ORAL ARGUMENT NOT SCHEDULED

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

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Respondent*,	No. 15-1363 (and consolidated cases)

Opposition to Petitioners' Motions for a Stay
On Behalf of States of New York, California (by and through Governor Edmund G. Brown Jr., the California Air Resources Board, and Attorney General Kamala D. Harris), Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland (by and through Attorney General Brian E. Frosh), Minnesota (by and through the Minnesota Pollution Control Agency), New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Washington, the Commonwealths of Massachusetts and Virginia, the District of Columbia, the Cities of Boulder, Chicago, New York, Philadelphia, and South Miami, and Broward County, Florida

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GLOSSARY

Act	Clean Air Act
Albright Decl.	Declaration of Madeleine Albright, Albright Stonebridge Group (submitted with Non-Governmental Intervenors' Stay Opposition)
Chang Decl.	Declaration of Edith Chang, California Air Resources Board
Clark Decl.	Declaration of Stuart Clark, Washington Department of Ecology
Dykes Decl.	Declaration of Katherine Dykes, Connecticut Department of Energy and Environmental Protection
Glatt Decl.	Declaration of L. David Glatt, North Dakota Department of Health (submitted as part of Attachment A to North Dakota's Stay Motion)
Gore Decl.	Declaration of Ronald Gore, Alabama Department of Environmental Management (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Eisdorfer Decl.	Declaration of Jason Eisdorfer, Oregon Public Utilities Commission
Easterly Decl.	Declaration of Thomas Easterly, Indiana Department of Environmental Management (submitted as part of Exhibit C to State Petitioners' Stay Motion)
EPA	United States Environmental Protection Agency
Field Decl.	Declaration of Christopher Field, United States Environmental Protection Agency (submitted as Exhibit 5 to EPA's Opposition to Stay Motions)
Hodanbosi Decl.	Declaration of Robert Hodanbosi, Ohio Environmental Protection Agency (submitted as part of Exhibit C to State Petitioners' Stay Motion)

Hyde Decl.	Declaration of Richard Hyde, Texas Commission on Environmental Quality (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Jones Decl.	Declaration of Suzanne Jones, City of Boulder, Colorado
Klee Decl.	Declaration of Robert Klee, Connecticut Department of Energy and Environmental Protection
KS Comments	Comments Submitted to EPA on Clean Power Plan by John Mitchell, Director, Kansas Department of Health and Environment (Nov. 17, 2014), EPA-HQ-OAR-2013-23255
KY Comments	Comments Submitted to EPA on Clean Power Plan by Leonard Peters, Secretary, Kentucky Energy and Environment Cabinet (Nov. 26, 2014), EPA-HQ-OAR-2013-22574
McCabe Decl.	Declaration of Janet G. McCabe, United States Environmental Protection Agency (submitted as Exhibit 1 to EPA's Opposition to Stay Motions)
McVay Decl.	Declaration of Douglas McVay, Rhode Island Department of Environmental Management
Millar Decl.	Declaration of Neil Millar, California Independent System Operator
MT Comments	Comments Submitted to EPA by Steve Bullock, Governor, State of Montana (Dec. 1, 2014), EPA-HQ-OAR-2013-22969
Nowak Decl.	Declaration of Ellen Nowak, Public Service Commission of Wisconsin (submitted as part of Exhibit C to State Petitioners' Stay Motion)
Pedersen Decl.	Declaration of Dick Pedersen, Oregon Department of Environmental Quality

Randolph Decl.	Declaration of Edward Randolph, California Public Utilities Commission
Rikard Decl.	Declaration of Gary Rikard, Mississippi Department of Environmental Quality (submitted with Mississippi Department of Environmental Quality's Stay Motion)
RGGI	Regional Greenhouse Gas Initiative
Snyder Decl.	Declaration of Jared Snyder, New York State Department of Environmental Conservation
Stern Decl.	Declaration of Todd Stern, United States Department of State (submitted as Exhibit 6 to EPA's Opposition to Stay Motions)
Stoddard Decl.	Declaration of Philip Stoddard, City of South Miami, Florida
Suuberg Decl.	Declaration of Martin Suuberg, Massachusetts Department of Environmental Protection
Thornton Decl.	Declaration of David Thornton, Minnesota Pollution Control Agency
Tierney Decl.	Declaration of Susan F. Tierney, Analysis Group, Inc. (submitted with Non-Governmental Intervenors' Stay Opposition)
Winslow Decl.	Declaration of Dallas Winslow, Delaware Public Utilities Commission
Wright Decl.	Declaration of Craig Wright, New Hampshire Department of Environmental Services
Zibelman Decl.	Declaration of Audrey Zibelman, New York State Public Service Commission

PRELIMINARY STATEMENT

To protect their residents' health and welfare from the dangers of climate change, the undersigned proposed Intervenor States and Municipalities ("State Intervenors") have sought for years to mitigate climate change harms and reduce carbon-dioxide emissions. The Clean Power Plan is an essential part of these efforts because it will impose pollution limits on the country's largest source of those emissions: fossil-fuel power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"). The Rule appropriately utilizes the cooperative-federalism framework of section 111(d) of the Clean Air Act, which directs EPA to prescribe regulations for emissions of carbon dioxide from power plants. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011).

Petitioners have moved to stay the Rule, asserting that it unconstitutionally commandeers States to implement a federal policy and improperly forces them to transform their energy sectors.[1] These arguments fundamentally mischaracterize the Rule. Far from intruding on state sovereignty or coercing state governments, the Rule sets reasonable limits on carbon-dioxide pollution from fossil-fuel power plants—just as previous EPA rules have limited other forms of pollution from these same power

[1] This Opposition focuses on arguments concerning state sovereignty and State Petitioners' alleged harms, which State Intervenors are uniquely situated to answer. State Intervenors agree with EPA and the other Intervenors-Respondents that Petitioners' other arguments lack merit.

plants. The Rule allows States the option of implementing the emission limits themselves—through a broad range of possible approaches—or opting out of regulation completely, in which case EPA will directly regulate the power plants. Under either approach, States will continue, as before, to exercise any traditional regulatory oversight they have to review and approve power plant decisions to comply with the Rule. Contrary to Petitioners' arguments, the Rule respects rather than interferes with state regulation of energy, and follows a long tradition of successful regulation of power plant pollution. For these reasons, Petitioners are unlikely to succeed on the merits, and a stay should be denied.

The equities also weigh heavily against a stay. State Intervenors are experiencing climate change harms firsthand and urgently seek the reductions provided for in the Rule. Any delay in emission reductions from a stay would compound these harms. Denial of a stay, on the other hand, would not cause irreparable harm. State Petitioners have sufficient time and flexibility to plan compliance strategies that will best enable power plants to meet emission obligations.

ARGUMENT

I. THE CLEAN POWER PLAN IS A LAWFUL EXERCISE OF EPA'S AUTHORITY UNDER SECTION 111(d)'S COOPERATIVE FEDERALISM STRUCTURE.

A. The Clean Power Plan Gives States Substantial Leeway to Decide Whether and How to Participate in Reducing Emissions.

Petitioners complain that the Rule forces States to "undertake a long series of

regulatory actions" in violation of their constitutional rights, Ok. Br. 11. *See also* W.Va. Br. 6, 10-11; Chamber Br. 6, 14-15; UARG Br. 2, 6, 13; NMA Br. 11. To the contrary, the Rule follows Congress's well-established framework of cooperative federalism—one that is embodied in the Clean Air Act and other statutes, and that has consistently been upheld as constitutional. *See Texas v. EPA*, 726 F.3d 180, 196 (D.C. Cir. 2013).

Similar to other Clean Air Act regulations, the Rule sets emission limits for power plants. In accord with the Act's cooperative federalism framework, the Rule gives each State the option of designing and implementing a state-specific plan to ensure that power plants in the State achieve these federally-enforceable emission limits. *See* 42 U.S.C. § 7411(d)(1); 80 Fed. Reg 64,827; EPA Br. 5-6. But no State is required to exercise this option. If a State opts out of submitting a plan, EPA will issue and enforce its own federal plan to implement the Rule's carbon-dioxide emission limits. 80 Fed. Reg. at 64,881-82; 42 U.S.C. § 7411(d)(2) (authorizing federal plan). Under a federal plan, EPA will enforce emission limits directly against power plants, which will have the choice to make technological changes that reduce emissions, purchase credits or allowances, shift to lower-emitting generation, or implement other measures to reduce emissions. *See* 80 Fed. Reg. 64,966, 64,970 (Oct. 23, 2015).

The "constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it" has been "repeatedly affirm[ed]." *Texas*, 726 F.3d at 196. The option of

direct federal regulation thus removes any "suggestion that the [Rule] commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1980).

The cooperative-federalism framework endorsed in *Texas* and *Hodel* exists throughout federal law. *See New York v. United States*, 505 U.S. 144, 167-68 (1992) (listing examples). And the Rule straightforwardly applies this framework. The Rule thus bears no similarity to the federal statutes that were found to impermissibly commandeer States in *Printz v. United States* and *New York v. United States*, contrary to Petitioners' claims (*see* Ok. Br. 10-11). In those cases, the States had no choice but to comply with federal mandates. *Printz*, 521 U.S. 898, 904, 932-33 (1997) (no choice to opt out of duty to perform background checks on gun purchasers); *New York*, 505 U.S. at 175 (no choice but to regulate as instructed or take title to low-level radioactive waste, both of which were commandeering). Here, the Rule, by contrast, allows States to decline to regulate at all and thus does not commandeer or coerce any State. *Cf. Hodel*, 452 U.S. at 288-89; *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) ("the Clean Air Act does not" compel States to implement federal regulatory programs).

The backstop of direct federal regulation by itself defeats Petitioners' claims of unconstitutional commandeering or coercion. But the availability of a federal option is not the only way in which the Rule respects state choices. States that decide to

participate in the regulation of carbon-dioxide emissions are afforded the "maximum possible degree of flexibility" in meeting emission goals. 80 Fed. Reg. at 64,820. The broad range of options available to States underscores the extraordinary degree to which the Rule respects, rather than interferes with, state sovereignty.

To provide States with a full range of options, EPA began by establishing guidelines for States to follow in limiting carbon-dioxide pollution for coal- and gas-fired power plants. To calculate these limits, EPA considered the degree of emission reductions that these power plants could achieve by adopting the "best system of emission reduction . . . adequately demonstrated," 42 U.S.C. § 7411(a)(1); *see also* 40 C.F.R § 60.22(b)(5). In EPA's determination, the "best system of emission reduction" includes the "building blocks" of improving heating efficiency at the power plants and shifting generation from fossil-fuel fired power plants to lower- or zero-emitting units, all of which are proven strategies to reduce carbon-dioxide pollution.[2] To maximize flexibility for States opting to submit state plans, EPA then translated these plant-specific emission limits into statewide goals. 80 Fed. Reg. at 64,667.

The Rule gives States broad discretion to decide how to achieve these statewide goals. States need not require power plants to use the particular measures EPA selected as the "building blocks" of the "best system of emission reduction" for

[2] EPA's consideration of these measures to set the emission limits—and power plants' use of them to meet the limits—is not unique in Clean Air Act regulation. *See* 80 Fed. Reg. at 64,724-25, 64,770-73 (listing examples); EPA Br. 28-30 (same).

purposes of their calculations of emission limits. *See* 80 Fed. Reg. at 64,710. Nor must States (or power plants) employ these "building blocks" at the levels EPA used in its limit-setting calculations, as some Petitioners concede. *See* NMA Br. 13 ("sources are not required to use the EPA-established [best system of emission reduction]"). As the Rule makes clear, States (and power plants) may achieve the emission goals by using any combination of measures. 80 Fed. Reg. at 64,755. *See* EPA Br. 9.

States that choose to submit a state plan may select a plan that places most of the burden on the power plants themselves, rather than the State. *See* EPA Br. 17, 46, 57.[3] Under such a plan, power-plant owners would be left to decide how to comply and the measures available to power-plant owners are familiar ones for that industry. The options include purchasing emission credits or allowances, making heat rate improvements, co-firing natural gas with coal, converting coal plants to natural gas, shifting generation to lower emitting units, or some combination of these and other options. *See* 80 Fed. Reg. at 64,709, 64,833-35; *see also* EPA Br. 9, 34-35.

This approach conforms with previous Clean Air Act regulations involving power plants (see *infra,* 9-10), and, contrary to Petitioners' claims, does not "dictate the market share of each generation fuel-type." *See* UARG Br. 6, 13. States that

[3] The Rule recognizes States may adopt a "trading ready" plan, *see* McCabe Decl. ¶¶ 19-21, or work with other States to achieve cost-effective emission reductions through market-based trading, such as the successful Regional Greenhouse Gas Initiative. *See*, *e.g.*, Dykes Decl., ¶¶ 8-9, 26-30 (A47, A55-57).

choose to implement the Rule's emission limits (and power plants on which limits are ultimately imposed) have freedom to choose from a broad range of familiar compliance options, underscoring the absence of any infringement on state sovereignty.

B. The Clean Power Plan Respects, Rather than Undermines, State Authority Over Energy.

Petitioners further argue that the Rule encroaches on States' authority to regulate their intrastate electrical grids. Ok. Br. 6, 11-12; *see also* Chamber Br. 14. Some Petitioners claim EPA is "bypassing all federal and state energy laws and the regulators that have overseen the industry for over seventy years." UARG Br. 2. Others assert that EPA is infringing on state sovereignty because, even if States opt out and EPA imposes the Rule's emissions limits directly on the power plants, States' utility regulators will have to oversee compliance responses such as generation shifting or plant closures. *See* Ok. Br. 6, 11-12. None of these claims has merit.

Far from intruding on the States' authority to regulate energy, the Rule preserves that authority, as previous Clean Air Act rules have, because any measures taken by power plants to comply with the Rule—whether under a state plan or a federal plan—will remain subject to the States' regulatory oversight of the energy sector. Whatever changes power plants implement to reduce carbon-dioxide emissions must still comply with the States' traditional regulation of "the economic aspects of electrical generation," including the setting of retail electricity rates and the

licensing of generating facilities, *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). *See* EPA Br. 33 ("[S]tates retain the same authorities they always have."). For example, as one State Petitioner's declarant notes, state energy regulators will continue, as before, to exercise their existing authority to review proposed power-plant retirements in response to the Rule to ensure continued reliability. Nowak Decl. ¶ 12.

Petitioner Oklahoma derides the Rule's preservation of state oversight authority as requiring States to "accommodate" the Rule or "facilitate the changes to electricity generation and transmission that the Rule requires." Ok. Br. 2. But the Rule merely anticipates that state regulators will continue exercising their ordinary oversight of compliance measures that would affect the energy sector—just as state regulators would review any changes caused by other regulations, economic forces, industry practice, or power-plant owners' business decisions.[4] Rather than "run[ning] roughshod over States' sovereign rights," W.Va. Br. 10; *see also* Chamber Br. 6, 14-16, the Rule assumes States will continue to exercise their sovereign rights to oversee their energy sectors and provides ample space for States to do so, whether a State submits a plan or EPA imposes a federal plan. This continued oversight is presumed in all

[4] Just last week, Oklahoma's public utility regulator exercised its regulatory authority to deny a power plant owners' plan for complying with federal environmental regulations, which had included converting two coal plants to natural gas. *In re Application of Ok. Gas & Elec. Co.*, No. PUD 201400229 (Ok. Corp. Comm'n, Dec. 2, 2015), *available at* http://imaging.occeweb.com/AP/Orders/occ5245126.pdf.

federal emission limits on power plants and cannot render the Rule unconstitutional.

States have extensive experience with providing regulatory oversight of power plants' compliance decisions. Many of the measures used by power plants to reduce emissions under prior EPA rules—such as plant retirements, conversions from coal to natural gas, and construction of new lower or zero-emitting generation—have required state regulatory approvals. State regulators have routinely reviewed and approved those measures as well as rate increases necessary to recover the costs of those measures.[5] For example, Virginia granted an application to convert a coal-fired power plant to natural gas after the Clean Air Act's regulatory requirements made the continued use of coal uneconomical. *In re Va. Elec. & Power Co.*, No. PUE-2012-00101, 2013 Va. PUC LEXIS 633 (Va. Corp. Comm'n, Sept. 10, 2013). Similarly, in coordination with state environmental regulators, Oregon's energy regulator approved the permanent retirement of a coal-fired power plant by 2020 to meet the State's regional haze obligations under the Clean Air Act while maintaining reliability. Eisdorfer Decl. ¶ 18 (A180-81); *see also* Thornton Decl. ¶ 10 (A146-47) (repowering project in Minnesota). State Petitioners also have overseen and approved similar

[5] *See, e.g.*, Zibelman Decl. ¶ 12 (A232) (discussing process in New York for Public Service Commission to ensure plant retirements in response to air regulations do not undermine reliability); Randolph Decl. ¶¶ 38-39 (A213-14) & Millar Decl. ¶ 6 (A185-86) (discussing work of California Public Utilities Commission and Independent System Operator to ensure power plants' decisions to comply with federal standards for particulate matter and restrictions on use of cooling water is consistent with long-term electric reliability planning for the Los Angeles Basin area).

power-plant compliance responses to previous EPA regulations. For example, state regulators routinely oversee the selection of appropriate compliance strategies from among a range of options (including generation shifting), the shutdown of power plants, the conversion of plants from coal to natural gas, and the recovery of the costs of compliance with federal emission limits, all while ensuring reliability and managing rate impacts.[6] States oversee these compliance measures even when the emission limits that power plants must comply with resulted from direct federal regulation under a federal plan.[7] Comparing this history with States' oversight under the Rule

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[6] *See, e.g.*, *In re Application of Tucson Elec. Power Co.*, No. E-01933A-12-0291, 2013 WL 3296522, at *6, 32, 59 (Ariz. Corp. Comm'n, June 27, 2013) (allowing power company to recover power plants' costs of complying with EPA regional haze and mercury air toxics rules); *In re Montana-Dakota Utilities Co.*, No. PU-11-163, 2012 WL 2849479 (N.D. Pub. Serv. Comm'n, May 9, 2012) (granting application for a proposed project at coal-fired power plant to comply with EPA-approved regional haze state implementation plan and mercury rule after considering other options, including conversion to natural gas, construction of a new natural gas plant and purchase of wind energy); *In re Appalachian Power Co. DBA, Am. Elec. Power*, No. 13-0764-E-CN, 2014 WL 5212906, at *1 (W. Va. Pub. Serv. Comm'n, Feb. 12, 2014) (approving conversion of several coal-fired units to natural gas to "retain needed generation capacity while complying with the recent tightening of federal environmental regulations"); *see also* M.J. Bradley & Associates, *Public Utility Comm'n Study*, EPA Contract No. EP-W-07-064 (Mar. 31, 2011) (describing responses by utility regulators, including in Indiana, Georgia, and West Virginia, to power plant efforts to comply with federal pollution regulations), *available at* http://www3.epa.gov/airtoxics/utility/puc_study_march2011.pdf; Matthew Bandyk, *We Energies coal-to-gas conversion gets approval from Wis. Regulators*, SNL (Feb. 3, 2014) (describing Wisconsin's utility regulator's approval of a coal plant's conversion to natural gas to comply with federal rule); Matthew Bandyk, *Kentucky Power gets approval to convert coal unit at Big Sandy to gas*, SNL (Aug. 1, 2014) (same for Kentucky).

[7] *See, e.g.*, *In re Tucson Elec. Power Co.*, No. U-1933-96-086, 1996 WL 551857

underscores the degree to which the Rule respects, rather than interferes with, state sovereignty.[8]

II. STATE PETITIONERS HAVE NOT DEMONSTRATED IRREPARABLE HARM.

A. The Clean Power Plan Does Not Impose Any Burdens that Justify a Stay.

State Petitioners assert that they face irreparable harm because they will have to spend "unrefundable dollars" to write their plans and decide what regulatory changes to make "governing their electricity markets" in order to ensure compliance with the Rule's deadlines. W. Va. Br. 17; *see also* Miss. Br. 10-11; Ok. Br. 17-18; N.D. Br. 14. But the Rule does not mandate States incur such costs because they have the option not to submit a plan and instead accept direct federal regulation of sources. Moreover,

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(Ariz. Corp. Comm'n, Apr. 24, 1996) (approving application for authorization to issue new pollution control bonds and refinance other pollution control revenue bonds for costs of compliance with federal plan regulating regional haze).

[8] For the same reasons, Petitioners' argument that the Clean Air Act does not contain a sufficiently "clear statement" authorizing EPA's consideration of energy in its regulation of pollution from power plants fails. *See, e.g.*, Ok. Br. 7-8; W. Va. Br. 10-11. By authorizing EPA to regulate power plants, the Act by necessity authorizes EPA to consider broader energy impacts of such regulation, and EPA routinely has done so. The Act also authorizes EPA to use a cooperative-federalism approach when it regulates under section 111(d), and instructs it to "tak[e] into account" "energy requirements," 42 U.S.C. § 7411(a)(1); *see also Am. Elec. Power v. Conn.*, 131 S. Ct. at 2539. Thus, EPA had sufficient statutory authority over interstitial details, such as consideration of the ability of power plants to shift generation to comply with pollution controls, and no further clear statement was required. *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 302 (3d Cir. 2015). And to the extent there is ambiguity in the statute, EPA's interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

even if a State submits a plan, it may choose a regulatory framework that imposes little burden on the State itself. A State can, for example, set up a trading system based on EPA's model rule and leave it to power-plant owners to decide how to comply.[9] *See* Point I.A, *supra*. *Cf. Ill. League of Advocates for the Developmentally Disabled v. Ill. Dep't of Human Servs.*, 803 F.3d 872, 875-76 (7th Cir. 2015) (denying stay where rule did not require alleged injury).[10] To the extent a State choosing to implement the Rule's emission limits goes beyond these options and makes regulatory decisions "governing their electricity markets," those "self-imposed costs" cannot establish irreparable harm. *Cuomo v. NRC*, 772 F.2d 972, 977 (D.C. Cir. 1985).

In addition, any voluntary choices States make to begin complying with the Rule during the pendency of this litigation cannot justify a stay. If developing a state plan or considering other compliance options could constitute irreparable harm, any cooperative federalism rule under the Clean Air Act or other similar statutes could be stayed. This would improperly transform a stay from an "extraordinary remedy" that is not a "matter of right" into a commonplace event. *Cf. Nken v. Holder*, 129 S. Ct. 1749, 1757, 1760 (2009) (quotation marks omitted); *see also Freedom Holdings, Inc. v.*

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[9] Further, States that initially decline to submit a state plan—perhaps waiting to see how this litigation unfolds—can change their mind and submit a state plan later. 40 CFR § 60.5720(b). Thus, even a State's decision to accept direct federal regulation of the State's power plants is not an irreversible one.

[10] State Petitioners argue the model rule here is only a proposal, but EPA has stated it would "likely approve" a state plan based on it. *See* McCabe Decl. ¶ 21 & n.6.

Spitzer, 408 F.3d 112 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); Order, *Miss. Comm'n on Envtl. Quality* (D.C. Cir. No. 12-1309) (Nov. 5, 2012) (Doc. No. 1403139) (denying stay in challenge to EPA's nonattainment designations); EPA Br. 58.

State Petitioners' further contention that they will be harmed even if they accept a federal plan because their utility regulators will have to review certain compliance measures by power plants, W. Va. Br. 16, Ok. Br. 18-19, relies on costs that are not a "direct[] result" mandated by the Rule. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Any potential decisions by state utility regulators on how to structure and regulate electricity generation in response to power plants' decisions—including whether to approve plant retirements, permits for new natural gas or renewable facilities, or rate change petitions—simply reflect their continued traditional role as an electricity regulator, not a burden caused by the Rule. See *supra* Part I.B.[11]

[11] State Petitioners' assertions of constitutional injury (Miss. Br. 10-11; Ok. Br. 17-18) also do not, by themselves, justify a stay. *See Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997) ("traditional prerequisites for injunctive relief" are still required when constitutional violation is asserted). Order, *Miss. Comm'n on Envtl. Quality*, *supra* (denying motion for a stay where Indiana had alleged constitutional violations). In addition, *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), relied upon by State Petitioners (*e.g.*, Ok. Br. 17), is inapposite because it involved Kansas's claim to ownership of land within state borders, not regulation under a cooperative federalism structure. *See* EPA Br. 54; *see also generally* Point I, *supra*.

B. State Petitioners' Asserted Burdens Are Neither "Certain and Great" Nor Imminent Enough to Warrant a Stay.

Moreover, State Petitioners have fallen far short of showing harm that is "both certain and great" or "imminen[t]." *Wisconsin Gas Co.*, 758 F.2d at 674. The Rule gives States flexibility to meet its deadlines without incurring overly burdensome costs or making irreversible decisions.

The September 2016 deadline for plan submissions or extension requests (until September 2018) does not, as State Petitioners assert,[12] require States to make final decisions now on what will be in their plans. *See* 80 Fed. Reg. at 64,669. States can submit an extension request by providing basic information to EPA about: (i) the plan options under consideration, (ii) why more time is needed to prepare the plan, and (iii) a description of the State's public participation process. 40 C.F.R. § 60.5765(a). Providing this information does not constitute a great burden and States are well-positioned to prepare timely extension requests. *See* McCabe Decl. ¶¶ 12-17. All State Intervenors are prepared to take this straightforward and simple step where necessary. *See, e.g.*, Clark Decl. ¶ 16 (A35-36); Klee Decl. ¶ 32 (A72); McVay Decl. ¶ 19 (A92); Pedersen Decl. ¶ 14 (A106).

The deadline for plan submittals in September 2018 is also readily achievable. It

[12] *See* Hodanbosi Decl. ¶ 4 (required to design an "interim State Plan" by September 2016); Gore Decl. ¶ 2; Rikard Decl. ¶ 2 (must submit final plan "absent special circumstances"); Easterly Decl. ¶¶ 5, 6; Glatt Decl. ¶ 11; Hyde Decl. ¶¶ 9, 11.

is consistent with the typical time period for preparing plans under the Clean Air Act. *See e.g.*, Clark Decl. ¶¶ 27-28 (A40-41); McCabe Decl. ¶¶ 25-30. And State Intervenors have finalized plans in shorter time.[13] In public comments, several State Petitioners took the position that three years would be sufficient to develop their plans implementing the Rule. *See*, *e.g.*, KS Comments at 15; KY Comments at 18; MT Comments at 15.

The Rule's next set of deadlines, governing compliance with the emission limits, also do not cause irreparable harm. Compliance with the Rule's final limits need not be achieved until 2030, with gradual interim deadlines beginning in 2022. 80 Fed. Reg. at 64,828, 64,785-86. Despite these generous deadlines, State Petitioners assert they will be forced to take steps now to "enable compliance" and avert "reliability impacts," W.Va. Br. 16, because of decisions that power plants will supposedly make now to comply with the Rule, Ok. Br. 19. But the generous compliance deadlines are far beyond the duration of litigation over the Rule[14] and assertions about decisions power plants will make now are speculative and based on unrealistic scenarios. *See*

[13] Thornton Decl. ¶ 34 (A156) (section 111(d) plan for large municipal waste combustors developed in twenty-eight months); Chang Decl. ¶ 21 (A14-15) (State developed plan to achieve particulate matter standard in Los Angeles area within two years, including extensive air quality modeling and stakeholder input); Klee Decl. ¶ 41 (A76) (state plan to implement nitrogen oxides trading program for power plants developed in twelve months).

[14] State Intervenors understand that Petitioners intend to seek expedited briefing in this case.

EPA Br. 57, 60-62; Tierney Decl. ¶¶ 28-29 (B15-18).[15] In addition, to enable power plants to meet the deadlines, States can design plans that allow the power plants to meet the interim emission limits through easily and quickly deployable strategies. *See* Advanced Energy Ass'ns Opp. 3-4; Power Companies Opp. 3-4. Moreover, many States are well on their way to meeting their statewide emission goals due to trends in the electricity generation sector toward less carbon-intensive fuels, Dykes Decl. ¶¶ 9-10 (A47-48), and widespread state regulations that require a certain percentage of power to be generated by renewable sources of energy such as wind and solar, *see* Clark Decl. ¶ 26 (A40); Klee Decl. ¶ 23 (A69); Thornton Decl., ¶ 8 (A145-46).

State Intervenors' experience implementing Clean Air Act rules also demonstrates that power plants have sufficient time and flexibility to comply with the Rule without jeopardizing reliability or causing significant increases in electricity prices. For example, more than two dozen States implemented the Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,162 (May 12, 2005), a cap-and-trade program requiring power plants to reduce their emissions of nitrogen oxides and/or sulfur dioxide pursuant to interim and final deadlines. States had four and a half years for the first deadline and nine and a half years for the second (compared to seven years and fourteen years under the Rule). And although the compliance deadlines under CAIR

[15] Nor are State Petitioners correct that power plant owners or utility regulators will soon have to make "irreversible" decisions to retire coal-fired generation. *See* EPA Br. 60-61, 65-66; Zibelman Decl. ¶ 13 (A233).

were much more expedited, there were no significant reliability problems associated with CAIR's implementation. *See also* McCabe Decl. ¶¶ 47-51 (discussing similar case with respect to Cross-State Air Pollution Rule).

Similarly, certain State Intervenors have implemented rules limiting carbon-dioxide emissions expeditiously without harming reliability or increasing electricity prices. To implement the Regional Greenhouse Gas Initiative (RGGI), all ten participating States enacted the necessary regulations to cap and reduce carbon emissions from their power plants in less than two and a half years following issuance of a model rule.[16] RGGI's compliance period began only a few months after States had established their programs. Snyder Decl. ¶ 27 (A123). And the RGGI States have already reduced regional carbon-dioxide emissions from power plants by forty percent from 2005 levels without compromising grid reliability or increasing consumer electricity bills. Dykes Decl. ¶¶ 8-9, 13-14 (A47, A50-51) (RGGI States on track for fifty percent reduction from 2005 levels by 2020; the program created $1.3 billion net economic benefits for region and reduced consumer energy bills by $460 million). Winslow Decl. ¶ 20 (A225) ("Implementing RGGI has not adversely affected electric reliability in Delaware in any way."). Similarly, California and Oregon timely

[16] *See, e.g.*, Snyder Decl. ¶¶ 19, 26 (A120-22); Wright Decl. ¶¶ 14, 19-20 (A165-68) (New Hampshire able to enact necessary legislation despite fact that legislature meets only periodically); Suuberg Decl. ¶ 7 (A140) (Massachusetts joined RGGI in 2007 and adopted final regulations implementing program the following year).

implemented programs to successfully reduce greenhouse gas emissions while preserving reliability and keeping rates stable. Chang Decl. ¶ 21 (A14-15); Randolph Decl. ¶¶ 7-8 (A194-95); Eisdorfer Decl. ¶ 7 (A176). *See also* Thornton Decl. ¶¶ 9, 11-16 (A146-49) (discussing Minnesota's experience promoting efficiency and reducing emissions while growing clean energy jobs).

III. A STAY IS NOT IN THE PUBLIC INTEREST.

Even where a stay is necessary to prevent irreparable harm, it may not be granted if it would "visit similar harm on other interested parties." *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). The Court must consider "the interests of . . . stakeholders who supported the rule and who . . . stand to suffer harm if the rule is enjoined." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

A. A Stay that Results in Delays to the Clean Power Plan's Deadlines Will Harm State Intervenors.

State Intervenors have faced significant harms and costs from climate change for many years. To spur federal action, several State Intervenors pursued litigation against EPA more than ten years ago, successfully forcing the agency to consider whether carbon dioxide and other greenhouse gases may reasonably be anticipated to endanger public health and welfare. *Massachusetts v. EPA*, 549 U.S. 497 (2007). Certain State Intervenors also sued EPA to promptly establish carbon-dioxide emissions limits under section 111 of the Clean Air Act because of the contribution of power plants' emissions to climate change. *New York v. EPA* (D.C. Cir. No. 06-1322).

EPA subsequently found that greenhouse gases pose a serious danger to public health and welfare. 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). Subsequent research has only strengthened that finding, concluding that climate change poses increased risk of mortality, especially in children and the elderly, during extreme heat events and from infectious and waterborne diseases, as well as threats to coastal communities and infrastructure from storms and rising sea levels. 80 Fed. Reg. at 64,683.

That conclusion is borne out by the experiences of State Intervenors. For example, in South Florida, flooding exacerbated by rising seas is now commonplace, adversely impacting homes, roads, bridges, drinking water, and sewage systems.[17] Many other cities and States face more severe storms, wildfires and droughts.[18] In addition, the increased heat waves, droughts, fires, storms, and freezes resulting from climate change all threaten reliability of the electric grid. Randolph Decl. ¶¶ 20-22 (A202-04) & Dykes Decl. ¶ 21 (A53-54). A stay that results in postponed emission reductions would be prejudicial because more emissions would continue to intensify the climate change that has been harming State Intervenors. Field Decl. ¶¶ 7, 29; *see also* McVay Decl. ¶ 35 (citing recent experience of three-year delay in emission

[17] Stoddard Decl. ¶¶ 7-13 (South Miami) (A250-51) & Ex. C (A266-70) (multi-city letter discussing similar hardships faced by other South Florida municipalities).

[18] *See* Jones Decl. ¶ 39 (A243) (Boulder); *see* Chang Decl. ¶ 2 (A2-6) (California); Clark Decl. ¶¶ 4-5 (A28-29) (Washington); Klee Decl. ¶ 6 (A60-61) (Connecticut); Pedersen Decl. ¶ 5 (A101-02) (Oregon); Snyder Decl. ¶ 4 (A112-13) (New York); Thornton Decl., ¶¶ 36-37 (A156-57) (Minnesota); Wright Decl., ¶ 6 (A161) (New Hampshire).

reductions from Cross-State Air Pollution Rule from stay granted at litigation's outset). A stay would also disrupt state programs set to coordinate with compliance planning for the Rule.[19]

B. A Stay Could Endanger United States' Ability to Secure International Reductions in Greenhouse Gas Emissions.

A stay of the Rule—a fundamental plank of our country's pledge to cut carbon pollution—could prejudice the United States' ability to convince other countries to implement an international agreement to reduce carbon emissions.[20] The potential for a stay to endanger the United States' interests internationally weighs heavily against granting it. *See Adams v. Vance*, 570 F.2d 950, 957 (D.C. Cir. 1978) (preliminary relief particularly disfavored where it will cause "symbolic impacts" to international relations and "substantially endanger the interests of the United States").

CONCLUSION

For the above reasons, Petitioners' motion for a stay should be denied.

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[19] For example, a stay would hamper California's efforts to integrate the Rule's emission reduction requirements with the State's existing cap-and-trade program for carbon-dioxide emissions. Chang Decl. ¶¶ 28-37 (A18-23); *see also* Winslow Decl. ¶ 22 (A226) (stay would complicate Delaware Public Utility Commission's integrated energy planning efforts); McVay Decl. ¶ 36 (A98-99) (same for RI and pending RGGI program review by all RGGI states).

[20] Jones Decl. ¶¶ 38-39 (A243) & Ex. A (A245-47) (letter from ten cities, including four in petitioning States, opposing a stay). *See* Stern Decl. ¶¶ 11, 18, 20, 31; Albright Decl. ¶¶ 7-12 (B105-07).

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[21] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel hereby represents that the other parties listed in the signature blocks have consented to the filing of this brief.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opposition to Petitioners' Motions for a Stay on Behalf of State, District, City and County Intervenors-Respondents, dated December 8, 2015, complies with the type-volume limitations of Rule 32 of the Federal Rules of Appellate Procedure, this Court's Circuit Rules, and this Court's briefing order issued on November 17, 2015, which limited the briefs for Intervenors in Support of Respondent to a total of 50 pages. I certify that this brief contains 20 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), and that when combined with the word count of the other Intervenors-Respondents, the total does not exceed 50 pages.

/s/ Michael J. Myers
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petitioners' Motions for a Stay on Behalf of State, District, City and County Intervenors-Respondents was filed on December 8, 2015 using the Court's CM/ECF system, and that, therefore, service was accomplished upon all registered counsel of record by the Court's system.

I further certify that a copy of the foregoing document was served by U.S. Mail on the following non-CM/ECF counsel:

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