

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for Review of Final Agency Action of the United
States Environmental Protection Agency
84 Fed. Reg. 32,520 (July 8, 2019)

**OPENING BRIEF OF PETITIONERS CONSOLIDATED
EDISON, INC., EXELON CORPORATION, NATIONAL
GRID USA, NEW YORK POWER AUTHORITY, POWER
COMPANIES CLIMATE COALITION, PUBLIC SERVICE
ENTERPRISE GROUP INCORPORATED, AND
SACRAMENTO MUNICIPAL UTILITY DISTRICT**

KEVIN POLONCARZ
DONALD L. RISTOW
JAKE LEVINE
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
+1 (415) 591-6000
kpoloncarz@cov.com

April 17, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District state as follows:

Parties and *Amici*

All parties, intervenors, and *amici* appearing in this case are listed in the Opening Brief for State and Municipal Petitioners.

Rulings Under Review

The final agency action under review is: Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

Related Cases

Petitioners adopt the statement of related cases set forth in the Opening Brief for State and Municipal Petitioners.

/s/ Kevin Poloncarz
Kevin Poloncarz

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioners Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District provide the following disclosure statements.

Consolidated Edison, Inc. (“Con Edison”) states that it is a holding company that owns several subsidiaries, including Consolidated Edison Company of New York, Inc., which delivers electricity, natural gas and steam to customers in New York City and Westchester County, Orange & Rockland Utilities, Inc., which together with its subsidiary, Rockland Electric Company, delivers electricity and natural gas to customers primarily located in southeastern New York State and Northern New Jersey, and Con Edison Clean Energy Business, Inc., which, through its subsidiaries, develops, owns, and operates renewable and energy infrastructure projects and provides energy-related products and services to wholesale and retail customers and has more than 2,600 megawatts of utility-scale solar and wind generation capacity in service,

with a footprint spanning 17 states. Con Edison has outstanding shares and debt held by the public and may issue additional securities to the public. Con Edison has no parent corporation and no publicly held company has a ten percent or greater ownership interest in it.

Exelon Corporation (“Exelon”) states that it is a holding company, headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 48 states, the District of Columbia and Canada. Exelon owns Atlantic City Electric Company (“Atlantic City Electric”), Baltimore Gas and Electric Company (“BGE”), Commonwealth Edison Company (“ComEd”), Delmarva Power & Light Company (“Delmarva Power”), PECO Energy Company (“PECO”), and Potomac Electric Power Company (“Pepco”). Together Atlantic City Electric, BGE, ComEd, Delmarva Power, PECO and Pepco own electric transmission and distribution systems that deliver electricity to approximately 10 million customers in the District of Columbia (Pepco), northern Delaware and the Delmarva Peninsula (Delmarva Power), southern New Jersey (Atlantic City Electric), Northern Illinois (ComEd), Maryland (BGE and Pepco), and southeastern Pennsylvania (PECO). In addition BGE distributes natural gas to over 600,000 customers in

central Maryland and also operates a liquefied natural gas facility for the liquefaction and storage of natural gas as well as associated propane facilities. Delmarva Power distributes natural gas to over 122,000 consumers in northern Delaware. PECO distributes natural gas to over 500,000 consumers in the suburban Philadelphia area. Exelon subsidiary Exelon Generation Company (“ExGen”) is one of the largest competitive power generators in the U.S., with approximately 32,000 megawatts of owned capacity comprising one of the nation’s cleanest and lowest-cost power generation fleets, located in a number of organized markets. Constellation, an ExGen business unit consisting of subsidiaries and divisions of ExGen, is one of the nation’s leading marketers of electricity and natural gas and related products in wholesale and retail markets. These businesses serve approximately 2.5 million residential and business customers in various markets throughout the U.S. Exelon’s stock trades on the NASDAQ under the symbol EXC. It has no parent corporation and no publicly held company has a 10 percent or greater ownership interest in it.

National Grid USA states that it is a holding company with regulated direct and indirect subsidiaries engaged in the transmission,

distribution and sale of electricity and natural gas and the generation of electricity. It is the direct or indirect corporate parent of several subsidiary electric distribution companies, including Massachusetts Electric Company, Nantucket Electric Company, Niagara Mohawk Power Corporation and The Narragansett Electric Company. National Grid USA is also the direct corporate parent of National Grid Generation LLC, which supplies capacity to, and produces energy for, the use of customers of the Long Island Power Authority. 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. No publicly held corporation directly owns more than 10 percent of National Grid plc's outstanding ordinary shares.

New York Power Authority ("NYPA") states that it is a New York State public-benefit corporation. It is the largest state public power utility in the United States, with 16 generating facilities and more than 1,400 circuit-miles of transmission lines. NYPA sells electricity to more than 1,000 customers, including local and state government entities, municipal and rural cooperative electric systems, industry, large and small businesses and non-profit organizations. NYPA has no parent corporation and no publicly held company owns greater than 10 percent ownership interest in it.

Power Companies Climate Coalition states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas, organized to advocate for responsible solutions to address climate change and reduce emissions of greenhouse gases and other pollutants, including through participation in litigation concerning federal regulation. Its members include the Los Angeles Department of Water and Power ("LADWP"), Pacific Gas and

Electric Company, Seattle City Light and the other entities providing disclosures in this statement.

LADWP states that it is a vertically integrated publicly-owned electric utility of the City of Los Angeles, serving a population of over 4 million people within a 465 square mile service territory covering the City of Los Angeles and portions of the Owens Valley. LADWP is the third largest electric utility in the state, one of five California balancing authorities, and the nation's largest municipal utility. LADWP owns and operates a diverse portfolio of generation, transmission, and distribution assets across several states. LADWP's diverse portfolio includes electricity produced from natural gas, hydropower, coal, nuclear, wind, biomass, geothermal, and solar energy resources. LADWP owns and/or operates the majority of its conventional generating resources, with a net dependable generating capacity of 7,967 megawatts. Its transmission system, which includes more than 3,700 circuit-miles of transmission lines, transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and elsewhere within California to the City of Los Angeles. LADWP's mission is to provide clean, reliable water and power in a safe, environmentally responsible, and cost-effective manner.

Public Service Enterprise Group Incorporated (“PSEG”) states that it is a publicly-held company trading on the New York Stock Exchange under the symbol PEG. Its subsidiaries include: (1) Public Service Electric and Gas Company, which has publicly held debt securities outstanding, earns revenues from its regulated rate tariffs and invests in regulated solar generation projects and energy efficiency and related programs in New Jersey; and (2) PSEG Power LLC, which has publicly held debt securities outstanding and is a wholesale energy supply company that integrates its generation asset with its wholesale energy, fuel supply, energy trading and marketing and risk management functions through three principal subsidiaries: (i) PSEG Nuclear LLC, which owns and operates nuclear generating stations; (ii) PSEG Fossil LLC, which develops, owns and operates domestic fossil-fired and other nonnuclear generating stations; and (iii) PSEG Energy Resources & Trade LLC, which markets the capacity and product of PSEG Nuclear LLC’s and PSEG Fossil LLC’s generating stations, manages the commodity price risks and market risks related to generation, and provides gas supply services. PSEG has publicly-held common stock and

debt securities outstanding. PSEG has no parent company and no publicly held company holds greater than a 10 percent interest in it.

Sacramento Municipal Utility District (“SMUD”) states that it is the nation’s sixth largest community-owned utility, with a service population of approximately 1.5 million located in Sacramento County, California, and small portions of Placer and Yolo counties. SMUD has no parent corporation and no publicly held company holds greater than a 10 percent interest in it.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .i	
CORPORATE DISCLOSURE STATEMENT.....ii	
TABLE OF CONTENTS x	
TABLE OF AUTHORITIESxii	
GLOSSARY xv	
STATEMENT OF JURISDICTION..... 1	
STATEMENT OF THE ISSUES..... 1	
STATUTES AND REGULATIONS 2	
STATEMENT OF THE CASE 2	
STANDARD OF REVIEW..... 2	
SUMMARY OF ARGUMENT 3	
STANDING 4	
ARGUMENT 8	
I. The Clean Air Act Does Not Mandate EPA’s Restrictive Interpretation of Section 111..... 8	
II. The Best “System” of Emission Reduction Can Reasonably Include Generation-Shifting Measures..... 17	
III. The Clean Air Act Does Not Prohibit Source Owners from Utilizing Trading or Averaging As a Means of Compliance 23	
IV. EPA Has Broad Authority Under the Clean Air Act To Approve More Stringent State Plans That Achieve Real Emission Reductions 29	
CONCLUSION 31	

CERTIFICATE OF COMPLIANCE 33

CERTIFICATE OF SERVICE..... 34

TABLE OF AUTHORITIES

CASES

<u>Am. Elec. Power v. Connecticut</u> , 564 U.S. 410 (2011)	8, 13-14
<u>ASARCO v. EPA</u> , 578 F.2d, 319 (D.C. Cir. 1978).....	26
<u>Lujan v. Defenders of Wildlife</u> , 504 U.S. 555 (1992).....	4-5
<u>Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.</u> , 471 F.3d 1350 (D.C. Cir. 2006)	17, 22
<u>Prill v. NLRB</u> , 755 F.2d 941 (D.C. Cir. 1985).....	9, 23
<u>Massachusetts v. EPA</u> , 549 U.S. 497 (2007)	22
<u>NARUC v. Interstate Commerce Comm’n</u> , 41 F.3d 721 (D.C. Cir. 1994)	25
<u>Sierra Club v. EPA</u> , 292 F.3d 895 (D.C. Cir. 2002).....	5
<u>Transitional Hospitals Corp. of Louisiana, Inc. v. Shalala</u> , 222 F.3d 1019 (D.C. Cir. 2000)	28-29
<u>Union Electric Co. v. EPA</u> , 427 U.S. 246 (1976).....	29-31
<u>Util. Air Regulatory Group v. EPA</u> , 573 U.S. 302 (2014).	13

STATUTES

*Clean Air Act § 111, 42 U.S.C. § 7411	8-12, 18-21, 24, 26
Clean Air Act § 169, 42 U.S.C. § 7479	21
Clean Air Act § 169A, 42 U.S.C. § 7491.....	21

Clean Air Act § 307, 42 U.S.C. § 7607	1
---	---

REGULATIONS

40 C.F.R. § 52.220.....	27
-------------------------	----

FEDERAL REGISTER

80 Fed. Reg. 64,662 (Oct. 23, 2015)	18-19
---	-------

*84 Fed. Reg. 32,520 (July 8, 2019)	1, 8-12, 17-21, 23-25, 27, 29-31
---	----------------------------------

MISCELANEOUS

Comments of American Electric Power on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-24822 (Oct. 31, 2018).....	28
---	----

Comments of Con Edison, Exelon, LADWP, National Grid, NYPA, PG&E, Seattle City Light, and SMUD on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-26636 (Oct. 31, 2018)....	7, 14, 15
--	-----------

Comments of Exelon on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-23801 (Oct. 31, 2018).....	7, 16
--	-------

Comments of Exelon on Proposed Repeal, EPA-HQ-OAR-2017-0355-20934 (Apr. 26, 2018)	7, 14, 16-17
--	--------------

Comments of Exelon, et al. on Proposed Repeal, EPA-HQ-OAR-2017-0355-19928 (Apr. 26, 2018)	7
--	---

Comments of LADWP on Proposed Clean Power Plan, EPA-HQ-OAR-2013-0602-23122 (Dec. 1, 2014)	15
--	----

Comments of The Clean Energy Group on Proposed Clean Power Plan, EPA-HQ-OAR-2013-0602-23169 (Dec. 1, 2014)	7
---	---

Comments of The Clean Energy Group on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-23802 (Oct. 31, 2018).....	7
Comments of The Clean Energy Group on Proposed Repeal, EPA-HQ-OAR-2017-0355-19852 (Apr. 26, 2018)	7
Legal Memorandum Accompanying the Clean Power Plan on Certain Issues, EPA-HQ-OAR-2013-0602-36872 (Oct. 23, 2015)	29
Respondent EPA’s Final Brief, <u>West Virginia v. EPA</u> , No. 15-1363 (D.C. Cir. Apr. 22, 2016).....	10

*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

CAA	Clean Air Act
CO ₂	Carbon Dioxide
EPA	U.S. Environmental Protection Agency
Rule	Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019)

STATEMENT OF JURISDICTION

Power Company Petitioners challenge the final agency action of the U.S. Environmental Protection Agency (“EPA”) entitled, “Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations” (the “Rule”), published at 84 Fed. Reg. 32,520 (July 8, 2019). This Court has exclusive jurisdiction over timely-filed petitions for review under Clean Air Act (“CAA”) section 307(b)(1), 42 U.S.C. § 7607(b)(1). Power Company Petitioners timely filed their petition for review on September 6, 2019 (Document #1805719).

STATEMENT OF THE ISSUES

(1) Whether EPA’s Rule, which repealed the Clean Power Plan and issued replacement emission guidelines, is arbitrary and capricious, an abuse of discretion, and not in accordance with the CAA because it is premised upon EPA’s erroneous conclusion that section 111 unambiguously limits the “best system of emission reduction” to only those measures that can be applied at and to an existing source and excludes other measures, which EPA contends cannot be applied at and

to an existing source, such as shifting of generation from higher-emitting to lower-emitting and non-emitting electric generating units.

(2) Whether EPA also erred in concluding that section 111 unambiguously prohibits it from approving state plans that authorize sources to utilize averaging and trading as a means of compliance and may also prohibit it from approving state plans that result in a greater degree of emission reduction than would occur through application of EPA's best system.

STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in the Opening Brief for State and Municipal Petitioners.

STATEMENT OF THE CASE

Petitioners adopt the Statement of the Case set forth in the Opening Brief for State and Municipal Petitioners.

STANDARD OF REVIEW

Petitioners adopt the Standard of Review set forth in the Opening Brief for State and Municipal Petitioners.

SUMMARY OF ARGUMENT

EPA's Rule is unlawful because it is premised upon EPA's erroneous conclusion – contrary to the preceding rule issued in 2015 – that CAA section 111 *unambiguously* limits the “best system of emission reduction” to measures that can be physically installed upon or implemented at a single fossil fuel-fired electric generating source. EPA's newly fabricated interpretation is inconsistent with the statute's text, structure, and purpose and would preclude consideration of the primary means by which the power sector and Power Company Petitioners have actually reduced and will continue to reduce emissions from affected fossil fuel-fired generating units: by shifting generation from higher-emitting generation to lower-emitting and non-emitting generation. By adopting a new interpretation that excludes the primary system used to reduce emissions from these sources, the Rule sets forth neither the “best” system of emission reduction, nor (as EPA contends) the only permissible reading of the statute.

The Rule also fails because, based on the same artificial and mistaken reading of section 111, EPA concludes that it cannot approve state plans that incorporate emissions trading or averaging as a means

of compliance. EPA further argues, in contravention of the express terms of the CAA, that it may have to disapprove state plans that require more than can be achieved through application of its identified best system. These purported limitations are contrary to the statute's text and purposes and arbitrarily limit states' authority to adopt more protective and cost-effective standards under section 111.

The Court should reject EPA's erroneous statutory construction and remand the Rule to EPA to exercise the discretion Congress provided to it under section 111.

STANDING

With operations in 49 states and the District of Columbia, the Power Company Petitioners collectively serve, directly or through their subsidiaries or members, over 23 million homes and businesses (amounting to a total service population of well over 50 million). They own or operate over 80,000 megawatts of generating capacity from an increasingly diverse set of resources, including coal, oil, natural gas, nuclear, wind, solar, hydropower, geothermal and biomass resources. Because their resources include affected electric generating units and designated facilities subject to the Rule and the Clean Power Plan, their

standing to challenge the Rule is self-evident. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (“little question” that those directly regulated by challenged action have standing). Petitioner Power Companies Climate Coalition has associational standing on behalf of its members, whose resources also include affected electric generating units and designated facilities. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002); Addendum, Attachment A, Declaration of Nancy Sutley ¶ 3.

Further, the Rule adversely affects Power Company Petitioners’ economic interests, thus satisfying the required elements of Article III standing: an injury in fact, fairly traceable to the Rule, which would be redressed by a remand of the Rule. *See Lujan*, 504 U.S. at 560-61. Power Company Petitioners have increased their reliance upon lower-emitting and non-emitting generating resources, and either eliminated or established a timetable for eliminating coal-fired generation from their generation portfolios. *See, e.g.*, Declaration of Nancy Sutley ¶¶ 3-5. The Rule’s identified “best system of emission reduction” would result in, at best, only modest improvements in efficiency and few, if any, actual reductions in emissions of carbon dioxide (“CO₂”) from covered coal-fired generating units, and it excludes requirements for gas altogether. By

relaxing overall emission reduction requirements for covered units, the Rule adversely affects cleaner generating units, including those owned by Power Company Petitioners. Units subject to heat rate improvements (or to no requirements at all) will submit lower bids in competitive wholesale power markets, reducing the wholesale rates paid to all market participants. This, in turn, will put additional pressure on competing non-emitting resources. Addendum, Attachment B, Declaration of William Mason Emmett ¶¶ 5-10. Additionally, by increasing the competitiveness of coal-fired units adopting heat-rate improvements, the Rule will cause some of Power Company Petitioners' utilities to provide their customers electricity produced with greater emissions of CO₂ and criteria pollutants. *Id.* ¶ 11. Further, making coal-fired units more efficient, in the absence of a renewable energy portfolio standard or greenhouse gas cap-and-trade program, could actually increase emissions.

Finally, the Rule's rescission of the Clean Power Plan also adversely affects Power Company Petitioners' interests relating to clean generation and efficiency investments. Under the Clean Power Plan, Power Company Petitioners' efforts to increase generation from lower-emitting

and non-emitting units and to promote electricity savings through energy efficiency could have qualified for emissions rate credits. Affected units would have applied these credits for purposes of compliance with rate-based emissions standards imposed by states. Additionally, had states instead implemented mass-based goals as they were allowed under the Clean Power Plan, investments in lower- and zero-emitting generation and energy efficiency would have helped to achieve such goals. Allowances allocated to companies making such investments could then be sold and the proceeds returned to ratepayers in the form of rebates, rate relief or further investments in emission reduction measures. In contrast, investments in clean generation and energy efficiency warrant no recognition under the Rule and cannot be credited towards compliance with the Rule's emissions standards.¹

¹ Power Company Petitioners advocated in response to EPA's development of the Clean Power Plan and proposal of this Rule for a "best system of emission reduction" that recognizes investments in lower- and zero-emitting generation, provides flexibility for the electricity sector to comply with the resulting standards through averaging and trading, and achieves meaningful reductions in emissions. *See, e.g.*, Comments of The Clean Energy Group on Proposed Clean Power Plan, EPA-HQ-OAR-2013-0602-23169 (JA__); Comments of Exelon, et al. on Proposed Repeal, EPA-HQ-OAR-2017-0355-19928 (JA__); Comments of The Clean Energy Group on Proposed Repeal, EPA-HQ-OAR-2017-0355-19852 (JA__); Comments of Exelon on Proposed Repeal, EPA-HQ-OAR-2017-0355-20934 (JA__); Comments of Con Edison, Exelon, LADWP, National Grid, NYPA, PG&E, Seattle City Light, and SMUD on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-26636 (JA__); Comments of The

The Rule ignores and accords no value to the primary means by which Power Company Petitioners and the electricity sector have reduced their emissions: by shifting generation to lower- and non-emitting sources. Addendum, Attachment A, Declaration of Nancy Sutley ¶¶ 3-8. To redress the foregoing harms to their interests, Power Company Petitioners are seeking an order of this Court vacating the Rule and setting it aside as unlawful.

ARGUMENT

I. The Clean Air Act Does Not Mandate EPA’s Restrictive Interpretation of Section 111

Faced with a statute that “speaks directly” to emissions of CO₂ from power plants and requires EPA to identify the “best system of emission reduction” that has been adequately demonstrated to reduce those emissions, EPA concludes that section 111 “unambiguously” requires it to limit its guidelines to a closed universe of measures that can be applied at and to any given individual power plant. *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011); 42 U.S.C. § 7411; 84 Fed. Reg. at

Clean Energy Group on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-23802 (JA__); Comments of Exelon on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-23801 (JA__).

32,524. EPA's current view, that section 111(d) allows *no other possible* interpretation, cannot be reconciled with the broad and flexible words of the statute, which require states to set standards reflecting the "application of the best system of emission reduction" for "any existing source." 42 U.S.C. § 7411(a)(1), (d). Further, EPA's conclusion makes no sense because it excludes the proven system the electricity sector and Power Company Petitioners are actually using to substantially and cost-effectively reduce CO₂ emissions: increasing the operation of low- and zero-emitting generation sources and reducing the operation of higher-emitting sources. Because EPA's repeal of the Clean Power Plan and promulgation of replacement emission guidelines are premised entirely on this "faulty legal premise," the Rule must be declared invalid and remanded, so that EPA can "exercise the full measure of administrative discretion granted to it by Congress," "free from its erroneous conception of the bounds of the law." *Prill v. NLRB*, 755 F.2d 941, 942, 948 (D.C. Cir. 1985).

EPA's inflexible and newfound conclusion that section 111 "unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility or

installation” (84 Fed. Reg. at 32,524, emphasis original) is unfounded, and not supported by the “grab bag of textual snippets” on which it now relies.² EPA asserts that these limitations flow from the plain meaning of section 111(a)(1) and section 111(d). But to manufacture this purported limitation, EPA hand-selects a series of words from throughout section 111, accords them talmudic significance, reorders them, and then substitutes others. This exercise in textual alchemy is certainly not the only permissible construction of the statute and makes no sense when applied to the real-world context of the power sector.

EPA’s conclusion centers on its new interpretation of the word “application” within section 111(a)(1)’s definition of “standard of performance,” to which EPA attributes stringent and far-reaching restraints:

The term “standard of performance” means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the *application* of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

² See Respondent EPA’s Final Brief, *West Virginia v. EPA*, No. 15-1363, at 60 (D.C. Cir. Apr. 22, 2016) (characterizing some of the same statutory arguments proffered by EPA as mere “textual snippets”).

42 U.S.C. § 7411(a)(1) (emphasis added). EPA contends that, when it promulgated the Clean Power Plan, it improperly interpreted “application” as a synonym of “implementation,” and that those two words “send different signals.” 84 Fed. Reg. at 32,527. The distinction, according to EPA, is that “application” takes an indirect object, which must, and can *only*, be the physical confines of an individual plant. 84 Fed. Reg. at 32,427.

EPA’s grammatical claims supporting its novel reading of section 111 are false. First, “application” does not require an indirect object when it is used in the sense of applying a principle or process to achieve a result or outcome, such as a judge’s application of precedent to decide a case. *See* State and Municipal Petitioners’ Brief at 43-44. Similar usages abound, such as a public interest lawyer’s application of her expertise and talents for the common good. Thus, it is plainly incorrect that “someone must apply *something to something else*.” 84 Fed. Reg. at 32,524 (emphasis original). Nowhere does section 111(a) direct precisely where or in what manner the “best system of emission reduction” must be applied. If anything, section 111(a)(1) may be noteworthy because it

does *not* dictate any specific indirect object to which the best system must be applied.

Proceeding from its false grammatical premise, EPA deems the meaning of section 111(a)(1) incomplete without an indirect object and searches elsewhere within the statute for one, discovering it in section 111(d)(1). EPA argues that, because section 111(d)(1) provides that “standards of performance” must be “*for* any existing source,” and because, through a chain of definitions, “source” refers to “any building, structure, facility, or installation which emits or may emit any air pollutant,” therefore “section 111 unambiguously limits the best system to those systems that can be put into operation *at* a building, structure, facility, or installation.” 84 Fed. Reg. at 32524.

This contorted textual syllogism is erroneous and does not reflect Congress’s unambiguous command. EPA errs first in conflating two distinct statutory sections and their respective function. While section 111(a)(1) describes *EPA’s* duty to determine the degree of emission limitation achievable through application of the best system of emission reduction, section 111(d) describes the *States’* obligation to then establish standards of performance *for* any existing source. EPA elides the distinct

functions of these two sections to manufacture an indirect object that does not exist in section 111(a)(1). EPA errs next in substituting a preposition appearing in neither section (“at”), to conclude that the statute unambiguously forbids it from requiring anything other than those systems that can be put into operation “at” an individual power plant.³

In putting too much weight on a single preposition (“for”) and then substituting another one (“at”) for it, EPA “ha[s] taken a wrong interpretive turn.” *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 328, 134 S.Ct. 2427, 2446 (2014). In so doing, EPA inappropriately strips 111(a)(1) of the discretion it affords the agency to identify the best system of emission reduction for existing sources in the relevant category, based on the nature of the pollutant to be controlled and the practical realities in which the affected sources operate. *See Am. Elec. Power v. Connecticut*, 564 U.S. 410, 426 (2011) (“The critical point is that Congress

³ Despite EPA’s assertion to the contrary, a “standard of performance” established by a state pursuant to section 111(d) can be “for” a source, regardless of whether the underlying “best system” is limited to physical measures directly applied at an individual power plant.

delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants”).

Tellingly, EPA’s “wrong interpretive turn” prevented the Agency from even considering the actual emission reduction strategies that are widely being used to reduce emissions from these affected sources. The electricity sector has long relied upon generation shifting as its primary system to reduce emissions, given the unique and inextricable production relationship of individual power plants to one another. Comments of Exelon on Proposed Repeal of Clean Power Plan, EPA-HQ-OAR-2017-0355-20934, at 11 (JA__) (“Generation shifting (and the emission reductions that can be achieved through generation shifting) is common and unavoidable across the electric generation industry, has been occurring for years, and will only increase in the coming years”). Unlike other source categories regulated under section 111, power plants produce their product in synchrony with one another across an interconnected grid, instantaneously and collectively meeting consumer demand based on the dispatch decisions of balancing authorities or utility operators. Comments of Con Edison, Exelon, LADWP, National Grid, NYPA, PG&E, Seattle City Light, SMUD, et al. on Proposed Emission

Guidelines, EPA-HQ-OAR-2017-0355-26636, at 3 (JA__) (“generation shifting is the ordinary means by which supply and demand are instantaneously matched”).

Across this “interconnected system,” generation shifting has long been the fundamental, business-as-usual strategy for meeting consumer demand and reducing emissions at least-cost to consumers. Power Company Petitioners have themselves applied generation shifting to substantially reduce emissions from their power plants for a host of reasons, including CO₂ reduction programs such as the Regional Greenhouse Gas Initiative and California’s cap-and-trade program, state renewable portfolio standards, their own board and investor-driven CO₂ reduction mandates, and market conditions. *See, e.g.*, Comments of LADWP on Proposed Clean Power Plan, EPA-HQ-OAR-2013-0602-23122, at 1 (JA__) (“significant CO₂ emission reductions” due to investments in, among other things, replacement of coal resources and renewable energy); Comments of Con Edison, Exelon, LADWP, National Grid, NYPA, PG&E, Seattle City Light, SMUD, et al. on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-26636, at 3 (JA__) (“Our companies’ successes at reducing emissions while continuing to deliver

electricity reliably and affordably . . . provides clear evidence of the emission reduction opportunities that generation shifting provides.”).

These CO₂ emission reduction methods are pervasive across the electricity sector, including among some of the very companies that petitioned for review of the Clean Power Plan and have intervened here in support of EPA. *See, e.g.*, Comments of Exelon on Proposed Emissions Guidelines, EPA-HQ-OAR-2017-0355-23801, at 6-7 (JA__) (describing several recently announced plans by power companies AEP, DTE Energy, and Southern Company to substantially reduce CO₂ emissions via generation shifting measures).

In addition to CO₂ reduction measures, Power Company Petitioners also comply with CAA programs focused on other pollutants, which for decades have been premised upon the ability of power plants to comply by shifting generation to lower-emitting sources and achieving the requisite reductions on a system-wide basis (e.g., the CAA’s Cross-State Air Pollution Rule, the Acid Rain Program, and state implementation plan (“SIP”) approved programs). *Id.* (noting well-established “benefits of using federal market-based systems to allow the power sector to identify the most cost-effective compliance opportunities”). This is

simply how the electricity sector – unique among those regulated under the CAA – operates and how its sources have long achieved and will continue to achieve the greatest emission reductions at least cost to consumers. *See* Comments of Exelon on Proposed Repeal of Clean Power Plan, EPA-HQ-OAR-2017-0355-20934, at 11 (JA__) (“There simply is no way around the impact of the integrated nature of the electric system.”).

If upheld, EPA’s rigid interpretation of section 111 will prohibit the Agency from considering the actual strategies applied by sources to substantially and cost-effectively reduce their CO₂ emissions. This construction would prevent EPA from satisfying its core statutory obligation to identify the “best” system of emission reduction for these sources. That is not a reasonable reading of section 111, let alone the *only* permissible reading. *See Peter Pan Bus Lines v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350 (D.C. Cir. 2006) (rejecting and remanding agency’s interpretation that statutory term “applicable” unambiguously referred to specific object).

II. The Best “System” of Emission Reduction Can Reasonably Include Generation-Shifting Measures

In addition to the artificial limitations EPA says flow unambiguously from the words “application” and “for,” EPA also asserts

that the Clean Power Plan is unlawful because the generation-shifting measures included within its best system exceed the statutory scope of the word “system” as used in section 111(a)(1). 84 Fed. Reg. at 32,528-29. As before, this newfound limitation is unfounded.

Section 111(a)(1) requires EPA to identify the “best system of emission reduction” that has been “adequately demonstrated.” While the term “system” is not defined in the CAA, EPA previously concluded that “[t]he ordinary, everyday meaning of ‘system’ is a set of things or parts forming a complex whole; a set of principles or procedures according to which something is done; an organized scheme or method; and a group of interacting, interrelated, or interdependent elements.” 80 Fed. Reg. 64,662, 64,720 (Oct. 23, 2015) (citing Oxford Dictionary of English). EPA also previously recognized that the term “system,” while broad, carries “significant constraints” when read in its statutory context, including that it must (1) cause reductions from sources (ruling out emission offsets), (2) be limited to emission reduction measures that source owners and operators can themselves take or control (ruling out demand-side energy efficiency measures), (3) be “adequately demonstrated,” based on a history of implementation and effectiveness, and (4) be “best,” taking

into account, among other things, emission reductions, “cost” and “energy requirements.” 42 U.S.C. § 7411(a)(1); 80 Fed. Reg. at 64,720, 64,762. Within these statutory constraints, and based on the integrated and coordinated nature of the electricity system, EPA reasonably concluded when it promulgated the Clean Power Plan that generation shifting qualified as part of the best “system” of emission reduction under section 111(a)(1). This conclusion was and remains an unremarkable exercise of EPA’s authority, as it does no more than recognize how utilities have been shifting generation among plants as a means of meeting demand and achieving emission reductions at least-cost to consumers for decades.

Under the current Rule, however, EPA strips the term “system” of this substance. Ignoring a fundamental canon of statutory construction, EPA now asserts that what matters is not the dictionary definition of the word (“the issue is not whether the dictionary provides a broad definition of the word ‘system’”), but rather the “permissible bounds of the *legal* meaning of the word” 84 Fed. Reg. at 32,528 (emphasis in original). Ironically, this comes just a few pages after EPA concludes that words in section 111(a)(1) which lack a statutory definition “must be construed in accordance with [their] ordinary or natural meaning” as reflected in a

dictionary. 84 Fed. Reg. at 32,524, n. 35 (relying on dictionary definition of word “application” to cabin its meaning).

Against a straw man, EPA then argues that “system” “cannot be read to encompass *any* ‘set of measures’ that would—through some chain of causation—lead to a reduction in emissions,” as that “on its own” could lead to “unbounded discretion” in the EPA. 84 Fed. Reg. at 32,528 (emphasis in original). In the process, EPA relegates to a single footnote any discussion of the statutory and contextual constraints on the word “system” (which it had previously identified in the Clean Power Plan), pejoratively labeling them “purported limitations.” 84 Fed. Reg. at 32,528, n. 82. Without explanation, EPA claims that “those purported limitations still lead to an interpretation that far exceeded the bounds of authority actually conferred by Congress on the EPA.” *Id.* EPA’s misunderstanding of these constraints is apparent when it suggests that, unless further cabined, the term “system” could allow it to impose “minimum wage requirements or production caps,” two measures that are outside the reasonable scope of its authority under section 111 (which requires systems that are “adequately demonstrated” at actually

reducing emissions, and are the “best” at doing so, considering “cost” and “energy requirements”). *See* 42 U.S.C. § 7411(a)(1).

On this flawed basis, EPA reconstrues the term “system” to be unambiguously “limited to measures that can be applied to and at the level of the individual source.” 84 Fed. Reg. at 32,529. This construction accords no significance to Congress’s use of the inherently broad word “system” in section 111, when it could have chosen narrower language. Elsewhere in the CAA, when Congress intended to require EPA to consider a specific technology applicable at the level of the source, it said so. As one example, Congress commanded EPA to require installation of “best available retrofit *technology*” under section 169A. 42 U.S.C. § 7491(g)(2) (emphasis added). As another, under section 169, Congress directed EPA to require installation of “best available control *technology*.” 42 U.S.C. § 7479(3) (emphasis added). Even in section 111, in a paragraph not applicable here, Congress defined the term “*technological* system of *continuous* emission reductions,” demonstrating its ability to cabin EPA’s discretion where it deemed necessary. 42 U.S.C. § 7411(a)(7) (emphasis added). The distinction between “system” and “technological system” cannot be more apparent, and any interpretation that narrows

it out of existence in section 111(a)(1) “cannot . . . reflect[] the Congress’s unambiguously expressed intent.” *Peter Pan Bus Lines*, 471 F.3d at 1354 (one “cannot plausibly make a *Chevron* step one argument to support interpretation that makes other statutory language surplusage” (internal quotations omitted)).

Congress’s use of the term “system” was designed to give EPA flexibility to identify effective pollution reduction approaches for the diverse source types subject to section 111. Section 111(d) authorizes EPA to regulate existing sources of pollutants that are regulated neither as “criteria” pollutants under section 110, nor as “hazardous” pollutants under section 112. It thus plays the role of regulatory backstop for pollutants not addressed by either of those two sections, including unknown and emerging pollutants whose properties, impacts and means of control could not be fully known by Congress at the time section 111 was passed into law. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (holding that CAA’s use of “broad language” “reflects an intentional effort to confer the flexibility necessary to forestall [] obsolescence”).

The inherent and intentional flexibility afforded by the word “system” allows EPA to at least consider generation shifting measures –

currently the most widely used and cost-effective means of reducing emissions of CO₂ from these sources – as part of the “best system” for reducing emissions of CO₂ from existing power plants. EPA’s conclusion to the contrary – that the CAA leaves it “no interpretive room” and “obliges it” to repeal the Clean Power Plan due to its inclusion of generation-shifting measures (84 Fed. Reg. at 32,532) – does not reflect an exercise of “the full measure of administrative discretion granted to it by Congress” and must be reconsidered, “free from its erroneous conception of the bounds of the law.” *Prill*, 755 F.2d at 942.

III. The Clean Air Act Does Not Prohibit Source Owners from Utilizing Trading or Averaging As a Means of Compliance

Compounding the errors discussed above, EPA extends its restrictive interpretation even further – concluding that section 111(d) prohibits states from adopting cost-effective emissions averaging and trading mechanisms. These purported restraints are unjustified and should be set aside.

First, EPA concludes that averaging and trading are “inconsistent with CAA section 111 because those options would not necessarily require any emission reductions from designated facilities and may not actually reflect application of the [best system of emission reduction].” 84

Fed. Reg. at 32, 557. This is incorrect and reflects a gross misapplication of the relevant statutory requirements.

EPA's confusion regarding which compliance mechanisms it is authorized to approve under section 111(d) appears to stem from its fundamental misunderstanding of the role that its "best system" determination plays in section 111(a)(1). EPA asserts that "state plans must establish standards of performance—which by definition 'reflects . . . the application of the best system of emission reduction.'" 84 Fed. Reg. at 32,557. Yet the omitted text from section 111(a)(1), which EPA replaces with an ellipsis, materially changes the meaning of the requirement and drastically so. In full, it provides that a standard of performance is "a standard for emissions of air pollutants which reflects *the degree of emission limitation achievable through the application of the best system of emission reduction . . .*" 42 U.S.C. § 7411(a)(1) (emphasis added). Put differently, standards of performance need only reflect the level of reduction that could be achieved by application of the "best system"; they need not directly require application of the "best system" itself. The difference is critical, because the actual text of the CAA provides wide latitude for sources to identify the most cost-effective

strategies to meet the standards of performance implemented and enforced by a state. The language selectively quoted by EPA would provide no such latitude, and instead fabricates “a legal constraint . . . that is simply not there.” *NARUC v. Interstate Commerce Comm’n*, 41 F.3d 721, 728 (D.C. Cir. 1994).

Likewise, EPA is mistaken in its assertion that section 111(d) unambiguously limits compliance measures to those that can be physically applied “to and at” the source and are directly measurable at the source. 84 Fed. Reg. at 32,557. In effect, EPA concludes that the same artificial constraints it imposes upon its identification of the “best system” must apply to individual sources in meeting the resulting standards of performance. 84 Fed. Reg. at 32,557. Yet, these limitations no more bind EPA’s determination of the “best system” than they do states in applying the resulting standards of performance “for” and “to” existing sources. Nothing in section 111(d) precludes EPA from allowing states to implement and enforce a standard of performance through more flexible compliance mechanisms, such as averaging and trading, so long

as they provide overall reductions from the affected sources commensurate with application of the best system.⁴

Indeed, the very structure of section 111(d) strongly suggests that Congress intended to afford states the discretion to assure compliance through trading and averaging. It instructs EPA and states to follow “a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan” and provides states wide discretion to implement and enforce standards of performance for existing sources in those plans. 42 U.S.C. § 7411(d)(1) (referencing CAA section 110). Consistent with CAA section 110, it also provides EPA the “same authority” it has under that section to prescribe a federal implementation plan when states fail to submit or enforce their own plan. *Id.* § 7411(d)(2).

The section 110 framework Congress incorporated into section 111(d) is central to the CAA and its flexible contours are well-known.

⁴ EPA argues that averaging among units would amount to “bubbling” for purposes of compliance and is therefore precluded by *ASARCO v. EPA*. 84 Fed. Reg. at 32,557. *ASARCO* is inapposite; there, the court held that bubbling cannot be used to avoid triggering application of new source performance standards to newly constructed or modified units. 578 F.2d 319, 322 (D.C. Cir. 1978). Here, there is no dispute that existing affected units must be subject to standards of performance.

States are afforded wide discretion in plans submitted pursuant to section 110 to implement measures that achieve the required reductions as they see fit. For more than four decades, EPA has routinely approved SIPs that apply a wide range of strategies. This includes countless plans that rely on credit trading and averaging programs. *See, e.g.*, 40 C.F.R. § 52.220 (approval of numerous California air district rules incorporating offset requirements).

It is implausible to suggest, as EPA does in the Rule, that Congress intended, in referring to section 110, to incorporate only the plan submittal “procedure,” but none of the flexibility which that “procedure” allows. EPA itself has previously promulgated section 111(d) regulations that authorize trading, through the Clean Air Mercury Rule (“CAMR”), the Municipal Waste Combustors standards, and the Clean Power Plan. EPA’s curious retort – that CAMR also incorporated trading within the best system (84 Fed. Reg. at 32,557) – only reinforces the flexibility Congress intended to provide in section 111, both to allow for EPA’s consideration of the reductions that can be achieved through averaging and trading in its determination of the best system under subsection (a), and as a means of achieving those reductions under subsection (d). As

was borne out in industry comments during EPA's development of both the Clean Power Plan and the replacement emission guidelines at issue here, there is near universal interest across the power sector in allowing trading and averaging across sources as a compliance mechanism under section 111(d).⁵ This not only reflects the widely-understood suitability of averaging and trading across sources as a compliance mechanism, but also provides strong support for consideration of the reductions that can be achieved through such mechanisms as part of the best system.

EPA's role under section 111(d) has never been and is not to ensure direct application of the best system at each regulated source; rather it is to ensure that at least equivalent emission reductions are achieved by such sources through plans implemented and enforced by states. That affords states the discretion to allow trading and averaging as a compliance mechanism, in accord with EPA's consistent interpretation of this framework over the last four decades. EPA's determination here

⁵ See, e.g., Comments of American Electric Power on Proposed Emission Guidelines, EPA-HQ-OAR-2017-0355-24822, at 7 (JA__) (supporting narrowing limits on "best system" but arguing that states "should have broad discretion to determine the amount and nature of flexibility designed into their plans, and be free to include averaging and trading programs to promote the most cost-effective compliance measures.").

that section 111 directs otherwise requires that its emission guidelines be set aside and revisited. *See Transitional Hospitals Corp. of Louisiana, Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000).

IV. EPA Has Broad Authority Under the Clean Air Act To Approve More Stringent State Plans That Achieve Real Emission Reductions

EPA's conclusion that it may be precluded from approving state plans that are more stringent than its identified "best system" likewise runs counter to the CAA and must be rejected. Without prejudging any specific state plan submittal, EPA concludes that there is "merit" to the position that "it is not within the EPA's authority under the CAA" to approve "more stringent requirements as part of a federally enforceable state plan." 84 Fed. Reg. at 32,560. Nowhere does EPA explain the ultimate source of this restrictive authority. Rather, EPA attempts to distinguish the Supreme Court's decision in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), which held that section 116 of the CAA affirmatively requires EPA to approve as federally-enforceable more stringent SIPs submitted under section 110.⁶

⁶ EPA has previously applied this conclusion to section 111(d) state plan submittals. *See* Legal Memorandum Accompanying the Clean Power

There is no basis to distinguish *Union Electric's* conclusion that section 116 obligates EPA to approve more stringent state plans. In a single footnote, EPA identifies a “key distinction” between state plans under section 110 and section 111(d), because, “under CAA section 111, the EPA identifies a particular measure or set of measures, and CAA section 111(d) more narrowly prescribes that the contents of state plans include performance standards based on the application of such measures” 84 Fed. Reg. at 32559, n. 255.

Yet, this asserted distinction is invented and relies entirely on EPA's insertion (as discussed above) of an ellipsis into the definition of “standard of performance.” Again, it is the “degree of emission limitation” that the standards of performance must reflect and the required state plans must achieve, not direct “application of the best system” identified by EPA. There is no material distinction between the degree of flexibility afforded states under section 110 and section 111(d), and therefore no basis to conclude that EPA is not required to approve more stringent state plans under the Supreme Court's reasoning in

Plan on Certain Issues, EPA-HQ-OAR-2013-0602-36872, at 28-30 (JA___) (Oct. 23, 2015).

Union Electric. 427 U.S. at 264 (concluding there is no basis in the CAA for “visiting such wasteful burdens” on states and EPA to require two different versions of a state plan, one enforceable federally and a more stringent version enforceable at the state level only).

While deferring a final conclusion to its subsequent consideration of individual state plan submissions, EPA concludes definitively in the Rule that, in evaluating *all* state plan submissions, “EPA’s authority is constrained to approving measures that comport with the statutory interpretations, including interpretations of the limitations on ‘standards of performance’ and the underlying [best system of emission reduction].” 84 Fed. Reg. at 32,560. As shown above, EPA’s newfound statutory limitations are illusory and can no more constrain its identification of the “best system” than they can preclude a state from submitting a plan that utilizes averaging and trading to exceed minimum federal standards.

CONCLUSION

For all the reasons set forth above, the petition for review should be granted and EPA’s Rule should be set aside and declared unlawful.

Dated: April 17, 2020

Respectfully submitted,

/s/ Kevin Poloncarz

KEVIN POLONCARZ

DONALD L. RISTOW

JAKE LEVINE

COVINGTON & BURLING LLP

415 Mission Street, Suite 5400

San Francisco, CA 94105

+1 (415) 591-6000

kpoloncarz@cov.com

*Counsel for Consolidated Edison, Inc.,
Exelon Corporation, National Grid
USA, New York Power Authority, Power
Companies Climate Coalition, Public
Service Enterprise Group Incorporated,
and Sacramento Municipal Utility
District*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, I hereby certify that the foregoing Brief of Petitioners Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District contains 5,962 words as counted by the word-processing system used to prepare this brief. I further certify that the combined words of this brief and those filed by the other Coordinating Petitioners do not exceed the 32,000 word limit set by the Court in its January 31, 2020, Order (Document #1826621).

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Kevin Poloncarz

Kevin Poloncarz

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for Review of Final Agency Action of the United
States Environmental Protection Agency
84 Fed. Reg. 32,520 (July 8, 2019)

**ADDENDUM TO BRIEF OF PETITIONERS
CONSOLIDATED EDISON, INC., EXELON
CORPORATION, NATIONAL GRID USA, NEW YORK
POWER AUTHORITY, POWER COMPANIES CLIMATE
COALITION, PUBLIC SERVICE ENTERPRISE GROUP
INCORPORATED, AND SACRAMENTO MUNICIPAL
UTILITY DISTRICT**

KEVIN POLONCARZ
DONALD L. RISTOW
JAKE LEVINE
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
+1 (415) 591-6000
kpoloncarz@cov.com

April 17, 2020

TABLE OF CONTENTS

Declaration of Nancy Sutley	Attachment A
Declaration of William Mason Emnett.....	Attachment B

Attachment A

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

DECLARATION OF NANCY SUTLEY

I, Nancy Sutley, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am the Senior Assistant General Manager of External and Regulatory Affairs and the Chief Sustainability Officer at the Los Angeles Department of Water and Power (“LADWP”). Prior to my current position at LADWP, I was Chair of the White House Council on Environmental Quality, where I served from 2009 to 2014. I also previously served as Los Angeles Deputy Mayor for Energy and Environment, a member of the Board of Metropolitan Water District of Southern California and the California State Water Resources Control Board, energy advisor to Governor Gray Davis, and Deputy

Secretary for Policy and Intergovernmental Relations for the California Environmental Protection Agency.

2. Founded in 1902 and delivering electricity starting in 1916, LADWP is the largest municipal electric utility in the nation, serving a population of over 4 million people. As a vertically integrated utility, LADWP owns and operates a diverse portfolio of generation, transmission, and distribution assets across several states. LADWP has a 465 square mile service territory that includes the City of Los Angeles and most of the Owens Valley. In fiscal year (“FY”) 2017-18, LADWP supplied more than 22 million megawatt-hours (“MWhs”) to its customers. Its transmission system, which includes more than 3,700 circuit-miles of transmission lines, transports power from the Pacific Northwest, Utah, Wyoming, Arizona, Nevada, and elsewhere within California to the City of Los Angeles.

3. LADWP’s diverse portfolio includes electricity produced from natural gas, hydropower, coal, nuclear, wind, biomass, geothermal, and solar energy resources. LADWP owns and/or operates the majority of its conventional generating resources, with a net dependable generating capacity of 7,967 megawatts (“MW”). This includes four local natural gas-fired power plants—Harbor, Haynes, Scattergood, and Valley Generating Stations—located within or near the City of Los Angeles. LADWP is also the largest participant in the Intermountain Power Project (“IPP”), an 1,800-MW coal-fired power plant located in Delta, Utah. LADWP is the operating/scheduling agent for IPP, which is operated by the Intermountain Power Service Corporation. LADWP’s share of

available capacity from IPP is approximately 1,200 MW; currently LADWP utilizes only a portion of its share of IPP due to the significant increase in renewable energy in LADWP's resource mix. IPP's existing coal-fired units are being replaced with an 840-MW natural gas-fired combined cycle facility, which is currently scheduled for completion in 2025. LADWP is exploring how the replacement facility could be fired exclusively on hydrogen produced using renewable resources by 2045, to help meet California's 100 percent clean energy goal.

4. LADWP has long been committed to increasing its use of renewable energy and reducing carbon dioxide ("CO₂") emissions. LADWP's actions to reduce CO₂ emissions include divesting of coal-fired generating resources; replacing its natural gas-fired generating units with new more efficient units; increasing its supply of renewable energy, including a 32 percent renewable energy portfolio in 2018 and setting a goal to at least meet California's 60 percent renewable energy target by 2030; developing grid-scale and local energy storage systems; investing in energy efficiency and local solar; and installing electric vehicle charging infrastructure to encourage drivers to switch to electric vehicles. By the end of 2018, LADWP had reduced CO₂ emissions associated with its electricity supply to 9.1 million metric tons ("MMT")—approximately 49 percent below LADWP's 1990 baseline of 17.9 MMT.

5. LADWP is currently planning how to replace generating capacity from local natural gas-fired units that will be retired to eliminate use of ocean water for once-through-cooling at its three coastal power plants—Scattergood,

Haynes, and Harbor. LADWP has also entered into a long-term power purchase agreement with a solar plus energy storage project located in Kern County, California, which will supply 375 MW of solar capacity and 1,369 MWh of energy storage to LADWP by December 2023. Through implementation of these and other strategies, LADWP forecasts that, by 2037, it will reduce its GHG emissions to 79 percent below its 1990 baseline.

6. LADWP supported the U.S. Environmental Protection Agency's ("EPA") final rule, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Clean Power Plan"). LADWP commented numerous times in the regulatory proceedings related to the promulgation of the Clean Power Plan.¹ We expressed our support for EPA's efforts to reduce CO₂ emissions from the power sector generally, as well as the reasonableness and legality of the Clean Power Plan.² LADWP also intervened in the litigation to defend the Clean Power Plan, along with several other power companies.

¹ See Letter from Mark J. Sedlacek, Director of Environmental Affairs, LADWP (Nov. 17, 2014), EPA-HQ-OAR-2013-0602-23122; Letter from Mark J. Sedlacek, Director of Environmental Affairs, LADWP (Nov. 25, 2014), EPA-HQ-OAR-2013-0602-24106 (supplement to Nov. 17, 2014 letter); Letter from Janet Loduca, Vice President, Safety, Health, and Environment, Pacific Gas and Electric Company ("PG&E"), et al. (Dec. 1, 2014) EPA-HQ-OAR-2013-0602-23198 (joint comments on proposed Clean Power Plan by several California utilities, including LADWP, PG&E, and Southern California Edison Company); Letter from Calpine Corporation, et al. (Dec. 1, 2014) EPA-HQ-OAR-2013-0602-23167 (joint comments on proposed Clean Power Plan by a group of power companies including LADWP, Calpine, National Grid, and Seattle City Light).

² *Id.*

7. LADWP also commented to express its opposition to EPA's proposed "Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" ("Proposed Repeal"), 82 Fed. Reg. 48,035 (October 16, 2017)³, EPA's proposed replacement of the Clean Power Plan, "State Guidelines for Greenhouse Gas Emissions from Existing Electric Generating Units", 82 Fed. Reg. 61,507 (Dec. 28, 2017)⁴, and EPA's proposed rule with revised emission guidelines, "Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program," 83 Fed. Reg. 44,746 (Aug. 31, 2018), known as the Affordable Clean Energy Rule ("ACE Rule").⁵

³ See Letter from Michael Bradley, President, M.J. Bradley & Associates (Apr. 26, 2018) EPA-HQ-OAR-2017-0355-19928 (joint comments on Proposed Repeal of Clean Power Plan by a group of power companies including LADWP, Austin Energy, Exelon, National Grid, New York Power Authority, PG&E, Sacramento Municipal Utility District, Seattle City Light, and Southern California Edison Company).

⁴ See Letter from Michael Bradley, President, M.J. Bradley & Associates (Feb. 26, 2018) EPA-HQ-OAR-2017-0545-0350 (joint comments on Advance Notice of Proposed Rulemaking to replace Clean Power Plan by a group of power companies including LADWP, National Grid, New York Power Authority, PG&E, Seattle City Light, and Sacramento Municipal Utility District).

⁵ See Letter from Michael Bradley, President, M.J. Bradley & Associates (Oct. 31, 2018) EPA-HQ-OAR-2017-0355-26636 (joint comments on EPA's proposal to replace Clean Power Plan with ACE Rule by a group of power companies including LADWP, Austin Energy, Consolidated Edison Company of New York, Inc., Exelon Corporation, National Grid, New York Power Authority, PG&E Corporation, Seattle City Light, Sacramento Municipal Utility District, and Tenaska).

8. LADWP's comments with respect to EPA's proposals to replace the Clean Power Plan with the new ACE Rule expressed LADWP's concern that EPA's revised definition of the "best system of emission reduction" failed to reflect real world industry practices, including those that LADWP has itself implemented.⁶ As a vertically integrated utility with ownership interests in a diverse array of generation assets, LADWP is particularly well-positioned to observe that achieving meaningful emission reduction across an interconnected system of generating units, transmission, and distribution assets necessarily involves shifting of generation from higher-emitting to lower- and non-emitting generating resources. LADWP's success at reducing emissions, while continuing to provide reliable and cost-effective electricity service to its customers, demonstrates that reducing reliance upon higher-emitting sources of electricity and increasing reliance upon lower- and zero-emitting resources is, in fact, the best system for achieving emission reductions.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 16, 2020.



Nancy Sutley

⁶ *Id.* at 3-4.

Attachment B

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

DECLARATION OF W. MASON EMNETT

I, William Mason Emmett, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am Vice President of Competitive Market Policy at Exelon Corporation (“Exelon”). In that capacity, I am responsible for overseeing Exelon’s environmental policy advocacy, federally-regulated energy market interactions, and overall corporate strategy with regard to both generation and utility activities. Previously, I was Senior FERC Counsel at NextEra Energy, a leading renewable and energy infrastructure owner/operator and developer. Prior to that, I was Deputy Director, Office of Energy Policy and Innovation at the Federal Energy Regulatory

Commission, where I led the development of regulations and rules governing wholesale electric markets and the provision of interstate transmission service.

2. Exelon is the largest generator of emission-free electricity in the United States and supports the goal of continuing to achieve real reductions in carbon dioxide (“CO₂”) emissions from the power sector via maintaining and expanding generation of emissions-free electricity and improving energy efficiency.

3. A Fortune 100 company headquartered in Chicago, Exelon does business in 48 states, the District of Columbia, and Canada. Exelon is one of the largest and cleanest competitive power generators in the United States, producing nearly 200,000 gigawatt-hours of carbon-free electricity annually. Eighty-seven percent of Exelon’s generation is carbon-free nuclear, hydroelectric, wind, or solar; the vast majority of the remainder is natural gas. Exelon is also the largest owner and operator of nuclear generation, owning or operating 23 of the nation’s 99 nuclear reactors in five states, which alone avoid 95 million short tons of CO₂ each year. Through our Constellation business unit, Exelon provides energy products and services to more than 2.5 million residential, public sector, and business customers, including more than two-thirds of the Fortune 100.

4. Additionally, Exelon’s six utilities deliver electricity and natural gas to more than 10 million customers via Atlantic City Electric Company (“Atlantic City Electric”), Baltimore Gas and Electric Company (“BGE”), Commonwealth Edison Company (“ComEd”), Delmarva Power & Light Company (“Delmarva Power”), PECO Energy Company (“PECO”), and Potomac Electric Power Company (“Pepco”).

5. Exelon submitted comments on the proposed Affordable Clean Energy (“ACE”) Rule, objecting to the ACE Rule’s ineffective approach and inadequate stringency as well as the Agency’s attempt to preclude more stringent regulations.¹ Declining to effectively regulate harmful emissions directly impacts the price paid to more emission-intensive generation, which disadvantages Exelon and other clean energy providers.

6. Exelon also expressed its concern that the proposed Rule may very well increase emissions by incentivizing more electricity production from fossil-fired power plants at the expense of non-polluting sources like nuclear, solar and wind power resources.²

7. As Exelon explained in its comments, grid operators decide which power plants are operated (or “dispatched”) in the integrated electricity system to meet demand for electricity based on relative but incomplete costs, i.e., not including significant environmental externalities. In competitive wholesale power markets, an individual power plant’s reduction of its production costs allows it to reduce its bids into the market, which will cause it to be dispatched more frequently, resulting in both higher revenues and emissions by emitting power plants.³

¹ Comments of Exelon Corporation on U.S. Environmental Protection Agency’s Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program (Oct. 31, 2018), Docket ID No. EPA-HQ-OAR-2017-0355-23801 (hereinafter, “Exelon Comments on Proposed ACE Rule”).

² *Id.* at 4.

³ *Id.* at 5.

8. As Exelon explained in its comments, heat rate improvements for existing coal-fired electric generating units of the type identified in the ACE Rule as the “best system of emission reduction” will increase the efficiency of any unit adopting such improvements and, as a consequence, reduce the amount of fuel it needs to produce each megawatt-hour, reducing its hourly production costs. For this reason, coal-fired power plants required to implement heat rate improvements pursuant to state plans submitted to comply with the ACE Rule will bid lower in competitive wholesale power markets and, as a result, be called to produce more electricity, operating more frequently than they would in the absence of such improvements. This “rebound effect” could be so powerful, as Exelon explained, that the total net emissions from a plant would increase, even though its emissions rate per unit of electricity generated might decrease.⁴

9. In the ACE Rule challenged in this case, EPA disregarded this rebound effect. EPA instead found that, although its modeling had shown that a number of units adopting heat rate improvements would improve their competitiveness (i.e., be able to lower their bids) and, as a consequence, their overall generation and mass emissions would increase, this “limited rebound effect” did not undermine its conclusion that heat rate improvements constitute the “best system of emission reduction.”⁵

⁴ *Id.* at 7-8.

⁵ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32543 (Jul. 8, 2019).

10. As Exelon had explained in its comments on the proposed ACE Rule, by allowing coal-fired power plants to continue to externalize their true social costs while enabling lower bid offers, the Rule's identified "best system of emission reduction" could cause coal-fired power plants to offer artificially lower bid prices relative to non-emitting forms of generation in competitive markets. This, in turn, lowers the wholesale rates paid to all market participants, and would put additional competitive pressure on non-emitting nuclear and other non-emitting generation resources that compete with coal-fired power plants, but are under-compensated for their environmental attributes, including their avoided emissions.⁶ As the largest operator of nuclear power plants in the country, implementation of the Rule and its identified "best system of emission reduction" could harm Exelon.

11. Exelon's utilities serve their customers with power purchased from regional competitive markets. By increasing the competitiveness of coal-fired generating units and displacing non-emitting generating sources, the Rule also will cause the company and its utilities to serve their customers electricity generated with greater emissions of CO₂ and criteria pollutants than if such coal-fired units did not undergo heat-rate improvements to comply with requirements imposed by states pursuant to the ACE Rule. As a company committed to serving its customers with a reliable, cost-effective and low-emitting supply of electricity, the Rule will therefore impede the company's achievement of core business objectives.

⁶ Exelon Comments on Proposed ACE Rule, at 9-10.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on April 16, 2020.



William Mason Emnett