

ORAL ARGUMENT NOT YET SCHEDULED

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

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

**Petitioners,**

**v.**

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

**Respondents.**

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**Case No. 15-1363**

**ALABAMA POWER COMPNAY,  
GEORGIA POWER COMPANY,  
GULF POWER COMPANY, and  
MISSISSIPPI POWER COMPANY**

**Petitioners,**

**v.**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and GINA  
McCARTHY, Administrator,**

**Respondents.**

**Case No. 15-1371  
(consolidated with No.  
15-1363 and other  
consolidated cases)**

**PETITIONERS ALABAMA POWER COMPANY, GEORGIA  
POWER COMPANY, GULF POWER COMPANY  
AND MISSISSIPPI POWER COMPANY'S NONBINDING  
STATEMENT OF ISSUES TO BE RAISED**

Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, "Petitioners") submit this preliminary and nonbinding statement of issues to be raised in this proceeding challenging the final action of the Respondent United States Environmental Protection Agency ("EPA") entitled *Carbon Pollution Emission Guidelines for Existing Sources: Electric Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Final Rule").

Whether EPA's Final Rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law as a result of:

1. EPA's failure to satisfy its duty to make an endangerment finding as required under Section 111 of the Clean Air Act;
2. EPA's regulation of existing fossil fuel-fired electric generating units under Clean Air Act Section 111(d) when those sources are already regulated under Section 112;
3. EPA's inclusion of "outside-the-fence" measures, which are not achievable at the affected sources, as part of the "best system of emission reduction";

4. EPA's interpretation of the Clean Air Act's definition of "stationary source" to include "owners or operators" of a source;
5. EPA's interpretation of the Clean Air Act's definition of "system of emission reduction" to include "any set of things" over which the owner or operator has control;
6. EPA's failure to evaluate the achievability of its "Building Blocks" collectively, rather than the achievability of each "Building Block" standing alone;
7. EPA's failure to identify standards that an individual source can achieve through measures taken at the source;
8. EPA's failure to demonstrate that the assumed heat rate improvements are achievable, taking into account factors that alter heat rate and the unsustainable nature of heat rate improvements;
9. EPA's determination of a source's gas-shifting capabilities with insufficient state, region, or national-level data to support its conclusion;
10. EPA's incorrect treatment of a reduction in generation or ceased operations at an affected source as the "best system of emission reduction" in identify guidelines for a "standard of performance";

11. EPA's application of the "best system of emission reduction" to displace coal-fueled electric generating units in favor of natural gas combined cycle units and renewable generation;
12. EPA's unfounded reliance on interstate trading between affected sources and non-emitting sources as part of the "best system of emission reduction";
13. EPA's infringement on the states' authority to establish "standards of performance" under Section 111(d) of the Clean Air Act;
14. EPA's failure to adequately consider costs, as required under Section 111 of the Clean Air Act, when developing guidelines for "standards of performance";
15. EPA's identification of standards for existing sources under Section 111(d) that are more stringent than standards it has established for new sources under Section 111(b);
16. EPA's failure to provide an adequate opportunity for States to take into consideration the "remaining useful life" of affected sources and "other factors" when developing State plans;
17. EPA's failure to adequately address reliability concerns;
18. EPA's regulation of new sources within its rule covering existing sources; and

19. EPA's unprecedented overreach into areas of the States' and other agencies' authority in an effort to regulate the entire electricity system.

Additionally, whether EPA's Final Rule is unconstitutional as a result of:

20. EPA's commandeering of state authority in violation of the 10th Amendment.

Date: December 18, 2015

Respectfully submitted,

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FOR GULF POWER COMPANY

**CERTIFICATE OF SERVICE**

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

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