ORAL ARGUMENT NOT YET SCHEDULED

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

MURRAY ENERGY CORPORATION Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	)	Docket No. 16-1127 (consolidated with Nos. 16-1175, 16-1204 16-1206, 16-1208 and 16-1210)

MOTION OF CALPINE CORPORATION AND EXELON CORPORATION FOR LEAVE TO INTERVENE AS RESPONDENTS

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Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), Calpine Corporation ("Calpine") and Exelon Corporation ("Exelon") (Calpine and Exelon are herein referred to collectively as "Proposed Intervenors") hereby move for leave to intervene as party respondents in the above-captioned proceedings.

In support of their motion, Proposed Intervenors state the following.

INTRODUCTION

1. Petitioner Murray Energy Corporation commenced this proceeding on April 25, 2016, seeking review of a final action of the United States Environmental Protection Agency ("EPA"), entitled the "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("Supplemental Finding") (Dkt. No. 16-1127). Petitioner ARIPPA filed a petition for review on June 7, 2016 (Dkt. No. 16-1175), and four petitions for review were filed on June 24, 2016: Michigan Attorney General Bill Schuette, et al., No. 16-1204; Oak Grove Management Company LLC, No. 16-1206; Southern Company Services, Inc., et al., No. 16-1208; and Utility Air Regulatory Group, 16-1210. By the Court's order of June 30, 2016 (Doc. 1622608), all of these petitions for review have been consolidated in this matter.[1]

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[1] Respondents and ARIPPA have advised movants' counsel that do not oppose this motion. All other petitioners have advised movants' counsel that they take no position on the motion.

2. EPA issued the Supplemental Finding in response to the U.S. Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which the Court held that EPA must include some consideration of costs in determining whether it is "appropriate and necessary" to regulate coal- and oil-fired electric utility steam generating units' emissions of hazardous air pollutants under section 112 of the Clean Air Act, 42 U.S.C. § 7412. *See* 81 Fed. Reg. at 24,420. EPA had initially determined in December 2000 that such regulation was "appropriate and necessary" and listed coal- and oil-fired electric utility steam generating units ("EGUs" or "power plants") for regulation under section 112. 65 Fed. Reg. 79,825 (Dec. 20, 2000). EPA then reaffirmed the determination that such regulation is "appropriate and necessary" when EPA promulgated the "Mercury and Air Toxics Standards" Rule ("MATS Rule") in February 2012. "National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units . . .," 77 Fed. Reg. 9,304 (Feb. 16, 2012).

3. The MATS Rule established national emission standards for hazardous air pollutants ("NESHAPs") that apply to coal- and oil-fired EGUs and that regulate the emissions of hazardous air pollutants from coal- and oil-fired EGUs with standards consistent with the requirements of section 112 of the Clean Air Act, 42 U.S.C. § 7412.

4. Dozens of parties filed petitions for review of the MATS Rule with this Court, in which they also challenged EPA's determination that it was "appropriate

and necessary" to regulate coal- and oil-fired EGUs under section 112. *See White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Proposed Intervenors were among the parties who intervened in support of EPA. *See White Stallion Energy Center*, Dkt. No. 12-1100, Order dated May 18, 2012 (granting Exelon and Calpine motion to intervene). This Court upheld the MATS Rule and denied the petitions. *White Stallion Energy Center*, 748 F.3d at 1229.

5. The Supreme Court granted certiorari to review one issue: whether EPA must have considered cost when it made the determination, in accordance with section 112(n)(1)(A), that regulating hazardous air pollutant emissions from coal- and oil-fired EGUs under section 112 was "appropriate." *Michigan*, 135 S.Ct. at 2706. Concluding that EPA had erred by interpreting section 112(n)(1)(A) not to require some consideration of cost in making the determination to regulate EGUs, the Court remanded the case to the D.C. Circuit. *Id.* at 2712.

6. On remand from the Supreme Court, the D.C. Circuit remanded the proceeding to EPA for the Agency to determine whether it remained appropriate to regulate EGUs under section 112, considering cost and other factors, but did not vacate the MATS Rule. *White Stallion Energy Center*, Docket No. 12-1100 (Order dated Dec. 15, 2015). EPA's administrative process culminated in EPA issuing the Supplemental Finding.

7. Calpine is a major U.S. power company that has invested substantially in clean, reliable electric generating technology. Calpine operates 84 low-carbon, natural

gas-fired and renewable geothermal power plants (in operation or under construction), that are capable of delivering nearly 27,000 megawatts of electricity to customers and communities in the United States. Calpine's fleet of combined-cycle and combined heat and power plants is among the largest in the nation. Declaration of J.D. Furstenwerth ("Furstenwerth Decl.") ¶¶4-5, attached hereto as Exhibit A.

8. Calpine owns and operates numerous EGUs that are not regulated by the MATS Rule, but which compete directly in electricity markets with generating units that are subject to the Rule. In 2010, Calpine acquired three coal-fired units that would have become subject to the MATS Rule, and immediately made the necessary investment to convert these units to burn natural gas. In addition, Calpine has several units that also operate at times on oil, which could subject them to the MATS Rule under certain circumstances. Furstenwerth Decl. ¶¶5-7.

9. Exelon Corporation is the parent company of Exelon Generation Company, LLC ("Exelon Generation"), which owns and operates over 32,000 megawatts of nuclear, wind, hydroelectric, solar, gas and oil-fired generation—one of the largest generation fleets in the United States. Exelon has six regulated electric utility subsidiaries serving approximately 10 million residential, industrial and commercial customers across Delaware, Illinois, Maryland, New Jersey, Pennsylvania, Virginia, and the District of Columbia. Declaration of Kathleen L. Barrón ("Barrón Decl.") ¶4, attached hereto as Exhibit B.

10. At the time the MATS Rule was adopted in 2012, Exelon Generation owned and operated EGUs directly affected by the Rule. Exelon divested its interest in some of these EGUs but continues to own or operate units affected by the MATS Rule. Exelon Generation also owns and operates numerous electric generating units that are not regulated by the MATS Rule, but which compete directly in electricity markets with generating units that are subject to the Rule. Barrón Decl. ¶¶5-6.

11. Proposed Intervenors support the MATS Rule and the Supplemental Finding, and seek to intervene in these proceedings to oppose the petition for review of the Supplemental Finding. As explained in greater detail below, Proposed Intervenors have a distinct view to present to this Court as large electric generators that have made strategic investments in low emission resources and that strongly support the MATS Rule and the Supplemental Finding. Proposed Intervenors' views contrast markedly with that of Petitioners.

BACKGROUND ON THE MATS RULE AND THE SUPPLEMENTAL FINDING

12. The MATS Rule reflected the culmination of nearly two decades of activity related to whether EPA should promulgate NESHAPs for coal- and oil-fired EGUs. In 1990, Congress amended section 112 of the Clean Air Act to hasten EPA's regulation of emissions of hazardous air pollutant by identifying in section 112(b) the pollutants that are hazardous. *See* 42 U.S.C. § 7412(b); S. Rep. No. 101-228 at 155-59 (1989); *Sierra Club v. EPA*, 353 F.3d 976, 979-80 (D.C. Cir. 2004). Congress also

required the EPA Administrator to promulgate a list of all categories of sources of hazardous air pollutants identified in section 112(b), mandating that EPA include on the list categories or subcategories of stationary sources whose emissions of hazardous air pollutants exceed certain numerical thresholds, 42 U.S.C. §§ 7412(c)(1), or even if below those thresholds, whose emissions "present[] a threat of adverse effects to human health or the environment," *id.* §§ 7412(a)(2), (c)(1), (c)(3). For each listed category or subcategory, EPA must establish emissions standards under 42 U.S.C. § 7412(d). *Id.* § 7412(c)(2).

13. Prior to determining that EGUs should be among the categories "listed" under section 112(c) of the Clean Air Act, Congress required the EPA Administrator to "perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of [hazardous air pollutants] . . . after imposition of the requirements of this chapter." *Id.* § 7412(n)(1)(A). The report, sometimes referred to as the "Utility Study," was completed and provided to Congress in February 1998. *See* "Study of Hazardous Air Pollutant Emissions from Electric Utility Steam Generating Units – Final Report to Congress," EPA-453/R-98-004a (Feb. 1998). Congress further required that the Administrator "shall regulate [EGUs] under [section 112], if the Administrator finds such regulation is appropriate and necessary after considering the results of the [Utility Study]." 42 U.S.C. § 7412(n)(1)(A).

14. On December 20, 2000, the Administrator published a determination pursuant to section 112(n)(1)(A) that it was both "appropriate" and "necessary" to

regulate hazardous air pollutant emissions from coal- and oil-fired EGUs under section 112, and added EGUs to the section 112(c) list. *Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units*, 65 Fed. Reg. 79,825 (Dec. 20, 2000); *see also* 81 Fed. Reg. 24,422. In May 2011, EPA published its proposed NESHAPs for coal- and oil-fired EGUs. 76 Fed. Reg. 24,976 (May 3, 2011). In that proposal, EPA confirmed that regulating EGUs under section 112 remained "appropriate and necessary." EPA subsequently finalized the MATS Rule and its determination that regulation of EGUs under section 112 remained "appropriate and necessary," and notice was published on February 16, 2012. 77 Fed. Reg. 9,304 (Feb. 16, 2012).

15. Calpine and Exelon participated in the rulemaking proceedings for the MATS Rule by, among other things, each submitting comments on the proposed rule.[2] Those comments were generally supportive of EPA's proposal and encouraged the prompt adoption of the Rule. After numerous parties sought review of MATS in *White Stallion Energy Center, LLC v. EPA*, No. 12-1100, Calpine and Exelon filed a motion to intervene in that matter (Doc. No. 1364505), which the Court granted. Calpine and Exelon participated in that matter through all stages of proceedings.

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[2] *See Comments of Calpine Corporation*, EPA-HQ-OAR-2009-0234-18450, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0234-18450; *Comments of Exelon Corporation*, EPA-HQ-OAR-2009-0234-17648, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0234-17648.

16. In the MATS Rule, EPA established emission standards for hazardous air pollutant emissions from coal- and oil-fired EGUs. The MATS Rule required units subject to the Rule to comply with those standards within three years—by April 16, 2015—although units could seek a one-year extension until April 16, 2016, if necessary for the "installation of controls." 77 Fed. Reg. at 9409-10, 9465 (40 C.F.R. § 63.9984(b)), 40 C.F.R. § 63.6(i)(4)(A); 42 U.S.C. § 7412(i)(3)(B). At this juncture, virtually all units that are subject to the MATS Rule have made the investments necessary to comply with the Rule, or have decided not to comply and have retired those units.

17. In *White Stallion Energy Center*, this Court upheld the MATS Rule and denied the petitions for review. 748 F.3d at 1229. However, the Supreme Court accepted certiorari to address whether EPA must have included some consideration of cost in deciding whether regulating hazardous air pollutant emissions from coal- and oil-fired EGUs under section 112 was "appropriate," as that term was used in section 112(n)(1)(A). *Michigan*, 135 S.Ct. at 2706, 2712. The Court concluded EPA was required to consider cost in making that determination, but left it to the Agency to determine how costs should be taken into account. *Id.* at 2711. The Supreme Court did not accept review of any challenges to the emission standards in the MATS Rule.

18. On remand from the Supreme Court's decision in *Michigan*, the D.C. Circuit considered separate motions to govern future proceedings on the question of

remedy filed by many parties, including one by a group comprised mostly of petitioner States, another by EPA, and one by Exelon, Calpine, and other industry respondent intervenors. *See* Order, Docket No. 12-1100 (D.C. Cir. Dec. 15, 2015). After oral argument on the motions to govern, the D.C. Circuit remanded the proceeding to EPA to determine whether it remained appropriate to regulate EGUs under section 112, considering cost and other factors, but did not vacate the MATS Rule. *Id.*

19. On December 1, 2015, EPA published a proposed supplemental finding that it remains appropriate to regulate EGUs. 80 Fed. Reg. 75,025 (Dec. 1, 2015). EPA took comment on the proposed supplemental finding, and Calpine and Exelon submitted comments in support of EPA's determination.[3] EPA finalized its determination in the Supplemental Finding, which reflects EPA's conclusion that regulating coal- and oil-fired EGUs under section 112 remains "appropriate and necessary" even after considering cost and that these sources are properly listed for regulation under section 112. 80 Fed. Reg. at 24,427. In this way, the Supplemental Finding supports the MATS Rule.

[3] Comments of Calpine Corporation, Exelon Corporation, and Public Service Enterprise Group, Inc., EPA-HQ-OAR-2009-0234-20549, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0234-20549.

20. While EPA was completing the administrative process that resulted in the Supplemental Finding, certain States filed an application with the Chief Justice on February 23, 2016, asking the Chief Justice to stay or enjoin the MATS Rule pending a petition for *certiorari* asking the Rule be vacated. Calpine and Exelon submitted a response in opposition to the application. The Chief Justice denied that application on March 3, 2016. Subsequently, certain States then filed a petition for certiorari with the Supreme Court seeking review of the D.C. Circuit's decision to leave the MATS Rule in place while EPA completed the Supplemental Finding, and Calpine and Exelon submitted a brief in opposition. *See Michigan v. EPA*, Supreme Court Dkt. No. 15-1152. The Court denied the petition for certiorari on June 13, 2016.

GROUNDS FOR INTERVENTION

21. A motion to intervene "must contain a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. 15(d). To satisfy this rule, a prospective intervenor must "simply . . . 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).[4]

[4] A motion to intervene in one case concerning direct review of an agency action is considered a motion to intervene in all cases before the Court involving the same agency action, including subsequently filed cases, and an order granting a motion to intervene in one case has the effect of granting intervention in all cases concerning the same action. D.C. Cir. Rule 15(b).

22. Rule 15(d) does not provide any standards for intervention, and "appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24." *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). Under that rule, this Court has held that "qualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant 'claims an interest relating to the property or transaction which is the subject of the action'; (3) whether 'the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest'; and (4) whether 'the applicant's interest is adequately represented by existing parties.'" *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting FED. R. CIV. P. 24(a)(2)); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003). Calpine and Exelon easily satisfy this standard.

A. The Motion Is Timely

23. This motion is timely because it is filed within the time established by the Court for procedural motions. Order, ECF. No. 1613741 (May 18, 2016) (ordering that procedural motions in this case are due July 25, 2016). In addition, the motion is timely because it was filed within 30 days after the petitions for review in Case Nos. 16-1204, 16-1206, 16-1208 and 16-1210. Fed. R. App. 15(d); *see also Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

B. Proposed Intervenors Have Significant Interests In Regulation of Emissions of Hazardous Air Pollutants Under MATS

24. As members of the industry regulated by the MATS Rule, Proposed Intervenors have a direct, immediate, and substantial interest in this case that may be harmed if the petition for review is granted. *See, e.g.*, *Huron Envtl. Activist League v. EPA*, 917 F. Supp. 34, 42-43 (D.D.C. 1996) (industry members have direct, legally cognizable interest in case involving rules for that industry). Proposed Intervenors will benefit from the timely and complete implementation of the MATS Rule, and any disruption of the Rule will deprive them of those substantial benefits.

25. In anticipation of the MATS Rule and other EPA rulemakings, Exelon made decisions to invest in pollution controls and alternative non-polluting technologies, and to retire certain older, fossil fuel-fired units. In December 2010, in reliance upon the then-proposed Cross-State Air Pollution Rule, the anticipated but not-yet-proposed MATS rule, and other rules, and the anticipated impacts from these rules on electricity markets, Exelon announced a multi-billion dollar capital investment program in clean energy technologies, including projects to increase the output of existing nuclear facilities with no additional fuel and no new plants. After EPA promulgated the MATS Rule, Exelon implemented several of those projects, including uprates of two units at a nuclear power plant. Barrón Decl. ¶9.

26. Calpine has long been committed to producing cleaner energy as an integral part of its business plan, investing billions of dollars in building, purchasing,

maintaining and upgrading its modern, clean and efficient natural gas plants. In large measure, these investments have been made in anticipation and expectation of federal and state environmental rules that would impose increasingly stringent emissions controls upon the electric generating sector. Furstenwerth Decl. ¶¶10-11.

27. Petitioners have used attacks on the "appropriate and necessary" determination as a basis to undermine or vacate the MATS Rule.[5] Vacating the Supplemental Finding could disrupt implementation of the Rule, which in turn would reduce the expected return on the investments that Proposed Intervenors have made in cleaner generation, frustrating their reasonable, investment-backed expectations. Furstenwerth Decl. ¶¶12-13; Barrón Decl. ¶¶11-12. The petition jeopardizes the many benefits that flow from MATS.

28. The electricity industry requires long-term certainty in order to make long-term investment decisions. EPA's promulgation of the MATS Rule relieved the

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[5] *See, e.g.*, Amicus Curiae Brief of Murray Energy Corporation in Support of Petitioners at 4, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) ("EPA's decision to regulate power plants under Section 112 [was] arbitrary and capricious. Accordingly, the Section 112 rule — and the determination on which it was based that it was "appropriate" to regulate power plants in this manner — must be vacated."); Joint Brief of State, Industry, and Labor Petitioners at 22, *White Stallion Energy Center LLC v. EPA*, Dkt. No. 12-1100 and consolidated cases (including *ARIPPA v. EPA*, Dkt. No. 12-1181) ("The MATS rule must be set aside because the 2002 listing of EGUs was based on a substantively and procedurally flawed December 2000 "appropriate and necessary" finding. Even if the Court finds that EPA could augment its 2000 finding in the later 2012 rulemaking, that rulemaking does not establish that it is "appropriate and necessary" to regulate EGUs under §112.").

uncertainty that plagued the electric generating industry for the better part of a decade, as a result of EPA's failure to promulgate a NESHAP after making the Finding in 2000, and its unlawful attempt to de-list EGUs in 2005 (*see New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). The MATS Rule provided the industry with the firm ground needed to support capital investment by establishing nationally-applicable emissions standards. In so doing, it also brought an end to the case-by-case derivation standards for hazardous air pollutant emissions from new or modified EGUs in the absence of a federal NESHAP. *See* 42 U.S.C. § 7412(g)(2). In the more than four years since the MATS Rule was promulgated, all generators have made investment decisions with the Rule in mind, and with the understanding that all units subject to the Rule would be required to comply by April 16, 2016.

29. The Court's review of the Supplemental Finding could adversely affect the implementation of the MATS Rule. Any disruption in the implementation of the Rule would return the industry to the uncertainty that followed this Court's decision in *New Jersey v. EPA*, paralyzing capital investment and harming those industry members who have done the most to reduce hazardous air pollutant emissions and to comply with the MATS Rule.

30. Implementation of the MATS Rule has affected the operation of Proposed Intervenors' generation fleets and has helped ensure Proposed Intervenors reap the benefits of their investments in low-emission generation. *See* Furstenwerth Decl. ¶11; Barrón Decl. ¶10. Proposed Intervenors operate in competitive multi-state

electric generation markets, where wholesale electricity prices are determined by a bid system. Because air pollution control equipment carries significant capital cost and often is expensive to operate as well, fossil fuel-fired plants without emission controls (or which do not operate the controls they have) are able to underbid cleaner fossil fuel-fired plants with emissions controls, cleaner natural gas-fired plants, and other cleaner generation sources. This price advantage is so strong that some plants that have installed emission controls might not run those controls unless necessary to meet permit limits, even if the controls are capable of removing much more pollution on a continuous basis.

31. In a competitive market, the price advantage held by uncontrolled plants reduces the price paid to all generators. As a result, without the MATS Rule, Proposed Intervenors' generation assets (including fossil, nuclear, hydropower and renewable plants) would produce less revenue than they would if uncontrolled plants were forced to reduce their pollution. The MATS Rule has eliminated some of the price advantage that uncontrolled and poorly controlled electric generating units enjoy over plants equipped with pollution controls. Plants that previously were uncontrolled have had to increase their electricity price bids to cover the cost of installation and operation of hazardous air pollutant emission controls. No longer can plants transfer the cost of their emissions to downwind populations in the form of additional health costs, lost work days and lost productivity.

C. Disposition Of The Petition May Impair Proposed Intervenors' Interests

32. Proposed Intervenors' operations are implicated by the agency action underlying the petition for review. Proposed Intervenors own or control generation assets that are or may be directly regulated by the MATS Rule, or that compete directly in electricity markets with units subject to the MATS Rule.

33. As noted above, the MATS Rule has positively affected Proposed Intervenors' businesses. For example, Calpine owns one of the largest fleets of combined-cycle and combined heat and power plants in the nation. The nation's fleet of combined-cycle natural gas plants has unused capacity, and Calpine has been poised to dispatch to meet demand that the oldest, dirtiest plants regulated by the MATS Rule no longer can meet. *See* Furstenwerth Decl. ¶11. These benefits will be diminished if the MATS Rule is disrupted.

34. Moreover, disrupting the implementation of the MATS Rule would deprive Proposed Intervenors (and other industry participants) of the certainty that was necessary to proceed with capital investments to modernize the generation fleet. *See* Furstenwerth Decl. ¶¶11-13 Barrón Decl. ¶¶10-12. Accordingly, the disposition of the petition may impair Proposed Intervenors' interests. *See Huron Envtl. Activist League*, 917 F. Supp. at 43 (intervention granted where relief sought by petitioner could result in rule of law unfavorable to intervenor).

D. Respondents May Be Unable Adequately To Represent Proposed Intervenors' Distinct Interests

35. A prospective intervenor's burden of showing inadequate representation "is not onerous," as it "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

36. Proposed Intervenors have unique interests in this matter separate and apart from the regulatory interests of Respondent EPA. EPA's overarching interests are the proper administration and implementation of the Clean Air Act, including making an "appropriate and necessary" determination and promulgating a NESHAP consistent with section 112. *See Dimond*, 792 F.2d at 192-93 ("A government entity . . . is charged by law with representing the public interest of its citizens"). Proposed Intervenors' interests, on the other hand, are protecting their business interests and implementing environmental regulations that will reduce emissions of air pollutants in a manner consistent with their capital investments in pollution control equipment and lower-polluting generation capacity.

37. It is uncommon for members of the regulated industry to support determinations that regulation of their industry is appropriate such as the Supplemental Finding, and to support implementation of a stringent air pollution control rule such as the MATS Rule. If Calpine and Exelon are not permitted to

intervene on EPA's behalf, they will have no other means of protecting their interests in the outcome of this litigation.

38. Proposed Intervenors believe that their participation will be uniquely helpful to the Court. The electric industry and the markets in which it functions are complex. Proposed Intervenors are well situated to address contentions about industry costs, electric price and reliability impacts, issues that are likely to be relevant in this proceeding. Proposed Intervenors are able to fill this role to assure that the adversarial process is as effective in this case as in any other.

39. Proposed Intervenors will endeavor to coordinate with EPA, as well as with any other intervenors, to avoid duplicative briefing and to ensure that their participation as intervenors will be of assistance to the Court.

* * *

Wherefore, Calpine and Exelon respectfully request that they be granted leave to intervene as party respondents in the captioned proceedings and any future petition for review challenging the Supplemental Finding.

July 25, 2016

Respectfully submitted,

/s/ Brendan K. Collins

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EXHIBIT A

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DECLARATION OF J.D. FURSTENWERTH

I, J.D. Furstenwerth, do hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I am Senior Director of Environmental Services for Calpine Corporation ("Calpine").

2. Through the course of my employment, I have personal knowledge of the issues and activities referred to herein.

3. I submit this declaration in support of the Motion of Calpine Corporation and Exelon Corporation for Leave to Intervene as Respondents. Petitioners are seeking review of EPA's "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired

Electric Utility Steam Generating Units," 81 Fed. Reg. 24,420 (Apr. 15, 2016) (the "Supplemental Finding"). The Supplemental Finding supports EPA's adoption of a 2012 rule known as the "Mercury and Air Toxics Standards" ("MATS"), 77 Fed. Reg. 9,304 (Feb. 16, 2012).

4. Calpine is a major U.S. power company that has invested substantially in clean, reliable electric generating technology. Calpine operates 84 low-carbon, natural gas-fired and renewable geothermal power plants that are capable of delivering nearly 27,000 megawatts of electricity to customers and communities in the United States.

5. Calpine owns and operates one of the largest fleet of natural gas-fired combined cycle ("NGCC") and combined heat and power facilities in the U.S. Calpine has invested billions of dollars in building and improving its fleet of NGCC units, in the anticipation that increasingly stringent emissions standards imposed under the Clean Air Act and correlative state programs would drive a shift away from higher-emitting electric generating units, towards Calpine's younger fleet of cleaner, flexible NGCC units.

6. In 2010, Calpine acquired three coal-fired units that would have become subject to the Rule, and immediately made the necessary investment to convert these units to burn natural gas. At the same time, Calpine acquired an EGU that fires a combination of natural gas and residual oil, which could become subject to the Rule depending on the amount of time Calpine operates the facility using oil.

7. Calpine owns and operates numerous electric generating units that compete directly in electricity markets with generating units that are subject to MATS.

8. Calpine participated in the MATS rulemaking proceedings by, among other things, submitting comments on the proposed rule. The comments were generally supportive of EPA's proposal and encouraged the prompt adoption of MATS.

9. Calpine has actively supported MATS in litigation challenging MATS (White Stallion Energy Center, LLC v. EPA, D.C. Cir. No. 12-1100) in the U.S. Court of Appeals for the D.C. Circuit and in the U.S. Supreme Court. Calpine has also supported EPA regarding the Supplemental Finding by, among other things, submitting comments on the proposed finding, 80 Fed. Reg. 75,025 (Dec. 1, 2015). The comments were generally supportive of EPA's proposal and encouraged the prompt adoption of the Supplemental Finding.

10. Calpine has long been committed to producing cleaner energy as an integral part of its business plan, investing billions of dollars in building, purchasing, maintaining and upgrading its modern, clean and efficient natural gas plants. In large measure, these investments have been made in anticipation and expectation of federal and state environmental rules that would impose increasingly stringent emissions controls upon the electric generating sector.

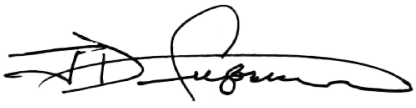
11. Because Calpine owns and operates numerous electric generating units that compete directly in electricity markets with generating units that are subject to the

Rule, implementation of MATS has helped allow Calpine to reap the benefit of its investment in low-emission generation. The nation's fleet of NGCC plants has unused capacity, and Calpine has been poised to dispatch its fleet to meet demand that the oldest, dirtiest, plants regulated by MATS no longer can meet. MATS has had a positive impact on revenues from Calpine's generation fleet.

12. Any disruption in the implementation of MATS could reduce the expected return on the investments that Calpine has made in cleaner generation, frustrating Calpine's reasonable, investment-backed expectations, and could force Calpine to delay or to cancel some planned projects.

13. Any disruption in the implementation of MATS would deprive Calpine of the certainty needed to proceed with capital investments necessary to make efficiency improvements and upgrades to its generation fleet.

July 25, 2016



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

MURRAY ENERGY CORPORATION Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	)	Docket No. 16-1127 (consolidated with Nos. 16-1175, 16-1204 16-1206, 16-1208 and 16-1210)

DECLARATION OF KATHLEEN L. BARRÓN

I, Kathleen L. Barrón, do hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I serve as Senior Vice President, Federal Regulatory Affairs and Wholesale Market Policy, for Exelon Corporation ("Exelon"). In that capacity, I am aware of the impact of federal and state environmental and energy regulatory programs on the business and operations of Exelon and its subsidiaries.

2. Through the course of my employment, I have personal knowledge of the issues and activities referred to herein.

3. I submit this declaration in support of the Motion of Calpine Corporation and Exelon Corporation for Leave to Intervene as Respondents. Petitioners are seeking review of EPA's "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 81 Fed. Reg. 24,420 (Apr. 15, 2016) (the "Supplemental Finding"). The Supplemental Finding supports EPA's adoption of a 2012 rule known as the "Mercury and Air Toxics Standards" ("MATS" or "Rule"), 77 Fed. Reg. 9,304 (Feb. 16, 2012).

4. Exelon Corporation is the parent company of Exelon Generation Company, LLC ("Exelon Generation"), which owns and operates over 32,000 MW of nuclear, wind, hydroelectric, solar, gas and oil-fired generation—one of the largest generation fleets in the United States. Exelon has six regulated electric utility subsidiaries serving approximately 10 million residential, industrial and commercial customers across Maryland, Illinois, Pennsylvania, New Jersey, Delaware, Virginia, and the District of Columbia.

5. When MATS was proposed and adopted, Exelon Generation owned and operated electric generating units directly affected by the Rule. After the Rule was adopted, Exelon divested its interests in some units that were subject to the Rule, but continues to own or operate units subject to MATS.

6. Exelon Generation currently owns and operates numerous electric generating units that compete directly in electricity markets with generating units that are subject to MATS.

7. Exelon participated in the MATS rulemaking proceedings by, among other things, submitting comments on the proposed rule. The comments were generally supportive of EPA's proposal and encouraged the prompt adoption of MATS.

8. Exelon has actively supported MATS in litigation challenging the Rule (White Stallion Energy Center, LLC v. EPA, D.C. Cir. No. 12-1100) in the U.S. Court of Appeals for the D.C. Circuit and in the U.S. Supreme Court. Exelon has also supported EPA regarding the Supplemental Finding by, among other things, submitting comments on the proposed finding, 80 Fed. Reg. 75,025 (Dec. 1, 2015). The comments were generally supportive of EPA's proposal and encouraged the prompt adoption of the Supplemental Finding.

9. In anticipation of MATS and other EPA rulemakings, Exelon made decisions to invest in pollution controls and alternative non-polluting technologies, and to retire certain older, fossil fuel-fired units. In December 2010, in reliance upon the then-proposed Cross-State Air Pollution Rule, the anticipated but not-yet-proposed MATS, and other rules, and the anticipated impacts from these rules on electricity markets, Exelon announced a multi-billion dollar capital investment program in clean energy technologies, including projects to increase the output of

existing nuclear facilities with no additional fuel and no new plants. After EPA promulgated MATS, Exelon implemented several of those projects, including uprates of two units at a nuclear power plant.

10. Because Exelon owns and operates numerous electric generating units that compete directly in electricity markets with units that are subject to the Rule, MATS has helped enable Exelon to recoup the cost of its investment in low-emission generation.

11. Any disruption in the implementation of MATS could reduce the expected return on the investments that Exelon has made in cleaner generation, frustrating Exelon's reasonable, investment-backed expectations.

12. Any disruption in the implementation of MATS would deprive Exelon of the certainty needed to proceed with capital investments necessary to continue operating its clean generation fleet.

July 22, 2016

Kathleen L. Barrón

ORAL ARGUMENT NOT YET SCHEDULED

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 27, Proposed Intervenor-Respondents Calpine Corporation ("Calpine") and Exelon Corporation ("Exelon") provide the following disclosure statements.

Calpine states that it is a major U.S. power company which owns 84 primarily low-carbon, natural gas-fired and renewable geothermal power plants in operation or under 0construction that are capable of delivering nearly 27,000 megawatts of electricity to customers and communities in 18 U.S. states and Canada. Calpine's fleet of combined-cycle and combined heat and power plants is one of he largest in the nation. Calpine is a publicly-traded corporation (NYSE:CPN), organized and existing

under the laws of the State of Delaware. Calpine has no parent company, and no publicly-held company has a ten percent or greater ownership interest in Calpine.

Exelon is a Pennsylvania corporation whose shares are publicly traded (NYSE: EXC). Exelon is a utility holding company with operations and business activities in 48 states, the District of Columbia, and Canada. Its operating subsidiaries include, among others, Exelon Generation Company, one of the largest competitive power generators in the United States. Exelon has no parent corporation, and no publicly-held corporation has a ten percent or greater ownership interest in Exelon.

July 25, 2016

Respectfully submitted,

/s/ Brendan K. Collins

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Counsel for Calpine Corporation and Exelon Corporation

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CERTIFICATE AS TO PARTIES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenors the Commonwealths of Massachusetts and Virginia, the States of California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, the Cities of Baltimore, Chicago, and New York, and the County of Erie, New York hereby certify as follows:

Petitioners. The Petitioners in the above-captioned cases are:

16-1127 — Murray Energy Corporation

16-1175 — ARIPPA

16-1204 — Michigan Attorney General Bill Schuette, on behalf of the People of Michigan, the States of Alabama, Arizona, Arkansas, Kansas, Kentucky,

Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming, and the Texas Commission on Environmental Quality, Public Utility Commission of Texas, and Railroad Commission of Texas

16-1206 — Oak Grove Management Company LLC

16-1208 — Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

16-1210 — Utility Air Regulatory Group

Respondents. The Respondents in the consolidated cases are the United States Environmental Protection Agency (EPA) and Regina A. McCarthy, Administrator of EPA.

July 25, 2016

Respectfully submitted,

/s/ Brendan K. Collins

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CERTIFICATE OF SERVICE

I, Brendan K. Collins, a member of the Bar of this Court, hereby certify that on July 25, 2016, I electronically filed the foregoing Motion Of Calpine Corporation and Exelon Corporation For Leave To Intervene As Respondents, Rule 26.1 Disclosure Statement and Certificate as to Parties with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

I further certify that I served the foregoing documents on all registered counsel through the Court's CM/ECF system.

/s/ Brendan K. Collins
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