

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

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Utility Air Regulatory Group and American Public  
Power Association,

*Petitioners,*

v.

U.S. Environmental Protection Agency,

*Respondent.*

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) No. 15-1370  
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Alabama Power Company, Georgia Power Company,  
Gulf Power Company, Mississippi Power Company,

*Petitioners,*

v.

U.S. Environmental Protection Agency, et al.,

*Respondents.*

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) No. 15-1371  
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National Rural Electric Cooperative Association;  
Arizona Electric Power Cooperative, Inc.; Associated  
Electric Cooperative, Inc.; Big Rivers Electric  
Corporation; Brazos Electric Power Cooperative, Inc.;  
Buckeye Power, Inc.; Central Montana Electric Power  
Cooperative; Central Power Electric Cooperative, Inc.;  
Corn Belt Power Cooperative; Dairyland Power  
Cooperative; Deseret Generation & Transmission Co-  
operative; East Kentucky Power Cooperative, Inc.; East  
River Electric Power Cooperative, Inc.; East Texas  
Electric Cooperative, Inc.; Georgia Transmission  
Corporation; Golden Spread Electrical Cooperative,  
Inc.; Hoosier Energy Rural Electric Cooperative, Inc.;  
Kansas Electric Power Cooperative, Inc.; Minnkota  
Power Cooperative, Inc.; North Carolina Electric  
Membership Corporation; Northeast Texas Electric  
Cooperative, Inc.; Northwest Iowa Power Cooperative;  
Oglethorpe Power Corporation; PowerSouth Energy  
Cooperative; Prairie Power, Inc.; Rushmore Electric  
Power Cooperative, Inc.; Sam Rayburn G&T Electric  
Cooperative, Inc.; San Miguel Electric Cooperative,  
Inc.; Seminole Electric Cooperative, Inc.; South  
Mississippi Electric Power Association; South Texas  
Electric Cooperative, Inc.; Southern Illinois Power  
Cooperative; Sunflower Electric Power Corporation;  
Tex-La Electric Cooperative of Texas, Inc.; Upper  
Missouri G. & T. Electric Cooperative, Inc.; Wabash  
Valley Power Association, Inc.; Western Farmers  
Electric Cooperative; and Wolverine Power Supply  
Cooperative, Inc.,

No. 15-1376

*Petitioners,*

v.

U.S. Environmental Protection Agency,

*Respondent.*

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NorthWestern Corporation  
d/b/a NorthWestern Energy,

*Petitioner,*

v.

U.S. Environmental Protection Agency, et al.,

*Respondents.*

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) No. 15-1378  
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Tri-State Generation and Transmission Association,  
Inc.,

*Petitioner,*

v.

U.S. Environmental Protection Agency,

*Respondent.*

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) No. 15-1374  
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United Mine Workers of America,

*Petitioner,*

v.

U.S. Environmental Protection Agency,

*Respondent.*

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Westar Energy, Inc.,		)	
	<i>Petitioner,</i>	)	
		)	
v.		)	No. 15-1377
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U.S. Environmental Protection Agency, et al.,		)	
	<i>Respondents.</i>	)	
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**On Petition for Review of an Action of the  
United States Environmental Protection Agency**

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**MOTION OF UTILITY AND ALLIED PETITIONERS  
FOR STAY OF RULE**

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## GLOSSARY

CAA	Clean Air Act
CO <sub>2</sub>	carbon dioxide
EGU	electric generating unit
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
GW	gigawatts
MATS	Mercury and Air Toxics Standards
RIA	Regulatory Impact Analysis
Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

## INTRODUCTION

Utility and Allied Petitioners request that this Court stay the U.S.

Environmental Protection Agency’s (“EPA”) final Rule setting limits for carbon dioxide (“CO<sub>2</sub>”) emissions from existing fossil fuel-fired power plants.<sup>1</sup> In the Rule, EPA asserts that a mere five words in a rarely used provision of the Clean Air Act (“CAA”)—“best system of emission reduction”—give it unprecedented authority to require States to restructure the nation’s energy industry by reducing the electricity generated by certain types of facilities (primarily coal-fired power plants) and by shifting that generation to EPA-favored facilities (e.g., wind and solar facilities) that emit less CO<sub>2</sub>. This shift will substantially increase costs to the public and jeopardize the reliability of the nation’s electricity system.

EPA claims to find authority for this extraordinary Rule in Section 111(d) of the CAA, which authorizes the *States* to establish “performance” standards for existing sources in a category (such as fossil fuel-fired electric generating units (“EGUs”)), and requires those standards to be “achievable” through “adequately demonstrated” emission-reducing technological upgrades (e.g., scrubbers) or operational processes (e.g., switching from high-sulfur coal to low-sulfur coal) at each such source. *See* 42 U.S.C. § 7411(a)(1), (d). That is what the statute says and that is

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<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule (“Rule”), 80 Fed. Reg. 64,662 (Oct. 23, 2015), Att. A. In August 2015, several petitioners requested that EPA stay the Rule. *See, e.g.*, Administrative Stay Petition of the Utility Air Regulatory Group (Aug. 24, 2015), Docket ID No. EPA-HQ-OAR-2013-0602-35728. EPA has not granted a stay.

how EPA has consistently interpreted it for decades. Now EPA purports to find in Section 111(d) *new* authority to force CO<sub>2</sub>-emitting EGUs to curtail their “performance” or to shutter entirely in order to accomplish EPA’s mandated emission reductions of up to 48 percent, depending on the State.<sup>2</sup> This is because no single unit in the source category can achieve EPA’s standards while continuing to perform, even through the use of technological controls or operational processes. To avoid electricity shortages, that lost capacity must be made up by lower- or zero-emission facilities that EPA prefers. EPA conservatively forecasts the Rule will force nearly 11 gigawatts (“GW”) of coal-fired EGUs to shutter *in 2016 alone*,<sup>3</sup> the amount needed to keep the lights on in more than two-and-a-half million homes. *See, e.g.,* Pemberton Decl. ¶ 13, Att. B. EPA, however, cannot show that Congress intended to allow *any* federal agency—much less one not even tasked with setting energy policy—to so radically restructure the nation’s electricity system, bypassing all federal and state energy laws and the regulators that have overseen the industry for over seventy years.

EPA concedes that the Rule was born out of frustration with congressional

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<sup>2</sup> Heidell & Repsher Decl. (Exhibit, PA Consulting Group, Inc., “A Survey of Near-Term Damages Associated with the EPA’s Clean Power Plan,” at 3 (Oct. 16, 2015)), Att. C.

<sup>3</sup> *See* Energy Ventures Analysis, Inc., “Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry,” at 15 (Oct. 2015), *available at* <http://www.nma.org/pdf/EVA-Report-Final.pdf> (“EVA Report”).

inaction.<sup>4</sup> Our constitutional structure, however, as well as settled principles of administrative law, requires an agency to have clear statutory authority from Congress before it adopts a sweeping regulation imposing billions in costs. As the Supreme Court has explained, “no matter how ‘important, conspicuous, and controversial’ the issue, ... an administrative agency’s power to regulate ... must always be grounded in a valid grant of authority from Congress.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (internal citation omitted). No such authority exists here. Petitioners are likely to succeed on the merits for these and other compelling reasons.<sup>5</sup>

The Supreme Court’s recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), overturning EPA’s Mercury and Air Toxics Standards (“MATS”), 77 Fed. Reg. 9304 (Feb. 16, 2012), shows why a stay is needed here. Just days before *Michigan* was decided, EPA Administrator Gina McCarthy boasted that, as a simple result of the time required to litigate the MATS rule, “[m]ost of [the regulated EGUs] are already in compliance, [and] investments have been made.”<sup>6</sup> Thus, she said, “we’re still going to get at the toxic pollution from these facilities” no matter how the Supreme Court

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<sup>4</sup> Valerie Richardson, *On climate change, Obama, EPA plan action without Congress*, WASHINGTON TIMES, Aug. 14, 2013, <http://www.washingtontimes.com/news/2013/aug/14/climate-change-obama-epa-plan-action-sans-congress/>.

<sup>5</sup> For example, because EGUs are already regulated under Section 112 of the CAA, 42 U.S.C. § 7412, they are not subject to regulation under Section 111(d).

<sup>6</sup> Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule*, THE HILL, June 29, 2015, *available at* <http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule>. *See also* Patton Decl. ¶ 15, Att. D.

ruled.<sup>7</sup> By setting this Rule’s first binding deadline for September 6, 2016 (when the Rule will still be under judicial review), and openly pressing that 2016 be “a year of implementation,”<sup>8</sup> EPA again attempts to lock in regulatory outcomes before a court can determine the regulation’s validity, and to thwart this Court’s ability to grant meaningful relief.

Utility and Allied Petitioners will suffer immediate and irreparable harm absent a stay because planning, permitting, and constructing new generation takes years, and thus must begin now to meet the Rule’s compliance obligations in 2022. The public interest also decisively favors a stay, as the Rule will cause substantial electricity rate increases and jeopardize reliability, while doing little to reduce global greenhouse gas emissions. This Court should stay the Rule while it considers the petitions for review.

## **BACKGROUND**

### **I. Statutory and Regulatory Background**

Section 111 governs performance standards for “stationary sources” of air pollution. 42 U.S.C. § 7411. Under Section 111(b), EPA establishes nationally applicable “standards of performance” to control emissions from “*new* sources.” *Id.* § 7411(b) (emphasis added). Under Section 111(d), the *States* develop source-specific “standards of performance for ... *existing* source[s].” *Id.* § 7411(d)(1) (emphasis

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<sup>7</sup> *Id.*

<sup>8</sup> William Mauldin & Colleen McCain Nelson, *U.S., China Build on Plan to Cut Emissions*, WALL ST. J., Sept. 15, 2015, *available at* <http://www.wsj.com/articles/u-s-china-build-on-climate-accord-1442342194> (subscription required).

added). In both cases, the standards must be “*achievable* through application of the *best system of emission reduction* ... [that] the Administrator determines has been *adequately demonstrated*.” *Id.* § 7411(a)(1) (emphases added). EPA purports to find its vast authority to restructure the nation’s electric industry in the five-word phrase, “best system of emission reduction.”

Unlike new sources, which can incorporate state-of-the-art control systems and operational processes into their design and construction, *existing* sources must be retrofitted to achieve emissions reductions. For some sources, retrofitting might be either physically impossible or economically prohibitive. Congress thus limited the circumstances in which performance standards could be established for existing sources. For example, existing sources that are regulated under Section 112 of the CAA are not subject to performance standards under Section 111(d). *Id.* § 7411(d)(1). Moreover, in establishing and determining the applicability of standards and compliance schedules, EPA and the States must “take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.” *Id.* In other words, existing source standards may be less stringent than new source standards, and they may be excused altogether for a specific source based on factors such as the source’s remaining useful life.

## **II. EPA’s 111(d) Rule for Existing EGUs**

EPA concedes that no pollution control measure or process can be installed at any existing EGU to achieve the Rule’s emission rates. 80 Fed. Reg. at 64,728

("[M]ost of the CO<sub>2</sub> controls need to come in the form of those other measures ... that involve, in one form or another, replacement of higher emitting generation with lower- or zero-emitting generation."). Rather, the Rule establishes CO<sub>2</sub> performance rates that can be achieved, if at all, only by measures applied across the electric grid, including shifting generation from fossil fuel-fired EGUs to those with low or no CO<sub>2</sub> emissions. The Rule thus establishes a "system of emission reduction" for the "grid," not for individual EGUs as required by the statute.

The Rule essentially dictates the market share of each generation fuel-type, shifting generation from EPA-disfavored sources (such as coal-fired EGUs) to those it prefers (such as wind and solar). EPA accomplishes this through what it calls "Building Blocks." The first Building Block assumes increased efficiency targets for coal-fired EGUs, because using less coal to generate the same amount of electricity will result in fewer CO<sub>2</sub> emissions. The second Building Block assumes increased utilization of natural gas combined cycle units—forcing CO<sub>2</sub> emission reductions by shifting generation from coal-fired EGUs to lower-emitting natural gas-fired EGUs. The third Building Block forces CO<sub>2</sub> emission reductions by displacing higher-emitting generation with zero-emission generation from renewable energy sources.

EPA uses these shifts in generation to set CO<sub>2</sub> performance standards for individual existing fossil-fuel fired power plants—standards that not only are unachievable by any existing EGU with emission control processes but that are significantly more stringent than EPA's simultaneously announced standards for *new*

power plants under Section 111(b). *See* 80 Fed Reg. 64,510 (Oct. 23, 2015) (new source rule). From this, EPA also establishes state-by-state CO<sub>2</sub> emissions targets. EPA claims that the Rule and its standards are “flexible” because States are “not required” to use the Building Blocks—but no State can meet its CO<sub>2</sub> target *except* by reducing generation from CO<sub>2</sub>-emitting units and, if it wants to make up for the lost capacity, by shifting generation to other types of resources. 80 Fed. Reg. at 64,663, 64,728, 64,734.

State plans implementing the Rule, or requests for extension, must be submitted to EPA by September 6, 2016, almost certainly while the Rule is still under review by this Court. 40 C.F.R. § 60.5760(a). Final plans must demonstrate that the State will meet interim emission targets beginning in 2022, and final targets by 2031. *Id.* § 60.5745(a)(2)(i), (a)(5)(ii), (a)(6)(iii). Extension requests are not mere formalities; they must show not only substantial “progress” toward a final plan but also “meaningful” public participation, requiring that state plan development begin *now* (and that plans be established or well underway by September 2016), regardless of whether the State submits a final plan or an extension request. *Id.* § 60.5765(a)(1), (3). If a State does not submit an approvable plan or extension request by September 2016 (or if EPA determines the State’s plan or extension request is not “justified,” 80 Fed. Reg. at 64,675), EPA will impose a federal plan. 40 C.F.R. § 60.5840(b).

Preparing final plans or extension requests will require many States to immediately start the legislative and regulatory process to rewrite utility laws and



regulations, and to abandon their historical practice of protecting consumers by requiring the lowest cost generators to be utilized first. The Rule drives a shift away from this traditional “least-cost dispatch” electricity planning to a centrally planned model that prioritizes electricity generation based on CO<sub>2</sub> emissions rather than on cost and reliability. The legislative and regulatory changes that States must undertake to implement this shift require Utility Petitioners immediately to both plan for and undertake costly measures to comply with the Rule. Indeed, this shift will require an historic transformation in the way Utility Petitioners operate their businesses. *See, e.g.*, Greene Decl. ¶¶ 10, 13-14, Att. E; Voyles Decl. ¶ 5, Att. F.

## **ARGUMENT**

This Court considers four factors in issuing a stay: (1) the likelihood movants will prevail on the merits; (2) the likelihood of irreparable harm to movants in the absence of a stay; (3) the possibility of substantial harm to others if a stay is granted; and (4) the public interest. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); D.C. Cir. R. 18(a). All four factors favor a stay.

### **I. Utility and Allied Petitioners Are Likely To Prevail on the Merits.**

#### **A. EPA Exceeded Its Authority Under Section 111(d).**

1. Petitioners will prevail on the merits because EPA exceeded its authority under Section 111(d). Section 111 authorizes performance standards for new and existing sources that are “achievable through the application of the best system of emission reduction” that is “adequately demonstrated” for that source. 42 U.S.C. §

7411(a)(1). In other words, Section 111 requires sources of air pollution to install new technology, like scrubbers, or to employ operational processes, like burning cleaner coal, to reduce air pollution. In every performance standard adopted over the past forty-five years, EPA has applied a “best system of emission reduction” that achieves a lower emission rate through technologies or operational processes applied *at the individual source*. See, e.g., 40 Fed. Reg. 53,340, 53,342 (Nov. 17, 1975) (“the technology-based approach of ... section [111] ... extend[s] ... to action under section 111(d).”). That is how every technology-based environmental program works.<sup>9</sup> But that is not how *this* Rule works.

Ignoring the Supreme Court’s instruction that statutory terms “must be read in their context and with a view to their place in the overall statutory scheme,” EPA in the Rule has abandoned the well-established and contextually compelled meaning of “best system of emission reduction.” *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks and citation omitted) (“*UARG*”). Instead, EPA focuses on the word “system” in isolation, finds a dictionary that defines it as any “set of things,” and then re-defines “system of emission reduction” as any “set of

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<sup>9</sup> Federal environmental law includes two types of programs: (i) those requiring facilities to install pollution controls or to adopt operating processes that reduce the *rate* at which pollutants are released during production, see, e.g., 33 U.S.C. §§ 1311(b) (effluent limitations), 1314(b) (same); 42 U.S.C. §§ 7411 (source performance standards), 7475(a)(4) (best available control technology), and (ii) those authorizing limits on *levels* of pollution, see, e.g., 33 U.S.C. § 1312 (water quality standards); 42 U.S.C. §§ 7651, *et seq.* (acid rain program), 7409 (national ambient air quality standards). Section 111 is a classic example of an emission *rate* program.

measures [undertaken anywhere] that work together to reduce emissions.” 80 Fed. Reg. at 64,720. According to EPA, these “measures” allow EPA to fundamentally restructure the way the nation’s electricity is generated, by requiring *reduced generation* (rather than improved emission performance) from existing EGUs that emit CO<sub>2</sub>. What EPA has promulgated, then, is not a standard of performance, but a standard of *nonperformance* under which there is no limit on EPA’s authority to govern and transform the country’s electric sector, and to do so at a cost—by EPA’s own admission—of billions of dollars per year.<sup>10</sup>

But Congress has never given EPA the authority—under Section 111(d)<sup>11</sup> or otherwise—to mandate that coal-fired power plants be closed or curtailed and replaced with other forms of generation or to otherwise impose generic constraints on their generation. *See, e.g.*, S. Con. Res. 8, S. Amdt. 646, 113th Cong. (2013) (rejecting carbon tax); Climate Prot. Act of 2013, S. 332, 113th Cong. (2013) (rejecting fees on greenhouse gas emissions); Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009) (rejecting greenhouse gas cap-and-trade program); *compare* The Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301 *et seq.* (prohibiting new oil- and gas-fired generation in favor of coal-fired generation). “When an agency

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<sup>10</sup> EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule at 3-22 to 3-23, 3-25 to 3-27, 3-30 (Aug. 2015) (“RIA”), *available at* <http://www2.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis>.

<sup>11</sup> The author of Section 111(d) recently described that provision as a “tiny little gap.” Elizabeth Harball, *111(d) author says Clean Air Act ‘not the best way’ to curb emissions*, CLIMATEWIRE, Oct. 16, 2015, *available at* <http://www.eenews.net/climatewire/2015/10/16/stories/1060026413> (subscription required).

claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,” courts “typically greet its announcement with a measure of skepticism.” *UARG*, 134 S. Ct. at 2444 (internal quotation marks and citation omitted). Here, the text, context, and historical understanding of Section 111 defeat this “enormous and transformative expansion in EPA’s regulatory authority.” *Id.*

2. Petitioners will also prevail because the Rule establishes performance standards that are not “achievable” through application of any control technology or operating process that is “adequately demonstrated” for use *at any individual EGU*. 42 U.S.C. § 7411(a)(1). Section 111 applies to “stationary sources” of air pollution, which Congress has defined as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* § 7411(a)(3). Rather than basing the Rule on “pollution control systems that will limit emissions to the level ‘achievable through ... adequately demonstrated’” techniques at individual facilities, as the statute requires, *see ASARCO, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978) (internal citation omitted), EPA redefines “source” to “include[] the ‘owner or operator’ of any building ... for which a standard of performance is applicable” and to exclude only those “actions beyond the ability of the [source’s] owners/operators to control.” 80 Fed. Reg. at 64,762 & n.472. On this basis, EPA concludes, Section 111(d) performance standards may reflect “overall emission reductions” from *combinations* of sources (including sources, such as renewables, that are outside the source category). *Id.* at 64,762,

64,779, 64,911. This reading of “source” eviscerates the limits Congress placed on *what* is regulated under Section 111(d). As in *ASARCO*, other facilities at a plant site—or spread over the electric grid—cannot be used to define another facility’s on-site performance standard obligation. Yet, that is precisely what the Rule does, requiring a plant owner/operator to shift generation to other types of plants.

Section 111(d) also requires that the performance standard be based on a system that is “adequately demonstrated.” 42 U.S.C. § 7411(a)(1). An “adequately demonstrated” system is one that applies to the “source,” considering the “cost” of that system, its “health and environmental impact,” and “energy requirements” that result from using the “system” of “reduction” at the source. *Id.* § 7411(a)(1), (d)(1); 40 C.F.R. § 60.22(b)(5). There is no demonstrated pollution control equipment or process that can be installed at any existing EGU (or even a new one) that could achieve the Rule’s performance rates. *See, e.g.*, Brummett Decl. ¶ 16, Att. G; Ledger Decl. ¶ 10, Att. H; McLennan Decl. ¶ 11, Att. I; Rasmussen Decl. ¶ 3, Att. J; K. Johnson Decl. ¶ 27, Att. K.

**3.** Petitioners are also likely to prevail because the Rule imposes standards on *existing* EGUs that are more stringent than any of EPA’s *new* source standards.<sup>12</sup>

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<sup>12</sup> The standard for new coal-fired EGUs, for instance, is 1,400 lbs. CO<sub>2</sub>/MWh, 95 lbs. *higher* than the 1,305 lb. standard EPA has set for existing coal-fired EGUs. 40 C.F.R. pt. 60, sbpt. TTTT, Tbl. 1; *Id.* sbpt. UUUU, Tbl. 1. The standard for a large reconstructed coal-fired EGU (an EGU that undergoes such significant work that it is then considered to be “new” for purposes of Section 111) is 495 lbs. higher than the

Even the newest EGUs utilizing the technologies specified in the new source performance standards cannot achieve the Rule’s emission rates; hence the reallocation of market share based on fuel type embedded in the Rule. This is not a Section 111 performance standard, and it stands the statute (and Congress’s intent in crafting a separate and more lenient subsection for existing sources) on its head.

Where an agency claims for itself the authority to resolve “question[s] of deep economic and political significance,” courts carefully examine whether Congress has “expressly” “assign[ed]” the agency the power to resolve those issues. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). The Rule’s restructuring of the electric sector is not only wholly untethered from the CAA, but is an assertion of authority over energy policy that is greater than what Congress has given to *any* federal agency, including the Federal Energy Regulatory Commission (“FERC”). By dictating market share for different types of electric generators, the nation’s historic energy regulators—FERC and the States—are relegated to the sidelines while EPA becomes the nation’s new energy czar.

#### **B. EPA’s Rule Is Unlawful for Other Reasons.**

The Rule is also unlawful in other ways. As a threshold matter, Section 111(d) prohibits EPA from regulating EGUs because those sources are already regulated under Section 112. 42 U.S.C. § 7411(d)(1). The Rule also addresses matters that

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standard for existing coal-fired EGUs and 400 lbs. higher than the standard for new sources. *Id.* sbpt. TTTT, Tbl. 1.

Congress has preserved as the exclusive province of state public utility commissions, *see Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983), and is *per se* coercive, unconstitutional, and a direct violation of the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 188 (1992). These and other reasons for the Rule's invalidity will be developed during merits briefing.

## **II. Petitioners Will Suffer Imminent and Irreparable Injury Absent a Stay.**

The Supreme Court's recent decision holding that EPA acted "unreasonably" when it promulgated MATS came too late for the utility industry. *Michigan*, 135 S. Ct. at 2712. There were no stay proceedings in that case, and thus utilities spent billions of dollars, permanently retired power plants, and committed to irreversible action before the Supreme Court invalidated the rule. *See, e.g.*, McInnes Decl. ¶ 22, Att. L; Patton Decl. ¶ 16. Absent a stay of this Rule, the same will happen here.

### **A. The Rule Requires Immediate Action by Petitioners.**

While the Rule provides that the deadline for final state plans can nominally be extended to 2018, in reality, EPA requires States and Utility Petitioners to undertake significant action in *less than one year*. Indeed, Petitioners must begin taking steps *now* if they are to have resources online in 2022 to replace curtailed or retired generation. *See, e.g.*, Greene Decl. ¶¶ 30, 32-33; Patton Decl. ¶ 24.

To submit a plan or to secure an extension of the plan due date, each State must—before September 6, 2016—begin to identify the coal-fired EGUs it intends to curtail or close, show how it will increase natural gas plant utilization, assess where

and how renewable generation will be constructed, and evaluate how and where the necessary massive infrastructure will be built. The States cannot do this alone. Much of the burden will fall on Utility Petitioners to identify the least costly candidates for closure, plan for load-shifting from coal to natural gas units while maintaining reliability, and undertake infrastructure planning, siting, and permitting for new generation and transmission facilities. *See* Patton Decl. ¶¶ 20, 22.

Moreover, the electric sector is a long lead-time industry. The 2022 compliance date requires that Utility Petitioners begin *now* to identify and prepare EGUs for retirement, *see, e.g.*, Heidell & Repsher Decl., PA Consulting Report at 8-9, 10-11; McInnes Decl. ¶ 14; and to prepare for corresponding increases in natural gas and renewable generation, *see, e.g.*, Greene Decl. ¶ 6; Heilbron Decl. ¶ 3, Att. M; L. Johnson Decl. ¶ 26, Att. N. Planning, permitting, and constructing new generation to replace those units will take between three and seventeen years. *See, e.g.*, Pemberton Decl. ¶ 7; Burroughs Decl. ¶ 7, Att. O; McLennan Decl. ¶ 20; Campbell Dec. ¶ 22, Att. P; Voyles Decl. ¶ 5. Similarly, transmission projects can take up to ten years, and gas pipeline infrastructure can take up to seven years. *See, e.g.*, McInnes Decl. ¶¶ 13-15; Heidell & Repsher Decl., PA Consulting Report at 10. EPA expressly “recognizes that successfully achieving reductions by 2022 will be facilitated by actions and investments ... prior to 2022” and “encourage[s] early actions.” 80 Fed. Reg. at 64,670. EPA actually estimates that about 70 percent of the final emission reduction target must be achieved *before the mandatory compliance period begins* in 2022. RIA at 3-20,



Tbl. 3-6 (estimating that 68.9 percent and 70.2 percent of the 2030 reductions are achieved in the rate-based and mass-based cases, respectively, in 2020). Utility Petitioners have no choice but to begin the energy planning mandated by the Rule *now*, to fulfill their obligation to provide reliable electricity to customers at just and reasonable rates. *See, e.g.*, McLennan Decl. ¶¶ 21-22, 24; Heilbron Decl. ¶¶ 22-23; *cf.* 16 U.S.C. § 824*o*; *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1169 (D.C. Cir. 1987).

### **B. Utility and Allied Petitioners Face Irreparable Harm Now.**

For all its complexity, the central feature of the Rule is straightforward: It requires utilities to significantly reduce the use of fossil fuel-fired (and, in particular, coal-fired) EGUs even where such generation is the least-cost, most reliable option. As EPA itself concedes, the Rule will force the retirement of power plants that otherwise have many years of remaining useful life.<sup>13</sup> *See, e.g.*, EVA Report at 15; Brummett Decl. ¶¶ 16-18; Frenzel Decl. ¶ 24, Att. Q; L. Johnson Decl. ¶¶ 10, 24-25.

For each EGU that must be retired or curtailed, Utility Petitioners must carefully plan and implement changes to the system to replace that lost generation. *See, e.g.*, Voyles Decl. ¶ 5; Burroughs Decl. ¶ 22; Reaves Decl. ¶ 22, Att. R; L. Johnson

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<sup>13</sup> EPA's modeling projects the Rule will cause a net retirement of around 11 GW of capacity at 53 EGUs in 2016 alone. *See* EVA Report at 15, 63 & Ex. 29. EPA further estimates 15 GW will retire by 2020, and 33 GW will retire by 2030. RIA at 3-31, Tbl. 3-12. EPA says its projections are the "best assessment of likely impacts of the [Clean Power Plan] under a range of approaches that states may adopt," *id.* at 3-11, but EPA's projected impacts are almost certainly unrealistically low. *See* Heidell & Repsher Decl., PA Consulting Report at 11-14; EVA Report at 19-25.

Decl. ¶¶ 25-27, 30; Jura Decl. ¶¶ 25-26, 28, Att. S. Coal-fired EGUs located next to mines will experience uniquely severe impacts due to the mutual dependence of the mine and EGU. Brummett Decl. ¶¶ 30-41. Once the decision to retire an EGU and associated infrastructure has been made, it will be difficult or impossible to undo: as resources are diverted from that unit, extraordinary, irreparable harms to both the utilities and the communities they serve will immediately follow. *See, e.g.*, Pemberton Decl. ¶¶ 15, 23; Greene Decl. ¶ 32; Burroughs Decl. ¶ 22; Reaves Decl. ¶ 22; Jura Decl. ¶ 33. These include:

- **Loss of jobs and harm to communities:** Plant retirements will cause significant job losses, in turn hurting local communities (e.g., falling home prices). *See, e.g.*, Jura Decl. ¶ 32; Reaves Decl. ¶ 2; Heilbron Decl. ¶ 2; Frenzel Decl. ¶ 34; Ledger Decl. ¶ 30.
- **Unrecoverable costs of shutting down a plant:** Decommissioning, dismantling, and otherwise preparing to retire a power plant involves substantial costs that will either be irreparably borne by utilities or passed on to ratepayers. *See, e.g.*, Heidell & Repsher Decl., PA Consulting Report at 10-11; McInnes Decl. ¶¶ 12, 17; Ledger Decl. ¶ 29.

Utility Petitioners' supporting declarations identify numerous additional harms, including contract cancellation costs for units retiring early, *see, e.g.*, Greene Decl. ¶ 34; Burroughs Decl. ¶ 23; Heilbron Decl. ¶ 24; stranded costs from prematurely retired or artificially curtailed units, *see, e.g.*, Pemberton Decl. ¶ 28; Patton Decl. ¶ 28; Frenzel Decl. ¶ 8(d); Rasmussen Decl. ¶¶ 9-11; Campbell Dec. ¶ 21; downgraded credit ratings and resulting higher costs of capital, *see, e.g.*, McLennan Decl. ¶ 23; Jura Decl. ¶¶ 27, 29, 32; operational disruptions, including lost or displaced investments, *see, e.g.*,

Rasmussen Decl. ¶¶ 9-10; Voyles Decl. ¶ 5; costs to maintain resource and transmission adequacy, *see, e.g.*, Heidell & Repsher Decl., PA Consulting Report at 22-24; increases in electricity prices, *see, e.g.*, Brummett Decl. ¶ 28; Campbell Decl. ¶ 24; Ledger Decl. ¶¶ 9, 29; McLennan Decl. ¶¶ 8, 23; Rasmussen Decl. ¶ 9; *see also Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 922 (S.D. Ohio 2004) (citing *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001)) (explaining that increased rates establish irreparable harm), and impacts to local communities as jobs and tax revenues disappear, *see, e.g.*, Burroughs Decl. ¶¶ 24-25; Reaves Decl. ¶¶ 25-26; L. Johnson Decl. ¶¶ 8-14, 32; Brummett Decl. ¶¶ 43-44.<sup>14</sup>

Further, as many Declarants and others explain, the construction, planning, development, coordination, siting, and permitting of energy resources to meet future demand is complex and involves tremendous costs and long lead times, *see, e.g.*, K. Johnson Decl. ¶¶ 13 & n.9, 28; Voyles Decl. ¶ 6; Campbell Decl. ¶ 22; Pemberton Decl. ¶ 7; Reaves Decl. ¶ 7; Heilbron Decl. ¶ 7; Frenzel Decl. ¶¶ 26-27; Rasmussen Decl. ¶ 12; EVA Report at 35-43, and will result in unrecoverable compliance costs including:

- Decisions regarding whether to invest in existing fossil fuel-fired EGUs (including emission-reduction measures) or to retire them. *See, e.g.*, L. Johnson Decl. ¶ 29; Jura Decl. ¶ 30; Ledger Decl. ¶ 34. Capital upgrades generally occur

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<sup>14</sup> The unique structure of electric cooperatives will force rural and often economically disadvantaged customers to bear the *entire cost* of stranded investments, new infrastructure, downgraded credit ratings, and other costs of complying with the Rule. *See, e.g.*, K. Johnson Decl. ¶¶ 11, 20, 31 & n.8.

during planned outages every 18-36 months and must be coordinated with other utilities' outages. *See* McInnes Decl. ¶ 19; EVA Report at 43.

- Capital expenditures associated with planning, coordinating, siting, permitting, and constructing new transmission lines, natural gas pipelines and storage, and other infrastructure needed to replace retiring generation and maintain reliability. *See, e.g.*, Frenzel Decl. ¶ 27; Campbell Decl. ¶¶ 2, 3. Such expenditures cannot be recovered absent the approval of the state public utility commission—and even then, would result in rate hikes for customers who cannot themselves recover costs. *See* K. Johnson Decl. ¶ 21.

These impacts constitute irreparable harm because they will have a serious effect on Utility Petitioners' business. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment) (“[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.” (emphasis in original)).

### **III. The Balance of Harms and the Public Interest Favor a Stay.**

The final two factors also favor a stay. There is no possibility of substantial and imminent harm to others if a stay is granted. Utility Petitioners have already significantly reduced CO<sub>2</sub> emissions from 2005 levels and are continuing to reduce such emissions even absent the Rule. EVA Report at 4, Ex. 2. A stay would not impact Utility Petitioners' ongoing voluntary emission reduction activities or those undertaken pursuant to state requirements.

The public interest also favors a stay. The public has a strong interest in reliable, affordable electricity. Granting a stay would ensure the Rule will not affect the cost or reliability of the nation's electricity supply unless the Rule is upheld.

Preserving the status quo would not endanger the public interest in environmental quality. The Rule addresses less than one percent of global human-made greenhouse emissions.<sup>15</sup> EPA does not even claim that the Rule will do anything to halt or mitigate climate change. Thus, the balance of harms and public interest strongly favor a stay. *Cf. In re EPA*, Nos. 15-3799/3822/3853/3887, 2015 WL 5893814, at \*3 (6th Cir. Oct. 9, 2015) (staying landmark EPA water rule to “temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing”).

## CONCLUSION

For the foregoing reasons, Utility and Allied Petitioners respectfully request the Court stay the Rule and preserve the status quo pending judicial review.

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<sup>15</sup> EPA estimates the Rule will reduce U.S. anthropogenic CO<sub>2</sub> emissions by 413-415 million tons in 2030. RIA at 3-19, Tbl. 3-5. The United Nations Intergovernmental Panel on Climate Change (“IPCC”) calculated that 2010 global anthropogenic greenhouse gas emissions were 49 billion tons. IPCC, *Climate Change 2014, Mitigation of Climate Change*, at 6 (2014), *available at* [http://report.mitigation2014.org/spm/ipcc\\_wg3\\_ar5\\_summary-for-policymakers\\_approved.pdf](http://report.mitigation2014.org/spm/ipcc_wg3_ar5_summary-for-policymakers_approved.pdf). Assuming similar global emissions in 2030, EPA’s estimated emission reductions due to the Rule would equal just 0.85 percent of global anthropogenic emissions.

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Respectfully submitted,



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Dated: October 23, 2015

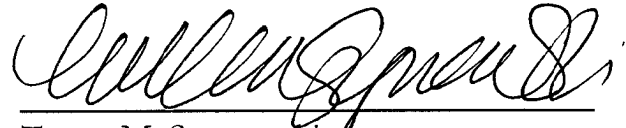
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**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 18(a)(2)**

I certify that on October 23, 2015, Eric Hostetler, counsel for the Respondents U.S. Environmental Protection Agency, et al., was informed by telephone of the filing of the Motion of Utility and Allied Petitioners for Stay of Rule.

  
Tauna M. Szymanski

## CERTIFICATE OF SERVICE

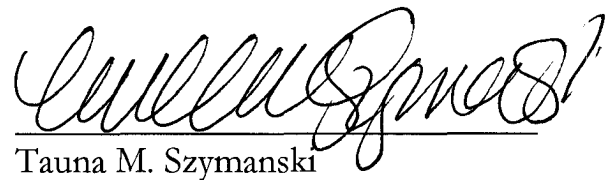
I hereby certify that on this 23<sup>rd</sup> day of October 2015, one copy of the foregoing Motion of Utility and Allied Petitioners for Stay of Rule was e-mailed to each of the following pursuant to Respondents' agreement to accept service by e-mail upon the named individuals in lieu of hand delivery:

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Tauna M. Szymanski



**ADDENDUM**  
**PURSUANT TO CIRCUIT RULE 18(a)(4)**

**UTILITY AND ALLIED PETITIONERS'  
CERTIFICATE AS TO PARTIES AND AMICI**

Pursuant to Circuit Rules 18(a)(4), 27(a)(4), and 28(a)(1)(A), Utility and Allied Petitioners state as follows:

**A. Parties, Intervenors, and *Amici Curiae***

These cases involve the following parties:

**Petitioners:**

No. 15-1370: Utility Air Regulatory Group and American Public Power Association.

No. 15-1371: Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company.

No. 15-1372: CO<sub>2</sub> Task Force of the Florida Electric Power Coordinating Group, Inc.

No. 15-1365: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers.

No. 15-1373: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

No. 15-1376: National Rural Electric Cooperative Association; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Power Electric Cooperative,

Inc.; Corn Belt Power Cooperative; Dairyland Power Cooperative; Deseret Generation & Transmission Co-operative; East Kentucky Power Cooperative, Inc.; East River Electric Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Georgia Transmission Corporation; Golden Spread Electrical Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Kansas Electric Power Cooperative, Inc.; Minnkota Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northeast Texas Electric Cooperative, Inc.; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; San Miguel Electric Cooperative, Inc.; Seminole Electric Cooperative, Inc.; South Mississippi Electric Power Association; South Texas Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tex-La Electric Cooperative of Texas, Inc.; Upper Missouri G. & T. Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Western Farmers Electric Cooperative; and Wolverine Power Supply Cooperative, Inc.

No. 15-1378: NorthWestern Corporation d/b/a NorthWesternEnergy.

No. 15-1374: Tri-State Generation and Transmission Association, Inc.

No. 15-1375: United Mine Workers of America.

No. 15-1377: Westar Energy, Inc.

**Respondents:**

Respondents are the United States Environmental Protection Agency (in Nos. 15-1365, 15-1370, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376), and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1371, 15-1377, 15-1378).

**Intervenors and Amici Curiae:**

There are no intervenors or *amici curiae* in these cases.