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Re: The Clean Power Plan stay

Dear Messrs. Kavulla and Clark and Ms. Nelson:

As you know, the United States Supreme Court issued on February 9, 2016, an unprecedented order staying the Environmental Protection Agency's so-called "Clean Power Plan,"¹ pending the conclusion of judicial review. Order, No. 15A773, *et al.* (U.S. Feb. 9, 2016). We understand that your organizations have been engaged in significant discussion about the meaning of the stay for the States, and heard yesterday from EPA Administrator Gina McCarthy, who urged States to continue to take voluntary steps toward compliance with the Clean Power Plan. *See* Emily Holden, *et al.*, *Court stay may slow, not stop, state carbon-cutting talks*, E&E News (Feb. 12, 2016). As the chief legal officers for two States involved in obtaining the stay,

¹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

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we want to ensure that States understand that there is no legal obligation to continue to spend taxpayer funds on compliance efforts and that, in the unlikely event the Power Plan is ultimately upheld by the courts more than a year from now, there will be ample time then to restart those efforts.

The result of the stay is clear: the Power Plan has no legal effect whatsoever during the entire judicial review process. In granting the stay, the Supreme Court considered whether the Power Plan is likely unlawful and whether it is causing irreparable harm now. We believe the Court's decision to grant the stay for the duration of the litigation—including any Supreme Court review—means that the States, their agencies, and EPA should put their pencils down. Any taxpayers dollars spent during the judicial review process are unnecessary and likely to be entirely wasted.

1. As the Supreme Court has explained, a stay of administrative action “suspend[s] administrative alteration of the status quo.” *Nken v. Holder*, 556 U.S. 418, 428 n.1 (2009). The stay was requested under the Administrative Procedure Act, 5 U.S.C. § 705, which grants the Supreme Court authority to “issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” *Id.* The Court's decision to issue the stay “halt[s] or postpone[s]” the Power Plan, including “by temporarily divesting [the Power Plan] of enforceability.” *Nken v. Holder*, 556 U.S. 418, 428 (2009). Put another way, the stay “suspend[s] the source of authority to act” by “hold[ing] [the Rule] in abeyance.” *Id.* In this case, that means EPA and its agents—including Administrator McCarthy—have no authority to take any action requiring States to comply with or respond to the Power Plan. While this litigation plays out—which is likely to continue well into 2017—any obligations in the Power Plan are effectively void.

2. It is also well-understood that in the unlikely event that the Power Plan is ultimately upheld, EPA would be forced to completely reset all Power Plan deadlines. As the United States Solicitor General, representing EPA, warned the Supreme Court in opposing the stay, “implementation of each sequential step mandated by the Rule *would be substantially delayed*” if the Power Plan were ultimately upheld. Memorandum for the Federal Respondents in Opposition 2-3, No. 15A773, *et al.* (U.S. Feb. 4, 2016) (emphasis added). “A request for such tolling is inherent even in the applications that do not explicitly address that subject,” the Solicitor General explained, “as all of them rest on the premise that *a stay would forestall harms alleged to arise from future deadlines.*” *Id.* at 3 (emphasis added); *see also id.* at 4 (granting a stay “would have the sweeping prospective consequences, extending far beyond the actual pendency of the relevant judicial proceedings”). If the Power Plan is upheld, which we do not believe is likely in light of the stay order, we expect that the deadlines would be tolled by the amount of time the Supreme Court's stay remains in place.

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This common-sense understanding of how stays work has been borne out in practice. *See, e.g., Order, Michigan v. EPA*, No. 98-1497, ECF 524995 (D.C. Cir. June 22, 2000) (tolling deadline for submission of state implementation plans in light of stay). The D.C. Circuit and EPA recently adopted an identical approach in the Cross-State Air Pollution Rule (“CSAPR”) litigation. *See Order, ECF 1518738, EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Oct. 23, 2014) (lifting stay and granting EPA’s request to toll by three years all CSAPR compliance deadlines); 79 Fed. Reg. 71,663 (Dec. 3, 2014) (amending compliance deadlines to reflect lifting of the stay by delaying compliance deadlines by three years).

There is no reason to think that if the Power Plan survives judicial review, its deadlines would not likewise be amended to reflect at a minimum the period of time that the Rule was stayed. Any other result would contravene longstanding practice, common sense, and the basic principles of equity and fairness that underlie stay orders. It would also suggest that EPA was attempting to render the stay a nullity, by punishing *ex post* those States and state agencies that had relied in good faith on the Supreme Court’s decision to halt the Rule to ensure orderly legal process. We are confident that the courts—and in particular, the Supreme Court—would not look favorably upon such an effort by EPA. Indeed, we believe this stay was issued in no small part because, as we pointed out to the Supreme Court in our papers seeking the stay, EPA previously boasted following *Michigan v. EPA*, 135 S. Ct. 2699 (2015), about its success in rendering practically ineffective a decision of the Supreme Court.

If public officials in States wish to spend taxpayer money voluntarily to comply with the Rule—even though it likely will never go into effect and even if upheld, will have extended deadlines—that is, of course, their decision. But there should be no mistake about that. The decisions by state officials to move “forward” in preparing for a stayed and likely-unlawful Power Plan are not required or compelled by the Power Plan or any of its presently-void deadlines.

3. While Administrator McCarthy has suggested that her agency will continue to “provide tools and outreach” to States, *see* Alan Neuhauser, *Despite Supreme Court Rebuke, EPA Vows to Press Forward*, U.S. News & World Report (Feb. 11, 2016),² none of those efforts by EPA should be perceived as requiring States to act. The Rule has been suspended and has *no*

² This article may be found here: <http://www.usnews.com/news/articles/2016-02-11/after-supreme-court-rebuke-epa-vows-to-press-forward-with-clean-power-plan>.

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legal force. EPA is not permitted to formally approve or disapprove any submissions by the States in relation to the Power Plan. To do otherwise would violate the Supreme Court's order.

Sincerely,



Patrick Morrissey
West Virginia Attorney General



Ken Paxton
Texas Attorney General

Enclosure

cc: The Honorable Paul Ryan
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Washington, DC 20515

The Honorable Mitch McConnell
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