

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

STATE OF WEST VIRGINIA, *et al.*,

*Petitioners,*

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, *et al.*,

*Respondents.*

No. 15-1363 (and  
consolidated cases)

**MOTION OF FORMER STATE PUBLIC UTILITY COMMISSIONERS  
CONGRESSMAN KEVIN CRAMER, DAVID ARMSTRONG, RANDALL  
BYNUM, CHARLES DAVIDSON, JEFF DAVIS, MARK DAVID GOSS,  
ROBERT HIX, TERRY JARRETT, LARRY LANDIS, JON MCKINNEY,  
CARL MILLER, POLLY PAGE, ANTHONY RACHAL III, DR. EDWARD  
SALMON, JOAN SMITH, JIM SULLIVAN, DAVID WRIGHT, AND TOM  
WRIGHT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT  
OF PETITIONERS**

Pursuant to Fed. R. App. Pro. 29(b) and D.C. Cir. Rule 29(b), former state public utility commissioners Congressman Kevin Cramer, David Armstrong, Randall Bynum, Charles Davidson, Jeff Davis, Mark David Goss, Robert Hix, Terry Jarrett, Larry Landis, Jon McKinney, Carl Miller, Polly Page, Anthony Rachal III, Dr. Edward Salmon, Joan Smith, Jim Sullivan, David Wright, and Tom Wright (collectively, “Movants”) respectfully move for leave to participate as

*amici curiae* in support of Petitioners in Case Nos. 15-1363 (and consolidated cases).

Counsel for Movants has conferred with all parties and the following parties consent to this motion:

- State of Oklahoma ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma (Case No. 15-1364)
- Oklahoma Department of Environmental Quality (Case No. 15-1364)
- International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers (Case No. 15-1365)
- Murray Energy Corporation (Case No. 15-1366)
- American Coalition for Clean Coal Electricity (Case No. 15-1368)
- East Kentucky Power Cooperative, Inc. (Case No. 15-1376)
- Hoosier Energy Rural Electric Cooperative, Inc. (Case No. 15-1376)
- Minnkota Power Cooperative, Inc. (Case No. 15-1376)
- San Miguel Electric Cooperative, Inc. (Case No. 15-1376)
- South Mississippi Electric Power Association (Case No. 15-1376)
- South Texas Electric Cooperative, Inc. (Case No. 15-1376)
- Western Farmers Electric Cooperative (Case No. 15-1376)
- National Association of Home Builders (Case No. 15-1379)
- Basin Electric Power Cooperative (Case No. 15-1393)

- West Virginia Coal Association (Case No. 15-1422)
- Newmont Nevada Energy Investment, LLC and Newmont USA Limited  
(Case No. 15-1432)
- Kansas City Board of Public Utilities – Unified Government of Wyandotte  
County/Kansas City, Kansas (Case No. 15-1442)
- The North American Coal Corporation (Case No. 15-1451)
- The Coteau Properties Company (Case No. 15-1451)
- Coyote Creek Mining Company, LLC (Case No. 15-1451)
- The Falkirk Mining Company (Case No. 15-1451)
- Mississippi Lignite Mining Company (Case No. 15-1451)
- North American Coal Royalty Company (Case No. 15-1451)
- NODAK Energy Services, LLC (Case No. 15-1451)
- Otter Creek Mining Company, LLC (Case No. 15-1451)
- The Sabine Mining Company (Case No. 15-1451)
- Louisiana Public Service Commission (Case No. 15-1464)
- Denbury Offshore, LLC (Case No. 15-1475)
- Competitive Enterprise Institute (Case No. 15-1488)
- Buckeye Institute for Public Policy Solutions (Case No. 15-1488)
- Independence Institute (Case No. 15-1488)
- Rio Grande Foundation (Case No. 15-1488)

- Sutherland Institute (Case No. 15-1488)
- Klaus J. Christoph (Case No. 15-1488)
- Samuel R. Damewood (Case No. 15-1488)
- Catherine C. Dellin (Case No. 15-1488)
- Joseph W. Luquire (Case No. 15-1488)
- Lisa R. Markham (Case No. 15-1488)
- Patrick T. Peterson (Case No. 15-1488)
- Kristi Rosenquist (Case No. 15-1488)
- Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company (Respondent-Intervenors)

The following parties take no position on this motion:

- State of West Virginia (Case No. 15-1363)
- State of Texas (Case No. 15-1363)
- State of Alabama (Case No. 15-1363)
- State of Arizona Corporation Commission (Case No. 15-1363)
- State of Arkansas (Case No. 15-1363)

- State of Colorado (Case No. 15-1363)
- State of Florida (Case No. 15-1363)
- State of Georgia (Case No. 15-1363)
- State of Indiana (Case No. 15-1363)
- State of Kansas (Case No. 15-1363)
- Commonwealth of Kentucky (Case No. 15-1363)
- State of Louisiana (Case No. 15-1363)
- State of Louisiana Department of Environmental Quality (Case No. 15-1363)
- Attorney General Bill Schuette, People of Michigan (Case No. 15-1363)
- State of Missouri (Case No. 15-1363)
- State of Montana (Case No. 15-1363)
- State of Nebraska (Case No. 15-1363)
- State of New Jersey (Case No. 15-1363)
- State of North Carolina Department of Environmental Quality (Case No. 15-1363)
- State of Ohio (Case No. 15-1363)
- State of South Carolina (Case No. 15-1363)
- State of South Dakota (Case No. 15-1363)
- State of Utah (Case No. 15-1363)

- State of Wisconsin (Case No. 15-1363)
- State of Wyoming (Case No. 15-1363)
- Golden Spread Electrical Cooperative , Inc. (Case No. 15-1376)
- Energy and Environment Legal Institute (Case No. 15-1398)
- Mississippi Department of Environmental Quality (Case No. 15-1409)
- State of Mississippi (Case No. 15-1409)
- Mississippi Public Service Commission (Case No. 15-1409)
- Minnesota Power (an operating division of ALLETE, Inc.) (Case No. 15-1474)

All remaining parties take no position on this motion. Accordingly, no party has objected to this motion or the filing of the Movants' brief as *amici curiae*.

### **INTERESTS OF MOVANT**

Movants are former state public utility commissioners. These former commissioners were either elected or appointed and served at the state level regulating, *inter alia*, electric distribution, transmission and generation systems in their respective states, including establishing and enforcing reasonable rates and standards for the sale and delivery of electricity service. These former state public utility commissioners, the states they served in, and their years of service are as follows:

- Congressman Kevin Cramer, North Dakota, 2003-2013

- David Armstrong, Kentucky, 2008-2015
- Randall Bynum, Arkansas, 2003-2007
- Charles Davidson, Florida, 2003-2005
- Jeff Davis, Missouri, 2004-2012
- Mark David Goss, Kentucky, 2004-2008
- Robert Hix, Colorado, 1994-2001
- Terry Jarrett, Missouri, 2007-2013
- Larry Landis, Indiana, 2003-2014
- Jon McKinney, West Virginia, 2005-2015
- Carl Miller, Colorado, 2004-2007
- Polly Page, Colorado, 2000-2008
- Anthony Rachal III, District of Columbia, 2002-2006
- Dr. Edward Salmon, New Jersey, 1991-1996
- Joan Smith, Oregon, 1990-2003
- Jim Sullivan, Alabama, 1993-2008
- David Wright, South Carolina, 2003-2013
- Tom Wright, Kansas, 2007-2014

Based on their respective experiences as state utility regulators, Movants believe that they can provide additional and valuable viewpoints on the issues presented in the petitions. Specifically, Movants have been involved in state

resource planning processes, either in vertically-integrated or restructured electric markets, and understand the state institutions dedicated to regulating electric utilities. Movants are interested in this proceeding because EPA's Power Plan reorders the current state institutional apparatus regulating electric utilities, and rewrites the "regulatory compact" that exists between utilities and state regulators.

### **REASONS FOR AN AMICUS BRIEF**

Fed. R. App. Pro. 29(b)(2) requires that a motion for leave to file an amicus brief state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *See also* D.C. Cir. Rule 29(b). Movants offer a perspective that is unique in this case as a group of former state public utility commissioners that have exercised resource planning and other authority over utilities under different regulatory models. These former regulators are specially situated to address the potential impacts on traditional state regulatory authorities, processes, and institutions, all of which may be helpful to the Court in evaluating the merits of the petitioners' claims. Further, this group represents a diverse group of jurisdictions with differing regulatory models, which provides for a broad perspective on the impacts of the Power Plan. Specifically, the former public utility commissioners have served in North Dakota, Missouri, West Virginia, Indiana, Colorado, Arkansas, the District of Columbia, New Jersey, Kentucky, Oregon, Alabama, Florida, Kansas, and South Carolina.



Within these states, the commissioners presided over proceedings involving utility resource planning decisions, and can therefore address the potential effects of an air quality rule that implements subcategory performance standards premised upon a system-wide analysis. This perspective is relevant to the disposition of the case due to the unprecedented nature of the Power Plan and its reliance on “outside the fence” metrics in determining subcategory performance standards, specifically increased natural gas utilization under Building Block 2 and significant renewable energy deployment assumptions under Building Block 3. The brief of Movants will provide this Court with relevant information on the impacts of this standard-setting methodology on electric markets and state processes under established and traditional state authorities. Accordingly, the proposed brief satisfies the standard set forth in Fed. R. App. Pro. 29(b)(2) and D.C. Cir. Rule 29(b).

Finally, pursuant to D.C. Cir. R. 29(d), the former state public utility commissioners hereby certify that a separate brief is necessary for their presentation to this Court due to the specialized nature of their distinct interests and expertise. This group of former state public utility commissioners is focusing on the state regulatory and institutional perspective; none of the *amici* of which we are aware will be in a position to address the unique impact of the Power Plan on state regulatory institutions and state regulatory authority.

Accordingly, the former state public utility commissioners, through counsel, certify that filing a joint brief would not be practicable.

### CONCLUSION

For the foregoing reasons, Movants respectfully request that they be granted leave to appear as *amici curiae* in this case and that the Court accept its brief for filing.

Respectfully submitted,

/s/ Raymond L. Gifford

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*Counsel for Amici Curiae*

February 23, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Raymond L. Gifford