

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OKLAHOMA,
ex rel. E. Scott Pruitt, in his official
capacity as Attorney General of
Oklahoma; OKLAHOMA
DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Petitioners,

v.

ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

No. 15-1364

(consolidated under No. 15-1363)

Petitioners' Nonbinding Statement of Issues To Be Raised

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Pursuant to this Court's Order of November 30, 2015, the State of Oklahoma and the Oklahoma Department of Environmental Quality, petitioners in No. 15-1364 (collectively, "Oklahoma"), submit this Nonbinding Statement of Issues To Be Raised in this proceeding to review the final action of Respondent Environmental Protection Agency ("EPA" or "the Agency") entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) ("Rule").

1. Whether the Rule is contrary to law because the text of Clean Air Act Section 111(d), 42 U.S.C. § 7411(d)(1)(A)(i), precludes EPA from regulating fossil-fuel-fired power plants under that Section because the Agency has already regulated those sources under Clean Air Act Section 112, 42 U.S.C. § 7412, *see* 77 Fed. Reg. 9,304 (Feb. 16, 2012).

2. Whether the Rule is contrary to law because it commandeers Oklahoma and its officials to carry out federal policy, in violation of the Tenth Amendment and the doctrine announced by the United States Supreme Court in, for example, *New York v. United States*, 505 U.S. 144 (1992).

3. Whether the Rule is contrary to law because it coerces Oklahoma and its officials to carry out federal policy, in violation of the Tenth Amendment and the doctrine announced by the United States Supreme Court in, for example, *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

4. Whether the Rule is contrary to law because it invades the traditional authority of Oklahoma and other state governments over electricity generation and intrastate electricity transmission as recognized by the Federal Power Act, 16 U.S.C. § 824 *et seq.*, in violation of that Act and/or in excess of the power delegated to EPA under the Clean Air Act.

5. Whether the Rule is contrary to law because it establishes “standards of performance for any existing source,” 42 U.S.C. § 7411(d)(1)(A), in the fossil-fuel-fired electric generating unit category that cannot be achieved by any existing source in that category through either technological or operational measures that limit the amount of carbon dioxide generated by that source.

6. Whether the Rule is contrary to statute because it departs from traditional environmental regulatory practice, and the plain text of Section 111 and other sections of the Clean Air Act, to define the “best system of emission reduction” for reducing carbon-dioxide emissions from fossil-fuel-fired power plants, 42 U.S.C. § 7411(a)(1), to include decreased source utilization, source closure, and “beyond-the-fenceline” measures addressing a state’s entire system of generating, transmitting, and distributing electricity, including but not limited to measures addressing the relative dispatch priority of coal-fired generation as compared to natural-gas-fired generation and of fossil-fuel-fired generation as compared to renewable and nuclear-fired generation.

7. Whether the Rule is contrary to statute because it was promulgated in the absence of a final, legally valid new source emission standard under 42 U.S.C.

§ 7411(b) covering the same sources, as expressly required under 42 U.S.C. § 7411(d)(1)(a)(ii).

8. Whether the Rule is contrary to law because it prescribes inflexible, state-specific mandates that each state, including Oklahoma, must achieve, rather than the guidelines and procedures for states to use in establishing standards of performance as authorized by 42 U.S.C. § 7411(d)(1).

9. Whether the Rule is contrary to law because deprived States of their authority under Section 111(d)(1), 42 U.S.C. § 7411(d)(1), “in applying a standard of performance to any particular source...to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”

10. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the heat-rate improvements that the existing coal-fired power plants in Oklahoma subject to the Rule can achieve on average.

11. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the shift in generation from coal-fired to natural-gas-fired generation achievable in Oklahoma.

12. Whether EPA acted arbitrarily and capriciously, or in an otherwise irrational manner, in basing the Rule in part on an unsupported assumption as to the amount of expanded renewable-generation capacity attainable in Oklahoma.

Oklahoma reserves the right to refine or supplement these issues in subsequent submissions, including to present and argue any other issues that have been preserved for judicial review, as well as any other issues that may arise from EPA's reconsideration process or revisions to the Rule.

Dated: December 18, 2015

Respectfully submitted,

/s/ David B. Rivkin, Jr.

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Certificate of Service

I hereby certify that on December 18, 2015, I electronically filed the foregoing with the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: /s/ David B. Rivkin, Jr.
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