ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

Case No. 15-1363 (and consolidated cases)

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON PETITIONS FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR *AMICI CURIAE* FORMER STATE PUBLIC UTILITY COMMISSIONERS CONGRESSMAN KEVIN CRAMER, DAVID ARMSTRONG, RANDALL BYNUM, CHARLES DAVIDSON, JEFF DAVIS, MARK DAVID GOSS, ROBERT HIX, TERRY JARRETT, LARRY LANDIS, JON MCKINNEY, CARL MILLER, POLLY PAGE, ANTHONY RACHAL III, DR. EDWARD SALMON, JOAN SMITH, JIM SULLIVAN, DAVID WRIGHT AND TOM WRIGHT

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February 23, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

These cases involve the following parties:

Petitioners:

No. 15-1363: State of West Virginia; State of Texas; State of Alabama; State of Arizona Corporation Commission; State of Arkansas; State of Colorado; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; State of New Jersey; State of North Carolina Department of Environmental Quality; State of Ohio; State of South Carolina; State of South Dakota; State of Utah; State of Wisconsin; and State of Wyoming.

No. 15-1364: State of Oklahoma *ex rel*. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma and Oklahoma Department of Environmental Quality.

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

No. 15-1366: Murray Energy Corporation.

No. 15-1367: National Mining Association.

No. 15-1368: American Coalition for Clean Coal Electricity.

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

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

No. 15-1372: CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc.

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

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

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

No. 15-1376: National Rural Electric Cooperative Association; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Electric Power Cooperative, Inc.; Corn Belt Power Cooperative; Dairyland Power Cooperative; Deseret Generation & Transmission Co-operative; East Kentucky Power Cooperative, Inc.; East River Electric Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Georgia Transmission Corporation; Golden Spread

Electrical Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Kansas Electric Power Cooperative, Inc.; Minnkota Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northeast Texas Electric Cooperative, Inc.; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; San Miguel Electric Cooperative, Inc.; Seminole Electric Cooperative, Inc.; South Mississippi Electric Power Association; South Texas Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tex-La Electric Cooperative of Texas, Inc.; Upper Missouri G. & T. Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Western Farmers Electric Cooperative; and Wolverine Power Supply Cooperative, Inc.

No. 15-1377: Westar Energy, Inc.

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

No. 15-1379: National Association of Home Builders ("NAHB").

No. 15-1380: State of North Dakota.

No. 15-1382: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American

Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

No. 15-1383: Association of American Railroads.

No. 15-1386: Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC.

No. 15-1393: Basin Electric Power Cooperative.

No. 15-1398: Energy & Environment Legal Institute.

No. 15-1409: Mississippi Department of Environmental Quality; State of Mississippi; and Mississippi Public Service Commission.

No. 15-1410: International Brotherhood of Electrical Workers, AFL-CIO.

No. 15-1413: Entergy Corporation.

No. 15-1418: LG&E and KU Energy LLC.

No. 15-1422: West Virginia Coal Association.

No. 15-1432: Newmont Nevada Energy Investment, LLC, and Newmont USA Limited.

No. 15-1442: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas.

No. 15-1451: The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company.

No. 15-1459: Indiana Utility Group.

No. 15-1464: Louisiana Public Service Commission.

No. 15-1470: GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC.

No. 15-1472: Prairie State Generating Company, LLC.

No. 15-1474: Minnesota Power (an operating division of ALLETE, Inc.).

No. 15-1475: Denbury Onshore, LLC.

No. 15-1477: Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation.

No. 15-1483: Local Government Coalition for Renewable Energy.

No. 15-1488: Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1364, 15-1365, 15-1367, 15-1368, 15-1370, 15-1373, 15-1374, 15-1375, 15-1376, 15-1380, 15-1383, 15-1398, 15-1410, 15-1418, 15-1442, 15-1472, 15-1474, 15-1475, 15-1483) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1363, 15-1366, 15-1371, 15-1372, 15-1377, 15-1378, 15-1379, 15-1382, 15-1386, 15-1393, 15-1409, 15-1413, 15-1422, 15-1432, 15-1451, 15-1459, 15-1464, 15-1470, 15-1477, 15-1488).

Intervenors and *Amici Curiae*:

Dixon Bros., Inc.; Gulf Coast Lignite Coalition; Joy Global Inc.; Nelson Brothers, Inc.; Norfolk Southern Corp.; Peabody Energy Corp.; and Western Explosive Systems Company are Petitioner-Intervenors.

Advanced Energy Economy; American Lung Association; American Wind Energy Association; Broward County, Florida; Calpine Corporation; Center for Biological Diversity; City of Austin d/b/a Austin Energy; City of Boulder; City of Chicago; City of Los Angeles, by and through its Department of Water and Power; City of New York; City of Philadelphia; City of Seattle, by and through its City Light Department; City of South Miami; Clean Air Council; Clean Wisconsin; Coal River Mountain Watch; Commonwealth of Massachusetts; Commonwealth of Virginia; Conservation Law Foundation; District of Columbia; Environmental Defense Fund; Kanawha Forest Coalition; Keepers of the Mountains Foundation; Mon Valley Clean Air Coalition; National Grid Generation, LLC; Natural Resources Defense Council; New York Power Authority; NextEra Energy, Inc.; Ohio Environmental Council; Ohio Valley Environmental Coalition; Pacific Gas and Electric Company; Sacramento Municipal Utility District; Sierra Club; Solar Energy Industries Association; Southern California Edison Company; State of California by and through Governor Edmund G. Brown, Jr., and the California Air Resources Board, and Attorney General Kamala D. Harris; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota by and through the Minnesota Pollution Control Agency; State of New Hampshire; State of New Mexico; State of New York;

State of Oregon; State of Rhode Island; State of Vermont; State of Washington; and West Virginia Highlands Conservancy are Respondent-Intervenors.

Philip Zoebisch; Pedernales Electric Cooperative, Inc.; Municipal Electric Authority of Georgia; Pacific Legal Foundation; Texas Public Policy Foundation; Morning Star Packing Company; Merit Oil Company; Loggers Association of Northern California; and Norman R. "Skip" Brown are *amici curiae* in support of Petitioners. Southeastern Legal Foundation is a movant *amicus curiae* in support of Petitioners. The 60 Plus Association, the Hispanic Leadership Fund, and the National Black Chamber of Commerce are movant *amici curiae* in support of Petitioners.

Former EPA Administrators William D. Ruckelshaus and William K. Reilly; Institute for Policy Integrity at New York University School of Law; National League of Cities; U.S. Conference of Mayors; Baltimore, MD; Boulder County, CO; Coral Gables, FL; Grand Rapids, MI; Houston, TX; Jersey City, NJ; Los Angeles, CA; Minneapolis, MN; Pinecrest, FL; Portland, OR; Providence, RI; Salt Lake City, UT; San Francisco, CA; West Palm Beach, FL; American Thoracic Society; American Medical Association; American College of Preventive Medicine; American College of Occupational and Environmental Medicine; and the Service Employees International Union are *amici curiae* in support of Respondents. American Sustainable Business Council and South

Carolina Small Business Chamber of Commerce are movant *amici curiae* in support of Respondents.

B. Ruling Under Review

The ruling under review is the final action of respondent EPA published at 80 Fed. Reg. 64,662 (October 23, 2015) (JA__), entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," and also known as the Power Plan.

C. Related Cases

The Power Plan has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the Power Plan have been consolidated in this Court, and counsel is unaware of any other related cases pending before this Court or any other court.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICUS CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), the former state public utility commissioners hereby certify that a separate brief is necessary for their presentation to this Court due to the specialized nature of their distinct interests and expertise. This group of former state public utility commissioners is focusing on the state regulatory and institutional perspective; none of the *amici* of which we are aware will be in a position to address the unique impact of the Power Plan on state regulatory institutions and state regulatory authority.

Accordingly, the former state public utility commissioners, through counsel, certify that filing a joint brief would not be practicable.

/s/ Raymond L. Gifford
Raymond L. Gifford

February 23, 2016

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GLOSSARY

Power Plan	The final rule published in the Federal Register at 80 Fed. Reg. 64,662 (October 23, 2015) (JA__) and titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units"
BSER	The "best system of emission reduction" pursuant to 42 U.S.C. § 7411(a)(1)
DSM	Demand side management
EGU	Electric generating unit
FPA	The Federal Power Act, 16 U.S.C. § 791a *et seq.*
IRP	Integrated Resource Plan
ISO	Independent System Operator
RTO	Regional Transmission Organization
PUC	Public utility commission or public service commission

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE

Amici are former state public utility commissioners, who served at the state level regulating, among other utilities, electric distribution, transmission and generation systems in their respective states, including establishing and enforcing reasonable rates and standards for the sale and delivery of electricity service.[1] These 18 former state public utility commissioners, the states they served in, and their years of service are as follows:

- Congressman Kevin Cramer, North Dakota, 2003-2013
- David Armstrong, Kentucky, 2008-2015
- Randall Bynum, Arkansas, 2003-2007
- Charles Davidson, Florida, 2003-2005
- Jeff Davis, Missouri, 2004-2012
- Mark David Goss, Kentucky, 2004-2008
- Robert Hix, Colorado, 1994-2001
- Terry Jarrett, Missouri, 2007-2013
- Larry Landis, Indiana, 2003-2014
- Jon McKinney, West Virginia, 2005-2015

[1] The Electric Reliability Coordinating Council provided funding for the preparation of this brief. The Electric Reliability Coordinating Council is a broad-based coalition of energy companies committed to the continued viability of diverse, affordable and reliable electric power supply in the United States. No party's counsel authored this brief in whole or in part and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

- Carl Miller, Colorado, 2004-2007
- Polly Page, Colorado, 2000-2008
- Anthony Rachal III, District of Columbia, 2002-2006
- Dr. Edward Salmon, New Jersey, 1991-1996
- Joan Smith, Oregon, 1990-2003
- Jim Sullivan, Alabama, 1993-2008
- David Wright, South Carolina, 2003-2013
- Tom Wright, Kansas, 2007-2014

Amici have been involved in state resource planning processes, either in vertically-integrated or restructured electric markets, and understand the state institutions dedicated to regulating electric utilities. *Amici* are interested in this proceeding because EPA's Power Plan thoroughly reorders the current state institutional apparatus regulating electric utilities, and rewrites the "regulatory compact" that exists between utilities and state regulators. Though *amici* have differing views on the purpose sought by the Power Plan, they all agree that it creates an institutional crisis and mandated reordering of state utility regulation.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Petitioners' Brief.

BACKGROUND/SUMMARY OF ARGUMENT

Lost in the litigation of EPA's Power Plan is its permanent and irreversible impact on state regulators and state institutions. The Power Plan traduces state utility regulation, the FPA, current state institutional arrangements, and the regulatory compact. The expansiveness of the "system" EPA deems regulable under the Power Plan eliminates the authority of state institutions. This includes where to regulate utilities, how to regulate utilities, and when to regulate utilities. All of these state institutional prerogatives, and the attendant exercise of states' historic police powers, become subordinate to the Power Plan's requirement that state air regulators, with EPA behind them, control the electric generation mix and the dispatch of that generation mix within any given state. EPA's use of subcategory performance standards does not mitigate these institutional impacts, as the Power Plan's subcategory performance standards are the product of a nationwide, system-wide resource planning exercise. Rather, EPA's Power Plan nullifies the regulatory compact, long held as the basis by which utilities and regulators keep faith, and more important, the electricity flowing. The only historic role left to state utility regulators is to present customers with the bill for the Power Plan's implementation.

ARGUMENT

I. EPA'S POWER PLAN IS PREMISED UPON A NOVEL INTERPRETATION OF THE "BEST SYSTEM OF EMISSION REDUCTION" UNDER SECTION 111(A)(1) AND SECTION 111(D) OF THE CLEAN AIR ACT AND HAS FAR-REACHING IMPLICATIONS.

EPA's Power Plan rests upon an unprecedented interpretation of the statutory term "system" that purports to allow EPA to regulate the entire electric system. *See*, 80 Fed. Reg. 64,725-64,726 (Oct. 23, 2015) (JA__). From the time Clean Air Act Section 111 was enacted until EPA announced its Power Plan, "system" has always been defined, and known by all, as a "technological system" to reduce pollutants at an individual facility.[2] "System" was never intended to mean employing technology beyond the facility, and certainly not the entire electric system of the United States. Further, it has never been interpreted so broadly as to trigger a reordering of state law and institutions involved in electric resource planning at the state level.

EPA's "focus on the machine as a whole - that is, the overall source category - by shifting generation from dirtier to cleaner sources in addition to emission

[2] Before issuing the Power Plan, EPA had published valid emission guidelines under section 111(d) for five source categories, all of which were based on technologies located at the facility. 41 Fed. Reg. 19585 (May 12, 1976) (guidelines for phosphate fertilizer plants based on "spray cross-flow packed scrubbers"); 41 Fed. Reg. 48706 (Nov. 4, 1976 (guidelines for sulfuric acid production units based on "fiber mist eliminators"); 43 Fed. Reg. 7597 (Feb. 23, 1978) (guidelines for kraft pulp mills based on various process controls and two-stage black liquor oxidation system); 45 Fed. Reg. 26294 (April 17, 1980) (guidelines for primary aluminum plants based on "effective collection of emissions followed by efficient fluoride removal by dry scrubbers or by wet scrubbers"); 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996) (guidelines for municipal solid waste landfills based on "(1) a well-designed and well-operated gas collection system and (2) a control device capable of reducing NMOC in the collected gas by 98 weight-percent").

reduction approaches that focus on improving the emission rates of individual sources" --sets aside a century's worth of jurisdictional distinctions between state and federal authorities in the generation and distribution of electricity and obviates traditional and well-established state authority over electric resource planning. *Id.* Through the novel expansion of the term "system," and by extension the statutory BSER, EPA fundamentally reorders the traditional federal-state division in the power sector. Further, EPA upends state institutions dealing with electricity, mandating rearrangement of the electricity resource planning function to air regulators and away from state agencies such as PUCs, which are charged with that role under state law. Accordingly, the Power Plan is unlawful because it is not authorized by the Clean Air Act, is contrary to the FPA, and asserts jurisdiction over matters of traditional state and local concern by overriding the regulatory compact.

II. EPA'S POWER PLAN IS CONTRARY TO THE FPA.

Under the FPA, electric generation is a state matter while unbundled transmission and wholesale markets are federal matters. Specifically, "[the FPA] authorizes the [FERC] to regulate 'the sale of electricity energy at wholesale in interstate commerce,' including both wholesale electricity rates and any rule or practice 'affecting' such rates." *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. _____, at 1 (Jan. 25, 2016). This authority includes

approving the rates, terms and conditions of unbundled electric transmission and wholesale electric sales by public utilities, and FERC enjoys exclusive jurisdiction over these areas under Parts II and III of the FPA. 16 U.S.C. §§ 824, 824d, and 824e (2016). However, under the FPA, "[j]urisdiction over this sale and delivery of electricity is split between the federal government and the states on the basis of the type of service being provided and the nature of the energy sale …. States retain jurisdiction over retail sales of electricity and over local distribution facilities." *Niagara Mohawk Power Corp. v. Fed. Energy Regulatory Comm'n*, 452 F.3d 822, 824 (D.C. Cir. 2006).

A. Relevant Background on Regulatory Models and Energy Markets.

Like the FPA, the regulatory models used in the U.S. split at the wholesale and retail level. The wholesale market has areas with organized centralized markets and areas featuring bilateral transactions. Bilateral transactions involve transactions between two parties directly, through brokers, or through an established exchange. *See* FERC, Energy Primer: A Handbook of Energy Market Basics, at 56 (Nov. 2015) (Energy Primer). Organized centralized markets, on the other hand, are bid-based and accepted bids are dispatched by the market operator. *Id.* at 40. These markets break down as follows:

> [B]ilateral transactions prevail in the Southeast, most of the Southwest, parts of the Midwest and the West, excluding California. Under this regime, utilities engage in wholesale physical power

> transactions through bilateral arrangements ranging from standardized contract packages, to customized, complex contracts known as structured transactions. This is characterized as a component of the traditionally regulated model. A centralized market model is the norm in the Northeast, Mid-Atlantic, much of the Midwest, the Electric Reliability Council of Texas … and California. In these markets participants bid/offer resources into a centralized market and are paid a uniform clearing price.

Electric Markets Research Foundation, Evolution of the Electric Industry Structure in the U.S. and Resulting Issues, (Oct. 8, 2013) (EMRF Study). The retail level similarly splits into two models depending upon whether all necessary services are provided by a single provider or whether energy generation and transmission are, or can be, provided by different entities. These two models for delivering power to retail customers are described as follows:

> The traditional model is the Vertically Integrated Utility, where various services are 'bundled,' meaning that all energy and energy delivery (transmission and distribution) services, as well as ancillary and retail services, are provided by one entity. Customers do not have the option of selecting another provider for any of these services, and the utility's charges are set entirely by the regulatory authority or governing body in the case of public power. In contrast, under the retail choice model, customer choice has been partially or fully implemented. In this model, customers may often select their energy provider, and the utility will deliver the power. Non-utility energy providers can set their own pricing for power, but the utility's charges for delivery and related services are set by the regulatory authority.

Id. Building on this background, there are two general types of states from a state utility regulation perspective: (1) vertically integrated states (sometimes known as traditionally regulated markets) and (2) restructured states (sometimes known as

market-regulated markets). Energy Primer, at 56. A vertically-integrated utility owns the generation, transmission, and distribution systems to provide power to its customers. *Id.* at 50. Accordingly, vertically-integrated pricing is cost-based, "meaning that the utility is allowed to charge prices that will recover prudent operating costs and provide an opportunity to earn a reasonable rate of return on the property devoted to the business."[3] EMRF Study, at iii. In restructured states, where the generation, transmission and distribution functions are "unbundled" or separated, "the customer choice feature of the retail choice model limits the operation of the regulated utility to the transmission and distribution functions, where traditional cost-based pricing is implemented and approved by regulators. Generation services are provided either by competitive service providers or through a default 'provider of last resort.'" *Id.* at iv.

The regulatory framework is different in these respective states. Vertically-integrated states feature the regulation of investor-owned utilities by PUCs, generally through IRPs or equivalent processes. In IRP processes, PUCs evaluate resource acquisition portfolios and consider, among other things, whether the energy future contemplated in the portfolio is in the public interest and satisfies applicable state law criteria. Investor-owned utilities "are subject to state

[3] The traditional "regulatory compact" underlying the investment of utilities in these services, the review of these investments by PUCs, and ultimate the recovery of costs and a reasonable rate of return is discussed in Section IV.

regulation as to their duties to customers, system requirements, financing arrangements, and retail rates." *Id.* at viii. Municipal and rural electric cooperative utilities, by contrast, are often "self-regulating" and autonomously determine their resource portfolios, with exceptions. In states that are all- or partially-restructured, ISOs or RTOs help govern the electric system. However, generation in ISOs and RTOs is not subject to traditional IRP processes and can be owned by merchant generators or utilities. Examples include the Electric Reliability Council of Texas, the Midcontinent ISO in the Midwestern U.S., and the California ISO.

B. EPA's Unprecedented Interpretation of the Term "System" Supersedes the Statutory Structure of the FPA.

Consistent with the discussion above, energy markets have developed consistent with the "zone of exclusive state jurisdiction" established by the FPA. *Elec. Power Supply Ass'n*, 577 U.S._____, at 3. States have jurisdiction over the siting and construction of generation and transmission facilities, with the exception of hydroelectric generation and siting "backstop" authority. *See, e.g.*, *Californians for Renewable Energy Inc. v. California Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,072, at P 10 (2006). PUCs have traditionally exercised the power reserved to the states under the FPA's split jurisdiction with regard to the sale and delivery of electricity. EPA's unprecedented interpretation of the term "system" transforms Clean Air Act Section 111 into a statute that obviates this established

split and usurps authority traditionally reserved to FERC and the states. As discussed below, EPA becomes the nation's electric resource planner, dictating the make-up of the generation and dispatch of the electric system through its review and approval of state plans submitted pursuant to the Power Plan or imposition of full or partial federal plans.

III. THE POWER PLAN OVERRIDES AUTHORITY THAT HAS TRADITIONALLY BELONGED TO STATE PUCS.

The unprecedented breadth of EPA's assertion of regulatory authority under the Clean Air Act over the entire electric grid will require comprehensive and permanent changes to traditional state regulatory authorities over the electricity sector.[4] While states have chosen different models from a utility regulation perspective, they share at least one common thread: EPA's Power Plan reorders and changes the state institutions involved in electric generation and dispatch under every regulatory model in use today.

A. The Power Plan's Effects on Vertically-Integrated States.

Modern IRPs in vertically-integrated states look at issues that go well beyond a utility's self-build generation plans. Investor-owned utilities present

[4] Indeed, EPA requires that state plans demonstrate the statutory restructuring necessary to implement the Power Plan. *See, e.g.*, 80 Fed. Reg. 64,946 (to be codified at 60 C.F.R. § 60.5745(a)(9)) (JA__) ("Your plan submittal must adequately demonstrate that your State has the legal authority *(e.g., through regulations or legislation)* and funding to implement and enforce each component of the State plan submittal, including federally enforceable emission standards for affected EGUs, and State measures as applicable." (emphasis added).

estimates to PUCs for future load, customer growth, gas and coal prices, cost of renewables, resource margins, and other data to support proposed IRPs. In addition to any self-build proposals, these plans involve power purchases from independent power producers, compliance with renewable energy portfolio standards, and incorporation of DSM programs.[5] Typically, state policy goals or mandates such as renewable energy penetration and DSM programs are overlaid onto a lowest cost resource portfolio approach. The PUC determines the lowest cost resource portfolio that also satisfies any state renewable energy adoption or DSM goals or mandates.

EPA's basis for setting the BSER is indistinguishable from the modern IRP process. Only Building Block 1, addressing heat rate improvements at EGUs, is source-based. Building Block 2 (increased natural gas utilization) and Building Block 3 (significantly increased renewable energy deployment) assume that utilities can meet certain "outside-the-fence," or outside the source, metrics. These metrics were used to derive the subcategory performance standards, and by extension the state-specific rate-based and mass-based performance goals, and

[5] DSM programs seek to modify customer behavior, and in turn decrease power demand and usage, though the use of financial rewards and education, among other approaches. DSM requirements may be statutory or may be voluntary programs proposed by utilities and approved, as appropriate, by PUCs.

EPA justifies these rates and goals as "achievable" and "demonstrated" based on their implementation.[6]

Indeed, EPA surveyed IRPs and incorporated the actions observed in these IRPs into its BSER analysis. *See, e.g.*, 80 Fed. Reg. 64,725; 80 Fed. Reg. 64,795 (JA). The Preamble for the Power Plan provides:

> [T]he study of utility IRPs placed in the docket for this rulemaking shows that sources are able to replace coal-fired generation with natural-gas fired generation and add incremental amounts of RE [renewable energy] (as well as take other actions, such as implement demand-side EE programs), on a gradual basis, after a several-year lead time, over an extended period, as provided for under the final rule.

80 Fed. Reg. 64,744 (JA). Carbon resource planning superintended by EPA supplants state integrated resource planning under the authority of a PUC. EPA's BSER, therefore, is the outgrowth of a national resource planning exercise that

[6] EPA might claim that the Power Plan is consistent with a state's preference for least-cost dispatch (*i.e.*, the deployment of lowest cost resources to serve load) because of potential carbon trading programs that states may adopt as a compliance pathway. The carbon trading option, however, comes after the EPA has already dictated the resource planning outcome through its carbon budget methodology. EPA's Power Plan sets each state's carbon budget through Building Blocks 1, 2, and 3. EPA assumed a state could shift from its coal plants' generation to 75 percent net summer capacity of its natural gas plants (Building Block 2). Further, looking to historic renewable capacity additions during 2010-2014, EPA selected the *maximum* change in capacity for each renewable resource type that occurred in any year over the five-year period, and adds this maximum capacity change year-over-year from 2024 through 2030 (Building Block 3). The accumulation of the Building Blocks' carbon reductions are nothing more and nothing less than a resource plan, a foreordained conclusion about what a state's resource mix can be. Unlike a trading market in which cost is the main driver, EPA's Power Plan assumes future generation by historic maximums that may have little to do with cost. Indeed, EPA used the anomalous year, 2012, to predict future growth of wind power, even though the wind production tax credit would expire in 2013, causing a developer rush to install wind before the end of 2012. Thus, EPA's trading option comes into play only *after* EPA assigned what it deigned to be the natural gas and renewable energy capacity additions that should be added in each state. As such, the Power Plan displaces the state prerogative of least cost planning – and the state's planning function itself – in favor of EPA's system planning.

usurps the jurisdiction of PUCs and well-established IRP processes. EPA conducted a resource planning exercise, premised upon its study of IRPs across the country, and then converted the nationwide resource planning results into subcategory performance standards for affected units. As EPA recognizes, its performance rates and goals cannot be met without reliance on grid-wide measures. *See, e.g.*, 80 Fed. Reg. 64,728 (JA__) ("[M]ost of the CO_2 controls need to come in the form of those other measures…that involve, in one form or another, replacement of higher emitting [coal or gas-fired] generation with lower- or zero-emitting generation.") The Power Plan, therefore, is a national carbon resource plan cloaked as an air quality rule.

The effect on PUCs in vertically-integrated states is total – hardly a surprise given that EPA has taken over the resource planning function. Traditional state regulatory aims of least cost or lowest cost resource planning will need to be replaced with the resource planning prerogatives of EPA's Power Plan. Every resource plan is a 'Carbon IRP,' where compliance with any state plan or federal plan approved or developed by EPA drives the resource planning process – not an analysis of the lowest cost portfolio of resources. This usurpation of state authority interferes with the states' and PUCs' exercise of historic police powers to regulate utilities. As noted by commentators, the Power Plan "directly intrudes upon the historic authority and abilities of the states to exercise their historic police powers,

especially with respect to all aspects of resource planning and how states oversee and regulate utility decisions on what the best mix of resources (including demand side measures) might be to prudently serve customers." William S. Scherman & Jason J. Fleischer, *The Environmental Protection Agency and the Clean Power Plan: A Paradigm Shift in Energy Regulation Away from Energy Regulators*, 36 Energy Law Journal 355, 383 (2015). Indeed, the mere specter of the Power Plan itself has intruded on the exercise of states' resource planning authority by affecting the outcomes of state resource planning proceedings already. Some examples include:

- *Driving tepid and temporary public interest findings.* The Idaho PUC approved an application to retrofit coal-fired EGUs noting that this action was necessary to continue providing reliable power. Expressing concern that "the future of coal is uncertain" and "[a]dditional future [federal] environmental regulations are likely," however, the Idaho PUC found that "[i]t is not inconceivable that, during the installation of the SCRs [*i.e.*, emission controls], a tipping point could be reached making them uneconomic." The Idaho PUC found this project to be in the public interest, but qualified the finding as based on "the facts as they exist today." Idaho Power, Approval for Retrofits Necessary for Environmental Compliance, Order No. 32929 (December 2, 2013).

- *Denying acquisition of coal-fired power plants.* Addressing a request from Appalachian Power Company to approve the acquisition of two coal-fired power plants, the Virginia State Corporation Commission noted:

> . . . [W]e find that the risks attendant to acquiring both facilities are too great given the uncertainty regarding future regulation of carbon dioxide emissions at the federal level. Indeed, a recent Presidential Memorandum directed the EPA to "issue proposed carbon pollution standards, regulations, or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2014."

Application of Appalachian Power Company, For approval of transactions to acquire interests in the Amos and Mitchell generation plants and to merge with Wheeling Power Company, Case No. PUE-2012-00141, 2013 S.C.C. Ann. Rept. 341, Order (July 31, 2013). The Virginia State Corporation Commission determined that risks of future carbon regulation at one of the facilities were already born by ratepayers, but denied acquisition of the other facility which it determined introduced this new risk to ratepayers.

- *Driving approval of renewable resources.* Addressing a proposal from MidAmerican Energy Company, the Iowa Utilities Board issued an order providing in part:

> Wind brings environmental compliance benefits at a price that cannot yet be obtained from other renewable sources at a utility scale. Wind X might be necessary for MidAmerican to meet the carbon dioxide requirements of [Section] 111(d) of the Clean Air Act. Also, because wind is an emissions free resource Wind

> X should mean that MidAmerican will have fewer long term compliance issues.

MidAmerican Energy Company, Order Approving Settlement with Modification and Requiring Reports, Docket No. RPU-2015-0002 (Aug. 21, 2015). The Power Plan therefore provided outsized influence in the decision, flowing from the overlay of a potential national resource plan on the proceeding.

- *Limiting deployment of DSM programs.* The Virginia State Corporation Commission denied Dominion Virginia Power's requested approval of five-year DSM programs based on EPA's pending Power Plan:

> We find that it is neither necessary, nor in the public interest, to approve these [demand side management] programs for five years. The cost-effectiveness of these programs should be evaluated with actual implementation data before being extended beyond three years. In addition, the emission guidelines proposed by the Environmental Protection Agency pursuant to Section 111(d) of the Clean Air Act create additional uncertainty relevant to these programs. For example, these DSM programs could be an essential component of meeting the Section 111(d) regulations and, as a result, the costs of these programs would be Section 111(d) compliance costs. Significant questions remain, however, as to when Dominion will incur Section 111(d) compliance costs and, when incurred, whether the Company would recover those costs through existing base rates or would seek to recover them through rate increases …. This uncertainty further supports limiting program approval at this time to three years.

Dominion Virginia Power, Approval to Implement New Demand-Side Management Programs, Case No. PUE-2014-00071 (Apr. 24, 2015).

- *Creating resource planning uncertainty and instability.* In a proceeding regarding the acquisition of a coal-fired EGU by Kentucky Power Company, the Kentucky Public Service Commission approved the acquisition but noted the assumption of risk by the utility given the Power Plan. The order provided in part:

> Kentucky Power explicitly recognizes the right of the Commission or any parties to challenge the company's rates on the grounds that they are unreasonable due to the Mitchell Station's no longer being the least-cost generation resource due to environmental requirements relating to greenhouse gas emission regulation; Kentucky Power explicitly recognizes the Commission's authority to retire for ratemaking purposes the company's interest in the Mitchell Station in such an event; and Kentucky Power will recover its remaining investment in the Mitchell Station over a period determined by the Commission at a debt-only return.

Kentucky Power Company, Approval to Purchase Coal Power Plant to Replace Power Plant Closing Due to Environmental Regulations, Case No. 2012-00578 (Oct. 7, 2013). Accordingly, while the acquisition was approved, the approval could one day be revisited if Power Plan compliance demanded retirement of the facility. Said another way, EPA's resource plan for Kentucky under the Power Plan trumps the finding made by the Kentucky Public Service Commission.

These are only some examples illustrating the Power Plan's override of state IRP authority across the country.

B. The Power Plan's Effects on Restructured States.

Restructured states are also severely impacted by EPA's resource planning process that is reflected in the Power Plan. FERC's Energy Primer describes the development of the markets in these states:

> While the industry had historically traded electricity through bilateral transactions and power pool agreements, Order No. 888 promoted the concept of independent system operators (ISO). Along with facilitating open-access to transmission, an ISO would operate the transmission system independently of, and foster competition for electricity generation among, wholesale market participants. Several groups of transmission owners formed ISOs, some from existing power pools. Close on the heels of Order No. 888, the Commission, in Order No. 2000, encouraged utilities to join regional transmission organizations (RTO) which, like an ISO, would operate the transmission systems and develop innovative procedures to manage transmission equitably. The Commission's proceedings in Orders Nos. 888 and 2000, *along with the efforts of the states* and the industry, led to the voluntary organization of ISOs and RTOs. Each of the ISOs and RTOs subsequently developed a full scale energy and ancillary service market in which buyers and sellers could bid for or offer generation. The ISOs and RTOs used the bid-based markets to determine economic dispatch.

Energy Primer, at 46 (emphasis added). As FERC points out, participation in these market organizations is voluntary. FERC has no authority to mandate any utility to join. As FERC also points out, it was the states that authorized their utilities to participate in these bid-based markets where electricity costs would be determined by economic dispatch, or lowest cost, rather than by set cost-based rates. To do this, the states chose to enact comprehensive statutory regimes to restructure their

historic regulatory model, unbundle services, eliminate anti-competitive barriers to new market entrants, and provide for the recovery of stranded assets, which typically included substantial revenue and financial measures. The states went through this cumbersome process because they believed these ISOs and RTOs would utilize economic dispatch to operate the markets according to economic values important to those states, namely optimized use of units and minimized real-time costs. The Power Plan short-circuits states' self-determination over the values by which units generate electricity within their borders to instead dictate how those units operate based on EPA's values. No matter how this is imposed upon states, the result is unworkably complex and undermines historic state jurisdiction over electricity policy.

EPA's Power Plan standards could be satisfied by reordering the established dispatch protocol of a restructured state's market to force a change from the historic use of economic dispatch to environmental dispatch. "Environmental dispatch is a policy in which the system operator explicitly considers environmental criteria (primarily air pollution emissions) when making dispatch decisions, even if the environmental impacts do not lead to an actual regulatory compliance cost." National Association of Clean Air Agencies, Implementing EPA's Clean Power Plan: A Menu of Options, at ES-7 (May 2015).

With environmental dispatch, speaking strictly in the carbon context, the RTO seeks to identify an optimal generation schedule that achieves appropriate power balance, satisfies unit operating limits, and minimizes both fuel cost and carbon emissions. However, commentators have identified concerns with this approach. Professor William Hogan, regarded as "the chief architect of wholesale electric market design in the United States," is one of them. John A. Bewick, *Bill Hogan, Unbundled*, Fortnightly Magazine (Nov. 2012). Professor Hogan states:

> While [environmental dispatch] could be done mechanically, there would be no prices in the settlement system to correspond to the actual costs of operation. Perhaps the RTO could work around this with a two-stage dispatch and pricing mechanism where the first stage minimizes carbon emissions and the second stage imposes the resulting emissions as the cap for the dispatch and minimizes total costs. Of course, this would then determine an implicit carbon price that would be included in the settlements system. But now the revenues would accrue to the RTO and not carbon emission permit holders. It is difficult to imagine where this leads, but it is hard to see the electricity market design surviving in this environment. This approach is consistent with one possible reading of the CPP, and EPA offers no discussion of why this would be a problem.

Professor William W. Hogan, Harvard University, *Electricity Markets and the Clean Power Plan*, at 23 (Sept. 21, 2015). Therefore, restructured states are effectively left with two options: (1) overhaul the dispatch protocols to allow for environmental dispatch, as opposed to economic dispatch, or (2) return to traditional market regulation (*i.e.*, vertical re-integration). Either approach necessarily reintroduces a central planning aspect to generation because allowable

facilities must now be approved through the regulatory process and portfolios must be balanced by each state. Further, the first approach tramples on FERC authority under the FPA, and the second approach is equally problematic by forcing states into a particular market structure. This latter result completely overrides a traditional area of state authority and discretion about whether to be a restructured or vertically integrated state.

Alternatively, states could create carbon emissions trading markets, and include those costs in the generation bids submitted into a state's restructured market. But, it will be these trading markets that will effectively determine the generation that can be bid into the ISO/RTO markets, and not the ISO/RTO markets themselves. Thus, the rule infringes on the states' decision about how electricity is to be supplied to meet the demands of their citizens. In addition, electricity would be supplied and distributed according to not one, but two markets – which will almost certainly conflict – one based on economics and the other on carbon. This will introduce complexity and uncertainty into what is already a technically complex system.

C. The Power Plan's Effects on Municipal Utilities and Electric Cooperatives.

The Power Plan's upending and displacement of traditional state and local authority is perhaps most pronounced with regard to municipal utilities and electric cooperatives (including generation and transmission associations that have electric

cooperatives as members). These entities, in many instances, are "self-governing" and not subject to the rate regulation and resource planning requirements that govern investor-owned utilities. EPA's Power Plan sets this traditional self-governance aside by imposing subcategory performance standards, derived from the national resource planning process, on these entities.

Colorado exemplifies the regulatory takeover of municipal utilities and electric cooperatives effectuated by the Power Plan. The Colorado PUC has varying degrees of regulatory authority over different types of utilities. With respect to rate-regulated utilities, the Colorado PUC has ratemaking authority, resource planning authority, and facilities jurisdiction, *i.e.*, approval authority over major construction such as transmission lines and generating facilities. Colo. Rev. Stat. § 40-5-101 *et. seq.* (2016). Colorado PUC authority over cooperatives is more limited as Colorado law provides that "cooperative electric associations which are owned by the member-consumers they serve are regulated by the member-consumers themselves acting through an elected governing body." Colo. Rev. Stat. § 40-9.5-101.

First, the agency lacks ratemaking authority over these entities because cooperatives in Colorado have voted to exempt themselves from Colorado PUC regulation pursuant to Colorado law. *See* Colo. Rev. Stat. §§ 40-9.5-103 to -104. Second, with regard to resource planning, the sole generation and transmission

association is only required "to file its [IRP] with the Commission as a report rather than filing it for approval." Decision No. C10-0101, Colorado PUC Docket No. 09I-041E, at ¶ 16 (mailed Feb. 4, 2010). Further, the exempt cooperatives are not subject to the resource planning jurisdiction of the Colorado PUC and do not need to file resource plans for approval. And finally, the Colorado PUC does not have resource planning or any other regulatory authority over municipal utilities. Colo. Constitution, Art. V, § 35; *Town of Holyoke v. Smith*, 75 Colo. 286 (Colo. 1924); *City of Lamar v. Town of Wiley*, 80 Colo. 18 (Colo. 1926). All of this is very different than the process for investor-owned utilities, in which resource plans are fully-litigated before the Colorado PUC.

The Power Plan sets this entire regulatory structure aside in Colorado and other states. The state air regulator, or EPA in the case of a federal plan, develops a resource plan for these formerly self-regulating entities based on the nationwide IRP survey and derived BSER. *See, e.g.*, 80 Fed. Reg. 64,744 (JA__). Indeed, the breadth of the Power Plan demands that state air regulators exercise full resource planning authority over all utilities that own generation, notwithstanding the history of self-regulation at the state level. The Power Plan is also demonstrably different from a more traditional Clean Air Act rule imposed *at affected sources* owned by municipal utilities and electric cooperatives, because the BSER is determined on a system-wide basis through EPA's "focus on the machine as a

whole ….” 80 Fed. Reg. 64,725-64,726 (JA__). This latter point, coupled with the IRP survey, illustrates the result of the rule for self-regulating municipal utilities and electric cooperatives: Their system-wide resource planning activities are fully regulated by state air regulators, or EPA, acting under the auspices of EPA’s Power Plan.[7]

IV. THE POWER PLAN ASSERTS JURISDICTION OVER MATTERS OF TRADITIONAL STATE AND LOCAL CONCERN BY OVERRIDING THE REGULATORY COMPACT.

EPA’s Power Plan overrides the balance between state and federal powers by interfering with and obviating state authority to regulate electric resource planning and the retail electricity market. As discussed above, the Power Plan dictates the resource choices made by states and upsets the clear balance contemplated by the FPA. EPA takes over traditional state authorities and upends the jurisdictional split set forth in the FPA and recognized by this Court.

Recent comments by the North Dakota Public Service Commission submitted to the North Dakota Department of Health summarize the permanent and irreversible impacts of the Power Plan on state authority:

[7] Further, the “cooperative federalism” structure of the Clean Air Act means that each state has to notionally undertake a carbon resource plan as if the state is a stand-alone carbon emitting “system.” This carbon resource plan, by necessity, has to ignore the multi-state nature of certain utilities, and is indifferent to the type or market structure of the electric utilities in a state. The vertical integration of a state’s carbon emitting “system” erases all state law distinctions between types of and regulatory structure toward electric utilities.

> The Clean Power Plan … requires North Dakota to address not only the emitting sources (coal-fueled power plants), but also extends beyond the boundary of a stationary source and incorporates non-emitting sources (e.g., wind and solar generation) and redispatching power to lower emitting units. The [Power Plan] also requires North Dakota to take into account reliability of the electrical system when developing North Dakota's plans, which has never occurred with any other air pollution control rule. The redispatch of power, protecting the reliability of the electrical system, and accounting for wind or solar generation have never before been federal compliance requirements when implementing an EPA rule. … The "regulatory compact" is a long-standing principle that grants monopoly service to bring efficiency to capital intensive industries. However, this principle also requires clear regulatory oversight in place of competition to protect customers. The Commission ensures that utility companies do not necessarily take the easiest path at the expense of North Dakota ratepayers. The [Power Plan] strips the Commission of authority to do so. The Federal Power Act gives North Dakota exclusive authority to regulate our retail electricity market. The [Power Plan] represents an unprecedented preemption of the sovereign authority and discretion held by the Commission.

North Dakota Public Service Commission, Comments on the development of a state plan related to EPA's Clean Power Plan, at 1-4 (Dec. 17, 2015). These comments should not be confused with political opposition to EPA's Power Plan; rather, they represent concerns and objections to the transformation effected by the Power Plan in its displacement of the traditional regulatory compact.

The Regulatory Assistance Project describes the "regulatory compact" as follows: "[T]he utility accepts an obligation to serve in return for the government's promise to set rates that will compensate it fully for the costs it incurs to meet that obligation." Regulatory Assistance Project, Electricity Regulation in the U.S.: A

Guide, at § 2.4, p. 5 (Mar. 2011); *see also* EMRF Study, at 5-6. Similarly, the Indiana Supreme Court states:

> The bedrock principle behind utility regulation is the so-called "regulatory compact," which arises out of a "bargain" struck between the utilities and the state. As a *quid pro quo* for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer. At the same time, the utility is not permitted to charge rates at the level which its status as a monopolist could command in a free market. Rather, the utility is allowed to earn a "fair rate of return" on its "rate base."

United States Gypsum, Inc. v. Ind. Gas Co., 735 N.E.2d 790, 797 (Ind. 2000). In vertically integrated or traditional markets, reliable baseload generation has traditionally and continues to be built under this "regulatory compact" whereby PUCs allow the recovery of capital costs necessary to finance the planning, construction, operation and maintenance of the electric system to be spread out in regulated and approved rates recovered incrementally from ratepayers over a long period of time. Further, when elected officials have decided to change laws in electricity markets to create centralized, bid-in markets, provisions were made for the recovery of these "stranded costs." States enacted fairly complicated and carefully negotiated laws to provide mechanisms for such recovery in a way not to overly burden the ratepayer, protect investors, and provide for certainty in the future operation of a newly established regime. EPA admits its Power Plan will cause increased ratepayer costs and the loss of "stranded" assets, but EPA leaves it

up to the states to figure out what to do about it. EPA, Overview of the Clean Power Plan: Cutting Carbon Pollution from Power Plants, (Aug. 3, 2015).

Moreover, to further exemplify the North Dakota Public Service Commission's point that EPA's Power Plan strips its ratemaking authority, recall that rates are cost-based in a vertically integrated state, "meaning that the utility is allowed to charge prices that will recover prudent operating costs and provide an opportunity to earn a reasonable rate of return on the property devoted to the business." EMRF Study, at iii. But the costs that a utility incurs are no longer dictated by its obligation to serve customers under the Power Plan. Costs are derived by determining the costs necessary to meet the carbon emission targets while still managing to meet customer demand. This does away with the "bedrock principle behind utility regulation," *i.e.*, the regulatory compact, in its entirety as "utilities will no longer be making resource planning decisions subject to traditional economic prudence reviews. Instead, the [Power Plan's] mandates will determine what mix of generation resources a utility must deploy, regardless of whether such decisions are prudent under traditional notions of state prudence reviews." Scherman & Fleischer, at 372.

As appropriately identified by the North Dakota Public Service Commission, the Power Plan – not the obligation to serve based on customer needs at the lowest possible cost – dictates the resources on the system and the attendant costs.

Therefore, EPA's Power Plan vitiates the lawful "regulatory compact" by stepping into the shoes of the North Dakota Public Service Commission – and every other PUC in every state in the country. Undeniably, PUCs do retain a sole, ministerial function: These regulators get to present the bill to ratepayers for costs incurred to satisfy EPA's Power Plan.

CONCLUSION

EPA's Power Plan does not represent an instance of a federal agency overstepping its authority and infringing upon state policy; it represents a federal agency obviating an established statutory regime under the FPA and completely usurping the authority of both the federal agency and state PUCs. The Power Plan thus emerges as an EPA "power grab" that accomplishes the trifecta of obviating traditional regulatory doctrines, wholly usurping traditional state jurisdiction, and overriding the FPA and the regulatory compact within a single administrative rule. For that reason, it cannot stand.

For the reasons stated herein and in the Petitioners' Brief, the Court should grant the petitions for review, vacate EPA's Power Plan, and remand to EPA for proceedings consistent with the Court's findings.

Respectfully submitted,

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February 23, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e)(2)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of D.C. Cir. R. 32(e)(3) and Fed. R. App. P. 29(d) because this brief contains 6,908 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1). This certification is made in reliance on the word count function of the word processing system used to prepare this brief (Microsoft Word 2010).

Further, I certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Raymond L. Gifford

February 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Raymond L. Gifford*