

ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2017

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

STATE OF NORTH DAKOTA, <i>et al.</i> ,)	
)	
Petitioners	)	No. 15-1381
	)	(consolidated with Nos.
v.	)	15-1396, 15-1397,
	)	15-1399, 15-1434,
	)	15-1438, 15-1448,
	)	15-1456, 15-1458,
	)	15-1463, 15-1468,
UNITED STATES ENVIRONMENTAL	)	15-1469, 15-1481,
PROTECTION AGENCY, and REGINA A.	)	15-1482, 15-1484,
MCCARTHY, Administrator	)	16-1218, 16-1220,
	)	16-1221, 16-1227)
Respondents.)	
_____)	

**UNOPPOSED MOTION OF SASKATCHEWAN POWER CORPORATION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
RESPONDENTS**

Pursuant to Federal Rule of Appellate Procedure 29(b) and D.C. Circuit Rule 29(b), Saskatchewan Power Corporation (“SaskPower”), by and through its undersigned counsel, moves this Court for leave to participate as *amicus curiae* in the above-captioned case in support of Respondents United States Environmental Protection Agency (“EPA”) and EPA Administrator Regina A. McCarthy. Proposed *amicus curiae* has consulted with the parties regarding this motion. Counsel for Respondents to these consolidated cases have indicated that their

clients consent to SaskPower's filing of an *amicus* brief. Counsel for the following Respondent-Intervenors have also indicated that their clients consent to SaskPower's filing of an *amicus* brief: 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 and Sacramento Municipal Utility District, Natural Resources Defense Council, Sierra Club, American Lung Ass'n, Conservation Law Foundation, Clean Air Council, and Ohio Environmental Council and Clean Wisconsin. Counsel for the Petitioners in Nos. 15-1396, 15-1399, 15-1448, 15-1463, and 15-1469 responded that they take no position on the question of whether this motion for leave to participate as *amicus curiae* should be granted. No other Petitioners responded to a notice sent at 10:45am on December 21, 2016 requesting consent. That notice provided that if no response was received by 3:00pm on December 21, 2016, counsel for SaskPower would assume that those parties took no position on this motion.

This motion is timely under Federal Rule of Appellate Procedure 29(a)(6) because it is filed no later than 7 days after Respondents' brief was filed. In addition, this motion is timely under Circuit Rule 29(b)-(c) because it is filed as soon as practicable after the docketing of the case.

In support of this motion, proposed *amicus curiae* states as follows:

I. Nature of the Case

Petitioners are challenging the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (the “Rule”), which the Environmental Protection Agency (“EPA”) finalized on October 23, 2015. 80 Fed. Reg. 64,510 (Oct. 23, 2015). The Rule requires new coal-fired electric generating units to limit their greenhouse gas emissions to the level achievable using partial carbon capture and sequestration. *Id.* at 64,513. EPA has the authority to set New Source Performance Standards, like the Rule, under section 111(b) of the Clean Air Act. 42 U.S.C. § 7411(b).

Petitioners argue that the Rule is unlawful because it is not based on a system of emissions reduction that is “adequately demonstrated” or “achievable,” and that EPA acted arbitrarily and capriciously because the Rule purportedly has no benefits and will impose excessive costs.

II. Interest of Proposed *Amicus Curiae* and Relevance and Desirability of Participation

Established in 1929, SaskPower is Saskatchewan’s leading energy supplier. SaskPower manages over \$10 billion CAD in generation, transmission, distribution and other assets. The corporation operates five natural gas stations, three coal-

fired power stations, seven hydroelectric stations and two wind facilities.

Combined they generate 3,542 megawatts (MW) of electricity. SaskPower also buys power from various independent power producers bringing the total of available generating capacity to 4,437MW. SaskPower serves a geographic area of 252,000 square miles. The Corporation maintains nearly 98,000 miles of power lines, 55 high voltage switching stations and 194 distribution substations. The company has interties with Manitoba, Alberta and North Dakota borders.

Traditionally, coal has been widely used in Saskatchewan as it is a secure, economical, well-developed and extremely reliable source of baseload energy. Today SaskPower has approximately 1,400MW of coal-fired generation capacity or 38% of total generating capacity.

On July 1, 2015, new Canadian Federal Government performance standards came into effect in Canada that apply to new coal-fired electricity generating units and units that have reached the end of their useful life, nominally 50 years. As a result of these regulations and recent Canadian Federal Government announcement (November 2016), the long-term operation of conventional coal generation is no longer an option in Canada.

In October 2014, SaskPower launched the Boundary Dam Integrated Carbon Capture and Storage project. The project transformed an existing generating unit at SaskPower's aging Boundary Dam Power Station into a long-term producer of

115 MW of baseload electricity. The addition of carbon capture and storage (CCS) represents the largest environmental upgrade for a coal-fired power station in Canada. Captured CO₂ from the CCS plant is transported by pipeline to nearby oil fields in southern Saskatchewan where it is used for enhanced oil recovery (EOR). CO₂ not used for EOR is stored in a deep saline formation known as Aquistore.

Months after the initial start-up of the capture facility SaskPower experienced various issues with a number of sub-systems within the process, however the company worked to develop solutions to fix them. These challenges are not uncommon in a large-scale industrial project during the early stages of operation.

The CCS facility has proven the nameplate 90 percent capture rate. Current operations allow SaskPower to meet its regulatory and off-taker commitments. As of November 30, 2016 the capture facility has captured a total of 1.275 million tonnes of CO₂ with the capture of 800,000 tonnes in a twelve consecutive month period. As well, as of November 30, 2016 Aquistore has received a total of 100,222 tonnes of CO₂.

SaskPower has a significant interest in the outcome of the present case, and insight into its CCS-related business decisions, operating history, expertise and lessons learned will assist the court in evaluating the claims of the parties.

SaskPower proposes to file an *amicus curiae* brief responding to arguments raised by Petitioners' briefs regarding the factual representations of the Boundary Dam CCS Facility. SaskPower is in a unique position because the Corporation actually owns the CCS facility and knows the actual facts and outlooks including cost assumptions.

If permitted to file an *amicus curiae* brief, SaskPower would file its brief in accordance with the briefing schedule, Circuit Rules, and any formatting requirements established by the Court.

CONCLUSION

For the foregoing reasons, the unopposed motion for leave to file an *amicus curiae* brief in support of Respondents should be granted.

Respectfully submitted on December 21, 2016.

Respectfully submitted,

/s/ Jonathan K. Tycko
Jonathan K. Tycko
TYCKO & ZAVAREEI LLP
1828 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 973-0900

Rachelle Verret Morphy
Vice President & General Counsel
John D. Phillips
Associate General Counsel
SASKATCHEWAN POWER
CORPORATION
2025 Victoria Avenue
Regina, Saskatchewan
S4P 0S1
(306) 566-3112

CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES AND AMICI

With the exception of *Amicus Curiae* Saskatchewan Power Corporation, all parties, intervenors, and amici appearing before this court are listed in the Respondent EPA's Initial Brief.

Dated: December 21, 2016

/s/ Jonathan K. Tycko

Counsel for SaskPower

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

SaskPower is wholly owned by the Government of Saskatchewan. The Corporation was established in 1929 and is the leading electricity supplier in the province of Saskatchewan. As of December 31, 2015, the Corporation serves approximately 552,000 customers spread across a geographic service area of nearly 252,000 square miles. SaskPower owns and maintains approximately 98,000 miles of power lines, 55 high voltage switching stations and 194 distribution substations and has interties at the borders with Manitoba, Alberta and North Dakota.

SaskPower owns and manages over \$10 billion CAD in generation, transmission, distribution and other assets. SaskPower owns and operates five natural gas generating stations, three coal-fired power stations, seven hydroelectric stations and two wind facilities. They have a combined capacity of 3,542 megawatts (MW). SaskPower also has power purchase agreements in place with independent power producers for an additional 895 MW giving a total generation capacity of 4,437 MW. The corporation has approximately 3,150 full time employees and annual revenues of \$2.296 billion CAD.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I filed the foregoing Unopposed Motion of Saskatchewan Power Corporation for Leave to File an *Amicus Curiae* Brief in Support of Respondents and Rule 26.1 Disclosure Statement through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused the foregoing to be served via first-class mail on counsel for the following parties at the following addresses:

Randy E. Brogdon
Troutman Sanders LLP
600 Peachtree Street, NE
Bank of America Plaza
Atlanta, GA 30308-2216
Counsel for Southern Power Company

Carrie Noteboom
New York City Law Department
100 Church Street
New York, NY 10007
Counsel for City of New York

William F. Cooper
State of Hawaii, Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for State of Hawaii

Thiruvendran Vignarajah
State of Maryland, Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Counsel for State of Maryland

Kelvin Allen Brooks
State of New Hampshire, Office of the Attorney General
33 Capitol Street
Concord, NH 03301
Counsel for State of New Hampshire

Tannis Fox
State of New Mexico, Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for State of New Mexico

/s/ Jonathan K. Tycko

Counsel for SaskPower