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September 23, 2016

VIA ELECTRONIC FILING

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *State of West Virginia, et al. v. EPA, et al.*, No. 15-1363
(and consolidated cases)

Dear Mr. Langer:

The State and state agency petitioners (“States”) submit this letter under FRAP 28(j) to notify the Court of the consideration yesterday, September 22, 2016, by the California Air Resources Board of California’s proposed compliance plan for the Rule. *See* California’s Proposed Compliance Plan for the Federal Clean Power Plan, <https://www.arb.ca.gov/cc/powerplants/meetings/09222016/proposedplan.pdf>. In its proposed plan, California explains that it is proposing a “single state” plan, *id.* at 13, and—pursuant to California Government Code § 12894(f)—will link with another State’s emissions trading program only if the other State adopts “program requirements for greenhouse gas reductions . . . that are equivalent to or stricter than those required by” California law, and permits California to enforce the requirements against participating entities in the other State, *id.* at 21. California also explains that its

“reporting and verification system is significantly more rigorous than the [Rule] requires.” *Id.* at 28.

California’s actions support the States’ argument that EPA has failed to demonstrate that its national-average performance rates are achievable by each State. Pet. Record Br. 53-55. Because it is indisputable that many States—including Montana, Kentucky, North Dakota, and West Virginia—cannot meet EPA’s national performance rates by applying EPA’s claimed BSER within their own borders, the Rule is unlawful on that basis alone. *Id.* California’s actions illustrate the States’ further point that States who can over-comply with EPA’s performance rates can and may very well either refuse entirely to trade with States like Montana, Kentucky, North Dakota, and West Virginia, or force those States to adopt more stringent regimes than the Rule provides, as the price for “linkage” and compliance. *Id.* at 49-53.

Accordingly, although interstate trading is a non-BSER compliance measure that the agency cannot rely upon to justify its national-average performance rates, California’s actions support the States’ additional argument that, in any event, EPA has not demonstrated that sufficient interstate trading will emerge. EPA’s claim that a sufficient interstate program will emerge to enable nationwide compliance is an impermissible “crystal ball” prediction, *Portland Cement Ass’n v. Ruckelhaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), which California’s actions further refute.

Dated: September 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23d day of September, 2016, a copy of the foregoing Federal Rule of Appellate Procedure 28(j) Letter was served electronically through the Court's CM/ECF system on all registered counsel.

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