

ORAL ARGUMENT SCHEDULED FOR MAY 18, 2017**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MURRAY ENERGY CORPORATION, <i>et al.</i>)	
)	
Petitioners,)	
)	Docket No. 16-1127
v.)	(and consolidated cases)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Respondents.)	

**INDUSTRY RESPONDENT-INTERVENORS' OPPOSITION TO MOTION
TO CONTINUE ORAL ARGUMENT**

Industry Respondent-Intervenors¹ oppose EPA's request to postpone indefinitely the oral argument on consolidated challenges to EPA's Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("Supplemental Finding"), in which EPA determined that, even after considering cost, it remains appropriate and necessary to regulate emissions of hazardous air pollutants from coal- and oil-fired electric

¹ Industry Respondent-Intervenors are Calpine Corporation and Exelon Corporation.

utility steam generating units (“power plants”) under section 112 of the Clean Air Act, 42 U.S.C. § 7412.

EPA’s request seeks relief far beyond the comity often shown by one branch of the government to another. Rather, EPA has asked this Court to wait indefinitely, continuing the argument until such time, if ever, as “EPA notif[ies] the court and the parties of any action that it has or will be taking with respect to the Supplemental Finding.” Motion at 8. EPA does not even acknowledge this Court’s Rule demanding a showing of “extraordinary cause” necessary to justify continuing a case scheduled for oral argument. *See* D.C. Cir. Rule 34(g).

EPA’s request is based solely on a desire to have more time “to review the Supplemental Finding to determine whether it will be reconsidered.” Motion at 6. EPA does not even go so far as to commit that the Supplemental Finding *will* be reconsidered, which means that any benefit purportedly conferred by a continuance would be entirely speculative. In contrast, the *harm* posed by granting EPA’s motion would be real. Industry Respondent-Intervenors and others in the electric power industry have made colossal investments based on the emission standards for hazardous air pollutants from power plants promulgated in 2012—the Mercury and Air Toxics Standards (“Standards”), 77 Fed. Reg. 9304 (Feb. 16, 2012). The Standards required power plants to control hazardous air pollutants beginning in 2015, and essentially the entire industry has now complied.

Yet, the Standards rely on the Supplemental Finding, as well as prior EPA findings in 2012 and 2000. Therefore, this proceeding attacking the Supplemental Finding creates uncertainty about whether the Standards will remain in place and whether the price predictions on which the industry's capital investments were based, and on which future decisions will be made, will be undermined. The indefinite deferral requested by EPA will prolong this uncertainty, to the detriment of the electric power industry.

Moreover, the speculative nature of EPA's request is exacerbated by very real limitations on the Agency's claimed "inherent authority to reconsider past decisions and to revise, replace or repeal a decision," Motion at 5, at least in this particular case. Whatever EPA's authority to reverse the course charted by a prior administration may be in the abstract, it is severely cabined here by the electric power industry's "serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), and this Court's decision in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *reh'g en banc denied* (May 20, 2008), *cert. dismissed sub nom. EPA v. New Jersey*, 555 U.S. 1162 (2009), and *cert. denied sub nom. Utility Air Regulatory Group v. EPA*, 555 U.S. 1169 (2009). Given these limits, it is even less likely that granting EPA's motion would produce any benefit sufficient to outweigh the costs to the industry of perpetuating the uncertainty surrounding the Supplemental Finding and, by extension, the Standards.

ARGUMENT

I. EPA Offers No “Extraordinary Cause” to Suspend Oral Argument Indefinitely.

The Court disfavors requests to suspend oral argument, Handbook of Practice and Internal Procedures (Jan. 26, 2017) at 49, and EPA fails to demonstrate the “extraordinary cause” necessary to justify a continuance of a case scheduled for oral argument. D.C. Cir. Rule 34(g).

Just two months ago, this Court rejected Petitioners’ request to delay briefing by 45 days, which was based on Petitioners’ similar speculation that the new Administration might wish to revisit the Supplemental Finding.² Nothing has changed in the intervening months, except that EPA now makes the request (though with no more certainty regarding the fate of the Supplemental Finding), the parties have now completed their briefing, a panel has been assigned and oral argument is now weeks rather than months away. Those factors only weaken EPA’s motion.

The benefits of the relief sought by EPA are no less speculative than those sought by Petitioners’ rejected motion. This is not the circumstance in which an agency has decided on a course of action which will necessarily render a pending case moot, and so requests a stay to allow it to implement that course of

² Joint Motion by Petitioners to Extend the Briefing Schedule (Jan. 31, 2017), ECF Doc. No. 1658604; Order (Feb. 9, 2017), ECF Doc. No. 1660381 (denying motion).

action. Here EPA seeks an indefinite period to consider *whether* to reconsider the Supplemental Finding. Motion at 5-6. EPA suggests no particular concern with the Supplemental Finding that warrants reconsideration and does not express any intent to revise the Supplemental Finding.

EPA also offers no assurance as to when, if ever, the Agency will decide whether to reconsider, let alone when it might propose any change in the Supplemental Finding. This Court views such open-ended approaches with suspicion. In *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), the Court held an appeal in abeyance because EPA had already proposed a regulation substantially altering the rule under review. Even when EPA had actually proposed a revised regulation (as opposed to merely considering whether to do so, as in this case), the Court expressed concern that if an agency could avoid judicial review simply by proposing a revised rule, “a savvy agency could perpetually dodge review.” *Id.* at 388. The Court noted that the “risk of agency abuse” was mitigated by the fact that EPA did not control the timing of the new rule, but had a fixed deadline to finalize the new rule by virtue of a settlement agreement. *Id.* at 388-89. Here, EPA has not committed to any course of action with respect to the Supplemental Finding, and would retain exclusive control not only over the timing of any future administrative action, but over the progress of this case.

Moreover, EPA's motion is simply too late. EPA took no position when Petitioners sought a 45-day delay (*see* ECF Doc. No. 1658604), and instead waited 11 more weeks to make this motion, during which time EPA even filed its final brief defending the Supplemental Finding. The motion was filed nearly 90 days after inauguration and 60 days after confirmation of EPA's new Administrator. EPA had no need to wait until after the panel was assigned to seek to defer this case. Meanwhile, significant resources have been invested by the parties on briefing and oral argument preparation. Even absent the specific prejudice discussed below, EPA's motion fails to meet the criteria for such extraordinary relief and should be denied.

II. EPA's Request to Delay Argument Would Prejudice Industry Respondent-Intervenors.

In evaluating EPA's request, the Court should consider the prejudice to parties. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (considerations for a stay may be relevant to a request for abeyance). Here, Industry Respondent-Intervenors will suffer significant and acute harm from continued delay in reviewing the Supplemental Finding.

First, as a practical matter, granting EPA's motion would mean at least one year of additional delay in resolving challenges to the Supplemental Finding. In the fastest scenario, EPA would review the Supplemental Finding for 90 days—until approximately August 2017—and decide *not* to propose any

revisions. Following the filing and disposition of motions to govern (as requested in EPA's motion), oral argument might be set for some time in spring 2018, with a decision likely not until late 2018. Of course, as noted above, EPA commits to no timeline or obligation other than 90 day status reports. EPA would have the capability to hold this case in limbo for years.

As Industry Respondent-Intervenors explained in their opposition to Petitioners' motion, a delay of any length in resolving litigation that could affect the Standards harms the electric power industry.³ The industry is characterized by large capital investment and long-term planning horizons. *See* Declaration of William B. Berg ("Berg Decl.") ¶¶ 10-13, 15-16, attached hereto as Exhibit A.⁴ These investment decisions require some degree of certainty about the industry's future operating conditions. Since the Standards were promulgated in February 2012, the electric generation industry has prepared for them to take effect in April 2015, and while some power plants obtained a one-year extension to comply,

³ Respondent-Intervenors' Opposition to Petitioners' Motion to Extend the Briefing Schedule (Feb. 3, 2017), ECF Doc. No. 1659428, at 6-7.

⁴ The Berg Declaration was originally an exhibit to the Motion to Govern Future Proceedings filed by Industry Intervenors in *White Stallion Energy Center, LLC v. EPA*, D.C. Cir. No. 12-1100, ECF Doc. No. 1574838, and was filed in this litigation as an exhibit to Respondent-Intervenors' Opposition to Petitioners' Motion to Extend the Briefing Schedule, ECF Doc. No. 1659428.

virtually all coal- and oil-fired power plants in the country now comply with the Standards. *See* Berg Decl. ¶¶ 5-7, 17, 19.

In response to the Standards, electric generators made decisions about whether to install or upgrade controls, to retire power plants, to restructure portfolios, and to upgrade generation or transmission capacity. Even generators with power plants not subject to the Standards made decisions and investments based on those Standards. *See id.* ¶¶ 8, 18. Because air pollution reductions required by the Standards imposed capital and operating costs on uncontrolled or under-controlled power plants, the Standards were expected to affect (and have affected) the wholesale price of electricity and capacity prices for all power plants where such markets exist. *Id.* ¶ 18. Electric generators have based their investment decisions and price predictions on the expectation that the Standards would remain in effect. *See id.* ¶¶ 18-21. The price predictions are particularly important in competitive electricity and capacity markets, where bids are submitted years in advance, precisely because of the industry's need for long-term stability.

The Standards *have* remained in effect throughout this litigation, but as long as Petitioners' challenges to the Supplemental Finding remain alive, the possibility remains that the Standards could be affected. Perpetual uncertainty over the Standards harms the industry. As long as this litigation continues, the electric generation industry faces the risk that the price predictions that

underpinned their past investment decisions—and the predictions that underpin their ongoing decisions about future investments—could be undermined by a litigation result that threatens the Standards. *See id.* As this Court has recognized, “[f]inality of regulations serves the public interest insofar as people cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack.” *New York Republican State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015).

EPA offers no good reason for this Court to shirk its “virtually unflagging obligation . . . to exercise [its] jurisdiction.” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Standards and EPA’s 2012 finding that it was “appropriate and necessary” to regulate power plants under section 112 of the Clean Air Act have already been subject to rigorous review by this Court, which upheld them. *White Stallion Energy Ctr., LLC v EPA*, 748 F.3d 1222 (D.C. Cir. 2014). The Supreme Court accepted *certiorari* on only one issue, and found only one administrative error: that EPA failed to consider costs in determining whether it was “appropriate and necessary” to regulate power plants under section 112. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). EPA addressed and corrected that error in the Supplemental Finding. An administrative process that has lasted more than 16 years is nearing an end, and this Court should not countenance further attempts to prolong the uncertainty indefinitely.

III. The Speculative Nature of EPA's Motion is Exacerbated by Serious Limitations on EPA's Ability to Alter the Supplemental Finding.

EPA has not proposed to take any action with respect to the Supplemental Finding, at least not yet. Therefore, the Court might view as premature any quarrel over the Agency's authority to reconsider or alter the Supplemental Finding. However, to the extent EPA lacks legal authority to alter the Supplemental Finding, or would face substantial burdens should it attempt to do so, EPA's motion and the relief it requests become even more speculative. In this case, the "inherent authority" to revisit existing rules on which EPA relies, Motion at 5, is abridged by both the text of the relevant statute and the heavy reliance of the electric power industry on the Standards.

Both Non-Governmental Organization Respondent-Intervenors (ECF No. 1672173 at 12-16) and State Local Government Respondent-Intervenors (ECF No. 1672191 at 7-9) explain in their responses that this Court in *New Jersey* foreclosed precisely the type of reconsideration of the Supplemental Finding that EPA appears to contemplate. Industry Respondent-Intervenors join in the responses of those respondent-intervenors.

Even if EPA is not barred from reconsidering the Supplemental Finding under the reasoning of *New Jersey*, EPA's discretion to alter the Supplemental Finding on reconsideration in a way that affects the Standards would be severely cabined under the standard articulated in *FCC v. Fox Television*

Stations, Inc., 556 U.S. 502 (2009). When an agency changes policy, in some circumstances it must “provide a more detailed justification than what would suffice for a new policy created on a blank slate,” such as “when . . . its new policy rests upon factual findings that contradict those which underlay its prior policy[,] or when its prior policy has engendered serious reliance interests that must be taken into account.” *Id.* at 515-16. Both circumstances apply here.

Most notably, industry has relied on the Standards and, therefore, on the underlying determination that regulation is “appropriate and necessary.” Industry has already invested the substantial capital necessary to comply with the Standards. *See supra* at 7-8. These investments represent irreversible, sunk costs, and any change in course would threaten generators’ ability to recover those costs.⁵ Absent the Standards, generators might reopen facilities without emission controls or cut costs by turning off pollution controls, which would lower prices for all generators. In those circumstances, generators that have upgraded their plants or reconfigured their fleets in response to the Standards may be unable to recover those investments. Further, EPA would have to address on reconsideration factual determinations supporting the Finding that already were upheld by this Court. *See*,

⁵ As EPA recognized in the Supplemental Finding, “capital costs represent largely *irreversible* investments for firms that must be paid off regardless of future economic conditions, as opposed to other important variable costs, such as fuel costs, that may vary according to economic conditions and generation needs.” 81 Fed. Reg. at 24,436 (emphasis added).

e.g., *White Stallion Energy Ctr.*, 748 F.3d at 1245 (“EPA’s ‘appropriate and necessary’ determination in 2000, and its reaffirmation of that determination in 2012, are amply supported by EPA’s findings regarding the health effects of mercury exposure.”).

In light of these considerations, should EPA seek to revise the Supplemental Finding, it would need to produce the “more detailed justification” required by *Fox*. Since EPA offers no hint of what a reconsideration of the Supplemental Finding would entail, it is impossible to say, as a matter of law, that EPA could not possibly meet the standard imposed by *Fox*, and it is equally impossible to say that EPA definitely could. That, however, is the point.

This is EPA’s motion, and it is EPA’s obligation to demonstrate that it has authority to take the action it is contemplating, if the Court is to stay proceedings in order to allow EPA to pursue that action. Where, as here, there are serious limitations on EPA’s authority to take the contemplated action, the Court should deny the motion as speculative, particularly when those who oppose the motion demonstrate real risk of prejudice.

CONCLUSION

The motion should be denied.

April 24, 2017

Respectfully submitted,

/s/ Brendan K. Collins

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response was prepared in compliance with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this response contains 2,661 words as counted by the Microsoft Office Word 2010 word processing system, excluding parts exempted by Fed. R. App. P. 32(f), and thus complies with the type volume limitation of Fed. R. App. P. 27(d)(2)(A).

April 24, 2017

/s/ Brendan K. Collins

Brendan K. Collins

CERTIFICATE OF SERVICE

I, Brendan K. Collins, a member of the Bar of this Court, hereby certify that on April 24, 2017, I electronically filed the foregoing “Industry Respondent-Intervenors’ Opposition to Motion to Continue Oral Argument” with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Brendan K. Collins

Brendan K. Collins

EXHIBIT A

**ARGUED DECEMBER 10, 2013
DECIDED APRIL 15, 2014**

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

WHITE STALLION ENERGY)	
CENTER, LLC, et al.,)	
)	
)	Case No. 12-1100,
Petitioners,)	and consolidated cases
)	
v.)	
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

DECLARATION OF WILLIAM B. BERG

I, William B. Berg, make the following declaration in support of the Motion of Industry Respondent Intervenors to Govern Future Proceedings, and declare under penalty of perjury that the following is true to the best of my knowledge, information, and belief:

1. I currently serve as Vice President of Wholesale Market Development for Exelon Corporation. In that capacity, I manage Exelon’s wholesale policy development and advocacy in all competitive wholesale electricity markets in which

Exelon is engaged (PJM, ISO New England, Electric Reliability Council of Texas, Southwest Power Pool, Midcontinent Independent System Operator, and New York Independent System Operator) to ensure outcomes that are aligned with Exelon's business strategy. In this role, I work closely with the various business units within Exelon (electric generation, retail, demand response, commodities trading, and utility interests) to understand the business needs of the Corporation, and I participate in strategic decisions regarding whether to make capital investments in generation capacity and pollution controls and whether to retire units.

2. I have worked in the electric power industry for 23 years, and in that time I have developed an understanding of market dynamics in regulated and deregulated markets. I have served in my current position as Vice President of Wholesale Market Development at Exelon since July 2014. Prior to that, from 2005 to 2014, I held positions of increasing responsibility at Exelon and performed many of the same functions I perform in my current role except with respect to a smaller geographic area. Before joining Exelon, from 2001 to 2004, I worked for Reliant Energy and was responsible for wholesale market development for the PJM region. Throughout my time with Exelon and Reliant, I have consistently worked closely with the various commercial units to understand the business needs of the companies to ensure alignment with competitive market development. From 1992 to 2001, I worked for the Florida Public Service Commission, a state regulatory agency that regulates a traditional cost of service, rather than a competitive, electric system. I held

many roles of increasing responsibility while at the Commission, and my last role was Chief Advisor to its then Chairman, J. Terry Deason, providing technical analysis on federal initiatives and state electric policy.

3. I hold a Bachelor of Arts in Business Administration with a Minor in Economics from Lenoir-Rhyne University and a Master of Arts in Applied Economics from the University of Central Florida, College of Business.

4. From my experience and training, I have personal knowledge of the matters on which I testify in this declaration. In particular, I am aware of the electric generation industry's response to the Mercury and Air Toxics Standards ("Standards"), the impact of the Standards on generators that participate in competitive electricity markets, and the likely consequences to electric generators and their customers should the Court disturb the Standards.

5. The Standards were released by EPA to the public in December 2011, although they were not published in the Federal Register until February 2012, effective April 16, 2012.

6. The Standards gave electric generators three years to comply – the maximum time permitted by the Clean Air Act. The Act allows permitting authorities to grant an additional one-year extension when "necessary for the installation of controls." In promulgating the Standards, EPA made clear that it would adopt a very broad interpretation of this term. EPA further indicated that it would also allow

additional time beyond the four-year extended compliance period for plants that were necessary to preserve electric reliability.

7. The Standards had been anticipated for several years, and prudent generators had long taken the forthcoming standards into account in making capital investment decisions for their generating fleets. Many generators began to develop their final plans for complying with the Standards when the proposed Standards were published and, with the release of the final Standards, all electricity generators either finalized or began to develop plans to comply with the Standards.

8. The capital decisions made by industry were not limited to coal- and oil-fired power plants to which the Standards apply. Because the electric generation industry is interconnected, the Standards also were directly relevant to decisions as to whether to invest in maintaining or expanding existing nuclear, natural gas-fired, and renewable generation, and whether to invest in new capacity of all fuel types.

9. Generators adopted a number of different strategies for compliance with the Standards. Some had already transitioned their fleets away from the coal-fired generation most affected by the Standards. Some had already upgraded their coal-fired plants in response to state laws or other obligations and could achieve the Standards without further investment. Others chose which of their existing plants justified the investment needed to comply with the Standards, and which plants would be “retired,” that is, permanently closed.

10. Electric generators base capital investment (such as that necessary to add or to upgrade pollution controls) on long-term operational plans. Whether participating in competitive electricity markets or traditional state-regulated resource planning, generators base investment decisions largely on the same set of considerations: the remaining useful life of a plant; the expected cost to maintain the plant in good working order; the cost of the required emission controls; and the revenue that the plant is expected to generate. Absent specific local reliability concerns, which are rare, generators will ordinarily choose to retire plants when expected revenues do not justify the cost of maintaining those plants, whether due to ordinary repairs or emission control or other necessary upgrades, such as for safety.

11. Power plant revenues typically include revenue from direct or indirect wholesale sales of electricity to local distribution companies (that is, retail electric suppliers like PEPSCO and Baltimore Gas & Electric), industrial users, and others. Depending on the level of electricity demand and the available generation resources, wholesale power prices can fluctuate from \$0 per megawatt hour (and less in some circumstances) to hundreds of dollars per megawatt hour. Often power plant owners will sell their electricity output in advance, entering contracts to deliver electricity months or years ahead. This approach allows generators and their customers to lock in prices to avoid the risk posed by highly variable wholesale power prices. These advance sales provide generators with a measure of revenue certainty and customers with a measure of cost certainty.

12. Power plant revenues can also include “capacity payments” – payments for ensuring that a plant will be available in the future to generate electricity if called upon. In much of the Northeastern and Midwestern regions of the country, forward capacity markets ensure that adequate generation resources will be available in future years. For example, PJM – which operates the electric power grid in all or part of 13 states and Washington, D.C., and is the largest power grid operator in the country – conducts a capacity auction each year for a period beginning three years later. So in 2015, PJM conducted an auction to acquire adequate generation capacity in the 2018/2019 delivery year. Power plants selected through that auction, held this summer, are required to do what is necessary to remain operational for the 2018/2019 delivery year, and those plants will receive capacity payments during that period, in addition to any revenues they receive from electricity sales. Because capacity prices are dependent on the amount of generation capacity that will be available, prices are very sensitive to power plant retirements, which reduce the available capacity.

13. Long-term capacity commitments require that electric generators develop and follow through on long-term capital planning. Generators responded quickly to the proposed and final Standards, evaluating available control options and identifying plants where additional investments would – and would not – be justified by projected revenues. PJM conducted its capacity auction covering the 2015/2016 delivery year (the first in which the Standards would be in effect) just five months after the Standards were released. That auction saw increased capacity prices

reflecting the additional investment some generators would have to make to comply with the Standards, and those generators whose plants cleared that auction are now receiving those higher payments.

14. Many generators with power plants subject to the Standards received one-year compliance extensions from their state permitting authorities, deferring compliance at specific power plants until April 16, 2016. With that deadline now less than seven months away, those generators have certainly decided whether to upgrade those plants to comply with the Standards or to shut the plants down when the deadline arrives.

15. Where material additional investments are to be made at a power plant, a number of arrangements must be made long before the actual upgrade work can be performed at the plant. Because power plants must be turned off in order for upgrade work to be performed, the generator must obtain permission from the grid management authority or resource planning agency to schedule an “outage” to allow the work to proceed. Outages must be scheduled at times of low electricity demand, when the power plant’s output would be more easily replaced by other generators, typically in the Spring or Fall. This planning requires a long lead time, and planning for any outages required to install controls before April 2016 has been completed.

16. Based on the planning work and the schedules set by the grid operator, generators must engage pollution control contractors to install the equipment during the scheduled outage, and those contractors in turn must order any equipment that

must be installed during the project. For any significant upgrade project, these interlocking arrangements are made long in advance, ordinarily one year or more before the actual work will be performed. Thus, these decisions and the vast majority of this work have already happened, and these improvements have been priced into the market.

17. With all of these long-term planning criteria in mind, the electric generation industry moved quickly after the Standards were released in December 2011 to ensure a smooth transition to compliance by the April 2015 deadline, and where necessary, by the extended April 2016 deadline. According to industry and third-party reports, the majority of generation capacity subject to the Standards met the April 2015 compliance date. But for the few plants that obtain further extensions required to preserve reliability, the remaining power plants will be retired or upgraded by April 2016. Grid operators have long accounted for this deadline in planning.

18. As is clear from the above, all generators have had good reason to incorporate the Standards into their long-term planning. This is true not only of generators that are directly affected by the Standards, but also of generators that use natural gas, nuclear, hydropower, wind, solar, and other means to produce electricity. Because the air pollution reductions required by the Standards impose significant capital and operating costs on previously uncontrolled coal-fired generation, the Standards were expected to affect – and have affected since April 2015 and before – the wholesale price of electricity and capacity prices where such markets exist. These

price impacts have been relied upon by *all generators* in making investment decisions: by coal-fired generators deciding whether to upgrade or retire their plants; by gas generators deciding whether to build new power plants; by nuclear generators deciding whether to increase output from existing plants; and by renewable developers deciding whether to build new wind or solar projects. These price impacts are also relevant to owners of nuclear and other non-emitting sources that must decide whether to retire existing plants or to make capital investments necessary to keep those plants operating or to increase capacity.

19. Now, nearly four years after adoption of the Standards, virtually all generators are either in compliance with the Standards or have finalized plans to come into compliance by April 2016. Any vacatur or stay of the Standards would disrupt the market's reasonable expectations and jeopardize the investments that the electric power sector has made over the past four years and earlier.

20. An interruption in the applicability of the Standards would disrupt wholesale electricity prices and disadvantage generators that timely complied with the Standards. Those generators would have to compete for a prolonged period of time against coal-fired plants that would otherwise retire by April 2016; a vacatur or stay would allow those non-compliant power plants to continue to operate, selling power at prices unaffected by any incremental compliance costs. This price uncertainty would disadvantage compliant generators and, ultimately, their customers.

21. Moreover, any vacatur or stay of the Standards would deprive the electric power industry of the ability to predict when the Standards would be reinstated after EPA reaffirms its finding, or whether the Standards would be replaced with different, more stringent requirements. In any case, if the Standards were vacated or stayed, the power industry would have complied with the Standards since April 2015, then would suffer an indeterminate period during which the Standards were nullified, and finally would have the Standards or some other (possibly more stringent) requirements imposed again. Such a moving target would be highly disruptive to the electric power industry and the markets and other regulatory regimes in which its participants operate.

22. This uncertainty could persist long enough even to disturb the long-range capacity markets. Each year those regional transmission organizations that conduct capacity markets hold one or more auctions to ensure capacity in later years. In February and May 2016, ISO New England and PJM, respectively, will conduct capacity markets for the delivery year 2019/20, and in April 2016, the Midcontinent Independent System Operator will conduct a capacity market for the delivery year 2016/17. If uncertainty continues to exist during those auctions – the first of which is only five months from now – electric generators may be reluctant to commit their power plants to operate in the subsequent years, or may commit those plants only to find that even greater investment will be required than anticipated. This uncertainty is

likely to cause higher bids and higher costs for electricity consumers than would otherwise occur.

September 24, 2015



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