

ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1363 (and consolidated cases)

**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.

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

PETITIONER'S NON-BINDING STATEMENT OF ISSUES

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*Attorneys for Petitioner Basin Electric Power Cooperative
in Case No. 15-1393 (consolidated with Lead Case No. 15-1363)*

Basin Electric Power Cooperative (“Basin Electric”), Petitioner in No. 15-1393 (consolidated with 15-1363), submits the following non-binding statement of issues to be raised in this appeal challenging EPA’s Final Rule titled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (the “Final Rule”).

1. Whether EPA should be afforded no deference in the promulgation of the Final Rule because EPA acted outside the scope of its authority under the Clean Air Act and outside its area of expertise.

2. Whether EPA’s Final Rule violates the U.S. Constitution because it will result in unconstitutional takings, exceeds Congress’ authority under the Commerce Clause, violates separation of powers principles, and impairs existing contracts.

3. Whether EPA exceeded its statutory authority under the Clean Air Act by regulating existing electric generating units under § 111(d) of the Act where the source category already is regulated under § 112 of the Act.

4. Whether EPA exceeded its statutory authority under the Clean Air Act by stripping the authority conferred upon the States and other federal agencies in connection with the regulation of the electric generation and transmission sector.

5. Whether EPA exceeded its statutory authority under the Clean Air Act by establishing standards of performance for existing sources rather than allowing the States to establish such standards, as required by § 111(d) of the Act.

6. Whether EPA's issuance of performance standards under Clean Air Act § 111(d) that preclude States from meaningfully considering the remaining useful life of existing facilities exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

7. Whether EPA's determination that performance standards under Clean Air Act § 111(d) can be premised on actions taken "beyond the fence line" of an individual stationary source exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

8. Whether EPA's promulgation of standards of performance that cannot be achieved by existing sources through either technological or operational measures exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

9. Whether EPA's determination that Clean Air Act § 111(d) performance standards can be premised on curtailing production at affected sources and shifting production to sources outside the source category exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

10. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because the emission limits established for existing sources under § 111(d) of the Clean Air Act are more stringent than those established for new sources under § 111(b) of the Act.

11. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because EPA failed to provide a reasoned basis for establishing that the best system of emission reduction is adequately demonstrated.

12. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because EPA failed to provide a reasoned basis for establishing that the best system of emission reduction is achievable on a national, regional, state, company, and unit basis.

13. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because EPA failed to provide a reasoned basis for establishing that the best system of emission reduction is technically feasible on a national, regional, state, company, and unit basis.

14. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because EPA failed to provide a reasoned basis for establishing that the best system of emission reduction is cost effective on a national, regional, state, company, and unit basis.

15. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because EPA's trading scheme cannot reasonably be relied upon to justify the achievability, technical feasibility, and cost effectiveness of the best system of emission reduction.

16. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it prohibits renewable energy resources built

prior to 2013 from generating emission reduction credits that can be used to comply with the Final Rule and state or federal plans adopted thereunder.

17. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it is not a logical outgrowth of EPA's Proposed Rule.

18. Whether EPA's regulation of "leakage" in the Final Rule exceeded its statutory authority or is otherwise arbitrary and capricious, an abuse of discretion, or not in accordance with law.

19. Whether EPA's Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise unlawful because it places unnecessary and arbitrary restrictions on implementation.

Basin Electric reserves the right to refine or supplement these issues to address any other issues that have been preserved for judicial review and any other issues that may arise from EPA's reconsideration process or revisions to the Final Rule.

Dated: December 18, 2015.

Respectfully submitted,

s/ Christina F. Gomez

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Non-Binding Statement of Issues was electronically filed today through the Court's CM/ECF system, which will electronically serve all registered counsel for the parties to this case.

Dated: December 18, 2015

s/ Christina F. Gomez _____

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