

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

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15-1363  
(and consolidated cases)

**PETITIONERS' NONBINDING STATEMENT OF  
THE ISSUES TO BE RAISED**

Pursuant to this Court's order dated November 30, 2015, *see* ECF 1585786, Petitioners in lead case No. 15-1363 and consolidated case No. 15-1409 submit the following nonbinding statement of issues to be raised in this proceeding reviewing the final rule of the United States Environmental Protection Agency (EPA) entitled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"):

**Core Legal Issues**

1. Whether the Rule, which regulates existing power plants under CAA § 111(d), 42 U.S.C. § 7411(d), is unlawful because EPA has regulated the same power plants under CAA § 112, 42 U.S.C. § 7412.

2. Whether EPA has the authority to force States to transform their energy economies to favor only certain sources of electricity, under the guise of regulating power plants under CAA § 111(d), 42 U.S.C. § 7411(d).
3. Whether EPA's authority is limited to promulgating regulations to establish a "procedure" under which States submit implementation plans in which the States establish "standards of performance" for existing sources under CAA § 111(d), 42 U.S.C. § 7411(d)(1).
4. Whether EPA's threat that it will seize control over the States' energy economies if they do not submit state plans violates the States' rights under the Tenth Amendment and the Federal Power Act, 16 U.S.C. § 824(a).

#### **Programmatic or Record-Based Issues**

1. Whether the Rule is unlawful because it is not a logical outgrowth of the proposed rule.
2. Whether the Rule's exclusion of certain categories of sources of zero emission energy and sources of energy efficiency from the special incentives created under the Clean Energy Incentive Program is unlawful.
3. Whether the Rule allowing cap and trade as a compliance option for meeting a "performance standard" is unlawful.

4. Whether the Rule requiring State Plans to regulate new, existing, or modified sources through means which include leakage provisions, set asides, and new source complements is unlawful.
5. Whether the Rule allowing States that choose a mass-based compliance plan to adopt a “state measures approach” and denying this option to States that choose a rate-based compliance plan is unlawful.
6. Whether the Rule’s limitations on trading between rate-based and mass-based States are unlawful.
7. Whether the Rule is unlawful and violates due process because fundamental elements critical to the Rule are uncertain or unknown, including technical issues relating to emission rate credits (ERCs), or are currently non-final agency action, including the model trading rules and the federal plan
8. Whether the Rule’s treatment of existing nuclear energy sources in Arkansas, particularly EPA’s refusal to provide clean energy credit for Entergy’s Arkansas Nuclear One power plant, is unlawful.
9. Whether EPA’s failure to consider Florida’s unique peninsular geography and the fact that only two States border Florida, thus limiting Florida’s power transfer opportunities, is unlawful.
10. Whether EPA’s failure to allow Florida to receive credit for decreases in emissions already achieved is unlawful.

11. Whether EPA's assumptions regarding the extent of renewable generation that could be developed in Florida and used to offset emissions from fossil fuel sources without accounting for intricacies and constraints on purchasing renewable energy under Florida law is unlawful.
12. Whether the Rule's failure to provide a method to account meaningfully for over three billion dollars in stranded investments made by Kansas utilities to install criteria pollutant control equipment on power plants in that State, is unlawful.
13. Whether the Rule's failure to provide compliance credit or emission rate credits for New Jersey's pre-2013, multi-billion dollar ratepayer investments in renewable energy, energy efficiency, and nuclear construction and uprates is unlawful.
14. Whether EPA has the authority to require New Jersey, an energy deregulated State that has chosen to eliminate the traditional retail monopoly structure which electric public utilities had previously held in this State for electric power generation and supply services, to enact a new legislative scheme so that New Jersey can exercise the authority over electric generation facilities that is required to comply with the Clean Power Plan.
15. Whether the Rule's failure to significantly account for the cost of achieving emissions reductions in New Jersey is unlawful.

16. Whether the Rule's effect of severely limiting fuel diversity in New Jersey, thereby presenting significant reliability and cost concerns, especially during bouts of extreme weather, is unlawful.
17. Whether the Rule unlawfully threatens the reliability of electric supply in the South Dakota because the only coal-fired power plant and the only natural gas-fired power plant in the State lack common ownership, have different regional transmission operators, and do not share a common customer base.
18. Whether the Rule unlawfully forces Texas to redesign the Electric Reliability Council of Texas ("ERCOT"), which is the only Independent System Operator in the continental United States that operates an electricity market that is wholly contained within one State and is not synchronously interconnected with the rest of the country, and which has otherwise been a vibrant and extremely successful competitive wholesale and retail electricity market for Texas.
19. Whether Texas is being unlawfully punished by the Rule as a first mover in the area of wind energy because, under the Rule, none of the renewable energy installed prior to January 6, 2013 (or capacity upgrades to existing renewable energy completed prior to that date) can be used by generators or the State to demonstrate compliance with the Rule.

20. Whether the Rule unlawfully applied a 4.3% heat rate improvement to Wisconsin steam power plants.
21. Whether the Rule unlawfully failed to consider biomass energy in developing the Wisconsin emission standard.
22. Whether EPA unlawfully failed to consider the impact of the Rule throughout Wyoming on the greater sage grouse and other sensitive species.

Dated: December 18, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this December 18, 2015, a copy of the foregoing *Petitioners' Nonbinding Statement Of The Issues To Be Raised* was served electronically through the Court's CM/ECF system on all registered counsel.

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