ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1363

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

STATE OF WEST VIRGINIA,
STATE OF TEXAS, *et al.*

Petitioners,
v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency,

Respondents.

On Petition for Review of a Final Action of the
United States Environmental Protection Agency

STATE PETITIONERS' MOTION FOR STAY AND FOR EXPEDITED CONSIDERATION OF PETITION FOR REVIEW

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CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to D.C. Circuit Rule 18, Petitioners state as follows:

Parties and Amici:

Petitioners include the States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan. Respondents include the United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency. There are no intervenors or amici at this time.

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GLOSSARY

Act (or CAA)	Clean Air Act
BSER	Best system of emission reduction
EPA	United States Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
MWh	Megawatt hour
Power Plan	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

This Court should issue a stay, and expedite consideration of the Petition For Review,[1] because the States are being immediately and irreparably harmed by EPA's illegal effort to force States to reorder their electrical generation systems.[2]

This case involves an unprecedented, unlawful attempt by an environmental regulator to reorganize the nation's energy grid. Relying on a rarely used section of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), EPA has adopted a final rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Power Plan"), that will "transfor[m] . . . the domestic energy industry."[3] The Power Plan rests on EPA's claim that it may disfavor and phase out certain kinds of energy generation, and force the States to reorganize how they produce, transmit, and consume electricity. But as an environmental regulator, EPA has vastly overstepped its authority by seeking to pick winners and losers in the energy field, and then requiring the States to take part in this unlawful regime. Further, EPA lacks expertise in regulating the energy grid, an area that is primarily the responsibility of the States and, to a more limited extent, the Federal Energy Regulatory Commission ("FERC").

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[1] The States respectfully request an expedited briefing schedule that would allow oral argument to take place in Spring 2016, before the end of this Court's term.

[2] On August 5 and 20, 2015, several of the States filed applications with EPA asking for an immediate stay of the Rule, under 5 U.S.C. § 705. EPA informed some States that the agency would not be granting the relief requested. On September 9, 2015, this Court denied several States' petition under the All Writs Act for a stay before publication of the Power Plan in the Federal Register. No. 15-1277, ECF 1572185. The States have informed EPA's counsel by telephone about the present motion.

[3] White House Factsheet, Exh. B at 1.

In addition to exceeding its authority, EPA is imposing immediate and irreparable harms upon the States. In the Power Plan, EPA set a timeline intended to force the States and other entities to make irreversible decisions before judicial review concludes. Less than eleven months remain for States to draft and submit either a State Plan or a detailed request for an extension. Even with an extension, State Plans are due just two years later. To meet these deadlines, each State must begin taking *immediate* steps to determine whether and how it will: reorganize its electrical generation, transmission, and distribution system; decommission coal generation; mandate the use of natural gas generation while imposing strict carbon dioxide emissions limits on that generation; adopt a cap-and-trade regime; radically increase investment in new renewable energy plants; and establish backup generation. This will involve significant legislative and regulatory changes, and massive taxpayer expenditures that can never be recouped. Without a stay, when the Power Plan is vacated as unlawful, EPA will be able to boast that "the majority of [States and] power plants are already in compliance or well on their way to compliance,"[4] just as it did after recently losing in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

[4] https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

BACKGROUND

I. Statutory Overview

In 1970, Congress enacted Section 111 of the CAA, entitled "standards of performance for new stationary sources." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 111, 84 Stat. 1676, 1683. The primary focus of Section 111 is the regulation of emissions from "new stationary sources." *Id.* EPA has employed this authority "for more than 70 source categories and subcategories . . . [including] fossil fuel-fired boilers, incinerators, sulfuric acid plants . . . ." 73 Fed. Reg. 44,354, 44,486-87 nn.239 & 242 (July 30, 2008). Each of these regulations of new sources involves a technology-forcing provision, which requires new stationary sources to adopt "adequately demonstrated" pollution-control technologies. 42 U.S.C. § 7411.

Section 111(d) provides a significantly more limited program for State-based regulation of emissions from *existing* sources. If various preconditions are met, EPA may require States to establish "standards of performance" for existing sources. 42 U.S.C. § 7411(d)(1)(B). A standard of performance for an air pollutant from an individual source must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1). EPA has lawfully invoked Section 111(d) only five times, and just once in the last 25 years. 80 Fed. Reg. at 64,703.

Section 111(d) strictly circumscribes EPA's authority by prohibiting EPA from enacting standards for "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." 42 U.S.C. § 7411(d)(1)(A) (hereinafter "Section 112 Exclusion"). The Exclusion reflects the significant changes Congress made in 1990 to expand Section 112, a frequently used program under which EPA establishes standards for "hazardous" pollutant emissions from a particular source category. Congress decided in 1990 that if EPA regulates an existing source under the newly expanded Section 112 program, "any air pollutant" emitted from that source may not be regulated under Section 111(d)'s state-by-state standards.

II. The Final Power Plan

Signed by the Administrator on August 3, 2015, and published on October 23, 2015, the Power Plan has three features that are relevant for this stay motion.

First, the Power Plan establishes carbon dioxide emission levels for each State based upon three so-called "building blocks": (1) altering coal-fired power plants to increase efficiency; (2) substituting natural gas combined cycle generation for generation from coal; and (3) substituting generation from low or zero-carbon energy generation, such as wind and solar, for generation from fossil fuels. 80 Fed. Reg. at 64,745. Blocks 2 and 3 do not directly regulate *emissions*. Rather, they substitute for the energy lost by reducing *generation* from sources that EPA disfavors. EPA erroneously asserts that this reorganizing of the mix of electric generation across the nation constitutes the statutory "best system of emission reduction" ("BSER"), 42

U.S.C. § 7411(a)(1), claiming that the agency has the authority to "shift[] generation from dirtier to cleaner sources." 80 Fed. Reg. at 64,726.

Second, EPA argues that it can regulate power plants under Section 111(d), even though those plants are regulated under Section 112. The Section 112 Exclusion prohibits EPA from regulating a source category under Section 111(d) where that source category is already "regulated under [Section 112]." § 7411(d)(1)(A). Abandoning its position of the last 20 years, EPA now claims that "the phrase 'regulated under section 112' refers only to the regulation of [] emissions [of pollutants actually regulated under Section 112]." 80 Fed. Reg. at 64,714. And because EPA has not (yet) decided to regulate carbon dioxide under Section 112, EPA asserts that it may impose carbon dioxide limitations under Section 111(d) on power plants notwithstanding its Section 112 regulation of those same plants. *Id.*

Third, EPA requires States to comply with the Power Plan on an aggressive schedule. A State Plan or detailed request for extension is due by September 2016. Even with an extension, a State Plan must be submitted by September 2018. 80 Fed. Reg. at 64,669. According to EPA, the hard deadlines are meant "to assure that states begin to address the urgent needs for reductions quickly." 80 Fed. Reg. at 64,675. As outlined below, complying with these deadlines will disrupt sovereign functions, require massive expenditures of State time and resources, and irreparably harm the States' power and renewable energy programs.

ARGUMENT

All four traditional factors favor a stay, which is appropriate "to preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006). The States are likely to prevail on the merits, they will be irreparably harmed if relief is withheld, no others are likely to suffer substantial harm if relief is granted, and the public interest favors a stay. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

I. Petitioners Are Likely To Prevail On The Merits.

A. Section 111(d) Does Not Authorize EPA To Force The States To Restructure The Electrical Grid.

1. EPA has exceeded its authority under Section 111(d), especially in light of the clear-statement rule set forth in *UARG v. EPA*, 134 S. Ct. 2427 (2014). In *UARG*, the Supreme Court rejected an expansive EPA regulation of carbon dioxide emissions, holding that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Id.* at 2444 (citation omitted). Congress, the Court explained, is expected to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). EPA now claims to have found in Section 111(d), a long-extant provision, the power to transform the nation's energy grid. But the text of Section 111(d) does not begin to

suggest that EPA may make such "decisions of vast economic and political significance," much less "clearly" authorize it to do so.

Section 111(d) limits EPA to requiring States—if certain prerequisites are met—to establish "standards of performance for any existing source" that reflect emission reductions through improvements to a source's performance. 42 U.S.C. § 7411(d)(1)(A). A "standard of performance" must be "appl[icable] . . . to a[] particular source," *id.* § 7411(d)(1)(B), and set forth "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction," *id.* § 7411(a)(1). By its plain terms, Section 111(d) concerns the reduction of emissions by improving a source's "performance" through measures that can be "appli[ed]" to the source. Section 111(d) is thus simply one of the CAA's many requirements for the adoption of "pollution control devices," *Union Elec. Co v. EPA*, 427 U.S. 246, 257 (1976), or other measures that "hold the industry to a standard of improved design and operational advances," *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981).

The Power Plan far exceeds the authority Congress granted to EPA under Section 111(d). The Plan's building blocks 2 and 3 are not measures that can be applied to an individual source's "performance." Rather than imposing "improved design and operational advances" on the source at issue, the Plan imposes measures that favor renewable generation *as substitutes for* fossil-fuel-fired energy. 80 Fed. Reg. at 64,745. The Plan goes well beyond improving efficiency at individual existing

power plants; it attempts to regulate each State's energy generation mix. That is why the emission targets EPA claims are achievable for *existing* power plants are more restrictive than EPA's *new* power plant targets, which are based on technologies applied at each plant. *Compare* 80 Fed. Reg. at 64,707 (1,305 lb CO_2/MWh), *with* 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015) (1,400 lb CO_2/MWh); 80 Fed. Reg. at 64,707 (771 lb CO_2/MWh), *with* 80 Fed. Reg. at 64,513 (1,000 lb CO_2/MWh).

To justify its novel, unauthorized approach, EPA argues that Section 111(d) empowers the agency to set emissions targets based on any measures achievable by a source's "owners and operators," including those measures that "shift[] generation from dirtier to cleaner sources" within the "complex machine" energy grid. 80 Fed. Reg. at 64,726, 64,767-68. But EPA's argument cannot be squared with either the text of Section 111(d) or *UARG*. Section 111(d) provides EPA with authority to regulate emissions only by applying pollution control technology or operational and design advances that improve a source's "performance." 42 U.S.C. § 7411(d)(1)(B). It does not permit EPA to regulate the electric grid as a "complex machine," favor certain methods of energy generation as allegedly "cleaner," or premise emission reductions on the notion that the owners of a source of emissions can pay their "cleaner" competitors to take their customers. 80 Fed. Reg. at 64,726, 64,767-68. Indeed, on EPA's reasoning, the agency could mandate that States require all coal-fired power plants to close, if the power grid could produce sufficient substitute electricity from

sources designated by EPA as "cleaner." 80 Fed. Reg. at 64,726. That is not a "standard of performance," but one of non-performance.

At a minimum, it is hardly "clear[]" from the text of Section 111(d) that Congress intended that rarely-used provision to transform EPA from an environmental regulator into the nation's most powerful central planner, making "decisions of vast economic and political significance." *UARG*, 134 S. Ct. at 2444 (quotations omitted). Under EPA's view, it has authority under Section 111(d) to pick winners and losers not only among different sources of electricity generation, but "any" existing stationary source categories, 42 U.S.C. § 7411(d). EPA cannot show the clear statement required under *UARG* for such a capacious assertion of authority.

EPA's repeated claim that its interpretation has historical support in Congress's authorization of a cap-and-trade regime for sulfur-dioxide emissions under Title IV of the CAA, *see* 80 Fed. Reg. at 64,665, 64,734, 64,761, 64,770-71, 64,778, only underscores the Power Plan's illegality and illustrates the manner in which the agency has sought to evade the legislative process. Congress understood that it was necessary to enact the detailed Title IV regime precisely because such a regime must come from a "clear" congressional directive. *UARG*, 134 S. Ct. at 2444. Here, in contrast, Congress rejected the present Administration's effort to pass Title IV-like cap-and-trade authority over carbon dioxide emissions from fossil fuel-fired power plants. *See* Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009). Under EPA's

reading of Section 111(d), the Administration's efforts to seek congressional authorization for a carbon dioxide cap-and-trade regime were entirely unnecessary.

2. The Power Plan's illegality is reinforced by the statutory canons that an agency is afforded no deference when it seeks to invade "areas traditionally regulated by the States," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), or asserts power where it lacks "expertise," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

The authority and expertise to regulate the electrical grid lies primarily with the States and, to a more limited degree, with FERC. States' power over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized this State authority in the Federal Power Act ("FPA"), which respects the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The FPA confines federal jurisdiction over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," and it assigns that limited authority to FERC, not EPA. 16 U.S.C. § 824(a).

EPA's view of Section 111(d) runs roughshod over States' sovereign rights, while asserting EPA authority over an area in which the agency *has admitted it lacks expertise.* By setting emission targets premised on disfavoring coal and reordering of

electricity generation for intrastate use, the Power Plan encroaches on the States' authority to independently assess the intrastate "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas*, 461 U.S. at 205; *see also* Lloyd Decl. ¶¶ 9-93; Nowak Decl. ¶ 7; McClanahan Decl. ¶¶ 5, 11; Bracht Decl. ¶ 13. In addition, EPA supports its reading of Section 111(d) with the agency's understanding of the electrical grid as a "complex machine." 80 Fed. Reg. at 64,725. But EPA has no "expertise" as to the functioning of this grid, *King*, 135 S. Ct. at 2489, as the agency itself has acknowledged. *See* Melanie King, EPA Office of Air Energy Strategies Division, Response to Public Comments in Dkt. EPA-HQ-OAR-2008-0708, at 50 (Jan. 14, 2013) ("The issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities for setting standards under the CAA.").

In sum, Congress did not delegate to EPA the authority to regulate the electric grid, and any claim by EPA to deference in interpreting Section 111(d) to reach such a result, *see* 80 Fed. Reg. at 64,768, is contrary to controlling caselaw.

B. The Section 112 Exclusion Prohibits The Power Plan.

The Section 112 Exclusion prohibits EPA from regulating under Section 111(d) "any air pollutant" emitted from a "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i). As EPA has repeatedly admitted, starting with the Clinton Administration and continuing to the proposed version of the Power Plan itself, this text in the U.S. Code means what it says: EPA may not

require States to regulate a source category under Section 111(d) when EPA already regulates that source category under Section 112.[5] Or, as the Supreme Court has explained, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated . . . under [Section 112]." *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011).

Under EPA's own longstanding reading of the text in the U.S. Code, the Exclusion is an independent and outright bar on the Power Plan. EPA states that it has issued the Power Plan as a regulation of fossil fueled electric generation under Section 111(d). 80 Fed. Reg. at 64,662. But given that such power plants are extensively regulated under Section 112, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012), the Exclusion forecloses EPA from invoking Section 111(d) to doubly regulate those same plants. This Court should strike down the Plan for violating the Exclusion, just as it did the last time EPA attempted to regulate power plants under Section 111(d). *See New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008).[6]

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[5] *See, e.g.*, EPA 2014 Legal Memo at 26; Brief of EPA, *New Jersey v. EPA*, No. 05-1097, 2007 WL 2155494 (D.C. Cir. July 23, 2007); 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004); EPA, Air Emissions from Municipal Solid Waste Landfills, Pub. No. EPA-453/R-94-021, 1-5, 1-6 (1995) ("1995 EPA Landfill Memo").

[6] This Court's forthcoming decision on remand from *Michigan v. EPA*, 135 S. Ct. 2699 (2015), reviewing EPA's Section 112 regulation of power plants, has no impact on the present challenge because agency action can be upheld only on the "grounds upon which [EPA] itself based its action." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

In an effort to escape this result, EPA has abandoned its longstanding interpretation of the statutory text and adopted a new, impermissible interpretation of the Exclusion's phrase "regulated under [Section 112]." EPA now argues that the Exclusion "only exclud[es] the regulation of [] emissions under CAA section 111(d) [that are actually regulated under Section 112] and only when th[e] source category [at issue] is regulated under CAA section 112." 80 Fed. Reg. at 64,714. This is indefensible. EPA would rewrite the plain terms of the prohibition against Section 111(d) regulation of any "source category which is regulated under Section 112" into a prohibition against Section 111(d) regulation of any "source category which is regulated under [Section 112], *where the air pollutant is a hazardous air pollutant actually regulated under Section 112*." EPA has no authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

EPA's argument that its rewrite is necessary to avoid a regulatory "gap" is based on an understanding of the CAA that predates the substantial amendments to that statute in 1990. 80 Fed. Reg. at 64,711 (discussing the 1970 CAA). That year, Congress enacted the present Exclusion and also vastly expanded the scope of Section 112, such that EPA has never identified any pollutant that could be covered under Section 111(d) but not the post-1990 version of Section 112—including carbon dioxide. *See* 73 Fed. Reg. 44,354, 44,493-95 (July 30, 2008) (EPA concluding that carbon dioxide falls under both the Section 111 and Section 112 definitions of "air pollutants"). Notably, EPA has used Section 111(d) for only two regulations since

1990, and both regulations were consistent with the Exclusion's plain terms, as they appear in the U.S. Code. In the first, EPA sought to regulate power plants under Section 111(d) only after the agency attempted to deregulate those power plants under Section 112. *See New Jersey*, 517 F.3d at 583-84. In the second, the agency explained that the Exclusion did not apply because the source category was not "actually being regulated under section 112." 1995 EPA Landfill Memo, at 1-6.

Finally, EPA's new approach confirms the States' argument that EPA's alternative, "two versions" approach to the Exclusion lacks merit. Once EPA's primary attempt to escape the Exclusion, the "two versions" approach relied upon the fact that the 1990 Statutes at Large included two amendments to the Exclusion—one clerical, one substantive. EPA 2014 Legal Memo at 23.[7] The clerical amendment made a "conforming" edit to the pre-1990 Exclusion, updating a cross-reference in light of other revisions to the CAA in 1990. Pub. L. No. 101-549, § 302(a), 104 Stat. 2399 (1990). The substantive amendment revised the scope of the Exclusion entirely, and in the process eliminated the cross-reference updated by the clerical amendment. Pub. L. No. 101-549, § 108(g), 104 Stat. 2399 (1990). Having been rendered moot by the substantive amendment, the clerical amendment was excluded from the U.S. Code, under uniform practice. *See* Revisor's Note, 42 U.S.C. § 7411. But EPA took the remarkable position that the obsolete clerical amendment created a version-in-

[7] http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

exile of the Exclusion—retaining the pre-1990 scope of the Exclusion—that produced an ambiguity EPA was entitled to resolve. EPA 2014 Legal Memo at 23.

In response to the States' criticism, this position is now relegated to a footnote. 80 Fed. Reg. at 64,714 n.294. Notably, EPA points to no case or decision by any court or agency giving meaning to such a clerical error, and has no response to the dozens of examples uniformly treating such errors as irrelevant. *See* Letter of 17 States, EPA-HQ-OAR-2013-0602-25433, at *5-6 (posted Dec. 15, 2014). As this Court has made clear, these routine errors, which are common in modern, complex legislation, do not create any statutory "ambiguity." *See Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013). In fact, that is the view the Clinton EPA took just five years after the 1990 Amendments. 1995 EPA Landfill Memo at 1-5.

II. The States Will Suffer Irreparable Injury Absent A Stay.

Absent an immediate stay, the Power Plan will impose immense sovereign and financial harms upon the States, on a scale exceeding any environmental regulations the States have ever faced. Gross Decl. ¶ 3; Stevens Decl. ¶ 8; Martin Decl. ¶ 8.

A. The Power Plan will inflict upon the States significant sovereign harms, which are irreparable as a matter of law. *See New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). The Power Plan will require the States immediately to debate, design, and enact significant legislative and regulatory changes to programs

governing intra-state electricity markets. For example, many States will need to enact legislation in the next 1 to 2 years to ensure the growth in renewable energy sources and natural gas that will be needed to be in place by 2022 to enable compliance with the Power Plan's stringent targets. Lloyd Decl. ¶¶ 78-81; Nowak Decl. ¶ 17; Bracht Decl. ¶ 12; McClanahan Decl. ¶ 11; Martin Decl. ¶ 8. States will also need to amend innumerable rules, including those that might prevent their state public utility commissions from mitigating the Plan's negative market and energy reliability impacts. Lloyd Decl. ¶¶ 88-93; Bracht Decl. ¶¶ 12-13; Nowak Decl. ¶¶ 7, 16; Hodanbosi Decl. ¶¶ 5, 8; McClanahan Decl. ¶ 4; Hyde Decl. ¶ 35; Hays Decl. ¶¶ 5, 9.

This will undermine the States' sovereign choices. The changes will displace the policies States have carefully crafted over decades concerning the regulation of electrical utilities and questions of need, reliability, and cost. Lloyd Decl. ¶¶ 31-46, 87. Once made, many of these changes will be "impossible" to reverse. Lloyd Decl. ¶ 47; McClanahan Decl. ¶ 11; Nowak Decl. ¶ 12; Bracht Decl. ¶¶ 11, 14; Mroz Decl. ¶¶ 3, 8. The time spent by legislators and state agencies to satisfy EPA's unlawful mandate will limit the finite time that they can devote to their own sovereign priorities, a problem exacerbated by the fact that many state legislatures sit briefly every year or every other year. Lloyd Decl. ¶¶ 39, 75, 80; Parfitt Decl. ¶ 10; Easterly Decl. ¶ 9.

B. The Power Plan will also require massive and immediate efforts by State energy and environmental regulators, imposing irreparable financial harms upon the States. *See Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 543 F.2d 356, 358 (D.C. Cir.

1976); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). These efforts will cost the States tens of thousands of unrecoverable hours and millions of unrefundable dollars. *See, e.g.*, Durham Decl. ¶ 6 (7,100 hours of 9 senior staff members); McClanahan Decl. ¶ 6 ($500,000 to $1 million on consultants alone); Gore Decl. ¶ 6 ($760,000 per year).

Just a few examples of State regulators' responsibilities under the Power Plan illustrate the point. To design State Plans that shift the States' energy grids away from coal-fired generation, States will need to conduct interagency analyses and then consult with stakeholders to determine what changes can plausibly be made to increase natural gas and add renewable energy generation. Nowak Decl. ¶¶ 4-13; McClanahan ¶¶ 4-10; Martin Decl. ¶¶ 8-9. This process will include an assessment of the forms of energy available to the State, whether developing more new energy sources is feasible, and what changes to state law would be required. Bracht Decl. ¶¶ 2, 8, 10, 12; McClanahan Decl. ¶¶ 5, 7-8; Hodanbosi Decl. ¶ 5; Gore Decl. ¶¶ 5-6; Lloyd Decl. ¶¶ 47-48, 82-87; Martin Decl. ¶ 8. States will then need to undertake to change state laws and regulations governing their electricity markets. Gustafson Decl. ¶ 15. And since the Power Plan contemplates interstate regimes, States will need to engage in time-consuming interstate consultation. Lloyd Decl. ¶¶ 85-86; Bracht Decl. ¶ 14; Stevens Decl. ¶ 10; Macy ¶ 5; McClanahan Decl. ¶ 14.

C. Critically, the regulatory and statutory steps that the States will need to take must begin "immediately." Hyde Decl. ¶ 10; Lloyd Decl. ¶¶ 86, 93; Stevens Decl. ¶¶ 5-10; Thomas Decl. ¶ 7; Bracht Decl. ¶¶ 7-8. As EPA explained, the Plan's submission deadlines—the first in September 2016, and the last in September 2018—are based on EPA's view of "the need to begin promptly what will be a lengthy effort to implement the requirements of" the Rule. 80 Fed. Reg. at 64,855.

By September 2016, the States must submit their Plans or seek extensions by: (1) identifying the State Plans that are "under consideration"; (2) providing an "appropriate explanation" for the extension; and (3) describing how they have provided for "meaningful engagement" with the public. 80 Fed. Reg. at 64,856. Even the steps for an extension requires immediate and substantial expenditures, as deciding between the Rule's various options—outlined in *500 pages*, 80 Fed. Reg. at 64,826-64,914—involves a massive effort by each State, as described in the States' declarations. Hyde Decl. ¶ 9; Stevens Decl. ¶¶ 5-10; McClanahan Decl. ¶¶ 4-10; Bracht Decl. ¶¶ 2, 7-8, 12; Spencer Decl. ¶ 4; Nowak Decl. ¶¶ 4-13; Hodanbosi Decl. ¶¶ 5-6; Gore Decl. ¶¶ 5-6; Martin Decl. ¶ 8. Awaiting completion of this litigation to begin these efforts will likely result in the States missing the September 2016 deadline, which would permit EPA to impose its own Federal Plan, taking over those States' sovereign functions over their own energy grids. 80 Fed. Reg. at 64,856-57.

Moreover, States that intend to seek an extension until September 2018 cannot simply do the work required for the extension and then await completion of this

litigation to continue work on their Plans. The Rule is the most complex rule the States have faced, requiring some States 3 to 5 years to finish their State Plans. Gross Decl. ¶ 3; Stevens Decl. ¶ 8. Given that the massive changes required by the Rule can take years, States will need to act well before the end of this litigation if they have any hope of meeting the September 2018 deadline. Lloyd Decl. ¶ 86; Hyde Decl. ¶¶ 9, 20, 22; Martin Decl. ¶ 7. Notably, the Rule requires States to submit an "update" to EPA by September 2017, describing "the type of approach it will take in the final plan submittal and to draft legislation or regulations for this approach." 80 Fed. Reg. at 64,859. Crafting such legislation and regulations is a complex endeavor, which will divert sovereign resources. States cannot wait until litigation is completed to begin these time-consuming tasks. Lloyd Decl. ¶ 93; Hyde Decl. ¶ 31; Martin Decl. ¶ 7, 8.

III. The Balance Of Harms And The Public Interest Strongly Favor A Stay.

As the Sixth Circuit recently explained in staying another far-reaching EPA rule, "the sheer breadth of the ripple effects caused by the Rule[] . . . counsels strongly in favor of maintaining the status quo for the time being." *In re EPA*, Nos. 15-3799/3822/3853/3887, -- F.3d --, --, 2015 WL 5893814, at *3 (6th Cir. Oct. 9, 2015). EPA designed the Power Plan to have massive, immediate "ripple effects" throughout the energy economy, including forcing significant early retirement of coal-fired power plants as early as 2016. *See* Energy Ventures Analysis, "Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry," at 16, 66-68 (Sept.

2015).[8] These retirements will reduce the supply of one of the most reliable sources of energy, resulting in higher energy prices, threatened blackouts during periods of increased demand, and lost jobs. Lloyd Decl. ¶¶ 31, 33, 41-46. A stay would "silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing [while] honor[ing] the policy of cooperative federalism." *In re EPA*, 2015 WL 5893814, at *3. If the Plan's massive obligations are to be imposed upon the States and their citizens, while fundamentally changing the CAA's "cooperative federalism" regime, *id.*, this should occur only after this Court has had a full opportunity to review the Plan.

Nor is there any persuasive reason to deny the stay. EPA has repeatedly missed its own deadlines for issuing the Power Plan, indicating that no harm will occur from a delay in the implementation of just one of the Administration's cascade of carbon-dioxide-focused rules. *See* No. 14-1146, ECF 1540020, JA 3 (EPA committing to sign final Power Plan by May 26, *2012*). In any event, given that the Power Plan is illegal, there is no legally cognizable interest in compliance with the Plan's deadlines. *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58-59 (D.C. Cir. 1977).

CONCLUSION

The States respectfully request that the Motion for Stay and for Expedited Consideration of the Petition for Review be granted.

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[8] http://www.nma.org/pdf/EVA-Report-Final.pdf

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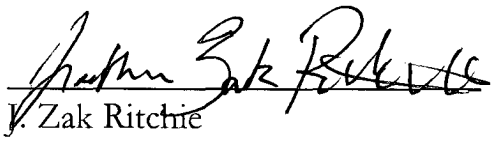
CERTIFICATE OF COMPLIANCE

This motion complies with Federal Rule of Appellate Procedure 21(d) because it does not exceed 20 pages, excluding the parts of the motion exempted by 21(d). This motion also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond.



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CERTIFICATE OF SERVICE

I certify that on this October 23, 2015, a copy of the foregoing *State Petitioners' Motion To Stay And For Expedited Consideration* was transmitted by email on each the following with their consent:

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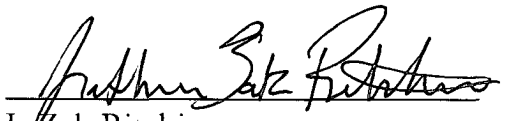

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