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I. Executive Summary

EPA's proposed rule imposes harmful economic costs on Ohioans, raises the risk of electric unreliability during times of stress to the energy grid, and suffers from multiple legal flaws. For these reasons, the EPA should withdraw the Section 111(d) proposal.

For more than a century, Ohio has exercised exclusive jurisdiction over the State's retail electricity markets. With the Federal Power Act in 1935, Congress codified Ohio's—and all States'—prerogative to oversee its retail electricity markets, unencumbered by federal intrusion. EPA's Clean Power Plan, by its very terms, would erase this jurisdictional "bright line" between federal and State governments.

If finalized in its current form, the proposed rule would constitute an unprecedented expansion of federal authority into Ohio's rightful affairs, such that State officials could regulate electricity within its borders only with EPA's approval. As the current Federal Energy Regulatory Commission Commissioner Tony Clark observed, "[States] will have entered a comprehensive 'mother may I?' relationship with the EPA that has never before existed."

In addition to usurping the State's rightful regulatory authority and violating the Federal Power Act, the Clean Power Plan suffers from multiple legal problems, including a violation of the Clean Air Act's Section 111(d) bar on regulating emission sources also regulated under Section 112 of the Act. EPA's proposal also lacks a lawful New-Source Standard predicate whereby the EPA must first have established lawful standards under Section 111(b) for new sources in a particular industrial category.

Beyond the legal problems association with the Clean Power Plan, the proposed rule adds insult to injury by imposing unreasonable costs on Ohio. For example, according to a study conducted by the economic consulting firm NERA, EPA's proposed Clean Power Plan would be the most expensive regulation ever imposed on the power sector, costing between $41 and $73 billion per year. NERA's analysis projects that the rule would cause retail electricity rates in Ohio to rise by 12 percent.

Another analysis, by Energy Ventures Analysis, Inc., estimates that EPA's suite of energy regulations, including the Clean Power Plan, cumulatively would increase the cost of electricity and natural gas by nearly $300 billion in 2020 compared with 2012. The same study projects that gas bills would increase in Ohio by 51 percent and industrial electricity rates would increase 74 percent in nominal terms.

Finally, EPA's proposed rule poses a distinct threat to electric reliability. The retirement of coal-fired electric generating capacity due to EPA regulations, and the inadequacy of existing natural gas pipeline capacity in the northeast, creates the distinct possibility that the Clean Power Plan would stress Ohio's power grids beyond their capacity, especially during unusually cold and hot temperatures.

II. **How EPA's Clean Power Plan Impacts Ohio**

A. Ohio Has Exercised Exclusive Jurisdiction over Its Retail Electricity Markets for More Than a Century

The Ohio Public Utilities Commission has had sole jurisdiction to oversee the state's electricity retail electricity market since 1911—almost six decades before the EPA was formed. Pursuant to Ohio Revised Code Title 49 *et seq*., the Public Utilities Commission is entrusted with broad oversight powers of the state's electricity market. To this end, its mission is to "assure all residential and business consumers access to adequate, safe, and reliable utility services at fair prices, while facilitating an environment that provides competitive choices."

In 1935, Congress codified the States' exclusive prerogative to oversee retail electricity provision within their borders, with the passage of the Federal Power Act. The law embodies the New Deal philosophy that an electric utility is a "local institution" that should be "locally

controlled," as articulated by Montana Senator Burton Wheeler, who was one of the statute's chief sponsors.

Accordingly, the 1935 Federal Power Act explicitly stipulates that the federal government's jurisdiction shall "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a). As interpreted by Article III Courts, the Federal Power Act establishes a "bright line" between state and federal regulation. *Northern States Power Company v. FERC*, 176 F. 3d 1090, 1096 (8th Cir. 1999). The federal government has jurisdiction over interstate sales of wholesale electricity, while "States retain exclusive authority to regulate the retail market." *Electric Power Supply Association v. FERC*, WL___(D.C. Cir. May 23, 2014).

In plain contravention of Ohio's rights as established by the Federal Power Act, EPA's Clean Power Plan would erase the "bright line" in jurisdiction between State and Federal governments in the electricity market. Through the regulation, federal ***environmental*** regulators have proposed to do exactly what has long been denied federal ***energy*** regulators. In recent Congressional testimony, Federal Energy Regulatory Commission Commissioner Tony Clark addressed the Clean Power Plan's impact on federalism:

> More than any regulation I have seen during the time that I have been involved in the energy sector, this EPA proposed rule has the potential to comprehensively reorder the jurisdictional relationship between the federal government and states as it relates to the regulation of public utilities and energy development… [States] will have entered a comprehensive 'mother may I?' relationship with the EPA that has never before existed.

During the same hearing, FERC Commissioner Philip Moeller quipped that, "If it isn't already obvious, the title of the proposed rule, the Clean Power Plan, makes it clear that EPA is creating national electricity policy." In a similar vein, during a July 15 panel discussion, National Association of Regulatory Utility Commissioners Chairman Joshua Epel said that the proposed rule threatens to "invad[e] our exclusive domain," and that EPA seems to be "substitut[ing] their judgment for us economic regulators."

EPA, of course, denies that its proposed regulation unduly infringes on state authority. The agency stresses the rule's "flexibility," and even notes "that the design of the guidelines makes clear that states are not required to reach their targets using precisely the building blocks that EPA used to determine each state's goal." 79 FR 64543. This disclaimer, however, is belied by the substance of the rule. In practice, the four "building blocks" on which EPA established Ohio's carbon cap are so stringent and so specific as to leave the State no alternatives other than to retire coal-fired generating capacity. EPA's protestations to the contrary do not change the troubling fact that the agency is attempting to exert direct jurisdiction over Ohio's electricity market—an authority that has been expressly denied the federal government since 1935.

Of course, it is doubtful that Clean Air Act §111(d) authorizes EPA to "comprehensively reorder the jurisdictional relationship between the federal government and states" to further "national

electricity policy." In the next section, these comments explain how EPA's §111(d) rule severely intrudes upon Ohio's rightful authority to oversee its retail electricity markets.

B. How the Clean Power Plan Usurps or Otherwise Upsets Ohio's Long Held Prerogative to Oversee Retail Electricity Markets

1. EPA's Clean Power Plan Would Effectively Reverse Ohio's Decision to Restructure Its Electricity Market

In July of 1999, Governor Bob Taft signed into law S.B. 3, mandating a restructuring of the state's electricity market. Since then, Ohio has carried out one of the most successful transition processes to restructure the electric industry, and, as a result of this policy, most ratepayers in Ohio are afforded a choice among power generators on a competitive wholesale market.

Currently, about 62 percent of Ohio's retail customer load participates in a competitive market for electric services. This represents almost 1.8 million ratepayers. EPA's Clean Power Plan, by its very nature, would vitiate Ohio's choice to open its retail electricity market to competitive forces. The point of restructuring the State's electricity market has been to tap into the decentralized forces of supplier competition and consumer choice. For example, in Ohio, consumers can choose among: different prices; different contract terms ranging from fixed price contracts to variable rate contracts, and contracts that combine the two; different generation resources, such as wind or solar energy; and even different incentives, like free nights and weekends and residential dynamic pricing.

The practical effect of EPA's proposed rule would be to centralize the State's electricity sector under the authority of an environmental regulator—ultimately, the Environmental Protection Agency. Thus, the rule works at cross purposes with the State's decision to restructure its market. EPA's Clean Power Plan threatens to induce a "soft re-integration" of Ohio's market, which would serve to undermine the principles of consumer choice that undergird the State's decision to restructure its market.

Finally, EPA's Clean Power Plan raises significant equity concerns for owners of electric generating capacity operating in Ohio's restructured electricity market. Were the State to choose to comply with the regulation by ordering the shutdown of coal-fired power plants—and, to this end, it is notable that EPA projects 2,379 megawatts of fossil fuel electricity generation in Ohio would retire due to the rule—it is wholly uncertain how these owners would be compensated. There is no clear mechanism by which these costs would be assigned to ratepayers.

2. EPA's Clean Power Plan Roils Ohio's Oversight of Retail Electricity Markets

Implementation of the Clean Power Plan raises a host of complicated jurisdictional questions that promise to roil state oversight of the electricity sector in Ohio.

For starters, EPA's proposal is silent as to which state body should implement the regulatory regime. Pursuant to Ohio Revised Statutes Chapter 3704.03, the Ohio Environmental Protection Agency is vested with the authority to promulgate and administer air quality regulations. However, EPA's unprecedented Clean Power Plan is a "national electricity policy" (as described by FERC Commissioner Philip Moeller), and, as noted above, Ohio's electricity sector long has fallen under the purview of the Public Utilities Commission.

Unfortunately, EPA's proposed Clean Power Plan lends no insight into which body should take the lead. Were the Ohio Environmental Protection Agency to adopt its historical role administering the Clean Air Act, and implement the Clean Power Plan, the Agency would infringe upon the Public Utilities Commission's legal authority. Of course, there is no simple solution to this jurisdictional conflict, because EPA's Clean Power Plan is at once both an environmental regulation and an energy regulation. In all likelihood, the legislature would have to choose a leader by enacting an enabling statute.

Also, EPA's Clean Power Plan would subject the State's non-investor owned utilities to regulatory limbo and thereby promises to engender a political quagmire. Scores of Ohio municipalities operate their own utilities; in rural areas, the State's 25 member-owned rural electric cooperatives distribute electricity to more than 380,000 homes and businesses. These "munis" and "coops" would have to be incorporated into any Ohio compliance plan for EPA's proposed regulation, but the Public Utilities Commission exercises very limited authority over these entities. Moreover, munis and coops long have resisted enhanced oversight by the State. As a result, any attempt to bring them into a regulatory regime to meet EPA's Clean Power Plan would court a political battle.

Finally, the Clean Power Plan confuses Ohio's participation in multistate electricity markets. Specifically, EPA set the State's targets based on an assumption that all natural gas combined cycle power plants will be "re-dispatched" to operate 70 percent of the time. This is problematic for many reasons (see the next subsection), including the fact that Ohio participates in a multistate "regional transmission organization," known as the "PJM," which is responsible for the dispatch of electricity to distribution companies operated in the State. However, the PJM is not a regulatory body. The Clean Power Plan is silent on how Ohio could legally deputize its multistate grid operator as part of its State Implementation Plan.

3. EPA's Clean Power Plan Upsets Ohio's Choice to Rely on Economic Dispatch

A key concept in the operation of a power system is "economic dispatch." Section 1234(b) of the Energy Policy Act of 2005 defines economic dispatch to mean "the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities." In simple terms, "economic dispatch" means meeting electric demand by deploying the most affordable power sources in reliable fashion.

As noted, Ohio ratepayers receive transmission service from a multistate regional transmission organization, or PJM. PJM uses sophisticated software and supercomputers in assigning load to specific generating stations to effect the most economical supply as demand varies.

Economic dispatch is so intimately associated with the provision of retail electricity that federal energy regulators have never challenged the State's authority over this process, save for very narrow reliability emergencies. Yet EPA's Clean Power Plan incorporates economic dispatch squarely within EPA's regulatory purview. In a technical support document to the proposed rule, the agency states:

> Reduced generation is encompassed by the terms of the phrase "system of emission reduction" in Clean Air Act § 111(a)(1)…because, in accordance with the above-discussed definitions of "system," reduced generation is a "set of things"—which included reduced use of generating equipment and therefore reduced fuel input—that the affected source might take to reduce CO2 emissions.

Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 13-14.

In plain terms, the agency is asserting the authority to require a decrease in the dispatch of coal-fired generation, and an increase of in the dispatch of virtually all other resources. In particular, EPA based Ohio's Clean Power Plan targets on an assumption that all natural gas combined cycle power plants in the country would operate at a 70 percent capacity factor, despite the fact that the national average in 2012 was 46 percent, according to the Edison Electric Institute. This particular mandate would cost Ohio ratepayers "billions," according to a recent presentation given by Public Utilities Commission of Ohio Commissioner Asim Haque.

Obviously, EPA's de facto natural gas generation quota would profoundly alter how electricity is dispatched to serve Ohio ratepayers. In this manner, the proposed Clean Power Plan negates Ohio's long-held, if implicit, prerogative to choose to rely on economic dispatch, and instead imposes a system of environmental dispatch.

4. EPA's Clean Power Plan Would Result in Federal Jurisdiction over Discrete Energy Policies Enacted & Administrated by Ohio Policymakers

If finalized in its current form, EPA's Clean Power Plan would assert unprecedented federal jurisdiction over energy policymaking in Ohio. Indeed, the law reaches so far into the State's rightful affairs that it would require Ohio lawmakers to enact or amend energy laws mandating the usage of certain types of services in the State's retail electricity market.

To wit, Ohio's Clean Power Plan target is based on the assumptions that renewable energy would account for 11 percent of the State's electricity generation and also that the State's utilities would achieve 1.5 percent annual reductions in electricity demand. Thus, the agency is attempting to

exert jurisdiction over these discrete energy policies, as is made clear in a technical support document attendant to the rule:

> The EPA is proposing that states be authorized to submit state plans that do not impose legal responsibility on the affected EGUs for the entirety of the emission performance level, but instead, by adopting what this preamble refers to as a "portfolio approach," ***impose requirements on other affected entities—e.g., renewable energy and demand-side energy efficiency measures—that would reduce CO2 emissions from the affected EGUs.***

Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units, at 16 (emphasis added).

Under the EPA's Clean Air Act §111(d) regulatory regime, these "requirements" (i.e., a renewable energy standard and an energy efficiency standard) would have to be approved by the agency. Regarding the possibility that EPA could order states to boost their renewable generation goals or increase their end-use efficiency programs, National Association of Regulatory Utility Commissioners Chairman Joshua Epel recently noted that "[t]his provision concerns me more than just about anything else in the rule," due to its apparent intrusion on the State's rightful authority.

And although it is true that Ohio's existing statutory and regulatory regime for renewable energy procurement exceeds EPA's Clean Power Plan target (see Ohio Revised Code Chapter 4928.64 *et seq*.), the important fact nonetheless remains that the agency is exerting jurisdiction over these policymaking prerogatives that have long been exclusive to the States. Furthermore, Ohio has recently enacted a two-year freeze on renewable energy procurement standards—standards that are to be reviewed by a study commission. Although Ohio's current standards exceed the EPA's Clean Power Plan target, the study commission could recommend, and the legislature could adopt, modified standards. Any such modification would be consistent with the traditional jurisdiction and policymaking prerogatives of the State.

Moreover, EPA's 1.5 percent per annum energy efficiency target exceeds the energy efficiency target established by Ohio lawmakers (see Ohio Revised Code, Chapter 4928.66 *et seq*.). Accordingly, the Ohio Legislature would have to enact enabling legislation to harmonize EPA's Clean Power Plan with the State's energy efficiency regime.

Notably, the D.C. Circuit recently struck down a FERC order that **indirectly** regulated utility energy efficiency programs, because the program violated the States' exclusive jurisdiction over retail electricity markets. *Electric Power Supply Association v. FERC*, WL___(D.C. Cir. May 23, 2014). By contrast, EPA's Clean Power Plan asserts **direct** authority over Ohio's energy efficiency program.

EPA's attempt to seize the reins of Ohio's energy policymaking is expressly forbidden by the Federal Power Act. And until the proposed Clean Power Plan, the agency never has attempted to use the Clean Air Act to compel States to pass energy statutes. It remains wholly unclear how the agency would exercise this new-found power—i.e., the authority to require Ohio lawmakers to enact energy statutes—were the agency to impose a Clean Air Act §111(d) federal implementation plan.

C. Clean Power Plan Costs and Reliability Impact on Ohio

1. Compliance Costs

In addition to usurping the State's rightful authority, the proposed rule adds insult to injury by imposing unreasonable costs on Ohio. According to a study conducted by the economic consulting firm NERA, EPA's proposed Clean Power Plan would be the most expensive regulation ever imposed on the power sector, costing between $41 and $73 billion per year. NERA's analysis projects that the rule would cause residential electricity rates in Ohio to increase by 12 percent. Analysis done by Energy Ventures Analysis, Inc., estimates that EPA's suite of energy regulations, including the Clean Power Plan, cumulatively would increase the cost of electricity and natural gas by nearly $300 billion nationally in 2020 compared with 2012. The Energy Venture study projects that gas bills would increase in Ohio by 51 percent and industrial electricity rates would increase 74 percent in nominal terms.

2. Reliability Impact

Nationwide, 132 gigawatts of generating capacity is projected to retire between 2016 and 2020, of which 68 GW is directly attributable to the Clean Power Plan, according to EPA modeling. Reliability watchdog North American Reliability Corporation has warned that "essential reliability services may be strained by the proposed Clean Power Plan." Similarly, in comments to the EPA, the Edison Electric Institute cautioned that "[t]he dynamics of compliance, under circumstances of any unexpected shortfall in the non-emitting resources required for compliance, creates the risk of multi-state compliance failures that would disrupt interstate power flows."

Although the PJM that operates transmission service across an 11 State footprint that includes Ohio, has not yet weighed in on the reliability impact of the Clean Power Plan (PJM plans to issue a report on the reliability implications of the proposed rule in December), there is plenty of cause for concern.

For example, on January 7, 2014, during last year's "polar vortex," available power in the PJM totaled slightly more than 142 gigawatts of generating capacity, while demand peaked that day at 141 GW—meaning that the grid was very close to failure. Generation supplies were ultra-tight during that time due in large part to the inadequacy of the region's natural gas pipeline infrastructure. On January 7, 2014, 36 percent of the total gas fleet in PJM was knocked out, almost half due to interruptions in fuel supply caused by logistical impediments. Of course, it

takes years to build out pipeline infrastructure for gas, and the region remains underserved and therefore vulnerable to interruptions in the supply of natural gas during periods of high demand.

The retirement of coal-fired power plants due to pending regulations in addition to the Clean Power Plan further threatens the region's electric reliability. According to SNL Financial, 2,721 megawatts of coal-fired capacity that is slated to retire in Ohio by 2015 on account of EPA's Mercury and Air Toxics Rule provided more than 980,000 megawatt hours of electricity during January 2014, in the midst of the polar vortex.

All told, EPA expects 2,379 megawatts of coal-fired electricity generation to retire by 2020 in Ohio due to agency regulations, including the Clean Power Plan. It is uncertain if Ohio, and neighboring States similarly affected, can afford to lose this much capacity.

Indeed, alarm bells about the Clean Power Plan's reliability impact have been sounded by state, regional, and federal reliability watchdogs for more than half the country. In recent testimony before the House Energy and Commerce Committee, FERC Commissioner Philip Moeller warned that the proposed rule threatened the 15-State Midcontinent Independent Service Operator region with "widespread rotating blackouts." And in comments to the EPA, the Southwest Power Pool, a regional transmission organization spanning 8 States, cautioned that the Clean Power Plan "introduce[es] the very real possibility of rolling blackouts or cascading outages." In an interview with Bloomberg in November, Thomas Fanning, the CEO of Southern Company, which services a multistate region in the southeast, said that "I don't think we have the ability to maintain a reliable system" and also comply with EPA's §111(d) rule. Finally, a reliability analysis performed by ERCOT, the independent service operator that maintains Texas's grid, warned that the rule "could result in transmission reliability issues due to the loss of generation resources in and around major urban centers."

EPA's proposal would have serious consequences for Ohio and its citizens. Electric grid operators will confront a situation in which an increasing amount of backup and emergency procedures are necessary to ensure the adequate supply of electricity. Last year's unusually cold winter placed much of the country at risk of blackouts; projected retirements of coal-fired electric generating capacity under this and other rules will make this a recurring danger.

These dangers might have been avoided if EPA had included a safety valve in its plan. This is a point echoed by, among others, officials at the PJM Interconnection regional transmission organization and the North American Electric Reliability Corporation. Grid Operators Detail Call for EPA to Provide ESPS Reliability "Safety Valve," InsideEPA (Oct. 31, 2014); NERC Review at 27 ("NERC . . . urges policy makers and the EPA to ensure that a flexible and effective reliability assurance mechanism is included in the rule's implementation"). Similarly, these dangers might have been avoided if EPA had not proposed to require States to make dramatic cuts in GHG emissions by 2020, front-loading compliance burdens through a rapidly approaching deadline that does not provide adequate time for States to make the major planning

decisions necessary to comply. See Jonathan L. Ramseur, EPA's Clean Power Plan Proposal: Are the Emission Rate Targets Front-Loaded? (CRS Nov. 3, 2014) ("[T]he mathematics of EPA's 2029 interim target effectively require states to make emission reductions in the early years, which some have described as 'front-loading.'"); NERC Review at 27 ("EPA should consider a more timely approach that addresses [bulk power system] reliability concerns and infrastructure deployments.").

III. Legal Flaws in Section 111(d) Proposal

In addition to the burdens that the Section 111(d) proposal would place on state governments and ratepayers, the proposal is contrary to the Clean Air Act in several critical ways. Individually and taken together, these legal infirmities mean that the Section 111(d) proposal, if finalized in a manner that includes one or more of these flaws, would constitute an unlawful rule. Given the fundamental nature of these legal flaws, EPA should withdraw the Section 111(d) proposal.

A. The Section 111(d) Proposal Constitutes an Unlawful Reorganization of State Energy Economies

Section 111 authorizes only the establishment of emission standards that can be met at *individual* new and existing sources of certain air pollutants, and with virtually no exceptions, EPA has implemented it in this manner since its enactment as part of the Clean Air Act Amendments of 1970. But rather than propose emission standards that are achievable by existing fossil fuel-fired power plants, the Section 111(d) proposal overrides state prerogatives by forcing them to prioritize natural gas-fired generation over coal-fired generation, and non-fossil-fuel generation over fossil-fueled generation. In this way, the Section 111(d) proposal departs from Section 111(d)'s proper scope by imposing a national energy and resource-planning policy, in violation of states' traditional role in making their individual energy policies.

Section 111(d)'s text is clear: it authorizes EPA to establish a procedure under which states will submit to it a plan that "establishes standards of performance *for any existing source* . . . ." C.A.A. § 111(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A) (emphasis added). Only the first "building block" from which EPA derives its proposed "state goals," heat-rate efficiency improvements, resembles the "inside-the-fenceline" measures authorized by Section 111(d). And even in the case of efficiency improvements, there is a good case that EPA is overstepping its authority. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2448 (2014) (warning agency of "important limitations" on its authority to "force . . . energy efficiency" improvements on facilities under the Prevention of Significant Deterioration program).

The other three "building blocks," which constitute nearly all of the GHG emission rate improvements under the Section 111(d) proposal, envision the reorganization of substantially every aspect of a state's power sector. Through these measures, the proposal requires the

substantial redispatch of coal-fired electric generation to natural gas-fired generation, without regard to the nature of state resources or the legal and technical difficulties with accomplishing this goal (block 2). The Section 111(d) proposal likewise requires the deployment of new renewable or nuclear energy to replace existing fossil fuel-generated power (block 3). Finally, the proposal requires that states actually *limit* the consumption of electricity through increased deployment of demand-side reduction and end-use energy efficiency measures (block 4). Although the Section 111(d) proposal purports to provides states with "flexibility" by not requiring any particular combination of these "building blocks," the binding emission goals it has proposed for each state are sufficiently stringent that states will be unable to meet them without going beyond the traditional, inside-the-fenceline first block and significantly altering their energy and resource policies.

But these policy choices are not EPA's to make. States—not EPA—are responsible for managing their energy resources through such measures as choosing what type of fuels or resources should be used to generate electricity, whether the limitation of energy consumption is a desirable policy, and the like. In turn, EPA and the states are collectively responsible for managing states' air quality resources by limiting emissions from industrial sources of air pollutants where appropriate. The Section 111(d) proposal aggrandizes EPA's authority beyond the statutory limits of the Clean Air Act by arrogating the role of national energy regulator with no statutory authorization.

There is no precedent in EPA's regulations under Section 111(d), or indeed in any previous Clean Air Act program, for this power grab. Instead, the Section 111(d) proposal purports to locate its authority solely in the Clean Air Act's definition of "standard of performance." Specifically, the Act defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated." C.A.A. § 7411(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added). Given that the Clean Air Act does not define the term "system of emission reduction," EPA argues that "system" is a broad, unconstrained term equivalent to any "set of things working together as parts of a mechanism or interconnecting network." Proposal, 79 Fed. Reg. at 34,885. On this basis, the agency asserts that Section 111 affords it unconstrained authority to formulate standards based on "*anything* that reduces the emissions of affected sources," *id.* at 34,886 (emphasis added). Under this view, EPA's authority is essentially unlimited; it could mandate that states prohibit the use of air conditioners during times of peak energy usage or dim the lights in police stations and firehouses.

In this regard, the Section 111(d) proposal violates the core tenet of administrative law that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *E.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Rather, statutory terms must be construed in light of the text of the provision as a whole, its context, its purpose, and relevant precedent and

authority. *Id.* Furthermore, agencies cannot ground a claim to regulatory power on the absence of express prohibition. *E.g.*, *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). The ostensibly open-ended "definitional possibilities" of the word "system" cannot support EPA's attempt to override states' policy choices and impose energy and natural-resource policy on them.

B. The Proposal Abrogates States' Primary Legal Authority Under Section 111(d)

Congress intended Section 111(d) to be a state-driven process, rather than be the subject of federal command-and-control dictate. The Section 111(d) proposal is unlawful because it abrogates states' right under Section 111(d) to state-driven emission standards.

Section 111(d) grants states the prerogative of "submit[ting] to the Administrator a plan which . . . . establishes standards of performance for . . . existing source[s] . . . ." C.A.A. § 7411(d)(1)(A), 42 U.S.C. § 7411(d)(1)(A). In so doing, Congress unquestionably intended for states to be the regulators exercising discretion in establishing emission standards, specifically authorizing states to consider such factors as the remaining useful life of a given source in the standard-setting process. *See id*. In contrast, Congress limited EPA's role to a subsidiary procedural role "prescrib[ing] regulations which shall establish a *procedure*" for plan submission and determining whether a state's submitted plan is satisfactory. *See id.*; *see also* C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2).

The proposal exceeds the proper scope of EPA's authority by proposing binding, inflexible emission rate limits in the *aggregate* for a state's *entire power sector*. Pursuant to the Section 111(d) proposal, once these "goals" are finalized, states will have no authority to change them, despite Section 111(d)'s express grant of authority to the states to consider factors such as the remaining useful life of sources in establishing standards. EPA does not and cannot identify anything in Section 111(d) or elsewhere in the text of the Clean Air Act that authorizes it to displace states' legal authority to establish emission standards. As a result, the Section 111(d) proposal cannot be reconciled with EPA's limited statutory authority and the statutory rights specifically afforded to states.

C. The Proposal Violates Section 111(d)'s Bar On Regulating Sources That Are Also Regulated Under Section 112 of the Act

In order to prevent sources from being subject to multiple costly layers of regulation that could harm their economic competitiveness, the Clean Air Act prohibits EPA from requiring states to submit Section 111(d) plans for source categories that are regulated under Section 112 of the Act. The Section 111(d) proposal would violate this prohibition by establishing Section 111(d) standards for fossil-fuel fired power plants, which have been regulated under Section 112 of the Act since 2012. For that reason, EPA should abandon the Section 111(d) proposal in its entirety.

Section 112 of the Clean Air Act empowers the agency to regulate "hazardous air pollutants." In 2012, the agency promulgated regulations under this section that limit the emission of mercury and other substances from fossil fuel-fired power plants. 77 Fed. Reg. 9,304 (Feb. 16, 2012); *see generally White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (upholding rule). According to EPA, the Section 112 Rule for electric utilities will impose $9.6 billion annually in costs on electric utilities, *see* 77 Fed. Reg. at 9,413; independent experts peg that figure at $10.4 billion in 2015, rising to $11.9 billion by 2030. NERA Economic Consulting, *An Economic Impact Analysis of EPA's Mercury and Air Toxic Standards Rule*, at 2, Fig. 1 (Mar. 1, 2012).

Section 111(d), in turn, authorizes EPA to require that states submit Section 111(d) plans only for "existing source[s] for any air pollutant . . . which is not . . . emitted from a source category which is regulated under section 7412." C.A.A. § 111(d)(1)(A)(i), 42 U.S.C. § 7411(d)(1)(A)(i) (the "prohibition"). As described above, fossil fuel-fired power plants are regulated under Section 112 of the Act, and it is eminently reasonable that Congress would want to avoid the situation that those sources currently face: $7.5 billion in annual costs from Section 111(d) regulations in 2020, rising to $8.8 billion in 2030, *see* Proposal, 79 Fed. Reg. at 34,839-40 & Tables 1 &2, to compound the over $10 billion that they are currently bearing under Section 112.

The Section 111(d) proposal's attempt to deal with this plain limitation of the Clean Air Act is unreasonable. The Section 111(d) proposal asserts that the prohibition described above only bars it from using Section 111(d) to regulate the emission of a *hazardous* air pollutant (i.e., one listed under Section 112) from a source category that is regulated under Section 112. EPA derives this interpretation from a purported harmonization of ostensibly conflicting amendments to Section 111(d) made by the House and the Senate in the Clean Air Act Amendments of 1990, whereby the Senate erroneously included a "Conforming Amendment" that the codifier of the United States Code determined "could not be executed." As such, EPA's "harmonization" is inappropriate, particularly given that the purported harmonization in the Section 111(d) proposal gives no meaningful effect to the actual language of the United States Code. It is plainly unreasonable for EPA to interpret the prohibition in a manner contradictory to the clear deregulatory thrust of this aspect of Section 111(d).

D. The Proposal Lacks a Lawful New-Source Standard Predicate

In order for EPA to require states to submit Section 111(d) plans to control emissions from existing sources in particular industrial categories, EPA must first have established lawful standards under Section 111(b) for new sources in that category. Because EPA has failed to establish such standards for fossil fuel-fired power plants and its existing regulatory proposal is unlawful, EPA may not finalize any Section 111(d) proposal until it has rectified this issue.

Section 111(d) provides that Section 111(d) is appropriate to regulate only "existing source[s] for any air pollutant . . . . to which a standard of performance under this section would apply if such

existing source were a new source . . . ." C.A.A. § 111(d)(1)(A)(ii), 42 U.S.C. § 7412(d)(1)(A)(ii). The Section 111(d) proposal concedes the plain language of this provision: that a lawful Section 111(b) rulemaking is a "requisite predicate" for a Section 111(d) rule. 79 Fed. Reg. at 34,852.

The Section 111(d) proposal identifies two pending 111(b) proposals as providing this predicate: the proposed rule regulating carbon dioxide emissions from *new* power plants, issued in January 2014, and the proposed rule regulating such emissions from *modified and reconstructed* power plants, issued in June 2014. But neither of these proposals have been finalized.

They are also unlawful and therefore cannot provide the requisite predicate for the 111(d) proposal. The new-source proposal is unlawful because it violates express restrictions on Section 111(b) rulemakings imposed by the Energy Policy Act of 2005 by inappropriately considering certain government-subsidized projects in the Section 111 standard-setting process. *See generally* Comments of the Competitive Enterprise Institute on Clear Air Act § 111(b) Carbon Pollution Standards (May 9, 2014). The modified-source proposal is unlawful because there is no authority under Section 111(b) to issue a regulation covering only modified sources, which the Clean Air Act treats as "new" sources without exception. *See* C.A.A. § 111(a)(1), 42 U.S.C. § 7411(a)(1) ("The term 'new source' means any stationary source, the construction *or modification* of which is commenced after" proposal or finalization, whichever is earlier, of Section 111 standards). These defects preclude EPA from promulgating Section 111(d) standards until such time (if ever) that it adopts lawful Section 111(b) standards.

E. The Proposal Suffers Other Legal Infirmities

There are at least two other serious legal flaws that undermine the proposal. First, EPA's attempt to impose a *de facto* national energy policy is in direct conflict with the Federal Power Act, which carefully reserves to the states their traditional authority to oversee their retail energy markets. *See* 16 U.S.C. § 824(b)(1). The D.C. Circuit has very recently enforced this limitation on the federal government's authority. *Electric Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014) (FERC may not regulate end-use energy demand, authority over which is reserved to the states). It is simply not credible for EPA to assert that, even though the federal agency that is actually tasked with overseeing interstate energy markets cannot engage in demand-side regulation, the federal pollution control agency is *sub silentio* empowered to do so by Section 111(d).

Second, if a state fails to submit a "satisfactory" plan under 111(d), EPA is authorized to directly prescribe a plan itself. C.A.A. § 111(d)(2), 42 U.S.C. § 7411(d)(2). But EPA lacks authority to directly regulate the substance of all but its first "building block"—*e.g.*, to require the development of new renewable generation or to require end-use efficiency measures. These measures are the traditional subject of state police powers, with federal regulation authorized only where Congress has expressly done so. For this reason, EPA would likely be limited to

measures under the first "block," *i.e.*, inside-the-fenceline efficiency improvements at individual sources, which would not be sufficient to achieve EPA's binding state-by-state emission goals. Furthermore, any attempt to do so would disproportionately burden the regulated sources, create highly inequitable treatment of one state's sources compared to another, and violate Congress's intent in affording EPA the authority to directly prescribe federal plans. Because EPA has that authority, the only reasonable reading of Section 111(d) is that the measures embraced in EPA's proposed "best system of emission reduction" should be the type of measures which the agency *could* directly regulate itself under its 111(d)(2) authority, should the need arise. The disconnect between the current proposal and EPA's ability to directly regulate under (d)(2) confirms that the proposal exceeds the agency's authority under Section 111(d).