Case No. 13-40317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ARANSAS PROJECT,

Plaintiff – Appellee

v.

BRYAN SHAW, in his official capacity as Chairman of the Texas Commission on Environmental Quality; BUDDY GARCIA, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; CARLOS RUBINSTEIN, in his official capacity as Commissioner of the Texas Commission on Environmental Quality; MARK VICKERY, in his official Capacity as Executive Director of the Texas Commission on Environmental Quality; AL SEGOVIA, in his official capacity as South Texas Watermaster,

Defendants – Appellants

GUADALUPE-BLANCO RIVER AUTHORITY; TEXAS CHEMICAL COUNCIL; SAN ANTONIO RIVER AUTHORITY,

Intervenors Defendants – Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION

BRIEF OF AMICUS CURIAE CPS ENERGY SUPPORTING DEFENDANTS-APPELLANTS AND INTERVENORS DEFENDANTS-APPELLANTS AND REVERSAL OF JUDGMENT BELOW

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CERTIFICATE OF INTERESTED PERSONS

No. 13-40317, *The Aransas Project v. Shaw et al.*

Pursuant to Fifth Circuit Rule 29.2, CPS Energy supplements the statement of interested parties provided by Intervenors Defendants-Appellants. The undersigned counsel of record certifies that the following listed persons as described in Fifth Circuit Rules 27.4 and 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

INVISTA S.a.r.l. LLC	Catherine E. Stetson HOGAN LOVELLS
Surface water rights owners and water users in the Guadalupe and San Antonio River basins:	All permitted and exempt surface water users within the Guadalupe and San Antonio River basins are financially interested in this appeal. According to a database maintained by the Texas Commission on Environmental Quality, available at http://www.tceq.state.tx.us/permitting/water_supply/water_rights/wr_databases.html, there are approximately 1,170 active permitted water rights holders on the Guadalupe and San Antonio River basins.

s/ Russell S. Johnson
Russell S. Johnson
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IDENTITY OF AMICUS CURIAE[1]

The City of San Antonio, acting by and through the Public Service Board ("CPS Energy"), is the exclusive provider of electrical service to over 1.7 million people in the greater San Antonio area. R. 857-58. To provide electrical service, CPS Energy owns and operates two power plant complexes in southeast Bexar County. R. 858. Each complex contains several electrical generating units located near two large water reservoirs designed for power plant operations: Braunig Lake and Calaveras Lake. *Id.* The complexes are a critical part of Texas' power grid managed by the Electric Reliability Council of Texas ("ERCOT"). *Id.* To operate the complexes and provide electricity to the citizens of greater San Antonio, CPS Energy must have an adequate and reliable water supply to maintain precise water levels in the reservoirs. *Id.* CPS Energy owns permitted water rights that authorize diversions from the San Antonio River basin sufficient to meet CPS Energy's water needs and has a long-term contract to purchase treated wastewater for delivery to the reservoirs. R. 858-60.

INTEREST OF AMICUS CURIAE

Any water-based solution stemming from the district court's injunction will modify existing surface water rights in the San Antonio and Guadalupe River

[1] No party or party's counsel authored any portion of this brief. In addition to *amicus curiae* CPS Energy and its counsel, interested party INVISTA S.a.r.l. LLC and its counsel contributed input with respect to information that appears at Part III.C. CPS Energy is a governmental entity.

basins. Existing water rights, like those owned by CPS Energy, R. 858-60, will be curtailed to meet the requirements of the court-ordered incidental take permit ("ITP") and concomitant habitat conservation plan ("HCP") developed pursuant to the Endangered Species Act ("ESA"). *See* R. 7855-56. Without adequate water supplies, generating units providing over 60% of CPS Energy's generation capacity will cease to operate, impairing CPS Energy's ability to provide electrical service to greater San Antonio. R. 858, 861. Such a shutdown will harm Texas' electricity grid, which already struggles to meet peak demand, threatening the health, safety, and welfare of millions of Texans. R. 861.

Curtailing water rights will have significant economic consequences for Texas beyond hindering the state's power grid. Major industries will be forced to curtail or shut down operations if their water rights are modified. The district court should have considered these significant state interests and the state's need for coherent water management policy in deciding whether to abstain from interfering with this complex state regulatory issue. The district court also should have balanced these interests against those of the Whooping Crane in evaluating injunctive relief. It did not. That was error. The district court should be reversed.

ARGUMENT

The district court's order forbids the Texas Commission on Environmental Quality ("TCEQ") from approving or granting new water permits affecting the

Guadalupe or San Antonio Rivers until Texas "provides reasonable assurances to the Court that such permits will not take Whooping Cranes in violation of the ESA." R. 7856.[2] The order also requires TCEQ to apply for an ITP by preparing an HCP, which threatens to modify existing water rights. *Id*. If not reversed, the injunction will harm the economy and public health and welfare in Texas, including its power grid, major industries, and water rights system.

I. In refusing to abstain, the district court disregarded Texas' significant interests and need for a coherent policy for surface water management.

The district court concluded there is no legal basis for abstention in this case. R. 7853, ¶ 67. This was error. A federal court should abstain from reviewing the domestic policy of a state when federal adjudication would interfere with state efforts to establish a coherent policy on a matter of substantial public concern, and where adequate and timely judicial review by the state court system is available. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Sierra Club v. City of San Antonio*, 112 F.3d 789, 794 (5th Cir. 1997). In evaluating abstention, a court should consider, among other things, the importance of the state interest involved and the state's need for a coherent policy in that area. *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993).

[2] The district court modified its injunction after the state sought a stay, adding the caveat that the state could grant new permits "necessary to protect the public's health and safety." R. 7935. The modification did not create a health-and-safety exception for curtailment of existing permits.

The Supreme Court recognized that a state's important economic and social interests must be considered before proceeding to affect a crucial state resource. *See Burford*, 319 U.S. at 320 (oil and gas). This Court reiterated the importance of such state interests in the context of Texas' water resources:

> *Burford* emphasized that the state regulatory scheme in issue concerned the 'very large' interest of the state in conserving oil and gas, and that the Railroad Commission's regulation of oil and gas production was 'of vital interest to the general public . . . with implications to the whole economy of the state.' The regulation of water resources is likewise a matter of great state concern.

City of San Antonio, 112 F.3d at 794. In both cases, Texas' complex economic and social interests counseled in favor of abstention. Similarly they do so here.

In declining to abstain, the district court failed to consider Texas' economic and human health and welfare interests and its need for a coherent policy for surface water management that avoids the deleterious effects of the injunction ordered here. *See* Part II *infra.*

II. In granting injunctive relief, the district court failed to balance equities and consider the public interest.

Texas' interests are also relevant in the context of injunctive relief. In granting injunctive relief, the district court should have evaluated how Texas and other intervenors would be harmed and how the public interest would be adversely affected if the relief were granted. *See, e.g., Water Keeper Alliance v. U.S. Dep't*

of Def., 271 F.3d 21, 34-35 (1st Cir. 2001); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 894, 897 (W.D. Tex. 1998).

Here, however, the district court declined to consider these interests in favor of what it deemed a "relaxed standard" that provides "'an almost absolute presumption in favor of the endangered species.'" R. 7835 (citing *Defenders of Wildlife v. Adm'r, E.P.A.*, 688 F.2d 1334, 1355 (D. Minn. 1988) and *Tenn. Valley Auth. v. Hill ("TVA")*, 437 U.S. 153, 173 (1978)); *see also* R. 7850, ¶¶ 35-36 (concluding court has no discretion to withhold injunctive relief). The district court dismissed the considerable harms to power generation, major industries, and Texas citizens altogether. *Id*. This too was error.

In the thirty years since *TVA*, the Supreme Court has repeatedly suggested that the pronouncements in *TVA* are limited to the narrow circumstances of that case: namely, where a court is reviewing the discretionary action of a federal agency under Section 7 of the ESA. In *Winter v. Natural Resources Defense Council, Inc.*, for example, the Natural Resource Defense Council sued the U.S. Navy under a number of federal statutes, including the ESA, to enjoin the Navy's use of sonar technology that allegedly harmed marine mammals. 555 U.S. 7, 14-15, 16-17 (2008). The Court did not apply *TVA*'s rule precluding consideration of the defendant's or public's interests. It instead applied the traditional four-factor test for injunctive relief and held that it "must balance the competing claims of

injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)).

The Court took the same approach in *National Association of Home Builders v. Defenders of Wildlife*, demonstrating yet again that *TVA* does not apply to all ESA claims. 551 U.S. 644 (2007). There the Court concluded *TVA* does not apply to a federal agency's statutorily mandated actions. *Id.* at 669-71.

It follows that *TVA* does not apply here, where there is no federal defendant and no discretionary federal agency action at issue. Moreover, the threats to the Texas economy, water rights system, and human health and welfare deserve greater weight than the interests at issue in *TVA*. *See* Part III *infra*. The governing standard in this case is the traditional four-factor test for determining whether injunctive relief is available in equity. *See Water Keeper Alliance*, 271 F.3d at 34-35 (threat to national security deserved greater weight than economic harm at issue in *Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997)); *Hamilton*, 8 F. Supp. at 894, 897 (distinguishing *TVA* and applying four-factor test because activity to be enjoined was not likely to cause extinction of species or destruction of its habitat).

This makes sense, as "a major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). It is "more compelling to conclude that, if Congress desired to

make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). Sections 9 and 10 of the ESA contain no such "plain" instruction, meaning this Court—which has never affirmatively adopted the "relaxed standard" identified by the district court, R. 7835—should "resolve the ambiguities . . . in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect." *Hecht Co.*, 321 U.S. at 330.

The district court should have applied the traditional four-factor test for injunctive relief and considered the balance of equities and public interest. It did not. This alone warrants reversal—particularly given the harms to Texas' power grid, industry, jobs, growth, water rights regime, and public welfare discussed next.

III. The injunction threatens Texas' economy, public confidence in its power grid, and complex water rights system.

A. Curtailment impairs generation capacity, causing economic and health and welfare consequences for a large population.

CPS Energy relies on its water rights to support its electrical generation operations and provide electricity to over 1.7 million people in the greater San Antonio area. R. 857-58. If this permitted water use is curtailed or enjoined under an HCP, CPS Energy will not be able to cool its generating units and power plants

will be shut down. R. 861. Plant closure would severely diminish CPS Energy's generating capacity, undermining its obligation to provide electricity to residents and businesses and the overall reliability of the ERCOT grid. R. 861.

Although CPS Energy was denied intervention and could not participate at trial to present its own evidence, the district court should have been aware of this consequence through the testimony of defense witness David Sunding. Dr. Sunding, a U.C. Berkley professor who has written extensively on the economic consequences of re-allocating water from developed uses to the environment, testified regarding the potential impact of instream flow requirements on the production of electricity around the San Antonio and Guadalupe Rivers. R. 6449. As noted by Dr. Sunding, CPS Energy operates Calaveras Lake. R. 6471. He calculated that, if the instream flow requirements requested by The Aransas Project ("TAP") are enforced, Calaveras Lake will only have the minimum operating level required for cooling power plants about 45 percent of the time. R. 6472. Thus, "essentially 50 percent of the time [Calaveras Lake] can no longer be used for cooling the power plants that are around it." *Id.* This is a devastating impact to CPS Energy's generating capacity, and it does not account for the similar impacts that would occur at CPS Energy's power stations located at the Braunig Lake reservoir. Ultimately, revenue-producing assets upon which CPS Energy has long

depended, and in which it has invested more than a billion dollars over the last decades, will suddenly be unavailable.

Dr. Sunding elaborated on the financial impact the electric generation sector would suffer annually due to cost of building additional projects and losses due to shortages resulting from the instream flow requirements. R. 6474-75. He pointed out that in 2020 the instream flow requirement would "cause something in the neighborhood of $61 million in expected losses to the electric generating sector." R. 6475. Dr. Sunding presented charts showing the financial impact rising to $132.5 million by 2040 and maintaining that level through 2060. DX 245. The district court's injunction will bring great economic harm to CPS Energy and the broader electric generating sector along the Guadalupe and San Antonio River basins, with cascading hardship to people across San Antonio and the state who depend on the power.

Reliable electricity is a societal necessity. Texas policymakers recognize the importance of ensuring that, in times of water scarcity, the power stays on to protect public health and welfare. *See* TEX. WATER CODE § 11.053(b)(5) (West 2012) (authorizing emergency suspension of water rights confirming to order of preferences in Section 11.024); *id.* § 11.024 (establishing water for electricity among the highest priorities, being implicated in both the first listed priority (domestic and municipal uses) and second listed priority (agricultural and

industrial use, including development of power by means other than hydroelectric)). Yet, under an HCP developed to increase estuary inflows, limitations on diversions will arise more often when citizens need power the most—in summer, when it is dry and the heat is at its highest and most dangerous.

The district court failed to consider the harm the injunction will cause to CPS Energy and the broader electric generation sector within the Guadalupe and San Antonio River basins, which implicates Texas' economy and the health and welfare of its citizens. Given these complex issues, the court should have abstained from interfering with Texas' water rights system, and should not have granted injunctive relief that stops that system in its tracks. The court's vague assurance that TCEQ may take public health and safety into account in granting *new* permits, R. 7935, provides no relief to CPS Energy and other water rights holders that rely on *existing* permits for public welfare.

B. The injunction threatens Texas' ability to manage water for a growing population and renders water supply projects infeasible.

As the district court made its decision in this case, the 83rd Texas Legislature began debating how to fund water infrastructure projects necessary to meet Texas' existing water demands and exploding population. Numerous projects were identified through the state's water plan to meet this need. *See* Tex. Water Dev. Bd., WATER FOR TEXAS, 2012 STATE WATER PLAN, chs. 3, 11 (Jan. 2012),

available at http://www.twdb.state.tx.us/waterplanning/swp/2012/index.asp (last visited May 7, 2013). The district court's injunction puts them all in doubt.

Dr. Sunding testified that a number of the potential water supplies included in the regional water plan for the Guadalupe and San Antonio River region would become infeasible if the instream flow requirements sought by TAP were imposed. R. 6464. These projects include an aquifer recharge project in the Edwards Aquifer and an aquifer storage and recovery project above Canyon Reservoir, among others. DX 248. The district court's injunction directly contradicts the state's policy to develop new water supply solutions, and threatens the state's ability to enjoy continued population and economic growth.

C. The injunction has grave consequences for all industrial water users, with concomitant impacts on the Texas economy.

The Guadalupe and San Antonio Rivers provide needed water for municipalities, farms, power generators, and recreational interests. They also provide critical water for major industries sited along the rivers, including manufacturers of polymers, chemicals, and textiles used in a variety of applications, such as medical devices, electronics, car parts, and building materials.

These industries require fresh water for cooling purposes. Facilities operating on the Guadalupe River own rights in tens of thousands of acre-feet per year of water from the river to meet this fresh water need. R. 542, 557. Those rights are represented by permits, and appellant TCEQ administers—or more

accurately, *used* to administer—the permitting process. By its injunction the district court now controls approval of any new surface water permits. The district court has forced TCEQ—a state agency—to engage in a federal HCP process that the district court intends will result in a modification and redistribution of *existing* water rights. This redistribution of water rights threatens widespread economic consequences for a significant portion of Texas industry.

Without reliable fresh water supplies, the industries drawing water from the Guadalupe and San Antonio Rivers will be forced to either significantly curtail operations or halt them altogether. Without water the plants cannot safely produce products for national and global consumption.

Loss of industry will gravely impact the region, resulting in unemployment, dislocation, and other threats to human and economic welfare. For example, one plant along the Guadalupe River employs about eighty employees and contractors, with annual payroll and benefits of $7 million. The company also pays annual property taxes of nearly $1 million. Another plant employs a thousand people and is one of the only producers of a material used in heart catheters and fuel line hoses. If these plants curtail operations or close, market supply will be profoundly impacted in the U.S. and abroad, jobs may be lost, company values will diminish, and contributions to community—both fiscal and otherwise—will diminish in turn.

The uncertain status of existing and future water permits caused by the district court's order also impacts a company's plans for expansion. Faced with unreliable water supplies, companies will be less likely to invest in growth, which means loss of accompanying benefits to jobs, commerce, and tax revenues, and a detriment to competition with other product lines in a global market.

The district court's injunction reaches beyond the industries along the Guadalupe and San Antonio Rivers. Industries across the country—like the lumber industry in the Northwest, the steel and petroleum industries in the Northeast, Midwest, and South, and nuclear power plants throughout the country—all rely on consistent water supplies. If the district court's order stands, it will serve as a basis for instituting ESA litigation to alter vested water rights nationwide. This in turn will threaten curtailment of production, abandonment of expansion plans, and lost job opportunities across the country, causing economic harm to national industry and global competition.

All of these considerations are real and significant and result directly from the district court's injunction. These *direct* consequences are all the more stark when compared to the decidedly *indirect* seven-step chain of "causation" the district court identified to justify its edict. *See* Intervenors Defs.-Appellants' Br. at 34. By contrast, there is only one step in the causal chain of economic consequences to industries along the rivers: a diminution of existing water rights

will cause the industries to curtail or shutter operations. That is *one* link in the causal chain, and it is the end of the line.

D. An HCP is cost and time prohibitive, given the large geographic area, number of stakeholders, and property rights at issue.

Dr. Sunding addressed the often exorbitant cost of crafting and implementing an HCP. R. 6457-58. HCPs vary widely in terms of geographic area covered and species protected. Common sense dictates that the larger the region and number of stakeholders, the more expensive and time consuming the process. Dr. Sunding explained that development of the Bay Delta HCP, intended to benefit, among other fish, the delta smelt, required a $25 billion investment. *Id*. The time required to develop an HCP is equally problematic. The HCP developed from the Edwards Aquifer legislation, first implemented in 1996, was not finally approved until this year—17 years later—in the form of an ITP to the Edwards Aquifer Authority. *See* Final Environmental Impact Statement and Record of Decision on the Edwards Aquifer Recovery Implementation Program Habitat Conservation Plan for Incidental Take of 11 Species (8 Federally Listed) in 8 Texas Counties, 78 Fed. Reg. 11,218 (Feb. 15, 2013).

The large geographic area covered and the high number of water rights holders on the Guadalupe and San Antonio River basins indicate the HCP ordered by the district court will be extremely expensive and time consuming. The potential that compensation would be required for the taking of private property

rights if water rights are curtailed makes the monetary figure even higher. *See* Part III.E *infra*. Astonishingly, the district court ordered Texas citizens to incur this cost and delay, and the associated uncertainty of water rights, without clear evidence an HCP will result in lower salinities and a presumed benefit to the Whooping Cranes. *See* Intervenors Defs.-Appellants' Br. at 54-57.

E. The injunction threatens a readjudication of surface water rights on Texas river systems.

Water rights obtained through the state's appropriation process, confirmed through adjudication, and put to beneficial use are vested and protectable property rights. *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971); *In re Adjudication of the Water Rights of Upper Guadalupe Segment of Guadalupe River*, 642 S.W.2d 438, 445 (Tex. 1982) ("Appropriated water rights, like riparian rights, are vested."). A water right holder is authorized to divert and use beneficially the amount of water allowed by the permit, and that quantity is the measure of the right, good against the state under section 11.026 and against competing claimants under section 11.029. *Lower Colo. River Auth. v. Tex. Dep't of Water Res.*, 638 S.W.2d 557, 563 & n.5 (Tex. App.—Austin 1982), *overruled on other grounds*, 689 S.W.2d 873 (Tex. 1984).[3]

[3] Like all vested property rights, a vested water right may be reasonably regulated. *In re Adjudication*, 642 S.W.2d at 445-46. For instance, the surface water "permittee's vested right is the right to use the resource beneficially—not waste it." *Id*. at 445. Thus, a surface water right may be cancelled for nonuse, because the right carries with it an implied condition subsequent of continued beneficial use. *Wright*, 464 S.W.2d at 647-48; *see also* TEX. WATER CODE § 11.172.

In reference to possible over-appropriations, particularly during drought, the Texas Supreme Court has stated "[n]o matter how many permits the Commission issues, the action is purely administrative, and it cannot divest or impair prior rights." *Lower Colo. River Auth. v. Tex. Dep't of Water Res.*, 689 S.W.2d 873, 882 (Tex. 1984). Thus, contrary to the district court's conclusion, R. 7854, ¶ 81, the fact that a surface water right is usufructuary does not change its protected status—vested water rights are legally protectable against other users and the state.

The crux of the case below was scarcity of water flowing into the San Antonio Bay in 2008-09. Any water-based solution developed through the mandated HCP process will necessarily require reductions in permitted diversions of water from the Guadalupe and San Antonio River basins. *See* R. 7845 (identifying measures the district court believes the state could take to increase inflows for the Whooping Cranes, including regulate diversions, oversee riparian withdrawals, secure return flows, release water from reservoirs, cancel unused water rights, monitor domestic and livestock use, or "other actions that would increase water flows").

Limiting diversions on this scale, particularly in times of drought, will disrupt Texas' appropriation system in the Guadalupe and San Antonio River

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When put to beneficial use, however, the property right owned by the water permittee remains vested and protectable. *See Lower Colo. River Auth.*, 689 S.W.2d at 876, 882.

basins and open the door for readjudication of water rights anywhere in the state where endangered species may reside. If more water must be available for species, less water must be used by existing permitted users. In this scenario, existing water rights will necessarily be compromised; they must be adjusted presumably through a process akin to an adjudication that Texas underwent in the middle 20th century. *See, e.g.*, *In re Adjudication*, 642 S.W.2d at 439-42. This realignment of property rights will entail immense legal and administrative costs and create uncertainty for every permitted water rights holder in Texas.

Costs of readjudication are not the biggest economic burden bearing down on the state. Implementing a set-aside quota for environmental flows will necessarily require that some users lose water for which they have a vested right. *See Wright*, 464 S.W.2d at 649; *In re Adjudication*, 642 S.W.2d at 445. If water rights are forced to be reallocated, compensation will be required for the taking of that private property. *See* U.S. CONST. amend. V; TEX. CONST. art. 1, § 17. Curtailed water users will have a regulatory takings claim against the government that orders an ITP that reduces water rights contrary to the users' investment-backed expectations. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *see also Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 840 (Tex. 2012). Some of the water users affected by the injunction have operated facilities for decades, investing millions of dollars in plants and other assets that

depend on the water to which their permits entitle them. Reallocating water rights to increase environmental flows under an HCP will present enormous potential financial liabilities for the government that takes those rights.

CONCLUSION

Administering water rights for the benefit of humans and the environment is an important interest in Texas, one that requires a coherent policy developed through a state process like that happening pursuant to S.B. 3. Rather than recognize this interest and policy, the district court preempted the process in a manner that disrupts and ignores the complex balance Texas policymakers must make in times of drought.

The district court's decision threatens to undermine the legal and economic regime governing surface water in Texas, as well as the property rights inherent in that regime. It may, in fact, require a complete readjudication of the rivers in Texas. Other impacts will include lost profits, lost jobs, undeveloped water projects, reduced energy production, and the curtailment or shuttering of manufacturing plants—all of which negatively affects a rapidly growing Texas population already struggling to provide sufficient water and electricity to residents and businesses.

CPS Energy requests that the Court reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 9, 2013, the foregoing document was served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following counsel of record:

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I also certify that, on May 9, 2013, the foregoing document was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https//ecf.ca5.uscourts.gov/.

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CERTIFICATIONS UNDER ECF FILING STANDARDS

I certify that: (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Russell S. Johnson
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(b) because this brief contains 4,347 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2007 word processing software in 14-point Times New Roman type style.

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Dated: May 9, 2013