

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN NURSES ASSOCIATION, )  
*et al.*, )  
  
Plaintiffs, )  
  
v. )  
  
LISA P. JACKSON, Administrator of )  
The United States Environmental )  
Protection Agency, *et al.* )  
  
Defendants, )  
  
UTILITY AIR REGULATORY GROUP, )  
  
Defendant-Intervenor )

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Civ. No. 1:08-CV-02198-RMC

**BRIEF OF THE STATES OF MICHIGAN, ALABAMA, ALASKA, ARIZONA,  
ARKANSAS, COLORADO, FLORIDA, GEORGIA, INDIANA, KANSAS,  
COMMONWEALTH OF KENTUCKY, LOUISIANA, MISSISSIPPI,  
NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH  
DAKOTA, TENNESSEE, TEXAS, UTAH, COMMONWEALTH OF VIRGINIA,  
WEST VIRGINIA, AND WYOMING, TERRY E. BRANSTAD, GOVERNOR OF  
THE STATE OF IOWA, ON BEHALF OF THE PEOPLE OF IOWA, AND THE  
TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF  
DEFENDANT-INTERVENOR UTILITY AIR REGULATORY GROUP'S  
MOTION FOR EQUITABLE RELIEF FROM JUDGMENT OR ORDER  
PURSUANT TO FED. R. CIV. P 60(B)(5)**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae*, the States of Michigan, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Commonwealth of Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Commonwealth of Virginia, West Virginia, and Wyoming, Terry E. Branstad, Governor of the State of Iowa, on behalf of the People of Iowa, and the Territory of Guam, (*amici curiae* States), have direct and substantial interests in the motion before this Court requesting that the United States Environmental Protection Agency (EPA) be granted additional time to promulgate final emission standards for coal- and oil-fired electric utility steam generating units (EGUs). The *amici curiae* States are responsible for: (i) issuing air permits to coal- and oil-fired EGUs under state laws and the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.*; (ii) regulating and ensuring the availability of sufficient electric power within their borders; and (iii) ensuring the health, welfare, and economic well-being of their citizens, all of which are at least in part dependent on the availability of reliable and affordable electric power.

Reflecting these substantial interests, many of the *amici curiae* States also submitted comments to EPA on the proposed EGU maximum achievable control technology (MACT) rule identifying their concerns about the rule's potential impact on their citizens and economies.

## INTRODUCTION AND SUMMARY OF ARGUMENT

EPA is insisting on rushing ahead with a rule that will have a far-reaching impact, without adequately considering the serious concerns and questions raised by states and other interested parties in the rulemaking process. Most notably, the rule under consideration has the potential to undermine significantly the reliability of our Nation's electrical supply and significantly increase the cost of electricity to the consumer. A rule of this magnitude should not be promulgated in such a haphazard fashion, which will only increase the likelihood of further challenges and delays. No one gains from that, and a more reasonable timeline for decision can prevent it.

The only issue before the Court is the deadline for EPA's decision on what standards should be established for emissions of "hazardous air pollutants" from the country's electricity generating power plants. This requires the Agency to weigh considerable interests – balancing the goal of improving the Nation's air quality with maintaining the continued reliable and cost-effective delivery of electricity to its citizens.

Intervening-Defendant, the Utility Air Regulatory Group (UARG), is not asking the Court to make a decision on the proper balance ultimately to be struck by EPA. Instead UARG, and the *amici curiae* States, simply ask the Court to allow EPA to "take a step back" and provide a reasonable period of time for it to respond to the voluminous comments received in the rulemaking process, to attempt to fix serious technical flaws acknowledged by EPA, and then to more carefully consider the promulgation of a rule with such serious and far-reaching consequences.

Plaintiff environmental and public health organizations initiated this case against EPA alleging that EPA had failed to perform a nondiscretionary duty under Section 304(a)(2) of the CAA, 42 U.S.C. § 7604(a)(2), to promulgate final MACT standards for hazardous air pollutants from coal- and oil-fired EGUs by the statutorily-mandated deadline. According to Plaintiffs, EPA is required to establish these standards (the EGU MACT) under CAA Section 112(d), 42 U.S.C. § 7412(d). After UARG, representing the utility industry, intervened as a defendant, Plaintiffs and EPA proposed to resolve Plaintiffs' claims by entering into a Consent Decree that required EPA to sign a notice of proposed rulemaking for the EGU MACT by March 16, 2011, and a notice of final rulemaking by November 16, 2011. But the Consent Decree expressly allowed EPA to request more time to complete the rulemaking if it was needed. Over UARG's objections that the Consent Decree provided too little time for EPA to properly consider the technically complex and costly regulatory decisions required, this Court approved the Consent Decree in its Memorandum Opinion dated April 15, 2010. 2010 U.S. Dist. LEXIS 37634; 2010 WL 1506913.

The proposed EGU MACT rule was published in the Federal Register on May 3, 2011, 76 Fed. Reg. 24,976, and provided a public comment period ending on July 5, 2011. EPA subsequently extended the public comment period to August 4, 2011. 76 Fed. Reg. 38,590 (July 1, 2011). This schedule allows only 104

days for EPA to consider and respond to the over 20,000 public comments received before publishing the final EGU MACT rule on November 16, 2011.<sup>1</sup>

Attorneys General, public utility commissions, and environmental agencies from the *amici curiae* States submitted comments to EPA on the proposed EGU MACT rule. These comments reflect the *amici curiae* States' significant concerns that EPA is needlessly rushing forward with a rule that will have potentially serious consequences – impacting the reliability of their electricity supply and unnecessarily increasing costs to their businesses and citizens, who will ultimately pay for this regulation. The vast majority of these comments from the states and state agencies asked EPA to delay or rescind the proposed EGU MACT rule.<sup>2</sup> Yet EPA appears intent on rushing ahead without taking the time needed for meaningful consideration of these concerns.

On October 7, 2011, UARG filed its Motion asking this Court to re-open the Consent Decree to extend the deadline for EPA to publish the final EGU MACT rule for one year, i.e., until November 16, 2012. The *amici curiae* States fully support this request.

The Consent Decree's current November 16, 2011 deadline for promulgation of the final EGU MACT rule provides too little time for EPA to meaningfully analyze and address thousands of comments, including the *amici curiae* States'

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<sup>1</sup><http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR+PS;rpp=10;po=0;D=EPA-HQ-OAR-2009-0234>.

<sup>2</sup> Twenty-nine of the 36 states that submitted comments asked the EPA either to delay the promulgation of the proposed rule or to withdraw the proposed EGU MACT rule altogether.

comments, on the proposed EGU MACT rule. Extension of this deadline by one year should allow EPA sufficient time to fully and properly: (i) address the threat to a reliable electricity supply posed by the proposed EGU MACT rule; (ii) assess the economic impact of the proposed EGU MACT rule; and (iii) comply with the requirement of Executive Order No. 13563 to take into account the costs of cumulative EPA regulations on electricity generation.

## ARGUMENT

### **I. The Consent Decree's November 16, 2011 deadline provides insufficient time for EPA to meaningfully analyze and address public comments on the proposed EGU MACT rule.**

The 104 days between the close of the public comment period on August 4, 2011 and EPA's self-imposed deadline of November 16, 2011 to publish the final EGU MACT rule is simply too short for EPA to conduct any sort of meaningful analysis of the comments it received from regulated industry, states, and the public, and to determine whether and what sort of revisions to the proposed rule are warranted in light of such comments.

Representatives of approximately 36 states and territories filed comments with EPA collectively identifying substantial technical, practical, and legal problems with the proposed rule. While many states expressed opposition to one or more components of the proposed rule, even those states expressing overall support for the proposed rule suggested technical revisions.<sup>3</sup>

In major CAA rulemakings such as the EGU MACT, EPA routinely provides itself substantially more time between the publication of proposed and final rules to consider and respond to public comments than the schedule EPA agreed to for the

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<sup>3</sup> See comments of Colorado, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17719 (Aug. 4, 2011), Connecticut, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-16513 (July 12, 2011); Delaware, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17818 (Aug. 2, 2011); Massachusetts, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18039 (July 29, 2011); New Jersey, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18444 (Aug. 4, 2011); New York, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17796 (Aug. 4, 2011); and Tennessee, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17848 (Aug. 2, 2011).



EGU MACT rulemaking. For example, in the CAA rulemaking regarding the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, EPA published the final rule approximately one year after publishing the proposed rule. 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed rule); 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final rule). The National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Portland Cement Manufacturing Industry was proposed on May 6, 2009 and promulgated on September 9, 2010 – resulting in a span of 16 months between proposal and promulgation. 74 Fed. Reg. 21,136 (May 6, 2009); 75 Fed. Reg. 54,970 (Sept. 9, 2010). This example is particularly notable because EPA originally committed in a settlement agreement to propose the rule by March 31, 2009 and to promulgate it by March 31, 2010. *See* 74 Fed. Reg. 4433 (Jan. 26, 2009). Even this one-year schedule proved overly ambitious.

Other similar examples include the NESHAP for chemical recovery combustion sources (proposed at 63 Fed. Reg. 18755 (Apr. 15, 1998) and promulgated over two and one-half years later at 66 Fed. Reg. 3180 (Jan. 12, 2001)) and the NESHAP for reciprocating internal combustion engines (with the first phase proposed at 67 Fed. Reg. 77,830 (Dec. 19, 2002) and promulgated at 69 Fed. Reg. 33,474 (June 15, 2004) – a gap of one and one-half years – and the second phase proposed at 71 Fed. Reg. 33,804 (June 12, 2006) and promulgated at 73 Fed. Reg. 3568 (June 18, 2008), resulting in a two year gap). These examples clearly show that the EGU MACT schedule is unreasonably compressed.

EPA has previously recognized the need for additional time under similar circumstances. In the Industrial, Commercial, and Institutional Boilers and Process Heaters CAA Section 112 rulemaking for hazardous air pollutant emissions (the “Boiler MACT”), EPA itself recognized that substantial additional time was needed to consider and respond to public comments regarding EPA’s proposed rule. The Court’s order for the Boiler MACT initially required EPA to promulgate a final rule by December 15, 2007. EPA subsequently sought and received several extensions from the Court.

At the time EPA published the proposed Boiler MACT rule on June 6, 2010 (75 Fed. Reg. 32,006), the order required EPA to promulgate the final Boiler MACT rule by January 16, 2011. *See Sierra Club v. Jackson*, Case No. 1:01-cv-01537-PLF, EPA’s Memorandum In Support Of Motion To Amend Order Of March 31, 2006, Doc. No. 136-1 at 9 (attached as Exhibit 1). EPA recognized that the approximately seven months this allowed for EPA to finalize the Boiler MACT rule after its proposal would be insufficient for EPA to take into account and carefully consider the numerous and technical comments received on the proposed rule, as well as provide an opportunity for additional public comment on aspects of the rule that had changed. Thus, EPA sought an extension of over 15 months to further consider the already-received comments and re-propose the rule for additional public comment.

EPA explained its reasons for the extension as follows:

Based on its initial review of the significant comments, EPA’s preliminary assessment is that the comments may materially affect

important decisions relating to source categorizations and coverage for the final emission standards. As explained more fully below, ***EPA believes that the purpose of section 112(c)(6) and the public interest will be best served if the Agency's deadline in Paragraph 3 is extended*** from January 16, 2011, to April 13, 2012, so that EPA can re-propose the rules for further public comment to ensure that the final rules are logical outgrowths of the proposals. ... ***The requested extension will also provide EPA the opportunity to respond fully to all of the significant comments received from the public on the proposed emission standards. These steps would significantly bolster the strength of the final rules and would enable the Agency to obtain additional input from the public*** on [the Boiler MACT and related rules].

Exhibit 1 at 2 - 3 (citations omitted, emphasis added).

EPA further emphasized that an extension of more than 15 months was warranted given the far-reaching scope of the proposed rule and the substantial costs involved:

As demonstrated by the 4,800 comments received, there is a strong public interest in the outcome of these rulemakings. ***The interests of public policy require that EPA proceed with due care in these circumstances.***

In this case, EPA's preliminary assessment is that the comments may materially affect important decisions relating to source categorizations and coverage for the final emission standards. If EPA re-proposes the rules, the interested parties will have the opportunity to identify and propose corrections to any weaknesses in the revisions that EPA is contemplating. ***This process is particularly valuable in complex and far-reaching rulemakings such as these standards. In light of the anticipated public health benefits and the significant costs associated with the implementation of the standards at the many facilities that will be regulated, it is important that EPA be able to formulate the final standards based on careful consideration of all relevant data and upon full consideration of comments on the anticipated changes to the proposed standards.***

*Id.* at 18 – 19 (emphasis added).

Although the Court did not grant EPA the extension it sought and granted only a one-month extension, EPA nevertheless decided to obtain essentially the same result through the regulatory process and announced that it would reconsider certain aspects of the final Boiler MACT rule, 76 Fed. Reg. 15,266 (Mar. 21, 2011), and issued a stay of the rule pending completion of its reconsideration, 76 Fed. Reg. 28,662 (May 18, 2011).<sup>4</sup>

EPA's reasons for seeking the extension in the Boiler MACT rulemaking equally apply to the EGU MACT rulemaking. The same considerations are applicable here, where there were numerous serious, substantive objections raised against the proposed rule. Moreover, the fact that EPA has taken upon itself to stay and reconsider the Boiler MACT rule notwithstanding the Court's refusal to grant the time extension sought by EPA, shows the importance EPA should place in not rushing to judgment in issuing the EGU MACT rule. That is, just as EPA argued to the Court in connection with the Boiler MACT rule, EPA needs to proceed with due care and formulate the final EGU MACT rule only after taking the time to carefully consider all relevant data and comments.<sup>5</sup>

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<sup>4</sup> There are important differences between the Boiler MACT rulemaking and the EGU MACT rulemaking. First, the schedule in the Boiler MACT rulemaking did not result from a consent agreement between the parties; it was by court order. Second, the court had already granted a number of prior extensions, totaling more than three years.

<sup>5</sup> EPA's authority to stay the Boiler MACT rule pending reconsideration, as opposed to addressing comments during the rulemaking, is now subject to challenge in the district court. See *Sierra Club v. Jackson*, No. 11-1278 (PLF) (D.C.D.C.), Opinion and Order of Sept. 27, 2011.

EPA's failure to seek an extension in this case merely reflects the rush to judgment preordained by Plaintiffs and EPA in the Consent Decree and EPA's apparent desire to proceed hastily rather than deliberately. EPA appears to believe it must publish a final rule only 104 days after the close of the public comment period even if it means not adequately considering cost and energy requirements, including reliability impacts, all of which EPA must analyze under Sections 112(d)(2) and 112(n)(1)(A) of the CAA, 42 USC §§ 7412(d)(2) and (n)(1)(A). Whether EPA should have anticipated the number and extent of comments it would receive before agreeing to the current deadline, it is apparent now that EPA needs additional time if it is to fulfill its statutory obligations. The interests of our states and the Nation in affordable and reliable electricity should have priority over the Consent Decree deadline in these circumstances.

Therefore, the Court should extend the November 16, 2011 deadline under the Consent Decree to November 16, 2012 so that EPA has time to properly consider and respond to the numerous substantive public comments on the proposed EGU MACT rule.

**II. EPA needs to take additional time to fully and properly address the threat to a reliable electricity supply posed by the proposed EGU MACT rule.**

As discussed by UARG in its Motion, state public utility commissions, the North American Electric Reliability Corporation, and utility planning authorities in regional transmission organizations (RTOs) have publicly stated that the proposed EGU MACT rule will seriously threaten the reliability of local and regional

electricity systems. *See* UARG’s Motion at 17-24. Moreover, as also discussed in UARG’s Motion, the Federal Energy Regulatory Commission (FERC), in documents that only became publicly available after the close of the comment period, has expressed serious concerns about the proposed EGU MACT rule’s effect on the reliability of the nation’s electricity supply and about EPA’s scant consideration of reliability. *Id.* at 18-20. EPA, however, has failed to conduct in depth consultations with FERC on this issue, contrary to its commitments to do otherwise. *Id.* This is particularly irresponsible given the number of states that have expressed concern with impacts to reliability.

The following are representative of comments from the *amici curiae* States regarding the threat the proposed EGU MACT rule poses to a reliable electricity supply in their respective states:

### **Alabama**

In its comments on the proposed EGU MACT rule, the Alabama Public Service Commission emphasized “the compliance obligations and timeline associated with the proposed rule will threaten the reliability of the electric supply in Alabama with similar consequences resulting at the national level as well.” Comments of the Alabama Public Service Commission at 3, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18016 (Aug. 3, 2011). In light of the combined impact of the proposed rule and other regulations (including the Cross-State Air Pollution Rule, 76 Fed. Reg 48,208 (Aug. 8, 2011)), “EPA has not adequately addressed the impact of the proposed rule on the reliability of the electric system.” *Id.*

## **Florida**

Swift implementation of the proposed EGU MACT rule, as EPA currently has planned, is of particular concern to Florida due to its unique weather and the corresponding reliance of energy consumers on heating and cooling. Of any state, Florida has the highest number of cooling degree days and thus the greatest need for reliable cooling sources. Comments of Florida Public Service Commission at 3, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-16850 (July 15, 2011). Rapid implementation may significantly increase electric utility rates for Florida's energy consumers and adversely affect reliability. As Florida stressed in its comments, a more cautious approach should be taken to allow sufficient time for evaluating and implementing the best compliance plans, ensuring the reliability and stability of its operations, while still meeting the public health and environmental goals. *Id.* at 3-6.

## **Michigan**

Comments on the proposed EGU MACT rule filed by the Michigan Public Service Commission recognized the impacts to electricity generation and stated that broadening the availability of a one-year extension for EGU compliance with the proposed rule would aid in addressing reliability issues caused by the need for transmission upgrades and replacement of existing capacity:

- “[T]he Commission supports applying the extension to transmission upgrades necessary for reliability purposes as a result of unit retirement.”
- “We therefore recommend that EPA should include provisions in the final rule to grant utilities time extensions on a timely basis to both

install pollution control technologies and to build new capacity or make transmission upgrades to resolve any potential localized reliability problems.” [Comments of the Michigan Public Service Commission at 2-3, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17297 (July 26, 2011)].

Comments by Michigan utilities stated that compliance with the proposed EGU MACT rule will require the retirement of a significant percentage of the generating capacity in the State. For example, Consumers Energy explained that “retirements of EGUs in the State (or reductions in capacity related to fuel switches), due to the proposed EGU MACT, are on the order of hundreds, if not thousands, of [megawatts] of coal and/or oil-fired capacity.” Comments of Consumers Energy at 19-20, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17881 (Aug. 4, 2011). Similarly, DTE Energy noted that the cost to install proven technologies would lead to the closing of a number of units: “This includes the expected requirement of installing FGD [flue gas desulfurization] on nearly 2/3 of our coal-fired generating capacity. It is clearly not economical to install FGD on each of those units, leading to the conclusion that those units where it is not economical to install FGD must be retired.” Comments of DTE Energy at 3, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17790 (Aug. 4, 2011).

The retirement of so much generation could compromise electric reliability in Michigan. At the very least, electricity will become much more expensive for Michigan consumers.



## **Nebraska**

The Nebraska Public Power District commented that “the statutorily imposed three-year time frame for compliance with the rules is too short.” Instead, “the electric industry needs at a minimum, an additional two years to avoid reliability issues.” Comments of the Nebraska Public Power District at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18437 (August 1, 2011).

## **Texas**

The Public Utility Commission of Texas stated in its comments that EPA “ignored the effects of local transmission constraints when considering the impact of generating plant retirements on electric reliability.” Comments of the Public Utility Commission of Texas at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18538. This flaw caused EPA “to ignore local reliability issues and vastly understate the reliability impacts” of the EGU MACT rule and other proposed or recently adopted rules that affect EGUs, including the Cross-State Air Pollution Rule. *Id.*

Although EPA acknowledges the proposed EGU MACT rule may result in some reliability issues, it provides no substantive analysis of the issue in the Federal Register preamble to the proposed rule. Instead, EPA simply assumes that any problems will correct themselves through unnamed “existing tools and processes.” 76 Fed. Reg. at 25,054, and maintains it will “work with” utilities in some undescribed fashion if electric supply reliability problems arise:

To the extent that isolated issues remain concerning the availability of electricity in some more remote parts of the country, we believe that EPA has the ability to work with companies making good faith efforts

to comply with the standards so that consumers in those areas are not adversely affected.

76 Fed. Reg. at 24,979.

Moreover, EPA failed to consider reliability with respect to nearly every relevant aspect of its EGU MACT rulemaking, such as sub-categorization of units and setting “beyond-the-floor” emission standards. *See* 42 U.S.C. §§ 112(c)(1) and (d)(2). Even if EPA sought to change course, it cannot now correct this wholesale omission in its final rule without first providing supplemental notice and an additional opportunity for public comment.

An issue as critically important as the reliability of the nation’s electricity supply must be fully considered and addressed by EPA now as part of the EGU MACT rulemaking. It cannot and should not be ignored. It cannot be deferred until sometime in the future based upon a vague promise to “work with” utilities that run into reliability problems. Further, the shutdown of power plants in order to comply with the proposed EGU MACT rule likely will not be “isolated issues” nor affect only “remote parts of the country,” but will impact electric reliability in all parts of the country. The nation’s economic health and competitiveness cannot depend on EPA’s vague promise to work through the problems when they later arise.

*Amici curiae* States have a particularity strong interest in electric reliability in light of their responsibilities as sovereigns in the exercise of their traditional police powers. States bear a special responsibility for the health and welfare of their citizens, *see Jacobson v Massachusetts*, 197 U.S. 11, 25 (1905), and they rely on electricity to carry out that responsibility. Outages, whether unplanned or

rolling, impact emergency services, traffic signals, hospitals and nursing homes, and the administration and execution of all State and local services. EPA's dismissal of reliability concerns in its proposed EGU MACT rule does not measure up to the importance of reliable electric service to the vital services provided by the States. To put it plainly: when the electricity goes out in the heat of summer or cold of winter, *amici curiae* States' citizens' health and welfare is threatened, and the States' ability to help them is impaired.

Therefore, the Court should extend the November 16, 2011 deadline under the Consent Decree to November 16, 2012 so that EPA has time to properly assess and consider the proposed EGU MACT rule's impacts on electric reliability.

**III. EPA needs to take additional time to fully and properly address the closely related issue of economic impacts to business and individual rate payers.**

There can be no doubt that the proposed EGU MACT rule will impose substantial new costs on electric utilities, which will be passed along to their industrial, commercial, and residential customers. For example, the American Coalition for Clean Coal Electricity (ACCCE) predicts national electricity price increases in 2016 to average 11.5%, and to range from 12.1% to 23.5% in regions covering all or portions of 24 states due to the combined economic impact of the proposed EGU MACT rule and the Cross-State Air Pollution Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011). Comments of ACCCE at 3, App. 2 at 3, 27-28, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17799 (Aug. 4, 2011). Appendix 2 of the ACCCE

Comments shows a 20.5% electricity price increase by 2016 for Michigan alone as a result of the combined effects of the two rules. *Id.*, App. 2 at 28.

According to ACCCE, other *amici curiae* States will see similar increases in cost. For example, the combined effect of the EGU MACT rule and the Cross-State Air Pollution Rule is projected to result in electricity price increases of 23.5% in Kentucky, 14.5% in Alabama, 17.6% in Nebraska, and 12.7% in Virginia. *Id.*

Moreover, according to ACCCE the rules are expected to result in nearly 1.5 million net job-year losses nationwide by 2020. *Id.* at 3, App. 2 at 3. This includes 51,500 lost jobs in Indiana, 40,000 in Michigan, and 50,000 in Virginia. ACCCE, Net Employment Losses Due to EPA's Proposed Transport and MACT Rules (attached as Exhibit 2). Such substantial increases in electricity cost and job loss will further hinder efforts to revive our States' and the Nation's economy.

EPA does not have adequate time to consider these important impacts of its EGU MACT rule and has an obligation to do so under the CAA. *See* 42 USC §§ 7412(d)(2) and (n)(1)(A). Therefore, the Court should extend the November 16, 2011 deadline under the Consent Decree to November 16, 2012 so that EPA has the time to adequately assess the economic effects of the proposed EGU MACT rule.

**IV. EPA needs additional time to comply with the requirements of Executive Order No. 13563 to take into account the costs of cumulative EPA regulations on electricity generation.**

EPA cites and discusses the requirements of Executive Order No. (EO) 13563 several times in the Federal Register preamble for the proposed EGU MACT rule.<sup>6</sup> However, EPA never directly addresses the mandate in EO 13563 that EPA “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations.*” Executive Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (emphasis added).

EPA acknowledges that multiple EPA rulemakings will impact EGUs:

EGUs are the subject of several rulemaking efforts that either are or will soon be underway. In addition to this rulemaking proposal, concerning both hazardous air pollutants under section 112 and criteria pollutant NSPS standards under section 111, EGUs are the subject of other rulemakings, including ones under section 110(a)(2)(D) addressing the interstate transport of emissions contributing to ozone and PM air quality problems, coal combustion wastes, and the implementation of section 316(b) of the Clean Water Act (CWA). They will also soon be the subject of a rulemaking under CAA section 111 concerning emissions of greenhouse gases.

76 Fed. Reg. At 25,057; *see also id.* at 25,079.

In those instances where EPA actually acknowledges the multiple pending regulatory burdens, and discusses certain requirements of EO 13563, EPA does not specifically reference or perform the cumulative regulation cost analysis required by the Executive Order. A number of commenters emphasized their concerns about

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<sup>6</sup> 76 Fed. Reg. 24,979, 25,057, 25,078 – 79.

the combined costs on electric utilities of the proposed EGU MACT rule and other regulations that address greenhouse gases, interstate transport of emissions, coal combustion waste, and cooling water intake structures.<sup>7</sup> These are exactly the type of concerns that EO 13563 directs agencies to address, but with which EPA has failed to comply in this instance. Additional time will enable EPA to meet its obligations under EO 13563 to analyze the economic impact of the variety of rules that are being imposed on much of our Nation's power generating capacity.

Therefore, the Court should extend the November 16, 2011 deadline under the Consent Decree to November 16, 2012 so that EPA has the time to perform the cumulative regulatory burden cost analysis mandated by EO 13563.

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<sup>7</sup> See, e.g., State of Wyoming Comments at 1, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17917 (Aug. 4, 2011); Wyoming Department of Environmental Quality Comments at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17629; Public Utility Commission of Texas Comments at 4, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18538 (Aug. 4, 2011); Alabama Public Service Commission Comments at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-2278 (Aug. 3, 2011); Commonwealth of Virginia Comments at 1, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-18442 (Aug. 4, 2011); State of Iowa Comments at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17639 (Aug. 3, 2011); North Dakota Public Service Commission Comments at 2, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17842 (Aug. 3, 2011); Nebraska Attorney General Comments at 5, EPA Docket Id. No. EPA-HQ-OAR-2009-0234-17834 (Aug. 4, 2011).

## CONCLUSION

For the reasons stated above, the *amici curiae* States respectfully request that the Court grant UARG's motion and modify the Consent Decree to extend its November 16, 2011 deadline for final rule promulgation to November 16, 2012. This will allow time for EPA, as required by the CAA, to meaningfully address and analyze the public comments received on the proposed EGU MACT rule, including, but not limited to, addressing electric supply reliability concerns, costs related to this rule, which will impact consumers and businesses alike, and performing the cumulative regulatory cost analysis required by EO 13563.

Respectfully submitted,

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