ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

No. 15-1363 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

BRIEF OF *AMICUS CURIAE* DOMINION RESOURCES, INC. IN SUPPORT OF RESPONDENT

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Dated: April 1, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the *amici curiae* hereby certifies as follows:

(A) **Parties and Amici.** Except for the *amicus curiae* Dominion Resources, Inc. ("Dominion"); Former State Officials; Union of Concerned Scientists; and Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, James D. Mccalley, and Brian Parsons, all parties and *amici*, rulings under review, and related cases are, to the best of my knowledge, set forth in the Brief for Respondents Environmental Protection Agency, ECF No. 1605911.

Amicus, Dominion is a publicly-held company incorporated in Virginia whose shares are listed on the New York Stock Exchange under the symbol "D." Dominion has no parent company and no publicly-held company has 10% or greater ownership in Dominion.

(B) **Rulings Under Review.** References to the rulings under review appear in EPA's brief.

(C) **Related Cases**. Reference to related cases appears in EPA's brief.

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AND RULE 29(C)(5)

Pursuant to Rule 29(a)-(b) of the Federal Rules of Appellate Procedure, proposed *amicus curiae* has consulted with the parties. As of the filing of this brief, the U.S. Environmental Protection Agency, Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District and Southern California Edison Company have consented to the filing of this brief.

The remaining parties either informed Dominion that they take no position as to Dominion's filing, or failed to respond to the undersigned counsel's email which stated that if no response was received by 5:00 p.m. March 31, 2016, Dominion would represent that they took no position. Consequently, Dominion states that the following parties take no position as to Dominion's filing: the Utility Air Regulatory Group, National Rural Electric Cooperative Association, Arizona Electric Power Cooperative, Inc., Associated Electric Cooperative, Inc., Big Rivers Electric Corporation, Brazos Electric Power Cooperative, Inc., Buckeye Power, Inc., Central Montana Electric Power Cooperative, Central Power Electric Cooperative, Inc., Corn Belt Power Cooperative, Dairyland Power Cooperative, Deseret Generation & Transmission Co-operative, Inc., East Kentucky Power

Cooperative, Inc., East River Electric Power Cooperative, Inc., East Texas Electric Cooperative, Inc., Georgia Transmission Corporation, Golden Spread Electric Cooperative, Inc., Hoosier Energy Rural Electric Cooperative, Inc., Kansas Electric Power Cooperative, Inc., Minnkota Power Cooperative, Inc., North Carolina Electric Membership Corporation, Northeast Texas Electric Cooperative, Inc., Northwest Iowa Power Cooperative, Oglethorpe Power Corporation, Powersouth Energy Cooperative, Prairie Power, Inc., Rushmore Electric Power Cooperative, Inc., Sam Rayburn G&T Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., Seminole Electric Cooperative, Inc., South Mississippi Electric Power Association, South Texas Electric Cooperative, Inc., Southern Illinois Power Cooperative, Sunflower Electric Power Corporation, Tex-La Electric Cooperative of Texas, Inc., Upper Missouri G. & T. Electric Cooperative, Inc., Wabash Valley Power Association, Inc., Western Farmers Electric Cooperative and Wolverine Power Supply Cooperative, Inc. take no position on Dominion's request to participate as amicus.

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* certify that a separate brief is necessary because no other *amicus* brief of which Dominion is aware will provide the perspective of a large energy company with an integrated electric utility that relies upon significant generation from coal-fired and natural gas-fired

power plants subject to regulation under the Clean Power Plan rule and that is supportive of Respondent.

Dominion states that no party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person – other than Dominion – contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App .P. 29(c)(5).

CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, Dominion Resources, Inc. ("Dominion") states that it is a publicly-held company incorporated in Virginia whose shares are listed on the New York Stock Exchange under the symbol "D." Dominion has no parent company and no publicly-held company has 10% or greater ownership in Dominion. Dominion is one of the nation's largest producers and transporters of energy, and is committed to providing safe, affordable, reliable, and increasingly clean electricity to its residential and business customers in Virginia and North Carolina.

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GLOSSARY OF TERMS

CAMR	Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule, 70 Fed. Reg. 28,606 (May 18, 2005)
Dominion	Dominion Resources, Inc.
EPA	Environmental Protection Agency
IRP	Integrated Resource Plan
Pet'rs Legal Br.	Opening Brief of Petitioners on Core Legal Issues
Resp't Br.	Respondent EPA's Initial Brief
the Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015)
UARG	Utility Air Regulatory Group

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE

Amicus curiae Dominion Resources, Inc. ("Dominion") is an investor-owned energy company that owns and operates Dominion Virginia Power, a fully integrated electric utility, serving approximately 2.4 million customers in Virginia and more than 100,000 customers in North Carolina. Dominion serves these customers with a diverse fleet of coal-fired and natural gas-fired generation facilities, four carbon-free nuclear units, and a growing portfolio of renewable generation. Many of Dominion's existing power plants will be subject to regulation under the Clean Power Plan. Given Dominion's mix of power plants and its large base of more than 2.4 million electric utility customers, Dominion has strong interests in the Clean Power Plan and the outcome of this litigation. Dominion has long been able to deliver reliable electricity at very competitive rates when compared to regional and national averages, in significant part due to its diverse mix of power generation resources and the operational and fuel diversity advantages these resources offer.

Dominion is one of the nation's largest producers and transporters of energy, and is committed to providing safe, affordable, reliable, and increasingly clean electricity to its residential and business customers in Virginia and North Carolina. Dominion owns and operates approximately 24,300 megawatts of generating capacity. Dominion's portfolio of assets also includes approximately 6,500 miles

of electric transmission lines; 57,300 miles of electric distribution lines; 12,200 miles of natural gas transmission, gathering, and storage pipelines; and 22,000 miles of gas distribution pipelines, exclusive of service lines. In total, Dominion serves over five million utility and retail energy customers in 14 states and operates one of the nation's largest underground natural gas storage systems, with approximately 933 billion cubic feet of storage capacity.

Dominion is at the mid-point of a 10-year growth plan with an annual average investment of $3.2 billion per year in expanding infrastructure for its regulated electric generation, transmission and distribution, and regulated natural gas transmission and distribution operations. Among other things, Dominion intends that this infrastructure expansion will enable the company to meet the projected increase in electricity demand in Dominion's electric utility service territory with lower-carbon electricity while maintaining reliable service.

In September 2014, Dominion announced the Atlantic Coast Pipeline, an approximately 600-mile natural gas pipeline that would run from West Virginia through Virginia to North Carolina to serve a region that is currently heavily reliant on a single natural gas pipeline. The Atlantic Coast Pipeline is one of several key infrastructure projects that will allow Dominion to increase natural gas supplies in the Mid-Atlantic region for natural gas-fired power plants, local gas utilities serving residential and commercial customers, and manufacturers.

SUMMARY OF ARGUMENT

Dominion offers the Court the perspective of an owner of several coal-fired and natural gas-fired power plants subject to regulation under the Clean Power Plan rule ("the Rule"). Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Dominion's position on the Rule and the Environmental Protection Agency's ("EPA") statutory authority under the Clean Air Act differs substantially from Petitioners on two points as discussed in greater detail below.

First, Dominion believes that, if key compliance flexibilities are maintained in the Rule, states adopt reasonable implementation plans, and government permitting and regulatory authorities efficiently process permit applications and perform regulatory oversight required to facilitate the timely development of needed gas pipeline and electric transmission infrastructure, then compliance is feasible for power plants subject to the Rule. From Dominion's perspective, the Rule is compatible with current trends toward additional renewable and natural gas generation in the power sector based on market conditions and customer demands, as well as already-finalized state and federal environmental requirements aimed at pollutants that have long been subject to federal regulation under the Clean Air Act. Effects on power plants and customers can be successfully managed, provided that the Rule continues to: allow market-based compliance measures,

such as emissions trading and averaging approaches; permit states to develop a flexible emission reduction timeline within the interim compliance period; and authorize states to tailor compliance plans to state circumstances.

Second, Dominion disagrees with Petitioners' overly narrow reading of the statutory phase "standard of performance" because their reading would not allow the use of market-based measures such as emissions trading or averaging. Petitioners' interpretation could have the unintended adverse effect of foreclosing market-based compliance flexibility for the Rule and other standards of performance set under section 111 of the Clean Air Act. Adopting Petitioners' interpretation could result in a reduction in the number of remaining coal-fired power plants, a less diverse generation fleet, and increased compliance costs for customers.

ARGUMENT

I. Assuming that Power Plants Are Afforded the Compliance Flexibility Contemplated under the Rule, Compliance Is Feasible.

Existing electric sector trends are resulting in increased levels of renewable and natural gas generation and the retirement of aging coal-fired plants nationwide. The expansion of Dominion's transmission and distribution natural gas pipeline network also has been actively underway in the Mid-Atlantic region for the past several years to deliver recoverable reserves of natural gas from the Marcellus and Utica shale formations to consumers. Much of this infrastructure development and

energy transition began prior to the Rule due to changing economic conditions and earlier state and federal environmental requirements.

Dominion finds the Rule to be compatible with these ongoing trends. Dominion intends on maintaining its diverse generation portfolio, including its coal-fired generation, in order to continue to provide its customers with affordable, reliable electricity. Compliance with the Rule will not unduly disrupt these goals, provided that the compliance flexibilities in the Rule—particularly including the market-based trading options and the interim compliance period flexibilities—are made available to power plants subject to the Rule, and states reasonably tailor their compliance plans to state circumstances.

A. The Rule Is Compatible with Existing Industry Trends Toward Renewable and Natural Gas Generation.

From Dominion's perspective as one of the country's largest power companies, the Rule is compatible with long-term industry trends influenced by market conditions and prior environmental regulations. These trends, which are resulting in the increased use of natural gas-fired and non-hydroelectric renewable electricity generation in the power sector, have been underway for some time and are ongoing.

In Virginia, investor-owned electric utilities are required to develop an annual Integrated Resource Plan ("IRP") that reflects a 15-year plan to meet projected customer needs using both supply and demand side resources. Va. Code

Ann. §§ 56-597, 56-599 (West 2015). Virginia law requires that such a plan include a lowest reasonable cost option, *id.* § 56-599(B)(9), and North Carolina law has a similar requirement. N.C. Gen. Stat. Ann. § 62-2(a)(3a) (West 2015). Dominion's recently-filed IRPs show that natural gas-fired generation has been, by far, the least-cost resource for around-the-clock "baseload" generation, and is a critical back-up resource for intermittent renewable generation.[1]

Similarly, in applying for regulatory approval of a new power station, regulated electric utilities such as Dominion Virginia Power are required to demonstrate that the proposed investment is both necessary and in the public interest. *See, e.g.*, Va. Code Ann. § 56-265.2. A critical part of such filings is establishing the cost of the proposed investment compared to alternatives.

Thus far, Dominion has successfully managed this transition consistent with its obligations to maintain affordability, long-term rate stability, and reliability for its customers. Assuming Dominion is able to ensure the timely completion of new electric generation, transmission, and natural gas pipeline infrastructure necessary

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[1] *See, e.g.*, Dominion, Integrated Resource Plan at 69 (July 1, 2015), *available at* https://www.dom.com/library/domcom/pdfs/electric-generation/2015-irp-final-public-version-internal-cover.pdf ("Of the new generating capacity in North America projected to begin operation over the next 10 years, a majority is expected to rely on natural gas as the single or primary fuel. With a production shift from conventional to an expanded array of unconventional gas sources (such as shale) and relatively low commodity price forecasts, gas-fired generation is the first choice for new capacity, overtaking and replacing coal-fired capacity.") (internal citation omitted).

as a result of these trends, Dominion expects to be able to continue to manage these transitions when the Rule takes effect. Having been in operation for over 100 years, Dominion has observed and adapted to similar transitions in the past—including a period in the 1970s and 1980s when national energy policy emphasized a shift from the use of oil and natural gas for electricity to a greater use of coal[2]—and believes that the composition of the electric generation sector will continue to evolve in response to external events, public policies, and technological change.

B. Compliance with the Rule Is Feasible, Provided that Regulated Power Plants Are Afforded the Rule's Key Compliance Flexibilities and Necessary Supporting Infrastructure Can Be Timely Constructed.

The Rule provides a flexible, accommodating compliance framework that means the Rule can be implemented by states and EPA in a way that is challenging but ultimately manageable for regulated power plants. While EPA sets the "degree of emission limitation achievable" by coal-fired power plants and natural gas combined cycle power plants—what EPA deems an "emission guideline," 40 C.F.R. § 60.21(e) (2015)—the Rule allows each state to develop an

[2] The American Presidency Project, National Energy Program Fact Sheet on the President's Program (Apr. 20, 1977), http://www.presidency.ucsb.edu/ws/?pid=7373 (last accessed on Mar. 29, 2016) (identifying as one of the objectives of the Carter Energy Plan as "The conversion of industry and utilities using oil and natural gas to coal and other more abundant fuels to reduce imports and make natural gas more widely available for household use, thereby helping to achieve both the short- and medium-term goals.")

implementation plan that is tailored to its needs. *Id.* §§ 60.5740-5790. In their implementation plans, states may choose to apply uniform performance rates for power plants, or set equivalent rate-based or mass-based statewide goals applicable to all power plants within the state. 80 Fed. Reg. at 64,832-35. Further, the Rule allows and encourages market-based compliance mechanisms, including both single-state and multi-state emissions trading and averaging. *Id.* at 64,834-35. As a result, depending upon the components of the relevant state plan, the owner of a particular regulated power plant may have multiple options for compliance beyond measures implemented exclusively at that power plant. Dominion is currently engaged in active discussions with states and other stakeholders about how to develop flexible state plans so that Dominion can continue to provide customers affordable and reliable power while ensuring compliance with the Rule.

Additionally, the Rule authorizes states to develop flexible, phased-in compliance obligations. *Id.* at 64,828-29. Dominion considers the timeline reasonable given that new infrastructure under construction and in various stages of state and federal permitting review and development will facilitate cost-effective compliance with the Rule. Timely review and decision-making by regulatory authorities are necessary to ensure the development of expanded gas pipeline and electric transmission infrastructure. For instance, Dominion expects that its proposed Atlantic Coast Pipeline will play a key role in achieving cost-effective

compliance with the Rule for Dominion and other regulated power plants in Virginia and North Carolina by enabling increased amounts of low-emitting natural gas-fired electric generation.

Petitioners suggest that the impacts of the Rule will result in "higher rates and less reliable electricity" for consumers. Opening Brief of Petitioners on Core Legal Issues at 27 ("Pet'rs Legal Br."). Because of the key compliance flexibilities highlighted above, Dominion does not agree that the Rule will necessarily result in such disruptive effects to the power sector and its consumers. Assuming that the key compliance flexibilities in the Rule remain available and that states implement the Rule's requirements in a reasonable and cost-effective manner, Dominion believes that compliance with the Rule is challenging but feasible and can be managed through a diverse generation fleet. *See* Respondent EPA's Initial Brief at 36-38 ("Resp't Br.") (highlighting how EPA assumptions and compliance flexibility in the Rule make emission guidelines "achievable"). This would be consistent with Dominion's state-level regulatory obligations to provide reliable electric service at the lowest reasonable cost, which can best be achieved with a varied generation portfolio.

II. Petitioners' Contention that the Rule's Market-Based Measures Are Not Permitted under Section 111 Could Make the Rule Infeasible and Significantly Increase the Compliance Costs of Future Air Quality Regulations.

Dominion strongly differs with Petitioners' arguments regarding the statutory limits on the terms "standard of performance" and "emission limitation." Pet'rs Legal Br. at 50-56. If the Court were to adopt Petitioners' interpretation of these terms, the interpretation would not only constrain EPA's authority when establishing "emission guidelines," as is intended by Petitioners, but would also effectively prohibit regulated entities from complying with this and all other section 111 standards through flexible compliance approaches such as market-based trading mechanisms. Foreclosing the ability of Dominion and other owners of regulated power plants to rely on trading measures as a means of compliance would unnecessarily increase the Rule's compliance costs and could adversely impact the feasibility of compliance with the Rule and other air quality regulations promulgated under section 111 of the Clean Air Act.

Real-world experience, academic theory, and industry consensus all indicate that market-based measures are an optimal approach for states to adopt in air quality regulatory plans, including plans for meeting Clean Air Act requirements. Such measures have many benefits as compared to command-and-control approaches that mandate source-specific measures. Market-based measures allow market forces to influence when and where emission reduction measures are

undertaken, which generally allows for the deployment of such measures in the most cost-efficient fashion, where costs are lowest. This, in turn, leads to the lowest possible compliance costs for industry and lower energy prices for consumers as well as the operational advantages of more fuel diversity as compared to command-and-control approaches. These benefits are well-established in academic literature on the topic. *See, e.g.*, Richard Schmalensee & Robert Stavins, *Lessons Learned from Three Decades of Experience with Cap-and-Trade* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 21742, 2015), *available at* http://www.nber.org/papers/w21742 ("[M]arket-based approaches tend to equate marginal abatement costs rather than emissions levels or rates across sources, and thereby can—in principle—achieve pollution-control targets at minimum cost."); Gregory E. Wannier et al., *Prevailing Academic Views on Compliance Flexibility Under Section 111 of the Clean Air Act* 3 (Inst. for Policy Integrity, Disc. Paper No. 2011/2, 2011), *available at* http://policyintegrity.org/publications/detail/prevailing-academic-view-on-compliance-flexibility-under-section-111-of-the (market-based compliance approaches all feature "the common characteristic of lowering costs without sacrificing ultimate emissions goals.").

Like the majority of companies that own power plants, Dominion has operational experience with market-based measures in several states. For example,

Dominion owns power plants in states that have adopted market-based plans for compliance with the Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone; Final Rule, 63 Fed. Reg. 57,356 (Oct. 27, 1998); the Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals; Final Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011); and its predecessor, the Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule, 70 Fed. Reg. 25,162 (May 12, 2005). Dominion also has owned power plants in states that have adopted cap-and-trade measures under the Regional Greenhouse Gas Initiative.

Further, for EPA's last major rule under section 111 of the Clean Air Act, Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units; Final Rule, 70 Fed. Reg. 28,606 (May 18, 2005) ("CAMR") (vacated in *New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008) on immaterial grounds), Dominion (along with Petitioners in this case including the Utility Air Regulatory Group ("UARG")) *supported* arguments that section 111 authorizes the use of market-based measures to reduce pollution:

> [Environmental group and state] Petitioners also claim that a cap-and-trade program is unlawful under § 111. EPA has offered compelling legal justifications for a mercury cap-and-trade program. A mercury cap-and-trade program is also reasonable as a matter of public policy.

> . . . CAMR maximizes reductions in U.S. mercury deposition while providing EGUs flexibility to achieve those reductions in a cost effective manner.[3]

UARG went farther, arguing that CAMR was unlawful because it did not *mandate* that the states adopt a market-based compliance program:

> EPA's CAMR is legally flawed because it allows states to adopt federally enforceable plans under § 111(d) that either do not implement the national mercury cap-and-trade program chosen by EPA as the "best system" of emission reduction" or affirmatively undermine that nationwide cap-and-trade program. . . . The Administrator determined that the "best system" for reducing mercury emissions from existing coal-fired EGUs was a nationally applicable cap-and-trade program.[4]

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[3] *New Jersey v. EPA*, Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervenors, and State Amicus The States of North Dakota, Alabama, Indiana, Nebraska, South Dakota, Wyoming, and Industry Respondent-Intervenors Utility Air Regulatory Group, Edison Electric Institute, Duke Energy Indiana, Inc., Duke Energy Kentucky, Inc., Duke Energy Ohio, Inc., PPL Corporation, PSEG Fossil LLC, NRG Energy, Florida Power and Light, and National Mining Association, and State Amicus West Virginia, Department of Environmental Protection, No. 05-1097, 2007 WL 3231261, at *26 (D.C. Cir. July 23, 2007) (internal citation omitted). *See also id.*, at *28-29 (State Respondent-Intervenors noting that "the regulation of air emissions using a cap-and-trade program has proven far more efficient than regulating each facility under a command-and-control approach[,]" "[a] cap-and-trade program also benefits State citizens by allowing market forces to govern the choice and timing of emission controls," and "State respondent-intervenors also favor CAMR because it provides States broad discretion in deciding how to allocate mercury allowances among EGUs."); *id.*, at *29 ("Respondent-intervenor States of North Dakota, South Dakota, Wyoming, and Nebraska support the methodology EPA used to establish state mercury budgets under CAMR.").

[4] *New Jersey v. EPA*, Brief of Petitioner Utility Air Regulatory Group, No. 05-1097, 2007 WL 2155486 (D.C. Cir. July 23, 2007). *See also New Jersey v. EPA*, Reply Brief of Petitioner Utility Air Regulatory Group, No. 05-1097, 2007 WL

See also Resp't Br. at 34 (noting UARG's support in rulemaking comments on the CAMR for a performance standard based on a cap-and-trade system).

Yet, Petitioners seek an interpretation of section 111 that would have the adverse effect of unnecessarily, *see* Resp't Br. at 65-68, returning to an outdated and costly command-and-control model. They argue that the broad terms "standard of performance" and "emission limitation" must be interpreted to preclude flexible emission reduction approaches such as emissions trading or averaging because such approaches necessarily involve the shifting of generation among regulated units, and such shifting is, in their view, excluded from the relevant definitions. *See* Pet'rs Legal Br. at 30, 52, 54.

From Dominion's perspective, Petitioners' legal strategy would have adverse consequences for electric utilities and their customers. Were this Court to adopt the overly narrow reading of "standard of performance" advocated by Petitioners—that it may reflect only those types of abatement measures that can be applied physically at an individual source to which it applies—EPA would necessarily be prohibited from establishing "emission guidelines" under the methodology used in the Rule. However, Petitioners either fail to understand or fail to appreciate the risk that this approach would also preclude trading-based

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2155485 (D.C. Cir. July 23, 2007) (noting that "EPA defends its national cap-and-trade program as the appropriate 'standard of performance'" under section 111).

compliance under section 111. As both EPA and Petitioners agree, it is the *states*, and not EPA, that set "standards of performance" under section 111(d).[5] 80 Fed. Reg. at 64,759 ("EPA issues emissions guidelines . . . ; in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction") (quoting *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, ___, 131 S. Ct. 2527, 2537-38 (2011)); Pet'rs Legal Br. at 74 ("Section 111(d) grants the authority to 'establish[] standards of performance' for existing sources to the States—*not* EPA") (emphasis in original) (citation omitted). Therefore, any constraint on the scope of the term "standard of performance"—such as limiting it to "inside-the-fence" abatement measures and prohibiting trading and averaging among sources (including through the use of market-based credits)—would function as a direct constraint on state authority and, ultimately, on compliance flexibility for regulated power plants.

Under Petitioners' legal theory, EPA would determine an emission guideline for coal-fired power plants and an emission guideline for natural gas-fired power plants based exclusively on systems of emission reduction that improve emissions performance at each individual power plant (e.g., heat rate improvements, fuel switching, or carbon capture and sequestration). Then, each state also would have

[5] Except in the case of a federal plan, in which EPA sets standards of performance for sources in place of the state. 42 U.S.C. § 7411(d)(2)(A) (2012).

to require each power plant to comply with the emission guideline exclusively through a technological or operational system(s) implemented at the power plant. Owners of regulated power plants would not be able to avail themselves of the cost-saving strategies of emissions trading or averaging with other generation assets.

In Dominion's view, this rigid interpretation of Clean Air Act section 111 could make compliance with the Rule infeasible. This reading would likely result in more premature and inefficient closures of power plants—most notably coal-fired power plants, including those for which other pollutants have already been well-controlled, often at recent and significant customer expense. Petitioners' overly narrow interpretation of the Clean Air Act would be more disruptive to the power sector, and result in higher compliance costs for power plant owners and electricity customers, than a regulatory program with "standards of performance" that allows for market-based trading compliance mechanisms. This could be the case even if the emission guideline that EPA sets under a section 111(d) regulatory program that does not permit trading is substantially less stringent than the corresponding emission guideline under a section 111(d) program that permits trading.

Further, the term "standard of performance" is broadly applicable to a variety of air pollutants emitted from both new and existing sources in a host of

other section 111 source categories. *See generally* 40 C.F.R. Pt. 60. Dominion has concerns that the consequences of adopting Petitioner's interpretation of section 111 would not be limited to the regulation of carbon dioxide from power plants, but would also constrain EPA and states from permitting sources to comply with section 111 standards of performance for pollutants other than carbon dioxide and for source categories other than power plants, in a cost effective manner.

For these reasons, Dominion urges the Court to reject Petitioners' legal arguments as to the interpretation of "standard of performance" under Clean Air Act section 111.

CONCLUSION

For the foregoing reasons, the flexibilities contemplated by the Rule, if effectuated in state plans, and complementary actions such as infrastructure permitting, will ensure that compliance with the Rule is challenging but feasible for Dominion which operates a large electric utility with significant investments in both coal and natural gas generation resources. However, both the feasibility of the Rule and cost-effective environmental regulation under section 111 depend on this Court's rejection of Petitioners' unduly narrow interpretation of the term "standard of performance" under Clean Air Act section 111, which would preclude trading-based compliance with this Rule, and with future regulations under section 111.

Dated: April 1, 2016

Respectfully submitted,

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RULE 29(d) CERTIFICATE OF COUNSEL

Pursuant to D.C. Circuit Rule 29(d), counsel for Dominion certifies that a separate brief is necessary because no other *amicus* brief of which Dominion is aware will provide the perspective of a large energy company with an integrated electric utility that relies upon significant generation from coal-fired and natural gas-fired power plants subject to regulation under the Clean Power Plan rule and that is supportive of Respondent.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. of App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in 14-point, proportionately spaced, Times New Roman typeface and contains 4,522 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word processing software used to prepare this brief was Microsoft Word 2010.

Dated: April 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system. The participants in this case are registered CM/ECF users and services will be accomplished by the appellate CM/ECF system.

Dated: April 1, 2016

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