communities. The effects of those job losses would ripple through the local communities and adversely affect virtually every business that provides goods and services to the local community. Thus, while EPA is directly regulating 14 generating units, as a practical matter, these costly requirements will harm the broader economy in communities where generating units are forced to close.

Fifth, Movant-Intervenors and their members have a strong interest in ensuring that challenges to local regulations that affect the state of Texas are litigated in the place where those impacts will be felt. Section 307(b) of the CAA states that petitions for review of EPA actions that are “locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit,” while nationally applicable regulations are reviewed in the D.C. Circuit. 42 U.S.C. § 7607(b). In this case, the Rule’s impacts are disproportionately felt in the state of Texas. The Rule sets new reasonable progress goals for Texas and directs 14 generating units in Texas to install costly emission controls to reduce SO₂ emissions. These generating units are

primarily located within ERCOT, which operates a separate and distinct electricity grid located entirely within Texas. Thus, the downstream impacts on electricity consumers will also be felt primarily by Texas consumers. Despite the fact that the Rule is, in essence, a local rule directly affecting Texas specifically, EPA attempts to misuse the CAA's venue provisions and steer this case to the D.C. Circuit by asserting that the rule has a nationwide scope and effect. 81 Fed. Reg. at 345-46. Movant-Intervenors have a strong interest in ensuring that EPA regulations, such as this Rule, that regulate Texas alone are litigated in the Fifth Circuit in accordance with the CAA.

ARGUMENT

This Court has held that “[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)). The Fifth Circuit evaluates two factors when determining whether a party may intervene: (1) “the statutory design of the act” and (2) “the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24.” *Texas v. U.S. Dep’t of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (citing *Int’l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).⁶

⁶ The Fifth Circuit does not require an intervenor to independently establish standing. *See Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). Here, the Utility Petitioners have standing to challenge the Rule. Because Movant-Intervenors seek to intervene on behalf of the Utility Petitioners, they are not required to independently establish standing. In any event, Movant-Intervenors do have standing to intervene on behalf of their members. *See Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). As explained above, Movant-Intervenors’ members include the regulated generating units who will be directly affected by the Rule, as well as the

I. MOVANT INTERVENORS' MEMBERS ARE REGULATED UNDER THE CAA AND INJURED BY THE FINAL RULE

Movant-Intervenors and their members have a defined role under the CAA's regional haze provisions. First, Movant-Intervenors' members include the generating units that will be directly regulated by the Rule. Second, Movant-Intervenors' members will be directly affected by the Rule's \$2 billion in projected compliance costs, which is one of the four factors that must be considered when setting reasonable progress goals. 42 U.S.C. § 7491(g)(1). Because these members are directly regulated under the Rule and will suffer direct pecuniary harm if the Rule is implemented, their interests are among those that the CAA's regional haze provisions are designed to protect and Movant-Intervenors' participation is warranted. Further, as discussed more fully by Respondent-Intervenors in their successful motion to intervene, Doc. No. 5134144974, public participation by citizens and citizen groups is encouraged by the CAA. Movant-Intervenors have already availed themselves of the CAA's public participation process by submitting comments on EPA's proposed rule. Granting Movant-Intervenors' motion would further these public participation goals.

II. THE ASSOCIATIONS SATISFY THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT

For an applicant to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), it must: (1) file a timely application; (2) claim an interest relating to the

regulated generating units' customers and other community businesses who will suffer direct harms as a result of compliance costs and generating unit closures that the Rule would require.

subject of the action, (3) show that disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) demonstrate that existing parties may not adequately represent the applicant's interest. *John Doe #1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001); *Sierra Club*, 18 F.3d at 1204-05.

Movant-Intervenors satisfy each of these requirements.

A. The Motion to Intervene Is Timely

Fifth Circuit Rule 15.5 provides that a motion to intervene in a case seeking review of an agency order "should be filed promptly after the petition for review of the agency proceeding is filed, but not later than 14 days prior to the due date of the brief of the party supported by the intervenor." At the earliest, Petitioners' opening brief will not be due until 40 days after the date on which EPA files the administrative record. *See* Fed. R. App. P. 31(a). EPA must file the administrative record in this case by April 19, 2016. Doc. No. 513461251. Movant-Intervenors' motion is timely because Petitioners' opening brief would not be due before May 31, 2016.

Furthermore as a practical matter, allowing Movant-Intervenors to intervene will not disrupt the proceedings because Movant-Intervenors are joining at an early stage, before a briefing schedule has been set. While several petitioners have filed motions to stay implementation of the rule pending appeal, Doc. Nos. 513405269 & 513428276, and Respondents have filed a motion to dismiss for lack of jurisdiction, Doc. No. 513434396, Movant-Intervenors' participation in this case will not disrupt or delay the Court's resolution of those matters. If Movant-Intervenors elect to

respond to any of these pending motions, they will do so in accordance with the schedule already established by this Court.

B. Movant-Intervenors Have Protectable Interests in Opposing the Rule that May Be Impaired

The interests of the Movant-Intervenors and their members will be impaired if the Rule is implemented. Movant-Intervenors' members include several of the generating units that are directly regulated by the Rule, as well as many other local businesses that will be harmed by the Rule. This Court has explained that "the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Sierra Club*, 18 F.3d at 1207; *see also Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) ("[T]he inquiry under [Fed. R. Civ. P. 24](a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application ... [and] intervention of right must be measured by a practical rather than technical yardstick."). This Court has previously granted the motions of Petitioner-Intervenors Local Union 2337, Balanced Energy for Texas, and Texas Mining and Reclamation Association who also identified protectable interests that would be impaired by the compliance costs and potential plant closures caused by the Rule.

First, Movant-Intervenors have a protectable interest in opposing the Rule because some of their members are among the 14 generating units that are directly regulated by it. Associations representing companies that would be injured by an

agency rule are routinely allowed to intervene in cases reviewing that rule. *See, e.g., Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998); *Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014); *Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). The emission controls required by EPA in the Rule are projected to cost \$2 billion for the 14 generating units, leaving them with the difficult prospect of choosing between an extraordinary capital investment in emission controls or retiring the regulated generating units. The interests of Movant-Intervenors and these regulated generating unit members will be impaired if these unlawful and unreasonable regulations are not vacated.

Second, Movant-Intervenors have a protectable interest in opposing the Rule because many of their members are located in the same communities as the regulated generating units, rely on the low-cost, reliable electricity provided by the regulated generating units, and will be adversely affected by the high compliance costs and reliability risks that the Rule will cause. Courts have held that entities that will suffer pecuniary loss as a result of an agency action can intervene as of right to prevent such a loss. For example, in *Fund for Animals, Inc. v. Norton*, the D.C. Circuit held that the Ministry of Nature and Environment of Mongolia could intervene to protect its interest in tourist revenue produced by sport hunting. 322 F.3d 728 (D.C. Cir. 2003). In that case, plaintiffs sued the U.S. Fish and Wildlife Service to require it to list the argali sheep as endangered in Mongolia, an action that would prevent the importation

of argali trophies to the United States. *Id.* at 730. The court held that the Ministry of Nature and Environment could intervene because it depended on hunting revenues to fund its conservation efforts and a ban on imports to the United States would reduce hunting demand for argali sheep. *Id.* at 733, 735.

Movant-Intervenors' interests would be similarly impaired here. Many of Movant-Intervenors' members are customers of the regulated generating units and depend on them for affordable and reliable electricity. These members include businesses in energy-intensive industry sectors where electricity costs are among the most significant operating expenses. If the Final Rule is implemented and the required emission controls are installed, the costs of those controls (or the costs of stranded assets caused by premature closures) will ultimately be borne by consumers. Hudson Decl. ¶ 16. A significant increase in electricity costs will directly impair the competitiveness of Texas businesses at both a national and international level as they will be forced to compete with other businesses that can obtain lower-cost electricity due to the absence of unlawful and unreasonable regulations on the generating units that provide their electricity.

These members' interest in the supply of reliable energy will be impaired by generating unit closures that may occur as a result of the Final Rule. The owners of several of the regulated generating units have stated that they are considering closing the facilities due to the costs of implementing the Final Rule. Frenzel Decl. ¶¶ 27-28; Hudson Decl. ¶ 8. Given the economic growth and demand for electricity in Texas,

loss of any existing generating capacity creates reliability concerns and the risk of service disruptions. ERCOT, *Impacts of Environmental Regulations in the ERCOT Region*, at ii. Movant-Intervenors' members would face lost profits and other costs if service disruptions prevented them from producing products and meeting their clients' demands. In addition, businesses facing even a potential risk of service disruptions would be forced to expend resources to develop and implement contingency plans to deal with potential service disruptions.

Further, the interests of Movant-Intervenors' members would be impaired by the adverse impact that the Final Rule would have on the local economies where the regulated generating units are located. If the Final Rule is not vacated, several of the regulated generating units may be forced to prematurely retire, resulting in significant job losses. Pierce Decl. ¶ 10. Those job losses will harm the local economies where the generating units are located. In particular, those job losses would cause economic harm to Movant-Intervenors' members who provide goods and services to local communities and lack access to other potential clients. To ensure the economic well-being of these members, it is imperative that Movant-Intervenors be permitted to intervene on behalf of these members and their local communities.

C. No Existing Party Adequately Represents Movant-Intervenors' Interests

The burden of showing that an intervenor's interests will not be adequately represented by the existing parties is "minimal." *Trbovich v. United Mine Workers of Am.*,

404 U.S. 528, 538 n.10 (1972). “The potential intervenor need only show that the representation *may be* inadequate.” *John Doe #1*, 256 F.3d at 380 (quoting *Trbovich*, 404 U.S. at 538 n.10). Moreover, representation by existing parties may be inadequate even if the putative intervenor and an existing party “agree[] on the merits of the substantive issues to be litigated.” *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 425 (5th Cir. 2002). Movant-Intervenors represent a broad array of businesses that will be harmed by the Rule, and none of the existing parties can represent the full range of interests at issue for Movant-Intervenors’ members.

Petitioners here are Texas, the owners of generating units that will be regulated under the Rule, and the Utility Air Regulatory Group (“UARG”). Texas cannot adequately represent Movant-Intervenors because it has a broader duty to the public as a whole and cannot focus solely on the particular business and economic interests of Movant-Intervenors’ members. *See John Doe #1*, 256 F.3d at 381 (“[A] governmental agency . . . must represent the broad public interest, not just the [Intervenors’] concerns.”).

Generating unit owners cannot adequately represent Movant-Intervenors because their interests are not as broad as Movant-Intervenors’. While Movant-Intervenors’ members include some generating unit owners, their members also include thousands of electricity customers who have an interest in low-cost electricity and whose interests may diverge from the generating units that supply them with electricity. Further, a significant number of Movant-Intervenors’ members serve the

communities where the regulated generating units are located and would be harmed by local economic impacts associated with the retirement of such units. Thus because Movant-Intervenors must represent all of their members, their interests in this case are much broader than those of the regulated generating units. Likewise, Movant-Intervenors' cannot be adequately represented by UARG because it represents electric generators and not the full breadth of Movant-Intervenors' members.

Movant-Intervenors cannot be adequately represented by Petitioner Nucor Corporation. Nucor is the largest steel producer in the United States and owns and operates a steel mill in Jewett, Texas.⁷ Movant-Intervenors represent members in diverse sectors with operations across the state of Texas, including many small, local businesses. As explained above, Movant-Intervenors' members also include businesses located near the regulated generating units who will be harmed by the impact of generating unit retirements on local economies. Thus, Movant-Intervenors interests in this case are necessarily broader than those of Nucor.

Other Petitioner-Intervenors cannot adequately represent Movant-Intervenors because they represent narrow interests that differ from those of Movant-Intervenors. Petitioner-Intervenors Balanced Energy for Texas and the Texas Mining and Reclamation Association's interest in this case is related to "promoting and

⁷ Nucor's Response in Support of Joint Motion to Stay Final Rule of the U.S. Environmental Protection Agency, Doc. No. 513427126 at 2.

developing the use of coal in Texas,”⁸ which differs from Movant-Intervenors’ broader business interests. Likewise, Petitioner-Intervenor Local Union 2337’s interest in this case is focused on the union members whose jobs may be at risk as a result of the Rule² and is different from the interests of Movant-Intervenors.

Finally, neither Respondents nor Respondent-Intervenors can adequately represent Movant-Intervenors interests because they will seek to defend the Rule and are, therefore, opposed to Movant-Intervenors’ interests.

III. IN THE ALTERNATIVE, MOVANT-INTERVENORS SATISFY THE STANDARD FOR PERMISSIVE INTERVENTION

Movant-Intervenors are not only entitled to intervene as of right; they also qualify for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides “on timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact.” *See also Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006).

As previously demonstrated, Movant-Intervenors’ motion is timely, will not cause undue delay, and will not prejudice the existing parties. Further, as discussed above, Movant-Intervenors possess legally protectable interests that will be impaired if the Rule is implemented. To protect those interests, Movant-Intervenors will argue

⁸ Motion of Balanced Energy for Texas and the Texas Mining and Reclamation Association for Leave to Intervene, Doc. No. 513462805 at 20.

² Motion for Leave to Intervene by Local Union 2337 of the International Brotherhood of Electrical Workers, Doc. No. 513428922 at 12-14.

that EPA violated the Clean Air Act by adopting the Rule. As described in their Motions for Stay, Petitioners intend to argue that the Rule is unlawful because, among other things, (1) the CAA does not require a source-by-source analysis when setting reasonable progress goals, (2) EPA unlawfully required emission controls that cannot be implemented during the current 2008-2018 planning period, and (3) EPA failed to conduct a rational cost-benefit analysis when it required the regulated generating units to expend \$2 billion to produce imperceptible changes in visibility. *See* Utility Petitioners Stay Motion at 12-17. Movant-Intervenors made these arguments in their comments on the proposed rule, *see* U.S. Chamber Comments at 13-20, and intend to advance them in this case. Thus, a common question of law exists in this case and permissive intervention is appropriate.

CONCLUSION

For the foregoing reasons, Movant-Intervenors respectfully ask the Court to grant their motion for leave to intervene in support of Petitioners.

Dated: April 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing motion were served, this 15th day of April, 2016, through CM/ECF on all registered counsel.

/s/ C. Frederick Beckner III