

**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 cases<sup>1</sup> respectfully request that  
the Court stay all proceedings in these consolidated cases for a period of

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<sup>1</sup> 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

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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.<sup>2</sup> *Balanced Energy for Texas and Texas Mining and Reclamation Association, Texas Association of Business et al., and*

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<sup>2</sup> 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

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**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.

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