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I. Executive Summary

II. How EPA's Clean Power Plan Impacts New Mexico

For more than 70 years, New Mexico has exercised exclusive jurisdiction over its retail electricity markets. With the passage of the Federal Power Act in 1935, the Congress codified New Mexico's—and all States'—prerogative to oversee their retail electricity markets, unencumbered by federal intrusion. EPA's Clean Power Plan, by its very terms, would erase this “bright line” in jurisdiction between federal and state governments. Indeed, if finalized in its current form, the rule would effectuate an unprecedented expansion of federal authority into New Mexico's rightful affairs, such that state officials could regulate the provision of electricity only with EPA's approval. As aptly explained by current Federal Energy Regulatory Commission Commissioner Tony Clark, “[States] will have entered a comprehensive ‘mother may I?’ relationship with the EPA that has never before existed.”

In addition to usurping the state's authority, the rule adds insult to injury by imposing unreasonable costs on New Mexico ratepayers. Residential rates are projected to increase by 13 percent to 14 percent, while industrial rates are projected to increase by 23 percent. Making matters worse, the rule also poses a threat to electric reliability. In response to previous EPA rules, utilities already have announced the closure of 633 megawatts of coal-fired electricity in New Mexico. EPA modeling for the Carbon Pollution Rule projects that the regulation would cause an additional 1,001 megawatts of electricity generating capacity in New Mexico to retire. According to an initial analysis performed by the Southwest Power Pool, which serves eastern New Mexico, EPA's rule “introduce[s] the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety and economic activity within the region.”

A. New Mexico Has Exercised Exclusive Jurisdiction over Retail Electricity Markets Since 1941

The New Mexico Public Regulation Commission (or its precursors) has had sole jurisdiction to oversee the state's electricity retail electricity market since 1941—almost 30 years before the EPA was formed. Pursuant to N.M. Stat. Ann. § 62-3-1(B), the Commission is authorized to supervise electric utilities in order to ensure “reasonable and proper services shall be available at fair, just and reasonable rates.”

Six years prior, in 1935, the Congress had codified New Mexico's exclusive prerogative to oversee retail electricity provision, with the passage of the Federal Power Act. The law embodied the New Deal philosophy that an electric utility is a “local institution” that should be “locally controlled,” as articulated by Montana Senator Burton Wheeler, who was one of the statute's chief sponsors.

To this end, the 1935 Federal Power Act explicitly states that the federal government’s jurisdiction shall “extend only to those matters which are not subject to regulation by the States.” 16 U.S.C. §824(a). As interpreted by Article III Courts, the Federal Power Act establishes a “‘bright line’ between state and federal regulation. *Northern States Power Company v. FERC*, 176 F. 3d 1090 (8th Cir. 1999), at 1096. The federal government has jurisdiction over interstate sales of wholesale electricity, while “States retain exclusive authority to regulate the retail market.” *Electric Power Supply Association v. FERC*, WL____(D.C. Cir. May 23, 2014).

In this fashion, New Mexico officials have tended to the state’s electricity market for more than seven decades. During that time, federal regulators have been barred by statute from intruding on these “matters...subject to regulation by the States.”

EPA’s Clean Power Plan would erase the “bright line” in jurisdiction between State and Federal governments in the electricity market. Through the regulation, federal **environmental** regulators have proposed to do exactly what has long been denied federal **energy** regulators. In recent Congressional testimony, Federal Energy Regulatory Commission Commissioner Tony Clark aptly addressed the Clean Power Plan’s severe impact on federalism:

More than any regulation I have seen during the time that I have been involved in the energy sector, this EPA proposed rule has the potential to comprehensively reorder the jurisdictional relationship between the federal government and states as it relates to the regulation of public utilities and energy development... [States] will have entered a comprehensive ‘mother may I?’ relationship with the EPA that has never before existed.”

During the same hearing, Clark’s colleague Philip Moeller quipped that, “If it isn’t already obvious, the title of the proposed rule, the Clean Power Plan, makes it clear that EPA is creating national electricity policy.”

Of course, it is highly doubtful that Clean Air Act §111(d) authorizes EPA to “comprehensively reorder the jurisdictional relational between the federal government and states” to further “national electricity policy.” In the next section, these comments explain how EPA’s §111(d) rule severely intrudes upon New Mexico’s rightful authority to oversee its retail electricity markets.

B. How the Clean Power Plan Usurps New Mexico’s Long Held Prerogative to Oversee Retail Electricity Markets

1. EPA’s Clean Power Plan Infringes on New Mexico’s Long Term Resource Planning

In 2007, acting pursuant to New Mexico Public Regulation Commission Act, NMSA 1978, Section 8-8-15, the Public Utility Act, NMSA 1978, Section 62-3-1 et seq., and the Efficient Use of Energy Act, NMSA 1978, Section 62-17-1 et seq., the New Mexico Public Regulatory Commission promulgated 17.7.3 NMAC, thereby requiring the state’s utilities to prepare a triennial assessment that evaluates the adequacy and reliability of New Mexico’s current and future electric capacity and supply. The plan, which is known as an “integrated resource plan,” is subject to the Commission’s approval.

In fact, integrated resource plans or similar filings are required in 48 States. As defined by 1992 Energy Policy Act §111(d)(19):

The term “integrated resource planning” means, in the case of an electric utility, a planning and selection process for new energy resources that evaluates the full range of alternatives...in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such as diversity, reliability, dispatchability, and other factors of risk...and shall treat demand and supply resources on a consistent and integrated basis.

In plain terms, New Mexico adopted integrated resource planning in order to ensure the long-term reliability of delivered energy at the lowest cost.

IRP planning unquestionably falls on New Mexico’s side of the “bright line” dividing state and federal jurisdiction over the electric industry. It is a process by which many states decide on which power sources they will rely, and, pursuant to the Federal Power Act, the federal government “shall not have jurisdiction...over facilities used for the generation of electric industry.” 16 U.S.C. §824(b)(1). Accordingly, federal energy regulators have disavowed any authority over a state’s IRP process. For example, FERC’s landmark 2011 Order 1000, which established a cost allocation regime for the transmission of renewable energy, included a disclaimer that “nothing is intended to preempt or otherwise conflict with State authority over...integrated resource planning and similar processes.”

In stark contrast to FERC’s disavowal of authority over a state’s IRP, EPA’s Clean Power Plan expressly subsumes state IRP planning within the agency’s regulatory regime for carbon. In the preamble to the proposed rule, the agency states that, “Those states committed to Integrated Resource Planning would be able to establish their CO2 reduction plans within that framework.” 79 FR 34834, June 18 2014.

To date, New Mexico utilities have performed integrated resource planning under the aegis of the Public Regulatory Commission, which traditionally has judged utility IRPs based on reliability and affordability, free from federal government intrusion. EPA’s Clean Power Plan would effectively commandeer this process. Under the EPA’s rule, in lieu of affordability and reliability, the Public Regulatory Commission would have a federally-determined goal for resource planning: carbon reduction. New Mexico’s “carbon IRP,” in turn, would be subject to EPA approval, which before had never been necessary. In this fashion, EPA’s Clean Power Plan robs New Mexico of its initiative and authority to conduct resource planning for the retail provision of electricity.

2. EPA’s Clean Power Plan Upsets New Mexico’s Choice to Rely on Economic Dispatch

In the previous subsection, these comments explained how EPA’s Clean Power Plan usurps New Mexico’s authority to oversee which generation capacity to build to power the future. This section explains how the regulation would dictate to New Mexico ratepayers which generation source to use in the present.

New Mexico citizens are served by multiple power grids. The state's largest urban areas are served by Public Service Company of New Mexico. Many rural areas receive electricity from a grid operated by [XXXXX]. Finally, Eastern New Mexico participates in a multistate "regional transmission organization" known as the Southwest Power Pool.

A key concept in the operation of a power system is "economic dispatch." Section 1234(b) of the Energy Policy Act of 2005 defines economic dispatch to mean "the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities." In simple terms, "economic dispatch" means meeting electric demand by deploying the most affordable power sources in reliable fashion. Grid operators use sophisticated software and supercomputers in assigning load to specific generating stations to effect the most economical supply as demand varies.

Dispatch is so intimately associated with the provision of retail electricity that federal energy regulators have never even thought to challenge the state's authority over this process, save for very narrow reliability emergencies. Yet EPA's Clean Power Plan incorporates dispatch squarely within EPA's regulatory purview. In a technical support document to the rule, the agency states:

Reduced generation is encompassed by the terms of the phrase "system of emission reduction" in Clean Air Act § 111(a)(1)...because, in accordance with the above-discussed definitions of "system," reduced generation is a "set of things"—which included reduced use of generating equipment and therefore reduced fuel input—that the affected source might take to reduce CO2 emissions. Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 13-14

Accordingly, the agency based New Mexico's Clean Power Plan targets on an assumption that all natural gas combined cycle power plants in the U.S. would operate at a 70 percent capacity factor (i.e., that the plants would run 70 percent of the time). Obviously, such a de facto natural gas generation quota would profoundly alter the manner in which electricity is dispatched to serve New Mexico ratepayers. Nationwide, the average capacity factor for natural gas combined cycle is 46 percent. There are 8 combined cycle natural gas plants in New Mexico, representing 925 megawatts of capacity, and they operate at an average 48 percent capacity factor.

By seizing authority over the operation of electricity in New Mexico, EPA negates the state's long-held prerogative to choose to rely on economic dispatch. In its stead, the agency has imposed a system of environmental dispatch.

3. EPA's Clean Power Plan Requires New Mexico To Enact Energy Laws

The previous two subsections of these comments explained how EPA's Clean Power Plan, by its own terms, expands the agency's authority into areas of state jurisdiction over electricity markets that long have been off-limits to federal energy regulators. This section explains how the rule's unprecedented reach extends past New Mexico's utilities and even beyond the Public Service Commission—all the way the state legislature. Indeed, if finalized in its current form, EPA's Clean Power Plan would require New

Mexico lawmakers to enact energy laws that mandate the usage of certain types of energy and services in the retail electricity market.

New Mexico's Clean Power Plan target is based on the assumption that that renewable energy resources would account for 21 percent of annual energy sales by 2030 and also that New Mexico utilities would achieve 1.5 percent annual reductions in demand. Of course, state regulators do not possess an independent basis of authority to require minimum amounts of renewable energy generation or energy savings; rather, the New Mexico legislature must delegate such authority to state regulators. In fact, lawmakers have already done so. Pursuant to *Renewable Energy Act* (S.B. 43) (And subsequent amendments), By 2020, investor-owned utilities (IOUs) are required to generate 20% of total retail sales from renewable energy resources, and rural electric cooperatives are required to generate 10% of total retail sales from renewable energy resources. And pursuant to H.B. 267, investor-owned utilities in the State must achieve energy efficiency savings of 8% of 2005 total retail kWh sales by 2020. The Clean Power Plan, in its current form, almost would require the state legislature to enact legislation to make more stringent the State's existing programs for promoting renewable energy and energy efficiency.

Notably, the D.C. Circuit recently struck down a FERC order that **indirectly** regulated utility energy efficiency programs, because the program violated the states' exclusive jurisdiction over retail electricity markets. *Electric Power Supply Association v. FERC*, WL___ (D.C. Cir. May 23, 2014). By contrast, EPA's Clean Power Plan asserts **direct** authority over New Mexico's energy efficiency program, as is made clear in a technical support document attendant to the rule:

the EPA is proposing that states be authorized to submit state plans that do not impose legal responsibility on the affected EGUs for the entirety of the emission performance level, but instead, by adopting what this preamble refers to as a "portfolio approach," **impose requirements on other affected entities—e.g., renewable energy and demand-side energy efficiency measures—that would reduce CO2 emissions from the affected EGUs.** [Formatting added] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 16

Of course, EPA's de facto requirement that New Mexico enact energy laws is expressly forbidden by the Federal Power Act. And until the proposed Clean Power Plan, the agency never has attempted to use the Clean Air Act to compel States to pass energy statutes.

4. EPA's Clean Power Plan Roils New Mexico's Oversight of Retail Electricity Markets

Implementation of the Clean Power Plan raises a host of complicated jurisdictional questions that promise to roil state oversight of the electricity sector in New Mexico.

For starters, EPA's proposal is silent on which state body should implement the regulatory regime. Normally, the New Mexico Environment Department would administer a Clean Air Act regulatory program, subject to oversight by the Environmental Improvement Board. However, EPA's unprecedented Clean Power Plan is a "national electricity policy" (as described by FERC Commissioner Philip Moeller), and New Mexico's electricity sector long has fallen under the purview of the Public

Regulatory Commission. The proposed regulation lends no insight into which body should take the lead. In all likelihood, the legislature would have to decide by passing an enabling statute.

Similarly, there is no statutory basis mandating a conversion from “economic dispatch” to “environmental dispatch.” As such, the New Mexico legislature would have to enact legislation creating such an authority. This is no simple task, and it is further complicated by eastern New Mexico’s participation in Southwest Power Pool, which operates dispatch over an 8 state region. Of course, the Southwest Power Pool is not a regulatory body. The Clean Power Plan is silent on how New Mexico could somehow deputize its regional transmission organization as part of its State Implementation Plan.

Finally, EPA’s Clean Power Plan subjects the state’s 16 rural electric cooperatives and two generation and transmission cooperatives, serving much of rural New Mexico, in regulatory limbo. These rural cooperatives would have to be part of any New Mexico strategy to achieve the Clean Power Plan, but they are exempt from rate regulation by the Public Regulatory Commission. The proposed regulation is silent as to how New Mexico should incorporate its rural electric cooperatives into a compliance plan. This raises significant local political issues, as rural electric cooperatives generally have resisted being subject to state oversight.

C. New Mexico Cost & Reliability Threats

1. Compliance Costs

According to a study conducted by the economic consulting firm NERA, EPA’s proposed Clean Power Plan would be the most expensive regulation ever imposed on the power sector, costing between \$41 and \$73 billion per year. Their analysis projects that the rule would cause electricity rates to increase between 13 percent and 14 percent in New Mexico. Industry would fare much worse. According to an analysis conducted by Industrial Energy Consumers of America, the Clean Power Plan would increase wholesale power prices in the State by up to 23 percent.

2. Reliability Impact

Nationwide, 132 gigawatts of generating capacity is projected to retire between 2016 and 2020, of which 68 GW is directly attributable to the Clean Power Plan, according to EPA modeling. Reliability watchdog North American Reliability Corporation has warned that “essential reliability services may be strained by the proposed Clean Power Plan.” Similarly, in comments to the EPA, the Edison Electric Institute cautioned that, “The dynamics of compliance, under circumstances of any unexpected shortfall in the non-emitting resources required for compliance, creates the risk of multi-state compliance failures that would disrupt interstate power flows.”

In response to previous EPA rules, utilities already have announced the closure of 633 megawatts of coal-fired electricity in New Mexico. EPA modeling for the Carbon Pollution Rule projects that the regulation would cause an additional 1,001 megawatts of generating electricity generating capacity in New Mexico to retire.

The retirement of this much generating capacity will strain the grids that serve New Mexico ratepayers. For example, Southwest Power Pool, which serves eastern New Mexico, conducted a reliability analysis of the rule and concluded:

EPA's projected [power plant] retirements represents approximately 6,000 MW of additional capacity being retired in the SPP region beyond that currently expected by 2020. This represents approximately a 200% increase in retired generating capacity compared to SPP's current expectations. Unless the proposed Clean Power Plan is modified significantly, SPP's transmission system impact evaluation indicates serious, detrimental impacts on the reliable operation of the bulk electric system in the SPP region, introducing the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety and economic activity within the region.

SPP's comments are not isolated. In recent congressional testimony, FERC commissioner Philip Moeller noted his particular concern for the possibility of EPA's Clean Power Plan causing rolling blackouts in the 15-State Midcontinent Independent Service Operator. And in an interview with Bloomberg in November, Thomas Fanning, the CEO of Southern Company, which services a multistate region in the southeast, said that "I don't think we have the ability to maintain a reliable system" and also comply with EPA's §111(d) rule.

The proposal would have serious consequences for New Mexico and its citizens. Electric grid operators, including PNM and the Southwest Power Pool, will be placed into a situation where an increasing amount of backup and emergency procedures are necessary to ensure the adequate supply of electricity. Given that last year's unusually cold winter placed much of the country at risk of blackouts and that projected retirements of coal-fired electric generating capacity under this and other rules will make this a recurring danger.

These dangers potentially could have been avoided if EPA had included a safety valve in its plan, a point echoed by, among others, officials at the PJM Interconnection regional transmission organization and the North American Electric Reliability Corporation. Grid Operators Detail Call for EPA To Provide ESPS Reliability "Safety Valve," InsideEPA (Oct. 31, 2014); NERC Review at 27 ("NERC . . . urges policy makers and the EPA to ensure that a flexible and effective reliability assurance mechanism is included in the rule's implementation"). Similarly, these dangers potentially could have been avoided if EPA had not proposed to require states to make dramatic cuts in GHG emissions by 2020, which is less than six years away, front-loading compliance burdens through a rapidly approaching date that does not provide adequate time for states to make the major planning decisions necessary to comply. See Jonathan L. Ramseur, EPA's Clean Power Plan Proposal: Are the Emission Rate Targets Front-Loaded? (CRS Nov. 3, 2014) ("[T]he mathematics of EPA's 2029 interim target effectively require states to make emission reductions in the early years, which some have described as 'front-loading.'"); NERC Review at 27 ("EPA should consider a more timely approach that addresses [bulk power system] reliability concerns and infrastructure deployments.").

III. Legal Flaws in Section 111(d) Proposal

In addition to the burdens that the Section 111(d) proposal would place on state governments and ratepayers, the proposal is contrary to the Clean Air Act in several critical ways. Individually and taken together, these legal infirmities mean that the Section 111(d) proposal, if finalized in a manner that includes one or more of these flaws, would constitute an unlawful rule. Given the fundamental nature of these legal flaws, EPA should withdraw the Section 111(d) proposal.

A. The Section 111(d) Proposal Constitutes an Unlawful Reorganization of State Energy Economies

Section 111 authorizes only the establishment of emission standards that can be met at *individual* new and existing sources of certain air pollutants, and with virtually no exceptions, EPA has implemented it in this manner since its enactment as part of the Clean Air Act Amendments of 1970. But rather than propose emission standards that are achievable by existing fossil fuel-fired power plants, the Section 111(d) proposal overrides state prerogatives by forcing them to prioritize natural gas-fired generation over coal-fired generation, and non-fossil-fuel generation over fossil-fueled generation. In this way, the Section 111(d) proposal departs from Section 111(d)'s proper scope by imposing a national energy and resource-planning policy, in violation of states' traditional role in making their individual energy policies.

Section 111(d)'s text is clear: it authorizes EPA to establish a procedure under which states will submit to it a plan that “establishes standards of performance *for any existing source . . .*” C.A.A. § 111(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A) (emphasis added). Only the first “building block” from which EPA derives its proposed “state goals,” heat-rate efficiency improvements, resembles the “inside-the-fenceline” measures authorized by Section 111(d). And even in the case of efficiency improvements, there is a good case that EPA is overstepping its authority. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014) (warning agency of “important limitations” on its authority to “force . . . energy efficiency” improvements on facilities under the Prevention of Significant Deterioration program).

The other three “building blocks,” which constitute nearly all of the GHG emission rate improvements under the Section 111(d) proposal, envision the reorganization of substantially every aspect of a state's power sector. Through these measures, the proposal requires the substantial redispatch of coal-fired electric generation to natural gas-fired generation, without regard to the nature of state resources or the legal and technical difficulties with accomplishing this goal (block 2). The Section 111(d) proposal likewise requires the deployment of new renewable or nuclear energy to replace existing fossil fuel-generated power (block 3). Finally, the proposal requires that states actually *limit* the consumption of electricity through increased deployment of demand-side reduction and end-use energy efficiency measures (block 4). Although the Section 111(d) proposal purports to provide states with “flexibility” by not requiring any particular combination of these “building blocks,” the binding emission goals it has proposed for each state are sufficiently stringent that states will be unable to meet them without going beyond the traditional, inside-the-fenceline first block and significantly altering their energy and resource policies.

But these policy choices are not EPA's to make. States—not EPA—are responsible for managing their energy resources through such measures as choosing what type of fuels or resources should be used to generate electricity, whether the limitation of energy consumption is a desirable policy, and the like. In turn, EPA and the states are collectively responsible for managing states' air quality resources by limiting emissions from industrial sources of air pollutants where appropriate. The Section 111(d) proposal aggrandizes EPA's authority beyond the statutory limits of the Clean Air Act by arrogating the role of national energy regulator with no statutory authorization.

There is no precedent in EPA's regulations under Section 111(d), or indeed in any previous Clean Air Act program, for this power grab. Instead, the Section 111(d) proposal purports to locate its authority solely in the Clean Air Act's definition of "standard of performance." Specifically, the Act defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated." C.A.A. § 7411(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). Given that the Clean Air Act does not define the term "system of emission reduction," EPA argues that "system" is a broad, unconstrained term equivalent to any "set of things working together as parts of a mechanism or interconnecting network." Proposal, 79 Fed. Reg. at 34,885. On this basis, the agency asserts that Section 111 affords it unconstrained authority to formulate standards based on "*anything* that reduces the emissions of affected sources," *id.* at 34,886 (emphasis added). Under this view, EPA's authority is essentially unlimited; it could mandate that states prohibit the use of air conditioners during times of peak energy usage or dim the lights in police stations and firehouses.

In this regard, the Section 111(d) proposal violates the core tenet of administrative law that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *E.g., Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Rather, statutory terms must be construed in light of the text of the provision as a whole, its context, its purpose, and relevant precedent and authority. *Id.* Furthermore, agencies cannot ground a claim to regulatory power on the absence of express prohibition. *E.g., Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). The ostensibly open-ended "definitional possibilities" of the word "system" cannot support EPA's attempt to override states' policy choices and impose energy and natural-resource policy on them.

B. The Proposal Abrogates States' Primary Legal Authority Under Section 111(d)

Congress intended Section 111(d) to be a state-driven process, rather than be the subject of federal command-and-control dictate. The Section 111(d) proposal is unlawful because it abrogates states' right under Section 111(d) to state-driven emission standards.

Section 111(d) grants states the prerogative of "submit[ting] to the Administrator a plan which . . . establishes standards of performance for . . . existing source[s] . . ." C.A.A. § 7411(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A). In so doing, Congress unquestionably intended for states to be the regulators exercising discretion in establishing emission standards, specifically authorizing states to consider such

factors as the remaining useful life of a given source in the standard-setting process. *See id.* In contrast, Congress limited EPA's role to a subsidiary procedural role "prescrib[ing] regulations which shall establish a *procedure*" for plan submission and determining whether a state's submitted plan is satisfactory. *See id.*; *see also* C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2).

The proposal exceeds the proper scope of EPA's authority by proposing binding, inflexible emission rate limits in the *aggregate* for a state's *entire power sector*. Pursuant to the Section 111(d) proposal, once these "goals" are finalized, states will have no authority to change them, despite Section 111(d)'s express grant of authority to the states to consider factors such as the remaining useful life of sources in establishing standards. EPA does not and cannot identify anything in Section 111(d) or elsewhere in the text of the Clean Air Act that authorizes it to displace states' legal authority to establish emission standards. As a result, the Section 111(d) proposal cannot be reconciled with EPA's limited statutory authority and the statutory rights specifically afforded to states.

C. The Proposal Violates Section 111(d)'s Bar On Regulating Sources That Are Also Regulated Under Section 112 of the Act

In order to prevent sources from being subject to multiple costly layers of regulation that could harm their economic competitiveness, the Clean Air Act prohibits EPA from requiring states to submit Section 111(d) plans for source categories that are regulated under Section 112 of the Act. The Section 111(d) proposal would violate this prohibition by establishing Section 111(d) standards for fossil-fuel fired power plants, which have been regulated under Section 112 of the Act since 2012. For that reason, EPA should abandon the Section 111(d) proposal in its entirety.

Section 112 of the Clean Air Act empowers the agency to regulate "hazardous air pollutants." In 2012, the agency promulgated regulations under this section that limit the emission of mercury and other substances from fossil fuel-fired power plants. 77 Fed. Reg. 9,304 (Feb. 16, 2012); *see generally White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (upholding rule). According to EPA, the Section 112 Rule for electric utilities will impose \$9.6 billion annually in costs on electric utilities, *see* 77 Fed. Reg. at 9,413; independent experts peg that figure at \$10.4 billion in 2015, rising to \$11.9 billion by 2030. NERA Economic Consulting, *An Economic Impact Analysis of EPA's Mercury and Air Toxic Standards Rule*, at 2, Fig. 1 (Mar. 1, 2012).

Section 111(d), in turn, authorizes EPA to require that states submit Section 111(d) plans only for "existing source[s] for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section 7412." C.A.A. § 111(d)(1)(A)(i), 42 U.S.C. § 7411(d)(1)(A)(i) (the "prohibition"). As described above, fossil fuel-fired power plants are regulated under Section 112 of the Act, and it is eminently reasonable that Congress would want to avoid the situation that those sources currently face: \$7.5 billion in annual costs from Section 111(d) regulations in 2020, rising to \$8.8 billion in 2030, *see* Proposal, 79 Fed. Reg. at 34,839-40 & Tables 1 & 2, to compound the over \$10 billion that they are currently bearing under Section 112.

The Section 111(d) proposal's attempt to deal with this plain limitation of the Clean Air Act is unreasonable. The Section 111(d) proposal asserts that the prohibition described above only bars it

from using Section 111(d) to regulate the emission of a *hazardous* air pollutant (i.e., one listed under Section 112) from a source category that is regulated under Section 112. EPA derives this interpretation from a purported harmonization of ostensibly conflicting amendments to Section 111(d) made by the House and the Senate in the Clean Air Act Amendments of 1990, whereby the Senate erroneously included a “Conforming Amendment” that the codifier of the United States Code determined “could not be executed.” As such, EPA’s “harmonization” is inappropriate, particularly given that the purported harmonization in the Section 111(d) proposal gives no meaningful effect to the actual language of the United States Code. It is plainly unreasonable for EPA to interpret the prohibition in a manner contradictory to the clear deregulatory thrust of this aspect of Section 111(d).

D. The Proposal Lacks a Lawful New-Source Standard Predicate

In order for EPA to require states to submit Section 111(d) plans to control emissions from existing sources in a particular industrial categories, EPA must first have established lawful standards under Section 111(b) for new sources in that category. Because EPA has failed to establish such standards for fossil fuel-fired power plants and its existing regulatory proposal is unlawful, EPA may not finalize any Section 111(d) proposal until it has rectified this issue.

Section 111(d) provides that Section 111(d) is appropriate to regulate only “existing source[s] for any air pollutant . . . to which a standard of performance under this section would apply if such existing source were a new source . . .” C.A.A. § 111(d)(1)(A)(ii), 42 U.S.C. § 7412(d)(1)(A)(ii). The Section 111(d) proposal concedes the plain language of this provision: that a lawful Section 111(b) rulemaking is a “requisite predicate” for a Section 111(d) rule. 79 Fed. Reg. at 34,852.

The Section 111(d) proposal identifies two pending 111(b) proposals as providing this predicate: the proposed rule regulating carbon dioxide emissions from *new* power plants, issued in January 2014, and the proposed rule regulating such emissions from *modified and reconstructed* power plants, issued in June 2014. But neither of these proposals have been finalized.

They are also unlawful and therefore cannot provide the requisite predicate for the 111(d) proposal. The new-source proposal is unlawful because it violates express restrictions on Section 111(b) rulemakings imposed by the Energy Policy Act of 2005 by inappropriately considering certain government-subsidized projects in the Section 111 standard-setting process. *See generally* Comments of the Competitive Enterprise Institute on Clear Air Act § 111(b) Carbon Pollution Standards (May 9, 2014). The modified-source proposal is unlawful because there is no authority under Section 111(b) to issue a regulation covering only modified sources, which the Clean Air Act treats as “new” sources without exception. *See* C.A.A. § 111(a)(1), 42 U.S.C. § 7411(a)(1) (“The term ‘new source’ means any stationary source, the construction *or modification* of which is commenced after” proposal or finalization, whichever is earlier, of Section 111 standards). These defects preclude EPA from promulgating Section 111(d) standards until such time (if ever) that it adopts lawful Section 111(b) standards.

E. The Proposal Suffers Other Legal Infirmities

There are at least two other serious legal flaws that undermine the proposal. First, EPA's attempt to impose a *de facto* national energy policy is in direct conflict with the Federal Power Act, which carefully reserves to the states their traditional authority to oversee their retail energy markets. See 16 U.S.C. § 824(b)(1). The D.C. Circuit has very recently enforced this limitation on the federal government's authority. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (FERC may not regulate end-use energy demand, authority over which is reserved to the states). It is simply not credible for EPA to assert that, even though the federal agency that is actually tasked with overseeing interstate energy markets cannot engage in demand-side regulation, the federal pollution control agency is *sub silentio* empowered to do so by Section 111(d).

Second, if a state fails to submit a "satisfactory" plan under 111(d), EPA is authorized to directly prescribe a plan itself. C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2). But EPA lacks authority to directly regulate the substance of all but its first "building block"—*e.g.*, to require the development of new renewable generation or to require end-use efficiency measures. These measures are the traditional subject of state police powers, with federal regulation authorized only where Congress has expressly done so. For this reason, EPA would likely be limited to measures under the first "block," *i.e.*, inside-the-fenceline efficiency improvements at individual sources, which would not be sufficient to achieve EPA's binding state-by-state emission goals. Furthermore, any attempt to do so would disproportionately burden the regulated sources, create highly inequitable treatment of one state's sources compared to another, and violate Congress's intent in affording EPA the authority to directly prescribe federal plans. Because EPA has that authority, the only reasonable reading of Section 111(d) is that the measures embraced in EPA's proposed "best system of emission reduction" should be the type of measures which the agency *could* directly regulate itself under its 111(d)(2) authority, should the need arise. The disconnect between the current proposal and EPA's ability to directly regulate under (d)(2) confirms that the proposal exceeds the agency's authority under Section 111(d).