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July 27, 2016

VIA ELECTRONIC FILING

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *State of West Virginia, et al. v. EPA, et al.*, No. 15-1363
(and consolidated cases)

Dear Mr. Langer:

The State and state agency petitioners submit this letter under FRAP 28(j) to notify the Court of a recent decision of the U.S. Court of Appeals for the Fifth Circuit. *Texas v. EPA*, No. 16-60118, --F.3d--, 2016 WL 3878180 (5th Cir. July 15, 2016). Staying EPA's disapproval of certain "state implementation plans" under the Clean Air Act, the Fifth Circuit agreed that EPA failed to properly consider concerns about grid reliability when it imposed emission controls on power plants. *Id.* at *37-39. The court concluded that "EPA's assertions about grid reliability" were owed "diminished" deference because "EPA has no expertise on grid reliability." *Id.* at *39 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

The Fifth Circuit’s conclusion is consistent with this Court’s similar conclusion in *Delaware Dep’t of Nat. Res. v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) (“[G]rid reliability is not a subject of the Clean Air Act and is not the province of EPA.”), and is relevant here in two ways.

First, it supports Petitioners’ argument that the Rule requires clear congressional authorization because, *inter alia*, EPA has no expertise in managing electric generation. Pet. Core Br. 32-36 (discussing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)). As Petitioners have explained, that expertise lies with state utilities regulators and FERC. *Id.* at 38; *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983) (“the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States”); *Texas*, 2016 WL 3878180 at *39 (“FERC . . . is the federal expert in that area.”).

Second, it supports Petitioners’ argument that EPA has failed to show that the Rule will not detrimentally affect grid reliability. Pet. Record Br. 20, 40. As the Fifth Circuit explained, regardless of whether EPA consulted with outside experts, EPA Br. 55, EPA’s lack of expertise “diminishe[s]” any deference owed to agency conclusions supporting the Rule. *Texas*, 2016 WL 3878180 at *39.

Dated: July 27, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 27th day of July, 2016, a copy of the foregoing Federal Rule of Appellate Procedure 28(j) Letter was served electronically through the Court's CM/ECF system on all registered counsel.

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