No. 15A773

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA,
STATE OF TEXAS, *et al.,*

Applicants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency

Respondents.

ON APPLICATION FOR
IMMEDIATE STAY OF FINAL AGENCY ACTION

REPLY APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1363

REPLY DECLARATION OF DAVID L. BRACHT, DIRECTOR, NEBRASKA ENERGY OFFICE

I, David L. Bracht, declare as follows:

1. I am the Director of the Nebraska Energy Office ("NEO"). I have been employed at the NEO since January 2015. I have over 30 years of business, government and legal experience, including as a senior executive in private industry and government agencies and, for the last 10 years, as a private practice attorney working in the energy industry. As part of my duties, I have authority to monitor, track, and interact with stakeholders and regulators on the development and implementation of state and federal environmental rules impacting public utilities.

2. I have personal knowledge to understand what steps Nebraska has taken and will likely need to take in response to the EPA's Section 111(d) Rule, including future resource planning for system reliability. In general, the Section 111(d) Rule will dramatically transform the way electric power will be generated and transmitted to consumers in Nebraska and throughout the United States. The Rule will, at the very least, require the construction of new power generation and transmission facilities and associated infrastructure, the updating or decommissioning of existing power generation and transmission facilities that are not fully depreciated, and changes to the

electric power system that will affect the availability, cost and reliability of electric power for every single current and future consumer. In short, the Section 111(d) Rule will transform the American energy economy.

3. Based on my work experience and position, I have determined that implementing the Section 111(d) Rule will be a complicated, time consuming, and expensive endeavor, which will require the expenditure of substantial State resources, immediately and over the next calendar year.

4. Based on my knowledge and experience, the Section 111(d) Rule represents an unprecedented infringement by the EPA on the traditional authority of Nebraska to manage energy resources within our jurisdiction because the mandates of the Section 111(d) require NEO to undertake specific changes to how energy is provided to consumers. The Section 111(d) Rule also disrupts the well-settled division of authority over electricity markets under the Federal Power Act, and raises significant uncertainty about the role of the Federal Energy Regulatory Commission to ensure the reliability of electricity through the wholesale market.

5. Absent a stay from this Court, compliance planning must begin immediately. The system-wide changes necessary for compliance must be gradual to preserve reliability of the electric grid. Because compliance is calculated based on a rolling average, the longer Nebraska waits to begin compliance, the more expensive and difficult it will be to meet the requirements of the Rule.

6. Absent a stay from this Court, evaluation of specific compliance measures, such as new facilities or retirements, must also begin immediately. The lengthy application and approval process for utilities to construct, upgrade, or retire facilities to comply with the Section 111(d) Rule, as well as the in-depth evaluation of public necessity and convenience for each facility,

requires utilities to plan and submit applications for upgrades almost immediately in order to have equipment constructed, upgraded, or decommissioned before the compliance period begins in 2022.

7. Absent a stay from this Court, the Section 111(d) Rule will also severely threaten reliability and increase the cost of electricity by forcing Nebraska to move immediately toward reliance on a limited number of fuel sources. The risks associated with this type of system-wide transformation will occur in the next year, unless the Rule is stayed. The threats posed by this shift in resources and transformation of Nebraska's existing power system are particularly significant in the more sparsely populated rural areas of Nebraska that have limited transmission capabilities. The rural areas will also face a significant economic burden due to more limited tax base and the distributed nature of Nebraska's public power system. Nebraska's relatively small total population will also limit the resources available for implementing this significant change, thereby increasing the impact on ratepayers resulting in a negative impact on the entire state economy.

8. Changes made for the sake of compliance with the Section 111(d) Rule immediately and over the next calendar year will be irreversible and will impact the electric grid for decades. System planning is typically based on the 30-40 year lives of generation and transmission facilities. Building, redesigning, and adjusting power generation facilities takes years, and decisions made in these areas are often irreversible once they are made. For example, the decision to prematurely retire an electric generating unit could have significant consequences for system reliability and may unnecessarily increase costs to ratepayers for decades to come. This is particularly true because of Nebraska's relatively small total population and the significant areas of the state that are sparsely populated.

9. Absent a stay from this Court, implementation of the Section 111(d) Rule will require legislative and constitutional changes on the state level that may permanently alter the daily operation of utilities. Nebraska would have to immediately set in motion the chain of events, including statutory changes, larger investment in customer-side behavior, and further rate restructuring, in order for these compliance options to contribute to the Section 111(d) Rule's emission reduction targets.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5, 2016.

David L. Bracht

David L. Bracht
Director, Nebraska Energy Office

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF RONALD W. GORE, CHIEF, AIR DIVISION, ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

I, Ronald W. Gore, hereby declare as follows:

1. I am the Chief of the Air Division within the Alabama Department of Environmental Management (ADEM). I have been employed by ADEM for 42 years. As part of my duties, I am responsible for the Division's development of State plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to EPA's finalized *Carbon Pollution*

Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (October 23, 2015) ("Section 111(d) Rule" or "Rule"). This includes personal knowledge and experience in preparing a State plan consistent with the Rule. Under that Rule, the State must submit a plan to the Environmental Protection Agency ("EPA") by September, 2016, absent special circumstances.

3. Based on my knowledge and experience, I believe that developing Alabama's response to the Section 111(d) Rule will be the most complex air pollution rulemaking undertaken by ADEM in the last 42 years. I have been responsible for and worked on many State plans designed to be submitted to and approved by EPA, including plans for attaining air quality standards, construction and operating permit plans, visibility rules, etc. The Clean Air Act recognizes the time and resources necessary to draft and finalize such plans by providing three to five years, at a minimum, for States to submit them. In the 111(d) Rule, EPA requires that States submit a vastly more complex rule in one to three years.

4. EPA has proposed that GHG reductions can be maximized by viewing the electric utility system in a very broad way, i.e., that States can and should regulate facilities and consumer behavior in ways never before considered to be authorized by the CAA. This broadening of authority means that ADEM will likely have to seek authorization from the State Legislature to implement EPA's proposal. It is likely that other Alabama agencies will need to participate in enforcing parts of Alabama's plan and broad new State Legislative authority will be needed for them as well. ADEM historically has been the agency solely responsible for air quality compliance in the State. Having several other State agencies closely involved in the development and administration of air quality rules presents a daunting challenge for ADEM.

5. Since EPA proposed the Section 111(d) Rule in June of 2014, ADEM has expended considerable resources in attempting to understand the State's necessary response. Two employees have been assigned full-time to analyzing the proposal. I estimate that in addition to the two full time employees mentioned above, an additional three man years[1] per year of effort are being expended by fifteen other employees who devote part of their work time on 111(d) issues. In total, I estimate that five man-years per year of effort, (equating to approximately $475,000 in additional personnel costs per year) are being deployed at present responding to the Section 111(d) Rule. Efforts on which resources have been spent include, but are not limited to, the following examples:

- Checking EPA's calculations and assumptions on the emissions reduction goals the State should attain
- Generating possible responses to check whether they are achievable in practice
- Meeting with trade groups, EPA, other states, environmental groups, individual utilities, etc. to consider their input and viewpoints
- Traveling to and speaking at EPA's Regional Public Hearing
- Traveling to and participating in several national workshops on Section 111(d)
- Holding many internal meetings to facilitate information flow up and down the management chain

6. Now that the Section 111(d) Rule has been finalized and adopted, additional man-years of effort will be needed for ADEM to prepare and submit a plan. Assuming ADEM chooses to prepare and submit a plan, my best estimate is that eight man-years of effort per year (equating to $760,000 per year for several years) would be needed.

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[1] The approximate dollar value of a "man year" is estimated to be $95,000, counting salary, fringe benefits, and overhead.

7. EPA has not provided additional funding for States to prepare and respond to the Rule. The manpower expended as described in Paragraphs 5 and 6 must be redirected from other EPA calls for action, such as:

- Changes to State regulations regarding start-up, shutdown, and emergencies
- Changes to the Cross State Air Pollution Rule
- Responses to the tightened National Ambient Air Quality Standard for ozone

This redirection of resources will cause less effort to be spent on these programs and a possible delay in final action.

8. Should the Court grant the requested stay, ADEM's efforts would cease for the time being. However, should the Court not grant a stay and later determine on the merits that the Rule is invalid, then all the resources expended by ADEM on developing a State plan will have been for naught.

I declare under penalty of perjury that the foregoing is correct.

Executed on this 5th day of February 2016, in Montgomery, Alabama.

Ronald W. Gore

Ronald W. Gore

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF TOM GROSS, CHIEF, MONITORING AND PLANNING SECTION, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

I, Thomas Gross, hereby declare as follows:

1. I am the Chief of the Monitoring and Planning Section in the Kansas Department of Health and Environment Bureau of Air Quality. I have been employed by the Kansas Department of Health and Environment for 39 years. As part of my duties, I am responsible for managing the group that develops state plans to implement federal air quality rules and regulations.

2. Based on my position, I have the personal knowledge and experience to understand what steps Kansas will need to undertake in response to EPA's Clean Power Plan (CPP), including the preparation of a state plan consistent with the Rule.

3. If the Court denies the stay, there is no reasonable prospect that KDHE can simply do nothing and await an unknown federal plan. KDHE must take action to develop a state plan to

even attempt to meet the aggressive timeline of the Clean Power Plan. The first CPP deadline for submittal of a state plan or request for an extension is only seven months away, in September 2016. Although the final compliance deadline under the CPP is in 2030, the rule requires a substantial reduction in CO_2 emissions by the first interim compliance period. Kansas' baseline emissions in 2012 were 2,319 lbs/MWh of CO_2. The first interim target goal is 1,519 lbs/MWh of CO_2 to be achieved by 2022. EPA expects Kansas to have completed a substantial shift in its electric generating system by 2030, down to 1,293 lbs/MWh, with what may be a more challenging goal to meet by the first compliance period. That type of shift in generation and transmission would require far more than the six years provided for in the CPP to complete the planning and implementation; therefore, KDHE cannot wait for the outcome of this litigation before it acts. KDHE and Kansas's electric utilities must take action now to adapt to generation shifting regardless of the state or federal plan.

The proposed federal plan has not been finalized by EPA, so KDHE cannot consider that option when the clock is ticking on the deadlines for a state plan. If the federal plan were finalized and KDHE decided it would prefer a state plan, there would not be time to comply with the deadlines. Absent a stay, KDHE must act now to develop a state plan.

4. Kansas's obligations under the Clean Power Plan are more complicated than the requirements of any National Ambient Air Quality Standards, or NAAQS, promulgated under the Clean Air Act. The NAAQS are established by EPA based on a comprehensive review of epidemiological and toxicological studies to ensure that the ambient air does not cause negative health impacts to those most at risk. To determine compliance with the NAAQS, KDHE relies on its ambient air monitoring system, which has been in place for several decades. KDHE also relies on established inspection, enforcement, permitting, modeling and SIP development processes that

have been refined over many years. If there is an actual or potential violation of a NAAQS, KDHE proscribes control equipment or limits on operations at stationary sources. The CPP State Plan development process shares some process similarities, but includes potentially regulating a whole universe of new activities that KDHE does not have experience with and may not have clear statutory authority to include in a plan without getting changes in state law.

To comply with the CPP, KDHE will have to change this entire process. It will not rely on meeting a standard for a pollutant in the ambient air through monitoring or modeling. It will not approach a stationary source to install control equipment. There is no control-equipment solution to the CPP goal. KDHE will instead have to look at the entire energy generation, transmission and commercial, industrial and retail sale of electricity in Kansas and choose winners and losers to achieve a standard that is not based on health effects. KDHE may be forced to require the shuttering of multiple fossil generation units and the construction of new renewable energy and associated transmission lines.

KDHE must take into consideration new factors that it has never before considered when regulating the environment of the state of Kansas: the reliability of the electric system and the effects of its action on the electric rates charged to consumers. These new concerns greatly complicate KDHE's work. These issues are outside KDHE's jurisdiction, and accordingly, KDHE does not have the requisite expertise. KDHE defers to Kansas's public utility commission, the Kansas Corporation Commission, or KCC, on the cost and reliability of the state's electric system. KDHE has a good working relationship with the KCC, but this interdependence adds a substantial amount of work and complication to KDHE's role as the state's environmental regulator.

5. Kansas' burden under the Clean Power Plan is greater than other states that did not make substantial improvements in emission reductions for criteria pollutants in recent years. This

is through no fault of the Kansas utilities. The Kansas units were not subject to the NOx SIP call, the Clean Air Interstate Rule, or state-specific rules that caused units in other states to install controls during a time window when most of the capital costs would have been recovered to date. Kansas' largest coal fired units were subject to the BART provisions of the Clean Air Visibility Rule. This was a result of the dates of their initial construction and impacted Kansas' six largest coal fired units. As a result, these units were required to install pollutant controls in the past five years, an insufficient amount of time to recover the capital costs. The total cost for these improvements is more than 3 billion dollars. A substantial share of these costs for improving air quality in Kansas and downwind states will be stranded under the provisions of the Clean Power Plan.

I declare under penalty of perjury that the foregoing is correct. Executed on this 5th day of February, 2016, at Topeka, Kansas.

Thomas Gross

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1363

REPLY DECLARATION OF JIM MACY, DIRECTOR, NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

I, Jim Macy, declare as follows:

1. I am the Director at the Nebraska Department of Environmental Quality ("NDEQ"). I have over 30 years of experience in the environmental field as a regulatory official in the State of Missouri, as a consultant, and now as the head of the State of Nebraska's environmental agency. As part of my duties, I am responsible for overseeing and supervising the agency in Nebraska with exclusive jurisdiction to act as the state air pollution control agency for all purposes of the Clean Air Act, as amended, 42 U.S.C. 7401 et seq., including development and administration of State Plans under Section 111(d) of the Clean Air Act. I have personal knowledge and experience to understand what steps that Nebraska has taken and will need to undertake in response to the EPA's final Section 111(d) Rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.

2. I write this declaration in response to points made by the Environmental Protection Agency ("EPA") in its opposition to the Applicants' application for stay. Specifically,

I respond to EPA's argument that the denial of a stay of the Clean Power Plan ("CPP") will not have immediate impacts upon the States.

3. Absent a stay, the CPP will immediately and significantly impact Nebraska's public power industry. Specifically, the unique nature of Nebraska's public power industry has forced NDEQ to expend resources in order to determine the necessary regulatory decisions that must be made this year to comply with the CPP's generation-shifting mandate.

4. Given the statutory deadlines set out in the CPP, there are important decisions that cannot be postponed until the conclusion of litigation. And many of these decisions will have to be made before the proposed Federal Plan is finalized. Furthermore, Nebraska faces additional challenges because Nebraska's public utilities are statutorily required by state law to rely exclusively on ratepayer fees and bonds to pay the costs of compliance with the CPP. Therefore, any increases to rates or the levying of bonds must be decided in the immediate future.

5. The CPP will likely require Nebraska to pass laws and possibly even a state constitutional amendment to enable compliance. Once passed, these legislative enactments will significantly impact Nebraska's public power sector and will render the effect of success on the merits in the litigation meaningless.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5th, 2016.

Jim Macy
Director, Nebraska Department of
Environmental Quality

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF JEFF MCCLANAHAN
DIRECTOR, UTILITIES DIVISION
KANSAS CORPORATION COMMISSION

I, Jeff McClanahan, hereby declare as follows:

1. I am the Director of the Utilities Division of the Kansas Corporation Commission (KCC). The KCC regulates public utilities, common carriers, motor carriers, and oil and gas producers. Public utilities include local telephone, natural gas, and investor-owned electric service providers. As part of its duties, the KCC is responsible for ensuring that reliable and affordable energy is available and deliverable to Kansas citizens and businesses.

2. Based on my position, I have the personal knowledge and experience to understand what steps the State will need to undertake in response to the Environmental

Protection Agency's (EPA's) Section 111(d) Rule, including the difficulties that will be encountered in attempting to comply with the Rule. In general, the Section 111(d) Rule will dramatically transform the way electric power will be generated, dispatched, and transmitted to consumers in the State of Kansas and throughout the United States.

3. Absent a stay from this Court, Kansas ratepayers will incur more rate increases related to generation shifting as Kansas' affected plant owners continue to add renewable resources and build transmission facilities. In other words, due to the practical realities and complexity of resource planning, utilities will commit – and are already committing – ratepayer funds before any final decision on the legality of EPA's rule is issued.

4. In its opposition to staying the final rule, the EPA asserts that immediate action by the Court is "unwarranted." The EPA's assertions are based on its claim that state plans need not be submitted until 2018, which will be well after judicial review is completed. EPA further asserts that compliance obligations do not begin until 2022 and the obligations are phased in over eight years. Based on these assertions, EPA's position appears to be that plant owners cannot know what requirements will be imposed on plants until a plan is filed with EPA in 2018 and that there will be plenty of time for the plant owners to take action to comply between 2018 and when compliance obligations begin in 2022. EPA further supports its position by noting that plant owners cannot reliably identify what their requirements will be until a plan is filed. This leads the EPA to the conclusion that states cannot show with certainty that compliance obligations created by a state's final plan will force them to take any particular action during the period of litigation.

5. The EPA's argument is inappropriate because it ignores practical realities. The EPA's argument is based on the unrealistic time lines included within the final rule and the time

required for a state to ensure that its state plan is enforceable. For instance, the EPA fails to note that by September 6, 2017, states must submit a progress report. The progress report must include a summary of the status of each component of the final plan, including an update from the 2016 initial submittal and a list of which final plan components are not complete as well as a commitment to a plan approach. This progress report will almost certainly require draft rules and regulations to ensure that enforceable final rules will be in place in 2018. Moreover, in order to meet the September 2017 progress report date, Kansas must have a draft plan and draft rules and regulations completed around June of 2017. Therefore, states will have most, if not all, of the major components of their final plan drafted no later than June of 2017, which will allow plant owners to know the plan requirements at, or prior to, the conclusion of the litigation in this case.

6. The EPA's position noted above also fails to consider the fact that Kansas' affected plant owners have already performed re-dispatch modeling to evaluate compliance options available to them. Because the Best System of Emission Reduction (BSER) places heavy reliance on renewable resources, affected plant owners have determined the approximate amount of wind generation that can be added to their respective systems to help achieve compliance with the final rule as it exists today. Several affected plant owners have recently acquired additional wind resources either through purchased power agreements or ownership, despite the fact that there is a more than adequate capacity margin within the Southwest Power Pool's Integrated Market. The cost for the ownership option will be approximately $400 million dollars. Therefore, Kansas utilities are already adding new generation resources that help ensure compliance with the final rule. Because of the long lead times to build generation and transmission, Kansas utilities are compelled to make investments today in anticipation of the

final rule, despite the fact that the final rule could be altered or struck down through litigation. This puts Kansas' utilities in the untenable position of beginning compliance actions today in order to hedge against the risk of waiting until a final plan is issued post litigation and not being able to comply due to long construction lead times.

7. The EPA places a heavy reliance on the fact that certain states have shifted generation from one type of generation resource to another in order to meet environmental standards. The EPA also places a heavy reliance on its assertion that the bulk electric system is highly integrated, electricity is fungible, and generation is substitutable. EPA's analysis is again flawed. EPA ignores the fact that coal heavy states such as Kansas must shift a significant amount of generation from coal to other resources, primarily renewable resources, in order to meet the stringent emissions standards set by EPA. Shifting generation from coal to wind resources in Kansas will create a significant burden and cost. Kansas' coal generation is primarily located in the eastern half of the state, while our best wind resource is located in the western half of the state. Shifting generation from the eastern half to the western half of the state will also require the transmission system in Kansas to be significantly upgraded in the western half, while transmission improvements already made in the eastern half may no longer be used and useful. This shift in generation will be time consuming and expensive. Clearly, the magnitude of changes required in Kanas does not match the EPA's conclusory assertion that significant changes to the grid are not necessary. Moreover, it is also highly questionable as to whether waiting to begin this shift in generation after a final plan is filed in 2018, as EPA asserts is appropriate, will allow affected plant owners the time needed to achieve compliance within the unrealistic timeline established by EPA. If the Court does not grant a stay, the final rule will immediately impact generation and transmission resource planning in Kansas due to the long

lead times needed to plan and construct generation and transmission facilities. As stated above, affected plant owners are already beginning to acquire renewable generation resources to aid in their respective compliance requirements. The acquisition of the renewable generation resources also requires an irreversible increase in Kansans utility rates prior to a resolution on the legality of the rule.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/5/16

Jeff McClanahan

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF ELLEN NOWAK, CHAIR, WISCONSIN PUBLIC SERVICE COMMISSION

I, Ellen Nowak, declare as follows:

1. I am the Chair of the Public Service Commission of Wisconsin ("PSCW"). I have been employed at the PSCW for four years. As part of my duties, I have authority to monitor, track, and interact with stakeholders[1] and regulators on the development and implementation of state and federal environmental rules impacting public utilities.

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[1] Stakeholders include regulated utilities, merchant-owned EGUs, municipal utilities, utility cooperatives, environmental groups, industry groups, residential and small business representatives, Midcontinent Independent System Operator, Inc. ("MISO"), Midwest Renewable Energy Tracking System ("M-RETS"), and representatives from other entities interested in or impacted by state and federal environmental rules impacting public utilities.

2. I write this declaration in response to certain points made by the Environmental Protection Agency ("EPA") in its opposition to the Application for Stay. In particular, I respond to the EPA's argument that refusing to stay the Clean Power Plan ("CPP") will not have immediate impacts upon the states.

3. If the Court does not grant a stay, the CPP will immediately and significantly impact nearly every regulatory decision affecting the energy industry in Wisconsin. Simply put, consideration of the CPP's generation-shifting mandate will be one of the most important factors the PSCW will be forced to consider in making its regulatory decisions over the next year and beyond.

4. Many regulatory decisions cannot be delayed until litigation is complete, or even until there is more certainty on the proposed Federal Plan. Specifically, state statutory deadlines determine how long the PSCW has to make decisions on construction applications. In addition, utility rate cases must be decided so utilities can implement the appropriate rates to recover their costs for a given year.

5. The immediacy of the impact of the CPP on regulatory decisions, absent a stay, is independent of the type of compliance plan the state of Wisconsin will ultimately adopt. Specifically, regardless of whether Wisconsin ultimately adopts a state plan, or some version of the still-uncertain federal plan, utilities will begin investing in carbon reduction measures that would be unnecessary absent the

CPP. That is because under *any* CPP plan—federal or state—utilities need to massively shift generation away from coal-fired energy, a process that takes many years. These investments will begin before litigation is complete, and in some cases, have already begun.

6. In addition, absent a stay from this Court, the CPP will significantly and immediately impact the PSCW-approved gas and energy rates for Wisconsin citizens. Again, this will occur regardless of whether Wisconsin ultimately chooses to adopt a state plan or awaits the issuance of a federal plan. That is because rate increases result from utilities having to invest resources in planning and implementing generation-shifting, whether such shifting is required under a state plan or a federal plan.

7. Wisconsin sets electric rates based on projected expenses for the upcoming year (a forward-looking test year). The rate cases that will be completed in 2016 will establish electric and gas rates for customers of investor owned utilities in Wisconsin for 2017 through 2018. If the Court does not stay the CPP, these rates will likely include significant expenditures by the utilities to begin compliance planning, and may also include some implementation costs for the CPP's generational-shifting mandate.

8. The rate cases, which will include significant dollar amounts for CPP planning, will be filed in Spring 2016, with auditing and adjustments completed in

Summer 2016, well before CPP litigation is complete. Regulators will be forced to evaluate utilities' requests to begin significant spending on CPP compliance planning, which, if approved, will lock in rates and impact utility rate payers for at least the next two years.

9. To make such a significant generation shift as will be required by the CPP under either a state or federal plan, construction applications will have to be filed and processed as soon as possible. In addition to the rate increases necessary to recover the cost of CPP planning, regulators will also be forced to evaluate utilities' requests to begin significant spending on CPP implementation, including compliance construction projects. Again, the evaluation of any new compliance projects will be impacted, absent a stay, regardless of whether the state ultimately chooses a state plan or awaits issuance of a federal plan because the need for these projects is impacted by the CPP's generation-shifting mandate. These projects, if approved, will increase rates and quickly and significantly impact utility rate payers for the next several years.

10. PSCW's approvals of new generation construction are already, and will continue to be impacted by the CPP. The CPP is currently being considered in a recent application for a Certification of Public Convenience and Necessity ("CPCN"), requesting approval to construct a new natural gas generator known as the Riverside Energy Center. A determination of need is vital to obtaining a

certificate, and whether a facility is needed depends, in part, on the projected generation mix. The CPP forces generation shifting, which alters the evaluation of need, and impacts which projects may receive a certification. Any CPCN applications pending between now and the completion of litigation may likely be irreversibly impacted by the CPP.

11. In addition, CPCN applications for large transmission lines will be impacted. Since the CPP will force significant generation shifting to out-of-state wind resources, the need for large scale transmission build-out will be inflated while litigation is pending. While the PSCW strives to mitigate the impacts of transmissions lines, at least minimal impacts to property values, wildlife, and wetlands are possible. Any CPCNs decided before the completion of litigation may result in unnecessary overbuilding and irreversible impacts.

12. Wisconsin's long-established energy efficiency program, Focus on Energy, will likely be impacted by the absence of a stay. Currently, state statute mandates how much utilities spend on efficiency, with specific four-year energy savings goals. Absent a stay, the program will likely need to be re-evaluated to prioritize carbon reduction rather than cost-effective energy efficiency. The program has several contractual relationships, including many with small, local businesses. It also provides services to all energy users, from residential to large industrial customers. All of the current contracts and queued efficiency projects

would need to be re-evaluated to maximize carbon reduction rather than energy efficiency, impacting many residents and job-creators in Wisconsin.

13. Other laws are already being re-evaluated based on the CPP. For example, a proposal to lift Wisconsin's moratorium on building new nuclear facilities recently passed one house of the legislature. Assemb. B. 384, 2015 Assemb., 2015-2016 Sess. (Wis. 2016). This legislative change was impacted by the CPP and likely would not have advanced without the CPP.

14. Absent a stay, I expect significant statutory changes that reshape energy policy in our state which may render success on the merits of this case meaningless.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/2016

Ellen E. Nowak

Ellen Nowak

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF STUART SPENCER, ASSOCIATE DIRECTOR, OFFICE OF AIR QUALITY, ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

I, Stuart Spencer, declare as follows:

1. I am the Associate Director of the Office of Air Quality at the Arkansas Department of Environmental Quality ("ADEQ"). I have been employed at the ADEQ for approximately five years. As part of my duties, I supervise a staff of approximately eighty employees. The ADEQ Office of Air Quality has received all delegable air programs, including the Title V program for major sources of pollutants, from Region 6 of the United States Environmental Protection Agency ("EPA"). I have personal knowledge and experience to understand the steps that

the State of Arkansas has taken and will need to undertake in response to the EPA's Section 111(d) Rule.

2. I write this declaration in response to certain points made by the Environmental Protection Agency ("EPA") in its opposition. In particular, I respond to EPA's argument that refusing to stay the Clean Power Plan ("CPP") will not have immediate impacts upon the States.

3. Based on my experience, I have determined that implementing the Section 111(d) Rule will be a complicated and time-consuming endeavor unlike previous Clean Air Act implementations undertaken by the State of Arkansas.

4. To date, four employees have expended approximately 2,500 hours on understanding the Section 111(d) Rule and preparing for its implementation.

5. The CPP requires States to submit a final state plan by September 6, 2016. States may request an extension to September 6, 2018, by filing an initial submittal by September 6, 2016, along with a request for an extension. For an extension to be granted, the State must submit: 1) an identification of the final plan approach or approaches under consideration by the state and a description of progress made to date on the final plan components; 2) an explanation of why the state requires additional time to submit a final plan; and 3) a demonstration or description of the opportunity for public comment the state has provided on the initial submittal and opportunities for meaningful engagement with stakeholders,

including vulnerable communities, during preparation of the initial submittal, and plans for public engagement during development of the final plan.

6. Thus, even if the State seeks an extension to September 8, 2018, absent a stay, Arkansas is required to expend significant time and resources to meet the initial submittal requirements.

7. The ADEQ and the Arkansas Public Service Commission ("APSC") have initiated a stakeholder process, at the direction of Arkansas' Governor. To date, two day-long meetings have been attended by several ADEQ staff members, approximately two dozen primary stakeholder representatives, and several other interested individuals, entities, and organizations. In addition, a separate series of stakeholder conference calls were held to gather feedback on the proposed Federal Plan issued under the CPP.

8. Absent a stay, the ADEQ will need to devote five employees and approximately 3,000 hours to the preparation of the initial submittal that is due on September 6, 2018.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 5th, 2016

Stuart Spencer

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF Pulaski

On this 5 day of February, 2016, before me, Stuart Spencer the undersigned officer, personally appeared Stuart Spencer, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Sarah Martin
Notary Public

My Commission Expires: 9-7-2024

SARAH MARTIN
FAULKNER COUNTY
NOTARY PUBLIC - ARKANSAS
My Commission Expires September 07, 2024
Commission No. 12400461

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF TED THOMAS, CHAIR, ARKANSAS PUBLIC SERVICE COMMISSION

I, Ted Thomas, declare as follows:

1. I am the Chair of the Arkansas Public Service Commission ("APSC"). I have been employed at the APSC since January 2015 and was previously employed at the APSC as an administrative law judge for 7 years. As part of my duties, I have authority to monitor, track, and interact with stakeholders and regulators on the development and implementation of state and federal environmental rules impacting public utilities.

2. I write this declaration in response to certain points made by the Environmental Protection Agency ("EPA") in its opposition. In particular, I respond to EPA's argument that refusing to stay the Clean Power Plan ("CPP") will not have immediate impacts upon the States.

3. If the Court does not grant a stay, the CPP will immediately and significantly impact nearly every regulatory decision affecting the energy industry in Arkansas. Simply put, consideration of the CPP's generation-shifting mandate will be one of the most important factors the APSC will be forced to consider in making its regulatory decisions over the next year and beyond.

4. Many regulatory decisions cannot be delayed until litigation is complete, or even until there is more certainty on the proposed Federal Plan. Specifically, state statutory deadlines determine how long the APSC has to make decisions on construction applications. In addition, utility rate cases must be decided so utilities can implement the appropriate rates to recover their costs for a given year.

5. The immediacy of the impact of the CPP on regulatory decisions, absent a stay, will be independent of the type of compliance plan the state of Arkansas will ultimately adopt. Specifically, regardless of whether Arkansas ultimately adopts a state plan, or some version of the still-uncertain federal plan,

utilities will begin investing in carbon reduction measures that would be unnecessary absent the CPP.

6. In addition, absent a stay from this Court, the CPP will significantly and immediately impact the APSC-approved gas and energy rates for Arkansas citizens. Again, this will occur immediately, regardless of whether Arkansas ultimately chooses to adopt a state plan or awaits the issuance of a federal plan.

7. Arkansas sets electric rates based, in part, on projected expenses for the upcoming year (a partially forward-looking test year). The rate cases that will be completed in 2016 will establish electric and gas rates for customers of all investor owned utilities in Arkansas for 2017 and beyond. If the Court does not stay the CPP, these rates will likely include significant expenditures by the utilities to begin compliance planning and implementation for the CPP's generational-shifting mandate.

8. Current rate cases will be completed in Fall of 2016, well before CPP litigation is complete. Regulators will be forced to evaluate utilities' requests to begin significant compliance spending, which, if approved, will lock in rates and immediately impact utility rate payers for at least the next year.

9. APSC's approvals of new generation construction are already, and will continue to, be impacted by the CPP. Again, the evaluation of any new construction projects will be impacted, absent a stay, regardless of whether the

State ultimately chooses a state plan or awaits issuance of a federal plan because the need for these projects is impacted by the CPP's generation-shifting mandate.

10. The CPP must be considered in applications for a Certificate of Convenience and Necessity ("CCN") or a Certificate of Environmental Compatibility and Public Need ("CECPN"). Part of consideration by the APSC concerns whether the construction option chosen is the most appropriate in view of other options; the choice of options is irreversibly shaped by the CPP.

11. In addition, CCN applications for large transmission lines will be impacted. Since the CPP will force significant generation shifting to some out-of-state resources, the need for large scale transmission build-out will be inflated while litigation is pending. Transmission line construction impacts property values, wildlife and wetlands, and reliability. Any CCNs decided before the completion of litigation may resulting in unnecessary overbuilding and irreversibly impact the state's natural resources.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/16

Ted Thomas

ACKNOWLEDGMENT

STATE OF ARKANSAS

COUNTY OF PULASKI

On this 5th day of February, 2015, before me, Rebecca Gorrell, the undersigned officer, personally appeared Ted Thomas, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seal.

Rebecca I Gorrell

Notary Public

REBECCA I. GORRELL
PULASKI COUNTY
NOTARY PUBLIC - ARKANSAS
My Commission Expires August 25, 2025
Commission No. 12695274

My Commission Expires: 8.25.25

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA, *et al.*, Applicants, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15A773

REPLY DECLARATION OF NANCY E. VEHR, ADMINISTRATOR, WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, AIR QUALITY DIVISION

I, Nancy E. Vehr, declare that the following statements are true and correct to the best of my knowledge and belief and that they are based upon my personal knowledge or on information contained in the records of the Wyoming Department of Environmental Quality, Air Quality Division:

1. I am the Administrator of the Wyoming Department of Environmental Quality, Air Quality Division ("DEQ/AQD"). As part of my duties, I am responsible for assisting with the development of a Clean Power Plan ("CPP") initial extension request for submittal to the U.S. Environmental Protection Agency ("EPA") by September 6, 2016.

2. I write this declaration in response to certain points made by EPA in its opposition. In particular, I respond to EPA's arguments that our state burdens are no greater than those of other states that have previously chosen to proceed with generation shifting through state policy choices or "sector trends" (Fed. Resp. Br. at 64; Non-State Resp. Br. at 9-10); and that states have no harm or "near-term effects that are traceable to the Rule" (Fed. Resp. Br. at 54).

3. Over the upcoming days, weeks, and months, the administrative priorities and resource expenditures of the DEQ/AQD will be significantly impacted by the CPP requirements, including efforts to meet the September 6, 2016 submittal.

4. Under the CPP, "plans must be submitted to the EPA in 2016, though an extension to 2018 is available to allow for the **completion** of stakeholder and administrative processes." 80 Fed. Reg. 64664 (emphasis added). This means that states such as Wyoming must **now start** the stakeholder and administrative processes in order to meet the September 6, 2016 deadline to submit either a Plan or an EPA-approvable plan extension request. *See* 80 Fed. Reg. at 64669. If Wyoming fails to satisfy these requirements by September 6, 2016, EPA will promulgate a federal plan. *See* 80 Fed. Reg. at 64942.

5. Therefore, as a direct result of the CPP and in order to avoid EPA's imposition of a Federal Plan, the DEQ/AQD has expended and will continue to expend significant time and resources to develop an EPA-approvable extension

request for submittal by September 6, 2016. *See* 80 Fed. Reg. at 64675 (EPA established the September 2016 deadline so that states such as Wyoming start plan development now).

6. EPA mandated three elements that a state – including Wyoming - must satisfy before EPA would approve an extension request: 1) identify the State Plans that are "under consideration" including any progress to date; 2) provide an "appropriate explanation" for why the state requires an extension; and (3) describe how the state has provided for "meaningful engagement" with the public, including "vulnerable communities". *See* 80 Fed. Reg. at 64,856; *see also* EPA Memorandum, Initial Clean Power Plan Submittals under Section 111(d) of the Clean Air Act (Oct. 22, 2015) ("Initial Plan Memo").

7. Element 1 – Identify State Plans Under Consideration. In order to be eligible to request an extension, Wyoming must identify the state plans under consideration. However, EPA expects Wyoming to do this without the benefit of knowing the final model plans for state consideration because EPA "intends to promulgate in the near future" but as of yet has not promulgated any model plan for state consideration. (Fed. Resp. Br. at 58).

8. Element 2 – Appropriate Explanation for Requesting an Extension. Under Element 2, Wyoming must describe and specify its timeline for evaluation of potential impacts of different state plan approaches, work efforts with other states

and stakeholders, state regulatory actions, legislative approval or consultation, data analysis, and schedule for public outreach. *See* Initial Plan Memo at p. 3. In order to satisfy Element 2, Wyoming must continue to expend significant time and resources to address these points for its September 6, 2016 submittal.

9. Element 3 – "Meaningful Engagement" with the Public. In order to satisfy Element 3, Wyoming must provide "an opportunity for public comment and meaningful stakeholder engagement on the **initial** submittal, including outreach to vulnerable communities; and (2) a description of the state's plans for meaningful public engagement on the **final** state plan, including outreach to vulnerable communities." *See* Initial Plan Memo at p. 3.

10. In order to satisfy Element 3, Wyoming must continue to expend significant time and resources to address these points for its September 6, 2016 submittal. Examples of Wyoming's time and resource expenditures are associated with planning, traveling, and holding outreach meetings throughout Wyoming, including the communities of Wheatland, Powell, Greybull, Riverton, Torrington, Gillette, Casper, Rock Springs, Kemmerer, and Cheyenne. Some of these meetings will require overnight trips for multiple DEQ employees. The DEQ is currently in the process of making those arrangements and allocating significant staff resource time towards those efforts.

11. The DEQ/AQD has and continues to expend staff resources and incur other costs all related to the CPP. To date, the DEQ/AQD has expended 2,368 hours of 10 senior staff members for efforts required under the CPP. These efforts include consultation, analyses, presentation development, securing URLs, planning and outreach efforts with other state agencies such as the Public Service Commission, Wyoming utilities, vulnerable Wyoming communities and populations, multi-state planning groups, other states – including their environmental and utility regulators, and the EPA.

12. Another example of a near-term effect traceable to the final rule is EPA's failure to consider "non-air environmental impacts" or engage in consultation under the Endangered Species Act (ESA) before issuing the Final Rule may have a significant impact on threatened and endangered species in Wyoming during the pendency of the underlying litigation. *See* Wyoming Petition for Reconsideration at p. 13-16 (Dec. 21, 2015); *see also* Wyoming DEQ Comments, Docket ID No. EPA-HQ-OAR-2013-0602-22977 at p. 9 (Dec. 1, 2014).

13. DEQ submitted comments to EPA noting that "Wyoming is dedicated to protecting the Greater Sage-Grouse, which lives in the sagebrush steppes of our State. Wyoming has devoted significant resources towards developing a conservation plan for this species. One of the important safeguards for this species is protection of its core habitat areas. The level of wind infrastructure development

imagined by the Proposed Rule would negatively impact significant portions of the Greater Sage- Grouse's core habitat. [EPA's] oversight is not limited to the Greater Sage-Grouse; EPA has also failed to consider the environmental impact to other species such as bald eagles and bats." Wyoming DEQ Comments, Docket ID No. EPA-HQ-OAR-2013-0602-22977 at p. 9 (Dec. 1, 2014).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 2/5/2016

Nancy E. Vehr, Administrator