ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1315 (consolidated with Lead No. 11-1302, 11-1323)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LUMINANT GENERATION COMPANY LLC, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents,

On Petition for Review of an Action of the
United States Environmental Protection Agency

PETITIONERS' MOTION FOR PARTIAL STAY OF EPA'S FINAL TRANSPORT RULE

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TABLE OF CONTENTS

TABLE OF EXHIBITS

Exhibit 6 Luminant Generation Company LLC, et al. to Environmental Protection Agency Administrator Lisa P. Jackson, et al., Request for Partial Reconsideration and Stay of EPA's Final Rule (Aug. 5, 2011) (Recon. Pet.)

Exhibit 7 Luminant Generation Company LLC, et al. to Environmental Protection Agency Administrator Lisa P. Jackson, et al., Additional Information and Supplementation in Support of Request for Partial Reconsideration and Stay of EPA's Final Rule (Sept. 9, 2011) (Supp. Pet.)

Exhibit 8 Office of Management and Budget, Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review (July 11, 2011) (*OMB Summary of Interagency Working Comments*)

Exhibit 9 Declarations in Support of Motion to Stay:

1) Declaration of David A. Campbell, Chief Executive Officer, Luminant Holding Company LLC (Campbell Dec.)

2) Declaration of Stephen J. Kopenitz, Vice President of Mining, Luminant Mining Company LLC (Kopenitz Dec.)

3) Declaration of Ken Smith, Vice President of Construction Management, Luminant (K. Smith Dec.)

4) Declaration of Matthew Goering, Vice President of Solid Fuels and Emissions Strategy, Luminant Energy Company LLC, (Goering Dec.)

5) Declaration of Warren P. Lasher, Manager of Long-Term Planning and Policy for the Electric Reliability Council of Texas (Lasher Dec.)

6) Declaration of Charles L. Smith, Executive Director, Mount Pleasant Industrial Foundation, Titus County, Texas (C. Smith Dec.)

7) Declaration of Judge Brian P. Lee, County Judge, Titus County, Texas (Lee Dec.)

8) Declaration of Dr. Lynn Dehart, Superintendant of Schools, Mount Pleasant Independent School District (Dehart Dec.)

9) Declaration of Dr. Bradley Johnson, President, Northeast Texas Community College, Titus County, Texas (Johnson Dec.)

10) Declaration of Roy W. Hill, Mayor, City of Fairfield, Texas (Hill Dec.)

11) Declaration of David E. Zuber, P.E., President, Fairfield Industrial Development Corporation, Freestone County, Texas (Zuber Dec.)

12) Declaration of Judge Linda K. Grant, County Judge, Freestone County, Texas (Grant Dec.)

13) Declaration of George M. Robinson, President, Fairfield Hospital District, Fairfield, Texas (Robinson Dec.)

14) Declaration of Jonathan Gardner, International Vice President, Seventh District of the International Brotherhood of Electrical Workers, AFL-CIO (Gardner Dec.)

15) Declaration of William Scott Perlet, Mining Industry Market Manager, HOLT Texas Ltd.(Perlet Dec.)

16) Declaration of Dr. M. Ray Perryman, President and Chief Executive Officer, The Perryman Group (Perryman Dec.)

TABLE OF AUTHORITIES*

Page(s)

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

FEDERAL REGISTER

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500, *et seq.*
CAA	Clean Air Act, 42 U.S.C. § 7401, *et seq.*
CAIR	Clean Air Interstate Rule
EGUs	Electric generating units
EPA	United States Environmental Protection Agency
Final Rule	Environmental Protection Agency, Final Rule, *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals*, 76 FR 48208 (Aug. 8, 2011)
Luminant	Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Company LLC, and Luminant Holding Company LLC
NO_x	Nitrogen oxides
OMB	Office of Management and Budget
$PM_{2.5}$	Fine particulate matter less than 2.5 micrometers
PRB	Powder River Basin
Proposed Rule or *Notice*	Environmental Protection Agency, Proposed Rule, *Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone*, 75 FR 45210 (Aug. 2, 2010)
SO_2	Sulfur dioxide
Section 110	Section 110 of the Clean Air Act, 42 U.S.C. § 7410
Section 307	Section 307 of the Clean Air Act, 42 U.S.C. § 7607
TSD	Technical Support Document

Luminant seeks a partial stay of EPA's "transport rule," 76 FR 48208 (Aug. 8, 2011) (Final Rule) (Ex. 3).[1] The requested stay is limited to the portion of the rule that requires Texas electric generating units (EGUs) to drastically reduce emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_X) in less than five months—reductions that will require the idling of Luminant generating facilities and the loss of approximately 500 jobs, impacts that will begin before the end of this year.

The Final Rule replaces the Clean Air Interstate Rule (CAIR) that the Court held unlawful. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). It seeks to implement §110(a)(2)(D)(i)(I) of the Clean Air Act (CAA), which requires States to include in their implementation plans provisions to prohibit emissions of "pollutant[s] in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [air quality standard]."[2] EGUs emit SO_2 and NO_X, which can contribute to a "downwind" State's "nonattainment" of air quality standards for fine particulate matter ($PM_{2.5}$) and ozone. The Final Rule subjects Luminant to restrictions relating to both $PM_{2.5}$ and ozone—annual limits on SO_2 and NO_X for $PM_{2.5}$ and seasonal limits on NO_X for ozone.

In its rulemaking, EPA sought to identify "upwind" States that in 2012 would make a "significant contribution" to another State's nonattainment of $PM_{2.5}$ or ozone standards. Using computer modeling, EPA identified such "significantly contributing"

[1]Luminant's counsel notified EPA's counsel by phone prior to filing this motion.
[2]Cited portions of the CAA are reproduced in Exhibit 2.

States and determined individual "emissions budgets" for each such State that limit the amount of SO_2 and NO_X they can emit. 76 FR at 48223-71.

In issuing its Proposed Rule, EPA found that emissions from Texas sources would not significantly contribute to $PM_{2.5}$ nonattainment in any downwind area, 75 FR 45210, 45255-67, 45282-84 (Aug. 2, 2010) (*Notice*) (Ex. 4). But EPA completely reversed course in its Final Rule, asserting there for the first time—with no prior notice and opportunity for comment—that Texas would "significantly contribute" to "nonattainment" of $PM_{2.5}$ standards at a single "receptor" in Madison County, Illinois. 76 FR at 48241. EPA then required that Texas EGUs drastically reduce their emissions. *Id.* at 48262, 48269, 48305-06; *see also* Recon. Pet. 21 (Ex. 6).

These new mandates violate not only the notice requirements of the CAA but its substantive requirements as well. Section 110(a)(2)(D)(i)(I) authorizes emissions prohibitions only of "amounts which will . . . contribute significantly" to attainment problems in other States. EPA's mandated reductions, by contrast, require Texas to eliminate far *more* than the *entire* "amount" of the "significant contribution" EPA determined Texas would make. And contrary to EPA's claim that the mandates are necessary to address "nonattainment" in Madison, EPA recently and separately found—based on real-world data, rather than modeling projections—that Madison has *already attained* the $PM_{2.5}$ standard and that continued improvement is expected even in the absence of these regulations. 76 FR 29652, 29654 (May 23, 2011).

Relatedly, although the *Notice* found Texas contributed to nonattainment for ozone in a single area (Baton Rouge, Louisiana), the Final Rule announced for the first time that Texas was "linked" to problems in Allegan County, Michigan and unexpectedly slashed the proposed seasonal NO_X budget. 76 FR at 48246, 48263. But, like Madison, these two areas are in attainment today, *see* 75 FR 58312 (Sept. 24, 2010); 75 FR 54778 (Sept. 9, 2010), and EPA's own projections show they will remain so even in the absence of the Final Rule, *see* Air Quality TSD B-14, B-16 (2014 base case results).[3]

For these and other reasons, Luminant asked EPA to reconsider and stay the Final Rule. *See* Recon. Pet.; Supp. Pet. (Ex. 7). Luminant demonstrated that it had no meaningful opportunity to comment on central features of the Final Rule, that EPA made numerous factual and legal errors in ordering the emissions reductions related to Texas, and that it could not meet the compliance deadline without suffering irreparable harm. EPA has not acted on Luminant's petition.[4]

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[3]Exhibit 5 contains the cited portions of EPA's technical support documents.

[4]EPA has recently acknowledged that it made errors in setting the budget for Texas and has "offered to make technical adjustments" that would increase the allowances allocated to Texas. Campbell Dec., Ex. 1. (All declarations are attached as Exhibit 9). Although Luminant appreciates this offer and looks forward to a corrected rule, EPA has not yet promulgated one, and Luminant must base its compliance decisions and its legal challenge on the rule that is currently in place. Moreover, as Luminant understands the "technical adjustments" being considered by EPA, the adjustments would not solve the fundamental flaws in the rule nor would they be sufficient to avoid the irreparable harm that the Final Rule would cause Luminant and the public. *See id.* ¶50, Ex. 2.

As demonstrated below, the grounds supporting this limited stay are compelling.[5] There is a strong likelihood of success on the merits in light of EPA's procedural and substantive violations of the CAA. And in the absence of a stay, Luminant and others will suffer serious and concrete irreparable harm. EPA has given Texas only five months to make extraordinary reductions in SO_2 emissions and NO_X emissions. These mandates will require Luminant to begin taking steps to idle EGUs and close mines as early as November 2011—resulting in substantial job losses, harm to local communities, and threats to reliable electric service.

Moreover, in contrast to the deep and immediate harm to Luminant and numerous others in Texas, the limited stay would cause no harm to third parties during the pendency of review. EPA has found, using real-world data, that the only areas claimed to be affected are already attaining the standards. EPA has also found that Texas EGU emissions will *decrease* from 2010 levels even in the absence of the Final Rule. And, under EPA's method for setting emissions budgets, because the substantial majority of the many States "linked" to Madison (for $PM_{2.5}$) and Baton Rouge and Allegan (for ozone) were also deemed "substantial contributors" to other areas, these other States will be subject to the same emissions requirements regardless

[5]If the Court has any doubt as to its jurisdiction to grant a stay based on the arguments raised in reconsideration, it should construe the petition for review as a petition under the All Writs Act, 28 U.S.C. §1651(a). *See Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 170 (D.C. Cir. 1985) (petition for review may be treated as petition for mandamus); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (mandamus is available to prevent an agency from thwarting judicial review).

of whether EPA's determinations as to Texas are set aside. This is therefore a case in which all considerations strongly support a stay.

ARGUMENT

In reviewing a motion for stay, this Court considers: (1) the likelihood that the movant will prevail on the merits; (2) the prospect of irreparable injury if relief is withheld; (3) the possibility of substantial harm to others if relief is granted; and (4) the public interest. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). All four factors weigh strongly in favor of a stay here.

I. LUMINANT IS LIKELY TO PREVAIL ON THE MERITS.

A. EPA Violated The CAA's Notice Requirements.

In adopting the Final Rule, EPA violated the CAA's notice requirements. Section 307(d) imposes notice and comment obligations that are "more stringent" than the APA. *See Union Oil v. EPA,* 821 F.2d 678, 681-82 (D.C. Cir. 1987). The CAA requires that EPA both publish a specific "proposed rule" and provide a "detailed explanation of its reasoning at the 'proposed rule' stage." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983). The CAA further requires that EPA disclose the pertinent "factual data" and "methodology" underlying the proposed rule at the time of its issuance and update the docket as new information becomes available. §307(d)(3), (4)(B)(i).

In enforcing these requirements, this Court has held that the final rule must be a "logical outgrowth" of the proposal. *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d

936, 950-52 (D.C. Cir. 2004). A "final rule is a 'logical outgrowth' of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Commenters should not have to "divine [the agency's] unspoken thoughts," nor should the final rule be "surprisingly distant" from the agency's proposal. *Id.*

Here, EPA's *Notice* did not include Texas in its proposed reductions for $PM_{2.5}$, and concluded that EPA's modeling found that Texas sources do *not* contribute to nonattainment of $PM_{2.5}$ standards. 75 FR at 45255-67, 45282-84. The Final Rule represented an abrupt reversal—including Texas as a "significant contributor" to $PM_{2.5}$ in a single downwind county and announcing for the first time emissions budgets that impose crippling restrictions on Texas sources. Indeed, the Final Rule's emissions caps are substantially lower than the rates that EPA, in the proposed rule, found would *not* significantly contribute to nonattainment.[6] Furthermore, EPA's final allocation of seasonal NO_X allowances to Luminant is starkly lower than EPA's proposed allocation, triggering substantial additional harms not implicated by the proposed rule. Supp. Pet. 2-7. As OMB's Interagency Working Group recognized, EPA's inclusion of Texas, its use of "substantially different" modeling results, and

[6] *Compare* 76 FR at 48466, 48388 (setting budgets of 243,954 tons of SO_2 and 133,595 tons of NO_X), *with* 75 FR at 45241-42 (finding that 327,873 tons of SO_2 and 159,738 tons of NO_X would not significantly contribute to downwind nonattainment).

other changes resulted in a "significantly different rule than originally proposed." *OMB Summary of Interagency Working Comments* §E (July 11, 2011) (Ex. 8).

Lack of Notice Regarding Inclusion of Texas for $PM_{2.5}$. The *Notice* stated that Texas was *not* significantly contributing to nonattainment of the $PM_{2.5}$ standards. *See* 75 FR at 45255. In its Final Rule, EPA reversed course and included Texas as a "significant contributor" subject to mandated emissions reductions. This was a breach of statutory notice-and-comment obligations, and EPA therefore took the unusual step of defending itself on this point when it issued the Final Rule. EPA asserted that imposing restrictions on Texas was "a logical outgrowth" of its very different proposed rule because "[i]n the proposal EPA also requested comment on whether Texas should be included in the Transport Rule for annual $PM_{2.5}$." 76 FR at 48214.

EPA's claim does not withstand scrutiny. In the *Notice,* after stating that EPA's own modeling showed Texas sources making no significant contribution to nonattainment, EPA raised only one contrary "possibility": that *adoption of the proposed rule* might *itself* alter that conclusion by causing changes in coal prices that might prompt Texas EGUs to burn coal with higher sulfur content. 75 FR at 45284. The *Notice* unequivocally stated: "*For this reason*, EPA takes comment on whether Texas should be included in the program . . .." *Id.* (emphasis added).

In its Final Rule, however, EPA then declared the only basis it had proposed for including Texas "no longer relevant" and did not even address it. Response to Comments 563-64. The Final Rule instead includes Texas on a wholly different

theory, based on new and revised modeling for determining "significant contribution." *Id.* If the sole concern posed for comment is not even "relevant" to the Final Rule, it cannot constitute sufficient notice of that rule or a basis for deeming the Final Rule a "logical outgrowth" of the proposed rule.

Indeed, this Court rejected a similar argument by EPA in *Environmental Integrity Project*. There, EPA argued "that it met its notice-and-comment obligations because its final interpretation was also mentioned (albeit negatively) in the Agency's proposal." 425 F.3d at 998. This Court, however, found EPA's "argument proves too much. If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about *which particular* aspects of its proposal are open for consideration." *Id.* (emphasis in original).

Lack of Notice Regarding Actual Emissions Limitations Imposed on Texas. "'[S]omething is not a logical outgrowth of nothing.'" *Id.* at 996. The $PM_{2.5}$ rules EPA adopted for Texas have no predecessor in the *Notice*. Thus, in addition to failing to provide notice of its conclusion that Texas was "substantially contributing" to $PM_{2.5}$ nonattainment, EPA separately gave no notice of—and therefore no meaningful opportunity to comment on—the annual emissions budgets imposed on Texas in the Final Rule. In the *Notice*, EPA provided proposed emissions budgets for *every* other State that was included in the Final Rule and specifically requested comment on the "state budgets." 75 FR at 45309. EPA has also issued proposed

emissions budgets for *every* State covered in similar past rulemakings.[7]

By failing to provide the same information for Texas that it provided for every other State before imposing annual emission limitations, EPA violated the CAA.[8] In promulgating the CAA's notice provisions, §307(d)(2)-(6), Congress affirmatively rejected the alternative provided in the APA under which an agency might forego actual proposed rule language in a notice of proposed rulemaking and instead simply state that it may or may not take regulatory action. *See Small Refiner*, 705 F.2d at 519. Thus, under the CAA, a vague statement that the agency may regulate in an area does not constitute the issuance of a proposed rule.

In addition, this Court has reversed EPA where, as here, EPA failed to provide a meaningful opportunity for comment by declining to disclose key information prior to finalization of its rules. *Kennecott Corp. v. EPA*, 684 F.2d 1007 (D.C. Cir. 1982). In *Kennecott*, EPA's final rule was based on "forecast data [that] was placed in the docket

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[7] *Compare* 62 FR 60318, 60361(Nov. 7, 1997), *with* 63 FR 57356, 57439 (Oct. 27, 1998) (NO_X SIP Call); *compare* 69 FR 4566, 4619-21 (Jan. 30, 2004), *with* 70 FR 25162, 25230-31 (May 12, 2005) (CAIR).

[8] EPA also violated the CAA with regard to the Texas seasonal NO_X limits. While EPA proposed separate seasonal NO_X limitations for Texas to address ozone, the final limitations were drastically more restrictive. *See* Recon. Pet. 2 n.3, 31; Supp. Pet. 3. Because the revised and unexpectedly lower seasonal NO_X budget was the result of errors that Luminant could not have challenged during the comment period, EPA violated the CAA with regard to the seasonal NO_X budget as well as the annual budgets. Supp. Pet. 2-3, 6-7. EPA also announced for the first time in the Final Rule that Texas sources were significantly contributing to ozone "maintenance" problems at Allegan notwithstanding that area is in attainment today. 75 FR at 45270. Luminant was thus unable to comment on this legally flawed and arbitrary aspect of the Final Rule as well.

only one week before promulgation of its final regulations and differed significantly from the forecast data provided during the public comment period." *Id.* at 1019. This Court held that in such circumstances "there has been no opportunity for the notice and comment proceedings contemplated by §307(d)(5)." *Id.*; *see also Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981) (CAA is violated"[i]f . . . documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment prior to promulgation").

B. EPA's Texas Emissions Budgets Exceed Its Statutory Authority.

The Texas emissions budgets are also unlawful because the CAA does not authorize reductions of their magnitude. EPA's annual budgets require Texas sources to reduce emissions to well *below* "significant contribution" levels. Those requirements therefore exceed EPA's authority under §110(a)(2)(D)(i)(I) to require State plans to "prohibit[] . . . emissions activity within the State" in "amounts which will . . . contribute significantly" to attainment problems in other States.

EPA determined that a State "significantly contributes" to $PM_{2.5}$ nonattainment only when its emissions will contribute more than 0.15 $\mu g/m^3$ of $PM_{2.5}$ at a downwind location—*i.e.*, EPA determined that States that do not contribute 0.15 $\mu g/m^3$ or more to annual $PM_{2.5}$ nonattainment "do not significantly contribute" and would not be subject to emission controls. 76 FR at 48236, 48240-41, 48246. EPA nonetheless set annual budgets for Texas designed to reduce its $PM_{2.5}$ "contribution" to 0.127 $\mu g/m^3$, nearly 16% below the significance threshold. *See* Recon. Pet. 21.

The decision to require Texas to reduce beyond the level of its supposed "significant contribution" was a function of the misguided method EPA used to set the emissions budgets. EPA did not take the straightforward approach of setting budgets that would reduce or eliminate the "significant contribution" to nonattainment that Texas *itself* was found to make. Instead, for each downwind location in which EPA determined that "upwind" States were contributing to nonattainment, EPA placed the upwind States into one of two categories. 76 FR at 48248-49, 48257-59. Emissions budgets for Group 1 States were set based on the emissions reductions achieved if each Group 1 State applied controls that cost $2,300 per ton of emissions; emissions budgets for Group 2 were set the same way but at $500 per ton. *Id.* EPA selected these cost control levels based on modeling projections indicating that such levels—if applied simultaneously to *all* contributing States (both Group 1 and Group 2)—would reduce *aggregate* emissions from those States sufficiently to eliminate attainment problems at the downwind locations linked to those States. *See id.* at 48252 ("With these final cost curves in hand, EPA was able to identify the *combined reductions* available from upwind contributing states and the downwind state . . . .") (emphasis added); *see also id.* at 48248-49, 48257-63, 48270-71.[9]

EPA applied this approach even where it resulted in requiring States like Texas to reduce emissions below the significance levels. While EPA is requiring Texas to

[9]EPA used this approach for SO_2 limits. For annual NO_X, the same basic approach was used, but a uniform cost control level ($500 per ton) was applied to all States.

over-reduce emissions below the significance level (0.15 $\mu g/m^3$), EPA's Final Rule permits Indiana (0.293 $\mu g/m^3$); Illinois (0.612 $\mu g/m^3$); and Missouri (0.642 $\mu g/m^3$) to continue to emit above that level. *See* EPA Spreadsheet; Recon. Pet. 21. EPA thus concluded that if it decides that some States can reduce emissions more cheaply, those States can be forced to reduce even beyond their significance levels to offset higher emissions from other upwind States that cannot eliminate their contributions as cheaply, as long as the overall result is to eliminate the aggregate "significant contribution" on a *regionwide* (rather than State-specific) basis.

The Final Rule therefore exceeds EPA's statutory authority to require that State plans "prohibit[] . . . emissions activity within the State from emitting any air pollutant in *amounts which will . . . contribute significantly*" to attainment problems in other States. §110(a)(2)(D)(i)(I) (emphasis added). EPA is instead requiring Texas to reduce its emissions well below "amounts" of "significance" in order to enable other States to make smaller reductions while still eliminating nonattainment in the downwind State.

This Court's *North Carolina* decision confirms EPA acted unlawfully. There, the Court held that EPA had no statutory authority to adopt CAIR because "EPA did not purport to measure each state's significant contribution to specific downwind nonattainment areas *and eliminate them in an isolated, state-by-state manner*." 531 F.3d at 907-8, 922 (emphasis added). The Court explained that "according to Congress, individual state contributions to downwind nonattainment areas do matter." *Id.* at 907. The Final Rule again flouts those statutory requirements—and violates the state-

by-state principles relied upon in *North Carolina*—by forcing Texas to reduce emissions to below the significance level. *North Carolina* held that "EPA can't just pick a cost for a region, and deem 'significant' any emissions that can [be] eliminate[d] more cheaply." *Id.* at 918. It explained that notwithstanding "EPA's redistributional instinct …, section 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution." *Id.* at 921.

Nor, contrary to EPA's assertions, 76 FR at 48270-71, did *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), endorse EPA's approach here. Although a divided panel in *Michigan* did permit EPA to take costs into account in setting emissions reductions, *id.* at 674-79, this Court later explained that EPA's ability to do so "stops at the point where EPA is no longer effectuating its statutory mandate," *North Carolina,* 531 F.3d at 908. *Michigan* held that EPA could rely on costs to *lessen* the State's burden—*i.e.*, to "terminat[e] … only a *subset* of each state's contribution." 213 F.3d at 675, 679 (emphasis added); *see also North Carolina*, 531 F.3d at 917 ("EPA may 'after [a state's] reduction of all [it] could . . . cost-effectively eliminate[],' consider 'any *remaining "contribution*"' insignificant") (emphasis added) (quoting *Michigan*, 213 F.3d at 677, 679). This Court has never held that EPA has any statutory authority to require a State to eliminate *more* than its "significant contribution" merely because EPA believes as a matter of policy that additional controls would be worth the cost.

C. EPA Lacks Authority To Impose Any Emissions Limits On Texas Under The Circumstances Here.

EPA not only lacked authority to force Texas' emissions below the "significant contribution" threshold, but EPA's own findings establish it lacked authority to regulate Texas at all under §110(a)(2)(D)(i)(I). As noted, Texas was included in the $PM_{2.5}$ aspect of the Final Rule solely because EPA concluded that Texas was "linked" to Madison and was contributing to that one area's nonattainment of $PM_{2.5}$ standards. 76 FR at 48223, 48235, 48241-43.

But EPA did not determine whether an area would be in nonattainment based on actual and current air quality data. Instead, it used computer models based on 2005 data to project whether an area would be in nonattainment in 2012 in the absence of the rules it was adopting and in attainment by 2014 as a result of its emission budgets. *Id.* at 48223, 48227-30, 48255. And in the case of Madison, EPA's predictions are disproved by reality. Just a few months ago—after the comment period closed but before the Final Rule issued—EPA concluded, based on real-world monitoring data, that Madison has achieved *attainment* of $PM_{2.5}$ standards by a substantial margin and stated that it "expected" *further* "significant reductions of $PM_{2.5}$ emissions" from local sources. 76 FR at 29654.

Texas is thus not "contributing" to "nonattainment." Indeed, EPA projected that even absent new regulatory intervention, Texas EGU emissions would *decrease* from 2010 levels. *See* Emission Inventory TSD 100-06; Response to Comments 564;

Recon. Pet. 5 n.6. Where an area is in attainment *today* and emissions from an upwind State are *decreasing* even in the absence of regulation, there can be no basis for concluding that sources within the State will "contribute significantly" to "nonattainment" or that drastic emissions reductions are necessary for attainment. Indeed, even the models EPA relied on here predict that Madison will be in attainment in 2014 absent *any* new "upwind" emission limitations. *See* Air Quality TSD B-41; Sig. Contribution TSD 30.

At a minimum, EPA was obligated to reconcile its prediction that massive emission reductions are necessary for Madison to achieve attainment with its contradictory real-world observation that the area is in attainment and expected to remain so. *NRDC v. Jackson*, 2011 WL 2410398, at *3 (7th Cir. June 16, 2011)("[T]he way to test" predictive models is to "compare [the] projection against real outcomes . . . . An agency that clings to predictions rather than performing readily available tests may run into trouble."). In *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054 (D.C. Cir. 2001), this Court found EPA acted arbitrarily in failing to "address[] what appear[s] to be stark disparities between its projections and real world observations." Here, EPA arbitrarily failed to meaningfully consider at all its attainment finding when subsequently and implausibly projecting that the receptor allegedly linked to Texas would suddenly fall back into nonattainment in just a few months.[10]

[10]Among the reasons for EPA's inaccurate $PM_{2.5}$ projection is EPA's apparent failure to account for the impact of a local steel mill that has a significant impact on air

This is also true with regard to ozone attainment. *See* Supp. Pet. 4. The two areas (Baton Rouge and Allegan) that were the basis of EPA's decision to impose seasonal NO_X limits on Texas sources are in attainment today. *See* p. 3. Further, EPA's own data predict that, even absent the Final Rule, Texas EGU NO_X emissions will decrease from 2010 levels. *See* Recon. Pet. 5 n.6; Emission Inventory TSD 99-106. Indeed, EPA's projections, however flawed, show these areas will achieve attainment in 2014 without any regulatory intervention. Air Quality TSD B-14, B-16.

II. LUMINANT WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

In order to comply with the emissions limits by January 1, 2012, Luminant must make substantial and costly operational changes that will result in enormous economic losses.[11] As explained in detail in sworn declarations attached to this Motion, the harm to Luminant from the Final Rule will be staggering and irreparable:

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quality at the single Madison receptor location that is the basis for the EPA's regulation of Texas. 76 FR at 29653. In 2010, the mill entered into an agreement with the Illinois EPA to reduce emissions. Not only has EPA found that air quality has already substantially improved at the receptor location, EPA "expect[s]" "the agreement . . . to provide significant reductions of $PM_{2.5}$" going forward. *Id.* at 29654. Modeling projections that failed to reflect the agreement—and other documented, real-world air quality improvements in Madison—would overstate $PM_{2.5}$ levels at the receptor, which is what EPA appears to have done. *See* Recon. Pet. 18-19 & n.17.

[11]Unrecoverable economic loss can amount to irreparable harm. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring)("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) ("loss of profits which could never be recaptured" is irreparable harm).

- To meet the Final Rule's emission limitations, Luminant must idle two large EGUs, curtail generation in other locations, and switch fuel sources in some locations. Campbell Dec. ¶18; K. Smith Dec. ¶¶6, 21-22. These actions will cause the loss of enough generating capacity to power 650,000 homes during normal conditions in Texas. Campbell Dec. ¶43.
- The company can no longer operate three mines providing lignite for the EGUs that are forced by the Final Rule to be idled or to switch fuels. Kopenitz Dec. ¶9. The shutting of the mines will increase Luminant's cost of fuel and lead to hundreds of lost jobs. *Id.* ¶¶9, 12-13; Campbell Dec. ¶46.
- Luminant expects to incur hundreds of millions of dollars in 2011 and 2012 in increased costs to comply with the Final Rule. Campbell Dec. ¶¶46-47. Luminant cannot seek a regulatory increase in rates to recover these costs because it operates in a competitive wholesale market that does not allow it to pass along costs to ratepayers. *Id.* ¶7(f).
- Luminant estimates that it will suffer a loss of Earnings Before Interest, Taxes, Depreciation and Amortization expense (EBITDA) of $260 million for 2012. Campbell Dec. ¶46. In addition, typically energy companies like Luminant are valued based on EBITDA multiples in the 7-9 range. Using this methodology for just the single-year year 2012 EBITDA impacts translates into a reduction in the company's enterprise value of between $1.8 to $2.3 billion. *Id.*

Such extraordinary action results from errors EPA made regarding the ability of Texas sources to "achieve the required cost-effective emission reductions even while maintaining current levels of lignite consumption at affected [facilities]," 76 FR at 48284—errors EPA could have avoided with proper notice and comments. For example, EPA assumed some facilities could use a type of coal that their boilers cannot accommodate without decreasing output, the availability of scrubbers that do not exist or work the way EPA describes, and dispatch changes that are not possible. Recon. Pet. 26-32; Supp. Pet. 6-7; K. Smith Dec. ¶¶10-20. Contrary to EPA's assumptions, options such as fuel switching, additional control technology, and

trading allowances are not feasible to meet EPA's mandates or are far more costly than EPA believes. Campbell Dec. ¶¶19-22, tbl.2; K. Smith Dec. ¶¶10-20; Goering Dec. ¶¶8-20.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST STRONGLY FAVOR A STAY.

There are no offsetting harms to third-parties or the public interest from the narrow stay sought by Luminant. To the contrary, these factors strongly favor a stay.

The harms to the public are immediate and devastating. Absent a stay, the harm to others beyond Luminant will be immediate, severe, and far-reaching. Those harms, which are detailed in 12 additional declarations, include, but are not limited to:

- Hundreds of mine and plant employees will lose their jobs. *See* Campbell Dec. ¶7(b); Kopenitz Dec. ¶9, tbl.1. These employees, who currently have the most attractive jobs in their communities, are unlikely to have similar local job options and may have to relocate to find new jobs, if they are able to find new jobs at all. *E.g.*, Gardner Dec. ¶¶16-20. Communities will lose substantial tax and retail business. *See* C. Smith Dec. ¶¶3-5; Lee Dec. ¶¶7-12, 14; Dehart Dec. ¶¶6-10; Johnson Dec. ¶¶8, 10-15; Hill Dec. ¶¶6-8; Zuber Dec. ¶¶10-16; Grant Dec. ¶¶4, 6-11; Robinson Dec. ¶¶6-7, 9-10; Gardner Dec. ¶19. The financial impact on these small, rural communities will be "devastating"—likely requiring service cuts to hospitals, school systems, and other services. *See, e.g.*, Lee Dec. ¶¶7, 11-12; Dehart Dec. ¶9; Johnson Dec. ¶¶12-13; Robinson ¶12. Luminant's suppliers will also be harmed by the loss of business. Perlet Dec. ¶¶10-11; C. Smith Dec. ¶3.
- The Final Rule's reduction of generating capacity in Texas threatens the reliability of the distinct electric grid that serves most of Texas (known as the ERCOT system). ERCOT Rep. 7 (attached to Lasher Dec.).[12] In fact, according to ERCOT, there would have been rotating outages this last summer if the capacity that will be idled by Luminant had not been available. *Id.* at 5.

[12]The Electric Reliability Council of Texas, Inc. ("ERCOT") is a nonprofit corporation responsible for the reliability of Texas's main electricity power grid.

- By requiring severe reductions in electrical generation in Texas, the Final Rule will likely cause a substantial increase in wholesale and retail electricity prices in the ERCOT region. *See* Campbell Dec. ¶7(g), 48; Perryman Dec. ¶¶91-94. These impacts will harm vulnerable and minority populations disproportionately. Perryman Dec. ¶¶98-99.

- Beyond the direct economic harm to Luminant, the broader impacts to Texas will be staggering. Spending and output in Texas will be reduced by over $100 million each and over a thousand jobs will be eliminated. *Id.* ¶¶31, 37.

The requested limited stay will not harm EPA or others. The purpose of §110(a)(1)(D)(i)(I) is to help downwind States "attain" air quality standards. *North Carolina*, 531 F.3d at 907. Here, as explained above (p. 14), EPA has regulated Texas for $PM_{2.5}$ solely on the basis that it is "significantly" contributing to Madison. But EPA has also found that Madison is in attainment today by a substantial margin and it expects emissions of SO_2 and NO_X by Texas EGUs to decrease. Indeed, EPA's own models project Madison to be in attainment in 2014 without any regulatory intervention. Further, Texas is only 1 of 12 States that EPA deemed to be "substantially contributing" $PM_{2.5}$ to Madison. *See* 76 FR at 48241-44. These other 11 States—which, unlike Texas, were found also to contribute to other downwind areas—will continue to be subject to the same emissions limitations even if a stay is granted as to Texas.[13]

[13]Similarly, as noted (p. 3), with regard to the seasonal NO_X budget, EPA has found that Allegan and East Baton Rouge are in attainment today and that it expects further reductions of relevant emissions by Texas EGUs—so much so that even EPA's own flawed models show that these areas would be in attainment in 2014 regardless of seasonal NO_X limits. In all events, the numerous other States linked to these sites

The requested stay is also in the public interest. Texans' interest in the continued provision of reliable, affordable electricity strongly favors a stay here. Indeed, as noted, ERCOT has concluded that the "currently installed level of generating capacity is barely sufficient to avoid rotating outages with the level of demand experienced in 2011," Lasher Dec. ¶26, and that emissions limits will both cause a "substantial loss[] of available operating capacity" threatening the grid's reliability, ERCOT Rep. 7, and "increase the risk of rotating outages with more frequent or longer outages." Lasher Dec. ¶38. Further, ERCOT has concluded that, because of the lack of notice, there are "numerous unresolved questions associated with the impacts," ERCOT Rep. 5, of the Final Rule on the ERCOT system and that it has had only "an extremely truncated period in which to assess the reliability impacts of the rule, and no realistic opportunity to take steps that could even partially mitigate the substantial losses of available operating capacity," *id.* at 7. Thus, even if the Final Rule were ultimately to go into effect, a stay would benefit the public by giving Texas generators and ERCOT adequate time to take achievable steps to minimize the risk that required reductions will impact system reliability.

CONCLUSION

For the foregoing reasons, the Court should grant the limited stay requested herein.

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would remain subject to seasonal and/or annual emission limits even if this stay is granted. *See* 76 FR at 48241-46.

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Respectfully submitted,

/s/ Peter D. Keisler

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, I will cause the foregoing PETITIONERS' MOTION FOR PARTIAL STAY OF EPA'S FINAL TRANSPORT RULE, including all exhibits, to be served through the CM/ECF system, which will send a notice of filing to all registered attorneys of record.

/s/ Peter D. Keisler
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