IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Case No. 16-60118**
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, United States Environmental Protection Agency,	)	
	)	
Respondents.	)	

PETITIONERS' AND PETITIONER-INTERVENORS' JOINT RESPONSE IN OPPOSITION TO EPA'S MOTION FOR PARTIAL VOLUNTARY REMAND AND PARTIAL LIFTING OF THE STAY

and

PETITIONERS' AND PETITIONER-INTERVENORS' JOINT CROSS-MOTION FOR SUMMARY VACATUR

and

PETITIONERS' AND PETITIONER-INTERVENORS' JOINT CROSS-MOTION TO ENFORCE AND CLARIFY THE COURT'S STAY ORDER

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 Coleto Creek Power, LP)
- Baker Botts L.L.P. (Counsel for Petitioners Coleto 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)
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- Baytown Chamber of Commerce (Petitioner-Intervenor)
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- Big Brown Lignite Company LLC (Petitioner that, as a result of a Chapter 11 financial restructuring process, has been merged into Luminant Mining Company LLC)
- 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)
- Bumpers, William M. (Counsel for Petitioner Southwestern Public Service Company)
- Carson, David Aiken (Counsel for Respondents)
- Cedar Park Chamber of Commerce (Petitioner-Intervenor)
- Clear Lake Chamber of Commerce (Petitioner-Intervenor)
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- Coleto GP, LLC (A general partner and an owner of Petitioner Coleto Creek Power, LP)
- Coleto LP, LLC (Parent company of Petitioner Coleto Creek Power, LP)
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- Curry, Ron, Regional Administrator, United States Environmental Protection Agency, Region 6
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- GDF SUEZ Energy North America, Inc. (Parent company of Petitioner Coleto Creek Power, LP)
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- Greater Angleton Chamber of Commerce (Petitioner-Intervenor)
- Greater Beaumont Chamber of Commerce (Petitioner-Intervenor)
- Greater Hewitt Chamber of Commerce (Petitioner-Intervenor)
- Greater Irving-Las Colinas Chamber of Commerce (Petitioner-Intervenor)
- Greater Waco Chamber of Commerce (Petitioner-Intervenor)
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- International Power Ltd. (Parent company of Petitioner Coleto Creek Power, LP)
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- 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 and Vice President & Associate General Counsel for Vistra Energy Corp.)
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- Lubbock Chamber of Commerce (Petitioner-Intervenor)
- Luminant Big Brown Mining Company LLC (Petitioner that, as a result of a Chapter 11 financial restructuring process, has been merged into Luminant Mining Company LLC)
- Luminant Generation Company LLC (Petitioner)
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- Martella, Roger R., Jr. (Counsel for Petitioner-Intervenors Texas Association of Business *et al.*)
- McCarthy, Gina, Administrator, United States Environmental Protection Agency (Respondent)
- McDonald, Derek Raymond (Counsel for Petitioner Coleto Creek Power, LP)
- Mineral Wells Chamber of Commerce (Petitioner-Intervenor)
- 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)
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- National Parks Conservation Association (Respondent-Intervenor)
- NRG Energy, Inc. (Parent company of Petitioner NRG Texas Power LLC)
- NRG Texas LLC (Parent company of Petitioner NRG Texas Power LLC)
- NRG Texas Power LLC (Petitioner)
- Nucor Corporation (Petitioner)
- Pinkston, Daniel (Counsel for Respondents)
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- Public Utility Commission of Texas (Petitioner)
- Rockwall Area Chamber of Commerce (Petitioner-Intervenor)

- Romo, Carlos Ricardo (Counsel for Petitioner Coleto Creek Power, LP)
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- Sidley Austin LLP (Counsel for Petitioner-Intervenors)
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- South Padre Island Chamber of Commerce (Petitioner-Intervenor)
- Southwestern Public Service Company (Petitioner)
- State of Texas (Petitioner)
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- 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.)
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- Taylor, Natalie J. (Counsel for Petitioner Nucor Corporation)
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- Texas City-La Marque Chamber of Commerce (Petitioner-Intervenor)
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- Trisko, Eugene M. (Counsel for Petitioner-Intervenor Local Union 2337 of the International Brotherhood of Electrical Workers)
- Tyler Area Chamber of Commerce (Petitioner-Intervenor)

- United States Environmental Protection Agency (Respondent)
- Utility Air Regulatory Group (Petitioner)
- Victoria Chamber of Commerce (Petitioner-Intervenor)
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- Vistra Energy Corp. (Parent company of Petitioners Luminant Generation Company LLC, Big Brown Power Company LLC, and Luminant Mining Company LLC)
- Vistra Intermediate Company LLC (Parent company of Petitioners Luminant Generation Company LLC, Big Brown Power Company LLC, and Luminant Mining Company LLC)
- Vistra Operations Company LLC (Parent company of Petitioners Luminant Generation Company LLC, Big Brown Power Company LLC, and Luminant Mining Company LLC)
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- Whittle, Mary (Counsel for Respondent-Intervenors)
- Xcel Energy Inc. (Parent company of Petitioner Southwestern Public Service Company)

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INTRODUCTION

The Environmental Protection Agency's ("EPA") motion for partial voluntary remand and partial lifting of the stay should be denied. EPA's "last second motion to remand" is an improper attempt to circumvent this Court's prior rulings in this case and "avoid judicial review" of its unlawful rule. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying remand motion).[1]

After extensive briefing and oral argument, and based on multiple fundamental legal errors in EPA's final regional haze rule for Texas and Oklahoma ("Final Rule"), a Motions Panel of this Court held that "Petitioners have demonstrated a strong likelihood of success in establishing that EPA acted arbitrarily, capriciously, and in excess of its statutory authority when it disapproved the Texas and Oklahoma implementation plans and imposed a federal implementation plan," and thus the Panel stayed the Final Rule. *Texas v. EPA*, 829 F.3d 405,435-36 (5th Cir. 2016) ("Stay Order"). EPA's response is neither to acquiesce to the Court's conclusions about the unlawfulness of the rule nor to defend the rule on the merits. Instead, strategically, EPA seeks to avoid both by requesting a remand but leaving the Final Rule in place.

[1] All Petitioners and Petitioner-Intervenors join in this response in opposition and the cross-motions contained herein, except for NRG Texas Power LLC, which takes no position on the pending motions. Respondents have stated that they wish to reserve their response until after reviewing the cross-motions as filed. Sierra Club/National Parks Conservation Association oppose the cross-motions.

The Court should not sanction EPA's attempted end-run. The Panel's conclusions about the merits were correct. Petitioners contend that the unlawful portions of EPA's final rule must be vacated by the Court, not just remanded, and that EPA must approve Texas's SIP. Remand without vacatur is not appropriate where the agency rule suffers from fundamental legal errors, as does the Final Rule here. Further, because EPA has not confessed error—and, indeed, has expressed strong disagreement with the Court's rulings—there is no basis to believe, much less be assured, that remand proceedings will take place within the limits of the legal standards identified by the Court or result in any different outcome. EPA's proposed remand would only interpose further delay in the ultimate approval of Texas's first period plan, at a time when its 10-year duration is almost at an end.

Particularly troubling is that EPA's "remand" appears designed to facilitate EPA's continued reliance on the Final Rule and its legal underpinnings to support *other* rulemakings under the Regional Haze program notwithstanding that the Final Rule is stayed. Since filing its motion for remand, and without awaiting the Court's disposition of that motion, EPA has issued two new rules under the Regional Haze program that show clearly that EPA is not interested in reconsidering its position at this time. In one of those new rules, which relies on the Best Available Retrofit Technology ("BART") provisions of the Regional Haze program, EPA imports wholesale the record and rationale from the Final Rule, applies some of the same statutory factors and analysis as in the Final Rule, and proposes to impose the same

costly emission controls as in the Final Rule.[2] In the other, EPA openly disagrees with this Court's rulings and asserts they were "incorrect" and "mistaken[]" and that the Court "misunderstand[s]" the regional haze rules.[3] Clearly, EPA's remand is not intended to correct EPA's errors but to shelter them from this Court's review.

Thus, any remand must include vacatur of the illegal portions of EPA's Final Rule (those portions that disapprove Texas's state implementation plan ("SIP") and promulgate a federal implementation plan ("FIP")). In fact, EPA initially notified the parties it intended to seek exactly that: "We intend to seek remand *with vacatur* of EPA's disapproval decisions and EPA's FIP." E-mail from David A. Carson, Department of Justice, to All Counsel (Nov. 21, 2016) (emphasis added) (Exhibit 3). "After further internal deliberations," however, EPA changed course and informed the parties that "EPA has determined to seek voluntary remand *without requesting vacatur* of the final rule[.]" E-mail from David A. Carson, Department of Justice, to All Counsel (Dec. 2, 2016) (emphasis added) (Exhibit 4). EPA's initial intention to seek vacatur was the correct one.[4]

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[2] Proposed Rule, Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan (Dec. 9, 2016) ("December 9 Proposed Rule") (pre-publication version attached as Exhibit 1).

[3] Final Rule, Protection of Visibility: Amendments to Requirements for State Plans at 37, 40, 42, 43 (Dec. 14, 2016) ("December 14 Final Rule") (pre-publication version attached as Exhibit 2).

[4] When EPA's counsel consulted with Petitioners, it was unclear whether EPA would seek remand and vacatur by confessing error or without doing so; thus, Petitioners

While EPA's motion ultimately did not seek vacatur on a voluntary basis, the record is sufficiently developed for the Court to vacate the Final Rule's illegal portions on the merits. Given the extensive briefing and oral argument already conducted, summary vacatur of the Final Rule's SIP disapprovals and FIP would be an efficient way to resolve this case. Accordingly, Petitioners request, via cross-motion *infra*, that the Motions Panel vacate the SIP disapprovals and FIP in the Final Rule for the reasons stated in the Court's Stay Order. Should the Court determine summary disposition is not appropriate, it should allow Petitioners to proceed with full merits briefing.

Regardless, the Court should *deny* EPA's request to partially lift the Court's stay of the Final Rule. EPA has not shown that a partial lifting of the stay is warranted. Texas prepared and submitted its SIP to EPA as one integrated plan. Although Petitioners are requesting vacatur of only the SIP disapprovals and FIP in the Final Rule, continued stay of the *entire* rule is appropriate given EPA's recent attempts to selectively use certain portions of the Final Rule in other actions and the consequences that could follow. Certainly, EPA has failed to show it will not use portions of the Final Rule in this way were the Court to grant its motion.[5]

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reserved their position on the motion until they could review it. Doc. 00513783027 at 2-3 ("EPA Mot.").

[5] Petitioners agree with EPA (EPA Mot. at 24) that, at a minimum, should the Court remand without vacatur, the Court should retain jurisdiction, maintain the stay of the

Additionally, given EPA's recent attempts to work around the Court's stay and impose the same emission controls stayed by the Court using the same flawed analysis under review here, Petitioners and Petitioner-Intervenors cross-move the Court to clarify that the scope of its stay extends to *all* aspects of the Final Rule under review here and that EPA may not, without violating the Court's stay, utilize any aspect of the Final Rule to impose the same or any other emission controls at facilities affected by this litigation.

BACKGROUND

This case involves petitions for review of a final EPA rule that addresses requirements of the Regional Haze program of the Clean Air Act ("CAA") with respect to the States of Texas and Oklahoma. 81 Fed. Reg. 296 (Jan. 5, 2016) ("Final Rule"). EPA's Final Rule approves limited portions of those states' CAA SIPs, disapproves certain portions of those SIPs, and imposes FIP provisions in the disapproved provisions' place. EPA's FIP imposes stringent emission limitations on fourteen electric generating units in Texas. The limits, according to EPA, would require installation of new emission controls for sulfur dioxide ("SO_2") (called "scrubbers") on seven units and upgrading existing scrubbers on seven additional units. The combined costs for the controls are approximately $2 billion. *Texas*, 829 F.3d at 416.

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rule, and not dismiss the petitions for review, so the Court can review EPA's action following remand.

Among the portions of the Texas SIP that EPA disapproved were those addressing visibility in other states. EPA determined: "Because the Texas regional haze SIP does not ensure that Texas emissions would not interfere with measures required to be included in the SIP for any other state to protect visibility[,] … we are taking final action to disapprove portions of the Texas SIP submittals that address CAA provisions for prohibiting air pollutant emissions from interfering with measures required to protect visibility in any other state for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 1997 ozone, 2008 ozone, 2010 NO_2, and 2010 SO_2 NAAQS [National Ambient Air Quality Standards]." 81 Fed. Reg. at 302.

Following extensive briefing and oral argument, on July 15, 2016, this Court issued a published opinion that (1) denied EPA's motion to dismiss the petitions for review filed in this Court or, in the alternative, to transfer those petitions to the U.S. Court of Appeals for the D.C. Circuit, and (2) granted motions to stay the Final Rule "in its entirety" pending judicial review "including the emissions control requirements." *Texas*, 829 F.3d at 424, 435-36. The Court concluded that Petitioners were likely to succeed in establishing that EPA's SIP disapprovals and FIP in the Final Rule are unlawful for four separate reasons. *Id.* at 428-33.

The parties sought, and the Court granted, a 90-day stay of judicial proceedings to allow settlement discussions, but those discussions did not resolve the case.

EPA filed its motion for partial voluntary remand on December 2, 2016.

A week later, EPA's Region 6 Administrator signed a proposed Regional Haze rule for Texas that would promulgate a new FIP subjecting most of the same Texas units at issue in the Final Rule (and additional units) to the same emission controls EPA imposed in the Final Rule.[6] EPA's new rule is based on the BART provision of the Regional Haze program. BART is determined by looking at five statutory factors, three of which are the same as factors used for "reasonable progress," including "the energy … impacts of compliance," which the Court addressed in its Stay Order. *Compare* 42 U.S.C. §7491(g)(1) (reasonable progress factors) with §7491(g)(2) (BART factors). Indeed, in the new rule, EPA "incorporate[d] by reference and consider[s] to be part of this rulemaking record" the technical and cost analyses and rationale included in the administrative record for the Final Rule at issue in this case. December 9 Proposed Rule at 17 n.24.

In the December 9 Proposed Rule, EPA says "the Fifth Circuit's stay of our previous action complicates next steps" and creates "uncertainties." *Id.* at 19-20. EPA nevertheless proceeds to propose a new FIP predicated on prior SIP disapprovals that are presently stayed by this Court. *Id.* at 23 ("[B]eginning with our

[6] December 9 Proposed Rule at 21 ("The BART FIP requires controls on many but not all of the sources that were controlled in our previous partial FIP for Texas Regional Haze. The EGU BART FIP also includes control requirements at some additional sources not controlled in our previous action on Texas Regional Haze.").

January 5, 2016 disapproval of Texas SIP provisions regarding interstate visibility transport, we obtained the authority and obligation to promulgate a FIP[.]").[7]

EPA's proposed new rule is even more costly than the Final Rule and would require that fourteen Texas generating units install new scrubbers and four Texas generating units upgrade existing scrubbers. *Id.* at 119. As to nine of these eighteen units, the SO_2 emission control requirements are the same emission control requirements that are stayed pursuant to the Court's Stay Order. *Compare id. with* 81 Fed. Reg. at 305 (Table 1).

On December 14, 2016, the EPA Administrator signed for publication yet another regional haze rule, in which it expressed at length its disagreement with the legal conclusions in this Court's Stay Order. Although EPA claimed to be issuing new regulations for the second regional haze planning period, EPA nevertheless "explain[ed]" how this Court's analysis "under the existing regulations" for "the first implementation period" was "mistaken[]" and "incorrect for several reasons" and that, in EPA's view, "the Fifth Circuit appeared to misunderstand" the current regulations. December 14 Final Rule at 38-43.

[7] Specifically, EPA's new FIP is based on EPA's disapproval in the rule challenged here of "Texas' interstate visibility transport" SIP for the following six NAAQS: "1997 8-hour ozone, 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 2008 8-hour ozone, 2010 1-hour NO_2, and 2010 1-hour SO_2." December 9 Proposed Rule at 21.

ARGUMENT

I. The Court Should Deny EPA's Motion for Partial Voluntary Remand Without Vacatur

EPA's motion for partial voluntary remand without vacatur is not supported by the law or the facts, and it should be denied. Under the circumstances here, remand must be accompanied by vacatur of the illegal portions of the Final Rule.

A. Remand Without Vacatur Would Be Contrary to This Court's Precedent

Under this Court's precedent, remand without vacatur may be considered only where two conditions are met: (1) when the agency would likely be able to substantiate its original decision given the opportunity to do so; *and* (2) when vacating the rule would be disruptive. *See Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (citing *Radio–Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); *Allied–Signal, Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 1551 (D.C. Cir. 1993)). Neither condition is met here.

First, EPA cannot cure the defects underlying the Final Rule's disapprovals and FIP on remand merely by further substantiating its findings or developing the record. Where there are serious and fundamental legal errors with the agency's rule, as is the case here, vacatur is the appropriate remedy. *See Allied Signal, Inc.*, 988 F.2d at 150-51 (vacatur may be appropriate in light of "the seriousness of the [agency] order's deficiencies (and thus the extent of doubt whether the agency chose correctly)[.]") (quotation omitted)). This case is *not* the type of case where a remand is appropriate

for the agency to provide more "reasoned explanation" or a "new opportunity" for public comment, as EPA claims. EPA Mot. at 19, 21; *cf. Permian Basin Petroleum Ass'n Chaves Cnty. v. Dep't of the Interior*, 2016 WL 4411550, at *3 (W.D. Tex. Feb. 29, 2016) ("[T]he majority of the cases that held remand without vacatur was the appropriate remedy were those where the court found that the agency's only error was an inadequate explanation for the basis of its action."). The legal errors identified by the Court in its Stay Order are not procedural in nature and do not involve a simple failure by EPA to explain itself. Instead, they involve fundamental legal shortcomings in the rule. These same fundamental errors were already identified to EPA in public comments, and re-hashing them to a recalcitrant agency in a new round of comments, as EPA requests, would be of no benefit.

A remand on EPA's current terms would thus be futile. No amount of additional comment by the public or explanation by EPA can make lawful a rule that imposes the "source-specific" requirement that EPA imposed here, *Texas*, 829 F.3d at 427-28, or that requires emission controls that go into effect years after the planning period for the current round of implementation plans, *id.* at 429. These actions by EPA, which go to the very heart of the rule, are contrary to the statute and require that the disapprovals and FIP in the Final Rule be vacated.

EPA does not cite a single example of this Court simply remanding a SIP disapproval to EPA for further proceedings, much less remanding a disapproval that this Court has found is likely unlawful. That is because this Court's practice, in CAA

SIP cases like this one, is to *vacate* EPA rules that are determined to be unlawful. *See*, *e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932-33 (5th Cir. 2012) (vacating EPA's disapproval of Texas's pollution control permit program); *Texas v. EPA*, 690 F.3d 670, 686 (5th Cir. 2012) (vacating EPA's disapproval of the Texas Flexible Permit Program). That is what the Administrative Procedure Act ("APA") provides. *See* 5 U.S.C. §706(2) (reviewing court "*shall* hold unlawful *and set aside*" agency action found to be arbitrary and capricious or contrary to law (emphasis added)). Thus, EPA is wrong that, by requesting remand without vacatur, its motion seeks "the relief that would ordinarily be ordered if the petition for review were granted." EPA Mot. at 24. To the contrary, Petitioners seek to have the unlawful portions of the Final Rule vacated.

Second, vacating EPA's SIP disapprovals and FIP would not be disruptive. The Final Rule has not gone into effect, and thus there is no concern here about disrupting an ongoing regulatory program, as in some cases. *Cf. EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (remanding without vacatur to avoid disrupting emission-allowance markets). The Final Rule is stayed, and thus nothing would change if the rule were vacated. Moreover, the Final Rule applies to a limited number of Texas facilities, and is not a broadly-applicable regulatory program. Thus, unlike in *Central and Southwest Services*, vacatur here would not "be disruptive to … application of the Rule to other segments of the industry." 220 F.3d at 692 n.6. Finally, there is no concern here that vacatur would impact

public health or cause environmental harm, as in some cases,[8] because the Regional Haze program is about visibility only and the visibility goals set by EPA are already met. *Texas*, 829 F.3d at 415.

B. Remand Without Vacatur is Not Appropriate Because EPA Has Not Confessed Error

Remand without vacatur is particularly inappropriate here because EPA has not conceded the correctness of the Court's holdings about the likely legal errors in the rule. Tellingly, EPA does not state that it intends to follow the Court's rulings or that it concedes the errors identified by the Court. Indeed, EPA expressly requests remand "without confessing error." EPA Mot. at 18. And while EPA in its motion feigns that "it may reconsider [its] actions in light of the discussion regarding likelihood of success on the merits set forth in the Court's Order of July 15, 2016," EPA Mot. at 2, EPA has made clear in its new rules that it has no present intention of actually doing so. *See*, *e.g.*, December 9 Proposed Rule at 88-89 (contending that the "energy impacts" statutory factor "does not dictate that we study grid reliability," as the Court's Stay Order held); December 14 Final Rule at 38-46 (contending that the Court's Stay Order was "mistaken[]" and "incorrect").

Thus, EPA's motion is contrary to the case law, including case law that EPA itself cites, in which remand is premised on the agency's confession of error. *See*

[8] *See*, *e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (increased emissions potentially impacting environmental values).

Lutheran, 141 F.3d at 349 (denying motion to remand where, as here, agency "has not confessed error"); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (granting remand without vacatur because "EPA has admitted that the reasoning adopted for its final rule was flawed"); *Citizens Against Pellissippi Parkway Extension. Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) ("[W]hen an agency seeks a remand to take further action *consistent with correct legal standards*, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons." (emphasis added)); *see also Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992) (granting motion to remand where agency "acknowledged that [its action was] contrary to both the Communications Act and the Constitution").

Because EPA has not confessed error, its motion should be denied. EPA knows how to confess error in its SIP actions and has done so before this Court.[9] It should do so here. Until it does, there is simply no basis to believe (much less be assured) that EPA would reach any different outcome on remand or produce a lawful rule.[10] Under these circumstances, if EPA would like a remand, the Court must also vacate the unlawful SIP disapprovals and FIP.

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[9] *Luminant*, 675 F.3d at 925 ("The EPA concedes that it acted arbitrarily and capriciously by failing to supply any reason for its disapproval of §§116.610(a) and 116.610(b) *and consents to vacatur*." (emphasis added)).

[10] EPA wrongly claims that "all issues now pending in these petitions for review would be resolved" if the Court granted its motion. EPA Mot. at 2. To the contrary, *nothing* would be resolved were the Court simply to remand the rule to EPA without

Further, EPA's representation that it "plans to grant reconsideration" on one limited issue raised by Luminant Petitioners "in the near future" is disingenuous and does not justify remand without vacatur—certainly not remand without vacatur of the entire rule. EPA Mot. at 23. EPA does not explain how granting reconsideration on this one limited issue would or could resolve this case. Moreover, multiple parties petitioned EPA for reconsideration, yet EPA is not proposing to grant other parties' petitions. And Luminant's reconsideration petition raised several grounds for reconsideration, most of which EPA's motion does not address. Given that EPA has not committed to fully reconsider the Final Rule and its fundamental legal underpinnings, remand alone would be of limited value. Moreover, since EPA has not yet even granted reconsideration, and thus the scope of any reconsideration proceeding is uncertain, it is premature to remand the rule to EPA on this basis.[11]

C. Remand Without Vacatur Would Not Promote Judicial Efficiency

Finally, EPA's request for remand without vacatur should be denied because it would not promote efficiency, but would instead interpose further delay and needlessly complicate these proceedings. *See B.J. Alan Co.*, 897 F.2d at 562 n.1 ("The

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assurance that EPA will accept the fundamental legal constraints on its authority identified by this Court.

[11] EPA can address Luminant's reconsideration petition without a remand. Should EPA grant reconsideration in a way that would materially alter the rule here, then it may be appropriate to abate these proceedings. However, EPA has not done that, and has not requested abeyance as was done by the agency in *B.J. Alan Co., Inc. v. ICC*, 897 F.2d 561, 562 (D.C. Cir. 1990) (noting case was held "in abeyance pending resolution of the request for administrative reconsideration").

Commission has discretion to reconsider, *so long as its resumption does not conflict with proceedings in court.*" (emphasis added)). EPA's "last second motion to remand" is not an effort to reach the correct result, *i.e.*, approval of Texas's SIP, but rather appears designed to "avoid judicial review." *Lutheran*, 141 F.3d at 349 ("[T]he Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize."). Given EPA's actions, the only conclusion that can be reached is that it is engaging in an "administrative law shell game" to avoid a ruling on the merits of the pending petitions for review so that it can adopt substantively similar regulatory obligations in related proceedings. *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992).

Since EPA has not acceded to the Court's legal conclusions about the flaws in the Final Rule or agreed to vacatur, remand alone would not promote efficiency and fairness, but only defer judicial resolution. Texas submitted its plan to EPA on March 31, 2009, yet EPA delayed final action on the plan for more than six years, in violation of statutory deadlines. 81 Fed. Reg. at 296. The State, regulated parties, and EPA should have the benefit of this Court's final rulings on Texas's *first* plan, before a *second* plan is prepared and submitted.

II. Petitioners and Petitioner-Intervenors Move the Court to Grant Summary Vacatur of the SIP Disapprovals and FIP in the Final Rule Based on the Four Legal Errors Identified in the Court's Stay Order

Although remand without vacatur as proposed by EPA would not advance resolution of this matter, summary vacatur of the illegal portions of the Final Rule

would. The Court has already reviewed extensive briefing and heard oral argument on several merits arguments that go to the legality of EPA's rule, and determined that four of those arguments are likely to succeed on the merits. Based on those four grounds, and pursuant to Federal Rule of Appellate Procedure 27(a)(3)(B), Petitioners and Petitioner-Intervenors cross-move the Court to vacate the SIP disapprovals and FIP in the Final Rule without further proceedings.

Summary disposition is proper where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case[.]" *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Moreover, consistent with "orderly judicial administration," a panel of the Court of Appeals that decides preliminary relief, such as a stay, may also properly reach the merits where the grounds are based on the "applicable rule of law, and the facts are established or of no controlling relevance." *OFC Comm Baseball v. Markell*, 579 F.3d 293, 298-99 (3d Cir. 2009) (citations and quotation marks omitted) (appeal of district court's preliminary-injunction ruling).

Here, vacatur of the Final Rule's SIP disapprovals and FIPs by the Motions Panel would be appropriate without additional briefing or arguments, based on the four legal errors on which the Panel found Petitioners were likely to succeed on the merits. Further briefing and argument on these issues would be largely academic. Accordingly, Petitioners and Petitioner-Intervenors move the Panel to vacate the SIP disapprovals and FIP in the Final Rule and hold them unlawful for four reasons: (1)

"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"; (2) "EPA's disapproval of the consultation between Oklahoma and Texas was arbitrary and capricious"; (3) "EPA exceeded its statutory authority by imposing emissions controls that go into effect years after the period of time covered by the current round of implementation plans"; and (4) EPA's action was arbitrary and capricious because EPA failed to take into account "the explicit directive in the Clean Air Act that implementation plans 'take[] into consideration … the energy … impacts of compliance,' 42 U.S.C. §7491(g)(1)," by providing "an exemption from compliance when necessary to preserve the power supply [or] a more rigorous exploration of the impact of the Final Rule on grid reliability." *Texas*, 829 F.3d at 428-33.[12]

III. The Court Should Deny EPA's Request to Partially Lift the Court's Stay of the Final Rule

In any event, the Court should deny EPA's motion to partially lift the stay, regardless of what action it takes on EPA's motion to remand and Petitioners' cross-motion for vacatur. As before, EPA has not shown how "a limited stay" is necessary, *id.* at 435, nor has it explained why it seeks to have limited provisions of the Texas SIP go into immediate effect in isolation. EPA cannot, through partially approving some provisions of a SIP and disapproving others, create a SIP the state did not intend. *See*

[12] In support of their cross-motion for summary vacatur, Petitioners and Petitioner-Intervenors incorporate by reference their prior briefing on these issues. Doc. Nos. 00513405269, 00513428276, 00513469417, 00513469785.

Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1035-37 (7th Cir. 1984) (EPA cannot, through selective approvals and disapprovals, make overall SIP "completely unpalatable to the state."). Moreover, given EPA's present intention to use aspects of the Final Rule to impose the same emission controls that are stayed, a partial lifting of the stay is particularly inappropriate.

IV. Petitioners and Petitioner-Intervenors Move the Court to Clarify and Enforce the Court's Stay Order

In addition to denying EPA's motion to partially lift the stay, Petitioners and Petitioner-Intervenors move the Court to clarify and enforce its Stay Order. Petitioners and Petitioner-Intervenors believe the Court's Stay Order is crystal clear: the Final Rule is stayed "in its entirety, including the emissions control requirements, pending the outcome of this petition for review." *Texas*, 829 F.3d at 435. EPA, however, contends there are "uncertainties" with regard to the Stay Order that "complicate[] next steps." December 9 Proposed Rule at 19. Indeed, EPA asserts the false premise that it has an "obligation to promulgate a [new] FIP" *based on* disapprovals contained in the stayed Final Rule. *Id.* at 23. Thus, clarification of the Stay Order's scope and effect is necessary to ensure that any new regulations that EPA may promulgate do not rest on an improper and illegal foundation.

Accordingly, the Court should clarify that by staying the Final Rule "in its entirety," *Texas*, 829 F.3d at 435, the Court intended the Stay Order's scope to extend to all aspects of the Final Rule, including *all* the disapproval and FIP actions in the

Final Rule without exception. This would include EPA's disapprovals of those "portions of the Texas SIP submittals that address CAA provisions for prohibiting air pollutant emissions from interfering with measures required to protect visibility in any other state for the 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 1997 ozone, 2008 ozone, 2010 NO_2, and 2010 SO_2 NAAQS," 81 Fed. Reg. at 302, which EPA asserts obligate it to issue the December 9 Proposed Rule. *See* December 9 Proposed Rule at 23.

Petitioners and Petitioner-Intervenors further request that the Court clarify that the Stay Order's effect is to prohibit EPA, while the stay is in place, from relying on any of its SIP disapprovals or FIP actions and related findings in the Final Rule in any subsequent rule or action, including a subsequent rule or action to impose virtually the same emissions control requirements that are presently stayed. As this Court has explained: "Parties subject to the decision of a federal appellate court are 'without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of [the] court deciding the case.'" Order on Motion to Amend and Enforce Judgment, *Luminant Generation Co. LLC v. EPA*, No. 10-60891, at 4-5 (5th Cir. Feb. 21, 2014) (alteration in original) (quoting *Am. Trucking Ass'ns v. ICC*, 669 F.2d 957, 960 (5th Cir. 1982)). Given EPA's attempt to rely on certain portions of the Final Rule in its December 9 Proposed Rule despite the Stay Order, such clarification is particularly appropriate and necessary. *See United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) ("[A]n order issued by a court with

jurisdiction … must be obeyed by the parties" unless "reversed by orderly and proper proceedings.").

CONCLUSION

Petitioners and Petitioner-Intervenors respectfully request that the Court: (1) deny EPA's motion for partial voluntary remand unless remand is accompanied by vacatur of the Final Rule's SIP disapprovals and FIP provisions; (2) deny EPA's motion for partial lifting of the stay; (3) grant summary vacatur of the Final Rule's SIP disapprovals and FIP provisions based on the legal errors identified in the Stay Order; and (4) issue an order clarifying that the Stay Order encompasses all aspects of the Final Rule without exception and prohibits EPA from relying on any of its SIP disapprovals or FIP actions and related findings in the Final Rule in any subsequent rule or action, while the stay is in place.

Dated: December 19, 2016

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 5,167 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit. This motion also complies with typeface requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface in 14-point Garamond font.

Dated: December 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 19th day of December, 2016.

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