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Presentation by the Office of Attorney General on the Legal Status of the Clean Power Plan to the Kansas Corporation Commission by Chief Deputy Attorney General Jeff Chanay and Assistant Solicitor General Bryan Clark January 12, 2016

Chairperson Albrecht and Commissioners Emler and Apple, thank you for this opportunity to discuss the current legal status of the Clean Power Plan, which the Environmental Protection Agency ("EPA") announced on August 3, 2015. On October 23, 2015, the Rule implementing the Plan was published in the Federal Register and became ripe for legal challenge. The State of Kansas immediately challenged the Rule as part of a coalition of 24 States and state agencies.[1] A total of 27 states and numerous other public and private entities have challenged the Rule.[2]

The genesis of the Clean Power Plan proposal was a 2011 settlement agreement entered into between EPA, ten States, and several environmental organizations. Under the agreement, EPA committed to proposing standards of performance under Section 111 of the Clean Air Act ("CAA") for new, modified, and existing power plants that included emission standards for carbon dioxide. The settlement also included an agreement that EPA "will" issue a "proposed rule under Section 111(d) that includes emissions guidelines for [carbon dioxide]," and "will"—after adopting Section 111(b) standards for new power plants—"transmit . . . a final rule that takes action with respect to" existing power plants.

This agreement is an example of EPA's "sue and settle" practice wherein the Administration seeks to do by litigation settlement what it cannot do by existing law. The Office of Attorney General has consistently opposed this approach to rulemaking as it systematically excludes Kansas lawmakers, consumers, and citizens from having a meaningful voice in the process.

After the proposed Section 111(d) Rule was announced in June 2014, Kansas chose to be proactive in response to EPA's proposal. On August 1, 2014, Kansas and eleven other

[1] West Virginia, Texas, Alabama, Arizona Corporation Commission, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Louisiana Department of Environmental Quality, Attorney General Bill Schuette of Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina Department of Environmental Quality, Ohio, South Carolina, South Dakota, Utah, Wisconsin, and Wyoming.
[2] Mississippi Department of Environmental Quality, North Dakota, and Oklahoma filed separate petitions for review.

States[3] filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit, challenging the final settlement that led to the creation of the Section 111(d) proposal. The case was captioned *West Virginia, et al. v. United States Environmental Protection Agency*, Case No. 14-1146. The petitioning States asked the Court to hold the settlement agreement unlawful to the extent the settlement committed EPA to finalize a coal-fired power plant rule under Section 111(d), to enjoin EPA from complying with the settlement agreement by finalizing a coal-fired power plant rule under Section 111(d), and to vacate the settlement agreement in relevant part. The parties to the settlement agreement intervened in the litigation on the side of EPA.[4]

The same twelve petitioning States also intervened in a private preemptive challenge to the Section 111(d) rule, *In re Murray Energy Corporation*, in the United States Court of Appeals for the D.C. Circuit, Case Nos. 14-1112 and 14-1151. The *West Virginia* and *Murray Energy* cases were consolidated for briefing and oral argument. On June 9, 2015, the D.C. Circuit ruled against the petitioners on the ground that the Rule, which still in its preliminary form, could not be challenged until it became final.

Immediately after the Clean Power Plan Rule was announced in August 2015, eleven of the twelve original States plus four more States[5] filed an Emergency Petition for Extraordinary Writ in the D.C. Circuit asking that the Rule be stayed because the announced final Rule sets dates for the submission of State Plans that are not tied to the date of publication. The case was captioned *In re West Virginia, et al.*, Case No. 15-1277. On September 9, 2015, a panel of the D.C. Circuit, without comment, denied the Petition on the grounds that "petitioners have not satisfied the stringent standards that apply to petitions for extraordinary writs that seek to stay agency action."

I will now turn to the legal problems with the Rule that are of such concern to Kansas and many of our sister States. Based upon an obscure and rarely used provision of the CAA, Section 111(d) (42 U.S.C. § 7411(d)), the final Rule issued by the EPA on August 3, 2015, is designed to "transfor[m] . . . the domestic energy industry." The Section 111(d) Rule manifests EPA's policy judgment—never enacted or authorized by Congress—that coal-fired power generation should be systematically disfavored in this country. Even though the Rule was not published until October 23, 2015, and did not become effective until December 22, 2015, the clock has been ticking on States since August 2015 to design, draft, and submit an initial State Plan by September 6, 2016. That Plan must demonstrate how the State will replace coal-fired generation with entirely different sources such as natural gas, wind power, and solar power.

The Section 111(d) Rule requires the States to fundamentally reorganize their energy grids in order to reduce reliance on coal-fired power plants. EPA has mandated that the States design State Plans to achieve carbon dioxide emissions targets that EPA calculated

[3] Alabama, Indiana, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and Wyoming.

[4] Maine, New York, Connecticut, Vermont, Washington, Rhode Island, California, New Mexico, Delaware, Oregon, the City of New York, The District of Columbia, Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund.

[5] Arkansas, Florida, Michigan, and Wisconsin. South Carolina did not participate.

based on three "building blocks": (1) altering coal-fired power plants to increase their efficiency; (2) shifting reliance on coal-fired power to natural gas; and (3) shifting reliance on coal-fired power to low or zero-carbon energy generation like wind and solar. Only the first building block involves regulating the way existing power plants operate or perform. The remaining two blocks represent across-the-board energy policy changes, aimed explicitly at reducing reliance on coal-fired energy. EPA's legal justification for this approach is its assertion that Section 111(d) authorizes the agency to base a rule on any measure that "shifts generation from dirtier to cleaner sources." Put another way, EPA believes that if the agency has legal authority to *regulate* a source category under Section 111(d), it may force States to design plans that will *retire* the sources in that category and shift the State's energy portfolio toward different, "cleaner" sources.

It is the view of the Office of Attorney General that the Clean Power Plan unlawfully exceeds EPA's authority and contains multiple legal defects, each of which provides an independent basis to invalidate the rule in its entirety.

Section 111(d) is a narrow, rarely used program, invoked by EPA only five times in 35 years, and only once in the last 25 years. In those few instances, EPA aimed its regulations at pollutants from specialized industries, like acid mist emitted from sulfuric acid plants, and in each instance EPA provided guidelines to States to impose traditional pollution control devices at those existing sources. The primary reason Section 111(d) has been so rarely used is what is known as the "Section 112 exclusion." After the 1990 Amendments to the CAA, this exclusion prohibits EPA from invoking Section 111(d) for "any air pollutant . . . emitted from a source category which is regulated under [Section 112 of the CAA]." 42 U.S.C. § 7411(d)(1). Of course, the coal-fired sources EPA seeks to retire are already regulated under Section 112.

In *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445-46 (2014) ("*UARG*"), the Supreme Court held that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 134 S. Ct. at 2444 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *accord King v. Burwell*, 135 S. Ct. 2480 (2015). The Court barred EPA from regulating under the Prevention of Significant Deterioration and Title V programs "the construction and modification of tens of thousands, and the operation of millions, of small [carbon dioxide] sources nationwide." *UARG*, 134 S. Ct. at 2444. Such regulation, the Court explained, would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 134 S. Ct. at 2444. "[W]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court stressed, "[courts should] greet its announcement with a measure of skepticism." *Id*. (quoting *Brown*, 529 U.S. at 159).

We believe that this lack of specific authority is fatal to the Section 111(d) Rule. Invoking authority under a statutory provision that it has utilized on only five previous occasions, EPA has purported to grant itself the power to "drive a more aggressive transformation in the domestic energy industry" in order to replace America's most

common energy source—coal—with natural gas and renewable sources. This is a broad-based energy policy typically left to Congress to enact, not environmental regulation. EPA claims to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *UARG*, 134 S. Ct. at 2444 (internal quotation marks omitted). But there is no evidence that Congress "clearly" assigned to EPA the authority to make these energy policy decisions of "vast economic and political significance." *Id.*

We also believe that EPA's claim that Section 111(d) permits the agency to reorganize the nation's energy economy through the States must also be rejected because it violates the States' Tenth Amendment rights. States' authority over the intrastate generation and consumption of electricity is "one of the most important functions traditionally associated with the police powers of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress recognized this State authority in the Federal Power Act ("FPA"), which confines the federal authority over electricity markets to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." Regulation of the *intra*state consumer market remains where it constitutionally belongs: in the hands of the States. 16 U.S.C. § 824(a). The FPA and other federal energy statutes respect the States' "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

As mentioned at the outset, Kansas has joined a 24-State coalition challenging EPA's Section 111(d) rule. On October 23, 2015, Kansas filed a Petition for Review of the final Rule in the D.C. Circuit. The case is captioned *West Virginia, et al. v. U.S. Environmental Protection Agency, et al.*, No. 15-1363. As we expected, numerous private power companies, labor unions, trade associations, and others also filed petitions for review in the D.C. Circuit. In all, 71 petitioners have filed 16 petitions for review, which have been consolidated with ours for briefing and oral argument. In addition, numerous others have moved to intervene and others have sought permission to participate as *amici curiae*.

Given the present and ongoing harm to Kansas of having to comply with the Rule, Kansas also filed a Motion for Stay and for Expedited Consideration of Petition for Review. Our motion asked the court to put the Rule on hold while the case is litigated and to impose briefing deadlines that will allow the case to be argued in May 2015, before the court takes its summer recess. By filing this motion we hope to avoid what happened in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which EPA lost a challenge to its final rule setting standards for regulating hazardous air pollutants, but following the loss boasted that the regulated parties are "already in compliance or well on their way to compliance" because the rule remained in effect throughout the litigation. Our motion has been fully briefed and we expect a decision from the D.C. Circuit by the end of the month.

Regardless of how the D.C. Circuit rules in this case, it seems a near-certainty that this dispute will not be ultimately resolved until it is heard by the United States Supreme Court, most likely in 2017.