ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UTILITY AIR REGULATORY GROUP and AMERICAN PUBLIC POWER ASSOCIATION, **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** **Respondent.**	**No. 15-1370 (consolidated with No. 15-1367)**
MONTANA-DAKOTA UTILITIES CO., A DIVISION OF MDU RESOURCES GROUP, INC., **Petitioner,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,** **Respondent.**	**No. 15-1373 (consolidated with No. 15-1367)**

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	**No. 15-1374 (consolidated with No. 15-1367)**
Petitioner,	)	
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NONBINDING JOINT STATEMENT OF ISSUES OF PETITIONERS UTILITY AIR REGULATORY GROUP; AMERICAN PUBLIC POWER ASSOCIATION; MONTANA-DAKOTA UTILITIES CO., A DIVISION OF MDU RESOURCES GROUP, INC.; AND TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

Pursuant to this Court's orders of October 26, 2015, and November 30, 2015, ECF Nos. 1580046, 1585786, Petitioners Utility Air Regulatory Group; American Public Power Association; Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.; and Tri-State Generation and Transmission Association, Inc., jointly submit this preliminary and nonbinding statement of issues in these proceedings to review the final rule of Respondent United States Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA"), which was published at 80 Fed. Reg. 64,662 (Oct. 23, 2015) and entitled, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (hereinafter, "the Rule"):

Fundamental Legal Issues:

1. Whether the Rule violates section 111 of the CAA, 42 U.S.C. § 7411, by:

a. Establishing "standards of performance for any existing source" in the fossil fuel-fired electric generating unit ("EGU") category that are not achievable in practice by any existing EGU through either technological or operational processes that continuously limit the rate at which carbon dioxide is emitted by that source;

b. Establishing "standards of performance for any existing" fossil fuel-fired EGUs that require the curtailment or closure of affected facilities and replacement of their generation by EPA-preferred sources such as wind, solar, geothermal, and hydroelectric power, rather than relying on feasible improvements in emissions performance of existing fossil fuel-fired EGUs;

c. Defining the "best system of emission reduction" ("BSER") for existing fossil fuel-fired EGUs to include measures that cannot be implemented at the sources themselves or that impermissibly require construction of new sources;

d. Subjecting existing fossil fuel-fired EGUs to performance rates under section 111(d) of the CAA, 42 U.S.C. § 7411(d), that are more stringent than the concurrently-finalized performance standards under section 111(b) of the CAA, 42 U.S.C. § 7411(b), for new sources in the same category; and

e. Depriving states of their authority under section 111(d)(1) of the CAA, 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";

2. Whether the Rule, which regulates existing EGUs under section 111(d) of the CAA, 42 U.S.C. § 7411(d), is unlawful because EPA has regulated the same EGUs under section 112 of the CAA, 42 U.S.C. § 7412;

3. Whether the Rule impermissibly violates the Tenth Amendment by intruding on powers reserved to the states, such as the power to establish intrastate energy policies, and must be held unlawful because any interpretation of the CAA that allows the Rule would violate constitutional principles including federalism and separation of powers;

4. Whether the Rule impermissibly intrudes on the exclusive authority of the Federal Energy Regulatory Commission to regulate the interstate electricity market; and

5. Whether the Rule violates the requirements of section 307(d) of the CAA, 42 U.S.C. § 7607(d).

Programmatic Issues:

6. Whether EPA's inclusion of hypothetical generation from natural gas combined cycle ("NGCC") EGUs in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful;

7. Whether EPA's failure to apply the sales exclusion in the Rule's goal calculations, which resulted in non-affected EGUs being included in the goal calculations, is arbitrary, capricious, an abuse of discretion, or otherwise unlawful;

8. Whether EPA's inclusion of generation capacity from the duct burners of NGCC EGUs in the Rule's calculations of Building Block 2 is arbitrary, capricious, an abuse of discretion, or otherwise unlawful;

9. Whether EPA's inclusion of EGUs that were under construction, out of service, retired, and/or announced for retirement in 2012 in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful;

10. Whether EPA's use of unrealistic emission rates for coal-fired and NGCC EGUs in the Rule's goal calculations is arbitrary, capricious, an abuse of discretion, or otherwise unlawful;

11. Whether the Rule violates section 111 of the CAA, 42 U.S.C. § 7411, and is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because EPA based its emission guidelines on:

a. Heat rate improvement targets at coal-fired EGUs under Building Block 1 that are not achievable; and

b. Levels of increased utilization of NGCC units under Building Block 2 that are not achievable; and

12. Whether EPA's failure to account for conflicts between Building Block 1 of the BSER and the CAA's New Source Review program is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

Issues That Will Be the Subject of a Forthcoming Petition for Reconsideration by Petitioner Utility Air Regulatory Group:

13. Whether EPA's decision to fundamentally change the form, derivation, and applicability of the Rule's emission guidelines—the central elements of any rulemaking under section 111(d) of the CAA, 42 U.S.C. § 7411(d)—between proposal and promulgation violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the Administrative Procedure Act ("APA");

14. Whether EPA's new approach in the final Rule for its calculation of Building Block 3:

a. Violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA because it differs completely from the approach set forth in the proposed rule; and

b. Is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because its reliance on historical year-to-year changes in renewable

capacity is deeply flawed, completely arbitrary, and results in drastic inflation of the Rule's renewable energy targets;

15. Whether EPA's decision to change the way it applied the BSER to affected EGUs in the Rule's goal calculations by applying the BSER on a regional rather than statewide basis and by applying Building Block 3 before Building Block 2:

a. Violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA because it differs completely from the approach set forth in the proposed rule; and

b. Is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because it increased the stringency of the emission guidelines and increased the burden of compliance with the Rule for coal-fired EGUs;

16. Whether EPA's conversion of the Rule's emission rate-based goals to mass-based emission limits is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because it:

a. Uses a methodology that was never noticed and submitted for public comment in violation of section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA;

b. Interferes with the flexibility given to the states by Congress in section 111(d), 42 U.S.C. § 7411(d); and

c. Affects the ultimate stringency of the Rule and places new coal-fired EGUs at a disadvantage by assuming in the new source complement that all new fossil fuel-fired EGUs will be NGCC units;

17. Whether EPA's reliance in the Rule on emissions trading programs to support the Rule's emission reduction obligations for affected EGUs:

a. Violates section 307(d) of the CAA, 42 U.S.C. § 7607(d) and the APA because it differs substantially from the approach set forth in the proposed rule and codifies trading program elements that were not proposed; and

b. Is arbitrary, capricious, an abuse of discretion, or otherwise unlawful because it effectively mandates the use of interstate trading for compliance;

18. Whether EPA's decision to require states to address potential leakage:

a. Violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA because the leakage provisions were not included in the proposed rule; and

b. Violates section 111 of the CAA, 42 U.S.C. § 7411;

19. Whether the Rule violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA, because it failed to provide notice and an opportunity for public comment on numerous requirements of central importance to the Rule,

including the Rule's reliability safety valve provisions, the Clean Energy Incentive Program, and the Rule's requirement for federally enforceable backstop measures;

20. Whether EPA's decision to alter the final Rule's applicability criteria for stationary combustion turbines to include the heat input from duct burners:

a. Violates section 307(d) of the CAA, 42 U.S.C. § 7607(d), and the APA because the change to the applicability criteria was not included in the proposed rule; and

b. Is arbitrary, capricious, an abuse of discretion, or otherwise unlawful; and

21. Whether the Rule's failure to exclude modified and reconstructed fossil fuel-fired EGUs from the Rule violates section 111 of the CAA, 42 U.S.C. § 7411, and is arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

Respectfully submitted,

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Dated: December 18, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December 2015, the foregoing document was served electronically through the Court's CM/ECF system on all registered counsel.

/s/ Allison D. Wood
Allison D. Wood