

No. 07-60756



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ned Comer, et al.,
Plaintiffs-Appellants

v.

Murphy Oil U.S.A., et al.,
Defendants-Appellees

On Appeal from the United States District Court for
the Southern District of Mississippi

**BRIEF OF *AMICI CURIAE* THE AMERICAN FARM BUREAU
FEDERATION, NATIONAL ASSOCIATION OF MANUFACTURERS,
AND AMERICAN TORT REFORM ASSOCIATION AS JOINDER TO
AMICI CURIAE OF EDISON ELECTRIC INSTITUTE, THE AMERICAN
PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF
DEFENDANTS-APPELLEES' PETITIONS FOR REHEARING *EN BANC***

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rules 27.4 and 28.2.1, counsel for *Amici* certifies that the following persons and entities are interested in the outcome of this case. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

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American Public Power Association
American Tort Reform Association
Edison Electric Institute
National Association of Manufacturers
National Rural Electric Cooperative Association

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Arch Coal, Inc.
BP America Production Company
Cinergy Corp.
ConocoPhillips Company
Consol Energy Inc.
The Dow Chemical Company
Duke Energy Corp.
BP Products North America Inc.
E.On Ag
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FirstEnergy Corp.
FPL Group Inc.
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International Coal Group, Inc.
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The following entities were named as defendants in a proposed fourth amended complaint annexed to plaintiffs' motion for leave to amend filed in the district court, which leave was denied as moot in the District Court's dismissal order dated August 30, 2007.

Murphy Oil USA
Universal Oil Products Company (UOP)
Shell Oil Company
Chevron U.S.A. Inc.
ExxonMobil Corporation
BP p.l.c. d/b/a BP Amoco Chemical Company and BP Energy Company
BP America Production Company
BP Products North America Inc.
Superior Energy Services, Inc.
Placid Oil Company
Kerr-McGee Oil & Gas Corporation
Total PetroChemicals USA, Inc.
ConocoPhillips Company
Atlantic Richfield Company
Pioneer Natural Resources USA, Inc.

Devon Energy Production Company, L.P.
 Marathon Petroleum Company LLC
 Occidental Crude Sales, Inc.
 Occidental Energy Marketing, Inc.
 Total Gas & Power North America, Inc.
 Hess Corporation
 Anadarko Petroleum Corporation
 Apache Corporation
 Burlington Resources Offshore Inc.
 American Petroleum Institute
 Oil and Refining Entities 1-100
 AEP Generating Company
 Columbus Southern Power Company
 Ohio Power Company, d/b/a/ AEP Ohio
 Southwestern Public Service Co.
 AEP Texas Central Company
 AEP Texas North Company
 Appalachian Power Company
 Indiana Michigan Power Company
 Kentucky Power Company
 Public Service Company of Oklahoma
 Alabama Power Company
 Georgia Power Company
 Gulf Power Company
 Mississippi Power Company
 Southern Power Company
 Tennessee Valley Authority
 Xcel Energy Inc.
 Northern States Power Company
 Northern States Power Company
 Public Service Company of Colorado
 Southwestern Public Service Co.
 TXU Energy Solutions Company, LP
 TXU Big Brown Company LP
 TXU Generation Development Company LLC
 TXU Generation Development Company II LLC
 TXU Gas Company, LP
 TXU Energy Company LLC
 TXU Energy Retail Company LP
 TXU Portfolio Management Company LP
 TXU Generation Company LP

TXU Generation Management LLC
 TXU Enterprise Holdings Company, LLC
 Cinergy Corp.
 Duke Energy Ohio, Inc.
 Duke Energy Carolinas, LLC
 Duke Energy Kentucky, Inc.
 Duke Energy Gas Services, LLC
 Duke Energy Indiana, Inc.
 Duke Energy Operating Company, LLC
 Duke Energy Merchants, LLC
 Duke Energy Fossil-Hydro, LLC
 The Union, Heat and Power Company Reliant Energy Inc.
 Southern California Edison Company
 Edison Mission Energy
 Edison Mission Energy Petroleum
 Edison Mission Energy Services, Inc.
 Edison Mission Energy Fuel
 Edison Capital
 Edison International
 LG&E Energy Inc.
 LG&E Power Inc.
 Kentucky Utilities Company
 Western Kentucky Energy Corp.
 Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc.
 Florida Power Corporation d/b/a Progress Energy Florida, Inc.
 Ameren Energy Generating Company
 Union Electric Company, d/b/a AmerenUE
 Ameren Energy Resources Company
 Ameren Energy Fuels And Services Company
 Central Illinois Public Service Company, d/b/a AmerenCIPS
 Central Illinois Light Company, d/b/a AmerenCILCO
 Illinois Power Company, d/b/a AmerenIP
 Ameren Energy Generating Company
 Ameren Energy Marketing Company
 Entergy Louisiana, LLC
 Entergy Mississippi, Inc.
 Entergy Power & Light Company
 Entergy Arkansas, Inc.
 System Energy Resources, Inc.
 Allegheny Power Service Corporation
 Allegheny Energy Supply Company LLC

West Penn Power Company
The Potomac Edison Company
Monongahela Power Company
Allegheny Energy Inc.
Duke Energy Corp.
FirstEnergy Corp.
Ohio Edison Company
The Cleveland Electric Illuminating Company
The Toledo Edison Company
Pennsylvania Power Company
Jersey Central Power & Light Company
Metropolitan Edison Company
Pennsylvania Electric Company
Virginia Electric and Power Company
Consolidated Natural Gas Company
Dominion Energy, Inc.
Virginia Power Energy Marketing, Inc.
Michigan Consolidated Gas Company
The Detroit Edison Company
MichCon Gathering Company
Michcon Fuel Services Company
MichCon Enterprises, Inc.
Florida Power & Light Company
FPL Energy, LLC
FPL Group Capital, Inc.
AES Corp.
Indianapolis Power & Light Company
NRG Energy, Inc.
Texas Genco, Inc.
Texas Genco, LLC
NRG Thermal LLC
Arch Coal, Inc.
International Coal Group, Inc.
Alliance Resource Partners LP
Alpha Natural Resources Inc.
CONSOL Energy Inc.
Foundation Coal Holdings Inc.
Massey Energy Co.
Westmoreland Coal Co.
Peabody Energy Corp.
Natural Resource Partners LP

Western Fuels Association, Inc.
Rio Tinto Energy America Inc.
The North American Coal Corporation
Ohio Valley Coal Co.
Peter Kiewit Sons', Inc.
BHP Minerals International Inc.

Dated: December 4, 2009


By: Douglas A. Henderson

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INTEREST OF *AMICI*

Amici The American Farm Bureau Federation (“The Farm Bureau”), National Association of Manufacturers (“NAM”), and American Tort Reform Association (“ATRA”) have members throughout the nation that, in the course of their business activities fundamental to American life, produce carbon dioxide. Accordingly, *amici*’s members are potentially affected by the Panel’s unlimited holding regarding the justiciability of tort suits arising from weather-related events. Pursuant to FRAP 29(a), *amici* have sought leave of court to file this Joinder.

Formed in 1919, The Farm Bureau is the nation’s largest general farm organization. The Farm Bureau was founded to protect, promote and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families. Through its efforts, The Farm Bureau helps farmers meet the nation’s and world’s ever-growing needs for a safe, reliable, affordable and sustainable food supply over the last 100 years. The Farm Bureau has members, in the course of their farming, agricultural, and business activities fundamental to American life, produce carbon dioxide.

The NAM is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM’s mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S.

economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

ARGUMENT

For the sake of judicial economy, *amici* file this Joinder to the Motion and proposed *Amici Curiae* Brief filed by Edison Electric Institute, The American Public Power Association and The National Rural Electric Cooperative Association. The *amici* respectfully urge the court to grant *en banc* review of this matter.

The theories alleged by Plaintiffs would dramatically change tort law and negatively affect business and consumer practices far beyond the energy industry and the parties before the court. The practical application of these theories will burden trial judges with extraordinarily speculative litigation against American farms, manufacturers, and virtually all other businesses; arbitrary selection by plaintiffs' counsel will be the touchstone for liability. The tenuous link between plaintiffs' alleged harm and defendants' alleged conduct is beyond anything ever recognized in

American tort law. Causation issues will also create an impossible burden for judges and juries. Adjudicating such claims would require a fact-finder to balance the social utility and costs of an enormous range of industrial, agricultural, manufacturing and individual activities that are only remotely related (if at all) to the alleged harm in order to assess and to assign potential liability.

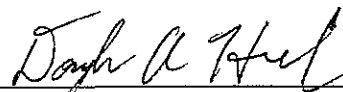
Further, complex regulatory matters should remain within the domain of the political branches, as the constitutional power to engage in the balancing of such economic, environmental and international interests is vested in them. Constitutional issues aside, only these branches of government can fully assess the impact of carbon emissions limits on the entire range of emitters, whether energy producers, farmers, or others not before the court. Those branches can also factor in the financial burden on consumers to afford the added costs associated with such restrictions to their utility, food and other bills.

For these reasons, *Amici* join the *Amicus Curiae* Brief of Edison Electric Institute, the American Public Power Association and the National Rural Electric Cooperative Association, the undersigned associations join that brief. As set forth in that Brief, the Panel's novel decisions on standing and justiciability transform Article III power, contradict Supreme Court precedent and overrule Fifth Circuit case law directly; they merit rehearing *en banc*.

CONCLUSION

For the foregoing reasons, the court should rehear this case *en banc*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2009, an original, twenty (20) copies, and an electronic version in PDF format (recorded on a compact disc) of the foregoing Brief of *Amici Curiae* as Joinder to *Amici Curiae* of Edison Electric Institute, The American Public Power Association and the National Rural Electric Cooperative Association in Support of Defendants-Appellees' Petitions for Rehearing En Banc was served via hand delivery to the United States Court of Appeals for the Fifth Circuit. I also hereby certify that on December 4, 2009, I served a paper copy and an electronic copy of same by United States mail, postage prepaid, on the following persons:

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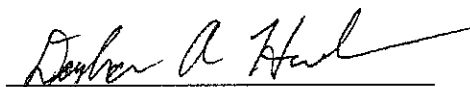
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because the brief contains 360 words, excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirement of Fed. R. App. P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Garamond.



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