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August 25, 2016

Hon. Mark J. Langer
Clerk
United States Court of Appeals
for the District of Columbia Circuit
Room 5523
333 Constitution Avenue, NW
Washington, DC 20001-2866

Re: Response to EPA's Notice of Supplemental Authority in *State of West Virginia*, No. 15-1363 (and consolidated Clean Power Plan cases): *Zero Zone, Inc. v. Dep't of Energy*, No. 14-2147 (Aug. 8, 2016).

Dear Mr. Langer:

Petitioners Competitive Enterprise Institute, et al., submit this response to EPA's August 17, 2016 Rule 28(j) letter.

The Seventh Circuit decision in *Zero Zone, Inc. v. Dep't of Energy* is not binding on this Court, it involves a very different statutory scheme, and the single paragraph devoted to DOE's comparison of global benefits and domestic costs does not address Petitioners' arguments in this case.

The Energy Policy and Conservation Act ("EPCA") at issue in *Zero Zone* required DOE to consider "the need for national energy and water conservation," but it also allowed DOE to consider, without limitation, "other factors the Secretary considers relevant" when deciding whether a standard is economically justified. 42 U.S.C. § 6295(o)(2)(B)(i), *quoted in* Slip op. 40 n.24. CAA § 111 contains no analogous residual clause, so EPA lacks statutory authority to consider foreign benefits.

Moreover, EPCA was passed to confront an international energy crisis, *see* Slip op. 5–6, and to "fulfill obligations of the United States under the *international* energy program." 42 U.S.C. § 6201(1) (emphasis added). By contrast, the relevant legislative purpose in this case is exclusively domestic: "to protect and enhance the quality of *the Nation's* air resources" for "*its* population." CAA § 101(b) (emphases added).

Finally, the statutory scheme at issue here demonstrates that Congress is explicit when it wants EPA to consider the effects of cross-border air pollution on the "public health or welfare in a foreign country," and that it requires reciprocity from the foreign country before allowing such consideration. CAA § 115.

DOE's defense of the social cost of carbon in *Zero Zone* proves too much. Slip op. 43–44. All major regulatory action has global externalities, but that does not mean any

rule is reasonable if its global benefits exceed its domestic costs. That reasoning would justify any number of economically debilitating rules with diffuse benefits to the world at large, paid for by U.S. residents and industry. *See* Ted Gayer & W. Kip Viscusi, Brookings Inst., Determining the Proper Scope of Climate Change Benefits 21–22 (2014), http://bit.ly/gayerviscusi, *cited in* Dkt. No. 1627298, at 64.

Respectfully submitted,

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cc: All counsel of record, whom the above-signed attorney certifies were served with this letter on August 25, 2016, via ECF.