ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1140 (and consolidated cases)

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

AMERICAN LUNG ASSOCIATION, *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
84 Fed. Reg. 32,520 (July 8, 2019)

BRIEF OF FORMER COMMISSIONERS OF THE FEDERAL ENERGY REGULATORY COMMISSION CHARLES B. CURTIS, ELIZABETH A. MOLER, JAMES J. HOECKER, NORA MEAD BROWNELL, JON WELLINGHOFF, JOHN NORRIS, NORMAN C. BAY, AND COLETTE D. HONORABLE AS AMICI CURIAE IN SUPPORT OF STATE AND MUNICIPAL, ENVIRONMENTAL AND PUBLIC HEALTH, POWER COMPANY, AND CLEAN ENERGY TRADE ASSOCIATION PETITIONERS

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April 24, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amici curiae appearing in the current brief are former Commissioners of the Federal Energy Regulatory Commission Charles B. Curtis, Elizabeth A. Moler, James J. Hoecker, Nora Mead Brownell, Jon Wellinghoff, John Norris, Norman C. Bay, and Colette D. Honorable. Other parties, *amici*, and intervenors appearing in this case are listed in the brief for State and Municipal Petitioners.

References to the rulings under review and related cases appear in the State and Municipal Petitioners' Brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

FEDERAL REGISTER

Page

AGENCY ORDERS

Page

MISCELLANEOUS AUTHORITIES

Page

GLOSSARY

BSER	Best System of Emission Reduction
Commission or FERC	Federal Energy Regulatory Commission
CPP	Clean Power Plan, 80 Fed. Reg. 64,665 (Oct. 23, 2015)
DOE	United States Department of Energy
DOT	United States Department of Transportation
EGU	Electric Generating Unit
EPA	United States Environmental Protection Agency
NERC	North American Electric Reliability Corporation
Proposal	Proposed Clean Power Plan, 79 Fed. Reg. 34,830 (June 18, 2014)
Proposed Repeal	Proposed Repeal of Clean Power Plan, 82 Fed. Reg. 48,035 (Oct. 16, 2017)
Repeal	Repeal of Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019)

INTEREST OF THE AMICI CURIAE

This case raises the question of whether the United States Environmental Protection Agency (EPA) properly exercised its statutory authority under the Clean Air Act to issue the Clean Power Plan (CPP). In its Repeal of the CPP in July 2019, EPA argued, *inter alia*, that the CPP encroached upon the jurisdiction that the Federal Power Act (FPA) provides to the Federal Energy Regulatory Commission (FERC or Commission) and reserves to the States.

Amici are a bipartisan group of former Commissioners of the FERC, the independent agency delegated by Congress to implement the FPA.[1] *Amici* have a substantial interest in the proper resolution of this issue and in ensuring that the Court is informed on the reach of and limits to the Commission's FPA authority, as well as the way in which the Commission has respected the EPA's distinct authority under the Clean Air Act. Moreover, *amici* have first-hand knowledge of the authority reserved to the States by the FPA, and three *amici* served as former state public utility regulators. *Amici* believe that they can provide a unique perspective to the Court based on their knowledge of federal energy law, federal and state jurisdiction, and the Commission's administrative practice of respecting

[1] Counsel for *amici* certifies that no counsel for any party to this proceeding authored any portion of this brief and that no person contributed money to the preparation or submission of this brief.

EPA's authority under the Clean Air Act to regulate pollution from entities in the electric power sector.

Amici were appointed by Republican and Democratic Presidents and collectively served on the Commission for a total of 42 years from its founding in 1977 through 2017. Five *amici* chaired the Commission. Commissioners Brownell, Norris, and Honorable also served on state public utility commissions. The *amici* are:

Charles B. Curtis, Commissioner 1977-1981, Chair 1977-1981.

Elizabeth A. Moler, Commissioner 1988-1997, Chair 1993-1997.

James J. Hoecker, Commissioner 1993-2001, Chair 1997-2001.

Nora Mead Brownell, Commissioner 2001-2006.

Jon Wellinghoff, Commissioner 2006-2013, Chair 2009-2013.

John Norris, Commissioner 2010-2014.

Norman C. Bay, Commissioner 2014-2017, Chair 2015-2017.

Colette D. Honorable, Commissioner 2015-2017.

BACKGROUND

In June 2014, EPA issued its proposed Clean Power Plan (Proposal), 79 Fed. Reg. 34,830 (June 18, 2014), to reduce greenhouse gas emissions from existing fossil fuel-fired electric generating unit (EGUs). The Proposal required States to meet specific emissions guidelines for their generation fleet but did not prescribe

how States should meet their targets. *Id.* at 34,833. Instead, each State was afforded "the flexibility to design a program to meet its goal in a manner that reflects its particular circumstances and energy and environmental policy objectives." *Id.* EPA projected that these state-based actions would achieve in aggregate a 30 percent reduction in power sector carbon dioxide (CO_2) emissions from 2005 levels by 2030. *Id*. at 34,832. The Proposal stated:

> This goal is achievable because innovations in the production, distribution and use of electricity are already making the power sector more efficient and sustainable while maintaining an affordable, reliable and diverse energy mix. This proposed rule would reinforce and continue this progress.

Id.

The Commission held four technical conferences to examine the Proposal's possible effects on electric reliability, energy infrastructure, and wholesale energy markets. 80 Fed. Reg. 64,662, 64,665, 64,673 (Oct. 23, 2015). EPA presented at the conferences. *Id*. Senior EPA officials also met with each member of the Commission, and Commission staff coordinated with EPA and the Department of Energy (DOE) on reliability questions. *Id*. at 64,707. On May 15, 2015, the Commission sent a letter to EPA signed by all five members. *See* Letter from FERC Chair Norman C. Bay and Commissioners Cheryl A. LaFleur, Colette D. Honorable, Philip D. Moeller, and Tony Clark to EPA Acting Administrator Janet G. McCabe, at 1, May 15, 2015, https://www.ferc.gov/media/headlines/

2015/ferc-letter-epa.pdf. The Commission suggested "more flexibility during the early years of compliance" and offered EPA assistance on reliability matters. *Id*. at 1, 4. At no point did the letter allege that the CPP encroached upon the Commission's jurisdiction.

Later that year, EPA issued the final CPP rule. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Consistent with the Proposal, the CPP required States to set standards of performance for EGUs but provided them with extensive compliance flexibility.

In setting emission guidelines, EPA determined that the Best System of Emission Reduction (BSER) for EGUs was comprised of three "building blocks": improving heat rates at existing coal units; substituting increased generation from lower-emitting natural gas combined cycle units for generation from higher-emitting steam generating units; and substituting renewable for fossil-fuel fired generation. *Id.* at 64,667. When establishing compliance programs, States were not required to rely solely on these building blocks "or even at all." *Id.* The CPP gave States the flexibility to establish "trading-based emission standards and compliance strategies," or to deploy technologies not included in the BSER. *Id.* at 64,665, 64,735. For instance, EPA did not identify carbon capture and sequestration as a building block, in favor of "significantly cheaper" options, but allowed its application in state compliance plans. *Id*. at 64,728, 64,756.

The CPP responded to concerns raised by the Commission's letter. *Id.* at 64,673. EPA included a reliability safety valve in the final rule, delayed the start of the program from 2020 to 2022, and enabled States to opt for "a more gradual glide path" to compliance by 2030. *Id*. at 64,875-76. EPA also established a process to coordinate with the Commission and DOE on future reliability matters. *See id.* at 64,671, 64,707, 64,879; *see also* FERC, *EPA-DOE-FERC Coordination on Implementation of Clean Power Plan* (Aug. 3, 2015), https://www.ferc.gov/media/headlines/2015/CPP-EPA-DOE-FERC.pdf.

Litigation resulted in a stay of the CPP, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016), and the rule was never implemented. On October 16, 2017, EPA issued a Proposed Repeal of the CPP. 82 Fed. Reg. 48,035 (Oct. 16, 2017). The Proposed Repeal cited concerns that the CPP "did not adequately ensure the national interest in affordable, reliable electricity, including coal generation." *Id.* at 48,038. In addition, EPA argued that a repeal would avoid interference with Commission and state authority. *Id.* at 48,038, 48,042.

In response, several former Commissioners wrote to explain that the CPP was consistent with the FPA and power sector trends, could be achieved cost-effectively, and did not pose threats to reliability. *See* Comments of Former FERC Commissioners Norman C. Bay, John Norris, and Jon Wellinghoff, EPA-HQ-2017-0355 (Mar. 27, 2018). The Chairman of the Commission subsequently filed

comments on behalf of himself, not the Commission as a whole, noting concerns about reliability and a possible impact of the CPP on the Commission's authority under the FPA. *See* Letter from FERC Chairman Neil Chatterjee to EPA Acting Administrator Andrew Wheeler, at 2, EPA-HQ-OAR-2017-0355 (Oct. 31, 2018).

In July 2019, EPA issued a final rule repealing and replacing the CPP. 84 Fed. Reg. 32,520, 32,532 (July 8, 2019). The Repeal argued that basing BSER on generation shifting impermissibly encroaches on Commission and state authorities, while acknowledging that "[m]arket-based forces have already led to significant generation shifting in the power sector." *Id.* at 32,529, 32,532. A number of parties sought timely review of the Repeal.

SUMMARY OF ARGUMENT

In promulgating the CPP, EPA acted on its broad statutory authority under the Clean Air Act to protect public health and welfare. The Commission, by contrast, is charged with ensuring just and reasonable rates and overseeing electric reliability under an entirely different statutory regime. The CPP's aim and target was reducing carbon emissions, and any potential effect on wholesale rates would have been indirect. Despite EPA having regulated air pollution from EGUs for more than four decades, *amici* are not aware of a single Clean Air Act regulation that the Commission has challenged in court as intruding upon its FPA authority.

The Clean Air Act authorizes and, at times, directs EPA to regulate air pollution from EGUs. Such regulation inevitably affects power generation, but the FPA does not prohibit EPA from acting. On the contrary, only in time of war or emergency does the FPA provide a temporary and narrowly tailored authority to require electric generation and to suspend environmental compliance. 16 U.S.C. § 824a(c). Congress was therefore aware of the impact of environmental regulation in reducing pollution from the power sector and, barring exceptional circumstances, was unwilling to allow the FPA to override the regulation.

More broadly, congressional acts enhancing air quality authorities during the 1970s energy crisis underscore EPA's authority to regulate power sector air pollution. Against this backdrop, EPA and the Commission have worked together to harmonize their authorities in the context of major air pollution rules.

Nor is EPA's authority to regulate air pollution in any way limited by FPA provisions reserving state authority over electricity generation. The plain language of the FPA delineates the relationship between the Commission and the States, not the relationship between EPA and the States. Moreover, the CPP afforded States extensive flexibility to design EGU compliance strategies consistent with their role under the FPA.

Finally, as the Repeal conceded, a profound energy transition is underway in the United States. The CPP identified the trends driving this transition and

reasonably relied on them to establish the BSER and to set emission reduction goals. In fact, the United States achieved the CPP's 2030 target at the national level (though not in every State) in 2019. *See* U.S. Energy Information Administration, *Monthly Energy Review (March 2020)* at Table 11.6, https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf. The on-going energy transition establishes that the EPA was correct in identifying generation shifting as a cost-effective way to reduce carbon emissions without compromising grid reliability or affordable electricity.

ARGUMENT

I. The CPP in No Way Contravened the Commission's Authority under the Federal Power Act.

The Commission and EPA regulate pursuant to independent authorities granted under different statutes. The plain text of the Clean Air Act and the FPA makes clear that each reaches different aspects of electric generation – air pollution for the former and wholesale rates for the latter. The Commission's ratemaking authority is also limited to rules or practices that *directly* affect wholesale rates. Unless EPA targets wholesale rates and directly affects them, the Commission's jurisdiction has not been invaded.

Moreover, the FPA does not give the Commission a license to block other agencies from using their own authorities simply because their regulations may affect wholesale rates. Only in time of war or emergency does the FPA provide a

temporary and narrowly tailored authority to suspend environmental laws and regulations. Congressional acts enhancing air quality authorities during the 1970s energy crisis underscore EPA's expansive authority to regulate power sector air emissions even when environmental regulations affect electricity generation. Not surprisingly, given this broader statutory context and the text of the FPA, the Commission's longstanding administrative practice has been to respect EPA environmental regulations, to collaborate with EPA, and to harmonize its authority with that of EPA.

A. The Commission and EPA Enjoy Independent Authorities under Different Statutes.

EPA is an environmental regulator, charged with implementing and enforcing the Clean Air Act to limit air pollution. The Commission, by contrast, is the economic regulator for the wholesale power market, ensuring, *inter alia*, that wholesale electricity rates are "just and reasonable." Although the Commission and EPA regulate some of the same entities, their statutory aims are distinct. That a Clean Air Act rule may indirectly affect wholesale rates does not preclude EPA action.

The CPP did not attempt to determine the rate to be paid for wholesale power, and the Repeal has not alleged as much. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 777 (2016) (ratemaking involves establishing the amount of money the purchaser must pay in exchange for power). To ascertain whether

jurisdictional overreaching has occurred, the Supreme Court considers "'the *target* at which [a] law *aims*.'" *Id. at* 776 (quoting *Oneok, Inc. v. Learjet, Inc.*, 573 U.S. 373, 385 (2015)). *See also Hughes v. Talen Energy Mktg., L.L.C.,* 136 S. Ct. 1288, 1298 (2016) (finding FPA preemption of state law that targeted wholesale rates). Here, it is uncontroverted that the CPP's aim and target was reducing carbon pollution from EGUs. Therefore, this exercise of EPA's authority under the Clean Air Act was consistent with the Commission's authority under the FPA.

The Commission's ratemaking jurisdiction under the FPA is limited to "rules or practices that '*directly* affect the [wholesale] rate.'" *EPSA*, 136 S. Ct. at 774. As the Supreme Court has explained, "indirect or tangential impact on wholesale electricity rates" lie beyond the Commission's reach. *Id.* To hold otherwise would give the FPA "near-infinite breadth": "FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice." *Id.*

Regulations from a myriad of federal agencies can increase generator costs – be they requirements from the Department of Labor, Occupational Safety and Health Administration, Pipeline and Hazardous Materials Safety Administration, Nuclear Regulatory Commission, National Surface Transportation Board, Mine Safety Health Administration, or Bureau of Land Management, to name but a few. To assert that the Commission's authority over wholesale electricity markets

precludes those agencies from exercising their statutory authorities would be nothing short of remarkable. Supreme Court precedent, "a common-sense construction of the FPA's language" and longstanding Commission practice repudiate such a sweeping view. *Id.*

Not only is the Commission's ratemaking authority limited to rules or practices that directly affect wholesale rates, but the FPA and Clean Air Act have different statutory mandates. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA argued that regulating motor vehicles' carbon pollution would require it to tighten mileage standards, a job which it believed Congress had entrusted to the Department of Transportation (DOT). *Id.* at 532. The Court rejected EPA's argument, noting that the DOT and EPA had different statutory mandates. One promoted "energy efficiency," and the other protected the public's "health" and "welfare":

> But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare,' a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think that the two agencies cannot both administer their obligations and yet avoid inconsistency.

Id. (internal citations omitted). Here, the Commission's obligation to ensure just and reasonable rates is independent of EPA's obligation to protect the "public's

'health' and 'welfare.'" Even if overlap arises in their statutory obligations, each agency can 'administer their obligations and yet avoid inconsistency." *Id.*

The Commission's obligation to ensure just and reasonable rates is independent of EPA's obligation to protect the public health and welfare. Their authorities arise out of different statutes and reflect distinct policy goals. Compliance with the CPP might have affected the cost of generation and therefore generation choice – as is the case for most, if not all, air pollution regulation of EGUs – but this impact was indirect and tangential to EPA's proper aim and target of reducing carbon emissions.

B. The Federal Power Act Only Authorizes Environmental Regulations To Be Temporarily Overridden in Emergencies.

The plain text of the FPA demonstrates that the Commission lacks the general authority to impede the EPA's statutory mandate to protect the public's health and welfare. Since 1935, the FPA has included an emergency provision to order electric "generation, delivery, interchange, or transmission" during a time of "war" or "emergency." FPA § 202(c), 16 U.S.C. § 824a(c). In 2015, Congress amended section 202(c) to provide a temporary and narrowly tailored authority to suspend environmental laws and regulations in an emergency order. Pub. L. 114-94, 129 Stat. 1772, Sec. 61002(a). Neither war nor emergency is relevant to the CPP. This emergency authority no longer even resides with the Commission, as Congress delegated it to DOE in the DOE Organization Act. 42 U.S.C. § 7151(b).

Congress also imposed significant guardrails to limit use of this provision, underscoring its exceptional nature. A section 202(c) order only applies "during hours necessary to meet the emergency and to serve the public interest." 16 U.S.C. § 824a(c)(2), and must be "consistent with any applicable Federal, State, or local environmental law or regulation and minimize[ ] any adverse environmental impacts." *Id.* Moreover, when conflict is unavoidable between the order and an environmental standard, the order "shall expire not later than 90 days after it is issued," unless reauthorized after consultation with the "primary Federal agency with expertise in the environmental interest." *Id.* § 824a(c)(4).

Thus, when Congress sought to include an authority in the FPA that allows environmental regulations to be overridden, it did so explicitly. Congress recognized the extraordinary nature of the authority, carefully tailored its use to the emergency, and required the minimization of any adverse environmental impact. That Congress enacted section 202(c) means that, by negative implication, it could not have intended the Commission to possess a more expansive power to impede EPA's mandate. Alongside the Clean Air Act's extensive references to regulation of EGU emissions, the FPA's emergency provision establishes that Congress was aware of possible tensions between air regulation and electric service, and yet short of wartime or emergencies intended for environmental regulation to proceed.

C. The Broader Statutory Context Bolsters EPA's Clear Authority to Regulate Air Pollution from EGUs.

Long before amending section 202(c) of the FPA in 2015, Congress had addressed the relationship between federal environmental and energy regulation. Particularly instructive are the energy and air quality laws enacted by Congress during the energy crisis of the late 1970s. Those statutes establish that Congress recognized the different aims of energy and environmental legislation and the importance of protecting the environment even during energy shortages.

Amid heightened concerns of "an increasing shortage of nonrenewable energy resources" on August 4, 1977, Congress created DOE and the Commission. Pub. L. No. 95-91, 91 Stat. 565 (1977). The DOE Organization Act found that "a strong national energy program" must be "consistent with overall economic, environmental, and social goals." *Id.* § 101. The legislation required DOE to submit an annual report to Congress to demonstrate, *inter alia*, that national energy needs were being met "with due regard for the protection of the environment." *Id.* § 657.

Three days later, Congress enhanced EPA's authority to protect and improve air quality by amending the Clean Air Act. Pub. L. No. 95-95, 91 Stat. 685 (1977). This legislation created several new programs that have been used to regulate pollution from EGUs, including an interstate air pollution authority, *id.*

§ 108(a)(4), the Prevention of Significant Deterioration program, *id.* § 127, and the Regional Haze Program. *Id.* § 128.

With the energy crisis in mind, Congress directed EPA to consider energy needs when setting emission limitations and implementing air quality strategies. *See*, *e.g.*, *id.* § 109(b). Congress also authorized the President, upon a Governor's request, to suspend a state air quality plan for up to four months for an energy emergency. *Id.* § 107(a). This time-limited emergency provision parallels the narrow emergency provision under the FPA and establishes that Congress did not intend for air quality regulations generally to give way to energy concerns.

Even during an energy crisis Congress did not impose federal energy regulation on EPA and environmental law. To the contrary, Congress empowered EPA with additional authority to regulate air pollution from EGUs, and crafted emergency provisions to override that authority only temporarily and under limited circumstances. Congress recognized that air pollution rules would affect decisions to operate EGUs and signaled that, absent an emergency, energy and environmental regulators should work to accommodate the other's distinct statutory aims and missions.

D. The Commission's Longstanding Administrative Practice Respects EPA's Environmental Authority.

Against this backdrop, the Commission has long sought to harmonize Clean Air Act regulations with its FPA duties, without viewing the regulations as

encroaching upon its jurisdiction. The Cross-State Air Pollution Rule, 76 Fed. Reg. 48,207 (Aug. 8, 2011), the Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005), the Acid Rain Program, 42 U.S.C. §§ 7651-7651o, the NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27, 1998), and the Mercury and Air Toxics Standards (MATS), 77 Fed. Reg. 9,303 (Feb. 16, 2012), all regulated pollution from power plants. Compliance with the rules, including the installation of scrubbers or other controls, undoubtedly increased the cost of generating electricity, changed EGU utilization rates, and resulted in decisions to retire units while replacing them with cleaner resources. The Commission has never challenged in court EPA's authority under the Clean Air Act to promulgate these regulations.

An examination of the MATS rules illustrates how the agencies have worked together to achieve important environmental goals while minimizing potential effects on wholesale electricity markets or reliability. MATS required existing coal plants to reduce mercury, acid gases, and other toxic emissions. *See Policy Statement on the Commission's Role Regarding the Environmental Protection Agency's Mercury and Air Toxics Standard*, 139 FERC ¶ 61,131, P 2 (2012). Affected sources could seek a one-year extension of the compliance start date for reliability reasons. *Id*. EPA agreed to seek the Commission's advice on a case-by-

case basis when considering extension requests, but under MATS was not required to follow it. *Id.* at P 7.

The Commission issued a Policy Statement explaining how it would share its views with EPA on the reliability consequences of prohibiting an EGU from operating because of MATS non-compliance. *Id.* at P 1. Subsequently, the Commission found that several units were needed to maintain reliability. *See*, *e.g.*, *Commission Comments on Grand River Dam Authority's Request for EPA Administrative Order,* 151 FERC ¶ 61,027, P 7 (2015); *Commission Comments on Kansas City Board of Public Utilities' Request for EPA Administrative Order*, 149 FERC ¶ 61,138, P 7 (2014). In each instance, EPA considered the Commission's guidance and enabled the EGU's continued operation. *See*, *e.g.*, *In the Matter of: Grand River Dam Authority*, AED-CAA-113(a)-2016-0002 (2016); *In the Matter of: Board of Public Utilities of the United Government of Wyandotte/Kansas City, Kansas*, AED-CAA-113(a)-2016-0001 (2016).

The Commission's experience with MATS informed its collaboration with EPA to provide technical feedback on the CPP. The Commission held four technical conferences to study possible effects of the CPP. 80 Fed. Reg. at 64,673. EPA participated in all four conferences. *Id.* at 64,707. Commission staff worked with EPA, and senior EPA officials met with each member of the Commission on more than one occasion. *Id*.

On May 15, 2015, the Commission sent a letter to EPA suggesting that EPA's final rule should build in adequate time and flexibility. Letter from FERC Chair Norman C. Bay and Commissioners Cheryl A. LaFleur, Colette D. Honorable, Philip D. Moeller, and Tony Clark to EPA Acting Administrator Janet G. McCabe, at 1, May 15, 2015. The Commission offered to help the EPA develop a reliability safety valve and to work with EPA staff to provide reliability monitoring and assistance. *Id.* at 4. The Commission recognized that "state authority to propose plans for compliance with the federal Clean Air Act does not depend on, or require, Commission approval." *Id.* at 3. At no point did the Commission's letter allege that the CPP encroached upon its jurisdiction.

EPA reviewed the Commission's comments and responded by creating a safety valve, pushing back the initial compliance start date for two years to 2022, and forming an interagency group with the Commission and DOE to coordinate reliability assurance efforts. 80 Fed. Reg. at 64,671. In short, the record demonstrates the way in which the Commission respected EPA's authority under the Clean Air Act, while leveraging the Commission's expertise to safeguard grid reliability.

E. The Commission Has Ruled that It Lacks Jurisdiction Over the Environmental Attributes of Generation Not Directly Related to the Wholesale Sale of Electricity in Interstate Commerce.

The Commission has avoided direct regulation of the environmental aspects of electricity generation. For instance, the Commission has disclaimed authority over emissions allowances that are unbundled from the wholesale sale of electricity in interstate commerce. The Commission has reasoned that "just as a sale or transfer of fuel supplies by a public utility is not subject to direct Commission review under section 205 when the sale or transfer occurs independent of a sale of electric energy in interstate commerce, . . . a sale or transfer of emissions allowances does not constitute a sale of electric energy for resale." *Edison Elec. Inst.*, 69 FERC ¶ 61,344, 1994 WL 701306, at *3 (1994).

Similarly, the Commission has disclaimed authority over renewable energy credits because they are state-created and state-issued instruments that do "not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce." *WSPP Inc.*, 139 FERC ¶ 61,061, P 21 (2012). The Commission noted that an "unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity." *Id*. at P 24. Therefore, the Commission has not asserted jurisdiction over the

environmental attributes of generation. This is precisely where EPA's authority lies.

II. The CPP Did Not Infringe on State Authority.

Just as the CPP did not intrude upon Commission authority, it did not intrude upon that of the States. Under the FPA, the Commission is charged with ensuring just and reasonable rates. But in carrying out this obligation "[t]he *Commission* . . . shall not have jurisdiction . . . over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1) (emphasis added). The Repeal argues that because the Commission cannot direct or encourage generation, *a fortiori*, EPA cannot either. 84 Fed. Reg. at 32,530. This argument again conflates the mandates of the FPA and Clean Air Act. The text of the FPA limits the Commission's jurisdiction in certain matters reserved to the States but cannot be read to restrict other federal agencies from regulating under their own statutory authorities. EPA's mission under the Clean Air Act is not the same as the Commission's, and constraints on the Commission's authority over wholesale markets are beside the point.

Moreover, the CPP did not seek to regulate generation of electricity or direct policy choices about generation; rather, it set emission limitations that took into account the availability of cleaner generation resources. In doing so, the CPP tracks the cooperative federalism structure of the Clean Air Act. EPA sets

emission guidelines for existing sources of pollution, based on its determination of the Best System of Emission Reduction. 42 U.S.C. § 7411(d). States then establish enforceable standards of performance on the covered sources in their jurisdiction and determine how sources will demonstrate compliance. *Id.* at § 7411(d)(1).

The Repeal appears to argue that the mere use of generation shifting in the BSER is problematic. Whether the BSER can be based on generation shifting is a question for the Clean Air Act, not the FPA. However, the CPP afforded States broad flexibility to implement programs that reflected local needs and interests. States were not required to rely solely on the generation shifting strategies comprising the BSER "or even at all." 80 Fed. Reg. at 64,723. If they wished, States could retain existing coal units and require installation of carbon capture and sequestration equipment, a step taken by the Wyoming legislature in 2020. *See* Andrew Graham, *Coal, Land, Workers and Education: 2020 Budget Session Wrapped*, Wyofile, Mar. 17, 2020. States could direct conversion of coal units to fire natural gas. 80 Fed. Reg. at 64,756. States could also craft trading approaches, through which EGUs could purchase emission rate credits or allowances and continue operating. *See, e.g., id.* at 64,836.

In any event, EPA was acting under its Clean Air Act authority, not the Commission's authority under the FPA. The CPP's aim and target was reducing

carbon emissions, not setting wholesale rates. And the plain language of the FPA that limits the Commission's authority over States – i.e., the reservation for generation – does not apply to EPA. Consistent with previous Clean Air Act standards, the CPP would certainly have influenced state regulators, utilities, and merchant generators in their decisions to run, retire, or build EGUs. This is not prohibited under the FPA, and *amici* who served as state utility regulators have ample experience integrating federal and state air regulations with the operation of generation in a State.

III. EPA Correctly Identified Important Electricity Sector Trends When Establishing the Best System of Emission Reduction.

Not only did the CPP not encroach on Commission or state authority, but EPA correctly identified electricity sector trends that have been driving a profound energy transition. Economic forces, state and federal public policy, and consumer preferences have resulted in exactly the type of cost-effective generation shifting that EPA determined was the Best System of Emission Reduction for the power sector. This transition has occurred without the CPP having been implemented.

In October 2015, EPA projected that carbon emissions would drop as combined cycle natural gas EGUs and renewable resources made up a growing market share of power generation. 80 Fed. Reg. at 64,725. The CPP noted:

> It is evident that, in the recent past, coal-fired electricity generation has been reduced, and projected future trends are for continued reduction. By the same token, lower-emitting

> NGCC [Natural Gas Combined Cycle] generation and renewable generation have increased, and projected future trends are for continued increases.

Id. The CPP's emission guidelines built on the projections to target a 32 percent decrease in power sector carbon emissions from 2005 levels by 2030. *Id*. at 64,665.

Two years later, in 2017, the Proposed Repeal raised concerns that the CPP "threaten[s] to impose massive costs on the power sector and consumers" and harm the "national interest in affordable, reliable electricity." 82 Fed. Reg. at 48,038. Yet in that very year carbon emissions from the power sector fell 28 percent below 2005 levels. *See* U.S. Energy Information Administration, *Monthly Energy Review (March 2020)* at Table 11.6, https://www.eia.gov/totalenergy/data/monthly/pdf/mer.pdf. By the end of 2019, the United States had, at a national level, achieved emissions reductions equal to those that the States were projected to achieve under the CPP.[2]

Those reductions resulted from a changing generation mix. When the CPP was issued in 2015, American electricity was 33 percent natural gas, 33 percent coal, 19 percent nuclear, 13 percent renewables, and 1 percent petroleum. *See*

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[2] *Id*. According to Table 11.6, the electric power sector emitted 2416 million metric tons of carbon emissions in 2005, 1743 million metric tons in 2017, and 1620 million metric tons in 2019. Thus, emissions fell 28 percent in 2017 and 33 percent in 2019 from 2005 levels.

NREL, *Electricity Generation Baseline Report 10 (2017)*, https://www.nrel.gov/docs/fy17osti/67645.pdf. By 2019, the generation mix was 38.4 percent natural gas, 23.5 percent coal, 19.7 percent nuclear, and 17.5 renewable energy. *See* U.S. Energy Information Administration, *Frequently Asked Questions: What is U.S. Electricity Generation by Source?* (Feb. 27, 2020), https://www.eia.gov/tools/faqs/faq.php?id=427&t=3. Moreover, for the first time, renewable capacity exceeded coal capacity on the grid. FERC, *Office of Energy Projects Infrastructure Update for May 2019*, https://www.ferc.gov/legal/staff-reports/2019/may-energy-infrastructure.pdf. According to the well-known annual Lazard study on the levelized cost of energy, on-shore wind and solar resources are cheaper than coal and natural gas generation on an unsubsidized basis. *See Lazard's Levelized Cost of Energy Analysis – Version 13.0* 7 (Nov. 2019), https://www.lazard.com/media/451086/lazards-levelized-cost-of-energy-version-130-vf.pdf. The rapid shift in generation suggests that the emission guidelines were, if anything, conservative.

Perhaps for these reasons, the Repeal abandons the Proposed Repeal's alarmist views and grudgingly acknowledges that "[m]arket-based forces have already led to significant generation shifting in the power sector." 84 Fed. Reg. at 32,532. This passing acknowledgement, however, fails to take into account the

full measure of the transition, as well as the fact that EPA correctly identified and harnessed electricity sector trends in setting emission guidelines for existing EGUs.

The Commission, the North American Electric Reliability Corporation (NERC), regional grid operators, and state public utility commissions have managed this rapid energy transition while maintaining reliable and affordable wholesale electricity. NERC has found that "[y]ear-over-year performance measures show generally positive trends in terms of generation, transmission, and protection and control performance." *See* NERC, *State of Reliability 2019*, at viii, https://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/NERC_SOR_2019.pdf. In rejecting a DOE proposed rulemaking to subsidize coal and nuclear plants, the Commission noted that "extensive comments submitted by the RTOs/ISOs [Regional Transmission Organizations/Independent System Operators] do not point to any past or planned generator retirements that may be a threat to grid resilience." *See Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures,* 162 FERC ¶ 61,102, at P 15 (2018).

In fact, Regional Transmission Organizations and Independent System Operators have been able to reliably integrate ever higher amounts of renewable energy. On April 20, 2019, the California ISO set a record by serving 78 percent of demand with renewable energy. *See* CAISO, *Key Statistics* 1, Dec. 2019,

http://www.caiso.com/Documents/MonthlyStats-Nov2019.pdf. The Southwest Power Pool set its own record, meeting 76.94 percent of demand with renewable energy on October 18, 2019. *See* Southwest Power Pool, *SPP Set Several New Records* (Oct. 22, 2019), https://twitter.com/SPPorg/status/1186680714927968273.

Meanwhile, wholesale electric prices fell 15 to 30 percent in 2019 in every region of the country except Texas. *See* U.S. Energy Information Administration, *Wholesale Electricity Prices Were Generally Lower in 2019, Except in Texas* (Jan. 10, 2020), https://www.eia.gov/todayinenergy/detail.php?id=42456. Clearly, federal and state energy regulators, utilities, and grid operators were more than up to the task of managing any generation shifting that would have occurred under the CPP.

State policies have played a strong role in the on-going decarbonization of the power industry. The CPP's goals complemented and facilitated these policies. Twenty-nine States and the District of Columbia have Renewable Portfolio Standards; eight States have Renewable Portfolio Goals. *See* U.S. Energy Information Administration, *Updated Renewable Portfolio Standards Will Lead to More Renewable Electricity Generation* (Feb. 27, 2019), https://www.eia.gov/todayinenergy/detail.php?id=38492. States including California, Hawaii, New Jersey, Connecticut, Virginia, Wisconsin, Colorado, New York, Maine, Nevada, Washington, and New Mexico have goals to source their electricity from 100

percent clean energy by mid-century. *See* Lori Bird and Tyler Clevenger, *2019 Was a Watershed Year for Clean Energy Commitments from U.S. States and Utilities* (Dec. 20, 2019), https://www.wri.org/blog/2019/12/2019-was-watershed-year-clean-energy-commitments-us-states-and-utilities. An increasing number of electric utilities have also announced plans to provide 100 percent clean energy or net-zero emissions by mid-century. *Id.*

At the federal level, the production tax credit (PTC) and investment tax credit (ITC) have incentivized the development of renewable resources and promoted generation shifting. Moreover, the Commission has long promoted the development of competitive wholesale markets and efficient price formation. As demand response and energy storage have emerged, the Commission has acted to enable their participation in wholesale markets. *See Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 (2011); *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,127 (2018).

All of this highlights the fact that the EPA correctly identified and relied upon important market and policy trends in establishing the CPP's Best System of Emission Reduction. The passage of time has demonstrated that the rule's emission guidelines were based on reasonable, albeit conservative, projections of

the potential for generation shifting to achieve cost-effective air pollution reductions.

CONCLUSION

For the foregoing reasons, the Court should conclude that the CPP did not infringe upon the authority of the Commission or the States and remand the Repeal for further action.

Respectfully submitted,

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April 24, 2020

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing format order dated January 31, 2020 (Doc. No. 1826631). According to the count of Microsoft Word, this brief contains 5,869 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

/s/ Katherine Konschnik
KATHERINE KONSCHNIK

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which served a copy of the document on all counsel of record in the case.

/s/ Katherine Konschnik
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