No. 15A773 (related to Nos. 15A776, 15A778, 15A787, 15A793)

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents

Non-State Respondent-Intervenors' Opposition to Applications for 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

Richard Ayres
Counsel of Record
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com
Counsel for NextEra Energy, Inc.
And the Solar Energy Industries Ass'n

Kevin Poloncarz
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com
Counsel for Power Company Respondents Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

ADDITIONAL COUNSEL LISTED ON SIGNATURE BLOCK

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenor-Respondents provide the following disclosure statements.

Advanced Energy Economy ("AEE") states that it is a not-for-profit trade association dedicated to making the energy we use secure, clean, and affordable. AEE does not have any parent companies or issue stock, and no publicly held company has a 10 percent or greater ownership interest in AEE.

The American Wind Energy Association ("AWEA") is a non-profit 501(c)(6) organization organized under the laws of the state of Michigan. AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA's members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers and customers. AWEA is a non-profit corporation and, as such, no entity has any ownership interest in it. AWEA does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public

Calpine Corporation ("Calpine") states that it is a major U.S. power company which owns 83 primarily low-carbon, natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering nearly 27,000 megawatts of electricity to customers and communities in 18 U.S.

states and Canada. Calpine's fleet of combined-cycle and combined heat and power plants is the largest in the nation. Calpine is a publicly traded corporation, organized and existing under the laws of the State of Delaware. Its stock trades on the New York Stock Exchange under the symbol CPN. Calpine has no parent company, and no publicly held company has a 10 percent or greater ownership interest in Calpine.

National Grid Generation, LLC ("National Grid Generation") states that it is a limited liability company organized under the laws of the State of New York that owns and operates 50 natural gas- and oil-fired electric generating units capable of delivering approximately 3,800 megawatts of electricity. All of the outstanding membership interests in National Grid Generation LLC are owned by KeySpan Corporation. All of the outstanding shares of common stock of KeySpan Corporation are owned by National Grid USA, a public utility holding company with regulated subsidiaries engaged in the generation of electricity and the transmission, distribution and sale of natural gas and electricity. All of the outstanding shares of common stock of National Grid USA are owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings

Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange.

NextEra Energy, Inc. states that NextEra Energy's principal subsidiaries are Florida Power & Light Company, which serves more than 4.8 million customer accounts in Florida and is one of the largest rate-regulated electric utilities in the United States, and NextEra Energy Resources, LLC, which, together with its affiliated entities, is the world's largest generator of renewable energy from the wind and sun. NextEra Energy, Inc. has no parent corporation, nor is any publicly held corporation the owner of 10% or more of NextEra Energy, Inc. stock. NextEra Energy, Inc. is a publicly traded company on the New York Stock Exchange under the symbol "NEE."

Pacific Gas and Electric Company ("PG&E") states that it is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. PG&E and its subsidiaries are subsidiaries of PG&E Corporation, an energy-based holding company organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E Corporation, PG&E's parent

corporation, is the only publicly held corporation owning 10% or more of PG&E's stock.

Solar Energy Industries Association ("SEIA") states that it is a trade association that represents approximately 1,100 member companies, including installers, project developers, manufacturers, contractors and financiers of solar power, and non-profits. SEIA has no parent corporation and no publicly held company owns 10% or more of its stock.

Southern California Edison Company ("SCE") states that it is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail in the State of California. SCE is a subsidiary of its parent, Edison International, both of which have issued equity and debt securities to the public. SCE has common and preferred stocks outstanding. The common stock is held 100% by Edison International; the preferred stocks are publicly held. There is no publicly held company that has a 10% or greater equity interest in SCE, other than Edison International.

American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Coal River Mountain Watch, Conservation Law Foundation, Environmental Defense Fund, Kanawha Forest Coalition, Keepers of the Mountains Foundation, Mon Valley Clean Air Coalition, Natural Resources Defense Council, The Ohio Environmental Council, Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club state that they

are not-for-profit non-governmental organizations whose missions include protection of public health and the environment and conservation of natural resources. None of the organizations has any outstanding shares or debt securities in the hands of the public, or any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Cont'd

Page(s)

TABLE OF AUTHORITIES—Cont'd

Page(s)

Statutes

Regulations

Page(s)

Other Authorities

The Non-State Respondent-Intervenors supporting the Environmental Protection Agency ("EPA") in the District of Columbia Circuit proceedings – composed of advanced energy associations ("Advanced Energy Respondents"),[1] nonprofit public health and environmental organizations ("Environmental Respondents"),[2] and power companies ("Power Company Respondents")[3] – oppose the five applications to stay Clean Air Act regulations addressing power plant carbon dioxide ("CO_2") emissions.

---

[1] The Advanced Energy Respondents, which represent more than 3,000 companies and organizations participating in the advanced energy sector, are the Advanced Energy Economy, the American Wind Energy Association, and the Solar Energy Industries Association. Advanced Energy Respondents' member companies manufacture, fund, develop, purchase, and operate advanced energy solutions, such as energy efficiency and electricity generation from solar, wind and natural gas, that will reduce CO_2 emissions from existing fossil-fuel-fired power plants to meet the requirements of the EPA rule at issue.

[2] The Environmental Respondents are not-for-profit public health and environmental organizations committed to protecting their members and others from the impacts of dangerous air pollution from existing power plants, including climate change and public health impacts. The organizations are: the American Lung Association, Center For Biological Diversity, Clean Air Council, Clean Wisconsin, Coal River Mountain Watch, Conservation Law Foundation, Environmental Defense Fund, Kanawha Forest Coalition, Keepers of the Mountains Foundation, Mon Valley Clean Air Coalition, Natural Resources Defense Council, The Ohio Environmental Council, Ohio Valley Environmental Coalition, Sierra Club, and West Virginia Highlands Conservancy.

[3] The Power Company Respondents are among the nation's largest and most forward-thinking electric utilities and owners of generating units subject to the Rule. They include: Calpine Corporation; the City of Austin d/b/a Austin Energy; the City of Los Angeles, by and through its Department of Water and Power; The City of Seattle, by and through its City Light Department; National Grid Generation, LLC; NextEra Energy, Inc.; New York Power Authority; Pacific Gas and Electric Company; Sacramento Municipal Utility District; and Southern California Edison Company. Together, they own and operate more than 100,000 megawatts of generating capacity (representing nearly 10% of the nation's total generating capacity) and serve millions of customers in 26 states across the country. Through their investment in low- and zero-emissions generation capacity and their procurement of electricity generated by such sources, the Power Companies have reduced CO_2 emissions within their respective generation fleets and portfolios, while continuing to provide reliable and affordable power to their customers. Their collective experience doing so demonstrates the achievability and reasonableness of the regulations currently undergoing review by the D.C. Circuit.

INTRODUCTION

Applicants and other parties have filed petitions for review of EPA's Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, promulgated on October 23, 2015. 80 Fed. Reg. 64,662 ("Rule"). The Rule addresses carbon dioxide emissions from existing power plants, which are the country's largest sources of the pollution that is destabilizing the Earth's climate and imperiling human health and welfare, exceeding even the "enormous quantity" emitted by the transportation sector, *see Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007). It establishes flexible, cost-effective emissions guidelines that take effect beginning in 2022 and that phase in gradually through 2030, reducing risks of climate change and other serious threats to public health and the environment while lowering average bills for electricity consumers.

After a weeks-long review of briefs and extensive evidence, a panel of the D.C. Circuit unanimously denied nine motions to stay the Rule. The motions and oppositions below were supported by thousands of pages of declarations addressing whether the Rule would cause irreparable harm prior to the court of appeals ruling on its merits, the impact of a stay on third parties, and the public interest. Applying the familiar four-part test for injunctive relief, the panel found that the movants had "not satisfied the stringent requirements for a stay pending court review." D.C. Cir. No. 15-1363, ECF No. 1594951 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) and D.C. Circuit Handbook of Practice and Internal Procedures 33 (2015)). In the same order and in response to the petitioners'

requests, the court expedited briefing on the merits and set oral argument for June 2-3, 2016.[4]

I. APPLICANTS' REQUEST FOR THIS COURT'S PREMATURE INTERVENTION IS UNSUPPORTED BY ANY PRECEDENT

Applicants seek to thrust this Court into the earliest stages of the court of appeals' review of an administrative rule. This request is particularly ill-founded given that the challenged Rule will be implemented over an exceptionally long timeframe, so that no emission reductions are required until 2022 – *six years* from now – after which the required reductions will be phased in gradually until 2030. This protracted implementation schedule and the Rule's extensive compliance flexibility – including performance-based emissions standards permitting multi-year averaging, emissions trading, and other flexible approaches – defeat Applicants' claims of immediate and irreparable harm during the pendency of this litigation.

"Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). In particular, a stay of agency action is an "'intrusion into the ordinary processes of administration and judicial review,'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Va. Petroleum Jobbers Assn. v. Fed. Power Comm'n,* 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*)). The degree of

[4] The court of appeals has since prescribed a schedule to complete briefing by April 15, 2016. D.C. Cir. No. 15-1363, ECF No. 1595922 (Jan. 28, 2016).

intrusion here would be extreme. The Clean Air Act assigns the review of nationally applicable Clean Air Act regulations to the D.C. Circuit, whose "special importance for administrative law" is well recognized.[5] Yet Applicants ask this Court to form judgments on the merits of this important Rule based only on stay motions briefing without full consideration of the Rule's massive administrative record, and to do so before *any* lower court has issued a decision on the merits of the Rule or provided any analysis of the statutory and record issues the challengers have presented. Additionally, they ask this Court to reweigh the large volume of evidence the D.C. Circuit had before it when deciding the stay motions. And on that truncated basis they seek a stay that would apply well beyond the period of the D.C. Circuit's review, even if that court upholds the Rule in full on the merits.

A stay granted here would be unprecedented: Applicants cite (and we have found) no instance, in the many decades of judicial review under the Clean Air Act and scores of other federal regulatory statutes, in which this Court has ever intervened to stay federal agency regulations before *any* lower court has reviewed their merits.[6] Applicants do not simply ask this Court to undo a lower court order,

---

[5] Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1310 (1975). *See also O'Donoghue v. United States*, 289 U.S. 516, 535 (1933); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 281 (1978) (discussing special role of D.C. Circuit under Clean Air Act). Section 307 of the Clean Air Act contains detailed provisions defining the scope of the D.C. Circuit's exclusive review jurisdiction, delineating the contemporaneous creation of a public administrative record for judicial review, prescribing the procedure for that review, and prohibiting collateral challenges. *E.g.*, 42 U.S.C. § 7607(b), (d), (e).

[6] The starkly different circumstances in the stay precedents that Applicants do cite – almost all of which involved immediate threats to the Court's jurisdiction on matters after the merits were decided below, but where certiorari was pending or imminent — underscore the inappropriateness of a stay here. *See*, *e.g.*, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (after Fourth Circuit ruled that applicant was not entitled to stay of imminent deportation, this Court treated his stay petition as a

but rather to block Executive Branch regulations that no lower court has found faulty. They do not simply seek to "suspend judicial alteration of the status quo," but ask this Court to engage in "judicial intervention…that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Reg. Comm'n* 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). Granting a stay here would encourage numerous litigants to come to this Court pleading for review of lower court decisions on whether to stay agency action. This would be a burdensome task for the Court and disruptive to the lower courts' orderly and efficient disposition of these cases. As it has repeatedly emphasized, this Court is "a court of review, not of first view," *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (citation omitted).

Applicants provide no reason to conclude that the D.C. Circuit's review of the stay motions was anything but painstaking and thorough.[7] This Court and its members have repeatedly emphasized that lower courts' decisions to grant or deny a stay are due "considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316-1317 (1983) (Blackmun, J., in chambers) (quoting *Graves v. Barnes*, 405

---

petition for certiorari, granted the petition based upon a well-defined circuit split, and stayed deportation pending its decision on certiorari; *Nken v. Holder*, 556 U.S. 418, 423 (2009)); *Maryland v. King*, 133 S. Ct. 1, 2-3 (2012) (granting stay of Maryland Court of Appeals judgment overturning a criminal conviction, where the state court's ruling created a split on a Fourth Amendment issue that the Court would likely take up on certiorari) (Roberts, C.J., in chambers). In *Nat'l League of Cities v. Brennan,* 419 U.S. 1321, 1322-23 (1974), Chief Justice Burger stayed regulations extending Fair Labor Standards Act requirements to state employees, but did so only hours before the regulations were to go into effect, imposing wage and hour obligations on state governments, after a final decision by the three-judge district court. *See also Nat'l League of Cities v. Usery,* 426 U.S. 833 (1976).

[7] The stay deliberations below included more than 350 pages of briefs, and more than 2,500 pages of declarations and other supporting exhibits. Those motions were fully briefed on December 23, 2015, and the three-judge panel denied them almost a month later, on January 21, 2016.

U.S. 1201, 1203 (1972) (Powell, J., in chambers)); *see also Rostker,* 448 U.S. at 1308 ("rebuttable presumption" in favor of lower court's judgment on propriety of interim relief) (Brennan, J., in chambers); *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers) ("Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding with adjudication on the merits with due expedition").[8] The Court has been particularly reluctant to grant stay applications in matters still pending before a court of appeals. *See, e.g.*, *Thomas v. Sierra Club*, 469 U.S. 1309, 1309-1310 (1985) (Rehnquist, J. in chambers).

Nor is there any reason to believe that the unanimous D.C. Circuit panel misapplied the familiar legal standard for a stay of agency action pending judicial review. *Cf. Nken*, 556 U.S. at 423 (addressing "a split among the Courts of Appeals on what standard governs a request for … a stay" of a deportation order). The D.C. Circuit itself gave that test its canonical formulation in the 1958 *Virginia Petroleum Jobbers* decision, *see In re Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968), and has since applied it in scores of cases.[9]

---

[8] This Court has repeatedly emphasized the deference owed to a lower court's judgments concerning interlocutory relief, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., joined by Thomas and Alito, JJ., concurring in denial of application to vacate stay) (court must decline to "vacate a stay entered by a court of appeals unless that court clearly and 'demonstrably' erred in its application of 'accepted standards'") (citation omitted); *Nken*, 556 U.S. at 438-39 (Kennedy, J., concurring); *Bateman v. Arizona*, 429 U.S. 1302, 1304 (1976) (Rehnquist, J., in chambers); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U.S. 1207, 1218 (1972) (Burger, C. J., in chambers); *see also United Fuel Gas Co.* v. *Public Service Comm'n*, 278 U.S. 322, 326 (1929) (citing cases for principle that "[a]n order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion").

[9] The D.C. Circuit has stayed other major Clean Air Act regulations when it has determined the standard to have been satisfied and where actual compliance obligations were imminent. *See* Order, *EME Homer City Generation, LP v. EPA*, Nos. 11-1302, *et al.* (D.C. Cir. Dec. 30, 2011) (ECF No. 1350421) (staying Cross-State Air Pollution Rule before the January 1, 2012 commencement of the

Applicants further claim that a stay is warranted here because EPA previously administered the Mercury and Air Toxics Rule so as to "circumvent judicial review." W. Va. Appl. 2. *See also* Utilities Appl. 3-4, Business Assoc. Appl. 3, Coal Appl. 3. There is no merit to this line of argument. First, as noted, the Rule allows ample time for normal judicial review long before sources' first compliance obligations in 2022. Furthermore, Applicants mischaracterize this Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), and disregard subsequent developments in that case.[10] It is simply false to portray the Mercury and Air Toxics Rule as an agency conspiracy or stratagem to frustrate judicial review or extract greater-than-statutorily-authorized compliance from industry.[11]

---

compliance period); Order, *Michigan v. EPA*, No. 98-1497, 1999 U.S. App. LEXIS 38833 (D.C. Cir. May 25, 1999) (staying "NOx SIP Call" rule).

[10] After the D.C. Circuit rejected a plethora of statutory and record challenges to that EPA rule, *White Stallion Energy Center v. EPA*, 748 Fed.3d 1222 (D.C. Cir. 2014), this Court reversed on the basis that EPA had improperly read the statute to forbid consideration of costs as part of its initial determination whether regulation of power plants' hazardous air pollutant emissions is "appropriate." 135 S. Ct. at 2707-11. In so doing, this Court declined multiple requests that it vacate the mercury rule or defer certain compliance deadlines, *e.g.*, State Opening Br. in No. 14-48, at 49; State Reply Br. 22; Utility Air Reg. Group Reply Br. 13. On remand, the D.C Circuit panel took extensive briefing, heard oral argument on remedy and assessed the likelihood that EPA could ultimately finalize a valid "appropriate" finding, as well as extensive and unrebutted evidence that vacatur would cause serious harm to public health. The unanimous panel (including the circuit judge who had dissented on the cost issue) found that vacatur was unwarranted. Order, D.C. Cir. No. 12-1100, ECF No. 1588459 (Dec. 15, 2015). See also 80 Fed. Reg. 75,025 (Dec. 1, 2015).(EPA's request for public comment on proposed finding that, considering cost, it is appropriate to regulate power plants' emissions of hazardous air pollutants). Actual experience implementing the Mercury and Air Toxics Rule is showing that annual compliance costs of the rule appear to be much less than the "$10 billion" estimate cited by Applicants, W.Va. Appl. 2, *see* Andover Technology Partners, Review and Analysis of the Actual Costs of Complying with MATS (finding that because of technological improvements and low natural gas prices, the annual compliance costs are about $2 billion), Exhibit 2 to Staudt Declaration in Support of Industry Respondent-Intervenors' Motion to Govern Future Proceedings (Sept. 24, 2015) (ECF No. 1574838).

[11] Nor is there any basis for concern about whether EPA has timely considered costs in this rulemaking; EPA produced a comprehensive analysis demonstrating that the Rule's climate protection and public health benefits vastly exceed the Rule's costs, and achieving emissions

In fact, it is Applicants here who have sought to "circumvent" regular judicial procedures by filing multiple lawsuits in the D.C. Circuit and elsewhere before the Rule was even finalized, in defiance of the explicit limitations of the Clean Air Act, 42 U.S.C. § 7607(b)(1), (d)(8), (e).[12] The current stay motions are similarly irregular in the ways outlined above, and should be denied on that basis alone. In any event, as we further explain below, Applicants utterly fail to demonstrate that they are entitled to the extraordinary relief they seek.

II. APPLICANTS' REQUESTS FOR A STAY REST UPON BASIC MISCHARACTERIZATIONS OF THE RULE

While we rely primarily on Respondent EPA's discussion of Applicants' various legal arguments, we note that Applicants' merits arguments rest on serious mischaracterizations of the Rule. Contrary to Applicants' claims, the Rule's statutory foundation is straightforward and robust: EPA adopted it under Section 111(d) of the Clean Air Act, a provision that the Court has said "'speaks directly'" to

---

reductions cost-effectively is central to the Rule's design. *See*, *e.g.*, 80 Fed. Reg. at 64,744-51. 64,679-81, 64,748-51, 64,928-31; see also 42 U.S.C. § 7411(a)(1) (standards must "tak[e] into account costs").

[12] *See West Virginia v. EPA (In re Murray Energy Corp.),* 788 F.3d 330, 334 (D.C. Cir. 2015) (Kavanaugh, Griffith, and Henderson, JJ.) (unanimously dismissing petitions seeking to challenge proposed rule, D.C. Cir Nos. 14-1112 *et al.*, and D.C. Cir. No. 14-1146); Order, *West Virginia v. EPA*, Nos. 15-1277 & 15-1284, ECF No. 1572185 (Sept. 9, 2015) (Henderson, Rogers, and Griffith, JJ.) (ECF 1572185) (unanimously dismissing extraordinary writ petitions filed prior to publication of rule). These dismissals were followed by unusual requests from the petitioners to assign a particular panel of judges to the review of the final Rule, *e.g.*, [State Petitioners'] Pet. For Reh'g or Reh'g En Banc, or in the Alternative, Mot. For a Stay of the Mandate at 13-14, D.C. Cir. Nos. 14-1112 & 14-1151, ECF Nos. 1564467 & 1564350 (July 24, 2015). *See also* ECF. No. 1564467 at 13 (similar request from coal company petitioners). Other premature suits attempted to bypass Congress's provision for exclusive D.C. Circuit review of national Clean Air Act regulations, *Oklahoma ex rel. Pruitt v. EPA*, No. 15-CV-0381-CVE-FHM, 2015 WL 4607903, at *1 (N.D. Okla. July 31, 2015) (dismissing challenge to rule brought in Northern District of Oklahoma), *appeal dismissed*, No. 15-5066 (10th Cir. Sept. 21, 2015); *Nebraska v. EPA*, No. 4:14-cv-3006, 2014 WL 4983678 at *1 (D. Neb. Oct. 6, 2014) ("Nebraska's attempt to short-circuit the administrative rulemaking process runs contrary to basic, well-understood administrative law.").

CO_2 emissions from existing power plants, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011), and provides a flexible, cost-conscious framework well suited to that task, *see id.* at 2539 (noting that control of carbon dioxide from existing power plants requires "complex balancing" that the Clean Air Act entrusts "to EPA in the first instance"). Indeed, in *American Electric Power*, this Court dismissed common law nuisance claims against owners of power plants based on its unanimous conclusion (explicitly agreed to by petitioners' counsel at oral argument) that EPA has authority to address CO_2 emissions from existing power plants under Section 111(d). *Id.* at 2537.[13] That is the acknowledged authority EPA has now exercised in promulgating the Rule.[14]

Applicants' broad allegations regarding the consequences of the Rule when it eventually takes full effect are irrelevant to whether the Rule will cause irreparable harm during the time required for the D.C. Circuit's expedited review on the merits.[15] And, in any event, Applicants' extreme characterizations are wrong. The Rule builds on well-established power sector trends that have already resulted in

---

[13] Asked by Justice Ginsburg at oral argument in *American Electric Power* whether EPA could "grant the relief" sought by the plaintiffs – *i.e.*, mandatory reductions in CO_2 emissions from existing power plants – counsel for the utility petitioners responded: "We believe that the EPA can consider, as it's undertaking to do, regulating existing nonmodified sources under section 111 of the Clean Air Act, and that's the process that's engaged in now." Tr. of Oral Argument, No. 10-174 at 16–17 (Apr. 19, 2011).

[14] Contrary to Applicants' assertions, W.Va. Appl. 33, EPA has consistently interpreted section 111(d) in a way that would authorize regulation of greenhouse gases from the power sector, and has done so under Administrations of both parties since the 1990 Clean Air Act Amendments were enacted. *See* Br. of the Institute for Policy Integrity at New York University School of Law as Amicus Curiae in Support of Respondent at 5, *West Virginia v. EPA,* No. 14-1146 (D.C. Cir. Jan. 30, 2015), *available at* http://policyintegrity.org/documents/WestVirginia_v_EPA_Policy_Integrity_Amicus_013015.pdf.

[15] The D.C. Circuit has scheduled oral argument for June 2, 2016, less than four months from now. *See supra* note 4.

substantial carbon emission reductions from fossil-fueled power plants. Contrary to claims of severe stringency, the Rule will require a rate of CO_2 emissions reductions between 2022 and 2030 that is *more gradual* than the reduction rate actually experienced in the power sector over the last decade. *See* 80 Fed. Reg. at 64,785. The Rule allows states up to three years to develop emission reduction plans — equal to or longer than the planning deadlines under many other Clean Air Act programs — and gives states broad discretion and flexibility as to plan design. Alternatively, the Rule allows states to refrain from doing *anything at all*, leaving it to EPA to regulate the emissions from affected power plants directly, consistent with the Clean Air Act's well-established cooperative federalism structure.[16] The Rule accommodates power plant owners' expressed preference for flexible, cost-effective means of reducing emissions via emissions averaging and trading. Contrary to the Applicants' protest, the Rule does not dictate the closure of any specific power plant or deprive states of flexibility to take into account the remaining useful lives of individual plants, so long as overall emission reduction targets are met for the group of plants located within the state. And again, the Rule does not begin to require any reductions from affected sources until 2022 and is not fully effective until 2030.

[16] Section 111(d)(2)(A) expressly provides for federal plans where states do not submit their own, cross-referencing similar provisions in section 110(c) of the Clean Air Act. Section 111(d)(1) also cross-references section 110, which provides for flexible regulation of the electric power industry. *See* section 110(a)(2)(A) (authorizing "economic incentives such as fees, marketable permits, and auctions of emissions rights.") For example, the Cross-State Air Pollution Rule is currently being implemented through a suite of federal implementation plans, and has successfully and cost-effectively reduced interstate emissions of pollutants that contribute to soot and smog, *see EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014).

Applicants' efforts to portray the Rule as a stark departure from Clean Air Act precedent are likewise fruitless. Many air pollution control programs addressing the power sector have employed techniques such as emissions averaging and trading to reduce emissions efficiently.[17] In this regard the Rule is no different from other power-sector pollution regulations, such as the "good neighbor" regulations upheld in *EPA v. EME Homer City*, 134 S. Ct. 1584, or the statewide limits on nitrogen oxide emissions from power plants upheld in *Michigan v. EPA,* 213 F.3d 663 (D.C. Cir. 2000).[18] The Rule's design is also consistent with other highly successful Clean Air Act programs, including the flexible fleet-wide greenhouse gas and nitrogen oxides standards for cars and the flexible averaging, banking and trading permitted as part of the sector-based phase-out of lead in gasoline*, see Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534-36 (D.C. Cir. 1983) (upholding gasoline lead standards that were premised on the projection that refineries would engage in emission credit trading); *NRDC v. Thomas*, 805 F.2d 410,

---

[17] *See* R. Revesz, *et al.*, "Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan." 1, 3 (Inst. for Policy Integrity Dec. 2015), *available at*: http://policyintegrity.org/files/publications/FamiliarTerritory.pdf (summarizing "a wide variety of regulations from the Clean Air Act's forty-five-year history that provide substantial precedent for the flexible design of the Clean Power Plan" and noting that EPA "has previously promulgated several rules – under both Section 111 and other provisions of the Clean Air Act – that incorporate beyond-the-fenceline strategies for reducing emissions."); *see also*, *e.g.*, 80 Fed. Reg. at 64,678; EPA, Legal Memorandum Accompanying Clean Power Plan for Certain Issues ("Legal Memo"), Docket No. EPA-HQ-OAR-2013-0602-36872, at 7-8, 105-17.

[18] Both the Cross-State Air Pollution Rule and the NO_x SIP Call Rule explicitly took the potential for shifting generation among facilities into account when establishing state-wide emission budgets for nitrogen oxides and sulfur dioxide from power plants. *See* Revesz et al., *supra* note 17 at 7 (describing how in setting state budgets for CSAPR, EPA explicitly took into account emission reductions that could be achieved only by going outside the fenceline of an individual plant, such as those associated with increased dispatch of lower-emitting generation); Legal Memo at 96 (explaining that state-wide emission budgets in the NO_x SIP Call Rule were based on controls determined to be cost-effective, considering changes in dispatch among regulated power plants).

425 (D.C. Cir. 1986) (upholding emissions averaging for heavy duty vehicles as reasonable and not prohibited by statute).

Shifting generation among facilities in order to meet power needs economically is also a routine part of the power industry's daily operations, and a familiar component of companies' longer-term emission reduction strategies. 80 Fed. Reg. at 64,795, 64,782 n.604; *cf. FERC v. Elec. Power Supply Ass'n*, No. 14-840, Slip op. at 4, 24 (Jan. 25, 2016) (recognizing that "almost all electricity flows … through an interconnected 'grid' of near-nationwide scope," and upholding agency's reliance on an approach to the electric power industry that "emerged not as a Commission power grab, but instead as a market-generated innovation"). Indeed, many industry commenters urged EPA to permit compliance with the Rule by these very means, reflecting the recognition that they are a well-demonstrated "system of emission reduction." *See*, *e.g.*, Legal Memo 14-18; *see also id.* at 114-16 (noting broad industry support for considering such measures to constitute "installation of controls" under the hazardous air pollution provisions of Section 112).

Contrary to Applicants' claims, *see*, *e.g.* N.D. Appl. 16-19, W. Va. Appl. 18-20, the Rule does not disturb the existing roles of energy regulators, system operators, or generators, all of whom have extensive experience incorporating federal air pollution requirements into the power system's planning and daily operations. To be sure, as with any pollution control regulation, compliance with the Rule starting in 2022 may affect an individual plant's cost of operation, which could, for plants in competitive markets, change how frequently they operate, *see, e.g. FERC v. EPSA*,

slip op. at 18-19, and potentially lead some operators to retire certain plants. Again, in this regard, the Rule is no different from any other power sector pollution regulation – *e.g.*, the good neighbor regulations this Court upheld in *EME Homer City*, or the acid rain provisions in Clean Air Act Title IV. These ordinary economic consequences of federal pollution controls do not impermissibly invade an energy policy domain exclusive to the states.[19]

Applicants, of course, will have a full and fair opportunity to present their objections to the Rule to the D.C. Circuit – and on an expedited basis – which is the court chosen by Congress to hear their arguments in the first instance. But they are unlikely to prevail on the merits, and they certainly have not shown otherwise in their briefing in this Court.

III. THE EQUITABLE FACTORS STRONGLY DISFAVOR A STAY

In considering the stay motions, the D.C. Circuit reviewed more than 350 pages of briefing from the parties, with more than 2,500 pages of supporting declarations offered in support or opposition to the stay motions. The Advanced Energy Respondents, Environmental Respondents and Power Company Respondents joining this opposition brief submitted separate briefs opposing the stay requests, as well as numerous supporting declarations, all addressing the equitable factors.

[19] Contentions that the Rule interferes with federal or state energy regulation have been refuted by a broad range of energy-sector declarants, including former FERC chairs appointed by Presidents of both parties, numerous state energy regulators, and leading experts on state energy regulation. *See*, *e.g.*, Declarations of Jon Wellinghoff ¶¶ 35-36, and Joseph Kelliher ¶¶ 6-12.

These submissions included substantial evidence from experts in energy policy, foreign policy, electric system reliability and the economy, and state planning. Declarations also were submitted by experts from some of the nation's largest power producers and utilities, and from major companies that produce and supply electricity from non-carbon sources, companies that market technologies to improve the reliability and increase the efficiency of the electricity distribution grid, and large electricity consumers with an interest in a robust and reliable energy system. The full set of these supporting declarations (as well as those submitted by the states opposing the stay motions), and the three stay oppositions themselves, may be found in the Appendices to this opposition.[20]

Below is a cross-section of the evidence offered in the D.C. Circuit showing that the Rule will not cause irreparable injury during the expedited period required for the court of appeals' review and that a stay would cause significant harm to third parties and to the public interest.

A. Applicants Have Failed to Show that the Rule Will Cause Them Irreparable Harm.

It is Applicants' burden to show that "irreparable injury is *likely*" in the absence of a stay, *Winter*, 555 U.S. at 21-22; without such a showing, their applications must be denied. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315,

[20] The groups of parties joining in this brief have differing perspectives, but are united in believing the Rule is a lawful, reasonable, and cost-effective means of achieving needed reductions of carbon pollution, and that a stay of the Rule is unwarranted. Their different perspectives are reflected in the separate D.C. Circuit responses and accompanying declarations, and the parties do not, by joining in this filing, necessarily adopt one another's distinct views on all matters addressed in those declarations.

1316-17 (1983) (Blackmun, J., in chambers) (likelihood of success "need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay").

Applicants ask this Court to stay regulatory obligations operative in the distant future. The Rule allows states that choose to submit implementation plans until September 2018 to adopt such plans – longer than provided under numerous prior Clean Air Act programs for the power sector. Declaration of Janet McCabe, EPA Acting Assistant Administrator for Air and Radiation attached to EPA's opposition, ¶¶ 10-31. Compliance obligations for sources do not *begin* until 2022, and do not fully phase in until 2030. The Rule allows each state to determine its own optimal "glide path" for compliance over this period. McCabe ¶¶ 6-9. Individual sources' obligations will depend upon the design of state plans to be adopted years from now, and will be based upon state-chosen, flexible compliance options when emission limits begin to phase in.

A stay here would necessitate abandoning traditional standards of what is required to establish irreparable harm. *See Nken,* 556 U.S. at 434; *Rucklehaus,* 463 U.S. at 1316-17 (Blackmun, J. describing "heavy burden" applicants must meet to show irreparable harm) (citation omitted); *see also Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers) (noting, in a case where there had already been a merits decision by a three-judge district court, that stays pending review by this Court are "granted only in extraordinary circumstances"). Applicants do not cite any case in which this Court has stayed agency (or other governmental) action

when the required compliance was so remote in time, or when (as here) particular compliance obligations had not yet been determined in subsequent regulatory actions.

1. *The Rule Does Not Cause Irreparable Harm to States.*

The responses of EPA and State Respondent-Intervenors fully refute claims that state planning efforts amount to substantial, let alone irreparable, harms upon states. For states that *choose* to develop their own plans, their near-term obligations are very modest. McCabe ¶¶ 11-17. The Rule allows states to submit a full plan by September 6, 2016, or obtain a two-year extension until September 2018 by making an undemanding and non-binding initial submittal. McCabe ¶¶ 11-17. The three-year period for submitting a full state plan is wholly consistent with many other rules under the Act and does not impose unusual burdens over the litigation period. McCabe ¶ 11; Declaration of Larry Soward, former head of the Texas Commission on Environmental Quality, ¶¶ 9-19. And as noted above, states can choose not to develop a plan at all, leaving direct regulation of power plants to EPA as provided under Section 111(d)(2)(A) of the Clean Air Act. Moreover, a state that becomes subject to a federal plan can still choose, at any later point, to adopt an approvable state plan that would supplant the federal plan. *See* Rule, 80 Fed. Reg. at 64,942.

2. *The Rule Does Not Cause Irreparable Harm to Industry.*

Faced with a Rule that imposes no compliance obligations on affected sources until 2022 at the earliest, Industry Applicants seek to blame the Rule for the observed decline in the coal industry, and for a series of speculative future harms as

well. They grossly misinterpret EPA modeling in order to claim that the Rule will force many coal-fired power plants to retire as soon as this year. Yet they fail to show that the Rule will force businesses to retire plants or undertake compliance investments before the D.C. Circuit can decide the merits, or indeed before this Court can consider whether to review that decision.

a. Applicants Persist in Wrongly Attributing the Continued Decline in Coal-Fired Generation to the Rule.

Applicants wrongly attribute the current decline in domestic coal mining and coal-fired power generation to a Rule that will not impose any compliance obligations before 2022. In fact, reductions in coal-fired generation are being driven by independent changes in the electricity sector that long predate the Rule. *See* Declaration of J.D. Furstenwerth, Senior Director of Environmental Services, Calpine Corp., for Power Company Respondents, ¶¶ 16-17; Declaration of Malcolm Woolf, Advanced Energy Economy, for Advanced Energy Respondents, ¶¶ 39-40. These changes include the abundant supply of relatively inexpensive natural gas, the increasing cost-competitiveness of electricity from renewable generation sources such as solar and wind power, the deployment of low-cost energy efficiency and other demand-side measures, and increasing consumer demand for advanced energy, as well as the rising costs of coal production and the high costs of maintaining very old coal-fired plants. None of these changes in the electricity sector shows any sign of abating, regardless of the Rule's implementation. *See, e.g.*, Declaration of Joseph Kelliher, former Chair of the Federal Energy Regulatory Commission, ¶ 13; Declaration of Susan Tierney, former Assistant Secretary of

Energy, ¶¶ 67-73; *see also* Declaration of EPA's Kevin Culligan ¶ 23 ("By 2030, the average coal-fired power plant will be approximately 60 years old – five years older than the average age that coal-fired power plants have been retiring in recent years."). These broad secular changes in the coal industry predated the Rule's adoption, and these trends would persist in the Rule's absence. *See id.* Figures A-1 to A-5.

Further, Applicants' claims that particular coal-fired power plants will close due to the Rule during this litigation are baseless. Applicants continue to ground their claims of the Rule's immediate consequences on coal-fired generation on a gross distortion of an EPA modeling analysis, presented in greatest detail in the declaration of coal-industry consultant Seth Schwartz. As Power Company Declarant Furstenwerth attests, no operator would retire a financially viable source in the near term merely because its retirement was projected by an EPA model designed to illustrate the long-term impacts of regulation on the power sector as a whole. Furstenwerth ¶ 22. As explained by Dallas Burtraw and Joshua Linn (PhD economists at Resources for Future and declarants for the Environmental Respondents), the modeling results on which Applicants rely cannot credibly be employed to predict specific plant closures six years in advance of when emission reductions are first required (in 2022). Burtraw ¶¶ 16-24; *see also* Declaration of EPA's Reid Harvey, ¶¶ 33-40. Indeed, Burtraw and Linn demonstrate that the owners of coal-fired plants have strong economic incentives to *defer* major

retirement or investment decisions until their specific obligations are defined in state (or federal) plans to be completed in 2018. Burtraw ¶¶ 20, 25.

Because there is no basis for Applicants' primary claims that the Rule compels plant owners to make immediate retirement decisions in order to comply with obligations that are at least six years off, there is also no basis for their derivative allegations regarding imminent job losses, mine closures and other business losses, and tax revenue losses. Burtraw ¶ 46.

b. Applicants Can Defer Decisions to Invest in New Generation Capacity Until After a Decision on the Merits.

Applicants claim they must construct major amounts of currently unplanned new generating capacity before 2022 to assure compliance, and that lead-time requirements mandate immediate decisions. Neither proposition is correct. More than six years remain before the Rule *begins* to require any emission reductions from affected units, and actual compliance with those emission limitations would not need to be demonstrated until even later. Because of this extended lead time, and the numerous options available to reduce emissions quickly, Applicants can wait at least until an expedited D.C. Circuit ruling on the merits before deciding on a compliance approach. Furstenwerth ¶ 27.

Further, transmission expansion is not essential in the near term because sufficient renewable resources can be deployed to comply with the Rule's interim targets without new transmission. Declaration of Michael Goggin for Advanced Energy Respondent American Wind Energy Association, ¶ 57. Additionally, former Assistant Energy Secretary Tierney explained that large amounts of new cleaner

generating capacity are *already* in advanced stages of planning or under construction and will contribute to timely compliance. Tierney ¶¶ 48-54.[21] Indeed, as many as 21 of the Applicant States can meet the Rule's emissions targets with generation projects *already* proposed, permitted, or under construction, coupled with existing state requirements for renewables and energy efficiency through 2024 – and as many as 18 of them can meet the targets through 2030 with currently proposed generation projects. Declaration of Dianne Munns, former chair of the National Association of Regulatory Utility Commissioners, for Environmental Respondents ¶¶ 9, 12. Applicant North Dakota, for example, a coal-intensive state that has alleged economic harms, could fully comply with the Rule by maintaining recent modest rates of wind power development. *Id.* Likewise, Texas will come close to full compliance with the Rule during the 2022-2030 compliance period under "business as usual" conditions. Declaration of John Hall, former chairman of the Texas Natural Resource Conservation Commission, for Environmental Respondents, ¶¶ 44-45.

Applicants ignore still other compliance options that can be deployed almost immediately. For example, the Rule contemplates increased use of existing natural-gas fired plants in 2022, a shift in generation which can occur without any new investment—and is in large part happening anyway. Woolf ¶ 39. The Rule also

[21] Tierney's analysis was performed before Congress extended tax credits for renewable generation in December 2015. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. P, §§ 301–303 (2015). The extension of these tax credits will drive further investment in renewable energy sources, reducing the compliance burden for the power sector.

recognizes that utilities can adopt energy efficiency and other demand-side measures as part of their compliance strategy (80 Fed. Reg. at 64,901), many of which can be deployed rapidly and achieve significant, cost-effective emission reductions. *Id.* ¶¶ 57-67. And Applicants will also be able to achieve rapid compliance with the Rule through emissions-trading programs (80 Fed. Reg. at 64,733-35), which are likely to emerge quickly as a rapidly deployable and cost-minimizing method for compliance. Furstenwerth ¶ 14. See also Advanced Energy Respondents' Appellate Br. at 4 n.3; Power Company Respondents' Appellate Br. at 4-5.

Even if Applicants determine that new generating capacity and transmission infrastructure is needed for compliance, such investment decisions can be deferred until after a decision on the merits. The lead time to develop new solar and wind generating capacity can be significantly shorter than five years, absent the need for new transmission to deliver power from these resources to the load. *Id.* at 3. As explained by the American Wind Energy Association's Michael Goggin, renewable energy projects can be developed quickly from initial assessment to completion – often in less than two years, even for utility-scale plants. Goggin ¶¶ 21-22. New gas-fired plants, too, can be developed much quicker than the decades-long time scale posited by Applicants. *Id.*; Furstenwerth ¶ 27.

Applicants' claims that major costs must be incurred in the next two years are inconsistent with the extensive experience of the Power Company Respondents in developing new generation capacity. *Id.* ¶ 28.

c. Applicants' Claims That the Rule Will Increase Electricity Costs and Compromise Reliability Are Baseless.

Applicants cannot seriously contend that, in the absence of a stay, electricity prices will increase. See, e.g., Utility Appl. (No. 15-A-776) at 17. It strains credibility to assert that prices will increase in the near term as the result of a Rule that requires no reductions prior to 2022. Moreover, EPA's careful analysis determined that the Rule will in fact *lower* electric bills by 2025, *See* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, Docket No. EPA-HQ-OAR-2013-0602-36791 3-40 (Aug. 2015) (hereinafter EPA RIA). Applicants' claims of impending price increases also ignore cost-saving compliance strategies such as energy efficiency, which *reduce* electric bills, as well as flexible tools like emissions trading that also minimize costs. Tierney ¶¶ 75-80. Further, the tremendous flexibility afforded states in designing state-based compliance strategies creates a clear pathway for states to adopt cost-minimizing compliance strategies.

Applicants' reliability concerns are similarly mistaken. For decades, utilities have successfully complied with Clean Air Act regulations that are more prescriptive and have shorter compliance timelines, all without jeopardizing electricity reliability. The Rule includes multiple reliability safeguards, and requires extensive and ongoing cooperation between EPA and FERC. It does not disturb any of the current reliability policies or mechanisms implemented by FERC, regional grid operators, state regulators, and other entities. *See* 80 Fed. Reg. at 64,876–79, and EPA-DOE-FERC Coordination on Implementation of the Clean

Power Plan, Docket ID No. EPA-HQ-OAR-2013-0602-36313 (Aug. 3, 2015). *See also* Declarations of former FERC Chairs Jon Wellinghoff, ¶¶ 35-36, and Joseph Kelliher, ¶¶ 6-12.

And Applicants ignore the variety of technological advances—including controls in renewable generators, demand-response technology, flexible gas generation, storage, and energy efficiency—that pair with renewable energy to bolster grid reliability. See Woolf ¶ 53. Applicants' reliability concerns are contradicted by utilities' real-world experience with integrating advanced and renewable energy into the grid.

B. A Stay Would Harm the Interests of Third Parties

Applicants ignore the real and substantial harm that a stay would inflict on the Advanced Energy Respondents' members and the nation's clean energy industry. A stay would introduce uncertainty among investors that could slow the growth of the $200 billion advanced energy market. Woolf ¶ 104.[22] Investors rely on policy certainty in deciding whether to finance solar, wind, and energy efficiency projects. A stay would make it more difficult to secure affordable project-level debt and equity, which are essential to developing, constructing, and operating these advanced energy projects. *Id.*

A stay also would likely diminish the benefit to investors of the Rule's Clean

[22] State Applicants cite Advanced Energy Respondents' brief for the proposition that the Rule would drive "'billion[s]'" of dollars to wind and solar power. State Appl. 13, 47 (alteration in original). That is a mischaracterization of Respondents' argument below, which was that a stay of the Rule "would chill the continued growth of the [existing] $200 billion advanced energy market." Advanced Energy Respondents' Br., App B., at 7.

Energy Incentive Program, a voluntary early action program for renewable energy and low-income energy efficiency projects. To be eligible for marketable CEIP emission credits, a facility must be constructed after a state submits its final plan to EPA. The facility can then earn salable credits for clean power generated or saved in 2020 and 2021. A stay that delayed the submission of state plans could delay construction of wind and solar facilities, or development of energy efficiency projects, which could, in turn, constrict or even eliminate the opportunity for investors to earn such credits. Declaration of Michael Mendelsohn for Advanced Energy Respondent Solar Energy Industries Association, ¶ 19.

These harms will be felt beyond the advanced energy industry. Uncertainty or slowing growth in the renewable energy market from a stay would harm consumers, such as Google Inc., who are planning to make long-term purchases of additional renewable energy. Demasi ¶ 11. And a stay would slow job growth in the solar and wind industries, which collectively employ more than twice as many workers as the coal industry. Mendelsohn ¶ 19.

C. A Stay Would Be Contrary to the Public Interest

Applicants' requests to delay the Rule's deadlines, both for state planning and for power plant compliance (e.g. Utilities Appl. 22; Coal Appl. 36), ignore the profound and ongoing harms to the Earth's climate and population. Any such delays would be decidedly contrary to the public interest. First, postponing deadlines for compliance beyond 2022 would further delay vital reductions in the largest source of the carbon pollution driving current and future climate change impacts that gravely

endanger public health and welfare. *See* Declaration of Michael MacCracken, PhD climate scientist and former director of the U.S. Global Change Research Program, for Environmental Respondents, ¶¶ 30, 56. Because CO_2 emissions are long-lived in the atmosphere – persisting and accumulating for hundreds of years – the increase in pollution threatened by any delay in compliance would damage our climate far beyond the period of the stay. Contrary to Applicants' attempts to belittle the Rule's benefits (*e.g.*, Coal Appl. 34-35), EPA's record and the climate scientists' declarations show that the Rule's CO_2 emission reductions will help mitigate highly dangerous future climate impacts, ranging from extreme weather events to rapid sea level rise. McCracken ¶¶ 20, 25-28. These reductions will provide quantifiable and significant climate protection and public health benefits to society, worth tens of billions of dollars over the lifetime of the Rule. *See* EPA RIA 4-9. Delaying the Rule's CO_2 reductions by even one year would sacrifice climate protection benefits worth $11 billion. McCracken ¶¶ 43-44.

Staying the Rule also would undermine the important U.S. foreign policy objective of galvanizing global efforts to curb climate-changing carbon pollution. As former Secretary of State Madeleine Albright explains in her declaration filed with the D.C. Circuit, the Rule is the central element of U.S. domestic action on climate change, and was critical to achieving serious action commitments from more than 190 nations that adopted the Paris Climate Agreement in December 2015.[23]

[23] The Paris Climate Agreement under the United Nations Framework Convention on Climate Change, (Dec. 12, 2015), available at http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf.

Declaration of Madeleine Albright ¶¶ 2, 4-5. Secretary Albright states that "[t]he leadership role of the United States will remain critical" going forward, and that, "if our country were to falter or renege on its commitments, we will undermine others' performance," setting back global cooperation on curbing climate pollution for years. For these reasons, Secretary Albright concludes that a stay would have "serious adverse foreign policy consequences." Albright ¶ 12.

CONCLUSION

The applications for a stay of the Rule should be denied.

Dated: February 4, 2016

Respectfully submitted,

Richard Ayres
Counsel of Record
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L Street, N.W., Suite 850
Washington, D.C. 20036
(202) 452-9200
ayresr@ayreslawgroup.com

Counsel for NextEra Energy, Inc. And the Solar Energy Industries Ass'n

Kevin Poloncarz
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
kevinpoloncarz@paulhastings.com

Counsel for Power Company Respondents Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District, and Southern California Edison Company

Lawrence S. Robbins
Jennifer S. Windom
Daniel N. Lerman
ROBBINS, RUSSELL, ENGLERT, ORSECK,
UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
lrobbins@robbinsrussell.com

Counsel for Advanced Energy Economy

Gene Grace
AMERICAN WIND ENERGY ASSOCIATION
1501 M St., N.W., Ste. 1000
Washington, D.C. 20005
Telephone: (202) 383-2500
ggrace@awea.org

Counsel for American Wind Energy Association

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 513-6256
ddoniger@nrdc.org

Counsel for Natural Resources Defense Council

Sean H. Donahue
Donahue & Goldberg, LLP
1130 Connecticut Avenue NW, Suite 950
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com

Tomás Carbonell
Vickie Patton
Martha Roberts
Peter Zalzal
Environmental Defense Fund
1875 Connecticut Avenue NW
Suite 600
Washington, D.C. 20009
(202) 572-3610
tcarbonell@edf.org

Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105
(415) 977-5725
joanne.spalding@sierraclub.org

Counsel for Sierra Club

Howard I. Fox
David S. Baron
Timothy D. Ballo
Earthjustice
1625 Mass. Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500
hfox@earthjustice.org

Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
18 Tremont Street, Suite 530
Boston, MA 02108
(617) 624-0234, ext. 156
aweeks@catf.us

Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and The

Vera P. Pardee
Kevin P. Bundy
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
vpardee@biologicaldiversity.org

Counsel for Center for Biological Diversity

Ohio Environmental Council

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
Tel: 304-342-5588
william.depaulo@gmail.com

Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition and Keepers of the Mountains Foundation