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Via First Class Mail and Electronic Mail

Nick Abraham
Legislative Clerk
House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing on “EPA’s Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues,” Responses to Additional Questions for the Record

Dear Mr. Abraham:

Pursuant to the April 8, 2015 request of the Honorable Ed Whitfield, Chairman of the Subcommittee on Energy and Power for the Committee on Energy and Commerce, enclosed please find my responses to the additional questions for the record.

I truly am honored to have been asked to testify before the Subcommittee on this important topic. Please let me know if there is anything further that you need.

Sincerely,

Allison D. Wood

Responses to Additional Questions for the Record

The Honorable Ed Whitfield

- 1. With respect to EPA's section 111(d) for existing fossil fuel-fired electric utility generating units, please describe the procedure and timing for States and other affected parties to file legal challenges to a final rule, and please describe the litigation and appeals process for such legal challenges.**

Under section 307(b)(1) of the Clean Air Act (42 U.S.C. § 7607(b)(1)), petitions for review challenging a final section 111(d) rule must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days after publication of the final rule in the Federal Register. Parties also have the option of filing a petition for reconsideration with EPA but the filing of such a petition does not extend the time period for filing a petition for review in the D.C. Circuit, and it does not postpone the effectiveness of the rule.

After the 60-day deadline for filing petitions for review has passed, the court will consolidate all of the petitions for review challenging the rule into a single proceeding. There will be a period of time during which preliminary motions may be filed, such as motions to dismiss, dispositive motions, or motions for a stay. Unless a motion for a stay is filed and granted (which is extremely rare), the rule will remain in effect during the pendency of the litigation.

In complicated cases involving multiple parties (which will certainly be the case with regard to any final section 111(d) rule), the court will usually ask the parties to try to agree on a format and schedule for briefing. If the parties do not agree, competing motions may be filed. The court will then set a briefing schedule, and oral argument will typically be heard a month or two after the completion of briefing. The court generally issues its opinion within three to four months after oral argument. This entire process from the filing of the petition for review until the issuance of the opinion by the court typically takes about two years.

Once the court issues its opinion, the parties have the option of filing a petition for rehearing seeking to have the three judge panel reconsider its decision and/or to file a petition for rehearing en banc seeking to have all of the judges in the D.C. Circuit reconsider the case. The D.C. Circuit does not have to grant petitions for rehearing and may deny them without even asking for a response from the other parties.

The parties also have the option of filing a petition for a writ of certiorari with the U.S. Supreme Court asking that Court to review the D.C. Circuit's decision. This option may be exercised regardless of whether a petition for rehearing was filed with the D.C. Circuit. A petition for a writ of certiorari must be filed within 90 days of the D.C. Circuit's entry of judgment in the case (entered the same day the opinion is issued) or within 90 days of the disposition by the D.C. Circuit of any petitions for rehearing that might have been filed. The Supreme Court is not required to hear the appeal (i.e., grant the petition for a writ of certiorari) and may deny the petition without any explanation.

2. For EPA's section 111(d) rule for existing fossil fuel-fired electric generating units, approximately how long do you estimate that it would take courts to complete judicial review of the legal challenges to a final rule?

I would expect the initial litigation in the D.C. Circuit to take approximately two years from the time the petition for review is filed starting the case until the court issues its opinion. If any of the parties then decided to file a petition for rehearing, which often happens in these types of cases, that could add another six months. Thus, the total time in the initial litigation in the D.C. Circuit would be between two and two and a half years.

If any of the parties then sought review by the Supreme Court, it would take approximately six months for the petition for a writ of certiorari to be briefed and for the Court to decide whether to take the case. If the Supreme Court decided not to take the case, that would be the end of the litigation. In this event, the total time for the litigation would be approximately three years. On the other hand, if the Supreme Court did decide to take the case, that would add approximately another eight months until the Supreme Court issued its decision in the case, bringing the total amount of time to approximately three years and eight months.

In the event the Supreme Court takes the case, however, it is possible that the Supreme Court's decision would not be the end of the litigation but that the case would need to return to the D.C. Circuit for further action. This happened in two recent Supreme Court cases involving EPA Clean Air Act rules: *Utility Air Regulatory Group v. EPA* (involving EPA's greenhouse gas rules for the prevention of significant deterioration and Title V permitting programs) and *EPA v. EME Homer City Generation* (involving EPA's Cross-State Air Pollution Rule). It took 10 months for the D.C. Circuit to resolve the remand issues in *Utility Air Regulatory Group v. EPA*, and it has been a year since the Supreme Court remanded *EPA v. EME Homer City Generation*, and the D.C. Circuit has not yet resolved that case, although a decision is expected soon. To use the *Utility Air Regulatory Group* case as an example, it took four years and ten months for that case to be fully resolved from the time the petition for review was initially filed in the D.C. Circuit until the resolution of the remand issues by the D.C. Circuit after the Supreme Court's decision in the case.