IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,	)	
	)	
Petitioners,	)	No. 16-60118
	)	
v.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, U.S. EPA,	)	
	)	
Respondents.	)	
	)	

RESPONDENTS' MOTION FOR
PARTIAL VOLUNTARY REMAND

Respondents United States Environmental Protection Agency and Administrator Gina McCarthy (collectively, "Respondents" or "EPA") move the Court for an order remanding EPA's disapproval of portions of Clean Air Act ("CAA") State Implementation Plan ("SIP") submittals from the State of Texas and the State of Oklahoma, and the Federal Implementation Plans ("FIPs") promulgated by EPA as part of the final rule issued by EPA published at 81 Fed. Reg. 296 (January 5, 2016) ("Final Rule"). EPA consents to the continuation of the current stay of the remanded portions of the Final Rule until EPA completes final action on reconsideration of those portions of the Final Rule.

EPA seeks voluntary remand of the Final Rule's SIP disapprovals and FIPs so that it may reconsider those actions in light of the discussion regarding likelihood of success on the merits set forth in the Court's Order of July 15, 2016 ("Order"), in which the Court stayed the Final Rule "pending the outcome of this petition for review." Order, at 44. Remand is also warranted because, as discussed below, EPA desires to reconsider at least one issue raised by petitioner Luminant Generation Company, LLC ("Luminant") in a request it submitted to EPA for administrative reconsideration of the Final Rule. EPA also respectfully requests that the Court lift the stay pending appeal as to those portions of the Final Rule that approved provisions of the Texas and Oklahoma SIPs, and which have not been challenged in this petition for review.[1] If the Court grants this motion, all issues now pending in these petitions for review would be resolved.

Petitioners and petitioner-intervenors have requested that EPA include the following statement in this motion: "Petitioners and Petitioner-Intervenors do not join EPA's Motion. Instead, they intend to

[1] The approved parts of the Texas and Oklahoma SIPs are reflected in the amendatory text to 40 C.F.R. §§ 52.1920(e) and 52.2270(c) in the Final Rule. 81 Fed. Reg. at 349-51.

review the motion once it is filed and to file a response or responses with the Court as appropriate, including potentially a request for different relief." Petitioner-respondent National Parks Association has not stated a position regarding this Motion.

BACKGROUND

A. Statutory and Regulatory Background

Under the cooperative-federalism scheme of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7401-7671q, EPA establishes standards that protect air quality and States implement those standards through "state implementation plans." States submit SIPs to EPA, and EPA must determine whether the SIP "meets all of the applicable requirements of [the Act]." *Id.* §§ 7410(a)(1), 7410(k)(3); 40 C.F.R. § 51.104-105. If a State fails to submit a required SIP, a SIP is incomplete, or all or part of a SIP fails to meet the Act's requirements, EPA must promulgate a "federal implementation plan" ("FIP"). 42 U.S.C. § 7410(c)(1).

Congress in 1977 enacted 42 U.S.C. § 7491, entitled "Visibility protection for Federal Class I areas." "Federal Class I areas" include national wilderness areas and national memorial parks exceeding 5,000 acres in size and national parks exceeding 6,000 acres in size. *Id*. §

7472(a). Congress declared as a national goal "the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from man-made air pollution." *Id*. § 7491(a)(1).

The CAA directed EPA to adopt regulations requiring States to revise their SIPs to include "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress" toward the national visibility goal. *Id*. § 7491(b)(2). The statute provides that SIPs (and by extension, FIPs) must include "a long-term (ten to fifteen years) strategy for making reasonable progress toward meeting the national goal . . . ." *Id*. § 7491(b)(2)(B). States (or EPA in the case of a FIP) must determine what emission limits are necessary to achieve "reasonable progress" by considering four statutory factors: "the costs of compliance, the time necessary for compliance, and the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing source . . . ." *Id*. § 7491(g).

SIPs must also require that certain existing stationary sources, such as power plants built between 1962 and 1977, install the "best available retrofit technology" ("BART"), which is defined as "an emission limitation based on the degree of reduction achievable through the

application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility . . . ." The BART emission limit is to be established on a case-by-case basis after considering five statutory factors, including the costs of compliance, the energy and non-air quality environmental impacts of compliance, existing pollution control technology at the source, the remaining useful life of the source, and "the degree of improvement which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. § 7491(g)(2).

EPA's Regional Haze Rule ("Haze Rule") sets out the requirements for regional haze SIPs. 40 C.F.R. §§ 51.308. Rather than requiring natural visibility conditions to be achieved all at once, the Haze Rule sets up multiple planning periods. For each planning period, SIPs must include a "long-term strategy" for achieving reasonable progress and "reasonable progress goals" ("Progress Goals") for each Class I area reflecting the visibility improvement that will be achieved at the end of the planning period by the measures in the long-term strategy. 40 C.F.R §§ 51.308(d)(1), (d)(3).

In addition, the CAA provides that a SIP must assure that emissions within the State will not interfere with air pollution control

efforts in other States. 42 U.S.C. § 7410(a)(2)(D)(i). The Haze Rule contains several provisions to address the interstate transport of visibility-impairing pollution. First, a State's long-term strategy must "address[] regional haze visibility impairment . . . for each mandatory Class I Federal area located outside the State which may be affected by emissions from the State." 40 C.F.R. § 51.308(d)(3). Second, States must consult with one another "to develop coordinated emission management strategies." *Id*. § 51.308(d)(3)(i). Third, upwind States must demonstrate that their long-term strategies contain "all measures necessary to obtain [their] share of the emission reductions needed to meet the progress goal[s] for [downwind Class I] area[s]." *Id*. § 51.308(d)(3)(ii). Fourth, States must document the technical basis they used to determine the "apportionment of emission reduction obligations necessary for achieving reasonable progress in each mandatory Class I Federal area [they] affect[]." Id. § 51.308(d)3)(iii). Finally, downwind States with Class I areas must consult with upwind States to determine whether the Progress Goals provide for reasonable progress. *Id*. § 51.308(d)(3)(iv).

In 2005, EPA issued the "Clean Air Act Interstate Rule" ("CAIR"), which required 28 States, including Texas, to reduce sulfur dioxide

("SO_{2}") and nitrogen oxide ("NO_x") emissions, which contribute to fine particle ("$PM_{2.5}$") and ozone pollution in downwind States. CAIR was remanded by the D.C. Circuit without vacatur to EPA. *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). In 2011, EPA issued the "Cross-State Air Pollution Rule" ("CSAPR") to replace CAIR. 76 Fed. Reg. 48,208 (Aug. 8, 2011). CSAPR established "budgets" for SO_2 and NO_x emissions for large EGUs in 23 States, including Texas. EPA issued a FIP for Texas which established CSAPR emission budgets for Texas electric generating units ("EGUs").

In 2012, EPA amended the Haze Rule to provide that participation by a State's EGUs in a CSAPR emissions trading program for a given pollutant would qualify as a "BART alternative" for those EGUs for that pollutant. 40 C.F.R. § 51.308(e)(4). In other words, a State participating in CSAPR would not be required to establish source-specific BART emission limits for each EGU in that State.

In *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015), the D.C. Circuit generally upheld the CSAPR program, but remanded the CSAPR Phase II SO_2 emissions budget for Texas EGUs to EPA.

B. Factual Background

1. The Final Rule

The State of Oklahoma submitted a regional haze SIP to EPA on February 19, 2010. EPA partially approved and partially disapproved the SIP. 76 Fed. Reg. 81,728 (Dec. 28, 2011). EPA ultimately promulgated a FIP requiring SO_2 scrubbers at six EGUs, *id*. at 81,729, which was upheld by the Tenth Circuit Court of Appeals. *Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013). EPA deferred action on Oklahoma's Progress Goals, 76 Fed. Reg. at 81,731, determining that sources in Texas affect visibility at the Wichita Mountains Wildlife Refuge (in Oklahoma), and that EPA first needed to review Texas's SIP submission to determine whether Oklahoma had met the CAA and Haze Rule reasonable progress requirements. 76 Fed. Reg. 16,168, 16,177 (March 22, 2011).

Texas submitted its regional haze SIP to EPA on March 31, 2009. In 2012, EPA finalized a limited disapproval of Texas' SIP for relying on the remanded CAIR to satisfy the State's BART obligations. 77 Fed. Reg. 33,642, 33,643 (June 7, 2012). On December 16, 2014, EPA proposed to take action on the remainder of Texas' and Oklahoma's regional haze

SIPs, including a proposal to promulgate a FIP that would rely on CSAPR to satisfy BART for Texas' EGUs. 79 Fed. Reg. 74,818.

On January 5, 2016, EPA issued the Final Rule, partially approving and partially disapproving the Texas and Oklahoma regional haze SIPs and promulgating FIPs for each State. 81 Fed. Reg. 296. EPA disapproved Texas's Progress Goals for the Big Bend and Guadalupe Mountains National Parks Class I areas, which were based on emission reductions from existing CAA programs only. *Id*. at 346. EPA found that Texas's four-factor reasonable progress analysis was flawed in multiple respects. *Id*. EPA disapproved Texas's long-term strategy because it failed to adequately evaluate and identify control measures to achieve reasonable progress at Wichita Mountains Wildlife Refuge or the State's own Class I areas. *Id*. In connection with these disapprovals, EPA also disapproved portions of several SIP revisions submitted by Texas for the purpose of addressing the requirements of the Act regarding interference with other states' programs for visibility protection. [2] *Id*.

EPA issued a FIP, establishing a new long-term strategy for Texas. The strategy consisted of SO_2 emission limits for 15 coal-fired EGUs at

[2] Amendatory text reflecting these disapprovals was added to 40 C.F.R. § 52.2304(d). 81 Fed. Reg. at 352.

eight power plants that significantly affect visibility at the Wichita Mountains Wildlife Refuge, Big Bend National Park, and Guadalupe Mountains National Park. *Id*. at 351-52. EPA required SO_2 scrubber upgrades at facilities with existing scrubbers, and scrubber retrofits at facilities without existing scrubbers. *Id*. at 305. EPA established new Progress Goals for 2018 for Big Bend, Guadalupe Mountains, and Wichita Mountains that accounted only for the emission reductions from the scrubber upgrades, which EPA projected would be installed by the end of 2018, but not the scrubber retrofits, for which EPA allowed five years. *Id*. at 347.

EPA issued the proposed rule in December 2014, after the CAIR rule was vacated. EPA did not finalize its proposal to satisfy the BART requirement for Texas' EGUs by relying on CSAPR, stating that, in light of the uncertainties created by the D.C. Circuit's July 2015 remand, "we have concluded that it would not be appropriate to finalize our proposed determination to rely on CSAPR as an alternative to SO_2 and NO_x BART for EGUs in Texas at this time." *Id.* at 302. EPA stated that it would "address the question of appropriate SO_2 and NO_x BART limits for EGUs in a future rulemaking." *Id*. at 316.

C. Progress of the Litigation

On March 1, 2016, the State of Texas, the Public Utility Commission of Texas, and the Texas Commission on Environmental Quality (collectively "Texas ") filed a petition for review of the "Texas applicable portions" of the Final Rule in this Court. Parties ultimately added as petitioners include Luminant Generation Company, L.L.C.; Big Brown Power Company, L.L.C.; Luminant Mining Company, L.L.C.; Big Brown Lignite Company, L.L.C.; Luminant Big Brown Mining Company, L.L.C.; Southwestern Public Service Company; Utility Air Regulatory Group; Coleto Creek Power, L.P.; NRG Texas Power, L.L.C.; and Nucor Corporation. On March 28, 2016, the Court granted motions to intervene filed by IBEW Local Union 2337 in support of petitioners and by Sierra Club and National Parks Conservation Association in support of EPA.[3] At approximately the same time this petition for review was filed in the Fifth Circuit, all of the petitioners here also filed petitions for

[3] The Court combined all petitions under Case No. 16-60118.

review challenging the Final Rule in the District of Columbia Circuit,[4] and certain of the petitioners filed similar actions in the Tenth Circuit.[5]

On March 3, 2016, petitioners Luminant Generation Company, L.L.C., Southwestern Public Service Company, and Coleto Creek Power, LP, filed a "Joint Motion to Stay Final Rule of the U.S. Environmental Protection Agency" ("Utilities' Stay Motion"), which sought a stay of the Final Rule and an order tolling all compliance deadlines included in the Final Rule pending resolution of this case. On March 17, 2016, Texas filed its motion ("Texas Stay Motion"), seeking the same relief. EPA filed a "Consolidated Response in Opposition to the Motions for Stay of the Final Rule" on April 7, 2016, and both the Utilities movants and Texas filed separate reply briefs on April 18, 2016.

[4] *State of Texas, et al. v. EPA*, No. 16-1078 (consolidated with Nos. 16-1083, 16-1084, 16-1085, 16-1086, 16-1087, and 16-1091). On August 30, 2016, the clerk issued an order holding the D.C. Circuit cases in abeyance pending settlement negotiations, with the parties directed to file an abeyance status report by November 28, 2016.

[5] *Luminant Generation Company, et al. v. EPA*, No. 16-508, with consolidated cases Nos. 16-9509, 16-9511, and 16-9512. On September 22, 2016, the Tenth Circuit issued an order holding the consolidated petitions for review there in abeyance, with a status report due from the parties by November 28, 2016.

In the meantime, on March 22, 2016, EPA filed a "Motion to Dismiss or, in the Alternative, Transfer to the D.C. Circuit" ("Transfer Motion") in this Court. EPA argued that under the CAA's judicial review provision, 42 U.S.C. § 7607(b)(1), "jurisdiction for review of all final actions that EPA finds are 'based on a determination of nationwide scope or effect,' and for which EPA publishes such a determination, rests exclusively in the D.C. Circuit." Transfer Motion at 1. On April 18, 2016, petitioners filed a joint opposition to EPA's Transfer Motion, and EPA filed a reply brief in support on April 28, 2016.

The motions panel rendered an opinion on July 15, 2015, which concluded that:

> Because the Clean Air Act gives jurisdiction over petitions for review to the courts of appeal generally and because the Act's forum selection clause designates the regional circuit as the appropriate venue for the challenge, we DENY EPA's motion to dismiss or transfer. Because Petitioners have demonstrated a strong likelihood of success on the merits, because they are likely to suffer irreparable injury in the absence of a stay while EPA has not shown similar injury from the issuance of a stay, and because the public interest weighs in favor of a stay, we GRANT the motion for a stay pending resolution of the petitions for review on the merits.

Order at 2.

The Court found that, in order to show a strong likelihood of success on the merits, the petitioners were required to show that EPA

acted arbitrarily, capriciously, or unlawfully. *Id*. The panel noted that "[o]ur determination of Petitioners' likelihood of success on the merits is for the purposes of the stay only and does not bind the merits panel." *Id*. n.29.

The Court stated that petitioners had alleged two grounds for why EPA's disapproval of the Texas SIP was unlawful: "(1) that EPA exceeded its powers when it disapproved Texas's reasonable progress goals and the resulting long-term strategy despite their compliance with the Clean Air Act; [and] (2) that EPA acted arbitrarily and capriciously when it disapproved Texas's consultation with Oklahoma." *Id*. at 27. The Court stated that petitioners had alleged three independent grounds why the FIP was unlawful: (1) that the FIP "impermissibly relied on effects outside the ten-year regulatory window in requiring emission controls"; (2) that FIP did not adequately consider costs; and (3) that the FIP did not adequately consider the effects on "grid reliability" in Texas. *Id*. at 27-28.

With regard to Progress Goals, the Court stated that "EPA disapproved both Texas's and Oklahoma's goals by arguing that Texas incorrectly weighed the four statutory factors that govern the development of reasonable progress goals" set forth in 42 U.S.C. §

7491(g)(1). Order at 30. The Court said that, while EPA asserted that it had several grounds for disapproving the Progress Goals, "[m]ost of these 'independent' grounds boil down to EPA's insistence that Texas should have conducted a source-specific requirement," *id.*, and that no ground except lack of source-specific analysis and estimation of natural visibility conditions was cited in the Final Rule. *Id*. at 30-31. The Court found that "EPA's requirement that Texas conduct a source-specific analysis is not supported by the Clean Air Act or the Regional Haze Rule." *Id*. at 31. Consequently, the Court held that "Petitioners are likely to establish that EPA improperly failed to defer to Texas's application of the statutory factors and improperly required a source-specific analysis not found in the Act or Regional Haze Rule." *Id*.

With regard to EPA's disapproval of the consultations between Texas and Oklahoma regarding interstate effects of pollution on visibility in Class I federal areas, the Court stated that "EPA's disapproval seems to stem in large part from its assertion that Texas had to conduct a source-specific analysis and provide Oklahoma with that source-specific analysis." *Id*. at 32. The Court found that

> Given the absence of a regulation or statute requiring source-specific consultations, the extent of negotiations between CENRAP states [the regional planning association], the

> volume of analysis produced by CENRAP, and the fact that EPA has never before disapproved the consultation between states under the Regional Haze Rule, Petitioners have a strong likelihood of success in showing that EPA's disapproval of the consultation between Oklahoma and Texas was arbitrary and capricious.

Id. at 33.

The Court also held that "Petitioners have a strong likelihood of showing that EPA acted in excess of its statutory power when it disapproved the Texas [SIP] for failing to require scrubbers that will not be installed until after the [SIP] is no longer in effect," that is, after 2018. *Id*. at 35. According to the Court, "EPA bound states (and accordingly bound itself) to a ten-year window when it promulgated the Regional Haze Rule," *id*. at 34, and EPA does not have authority to require actions that would take place after the particular period.

As to petitioners' claims that EPA did not adequately consider costs of the FIP's required changes to power plants, particularly scrubbers, the Court said that it need not consider whether EPA improperly used a dollars per ton of reduced pollution metric versus a dollars per deciview improvement metric "or whether the costs imposed are unreasonable as a whole in light of the minimal visibility benefits the FIP would achieve in the relevant time period," because

petitioners have a strong likelihood of establishing other flaws in the FIP. *Id*. at 36.

Finally, the Court held that "EPA's truncated discussion of [electric power] grid reliability indicates that the agency may not have fulfilled its statutory obligation to consider the energy impacts of the FIP." *Id.* at 39.

The Court found that petitioners had demonstrated that they would suffer irreparable injury if the effect of the Final Rule was not stayed pending litigation of this petition for review, *id*. at 40-42, that a stay would not injure EPA or Intervenor-Respondents, *id*. at 42-43, and that "the public's interest in ready access to affordable electricity outweighs the inconsequential visibility differences that the federal implementation plan would achieve in the near future." *Id*. at 43.

The Court stayed "the Final Rule in its entirety, including the emissions control requirements, pending the outcome of this petition for review." *Id*. at 44.

ARGUMENT

I. Standard for Granting Voluntary Remand

Through this motion, EPA seeks an order of the Court granting a voluntary remand of those portions of EPA's Final Rule disapproving the

Texas and Oklahoma SIPs and imposing FIPs. EPA does not oppose continuation of the current stay pending appeal through the completion of agency action on reconsideration pursuant to the requested remand. In addition, EPA requests that the Court lift the current stay pending appeal as to those portions of the Final Rule not challenged by petitioners in these petitions for review, *i.e.*, EPA's approval of portions of the Texas regional haze SIP and one portion of the Oklahoma regional haze SIP. See fn. 1, *supra*.

"A reviewing court has inherent power to remand a matter to the administrative agency." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983). "[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002); *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (noting that "the power to decide in the first instance carries with it the power to reconsider"). This authority includes the right to seek voluntary remand of a challenged agency decision, without confessing error. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (*quoting SKF USA Inc.*). For example, an agency

may seek remand because it wishes to reconsider its interpretation of the governing statute, the procedures it followed in making its decision, or the decision's relationship to other agency policies. *Id.* If an agency has not provided a "reasoned explanation" for its action, "it is appropriate to remand to the agency for further proceedings." *Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1201 (10th Cir. 2001).

While the reviewing court has discretion whether to remand, voluntary remand is appropriate where the request is reasonable and timely. *Macktal,* 286 F.3d at 826. "Administrative reconsideration is a more expeditious means of achieving . . . agency policy than is resort to the federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (*quoting Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). As the D.C. Circuit has stated, "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); *see also Anchor Line Ltd. v. Fed. Maritime Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962) ("[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance

pending reconsideration by the agency"). "[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004). "Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Calif. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012).

II. The Court Should Grant EPA's Motion for Voluntary Remand

In light of the Court's Order finding that petitioners have shown a strong likelihood that they would succeed on the merits of their claims, as well as EPA's determination that reconsideration of the deferral of action on BART in the Final Rule is warranted, as described below, EPA moves the Court to grant a motion for voluntary remand of those portions of the Final Rule disapproving the Texas and Oklahoma SIPs and promulgating the FIPs. While the Court indicated that its finding on likelihood of success on the merits does not bind a subsequent merit panel's consideration of the issues, EPA has reviewed the Court's Order and determined that it wishes to re-examine its disapproval of the Texas and Oklahoma SIPs and issuance of FIPs. A voluntary remand would allow the Agency to take a second look at the Final Rule and determine

whether another course of action is appropriate. Thus, a remand would result in judicial economy and conservation of the parties' resources by obviating the need for arduous and unnecessary briefing.[6]

EPA's concerns leading to this request for approval of a voluntary remand are "substantial and legitimate." *Citizens Against Pellissippi Parkway*, 375 F.3d at 417. Petitioners' motions for stay and the Court's Order demonstrate that the Final Rule could be found arbitrary and capricious or contrary to law. Consequently, EPA believes that it is appropriate to reconsider the Final Rule, provide interested parties with a new opportunity to provide comment, including with respect to the views expressed in the Court's Order, and issue a new rule that takes into account the comments received and any changed factual circumstances that could warrant different outcomes.

In addition, on March 2, 2016, petitioner Luminant submitted a request for administrative reconsideration of the Final Rule pursuant to 42 U.S.C. § 7607(d)(7)(B). Exhibit A. Among other things, Luminant

[6] Judicial economy would extend to the other Courts of Appeals. If the motion is granted, EPA would cite the Court's remand order here in seeking to dismiss the petitions for review in the Tenth and D.C. Circuits, preventing undue duplication of proceedings.

argued that reconsideration is appropriate because EPA did not finalize its proposal to rely on CSAPR to satisfy BART for Texas EGUs, but nonetheless finalized the Agency's proposed long-term strategy and Progress Goals for Texas. Luminant stated that "[b]y deferring this action, EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated." *Id*. at 2. Luminant claimed that the ultimate decision was not discussed in the proposed rule and that the public was therefore unable to comment on the change. *Id.*

EPA has determined that reconsideration of the Agency's decision to finalize a long-term strategy and Progress Goas for Texas before determining BART for Texas EGUs is warranted, because (1) the public did not have an opportunity to submit comments on the reasonableness or lawfulness of this approach, and (2) EPA's forthcoming proposal on BART for Texas EGUs will likely change how reasonable progress is evaluated.[7] This issue further supports voluntary remand to allow EPA

[7] EPA is subject to a consent decree entered in *Sierra Club v. McCarthy*, Civ. Act. No. 11-548 (D.D.C.), which established a schedule by which EPA had to take action on a number of regional haze FIPS or SIPs, including those for Texas and Oklahoma. Consistent with the requirements of the most recent amendment to that consent decree, no later than December 9, 2016, EPA will sign a notice of proposed rulemaking in which the

to consider this objection to the Final Rule. EPA plans to grant reconsideration on the issue in the near future, and voluntary remand is appropriate to allow EPA to reconsider the Final Rule in light of the Agency's impending BART proposal.

This motion is also timely. On August 19, 2016, approximately one month after the issuance of the Court's Order, the Court granted the parties' joint stipulation to stay further proceedings in the case, to and including November 28, 2016, to allow the parties to pursue settlement negotiations. Unfortunately, settlement negotiations were not successful. EPA's motion for voluntary remand has been filed before petitioners were under any obligation to file their opening merits briefs, but after EPA has had the benefit of reviewing the Court's July 15, 2016, Order, and after settlement negotiations failed. EPA notified the parties of the possibility that it would file a motion for voluntary remand before the Clerk issued a briefing schedule, and this motion is being filed shortly after a briefing schedule was set.

Agency "proposes approval of a SIP; promulgation of a FIP; partial approval of a SIP and promulgation of a partial FIP; or approval of a SIP or promulgation of a FIP in the alternative, for Texas, that collectively meet the regional haze implementation plan requirements that were due by December 17, 2007 under EPA's regional haze regulations." Order, ¶2(ii)(b) (Dec. 15, 2015).

As noted, EPA does not object to continue maintenance of the current stay pending appeal until the Agency's process on remand is complete. Because the Final Rule has been stayed since July 2016, and would remain so during the pendency of the remand, Petitioners will not be prejudiced by the timing of this motion for voluntary remand. In fact, the relief that would ordinarily be ordered if the petition for review were granted is a remand to EPA for reconsideration. Thus, petitioners are advantaged by EPA's request for a voluntary remand because they avoid the risk that EPA will prevail if this petition for review is litigated on the merits or successfully appealed. As the D.C. Circuit has stated, motions for voluntary remand are "commonly grant[ed]." *Ethyl Corp.*, 989 F.2d at 524.

If the Court grants the relief requested here, it should retain jurisdiction over the petition as to the remanded portions of the Final Rule and place the petition in abeyance during the pendency of the remand, so that the current stay pending appeal may be maintained.

III. The Court Should Lift the Stay Pending Appeal of Those Portions of the Final Rule That Partially Approved the Texas and Oklahoma SIPs and Have Not Been Challenged by Petitioners

The portions of the Final Rule challenged by petitioners are EPA's partial disapproval of the Texas and Oklahoma SIPs and the EPA's issuance of FIPs for Texas and Oklahoma. Through this motion, EPA seeks a voluntary remand of those actions. EPA's partial approval of portions of the Texas and Oklahoma SIPs is not disputed and was not cited as a reason for the imposition of the stay pending appeal. Because granting the motion for voluntary remand of the disapprovals and FIPs would resolve the claims asserted in these petitions for review, EPA respectfully requests that the undisputed portions of the Final Rule should be released from the terms of the stay imposed by the Court's Order of July 15, 2016. That is particularly the case because lifting the stay as to those aspects of the Final Rule would give effect to those portions of the proposed SIP submitted by the State of Texas that EPA has determined meet the requirements of the Clean Air Act.

CONCLUSION

For the reasons set forth above, EPA moves the Court to grant its request for voluntary remand of those portions of the Final Rule which

disapproved provisions of the Texas and Oklahoma SIPs, and issued FIPs for Texas and Oklahoma, for reconsideration by EPA in light of the Court's Order of July 15, 2016. EPA further requests that the Court lift the stay with regard to the portions of the Final Rule approving portions of the Texas and Oklahoma SIPs.

Respectfully submitted,

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Dated: Dec. 2, 2016

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)(2)(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Cambria, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5174 words, excluding the caption and signature blocks, according to the count of Microsoft Word.

/s/ David A. Carson
DAVID A. CARSON

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENTS' MOTION FOR PARTIAL VOLUNTARY REMAND** by Notice of Electronic Filing using the Court's CM/ECF system, which will send notice of such filing via email to all counsel of record.

Said filing was made on or before the date set forth below.

Dated: Dec. 2, 2016

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1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: **Request for Reconsideration of EPA's Final Rule 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" (81 Fed. Reg. 296 (Jan. 5, 2016) (Docket No. EPA-R06-OAR-2014-0754)**

Dear Administrator McCarthy:

Luminant Generation Company LLC ("Luminant") respectfully requests that the U.S. Environmental Protection Agency ("EPA") grant reconsideration of the final rule 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*." *See* 81 Fed. Reg. 296 (Jan. 5, 2016). Luminant commented on the proposed rule and has a substantial interest in the outcome of the final rule. Luminant owns and operates 9 of the 15 units that are directly regulated by the final rule, and because of the emission limitations in the final rule, Luminant is required to install over $1 billion in pollution controls at these units.

Luminant requests that EPA convene a proceeding pursuant to 42 U.S.C. § 7607(d)(7)(B) to reconsider new aspects of the final rule. Under the Clean Air Act, the Administrator "shall convene a proceeding for reconsideration of the rule" if the person raising the objection demonstrates that: (1) "it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review);" and (2) "such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). EPA must "provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

As outlined below, it was not possible for Luminant to raise certain objections during the comment period, and each of these objections is of central relevance to the outcome of the final rule. Because both prerequisites are met, EPA "lack[s] discretion not to address the claimed errors." *North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir. 2008).

- **Synapse Report:** EPA contracted Synapse Energy Economics, Inc. ("Synapse") to review a 2014 report issued by the Electric Reliability Council of Texas ("ERCOT")[1] that addresses reliability issues associated with EPA's regional haze proposal. The Synapse report was not submitted to EPA until September 8, 2015, nearly five months after the public comment period for the proposed regional haze rule was closed. EPA did not indicate in the proposal that it was considering hiring a contractor for this purpose. EPA has specifically relied on the Synapse report in the final rule to reject public comments regarding reliability issues. *See* 81 Fed. Reg. at 345 ("We reviewed and accept [Synapse's] finding and adopt its conclusion that ERCOT's report contained significant flaws. In sum, ERCOT's report cannot support a determination that there is likely to be any significant, adverse effect on the supply, distribution, or use of energy."). Reconsideration is warranted given EPA's express reliance on the Synapse report—which was issued well after the comment deadline—to dismiss valid reliability concerns.

- **October 2015 ERCOT Study:** ERCOT, which ensures that the electric grid in Texas remains reliable, issued an updated report in October 2015 regarding reliability issues associated with EPA's regional haze proposal.[2] The Synapse report was submitted to EPA in September 2015, and therefore, does not consider ERCOT's updated findings regarding reliability. The final rule itself also does not acknowledge ERCOT's October 2015 report. EPA must fully account for ERCOT's updated assessment regarding regional haze before issuing a final rule. Relatedly, in the final rule, EPA asserts that its reliability analysis was based on its conclusion that the rule "should not require a source to shut down to comply." Response to Comments at 162. This is a new determination by EPA and must be subject to notice and comment through the reconsideration process.

- **New Reasonable Progress Goals for 20% Best Days:** EPA's final regional haze rule includes new reasonable progress goals ("RPGs") for the 20% best days. In the final rule, EPA has quantified the RPGs as 5.70 dv at the Guadalupe Mountains National Park, 5.59 dv at Big Bend National Park, and 9.22 dv at Wichita Mountains National Wildlife Refuge. 81 Fed. Reg. at 306–07. EPA's proposed rule, however, quantified RPGs for only the 20% worst days. EPA's proposed rule was fundamentally flawed by not including proposed numerical values for the 20% best days, and therefore, EPA must consider public input on the newly calculated RPGs.

- **CSAPR/BART:** In the proposed rule, EPA stated that it would "replace Texas' reliance on CAIR to satisfy the BART requirement for EGUs with reliance on CSAPR." 79 Fed. Reg. 74,818, 74,823 (Dec. 16, 2014). Instead of finalizing this approach, EPA changed course and decided that "it would not be appropriate to finalize [its] proposed determination to rely on CSAPR as an alternative to SO_2 and NO_X BART for EGUs in Texas at this time." 81 Fed. Reg. at 302. This proposed course of action was not discussed in the proposed rule, and thus it was not possible to comment on EPA's deferral. By deferring this action, EPA is fundamentally changing the manner in which it will evaluate BART controls for Texas and how reasonable progress is evaluated. EPA must seek public comment on this fundamental difference between the proposed rule and final rule.

[1] ERCOT, *Impacts of Environmental Regulations in the ERCOT Region* (Dec. 16, 2014), http://www.ercot.com/content/news/presentations/2014/Impacts%20of%20Environmental%20Regulations%20in%20the%20ERCOT%20Region.pdf .

[2] ERCOT, *Transmission Impact of the Regional Haze Environmental Regulation* (Oct. 15, 2015), http://www.ercot.com/content/wcm/key_documents_lists/76860/Transmission_Impact_of_the_Regional_Haze_Environmental_Regulation__Oct_RPG.pdf.

- **EPA's Interpretation of the Clean Air Act:** In EPA's response to comment document, it claims that visibility benefit is "a consideration within the cost factor." Response to Comments at 84, 88. This interpretation of the reasonable progress statutory factors, however, is at odds with EPA's proposed rule. Although EPA previously stated that "visibility is not an explicitly listed factor to consider when determining whether additional controls are reasonable," TX TSD at 18, EPA did not state that it was interpreting "visibility" as a component of the statutory cost factor. EPA's disagreement with the Federal Land Managers, who warned EPA that it has no "statutory mandate" to consider visibility,[3] is also a new finding and new aspect of EPA's final action. EPA's newly developed interpretation of the cost factor is grounds for reconsideration.

Luminant was not given the opportunity to raise any of the foregoing issues during the public comment period. Due to the central relevance of these issues to the final rule, reconsideration is required under 42 U.S.C. § 7607(d)(7)(B).

Finally, we also request that EPA reconsider its denial of Luminant's request for a stay of the effective date of the rule and its compliance deadlines pending judicial review. Luminant previously requested that EPA stay the rule pending judicial review, but EPA denied that request in its final action. 81 Fed. Reg. at 315. In light of the issues raised above and the reconsideration proceedings that are necessary, Luminant again requests that EPA reconsider its denial and grant a stay of the rule and its requirements.

Please contact me with any questions regarding this request for reconsideration.

Sincerely,

Stephanie Zapata Moore
General Counsel, Luminant

cc: Janet McCabe
Ron Curry

[3] USDA Forest Serv., *Recommendations for Improved Implementation of the Regional Haze Program* 5 (May 2014), http://www.wrapair2.org/pdf/Final_RHR_USFS%20Improvement%20Suggestions%20May%202014.pdf.