ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN LUNG ASSOCIATION, and AMERICAN PUBLIC HEALTH ASSOCIATION Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency, Respondents.	Case No. 19-1140

MOTION OF MURRAY ENERGY CORPORATION TO INTERVENE

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rule 15(b) and 27, Murray Energy Corporation ("Murray Energy") respectfully moves for leave to intervene as a respondent in the above-captioned case and in any future petitions for review challenging the Final Rule consistent with D. C. Circuit Rule 15(b).

BACKGROUND

The petition in this case involves a challenge to the final rule promulgated by the United States Environmental Protection Agency ("EPA")

titled *Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (the "Rule").

EPA promulgated the Rule under Section 111 of the Clean Air Act. 42 U.S.C. § 7411. In the Rule, EPA takes three significant but separate actions. First, the Rule repeals EPA's prior final rule: *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan"). Second, the Rule implements a set of guidelines for greenhouse gas emissions from existing coal-fired electric utility generating units ("EGUs") under Section 111(d) of the Clean Air Act (the "Affordable Clean Energy Rule" or "ACE Rule"). The ACE Rule instructs States on how to develop, submit, and implement plans to establish performance standards for greenhouse gas emissions from certain EGUs. Finally, the Rule adopts regulations for EPA and States to implement the ACE Rule.

The Clean Power plan posed a significant threat to Murray Energy and its business, employees, and customers. Murray Energy is the largest underground coal mining company in the United States. Murray Energy and its subsidiaries operate fourteen active coal mines and produce more than 75 million tons of

bituminous coal each year from operations in Ohio, West Virginia, Illinois, Kentucky, Utah, Pennsylvania, and Colombia. Murray Energy is also engaged in the manufacture of equipment for the mining of coal and in the transport of coal. Murray Energy owns and operates four mining equipment manufacturing and rebuild facilities, along with a number of river, truck and rail terminals, twenty-five river towboats, and over 500 barges operating on the inland waterway system. Murray Energy is the largest employer of underground coal mine workers in the Untied States, employing over 5,800 workers. Much of the coal mined and transported by Murray Energy is used to produce electricity.

The Clean Power Plan was designed to reduce the consumption of coal by forcing coal-fired power plants to shut down or switch to other fuels. This posed a direct attack on Murray Energy's business and the market for coal. Murray Energy has been an active participant in litigation over the Clean Power Plan since it was proposed. Murray Energy was the first party to file a lawsuit challenging the Clean Power Plan. *See Murray Energy Corp. v. EPA*, Case No. 14-1112 (D.C. Cir.). In that litigation, Murray Energy briefed and provided affidavit support for its standing (attached hereto as Exhibit A). Murray Energy is a petitioner in the consolidated cases seeking judicial review of the Clean Power Plan currently before this Court. *See Murray Energy Corp. v. EPA*, Case No. 15-1366; consolidated with *West Virginia v. EPA*, Case No. 15-1363.

Murray Energy has also been an active participant in the development of the Rule, including submitting public comments on the proposed Rule,[1] testifying at a public hearing on the Rule held by EPA,[2] and commenting on EPA's proposed repeal of the Clean Power Plan.[3] Throughout this process, Murray Energy has sought to protect its interests, oppose regulations that unduly burden or intentionally harm the coal industry, and protect the jobs and livelihoods its employees, and the numerous people and communities that depend on coal.

LAW AND ARGUMENT

Intervention in a petition for judicial review under Fed. R. App. P. 15 is proper upon a timely motion setting forth in a "concise statement" the "interest of the moving party and the grounds for intervention. Fed. R. App. P. 15(d). This rule "simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought." *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

[1] Comment submitted by Robert E. Murray, Chairman, President and Chief Executive Officer, Murray Energy Corporation, EPA-HQ-OAR-2017-0355-24688 (Oct. 31, 2018).
[2] Comment submitted by Cody Nett, Assistant General Counsel, Director of Media and Investor Relations for Murray Energy Corporation, EPA-HQ-OAR-2017-0355-22155 (Oct. 1, 2018).
[3] Comment submitted by Robert E. Murray, Chairman, President, and Chief Executive Officer, Murray Energy Corporation, EPA-HQ-OAR-2017-0355-4102 (Nov. 28, 2017); Comment submitted by Orla E. Collier, Benesch Friedlander Coplan & Aronoff LLP on behalf of Murray Energy Corporation, EPA-HQ-OAR-2017-0355-20983 (Apr. 30, 2018).

While not binding on this Court, the requirements of Fed. R. Civ. P. 24 can also be used to help inform this Court's intervention analysis. *See Int'l Union v. Scofield*, 382 U.S. 205, 216, n.10 (1965). Federal Rule of Civil Procedure 24 allows for intervention as of right when the moving party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Further, permissive intervention is appropriate when the movant "is given a conditional right to intervene by a federal statute" or "has a claim or defense that shares with the main action a common question of law or fact." *Id.* at 24(b).

I. Murray Energy Has Significant Interests in the Outcome of This Case that Would be Impaired by an Adverse Ruling.

Murray Energy has a substantial interest in the final rule. The Clean Power Plan was designed to reduce the consumption of coal by the nation's energy sector, directly affecting Murray Energy's business. *See* 80 Fed. Reg. at 64,667 (describing the shifting of coal-fired generation to natural gas or other fuels as building blocks for compliance with the Clean Power Plan); Exhibit A at 7–8. In repealing the Clean Power Plan, the Rule acknowledges that EPA does not have the authority to rely on the shifting of generation away from coal to set emission guidelines for coal-fired power plants. *See* 84 Fed. Reg. at

32,524–32. As a result, while imposing emission guidelines for coal-fired utilities, the coal industry was also "an object of the action . . . at issue" in the Clean Power Plan and the current Rule. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In those circumstances, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561–62; *see also* Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (per curiam) (ECF No. 1722115) (finding a "'concrete and imminent injury'" justifying intervention when a petitioner has sought relief that "'threaten[s] loss' of [a] favorable [agency] action" (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003))).

Further, Murray Energy stands to "gain or lose by the direct legal operation and effect" of this Court's judgment. *U.S. v. AT&T*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (internal quotations omitted). The Clean Power Plan, particularly when combined with other rules of EPA that are still under judicial review, has had a devastating impact on the coal industry and Murray Energy. *See* Exhibit A at 7–8. Before it was stayed, the Clean Power Plan was already contributing to the premature closure of coal-fired utilities, including customers of Murray Energy. *Id.* The Rule repeals the Clean Power Plan and replaces it with emission guidelines that will not force the premature retirement of even

more coal-fired generating units. By rejecting EPA's authority to directly target coal consumption and by implementing guidelines that will allow coal-fired power plants to continue to operate, the Rule will benefit all of Murray Energy's coal operations, and affirmance in this Court will help protect Murray Energy's interests.

Vacatur of the Rule, on the other hand, could significantly impair Murray Energy's interests. In the event this Court vacates the Rule, or affirms in a manner that allows EPA to use Section 111(d) of the Clean Air Act to mandate generation shifting from coal to other fuels, Murray Energy will be at risk of either reinstatement of the Clean Power Plan or a similar rule, or future targeting of the coal industry through other regulations under Section 111(d) of the Clean Air Act.

The Rule also benefits Murray Energy by granting relief Murray Energy has long sought in litigation before this Court over EPA's Clean Power Plan. Murray Energy was the very first party to file a lawsuit challenging the Clean Power Plan. *See Murray Energy Corp. v. EPA*, Case No. 14-1112 (D.C. Cir.). Murray Energy has been actively involved in the long-running litigation seeking vacatur of the Clean Power Plan ever since, including in the consolidated cases seeking judicial review of the final Clean Power Plan that are currently before this Court in *West Virginia v. EPA*, Case No. 15-1363

(D.C. Cir.). While that litigation is now in abeyance, EPA's final Rule repeals the Clean Power Plan, providing the relief Murray Energy requested. Murray Energy has a substantial interest in defending that relief before this Court.

II. The Current Parties Do Not Adequately Represent Murray Energy's Interests.

The current parties do not adequately represent Murray Energy's interests. In the context of Fed. R. Civ. P. 24(a), the burden of showing inadequate representation "is not onerous." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). "The applicant need only show that representation of his interest 'may be' inadequate not that representation will in fact be inadequate." *Id.* (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n.10 (1972) among other cases).

Petitioners seek vacatur of the Rule, and therefore cannot possibly represent Murray Energy's interests. EPA also cannot adequately represent Murray Energy's interests in this case. First, as a governmental entity, EPA necessarily represents the broader "general public interest." *Dimond*, 792 F.2d at 192–93 ("A government entity . . . is charged by law with representing the public interest of its citizens." It would therefore "be shirking its duty were it to advance" an intervenor's narrower interest "at the expense of its representation of the general public interest."); *see also Fund for Animals*, 322 F.3d at 736 ("[W]e have often concluded that governmental entities do not adequately

represent the interests of aspiring intervenors.”).

Second, while EPA’s interest is in defending the Rule generally, including its affects on EPA, regulated EGUs, and other stakeholders, Murray Energy’s interest “is more narrow and focused than EPA’s.” *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977). Murray Energy is concerned with the impact of the Rule on the coal industry and the thousands of people it employs. Murray is further interested in seeing repeal of the Clean Power Plan, an issue in which it has been engaged in litigation against EPA for many years, upheld by this Court. EPA cannot be expected to adequately represent Murray Energy’s interest on these issues.

III. Murray Energy Has Standing to Intervene.

This Court has previously held that a movant seeking to intervene as of right under Rule 24(a)(2) must establish Article III standing. *In re Idaho Conservation League*, 811 F.3d 502, 514–15 (D.C. Cir. 2016). This Court did not address, however, whether Article III standing is required for permissive intervention. *Id.* at 515. In addition, recent Supreme Court precedent suggests that Article IIII standing is not required for intervention as of right as long as the intervenor seeks the same relief as the respondents. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (“[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond

that which the plaintiff requests.”). Nonetheless, Murray Energy’s interest in this case also supports standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (“[A]ny person who satisfies Rule 24(a) will also meet Article III’s standing requirement.”). As discussed above, Murray Energy has significant interests in the Rule that will be impaired by an adverse outcome. Murray Energy’s standing has also been briefed in prior litigation involving the Clean Power Plan. *See* Exhibit A. Since before the Clean Power Plan was finalized, Murray Energy has consistently sought to protect those interests, both in prior litigation and in public comments and testimony on the Clean Power Plan and the current Rule repealing the Clean Power Plan. Since Murray Energy’s interests will be directly affected by the outcome of this litigation, Murray Energy has standing to intervene.

IV. Murray Energy’s Motion is Timely.

A motion for intervene is timely if filed “within 30 days after the petition for review is filed.” Fed. R. App. P. 15(d). Petitioners filed their petition for review on July 8, 2019 and this motion has been filed within 30 days. Further, since this motion is being filed at an early stage of the proceedings, before a briefing schedule has been set and even before the time has run for petitions for judicial review to be filed, the addition of Murray Energy as an intervenor runs no risk of delaying this Case.

CONCLUSION

For these reasons, Murray Energy respectfully requests that its motion to intervene be granted and Murray Energy be allowed to intervene in this case and in any future petitions for review challenging the Rule.

Dated: August 7, 2019

Respectfully submitted,

/s/John Lazzaretti
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Counsel for Murray Energy Corporation

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type volume limitation of Rule 27(d)(2)(A) of the Federal Rules of Appellate Procedure because it contains 2,184 words, excluding parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, according to the count of Microsoft Word. The foregoing motion also complies with Rules 27(d)(1)(E), 32(a)(5), and 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in 14-point Times New Roman type.

Dated: August 7, 2019

Respectfully submitted,

/s/John Lazzaretti
John Lazzaretti

Counsel for Murray Energy Corporation

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

AMERICAN LUNG ASSOCIATION, and AMERICAN PUBLIC HEALTH ASSOCIATION Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency, Respondents.	Case No. 19-1140

RULE 26.1 DISCLOSURE STATEMENT OF MOVANT-INTERVENOR MURRAY ENERGY CORPORATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Murray Energy Corporation submits the following statement: Murray Energy Corporation has no parent corporation, and no publicly held corporation owns ten percent (10%) or more of its stock. Murray Energy Corporation is a privately-held coal company that operates underground coal mines in the United States, along with associated manufacturing and transportation.

Dated: August 7, 2019

Respectfully submitted,

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ORAL ARGUMENT NOT YET SCHEDULED

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MOVANT-INTERVENOR MURRAY ENERGY CORPORATION'S CERTIFICATE OF PARTIES AND *AMICI CURIAE*

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Murray Energy Corporation furnishes this list of parties, intervenors, and *amici curiae* that have appeared before this Court in Case No. 19-1140 (this "Case") as an addendum to its motion to intervene.

Petitioners: The Petitioners in this Case are the American Lung Association and the American Public Health Association.

Respondents: The Respondents in this Case are the United States

Environmental Protection Agency ("EPA") and Andrew R. Wheeler, in his capacity as Administrator of the EPA.

Intervenors: The National Rural Electric Cooperative Association filed a motion for leave to intervene in support of respondents in this Case. [ECF No. 1800270]. The Chamber of Commerce of the United States of America filed a motion for leave to intervene in this Case. [ECF No. 1800958]. The National Mining Association filed a motion to intervene in support of respondents in this Case. [ECF No. 1801004]. America's Power filed a motion for leave to intervene as a respondent in this Case. [ECF No. 1801050]. Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Generating Company, AEP Generation Resources Inc., and Wheeling Power Company filed a motion for leave to intervene in support of respondents in this Case. [ECF No. 1801137]. To the knowledge of Murray Energy Corporation, this Court has not yet granted any of these motions to intervene as of the time of this filing.

Amici Curiae: To the knowledge of Murray Energy Corporation, there are no *amici curiae* as of the time of this filing.

Dated: August 7, 2019

Respectfully submitted,

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Counsel for Murray Energy Corporation

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia circuit by using the CM/ECF system. Accordingly, all parties to this appeal were served via ECF.

/s/John Lazzaretti
John Lazzaretti

Counsel for Murray Energy Corporation

Exhibit A

No. ____

In the United States Court of Appeals for the District of Columbia Circuit

MURRAY ENERGY CORPORATION

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency

Respondents.

On Petition for Extraordinary Writ to the
United States Environmental Protection Agency

PETITIONER STANDING ADDENDUM

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ARGUMENT IN SUPPORT OF STANDING

DECLARATION OF ROBERT E. MURRAY

ARGUMENT IN SUPPORT OF STANDING

As the largest privately-held coal producer and the fifth largest coal producer in the United States, Murray Energy Corporation ("Murray Energy") has standing to seek a writ prohibiting EPA from issuing a rule that would jeopardize the existence of many of the nation's coal-fired power plants and thereby directly harm the domestic coal industry, including Murray Energy.

To have standing to litigate in federal court, a petitioner "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc., v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). As further supported in the Declaration of Robert E. Murray, attached as an Addendum to this Petition, EPA's proposed mandate imminently threatens to result in the shuttering or conversion of coal-fired power plants and thereby imminently threatens Murray Energy's core business – the mining of coal supplied to those power plants.

Prohibiting EPA from going any further with its proposal to cut carbon emissions under Section 111(d) of the Clean Air Act would immediately redress the injury facing Murray Energy. Murray Energy does not have the luxury of waiting for finalization by EPA of its mandate to the States in another year. Right now, States have no choice but to move forward with the massive undertaking of evaluating the proposed mandate and developing State-

specific plans in conformance with the mandate. These plans will not just impose numeric carbon emissions limitations, or even impose specific emission control technologies. Rather, EPA's mandate tells each State to examine holistically the entire energy sector within the State, addressing energy end-use as well as power generation.

Moreover, power plants already face an April 16, 2015, compliance deadline under EPA's separate national emission standard for power plants promulgated in 2012 and must make decisions now about the future of their coal-fired power plants under the 2012 rule. By EPA's own projections, that standard alone will result in 4,700 megawatts of coal-fired utility retirements. Even if EPA's proposed mandate does not become final for another 1–2 years, and even if another year or two passes before the individual State plans required by the mandate become effective, power plants face a decision right now under the 2012 rule. Why invest the millions of dollars needed to comply with that 2012 rule knowing that the carbon reduction mandate will cause the utility to shut down or convert that coal-fired power plant in which it just invested? Power plants have no choice but to incorporate projections about the carbon reduction mandate into their determinations now. In other words, even though EPA's proposed mandate is not yet a final action, the announcement alone of yet another anti-coal rule has an immediate—and significant—effect today on the energy sector and the companies who supply coal to the energy sector.

Accordingly, Murray Energy Corporation has standing to seek a writ prohibiting EPA's unlawful action.

DECLARATION OF ROBERT E. MURRAY

BEFORE ME, the undersigned authority, personally appeared Mr. Robert E. Murray, who after being duly sworn states as follows:

1. My name is Robert E. Murray. I am the Founder, Chairman, President, and Chief Executive Officer of Murray Energy Corporation.

2. Prior to founding Murray Energy Corporation, I was President and Chief Executive Officer of The North American Coal Corporation, which is now part of Nacco Industries, Inc.

3. Murray Energy Corporation began in 1988 with the purchase of a single continuous mining operation in the Ohio Valley mining region with an annual output of approximately 1.2 million tons per year.

4. In 2014, Murray Energy Corporation will produce approximately 65 million tons of coal from twelve active coal mining complexes. We currently employ approximately 7,300 people.

5. Murray Energy Corporation is the largest privately-held coal company in the United States, the largest underground coal mine operator in the United States, and the fifth largest coal producer in the United States determined by combined annual coal production.

6. Murray Energy Corporation's operations are located in six States: Illinois, Kentucky, Ohio, Pennsylvania, Utah and West Virginia.

7. Murray Energy Corporation also owns or controls approximately 2.0 billion tons of proven or probable coal reserves in the United States,

strategically located near our customers, near favorable transportation, and high in heat value.

8. Additionally, Murray Energy Corporation owns about 80 subsidiary and support companies directly or indirectly related to the domestic coal industry, including numerous coal transportation facilities such as coal transloading facilities, harbor boats, towboats and barges.

9. The vast majority of the coal produced by Murray Energy Corporation is supplied to coal-fired electric utility generating units (i.e., power plants), providing affordable energy to households and businesses across the country.

10. In 2013, we sold coal to domestic customers located in nine states. The substantial majority of those customers operate electric power plants located throughout the United States.

11. Coal production in the central Appalachian region is already down approximately 43% compared to 2008 levels. The American Coalition for Clean Coal Electricity ("ACCCE") recently concluded that 421 coal-fired power plants in the United States are being shut down or converted to a different fuel source. This represents nearly 63,000 megawatts of electric generating capacity. Of this total, ACCCE found that 299 are being shut down and 39 are being converted due to EPA policies, for a total of 338 units representing over 51,000 megawatts of electric generating capacity.

12. By way of example, and not necessarily all-inclusive, Murray Energy Corporation previously sold coal to the following power plants, each of

which has been shut down or slated for closure: First Energy Corporation's Hatfield Ferry Power Station, Mitchell Power Station, and Eastlake Plant; NRG's Indian River Generating Station; Appalachian Power Company's Philip Sporn Plant; GDF Suez Energy North America's Mount Tom Station; and Dairyland Power Cooperative's Alma Generating Station.

13. The shift away from coal has and will have a direct and significant impact on the primary business of Murray Energy Corporation.

14. I have been briefed on the Administration's proposed plan to cut carbon emissions at coal-burning power plants, announced by EPA on June 2, 2014 (*Proposed Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 40 CFR Part 60, Subpart UUUU*).

15. It is my understanding that EPA's plan announced on June 2, 2014, expressly contemplates the shifting of fuel at power plants from coal to other fossil fuels, and the shifting of energy supply from fossil fuel power plants to nuclear power plants and renewable energy sources such as wind and solar. Thus, EPA's June 2 plan calls for the shutting down and/or conversion of even more coal-fired power plants than already planned as a result of this piling on of regulation after regulation directly aimed at coal.

16. It is my understanding that the re-writing of energy policy in the United States is beginning right now, with States calling for stakeholder meetings and beginning the monumental task of overhauling the energy market (both supply and demand).

17. Murray Energy Corporation and its employees depend upon the presence of a stable and continuing domestic market for coal. Every coal fired power plant that is shut down (or converted) affects the financial bottom line of Murray Energy Corporation and enough shutdowns threaten the existence of Murray Energy Corporation and the well paid and well benefited jobs of our 7,300 employees.

Further Affiant sayeth naught.

By: Robert E. Murray

Robert E. Murray, Affiant

Subscribed and sworn to me this 18th day of June 2014.

Vickie C. Gray

Notary Public

My Commission Expires: 4/30/2017