NO. 15A776

IN THE SUPREME COURT OF THE UNITED STATES

Basin Electric Power Cooperative, et al.

Applicants,

v.

United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency

Respondents.

Reply in Support of Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review

DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF AUTHORITIES

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

1. Applicants seek this Court's intervention because EPA's rule is extraordinary. EPA concedes its lack of expertise in regulating power generation[1] but nonetheless has ordered that the nation's power sector be transformed in a very short time. EPA not only lacks statutory authority for its action, but also fails to understand (or to acknowledge) what its action is doing to the power sector. As a result, the utilities will be hard pressed to ensure the lights won't go off.

EPA urges that a stay is extraordinary and that Applicants did not cite cases granting a stay under these precise circumstances. EPA Resp. at 19-20. But this is not an ordinary case. Never before has EPA claimed such sweeping authority to reorganize an entire sector of the economy in the name of reducing emissions. Never has EPA interpreted its charge under Clean Air Act (CAA) Section 111 to encompass not just requiring the reduction of plant level emissions through installation of pollution control technology, but also the forced retirement or curtailment of many existing sources coupled with the forced investment in new alternative sources that are not even regulated by Section 111. EPA's action is both unprecedented and unfounded, and it warrants this Court's intervention.

[1] EPA, Response to Public Comments on Proposed Amendments to National Emission Standards for Hazardous Air Pollutants for Existing Stationary Reciprocating Internal Combustion Engines and New Source Performance Standards for Stationary Internal Combustion Engines, at 50, Docket EPA-HQ-OAR-2008-0708 (Jan. 14, 2013) ("The issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities for setting standards under the [Clean Air Act].").

2. The very *purpose* of the rule is to "'aggressive[ly] transform[] … the domestic energy industry.'"[2] EPA claims the rule simply builds on existing trends. EPA Resp. at 38-39, 64. But the rule undisputedly will cause far more plant retirements and curtailments than would occur in its absence. EPA predicts this, and the utilities and others have confirmed it.[3] Without the rule, coal-fired units would continue supplying 38% to 41% of the nation's electricity, while EPA says the rule will drop these units' share sharply to 27%—and it will be far less if EPA's optimistic assumptions do not pan out.[4] Far from supporting an existing trend, the rule mandates a transformative shift of the power sector, and a stranding of billions of dollars in assets that otherwise have many more years of remaining useful life.

3. The rule requires *immediate* action. EPA claims there is no need for industry action before a D.C. Circuit decision because the initial compliance period does not begin until 2022. EPA Resp. at 60, 63-64. But EPA has acknowledged that about 70% of the rule's 2030 emission reductions must be achieved *before* 2022.[5] And both Utility Applicants and the nation's power sector experts have explained that the resources and infrastructure the rule requires will take years to develop.[6]

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[2] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, WASH. POST (Aug. 1, 2015), www.washingtonpost.com/national/healthscience/white-house-set-to-adopt-sweeping-curbs-oncarbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html (quoting White House Fact Sheet).

[3] See Schwartz Decl. ¶¶ 18–22, 27–38 (a727–30, a733–39); Energy Ventures Analysis, Inc., Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry at 15, 62–63 (Oct. 2015) (EVA Report) (a765, a812–13); EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* at 2-3, 3-24 (Aug. 2015), www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis (RIA).

[4] Schwartz Second Decl. ¶¶ 13–14 (a845–47).

[5] RIA at 3-20, Tbl. 3-6 (estimating that 68.9% and 70.2% of the 2030 reductions are achieved in the rate-based and mass-based cases, respectively, in 2020).

[6] See generally Declarations, Utility and Allied Party Stay Application (a307-a873); *infra* at 3-4.

Long lead times, often more than five years and in many instances as many as seventeen, are required to design, plan, permit, and site the needed renewable projects, *as well as the associated infrastructure* needed to transmit energy from those projects and (in the case of new gas-fired units) to get gas to those units.[7] The Non-State Respondent-Intervenors argue misleadingly that the lead time for new solar and wind resources "can be significantly shorter than five years," Non-State Intervenors' Resp. at 20-21, but obliquely concede that this holds only "absent the need for new transmission to deliver the power from these resources to the load." *Id.*[8] EPA chooses to ignore the lead time issue altogether, except to incorrectly state that the utilities' estimates of harm are based on 2030 emission requirements, rather than the earlier, 2022 requirements. EPA Resp. at 63. They are not.[9]

Notwithstanding its conceded lack of expertise in energy markets, grid performance, or grid reliability, EPA claims to have determined that the shift to new renewable resources "would not add significant transmission requirements." EPA Resp. at 63. But the nation's actual (non-partisan) experts on these issues—including the North American Electric Reliability Corporation (NERC), one of the Federal Energy Regulatory Commission (FERC) Commissioners, and regional grid coordinators—have warned that *significant* new infrastructure must be built to

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[7] See Utility and Allied Party Stay Application at 12, 14-15, 18-19.

[8] In any event, solar and wind farms often take far more than five years to complete, particularly when environmental assessments or bird studies are required by federal law or where projects face local opposition; and only a small percentage of proposed projects actually are completed. See Utility and Allied Party Stay Application at 15, 18.

[9] See, *e.g.*, Raatz Decl. ¶¶ 21, 22 (a693–94) ("[I]t is anticipated Basin Electric will need to undertake the following changes to its generating assets in order for its affected steam generating EGUs to comply with the Final Rule *in 2022* . . . . The expected costs of building all these new assets, to comply with the Final Rule *in 2022*, is approximately $5 billion.") (emphases added).

support the new resources required by the rule, that this infrastructure will take several years to build, and that grid reliability will be seriously impaired if it is not already in place by 2022.[10] Utilities, which are in the business of distributing power, have said the same thing: it will take years to develop the infrastructure needed to get power from new facilities to the areas where it is needed.[11]

4. Uncertainty in how States will implement the rule reinforces—rather than undermines—why the industry must act *now*. EPA argues that, because final state plans are not due until September 2018, no utility need do *anything* now; it reasons that the utilities cannot "reliably identify what their compliance obligations will be, and they likely will not know them until 2018." EPA Resp. at 61; *see also id.* at 14 (The rule "does not require any amount of reductions by any particular source at any particular time."). But this is precisely the problem. The uncertainty itself requires that utilities act *now* to ensure that they can provide a reliable electric supply for hundreds of millions of customers *no matter what state programs are adopted and whether viable emission credit trading programs emerge or not.*

Moreover, massive restructuring of the industry will be required under *any* of EPA's proffered alternatives; the particulars of a State's individual plan are of little moment in this regard. EPA tasks Basin Electric Power Cooperative for supposedly basing its estimate of $5 billion in compliance costs ($330 million in the next two

[10] NERC, RELIABILITY CONSIDERATIONS FOR CLEAN POWER PLAN DEVELOPMENT at 7 (Jan. 2016), www.nerc.com/news/Pages/States-Urged-to-Consider-Essential-Reliability-Services,-Reserve-Margins,-Project-Timelines-in-Rule-Implementation.aspx; Written Testimony of Tony Clark, Commissioner, FERC, U.S. House Committee on Energy and Commerce, Subcommittee on Energy and Power at 6–7 (Dec. 1, 2015) (a906–07); Southwest Power Pool, Inc., Comments on Proposed Rule at 6, 8 (Oct. 9, 2014) (a891, a893); Midcontinent Independent System Operator, Inc., Comments on Proposed Rule at 3 (Nov. 25, 2014) (a898).

[11] See, *e.g.*, Stoltz Decl. ¶ 6, 14 (a862, a867–68).

years) on "speculative assumptions," including that the States will adopt rate-based plans and will require each plant to meet the subcategory performance levels. EPA Resp. at 61-62. EPA ignores that Basin Electric determined the rule's overall impact on it will be similar whether the States opt to adopt the sub-category performance rates, state-wide rate goals, or the EPA-established mass-based limit.[12]

5. EPA does not dispute that the rule will force coal-fired power plant shutdowns in the next few years. EPA's only quibble is that Applicants have not "identif[ied] a specific power plant or coal mine" that will be shuttered in the next few months. *Id.* at 65. As EPA has acknowledged, its *own* modeling, which is "designed … to gauge … overall, power-sector-wide impacts," *id.* at 66, predicts that the rule will cause about 11 GW of coal-fired generating capacity (53 units) to retire in 2016 alone, *id.* at 66-68.[13] The identity of the specific plants EPA predicts will close is immaterial; the fact remains that EPA does not dispute that many plants will soon close as a result of the rule and others must take other costly operational steps to prepare for the rule's massive "generation shifting" away from coal plants to other facilities. *Id.* at 13, 35-38. In their declarations, utilities described in detail the types of harms associated with such plant closures—harms that will occur in the near term for plants that must retire as a result of the rule.

[12] Raatz Decl. ¶¶ 6 n.1, 16 (a685, a690–91), cited in Utility and Allied Party Stay Application at 13.
[13] See also EVA Report at 15 (a765).

EPA also mischaracterizes the comments submitted on the agency's proposed revisions to the Cross-State Air Pollution Rule (CSAPR). *Id.* at 67-68.[14] Utility Applicants agreed with EPA that the agency's modeling does a poor job of predicting specific unit retirements. They have taken pains to point out to EPA erroneous unit-level assumptions, seeking to help it improve the model's assessment of the "base case" scenario in the absence of the rule.[15] In their CSAPR comments, stakeholders reiterated concerns about factual inaccuracies in EPA's unit-level assumptions, and presented analysis *confirming* that substantial unit retirements will occur by 2018 in the 23 States subject to CSAPR.[16] Fundamentally, specific unit retirement plans are orthogonal to the undisputed point of the Application (and of the rule itself) that the sector as a whole will suffer irreparable harm from the rule in the form of premature unit retirements—a point on which the analyses presented by Utility Applicants and EPA agree.

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[14] See also Schwartz Second Decl. ¶¶ 28–31 (a855–58). The utilities' comments to which EPA refers, EPA Resp. at 67-68, in fact confirmed at least 16 GW of plant retirements by 2018 in 23 States. See Comments of Utility Air Regulatory Group on Proposed CSAPR Update, EPA-HQ-OAR-2015-0500-0253, at 43 (Feb. 1, 2016) (UARG CSAPR Comments). In those comments, utilities objected to EPA's assumption that 75 GW of fossil plants in these States would retire by 2018—an assumption designed by EPA to force even more plant shutdowns under the CSAPR rule—but that in itself illustrates the immediate and irreparable harm EPA would impose on this industry. *Id.* EPA also neglects to point out that those comments stated that "[e]xact retirement plans may of course be affected by the outcome of pending litigation challenging the CPP (including pending applications to the U.S. Supreme Court to stay the CPP during judicial review) and approaches that States choose to implement the CPP in the next few years." *Id.* at 43–44 n.34.

[15] See, *e.g.*, Comments of Southern Company on Proposed CSAPR Update, EPA-HQ-OAR-2015-0500-0290, at 39-40 (Feb. 1, 2016); Comments of Tennessee Valley Authority on the Notice of Data Availability of the Environmental Protection Agency's Updated Ozone Transport Modeling Data for the 2008 Ozone National Ambient Air Quality Standard ("Aug. 4, 2015 NODA"), EPA-HQ-OAR-2015-0500-0035, at 1-3 (Oct. 23, 2015); Comments of Southern Company on Aug. 4, 2015 NODA, EPA-HQ-OAR-2015-0500-0046, at 3-7 (Oct. 23, 2015); Comments of Lafayette Utilities System on Aug. 4, 2015 NODA, EPA-HQ-OAR-2015-0500-0045, at 2-4 (Oct. 23, 2015); Comments of Alliant Energy on Aug. 4, 2015 NODA, EPA-HQ-OAR-2015-0500-0032, at 1-2 (Oct. 23, 2015).

[16] UARG CSAPR Comments at 43–44.

6. The utilities' recent experience with the Mercury Air Toxics Standards (MATS) supports a stay. EPA does not deny that it obtained compliance with the MATS rule's requirements despite the fact that this Court held the rule invalid in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015). Instead, EPA offers empty assurances that the same will not happen again. EPA Resp. at 68-69. EPA claims the four-and-a-half-year timeline for compliance with the MATS rule (including a one-year extension) can somehow be differentiated from the six-year timeline for sources to undertake the industry-wide shift in power generation required by this rule. *Id.* at 69. It also claims the MATS rule's direct imposition of specific requirements onto covered sources, rather than implementation of requirements through the State planning process, makes a difference. *Id.* As explained above, it does not. Regardless of how each State implements the rule, the rule will necessitate immense shifting from existing fossil-fuel sources to new renewable sources, and will require immediate steps to accomplish that result.

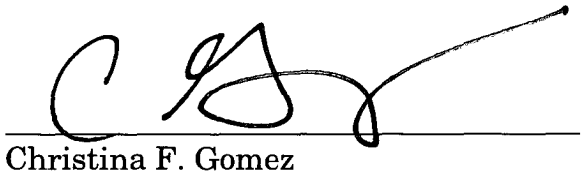
For all these reasons, a stay here is necessary to ensure meaningful review of EPA's unprecedented and unlawful attempt to restructure the energy sector under the guise of the Clean Air Act. A stay will avoid forcing Utility Applicants into an aggressive transformation of the power sector while the rule's dubious legality is reviewed. And a stay of the rule—like the rule itself—will have little impact on climate change. The rule addresses less than one percent of global human-made

greenhouse emissions, and EPA does not even claim that the rule will do anything to halt or mitigate climate change.[17]

[17] EPA estimates the rule will reduce U.S. anthropogenic CO_2 emissions by 413-415 million tons in 2030. RIA at 3-19, Tbl. 3-5. The United Nations Intergovernmental Panel on Climate Change (IPCC) calculated that 2010 global anthropogenic greenhouse gas emissions were 49 billion tons. IPCC, *Climate Change 2014, Mitigation of Climate Change*, at 6 (2014), http://report.mitigation2014.org/spm/ipcc_wg3_ar5_summary-for-policymakers_approved.pdf. Assuming similar global emissions in 2030, EPA's estimated emission reductions due to the rule would equal just 0.85% of global anthropogenic emissions.

Dated: February 5, 2016

Respectfully submitted,



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