KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 20, 2015

Via Certified Mail & Email
The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: EPA Docket No. EPA-HQ-OAR-2013-0602; Application for an Administrative Stay of the Final Rule on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units

Dear Administrator McCarthy:

The State of Texas requests that the Environmental Protection Agency ("EPA") stay the effectiveness of its "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" rule (the "Rule") pending judicial review. The Rule represents a significant expansion of EPA's power without a legitimate legal basis. In seeking to fundamentally restructure how electricity is generated, transmitted, and consumed—including Texas's unique and successful competitive electric market in the Electric Reliability Council of Texas ("ERCOT") that provides affordable and reliable electricity to its citizens and businesses—the Rule exceeds both EPA's legal authority and its expertise. Aside from the immediate harm to the State of Texas in having to divert its resources toward implementing EPA's 1560-page regulation, Texas's citizens and businesses face increased electricity costs and reliability concerns.

EPA is authorized, pursuant to 5 U.S.C. § 705, to "postpone the effective date of action taken by it, pending judicial review" when the agency finds that "justice so requires." The standard for a stay at the administrative level "is the same as the standard for a stay at the judicial level." *See, e.g.*, *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 29–30 (D.D.C. 2012). As such, EPA considers four factors when determining whether to grant a stay: (1) the likelihood that the movant will prevail

on the merits; (2) the prospect of irreparable injury to the movant if relief is denied; (3) the possibility of harm to other parties if relief is granted; and (4) the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

As outlined below, these four factors strongly favor a stay pending the outcome of the judicial proceedings. Should EPA choose not to act on this application for a stay before the Rule is published in the *Federal Register*, Texas will consider that action to be a denial of the application.

1. Texas is Likely to Succeed on the Merits.

The Rule calls for a sweeping reorganization of States' energy infrastructure based on the concept that such overall reorganization represents the "best system of emission reduction" ("BSER") for individual electric generating units. The State of Texas is likely to succeed on the merits of its claims that the Rule exceeds EPA's statutory authority and displaces sovereign powers that Congress has reserved for the States.

The Supreme Court has cautioned against statutory constructions that "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). More particularly, the last time it reviewed an EPA greenhouse gas regulation, the Supreme Court warned that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *UARG v. EPA*, 134 S. Ct. 2427, 2444 (2014) (finding EPA's statutory interpretation "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization"). In construing section 111(d)—a long-extant and little-used provision of the Clean Air Act—to authorize an overhaul of the country's energy policy, EPA has ignored the Supreme Court's warning and overstepped its statutory authority.

The authority granted to EPA by Congress in section 111(d) of the Clean Air Act is to institute procedures under which each State establishes "standards of performance" for "any existing source," which is defined in section 111(a)(3) as "any building, structure, facility, or installation which emits or may emit any air pollutant." Yet through the Rule, EPA instead establishes the standard of performance, depriving each State of the opportunity to do so for itself, giving due "consideration, among other factors, [to] the remaining useful life of the existing source to which such standard applies." While the Rule does acknowledge the textual

requirement that its section 111(d) regulations must be made applicable to "sources," as opposed to States, the effect of this acknowledgement on the scheme ultimately laid out by EPA is minimal. By continuing to include building blocks 2 and 3 in the calculation of BSER, the Rule relies on the construction and/or increased utilization of sources *other than* the sources EPA is authorized to regulate under Section 111(d). The D.C. Circuit has already invalidated a more modest effort by EPA to expand section 111(a)(3)'s definition of "source." *See ASARCO, Inc. v.* EPA, 578 F.2d 319, 326–27 (D.C. Cir. 1978) (disapproving an EPA rule that relied on a "bubble" concept that treated a combination of facilities within a plant as a single "source"). The end result is to establish as the BSER emission rate for existing sources a performance standard that is more stringent than that for new sources and that in practice is not achievable at the source. EPA attempts to avoid this problem by defining the source's owner and operator as the "source" itself, but such a definition contradicts the plain language of the statute.

When Congress intends to provide EPA broader authority to regulate the electric grid on an "interconnected" basis, it has demonstrated that it knows how to do so. For example, when Congress wanted EPA to address the issue of sulfur-dioxide emissions from power plants on an interconnected, sector-wide basis, it provided an entire title—Title IV—of the Clean Air Act to express that intent and authorize a sector-wide cap-and-trade structure. EPA's claim that the Rule simply mirrors this approach ignores the fact that Congress did not confer analogous powers on EPA under section 111. Indeed, determinations regarding the intrastate generation of electricity are within the traditional powers of the States. Not only have such powers not been conferred upon EPA in Clean Air Act section 111(d), but they have been expressly withheld from even the Federal Energy Regulatory Commission ("FERC")—the agency charged with implementing the Federal Power Act. *See, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695 (D.C. Cir. 2000) (noting "Congress' explicit directive . . . that regulation of local distribution facilities be left to the states"). EPA's Rule would therefore displace the traditional regulatory authority of the States without Congressional authorization.

Another dispositive obstacle to the Rule is that the plain text of Section 111(d) prohibits EPA from regulating power plants under that section because this source category is already regulated under Section 112. Under Section 111(d), EPA may only "establish[ ] standards of performance for any existing source for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section [112] . . . ." 42 U.S.C. § 7411(d)(1). EPA already regulates power plants as a

source category under § 112 in its Mercury and Air Toxics Standards (MATS).[1] In *American Electric Power Co. v. Connecticut*, the United States Supreme Court stated, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." 131 S. Ct. 2527, 2537 n.7 (2011). Under this plain reading, EPA's proposed rule under Section 111(d) is clearly invalid because it seeks to regulate emissions from power plants, which are a source category already regulated under Section 112.

2. Absent a Stay, Texas Will Suffer Irreparable Injury.

Texas and other States will suffer a number of irreparable injuries if the Rule is not stayed pending judicial review. The Rule will require States to change their laws and policies. Preparation of state plans will require complex legislation and consultation among numerous state agencies, which will detract from other priorities. And if the Rule is struck down, all laws, regulations, and memoranda of understanding put in place to facilitate compliance with the Rule would need to be rescinded or repealed, further exacerbating the misapplication of state resources. In addition, states will need to immediately begin planning for additional transmission and other infrastructure needed to accommodate the changes required by the Final Rule.

These injuries are irreparable for several reasons. First, it is not practicable to calculate damages for this type of harm. Second, damages would not be available in any event due to the federal government's sovereign immunity. *See, e.g., Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) (noting that "[i]mposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury"); *Patton v. Dole*, 806 F.2d 24, 28 (2d Cir. 1986) (finding irreparable harm where the plaintiff likely would have no damages claim because of the federal government's sovereign immunity). Third, the various expenditures required by the rule will interfere with the States' sovereign priorities. "Directing a priority expenditure from the state treasury 'may derange the operations of government, and thereby cause serious detriment to the public.'" *Barnes*

[1] *See* National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012). This rule was not vacated in the Court's ruling in *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (quoting *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871)).

3. No Harm Would Result from a Stay.

There has been no suggestion that any other party would be harmed, much less seriously harmed, by a stay of the Rule pending judicial review. A stay would simply maintain the status quo during the course of the litigation. Even assuming that EPA could show its Rule would have measurable benefits several years from now (it has not), EPA could not show that staying the Rule pending judicial review would jeopardize those benefits, especially if the Court expedites its review of the anticipated petitions. Furthermore, if the Rule is upheld, the stay would have no effect on the ultimate compliance deadline in 2030.

4. The Public Interest Strongly Favors a Stay.

Courts act within the "broad public interest[]" when they "maintain," rather than "derogat[e]," the "proper balance" of "the separation of powers." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). Congress did not provide EPA with the power, under section 111(d), to completely overhaul this nation's energy industry. Moreover, state citizens have an interest in their legislators' ability to enact laws that meet their needs and in avoiding waste of state resources to enact laws and regulations pursuant to a federal rule that is likely to be struck down.

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For the foregoing reasons, the request to stay the Rule pending judicial review should be granted.

Sincerely,

Jon Niermann
Chief, Environmental Protection Division