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.,	)	
Petitioners,	)	**Case No. 12-1100 (and consolidated cases)**
v.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondent.	)	

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION INC.'S MOTION TO GOVERN PROCEEDINGS ON REMAND FROM THE U.S. SUPREME COURT

The United States Environmental Protection Agency ("EPA") takes the position that this Court should leave the requirements of the Mercury Air Toxics Standards ("MATS") Rule in place even though the U.S. Supreme Court has decided, in *Michigan v. EPA*, 135 S. Ct. 2699 (June 29, 2015), that the sole legal basis for the Rule was unlawful – and even though there will not be a legal basis for the Rule unless and until EPA goes through the process necessary to respond to the Supreme Court's decision. For the reasons discussed below, Tri-State Generation and Transmission Association, Inc. ("Tri-State") opposes this request and believes that such a result would be contrary to established precedent.

Tri-State is aware that other parties are asking the Court to vacate the MATS Rule in light of *Michigan*. Tri-State joins in this request and believes that such a result is compelled by statute and by prior decisions of both the Supreme Court and this Court.

However, if the Court decides not to vacate the Rule, Tri-State requests that the requirements of the Rule be suspended for the small number of power plants that face a compliance deadline *in April 2016* and must decide, well in advance of that date, whether to shut down or spend millions of dollars on new control equipment that may or may not be required, depending on EPA's response to *Michigan* and potential judicial review of that response. As explained below, most power plants were required to come into compliance with MATS by April 2015 and have already done so. However, a relatively small number of plants, including one of Tri-State's plants, received one-year extensions and have until April 16, 2016, to come into compliance. Because of the lead-time needed to fabricate, install, and test new control equipment, Tri-State must decide soon whether to spend millions of dollars on new equipment or plan to shut down that plant in April 2016. It would be manifestly unfair to require Tri-State and any other similarly situated companies to make such decisions unless and until EPA takes the action necessary to provide a legal basis for the MATS Rule. As this Court has previously concluded, "industry should not have to [install] expensive new [equipment] until the standard is finally determined." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).

Specifically, if the Court decides not to vacate the MATS Rule in light of *Michigan*, Tri-State requests that the Court suspend the compliance obligations under the MATS Rule for any power plant *with a future compliance deadline*[1] unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that compliance deadlines for such plants be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of the new finding.

BACKGROUND

I. Statutory and Judicial Background

These consolidated cases involve review of the MATS Rule published in 77 Fed. Reg. 9,304 (Feb. 16, 2012). These standards were promulgated by EPA pursuant to Sections 111 and 112 of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7411, 7412. This Rule requires that existing coal-fired power plants comply with three new emissions standards – one for mercury, one for particulate matter (as a surrogate for non-

[1] Tri-State believes that this relief should be given to any plant that received a valid MATS compliance extension and thus faces a future compliance deadline. However, Tri-State is not aware of any other plant that faces the same dilemma as Nucla Station, where Tri-State must still decide whether to spend millions of dollars on control technology to comply with a requirement that may or may not remain in effect, depending on EPA's response to *Michigan*. Because Tri-State is not aware of any other companies or plants in a similar situation, Tri-State requests that, at the very least, the Court stay the hydrogen chloride ("HCl") compliance obligation at Tri-State's Nucla Station unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that the HCl compliance deadline for Nucla Station be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of such a finding.

mercury metals), and one for HCl (as a surrogate for all "acid gases").[2] *See* 40 C.F.R. §§ 63.9984, 63.9991. All coal-fired plants were required to meet these new standards by April 16, 2015, unless they received a compliance extension from their permitting authority. *See* 40 C.F.R. § 63.9984. By statute, permitting authorities may extend this compliance deadline by up to one year for plants that meet certain criteria. 42 U.S.C. § 7412(i)(3)(B).

Many states and industry groups challenged the MATS Rule, but the MATS compliance deadlines and standards remained in effect during the litigation. As a result, most coal-fired power plants were required to comply with the MATS emissions standards by April 2015 – either by installing new emissions controls or shutting down because it was not economically feasible to install costly new controls. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 7. However, a relatively small number of plants received one-year extensions of the compliance deadline and are required to come into compliance by April 16, 2016 – again, either by investing in additional control technology or shutting down.

On June 29, 2015, the U.S. Supreme Court reversed the D.C. Circuit's decision on a threshold issue that underpins the MATS Rule, holding "that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan,* 135 S. Ct. at 2712. As a result of the Supreme

[2] The MATS Rule also gives plant owners the option of complying with sulfur dioxide ("SO_2") standard in lieu of the HCl standard, but the alternative SO_2 standard is also a surrogate for "acid gases."

Court's decision, EPA must determine whether to make a new finding that it is "appropriate and necessary" to regulate hazardous air pollutant emissions ("HAPs") from coal-fired power plants under Section 112 of the CAA. *Id.* at 2711. Specifically, EPA must take into account the cost of such regulation in determining whether it is "appropriate and necessary" to regulate power plants under Section 112. *Id.*

Without the "appropriate and necessary" finding, there is no legal basis for the MATS Rule. Now that the Supreme Court has held that this finding was improper, this Court must decide whether MATS will be vacated or remanded to EPA without vacatur and, if remanded without vacatur, whether the requirements of the MATS Rule will remain in effect during remand.

II. Nucla Station

Approximately 1,400 coal and oil-fired electric generating units ("EGUs") are required to comply with the MATS Rule. *See* EPA, Mercury and Air Toxics Standards (MATS), http://www.epa.gov/mats/powerplants.html. It appears that about 165 of these 1,400 EGUs obtained extensions providing them additional time – typically until April 16, 2016 – to come into compliance with the Rule. *See* National Association of Clean Air Agencies Survey on MATS Compliance Extension Requests (Mar. 17, 2015), http://www.4cleanair.org/sites/default/files/Documents/MATS_extension_requests_table_March_2015.pdf. There is no centralized source that provides the details of these extension requests, but it appears that the majority

were for plants that were in the process of installing new controls but were not able to complete the installations by April 2016.

All but one of Tri-State's coal-fired units came into compliance with all the MATS requirements by the original April 2015 compliance date. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 9. The only Tri-State unit unable to come into full compliance by this date was Nucla Station, a small 110-megawatt circulating fluidized bed ("CFB") unit located in Nucla, Colorado. *Id.*

The MATS Rule authorized permitting agencies to extend the compliance deadline for a facility if continued operation of the facility was necessary to "avoid a serious risk to electric reliability." 77 Fed. Reg. at 9,410. Given Nucla's important role in maintaining reliability in southwestern Colorado, the Colorado Air Pollution Control Division ("APCD") granted Nucla Station a one-year extension of the MATS compliance deadline for HCl. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶¶ 13-14. Thus, Tri-State is required to bring Nucla Station into compliance with the MATS HCl standard by April 16, 2016. *Id.* According to information EPA used in the MATS rulemaking, Nucla Station has the lowest mercury emissions rate of any coal-fired unit in the country and easily meets the MATS standard for mercury. *Id.* at ¶ 10. It also meets the MATS emission standard for particulate matter (as a surrogate for non-mercury metals), but it does not meet the MATS standard for HCl. *Id.*

Tri-State undertook a major technical effort to evaluate the possible control technologies that would allow Nucla to meet the HCl standard; however, given

Nucla's small size and the fact that it does not operate frequently, none of them is economically justifiable. *Id.* at ¶ 11. Even though Nucla Station does not meet the HCl standard, it has remained in operation because it received a one-year extension of the HCl compliance deadline, based on the fact that it serves a remote area and its continued operation is necessary to maintain electric reliability in southwestern Colorado until an ongoing transmission line project in the area can be completed. *Id.* at ¶¶ 11, 14.

Because of the lead-time needed to fabricate, install, and test emissions control equipment, Tri-State must decide well before April 2016 whether to install new control equipment or plan on shutting down Nucla Station before the deadline. This is a difficult decision. Even though it does not make sense economically to install controls at Nucla Station – a plant that almost certainly will be forced to shut down under EPA's recently finalized Clean Power Plan – this plant still plays an important role in maintaining reliability in southwestern Colorado. *See id.* Shutting down Nucla Station would not necessarily cause the lights to go out in that part of Colorado, but until Tri-State is able to complete work on a nearby transmission upgrade project, the risk of power outages would significantly increase if Nucla is no longer in service. *Id.* at ¶¶ 11, 16, 26. Therefore, Tri-State must still decide whether avoiding this increased risk for the next few years would justify the cost of installing controls at Nucla. *Id.* at ¶ 16.

III. Tri-State's Emergency Motions

As this Court is aware, Tri-State has twice requested relief from one particular requirement in the MATS Rule for Nucla Station. On July 31, 2015, Tri-State submitted an emergency motion seeking a suspension of the HCl compliance obligation for the Nucla plant. ECF No. 1565685. EPA and several other parties submitted oppositions thereto on August 10. ECF Nos. 1567031, 1567025, 1567035. EPA (and the other parties opposing Tri-State's motion) argued that Tri-State had not exhausted its administrative remedies and should have sought relief from EPA or the State of Colorado before seeking relief from this Court. On August 17, before Tri-State could submit a reply, this Court issued an order denying Tri-State's emergency motion "without prejudice to refiling if Tri-State cannot obtain timely relief from EPA or the State of Colorado." ECF No. 1568181.

Within 24 hours of receiving the Court's August 17 order, Tri-State sent a letter to EPA, the Department of Justice ("DOJ") lawyer assigned to this case, and APCD – seeking the same relief that Tri-State had requested from this Court. *See* Tri-State Second Emergency Mot. Ex. 1. In an email dated August 18, 2015, the Director of APCD stated that Colorado does not have authority to grant the relief Tri-State is seeking, and that any such relief would need to come from EPA. *See* Tri-State Second Emergency Mot. Ex. 2. On August 21, the acting head of EPA's Office of Air and Radiation emailed a letter to Tri-State's counsel saying that "every source has unique concerns and constraints in responding to regulatory requirements" and that EPA

would not provide any relief to Tri-State at this time. *See* Tri-State Second Emergency Mot. Ex. 3.

Subsequently, on August 24, 2015, Tri-State submitted a second emergency motion to this Court. ECF No. 1569466. In response, EPA filed yet another opposition to Tri-State's request. ECF No. 1570353. Through this pleading, Tri-State learned that EPA had unilaterally eliminated a September 1, 2015 deadline by which Tri-State was required to notify the State regarding whether it would install new control equipment at Nucla. *Id.* at 8. Tri-State filed a reply to EPA's opposition, explaining why this "relief" was inadequate. ECF No. 1570496. Regardless, "in light of EPA's representation that it . . . extended Tri-State's impending deadlines, and because Tri-State may now seek administrative relief" before its April 16, 2016 compliance deadline, the Court denied Tri-State's second request on September 1, 2015. ECF No. 1570784. Again, the Court's decision was "without prejudice to Tri-State filing a motion should administrative relief be denied." *Id.*

Even though EPA eliminated the September 1, 2015 deadline for Tri-State to decide whether to install controls, Tri-State must still make this decision in the near future, unless MATS is vacated or Nucla's compliance obligation is suspended. In light of the uncertainty about EPA's response to *Michigan*, Tri-State has not yet made a decision about installing additional control equipment at Nucla. However, unless Tri-State orders such equipment soon, it will not be possible to have it installed and operating by April 2016.

ARGUMENT

I. This Court should vacate the Rule because there is no legal basis for it.

EPA has already informed the Court that it "intends to seek remand [of the MATS Rule] without vacatur." EPA Opp'n to Second Mot. of Tri-State for Suspension of its Compliance Obligation (hereinafter "EPA Second Opp'n") at 15. However, in light of the Supreme Court's decision in *Michigan*, EPA's proposed remedy is not available here.

The Administrative Procedures Act ("APA") provides that a "reviewing court *shall* . . . (2) hold unlawful and *set aside agency action*, findings, and conclusions found to be . . . (C) in excess of statutory . . . authority . . . ." 5 U.S.C. § 706(2)(C) (emphasis added). The Supreme Court has reinforced this command: "In *all* cases agency action *must* be set aside if the action was '. . . not in accordance with law' or if the action failed to meet statutory . . . requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (emphasis added).

In *Michigan*, the Court held that EPA acted unlawfully when it refused to consider the cost of regulating power plants under Section 112 of the CAA in determining that it was "appropriate and necessary" to regulate them under this section. 135 S. Ct. at 2712. This "appropriate and necessary" determination was the sole legal basis for the MATS Rule.

This is not a case where EPA must simply go back and better explain the rationale for its determination. EPA's rationale was quite clear and well explained: It

did not take costs into account when it determined that it was "appropriate and necessary" to regulate power plants under section 112 of the CAA. The Supreme Court found that this determination was unlawful. It did, of course, leave open the option that EPA might go back and make a new determination, this time considering the cost of such regulation. But this would need to be a new determination supported by a new record, not simply a better explanation of its original determination.

The Court has articulated a two-factor test to determine whether agency action should be vacated. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150 (D.C. Cir. 1993). Under this test, the court must consider "the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that itself may be changed." *Id.* at 150-51. This first factor is easily satisfied. The Supreme Court found that EPA's "appropriate and necessary" determination was not in accordance with law. *See* 135 S. Ct. at 2712. Unlawful errors are "more than sufficient reason to vacate the rules." *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007).

As to the second factor, vacating the MATS Rule will not be disruptive to anyone. This is unlike *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008), where the Court left the Clean Air Interstate Rule ("CAIR") in place during remand because many states had relied on CAIR in formulating their legally required state implementation plans (and where several of the parties that prevailed in the case supported remand without vacatur). Neither the states nor anyone else has relied on

MATS to satisfy any regulatory requirement other those in the Rule itself, and nothing would be disrupted by vacatur.

EPA may be free to reinstate the MATS Rule if it makes a new "appropriate and necessary" determination, but this Court should not allow it to remain in effect when it is based solely on a determination that the Supreme Court has found to be unlawful. Moreover, "leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges." *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001).

II. If the Court decides not to vacate the Rule, it should suspend compliance obligations for plants that still face future compliance deadlines unless and until EPA makes a new "appropriate and necessary" determination.

EPA should be required to determine whether it is "appropriate and necessary" to regulate power plants under Section 112 of the CAA before companies like Tri-State are forced to make decisions about whether to spend millions of dollars to comply with the MATS Rule, which was promulgated under this section of the Act. If the Rule is not vacated and the compliance obligations are not suspended during the remand, plants like Nucla Station will be forced to make a decision about installing controls before EPA can respond to the Supreme Court. This is manifestly unfair. As this Court has previously concluded, "industry should not have to [install] expensive new [equipment] until the standard is finally determined." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).

Of course it is also unfair that plant owners and ratepayers have already been forced to spend billions of dollars to install new control equipment to comply with a rule that was based on an unlawful finding. But these capital investments have already been made and cannot be undone. The situation is different for Nucla and any other plants that may be similarly situated. Because they received valid compliance extensions, they have not yet made irretrievable commitments to purchase and install new control equipment. Basic fairness dictates that they should not be forced to make such commitments before EPA decides whether, in light of the costs of compliance, it is "appropriate and necessary" to regulate power plants under section 112 of the CAA. *See Portland Cement Ass'n*, 665 F.3d at 189. To require Tri-State to spend millions of dollars to install controls or to shut down Nucla Station before EPA completes its analysis of whether it is "appropriate and necessary" to regulate such plants when taking into account the cost of such regulation would make a mockery of the Supreme Court's decision in *Michigan. Contra Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (where the Court denied petitioners' request for a stay, in part, because petitioners failed to identify "any specific, identifiable cost they will incur because of the Rule's emission limits.").

Regardless of whether MATS is vacated or remanded to EPA, EPA will not be able to make a new "appropriate and necessary" determination before Tri-State must make this decision. *See* EPA Second Opp'n at 15; Tri-State Second Emergency Mot. Ex. 4 at ¶¶ 21, 22. EPA has represented to the Court that it does not plan to issue its

appropriate and necessary determination until Spring 2016. *See* EPA Second Opp'n at 15. If its compliance deadline remains April 2016, and if Tri-State decides to incur the cost of installing additional control technology to meet the MATS HCl limit, Tri-State must order the requisite equipment soon to ensure that Nucla can remain in service in April 2016. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶¶ 13, 20. Such control equipment is not readily available and will need to be fabricated, installed, and tested before the April 2016 compliance deadline. *Id.* at ¶ 20. Installing such control equipment will require Tri-State to make a binding and irretrievable commitment of millions of dollars well in advance of the deadline.[3] *Id.* at ¶ 17.

If the Court does not vacate the Rule or suspend its requirements at least for plants with future effective dates, the Supreme Court's ruling in *Michigan* will essentially be a nullity. By the time EPA responds to *Michigan*, all the power plants in the country will have been forced to comply with MATS;[4] even if EPA or a court

[3] Tri-State recognizes that the Court will not likely be able to rule on the motions to govern until the end of 2015, but in light of the uncertainty about EPA's response to *Michigan* and the likelihood that this Court will vacate MATS or stay the compliance deadlines for plants like Nucla, Tri-State has not yet decided whether to install new control equipment for Nucla Station. Thus, if MATS remains in place and Tri-State decides to incur the cost of installing new control equipment, Tri-State will likely be forced to take Nucla out of service in April 2016, at least temporarily. If Tri-State decides to purchase and install new control equipment at Nucla, notwithstanding the fact that EPA's recently finalized Clean Power Plan would likely force it to retire by 2022, then Tri-State would likely be able to bring it back into service sometime after April 2016.

[4] It may be possible for some plants to enter into an "Administrative Order" with EPA's enforcement office that would excuse them from violating MATS for up to

decides that regulation of power plants under Section 112 is not "appropriate and necessary" in light of the costs, those cost will already have been incurred.

As members of this Court have observed, allowing a rule to remain in effect during remand also reduces the likelihood that an agency will respond promptly to the court's concerns. *See, e.g.*, *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such."); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) ("experience suggests that this remedy [allowing a rule to remain in effect during remand] sometimes invites agency indifference").

III. If the Rule is not vacated, the balance of harms and the public interest favor a suspension of compliance obligations for plants such as Nucla that face future compliance deadlines.

Tri-State believes that, if the Rule is not vacated, the MATS compliance deadlines should be suspended for any plant that faces a future compliance deadline unless and until EPA makes a valid "appropriate and necessary" determination. However, Tri-State is not aware of any other company or plant that faces the same dilemma that Tri-State faces with Nucla: whether to spend millions of dollars on control technology to comply with a requirement that may or may not remain in effect, depending on EPA's response to *Michigan*. As noted above, it appears that

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one additional year if those plants are necessary to maintain electric reliability. Tri-State has met with EPA about this possibility but has not had any success in this regard.

most plants that received compliance extensions were in the process of installing controls and simply needed more time to finish installation and testing. Thus, although they may face a future compliance deadline, they have already incurred the cost of purchasing and installing control equipment. The situation with Nucla is very different. *See Mexichem*, 787 F.3d at 557 ("attempting to comply in the meantime with the existing Rule will result in wasteful investments in unnecessarily stringent control technologies"). Because Nucla may be the only plant in this situation, in the section below, Tri-State has used Nucla as an example when reviewing the factors that may be relevant to the Court's decision as to whether compliance obligations should be suspended during remand.[5]

If the compliance obligations remain in effect during remand and Tri-State decides that it must incur the cost of installing new equipment, these costs cannot be recovered, even if EPA or the courts ultimately decide that a new "appropriate and necessary" determination cannot be justified. Such harm would clearly be irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."). This is not

[5] Until EPA completes its "appropriate and necessary" analysis, it is impossible even for EPA to predict the outcome of that analysis and therefore the likelihood of any party's success on the merits. To the extent that EPA may have tried to imply that it can predict the outcome of its "appropriate and necessary" analysis based on pre-existing information in the administrative record, EPA Second Opp'n at 15-16, Tri-State notes that EPA's analysis must be subjected to public notice-and-comment. Thus, based on standard administrative procedure requirements, the outcome of EPA's analysis "is far from certain." *Id.*

an insignificant matter for Tri-State and its members. *Contra Mexichem*, 787 F.3d at 556 (where the overall economic impact of the final rule on affected entities and consumers would be low). Tri-State serves rural areas that traditional investor-owned utilities have determined are not profitable to serve. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶¶ 3, 4. It is considerably more expensive to provide electricity to these areas and, consequently, Tri-State's members already pay higher electricity rates than customers in more urbanized areas. *Id.* at ¶ 4. Moreover, because Tri-State is a non-for-profit cooperative, its members must pay for any cost that Tri-State must incur to meet regulatory requirements, such as additional controls to comply with the MATS HCl limit. *Id.* Requiring these customers to pay even more for their electricity would be a hardship given that a significant percentage of Tri-State's residential customers live at or below the poverty line – 20.4% in New Mexico, 13.2% in Colorado, 12.8% in Nebraska, and 11.5% in Wyoming. *Id.* Such customers would be irreparably harmed if Tri-State is forced to purchase new equipment unnecessarily and they must help to pay the cost. *See id.* at ¶¶ 4, 18, 20, 25.

On the other hand, no one will be harmed if Nucla's MATS compliance deadlines are suspended unless and until EPA makes a lawful "appropriate and necessary" determination. According to EPA, Nucla Station has the lowest mercury emissions rate of any coal-fired power plant in the country. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 10. Nucla easily meets the MATS standard for mercury, and it also meets the MATS emission standard designed to control non-mercury

metals. *Id.* The only MATS standard that creates a compliance issue for Nucla Station is the one for HCl. *Id.*

Despite the fact that Nucla Station does not meet the HCl emissions standard, its HCl emissions do *not* pose a risk to public health, even for someone who might reside next to the plant for a lifetime. EPA's own analysis has repeatedly shown that concentrations of HCl caused by power plant emissions – even for plants much larger than Nucla – are well below conservative health-protective level that EPA has established for HCl. As EPA noted when it proposed the MATS Rule, "Our case study analyses of the chronic impacts of EGUs did not indicate any significant potential for them to cause any exceedances of the chronic RfC for HCl. . . ." 76 Fed. Reg. 24,975, 25,051 (May 3, 2011) (proposed MATS rule). The RfC is a reference concentration established by EPA at a level at which a person can be exposed continuously for his or her lifetime "without an appreciable risk of deleterious effects." EPA, Integrated Risk Information System (IRIS), http://www.epa.gov/iris/help_ques.htm.

Notably, EPA established emission limits for HCl in the MATS Rule because it believed that this was required under the CAA for acid gases – not because HCl emissions posed a risk to human health. *See* 77 Fed. Reg. at 9,361 (citing *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633 (D.C. Cir. 2000)). Thus, granting the requested relief for Nucla Station will not cause harm to human health.

Granting at least Tri-State the requested relief will clearly serve the public interest. As discussed above, if this Court does not suspend the HCl compliance obligation for Nucla Station, Tri-State must either (1) spend millions of dollars to install new equipment that is not economically justifiable and may not be necessary or (2) shut down the plant. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 15. As discussed above, if Tri-State chooses the first option, its members, including many low-income households, will be required to pay those costs. *Id.* at ¶ 4. If Tri-State chooses the second option, it will impose a significant hardship on the town of Nucla, its residents, and many of the residents of Montrose County, Colorado. *Id.* at ¶ 18.

Nucla Station is critical to the local economy. It is the largest taxpayer in Montrose County, paying approximately $1.1 million annually in taxes. *Id.* The town of Nucla receives most of its tax revenue from Nucla Station. *Id.* Nucla Station also creates approximately $72.4 million in direct and indirect economic impacts and has an annual payroll of approximately $14.6 million (including contractors who work on outages and other projects). *Id.* If Nucla Station is forced to shut down in April 2016, the impact on the town of Nucla would be devastating, and Montrose County, Colorado would also suffer serious adverse impacts. *Id.*

CONCLUSION

Tri-State respectfully requests that the Court vacate the MATS Rule in light of the Supreme Court's decision in *Michigan*. However, if the Court decides not to vacate the Rule, Tri-State requests (1) that the Court suspend the compliance obligations

under the MATS Rule for any power plant *with a future compliance deadline* unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and (2) that compliance deadlines for such plants be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of the new finding.[6]

Dated: September 24, 2015

Respectfully submitted,

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[6] Because Tri-State is not aware of any other companies or plants in a similar situation, Tri-State requests that the Court at least stay the HCl compliance obligation at Tri-State's Nucla Station unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that the HCl compliance deadline for Nucla Station be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of the new finding.

CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing Tri-State's Motion to Govern Proceedings on Remand From the U.S. Supreme Court electronically through the Court's CM/ECF system, for electronic service on all ECF registered counsel. I further certify that a copy has been served by first-class U.S. mail on the following:

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