



Kansas Power Pool support the requested stay. Intervenor-Respondents National Rural Electric Cooperative Association (“NRECA”) and Gas Processors (“GPA”) take no position on this motion. Intervenor-Respondents EnerNOC, Inc., EnergyConnect, Inc., and Innoventive Power, LLC, support the requested stay (with the caveat that they “reserve the right to contest any legal theories expressed in EPA’s motion”), and together with NRECA and GPA have filed a separate motion for a stay of issuance of the mandate.

### **BACKGROUND**

These consolidated petitions for review challenge portions of an EPA rule entitled, “*National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines*,” which was promulgated on January 30, 2013, 78 Fed. Reg. 6674 (Jan. 30, 2013) (“2013 Rule”). The 2013 Rule revises requirements applicable to certain classes of stationary reciprocating internal combustion engines, including revision of a subcategory of “emergency engines” to include reciprocating internal combustion engines that operate for up to 100 hours per year for maintenance checks, readiness testing, emergency demand response, or to address voltage or frequency deviations of greater than five percent

below standard.<sup>1</sup> 40 C.F.R. §§ 63.6640(f)(2)(i)-(iii), 60.4211(f)(2)(i)-(iii) and 60.4243(d)(2)(i)-(iii). The 2013 Rule specifies that emergency engines can be used for emergency demand response only if an Energy Emergency Alert Level 2 has been called under standards developed by the North American Electric Reliability Corporation. *See, e.g.*, 40 C.F.R. § 63.6640(f)(2)(ii).

On May 1, 2015, the Court issued a decision in this case concluding that the provisions containing a 100-hour allowance for emergency demand response were arbitrary and capricious. *See Delaware Dep't of Natural Resources & Env'tl. Control v. EPA ("Delaware")*, 785 F.3d 1, 4–5 (D.C. Cir. 2015). The Court vacated the 100-hour provisions and remanded them to EPA for further action. *See id.* at 18. The Court left in place the remainder of the 2013 Rule. The Court further indicated that if vacatur of these portions of the 2013 Rule would cause “administrative or other difficulties,” EPA or other parties to this proceeding could

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<sup>1</sup> As relevant to this case, the term “emergency demand response” refers to operation of reciprocating internal combustion engines when called upon by electric grid operators to help alleviate demand on the grid. Previously, in 2010, EPA had modified the definition of “emergency engines” to enable certain engines to operate for up to 15 hours of emergency demand response while maintaining their status as emergency engines. *See* 75 Fed. Reg. 9648, 9677 (Mar. 3, 2010); 40 C.F.R. § 63.6640(f)(4) (2010). More specifically, the 2010 Rule had restricted emergency engines to 100 hours of operation per year for maintenance checks and readiness testing, of which 15 hours could be used for emergency demand response if specified authorities have “determined there are emergency conditions that could lead to a potential electrical blackout, such as unusually low frequency, equipment overload, capacity or energy deficiency, or unacceptable voltage level.” 75 Fed. Reg. at 9677.

“file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards.” *Id.* at 18–19 (quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)); *see also* Docket Entry 1550128 (Judgment).

The Court stayed issuance of the mandate until 7 days after disposition of any timely petition for rehearing or rehearing en banc. Docket Entry 1550130. On May 22, the Court granted EPA’s motion for an extension of time until July 15, 2015, to file any petition for rehearing or motion to stay the mandate. Docket Entry 1553910. Simultaneously with this motion for a stay of issuance of the mandate, EPA is filing an unopposed petition for panel rehearing as to the scope of the Court’s vacatur order. EPA’s petition for panel rehearing seeks an amended Opinion and Judgment clarifying that the 100-hour annual allowances for maintenance checks and readiness testing are not vacated.

## ARGUMENT

### **I. A STAY OF ISSUANCE OF THE MANDATE UNTIL MAY 1, 2016, IS APPROPRIATE TO ENSURE ELECTRIC GRID RELIABILITY, TO ALLOW ENGINES A REASONABLE TIME TO INSTALL CONTROLS, AND TO ALLOW EPA TIME TO EVALUATE THE NEED FOR (AND TO PROMULGATE) A LIMITED FOLLOW-UP RULEMAKING.**

Vacatur of the 100-hour per year allowances (i.e., the provisions allowing up to 100 hours per year of emergency demand response operation during a grid operator-declared Energy Emergency Alert Level 2, or during periods when

voltage or frequency deviate by five percent or more below standard, 40 C.F.R. §§ 63.6640(f)(2)(ii)-(iii), 60.4211(f)(2)(ii)-(iii) and 60.4243(d)(2)(ii)-(iii)), means that engines operating for purposes of emergency demand response or to address voltage or frequency deviations no longer qualify as “emergency engines” under EPA’s regulations, absent further action by EPA on remand.<sup>2</sup> EPA respectfully

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<sup>2</sup> EPA does not interpret this Court’s vacatur of the 100-hour provisions within the 2013 Rule to reinstate the provisions within EPA’s prior 2010 regulation (see note 1, *supra*) that had previously allowed up to 15 hours per year of emergency demand response. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (holding that upon vacatur by the Court of an agency rule, “[t]he better course is generally to vacate the new rule without reinstating the old rule,” because “[t]his avoids any problem of the court overstepping its authority, and leaves it to the agency to craft the best replacement for its own rule.”); *but see Croplife Am. v. EPA*, 329 F.3d 876, 884–85 (D.C. Cir. 2003) (holding that “the agency’s previous practice . . . is reinstated and remains in effect unless and until it is replaced by a lawfully promulgated regulation.”). The 2010 15-hour allowance, which was promulgated without notice-and-comment, does not serve as a direct or full replacement for the 2013 Rule’s differently-formulated 100-hour allowance. The 2010 allowance was codified in a different subsection of the regulations that has now been entirely replaced (40 C.F.R. § 63.6640(f)(4) (2010)), and was not included in regulations implementing the New Source Performance Standards. Nor does EPA interpret this Court’s vacatur of the 100-hour provisions to mean that engines may operate for unlimited periods for emergency demand response and still qualify as emergency engines. Although pre-2010 definitions of “emergency engine” did not include any specific allowances for or prohibitions against emergency demand response operation, those earlier EPA rulemakings provided that emergency engines did not include engines “used to supply power to an electric grid *or that supply power as part of a financial arrangement with another entity.*” *See, e.g.,* 71 Fed. Reg. 39,154, 39,180 (July 11, 2006) (New Source Performance Standards for certain stationary compression ignition engines) (emphasis added); 73 Fed. Reg. 3568, 3577 (Jan. 18, 2008) (New Source Performance Standards for certain stationary spark ignition  
*(continued on next page)*

requests a stay of the mandate until May 1, 2016. As set forth below, such a stay is appropriate to ensure electric grid reliability, to allow affected engines a reasonable time to install necessary emission controls, and to allow EPA adequate time to evaluate the need for, and promulgate if appropriate, a follow-up rulemaking on remand.

**A. Electric Grid Reliability Concerns Support A Stay of the Mandate Through at Least August 31, 2015.**

Issuance of the mandate this summer could threaten electric grid reliability. Specifically, it would result in the likely unavailability of many reciprocating internal combustion engines that have already committed to operate if called upon for purposes of emergency demand response. Such engines would be unavailable because they presently lack the emissions controls required for non-emergency engines. A stay of issuance of the mandate through August 31, 2015, would help to facilitate an orderly transition for independent system operators (“ISOs”) and regional transmission organizations (“RTOs”) such as PJM Interconnection, LLC (“PJM”) that are already relying on stationary reciprocating internal combustion engines to be available for emergency demand response.<sup>3</sup> EPA has conferred with

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engines, and National Emission Standards for Hazardous Air Pollutants for certain new and reconstructed engines).

<sup>3</sup> ISOs and RTOs are federally-regulated entities “responsible for ensuring electric reliability within their regions of responsibility.” *Delaware*, 785 F.3d at 11. PJM (continued on next page)

attorneys in the Office of the General Counsel for the Federal Energy Regulatory Commission (“FERC”) regarding the below-described information provided by PJM. *See* Declaration of Melanie King (“King Dec.”) ¶ 21. FERC’s Office of General Counsel has advised EPA that FERC supports a stay through August 31, 2015, to facilitate an orderly transition for ISOs and RTOs. *Id.* ¶ 22.

PJM has informed EPA it currently has 10,600 megawatts of demand response resources committed to be available between June 1, 2015, and May 31, 2016,<sup>4</sup> representing approximately six percent of its total available resources for that period. Exhibit (“Ex.”) H to King Dec. (June 2, 2015 Letter from PJM) at 1. Of that number, PJM estimates that approximately fourteen percent (i.e., approximately 1,500 megawatts) are reciprocating internal combustion engines without the pollutant emission controls required of non-emergency engines. *Id.* PJM has further informed EPA that vacatur of the allowance for emergency

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coordinates the movement of wholesale electricity in all or parts of several Mid-Atlantic and Midwestern states.

<sup>4</sup> Capacity, which “is not electricity itself but the ability to produce it when necessary,” *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009), is procured in PJM through a yearly auction, three years in advance of when it may be needed. As this Court has explained, capacity markets such as PJM’s amount “to a kind of call option that electricity transmitters purchase from . . . generators who can either produce more or consume less when required.” *Id.*

demand response in mid-summer<sup>5</sup> “would cause [it] to lose these demand response resources [i.e., approximately 1,500 megawatts] with no realistic means to replace that capacity in the midst of the summer months.” *Id.* at 2. PJM further stated that it seeks “to avoid significant disruptions or new operating rules during the summer months as this is a period when all resources are needed should we see multiple days of hot weather in our footprint as we have seen in past years.” *Id.* In light of these issues, PJM concluded that issuance of the mandate this summer would be “disruptive,” *id.* at 3, and that “[i]ssuance of the mandate after the summer season and before winter (i.e., September 1-November 30) would allow for a more orderly transition” ahead of the winter portion of its 2015/2016 planning year, *id.* at 2.<sup>6</sup>

In addition, vacatur this summer of the allowances for emergency engines to operate in situations where frequency or voltage deviates by five percent or more from standard may adversely affect local grid reliability in some areas of the country. *See, e.g.*, Ex. I to King Dec. (June 19, 2015 Memorandum from Counsel for American Public Power Association) at 2 (summarizing comments from the

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<sup>5</sup> PJM’s letter refers to vacatur occurring “in the third week in June,” the original deadline for any petitions for rehearing or motions to stay the mandate in this matter. The same considerations would apply to vacatur occurring the third week in July, still mid-summer.

<sup>6</sup> Although PJM also stated in its letter that demand response resources “were helpful to PJM in maintaining reliability during extreme weather events such as the Polar Vortex conditions experienced in the winter of 2014,” Ex. H to King Dec. at 2, its primary focus was on the availability of emergency engines this summer.



Missouri Joint Municipal Electric Utility Commission that upon vacatur, “a number of communities will be in a position where they will watch voltages drop in the summer until the distribution system collapses,” at which point they intend to operate reciprocating internal combustion engines “until their supplier can get the system stabilized”). Moreover, as described below, such local grid reliability concerns would extend beyond just the summer months, warranting an even longer stay.

In sum, electric grid reliability considerations alone support a stay of the issuance of the mandate through at least August 31, 2015. As discussed below, however, a longer stay is warranted in light of additional important considerations (i.e., the time needed for engines to install appropriate controls, and for EPA to consider potential follow-on rulemakings).

**B. A Stay of Issuance of the Mandate Until May 1, 2016, Would Allow Operators of Affected Engines Electing to Install the Controls a Reasonable Amount of Time to Do So.**

While a stay through August 31, 2015, would alleviate near-term threats to electric grid reliability resulting from the Court’s vacatur order, a stay of only that duration would not allow sufficient time for installation of emissions controls on affected engines. *See* King Dec. ¶¶ 11, 19. In light of the Court’s May 1, 2015 decision, operators of engines that are used for purposes of emergency demand response will need to determine whether to install the controls required of non-

emergency engines so as to be able to continue such operation. Operators electing to install controls should be afforded a reasonable time to do so, particularly in view of the fact that operators participating in certain capacity markets have already committed for these engines to be available for such use. As set forth in detail in the attached Declaration of Melanie King, EPA has determined that installation time would vary widely according to a particular engine's location and owner, but in many cases could take up to a year or longer. King Dec. ¶¶ 11–19. For public entities such as municipalities, budget approval processes and other regulatory issues significantly lengthen the time needed to install controls. *Id.* ¶¶ 13–14, 16, 18. To afford engine operators a reasonable amount of time to install controls, EPA requests a stay of issuance of the mandate until May 1, 2016.

A stay until May 1, 2016, would be less than one-third of the time that EPA ordinarily allows for operators of these types of existing sources to come into compliance with newly-promulgated regulations. *See* 42 U.S.C. § 7412(i)(3) (authorizing EPA to establish compliance dates as expeditiously as practicable, but not more than three years after effective date the standard); *see, e.g.*, 75 Fed. Reg. 9648, 9675 (Mar. 3, 2010) (mandating that certain existing engines comply with the newly-promulgated emissions limitations within three years of the regulation's effective date). The allowances for emergency demand response and to address

voltage or frequency deviations have now been in effect for more than two years, and the regulated community has reasonably relied on those provisions.

While the requested stay until May 1, 2016, will not be sufficient to allow operators of engines participating in three-year forward capacity markets such as PJM's to operate without required non-emergency engine controls if called upon during the entire three-year period during which they have already committed to be available, it will allow a reasonable amount of time for those and other operators to install the required controls if they so choose. The requested stay would also allow time for capacity resource markets to adjust to the potential loss of capacity resources represented by engines that choose not to install controls. Thus, EPA believes that it would be a reasonable exercise of the Court's equitable discretion to stay issuance of the mandate until May 1, 2016, to allow operators of affected engines a reasonable time to come into compliance with any newly-applicable requirements and for capacity markets to adjust to the potential loss of demand response resources.

This Court has previously recognized that a stay of the mandate may be appropriate where a transition period is required after existing regulations have been vacated. *Cement Kiln Recycling Coalition*, 255 F.3d at 872; *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998); *see also Natural Res. Defense Council v. EPA*, D.C. Cir. Case No. 98-1379, Docket Entry 1520402 (per

curiam order granting EPA's motion, Docket Entry 1512351 (Sept. 15, 2014), for a six-month stay of mandate to allow time for facilities to come into compliance with Resource Conservation and Recovery Act and Clean Air Act requirements following the Court's vacatur of a regulatory exclusion). Here, delaying issuance of the mandate until May 1, 2016, would allow operators of engines a reasonable period of time within which to install the appropriate emissions controls.

Additionally, EPA does not believe that the requested stay will result in adverse impacts to the environment or public health. King. Dec. ¶ 24. A stay of issuance of the mandate for the requested period would not necessarily mean that any emergency engines would actually operate for emergency demand response or voltage/frequency deviation purposes. While an extension of time would allow for the *potential* operation of these engines if the criteria specified in EPA's regulations at 40 C.F.R. §§ 63.6640(f)(2)(ii)–(iii) are satisfied (i.e., an Energy Emergency Alert Level 2 declared by the grid operator, or when there is a “deviation of voltage or frequency of 5 percent or greater below standard”), any such operation would likely be of very limited duration (i.e., a matter of hours) and limited to specific geographic areas. *See* King Dec. ¶ 24; *see also* Docket Entry 1492405 (EPA Merits Brief) at 19–20 (“[o]n the infrequent occasions when emergency demand response resources are dispatched, it is usually only in specified areas and for relatively short periods of time”). Thus, for the reasons

explained above, EPA believes it is in the public interest for the Court to grant a stay of issuance of the mandate until May 1, 2016.

**C. A Stay of Issuance of the Mandate Until May 1, 2016, Would Allow EPA a Reasonable Time to Evaluate the Need For – and Potentially Promulgate – a Rule Allowing Operation of Emergency Engines to Address Voltage or Frequency Deviations.**

A stay of issuance of the mandate until May 1, 2016, is also warranted to allow EPA a reasonable time to evaluate the need for – and potentially promulgate – a rule allowing operation of emergency engines to address voltage or frequency deviations. The Court’s vacatur of the provisions allowing for operation of emergency engines in circumstances where voltage or frequency deviates five percent or more from standard could adversely impact local grid reliability in certain areas of the country. The requested stay of issuance of the mandate would allow EPA a reasonable time to evaluate the propriety of a rulemaking to reinstate an allowance for that type of operation, and, if warranted, to promulgate such a rule through the notice-and-comment process.<sup>7</sup>

The purpose of the voltage and frequency deviation provisions is to allow for use of emergency engines (particularly those operated by small municipalities or in geographically isolated areas) to stabilize the grid in the event of voltage or

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<sup>7</sup> If the Court denies EPA’s petition for panel rehearing as to the maintenance check and readiness testing provisions at subsections (i) of the regulations, the time needed for EPA to reinstate regulations allowing such operation would serve as an additional ground for the requested stay of issuance of the mandate.

frequency drops, typically caused by severe weather events. *See* Joint Appendix 1929 (Kansas Power Pool Comments, attached hereto as Ex. 1) at 1931–32 (explaining that in remote locations across Kansas, backup engines are the sole resources available to respond to voltage or frequency drops, since “there is no redundancy” in the form of larger or more efficient power plants); Joint Appendix 1453 (American Public Power Association Comments, excerpt attached hereto as Ex. 2) at 1474–77 (“[a]t the distribution system level, a utility is acting to prevent equipment damage when it responds to low voltage conditions”). Petitioners’ capacity market-focused arguments were not addressed to such operation. Nor are the Court’s stated grounds for reversal relevant to such operation. *See Delaware*, 785 F.3d at 13 (describing four capacity market-related issues as grounds for reversal). Leaving in place the voltage and frequency deviation provisions during the requested stay would help to ensure that rural communities and small municipal systems are able to address power quality issues and maintain system reliability during periods of severe grid instability, but will not have any adverse impacts on organized capacity markets.

In a recent letter to EPA, Intervenor-Respondent Kansas Power Pool reiterated that engines operated by its members are used to address unexpected voltage degradation resulting from stress on the grid. Ex. J to King Dec. (June 12, 2015 letter from counsel for Kansas Power Pool) at 2. Kansas Power Pool further

stated in this letter that, if the voltage or frequency deviation provisions were vacated, the unavailability of these engines as resources for local reliability coordinators (due to a lack of the controls needed to operate non-emergency engines) would result in more frequent blackouts in the rural areas served by its members. *Id.* EPA understands that Kansas Power Pool intends to file a separate motion for stay of issuance of the mandate to elaborate on these issues. A stay of issuance of the mandate until May 1, 2016 would allow EPA a reasonable time to evaluate the need for further rulemaking to address these issues, while maintaining the status quo so as not to threaten local grid reliability.

### CONCLUSION

EPA respectfully requests that the Court stay issuance of the mandate until May 1, 2016.

DATED: July 15, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Respondent's Motion for Stay of Mandate was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties who have registered with the Court's CM/ECF system.

Date: July 15, 2015

/s/ Austin D. Saylor  
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