

ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1430 (Consolidated with No. 16-1447)
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

On Petition for Review of a Decision of the U.S. Environmental
Protection Agency and the U.S. Department of Transportation

**STATE INTERVENORS' OPPOSITION TO PETITIONER
TRUCK TRAILER MANUFACTURERS ASSOCIATION'S
MOTION FOR STAY**

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INTRODUCTION

State Intervenors¹ oppose Petitioner Truck Trailer Manufacturers Association's (TTMA) motion for a stay, by which TTMA seeks to delay implementation of new greenhouse gas emissions reduction standards for the trailer portions of tractor-trailer vehicles until this Court has ruled on TTMA's challenge to those standards. We join Public Health and Environmental Intervenors in opposing a stay, and agree that TTMA has not met its burden of showing a likelihood of success on the merits.² This brief will focus, however, on TTMA's contentions that its members will be irreparably harmed if forced to incur the ordinary compliance costs associated with implementing these practical, cost-effective measures for reducing climate-altering greenhouse gas emissions, and that it would, therefore, be in the public interest to delay their implementation.

¹ "State Intervenors" are the California Air Resources Board, and the States of Connecticut, Iowa, Massachusetts, Oregon, Rhode Island, Vermont and Washington.

² While EPA has indicated that it does not oppose a stay (ECF No. 1698457), this Court "is not bound to accept" EPA's non-opposition; EPA's administrative reconsideration of a rule and consent to a stay are "not alone a sufficient basis" for this Court to stay a regulation. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

TTMA has not carried its burden of showing irreparable harm. The minimal costs TTMA says its members will incur in complying with the greenhouse gas standards do not constitute irreparable harm for purposes of a stay, and TTMA has failed to provide evidence that its members will experience any other type of harm. The standards require large trailer manufacturers to equip many, but not all, of their new trailers with components that reduce greenhouse gas emissions by increasing the fuel efficiency of the tractor-trailer combination. These components are highly cost effective; on average, they pay for themselves in fuel savings in under two years. They are also widely available; over the last decade, manufacturers have developed hundreds of these components in response to market demand created by California's greenhouse gas standards for trailers and a voluntary federal emissions reduction program. And flexibilities built into the rule minimize disruption to the trailer manufacturing industry by allowing trailer manufacturers to delay or avoid installing the emissions-reducing components when doing so does not make economic or practical sense. That the trailer industry has experienced no disruption in implementing California's standards, which rely on the same kinds of components and technologies, confirms that implementation of the federal

rule pending this Court's review will not irreparably harm TTMA's members.

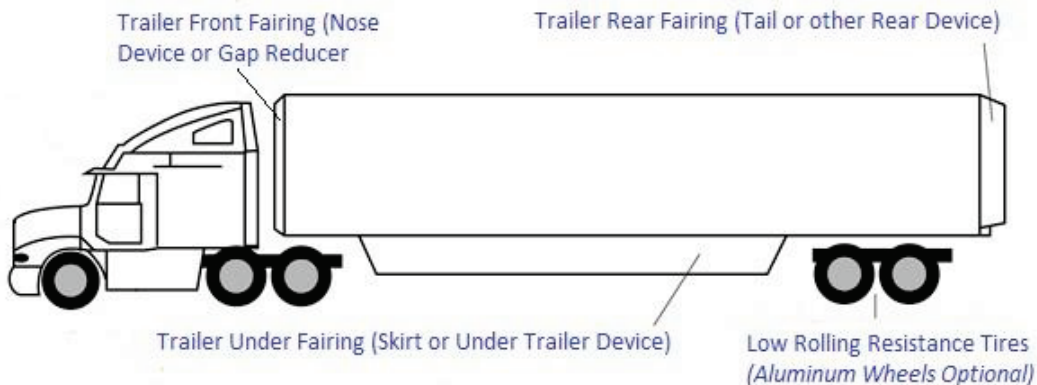
TTMA has likewise failed to carry its burden to establish that the public interest favors a stay. By delaying the adoption of widely available, cost-effective greenhouse gas emissions reduction technologies for trailers, a stay would contribute to climate change. Climate change is the most significant environmental challenge our country is facing today, and the trailer standards were adopted in response to extensive research establishing that greenhouse gas emissions are already causing lasting and irreversible harms, including sea level rise, more severe storms, heatwaves, wildfires, ocean acidification, and droughts. State Intervenors already are experiencing these and other harmful effects, which will certainly worsen if we fail to adopt even the most easily achievable emissions reduction technologies, like those required by the trailer standards at issue here.

Because requiring manufacturers to install the widely available, cost effective greenhouse gas emissions technologies mandated by the trailer rule while this suit remains pending would avoid significant harm to the general public without disrupting the trailer industry, TTMA's stay motion should be denied.

BACKGROUND

The trailer standards that TTMA seeks to stay require manufacturers to equip new trailers, beginning with model year 2018, with widely available aerodynamic technologies that offer fuel savings to the manufacturers' customers and reduce greenhouse gas emissions. These technologies include fairings (metal or plastic pieces, sometimes called "skirts," that can attach to the front, back, and undersides of trailers to increase streamlining and reduce drag), tire-pressure monitoring systems, low-rolling-resistance tires designed to reduce energy loss, and lighter-weight standard components.³ Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium and Heavy-Duty Engines and Vehicles — Phase 2, 81 Fed. Reg. 73,478, 73,505 (Oct. 25, 2016). EPA estimated that compliance with these

³ A typical, box-type trailer equipped with these technologies looks like this:



Source: EPA, *Verified Technologies for SmartWay and Clean Diesel*, <https://www.epa.gov/verified-diesel-tech/smartway-designated-tractors-and-trailers>.

trailer standards for model years 2018-2021 will result in a 5% savings in fuel and reduction in tractor-trailers' tailpipe greenhouse gas emissions, at an increased cost of only 3 percent of the trailer's purchase price. *Id.* at 73,482. On average, the technologies will pay for themselves in fuel savings in the second year of their use. *Id.* at 73,483. And even discounting the fact that the technologies quickly pay for themselves in fuel savings, the standards are highly cost-effective as a greenhouse gas emissions reduction measure, comparing favorably to other emissions-reduction programs. *Id.* at 73,663.

In designing the trailer standards, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) tailored their requirements to accommodate small businesses' need for longer ramp-up time and to exempt trailer categories for which installing the full complement of emissions-reduction technologies would be impractical. For example, the agencies limited the trailer standards' application to box trailers and three categories of non-box-type trailers (tank trailers, flatbed trailers, and container chassis) that they determined to be designed for and used in on-road applications. 81 Fed. Reg. at 73,646; *see also* Lemieux Decl. ¶ 30. The agencies also allowed each manufacturer to exempt up to 350 box trailers and 250 non-box-type trailers from otherwise applicable compliance requirements through model year 2026. 81 Fed. Reg.

at 73,674-675; 40 C.F.R. 1037.150 & 49 C.F.R. 535.3. And the agencies provided more ramp-up time to “small business” trailer manufacturers (having fewer than 1,000 employees), which do not have to comply until 2019. 81 Fed. Reg. at 73,677.

ARGUMENT

I. TTMA HAS NOT DEMONSTRATED IRREPARABLE HARM.

A. California’s Experience Refutes TTMA’s Asserted Burdens, which are Overstated and Fail to Justify a Stay.

California’s experience in implementing the first greenhouse gas standards for trailers in this country confirms that TTMA’s members will not be irreparably harmed by implementation of the federal standards pending review. Intervenor California Air Resources Board (ARB) first adopted tractor-trailer greenhouse gas standards in 2008, as one of the first regulatory actions taken under California’s Global Warming Solutions Act, which requires California to reduce greenhouse gas emissions to 1990 levels by 2020. Lemieux Dec. ¶ 2 & Exh. A. California’s regulations, like the standards at issue here, incorporate elements of EPA’s SmartWay program, a voluntary program that, among other things, establishes criteria for certifying technologies as providing greenhouse gas emissions reduction benefits for tractor-trailers. 81 Fed. Reg. at 73,487-488.

In adopting California's tractor-trailer regulations in 2008, ARB determined that the technologies needed to comply with the trailer requirements were commercially available. Lemieux Dec. ¶ 15. At the time, ARB estimated that the incremental costs associated with producing a compliant dry-van (non-refrigerated) box trailer came to \$30 per month when amortized over the trailer's lifespan, and could be recovered within 18 months through reduced fuel-consumption related costs. *Id.* ¶ 17. Since then, these costs have plummeted to less than half of what they were in 2008 due to technological innovations spurred by SmartWay and California's trailer program. *Id.* ¶ 26. For example, while only three trailer side skirts had been certified as SmartWay-approved in 2008, now over 60 side skirts are available that meet the program's requirements. *Id.* ¶ 21. And while only four tire manufacturers were producing SmartWay-approved low-rolling-resistance tires in 2008, now 234 different types of tires qualify. *Id.* ¶ 22. Unsurprisingly, many of these new technologies are improvements on their predecessors, enabling greater greenhouse gas emissions reductions benefits and fuel savings at lower cost. *Id.* ¶ 23. In sum, most of the technologies required for compliance with the federal greenhouse gas trailer standards that TTMA seeks to stay existed in 2008, and advances in

technology since then have resulted in even more widely available, more effective, cheaper technologies.

While it is true that the federal government has not previously regulated greenhouse gas emissions from trailers, trailer manufacturers have ample experience with these technologies. The federal standards for long (53-foot) box trailers set to go into effect on January 1, 2018 mirror the current performance levels required for SmartWay verification and by California's regulation and "can be met by adopting off-the-shelf aerodynamic and tire technologies available today." 81 Fed. Reg. 73,478. In fact, four of the five trailer manufacturers that provided declarations in support of TTMA's stay application (Utility Trailer, Hyundai Translead, Great Dane, and Wabash National), are listed on EPA's web site as offering new trailers equipped with packages of SmartWay-compliant aerodynamic components.⁴ The requirements for non-box-type trailers are less stringent and can be met without the use of aerodynamic technologies. 81 Fed. Reg. 73,478. In sum, as EPA and NHTSA found, all technologies required for

⁴ EPA, *Verified Technologies for SmartWay and Clean Diesel*, *supra* n. 1.

compliance with the model year 2018 standards are “readily available and are already familiar to the industry.” *Id.*⁵

Moreover, California provided 12 months of lead time to comply with the California regulation, and its implementation did not result in any industry disruption. By contrast, trailer manufacturers have had 14 months’ lead time to prepare for the federal standards at issue here, and the trailer manufacturers that qualify as small businesses have a total of 26 months to comply. *Lemiux Dec.* ¶ 28. Given the vastly expanded availability of the mandated technologies since 2008 and the experience trailer manufacturers have since gained with these technologies, implementation of the trailer standards is highly unlikely to disrupt trailer manufacturers’ operations. *Id.*

California’s experience confirms that requiring the use of widely available, cost-effective technologies mandated by the trailer standards will not result in irreparable harm to TTMA or its members.

B. The Greenhouse Gas Standards for Trailers Do Not Impose Any Harm Justifying a Stay.

As Public Health and Environmental Intervenors demonstrate, TTMA’s assertions that its members will lose business and market share are

⁵ TTMA essentially concedes this point with its declarant’s acknowledgment that its members currently install these technologies. *See Sims Dec.* ¶¶ 7-8.

internally contradictory and overblown. *See* Health & Env. Opp’n, ECF No. 1698824, at 14-21. Notably, no declarant professes to have lost any specific sale contract as a result of having to comply with the trailer rule. Mere speculation that a business is “likely to lose sales” (see Sims Decl. at ¶ 8; Carter Decl. at ¶ 4) cannot support a finding of irreparable harm. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (injuries must be “actual ‘and not theoretical’”); *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 212-13 (D.D.C. 2012) (to demonstrate irreparable harm movant must offer “concrete estimates regarding lost revenues, customers, or market share”). While one declarant asserts, somewhat more concretely than the others, that his company’s customers “are not able to purchase as many trailers in years past,” that declarant represents a small manufacturer, Kentucky Trailer, for whom the trailer standards will not take effect until 2019. Gauntt Decl. ¶ 6. It would be speculative, then, to assume that Kentucky Trailer’s loss of business is caused by the trailer standards — as opposed to other factors — or that it would be ameliorated by a stay, much less that it represents the situation of the larger trailer manufacturers for which the rule takes effect in 2018.

This leaves TTMA’s averments related to costs that its members will purportedly incur in complying with the standards. Stay Mot. at 16-18. As

Health and Environmental Intervenors have demonstrated, the trailer standards' compliance costs are minimal when considered in the context of the overall costs of manufacturing a trailer, and even less when viewed through the lens of the trailer manufacturers' annual revenues. *See* Health & Env. Opp'n at 14-21. And these costs will ultimately be borne by TTMA's customers, who will quickly recoup those costs in fuel savings.

A showing that a regulated party will incur the costs ordinarily incurred in complying with a regulation while that regulation is under review is typically insufficient to support a finding of irreparable harm. *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000); *see also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (a stay is an "extraordinary remedy"). Most, if not all, regulations challenged in this Court impose compliance costs on somebody. To accept TTMA's averments that some of its members will expend money, time, and energy in complying with the trailer standards pending review as sufficient to establish irreparable harm would be, in effect, to read the irreparable harm requirement out of the stay rule.⁶

⁶ TTMA makes a variation of this argument in the public interest section of its brief, contending that its members should not be required to comply with the trailer standards until the courts uphold them and EPA

TTMA has not demonstrated that requiring manufacturers to implement the cost-effective, practical requirements of the trailer standards would result in the certain, great, and imminent harm this court requires it to show to issue a stay. *Wis. Gas Co.*, 758 F.2d at 674.

II. A STAY THAT DELAYS IMPLEMENTATION OF THE GREENHOUSE GAS STANDARDS APPLICABLE TO TRACTORS WILL HARM THE PUBLIC INTEREST.

In determining whether a stay is appropriate, a court must balance any hardship the stay applicant has demonstrated against the hardships that other litigants and the public will endure should the stay be granted, and should decline to grant a stay when doing so would “visit similar harm on other interested parties,” even when a stay would result in irreparable harm to the party that requested it. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982); *see also Mexichem*, 787 F.3d at 557 (courts must consider “the interests of ... stake holders who supported the rule and who ... stand to suffer harm if the rule is enjoined”). As discussed above, TTMA has not met its burden to

decides, on reconsideration, to impose them. Stay Mot. at 18-19. But if a judicial challenge to, or agency reconsideration of, a regulation were sufficient to justify a judicial stay, regulated parties could prevent regulations from being implemented for years simply by challenging them and seeking reconsideration. This is not the law. *See Wis. Gas Co.*, 758 F.2d at 674 (stay applicant must show harm that is “certain, great, actual ‘and not theoretical’”); *Mexichem*, 787 F.3d at 557-58 (agency reconsideration and consent are insufficient to justify imposition of stay).

establish irreparable harm, but TTMA's motion should be denied for the additional reason that any harms TTMA purports to demonstrate are greatly outweighed by the harm to State Intervenor and to the public interest that would result from a stay.

The trailer standards that TTMA seeks to stay are a cost-effective, easily implemented way to reduce greenhouse gas emissions in the United States, which are a primary contributor to global climate change. These standards are an important component of the federal greenhouse gas emissions standards for medium and heavy-duty vehicles and, as such, are an important component of federal greenhouse gas emission reduction efforts. The heavy-duty standards reduce greenhouse gas emissions from the transportation sector, which is now the single largest contributor of those emissions.⁷ National standards are particularly important for tractor-trailers, which cause approximately 60 percent of the greenhouse gas emissions from all heavy-duty and medium-duty vehicles. 81 Fed. Reg. at 73,833. While California has adopted its own regulation that applies to some types of trailers, the federal standards cover many types of trailers that California's

⁷ U.S. Energy Information Administration, *Power Sector Emissions Fall Below Transportation Sector Emissions* (Jan. 19, 2017).

regulation does not. Lemiux Dec. ¶ 44. And other states rely exclusively on the federal standards to achieve these significant greenhouse gas emission reductions, which are necessary to avoid substantial emissions increases that otherwise would result from projected growth in tractor-trailer traffic. *See* Merrell Dec. ¶¶ 8-11. In adopting the heavy-duty vehicle rule, EPA and NHTSA found that the trailer standards will “significantly reduce” greenhouse gas emissions from tractor-trailers nationwide. 81 Fed. Reg. at 73,504; *see also id.* at 73,516, n. 89 (trailer standards can contribute approximately one-third of total greenhouse gas reduction achievable for tractor-trailer).

Delaying implementation of the greenhouse gas trailer standards is likely to result in a corresponding delay in the development of new, more effective emissions-reduction technologies for trailers that the standards would otherwise spur — an outcome which would have lasting effects for years to come. *See, e.g., supra*, at pp. 6-9; Lemiux Dec. ¶ 38. As the Supreme Court has observed, reductions in domestic greenhouse gas emissions can mitigate the risk of “catastrophic harm” from climate change, “no matter what happens elsewhere” in the world. *Mass. v. EPA*, 549 U.S. 497, 526 (2007). Because these emissions are long-lived, “emission reduction choices made today matter in determining impacts experienced not

just over the next few decades, but in the coming centuries and millennia.”

81 Fed. Reg. at 73,487.

The dire effects of climate change across the United States and the world include rising temperatures and sea levels, ocean acidification, fire, flood, drought, sickness, and economic destabilization. 81 Fed. Reg. at 73,486 (citing Endangerment and Cause or Contribute Findings for Greenhouse Gases Under section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009)). Climate change threatens human health by increasing sickness and mortality related to heatwaves, extreme weather, and ozone — a primary contributor to urban smog.⁸ *Id.* And it threatens public welfare by placing large areas of our country and the world at risk of reduced water supplies, rising sea levels, storm and flood damage, infrastructure failure, and reduced agricultural and forest productivity. *Id.* The more localized effects that State Intervenors are likely to experience include unhealthy air and threats to water infrastructure in California;⁹

⁸ By reducing the amount of fuel consumed, the standards also will reduce air pollutants that occur “when fuel is refined, distributed, and consumed,” and their attendant health and economic impacts. 81 Fed. Reg. at 73,478.

⁹ Lemieux Dec. ¶ 35.

increased incidence of Lyme disease and threat to the maple industry in Vermont;¹⁰ increased forest fires and decreased snowpack in Oregon;¹¹ loss of coastal land mass and increasingly intense heat waves in Massachusetts;¹² loss of alpine habitat for pika, wolverine, and marten in Washington state;¹³ reduced dairy production and loss of coastal wetlands in Connecticut;¹⁴ declining bass and clam populations in Rhode Island;¹⁵ and harm to corn and soybean harvests and flooding of the Mississippi and Missouri rivers in Iowa.¹⁶

TTMA does not directly challenge the final rule's conclusion that the trailer standards will "significantly reduce" greenhouse gas emissions from

¹⁰ Galford, Gillian L., Ann Hoogenboom, Sam Carlson, Sarah Ford, Julie Nash, Elizabeth Palchak, Sarah Pears, Kristin Underwood, and Daniel V. Baker, eds., *Considering Vermont's Future in a Changing Climate: The First Vermont Climate Assessment* 138, 185, 197 (2014).

¹¹ Dalton, M.M., K.D. Dello, L. Hawkins, P.W. Mote, and D.E. Rupp, *The Third Oregon Climate Assessment Report* 17-18 & 46-51 (2017).

¹² Massachusetts Executive Office of Energy and Environmental Affairs and Adaptation Advisory Committee, *Massachusetts Climate Change Adaptation Report* 2 & 14 (2011).

¹³ Snover, A.K., G.S. Mauger, L.C. Whitely Binder, M. Krosby, and I. Tohver, *Climate Change Impacts and Adaptation in Washington State: Technical Summaries for Decision Makers* 8-1 (2013).

¹⁴ EPA, *What Climate Change Means for Connecticut* (Aug. 2016).

¹⁵ EPA, *What Climate Change Means for Rhode Island* (Aug. 2016).

¹⁶ EPA, *What Climate Change Means for Iowa* (Aug. 2016).

tractor-trailers nationwide. 81 Fed. Reg. at 73,504. Instead, it speculates, based solely on anecdotal evidence presented in declarations from two of TTMA's members and a comment letter, that the trailer standards, if implemented, would do little to reduce greenhouse gas emissions. Stay Mot. at 19-21. But while EPA and NHTSA recognized that there is a market trend toward adopting the technologies required by the trailer standards — a fact that undercuts TTMA's assertion of irreparable harm — the detailed analysis in the record confirms that the rule will ultimately secure substantial emissions reductions much sooner than if the rule were not in effect: In reaching their determination that the trailer standards will significantly reduce greenhouse gas emissions, the agencies used a baseline that represented “the best assessment of the way the world would look absent the proposed action,” accounting for the extent to which the trailer industry would voluntarily adopt the technologies in the rule's absence. 81 Fed. Reg. at 73,504, 73,655-656, 73,910, 73,912. To set this baseline, the agencies analyzed industry trends and observed that many readily available technologies that offer cost-effective increases in fuel efficiency have not been widely adopted, despite the fact that fuel savings provide a strong incentive to purchase vehicles with fuel-saving technologies. *Id.* at 73,859-862 & 73,912. The agencies concluded that, due to this observed “energy

efficiency gap” or “energy paradox,” “a significant number of fuel efficiency improving technologies would remain far less widely adopted” in the absence of the standards. *Id.* at 73,912.¹⁷ In sum, the agencies’ findings and analysis squarely contradict TTMA’s speculation that implementation of the trailer standards may not result in significant greenhouse gas reduction benefits.

TTMA’s professed “safety concerns” are likewise contradicted by the record. These concerns relate to TTMA’s speculation that implementation of the rule will result in a net increase in overall vehicle miles travelled, with corresponding increases in fuel consumption and in the average number of accidents. As to fuel consumption, the agencies estimated that the implementation of the trailer standards that take effect in January 2018 will result in a 5% fuel savings. 81 Fed. Reg. at 73,482. TTMA has not challenged this conclusion. With respect to accidents, the agencies

¹⁷ While the agencies acknowledged that the greenhouse gas benefits are greater for tractor-trailers operating at higher speeds, they accounted for this in their modeling and determined that the technologies would generate net benefits even at slower speeds. 81 Fed. Reg. at 73,662-663. In determining the “pay-back” period — how long it would take aerodynamic technologies to pay for themselves in fuel savings — EPA projected that all trailers would achieve lifetime fuel savings equal to or greater than the cost of the technologies. *Id.* at 73,663.

recognized that aerodynamic devices “inherently add weight to trailers,” which could result in some loaded trailers exceeding weight limits and additional trips to transport freight that otherwise would have been transported in the weighed-out trucks. *Id.* at 73,642. But the agencies concluded that the rule’s incentives for weight reduction would “offset safety concerns from added weight of aerodynamic devices,” and may even “produce a net safety benefit in the long run due to the potentially greater amount of cargo that could be carried on each truck as a result of trailer weight reduction.” *Id.* TTMA has not shown any actual safety concern that would weigh in favor of a stay.

In sum, a stay of the trailer greenhouse gas rule would postpone implementation of a highly cost-effective measure for reducing greenhouse gas emissions and the related risk of “catastrophic harm” (*Mass. v. EPA*, 549 U.S. at 526), with no discernible benefit to the public.

CONCLUSION

For the foregoing reasons, TTMA’s motion to stay implementation of the greenhouse gas emissions standards applicable to trailers should be denied.

Dated: October 12, 2017

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¹⁸ For purposes of ECF-3(b) of this Court's Administrative Order Regarding Electronic Case filing (May 15, 2009), counsel for ARB hereby represents that the other parties listed in the signature blocks have consented to the filing of this motion to intervene.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume requirements of Fed. R. App. P. 27(d)(2)(C) because it contains 3,885 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to Microsoft Word.

Dated: October 12, 2017

/s/ Melinda Pilling
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Opposition to Petitioner Truck Trailer Manufacturers Association's Motion for Stay on all parties via the Court's electronic case filing system.

Dated: October 12, 2017

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