

**U.S. Department of Justice**

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August 2, 2016

VIA ELECTRONIC FILING

The Hon. Mark J. Langer
Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
Room 5523
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: State of West Virginia, et al. v. EPA: No. 15-1363 (and consolidated Clean Power Plan cases); EPA's Response to Petitioners' July 27, 2016 Notice of Supplemental Authority

Dear Mr. Langer:

Respondent United States Environmental Protection Agency submits this response to the July 27, 2016 Rule 28(j) letter filed by State Petitioners.

Petitioners cite a Fifth Circuit decision staying an EPA rule promulgating federal plans for Oklahoma and Texas to control regional haze. Texas v. EPA, No. 16-60118, 2016 WL 3878180 (5th Cir. July 15, 2016). This ruling has minimal relevance because it is not a final decision on the merits, id. at *12 n.29, and concerns a different regulatory program and distinct administrative record.

Contrary to Petitioners' suggestion, Texas fully supports EPA's position that its statutory interpretations are reviewed under the familiar Chevron standard. See EPA Br. 40-44. As the Fifth Circuit stated, judicial review "is deferential to EPA's interpretation of the Clean Air Act if the statute is susceptible to multiple reasonable interpretations." 2016 WL 3878180, at *12 (citing Chevron).

Texas adds no support to Petitioners' argument that EPA failed to adequately assess grid reliability impacts in the Rule under review. See EPA Br. 151-54. None of the alleged analytical deficiencies identified by the Fifth Circuit are present here: EPA consulted with FERC and other stakeholders, extensively evaluated grid reliability, and provided a reliability safety valve. See 80 Fed. Reg. 64,662, 64,874-81 (Oct. 23, 2015).

Finally, the Fifth Circuit erred in stating that EPA lacks "expertise on grid reliability," such that EPA's findings are entitled to "diminished" deference under the applicable arbitrary-and-capricious standard of review. 2016 WL 3878180, at *18. Congress specifically directed EPA to consider "energy" requirements in regulating power plants under both the regional-haze and Section 111 standard-of-performance programs, 42 U.S.C. §§ 7411(a)(1), 7491(g)(1). See also 2016 WL 3878180, at *17, *18 (42 U.S.C. § 7491(g)(1) reference to "energy" encompasses reliability). Thus, Congress designated EPA as the "expert administrative agency" qualified to make an "informed assessment of" the "Nation's energy needs" in the context of pollution control. American Electric Power Co. v. Connecticut, 564 U.S. 410, 427 (2011). Regardless, the reliability judgments made in the Rule are fully supported by a robust record and therefore satisfy any application of the inherently deferential arbitrary-and-capricious standard.

Sincerely,

/s/ Eric G. Hostetler

Eric G. Hostetler

cc: Counsel of record, via CM/ECF

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2016, I electronically filed the foregoing Rule 28(j) response letter with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Eric G. Hostetler

ERIC G. HOSTETLER