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.

U.S. Environmental Protection Agency, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA IN SUPPORT OF PETITIONERS

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Disclosure Statement

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, the Municipal Electric Authority of Georgia ("MEAG") declares as follows: MEAG is an instrumentality of the State of Georgia, created as a public corporation by the Georgia General Assembly. *See* O.C.G.A. §§ 46-3-110 to -155. The statutory purpose of MEAG is to provide an "adequate, dependable, and economical" wholesale supply of electricity to certain Georgia communities. *See id.* § 46-3-125. MEAG does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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Glossary

CO2	Carbon Dioxide
CSAPR	Cross State Air Pollution Rule
EGU	Electric Utility Generating Unit
EPA	U.S. Environmental Protection Agency
MEAG	Municipal Electric Authority of Georgia
MWh	Megawatt Hour
NGCC	Natural Gas Combined Cycle
PLF	Pacific Legal Foundation
PEC	Pedernales Electric Cooperative, Inc.
Power Plan Rule / Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)

Statement of Identity, Interest and Authority of Amicus Curiae

MEAG is an instrumentality of the State of Georgia, created as a not-for-profit public corporation by the Georgia General Assembly. *See* O.C.G.A. §§ 46-3-110 to 155. The statutory purpose of MEAG is to provide an "adequate, dependable, and economical" wholesale supply of electricity to certain Georgia communities. *See id.* § 46-3-125.

The U.S. Environmental Protection Agency ("EPA") rule entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Power Plan Rule" or the "Rule") was ceremonially christened by EPA as the "Clean Power Plan – a historic and important step in reducing carbon pollution from power plants that takes real action on climate change. … It also shows the world that the United States is committed to leading global efforts to address climate change." U.S. EPA, "Fact Sheet: Overview of the Clean Power Plan," available at www.epa.gov/cleanpowerplan/clean-power-plan-existing-power-plants. Despite, or perhaps as a result of, such lofty goal, EPA's Rule will undermine MEAG's ability to perform its domestic statutory function and will unfairly burden communities bound under long-term contracts with MEAG for electricity supplied from specific electric utility generating units ("EGUs"). To comply with the Rule, MEAG's communities will be obligated to pay twice for their electricity, both under existing contracts and for the non-emitting energy resources idealized by EPA's Rule. This unfair burden

will disproportionately affect low-income and minority communities and their residents already struggling to pay utility bills. MEAG is participating in this litigation as an advocate for its communities and to help inform the Court about the direct, real world impacts of EPA's incorrect assumptions and procedural omissions in promulgating the Rule.

This Court granted MEAG's motion to participate as an amicus curiae in this matter on January 13, 2016. *See* Doc. #1593404.

Certificate of Authorship

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than MEAG or its counsel—contributed money that was intended to fund the preparing or submitting this brief.

Certificate for Separate Brief

MEAG is submitting this separate brief as a government entity and because joining with the other amici in a single brief was not practicable. MEAG was formed by the Georgia legislature in 1975 as a not-for-profit public corporation and an instrumentality of the state. Under Georgia law, MEAG is a government entity. *See* O.C.G.A. § 46-3-128:

> (a) It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and that the authority is an institution of purely public charity performing an essential governmental function.
>
> (b)(1) The property of the authority is declared, and shall in all respects be considered, to be public property. Title to the authority's property shall be held by the authority only for the benefit of the public; and the use of such property pursuant to this article shall be and is declared to be for essential public and governmental purposes, that is, for the promotion of public general welfare in the matter of providing an adequate, dependable, and economical electric power supply in an effort to better the general condition of society in this state, which promotion is declared to be a public beneficence for the good of humanity and for the general improvement and happiness of society.

The requirement of joining in a single brief with other amici is not applicable to a government entity. *See* D.C. Cir. Rule 29(d).

Moreover, joining with other amici in a single brief was not practicable. Per this Court's December 17, 2015, Order, amicus curiae Philip Zoebisch already filed his amicus brief, before MEAG was an amicus curiae in this matter. Therefore, collaboration with him was not possible. Counsel for MEAG contacted counsel for

amicus curiae Pedernales Electric Cooperative, Inc. (PEC) on February 2, 2016, the day after PEC was authorized to participate as an amicus curiae in this matter. PEC's counsel represented that PEC intended to file its own separate brief because it would be addressing issues unique to it as a rural cooperative. Therefore, collaboration with PEC was also not possible. Pacific Legal Foundation (PLF) was only authorized to participate as an amicus curiae on February 13, 2016, indicating in their motion that they intended to provide "unique perspectives" in their brief. Therefore, joining with PLF in a single brief was also not practicable.

Finally, MEAG is addressing issues specific to its particular status under Georgia law. Georgia Code sections 46-3-110 through 46-3-155 set forth the complex structure by which MEAG is to operate and deliver wholesale power to its communities. These Code sections were drafted solely for and apply only to MEAG and no other entity. No other utility in the country must contemplate how to operate within both the boundaries of EPA's Power Plan Rule and these specific Georgia Code sections. Because MEAG's legal arguments are specific to it, MEAG cannot practicably combine with another entity in submitting common arguments to the Court.

Summary of Argument

The Power Plan Rule's government-mandated comprehensive restructuring of electricity generation is unprecedented, ill-conceived, and beyond EPA's authority. It is arbitrary, capricious, contrary to applicable statutes and regulations, and was promulgated without observance of procedures mandated by law. The Rule must be overturned. *See* 42 U.S.C. § 7607(d)(9).

The Rule is designed to require utilities to significantly curtail or cease their production of power from existing fossil fuel-fired EGUs and shift generation to other existing or future facilities favored by EPA in the Rule (i.e., those that do not emit carbon dioxide (CO2) like solar- and wind-power facilities). EPA's purpose is "leading global efforts to address climate change" (U.S. EPA, "Fact Sheet: Overview of the Clean Power Plan"), but such international purpose exceeds EPA's limited authority under CAA § 111(d). CAA § 111(d) only gives EPA authority to regulate "existing sources" through "technology-forcing" standards at those sources, not beyond the plant's boundaries. *See* 42 U.S.C. § 7411(a), (d); *Chevron v. NRDC*, 467 U.S. 837, 847 (1984); *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981). No court (or EPA) has ever interpreted CAA § 111(d) so broadly as to give EPA authority to require an existing source to curtail or cease production and to shift its electricity generation to non-emitting energy resources not otherwise subject to the Clean Air Act.

EPA's overreach is particularly acute for MEAG, which delivers wholesale electricity to its communities through a statutorily-mandated system of irrevocable long-term contracts between the communities and MEAG based on specific EGUs. Because the contracts are collateral for the revenue bonds used to construct, upgrade, and retrofit these EGUs (which environmental upgrades alone totaled over a half-billion dollars in recent years), the payment obligations continue irrespective of the Rule. MEAG's communities will be paying for these obligations through 2054 even when the same EGUs are precluded or curtailed from generating power under the Rule. To make up for the loss in power supply, MEAG's communities must enter into new contracts for power from those types of resources favored by EPA's Rule, while simultaneously paying for existing contracts with EGUs whose production must be curtailed or retired; in essence, paying twice for their electricity.

EPA arbitrarily and capriciously did not consider MEAG's and its communities' inability to shift generation due to long-term binding contracts, the economic waste of forced curtailment and retirement of EGUs well short of their true useful life, or the significant stranded and excess costs of the Rule to MEAG's communities. The Rule is no free ride. Shifting power generation to the types of resources favored by the Rule will cause significant costs that will be borne by rate-paying individuals. In MEAG's case, the costs of the Rule are amplified because its communities will double-pay for their electricity.

Nearly all the communities MEAG serves have higher poverty levels than the United States and Georgia averages, and many have a more than 50% minority population. EPA has failed in its Rule to identify and address, *to the greatest extent practicable*, the disproportionately high and adverse human health or environmental effects of its Rule on such low-income and minority populations. *See* Executive Order 12898 (Feb. 11, 1994). Adverse cost impacts to electricity service will cause deleterious health and environmental consequences for those individuals now barely able to pay their utility bills.

Even then, the Rule provides no guarantee against further compounding costs. Under either of the two state plan approaches, the Rule contains an unfair penalty provision obligating otherwise compliant EGUs to retroactively compensate for failures of others causing a state to miss its emissions targets. In such case, MEAG and its communities would be forced to further reduce generation at contracted EGUs and invest even more in other facilities favored by the Rule, to an extent presently unforeseeable. This penalization of innocent parties is arbitrary, capricious and beyond EPA's CAA authority. *See* 42 U.S.C. § 7413(d)(1).

EPA's discovery in a 45-year-old CAA section of newfound authority to compel momentous shifts in power generation across this country and lead the "global efforts to address climate change" is quintessential agency overreach. The Rule is in excess of and contrary to EPA's authority under the CAA, arbitrary,

capricious, and was promulgated in violation of mandatory regulatory procedures. It must be overturned.

Argument

I. Introduction

MEAG's statutory purpose is to provide "adequate, dependable, and economical" wholesale electric power to public power communities in Georgia – i.e. cities, towns and counties in the state that own and operate their own electricity distribution systems. *See* O.C.G.A. § 46-3-125. MEAG provides electricity to forty-nine Georgia public power communities representing more than 600,000 Georgia citizens.

As dictated by its governing statute, MEAG accomplishes this purpose by identifying electricity generator ownership opportunities, offering the public power communities the opportunity to participate with MEAG in such opportunities by contract, and then creating separate "projects" (each consisting of shares in one or several EGUs). *See* O.C.G.A. § 46-3-126(5)-(6). MEAG finances the projects by issuing revenue bonds collateralized with the long-term power sale contracts with the participating communities. *Id.* at (11); O.C.G.A. §§ 46-3-129; 46-3-130. Because the contracts are collateral for the bonds, they are irrevocable by law. *See* O.C.G.A. §§ 46-3-131; 46-3-146. Over the past four decades, each of MEAG's forty-nine communities has developed an individual generation portfolio with a different mix of EGUs. The contractual payments represent each community's share of the costs for the power projects in which they have elected to participate. The costs include debt service and operation and maintenance expenses, including those incurred to retrofit

the units to meet continuously more stringent federal and state environmental requirements. MEAG's current contracts with its communities extend at least through 2054.

The electricity MEAG delivered to its communities in 2014 was produced from a diverse set of resources: 48% from nuclear resources, 26% from coal EGUs, 15% from natural gas EGUs, 7% from hydroelectric power, and 4% purchased. *See* MEAG's 2014 Annual Report, available at http://www.meagpower.org/file/680c1f1b-fcf9-4d70-8460-0f0975d9be76.aspx. Between the nuclear and hydroelectric resources, 55% of the electricity MEAG delivered to its communities was completely CO2-emission free. Only 41% of the electricity was from coal or natural gas EGUs. These ratios are exceptional in the industry. The electricity MEAG delivered in 2015 had an overall emission rate of no more than 640 lbs. CO2/Megawatt hour (MWh). But the Rule does not give MEAG any credit for these forward-thinking environmental stewardship measures. The Rule will instead require MEAG to eliminate or significantly underutilize its fossil fuel-fired power plant capacity to meet the Rule's future emission limits. MEAG's communities remain obligated by statute to continue their existing contractual payments on their mix of EGUs despite the Rule.

Part of EPA's express purpose in promulgating the Rule is the curtailment of fossil-fuel EGUs in favor of non-emitting energy resources. Neither the Rule's mandate to reduce generation at fossil-fuel EGUs nor the obligation to shift

generation to other types of favored resources is within EPA's CAA authority. Under CAA § 111(d), EPA may only issue technology-oriented rules to control air pollutant emissions at regulated "sources." EPA has no CAA § 111(d) authority to regulate beyond the source boundary, as it has done with the Rule.

EPA incorrectly assumed this comprehensive generation-shifting strategy is even feasible with the current electrical supply system and the contracts of entities like MEAG. The system is not so fungible (and many rate-payers' pockets are not so deep) as to accommodate a wholesale shift in electrical generation from fossil fuel-fired EGUs to the types of resources favored under the Rule. MEAG's communities will be burdened with paying twice for their electricity, which will be a financial blow to those individuals already struggling to pay their utility bills. EPA's failure to identify and address, to the greatest extent possible, the disproportionately high and adverse human health or environmental effects of its Rule on the many low-income and minority communities MEAG supplies undermines the assumptions driving the Rule and violates EPA's procedural obligations in promulgating regulations.

Further, the Rule contains unfair penalty provisions obligating fully compliant EGUs to compensate retroactively for any failures of others causing a state to miss its emissions targets. This penalization of innocent parties contravenes the CAA and could further jeopardize MEAG's contractual arrangements with its communities.

The Rule is arbitrary and capricious, beyond EPA's CAA authority, and was promulgated without observance of the procedures required by law. This Court should vacate the Rule in its entirely.

II. Standard of Review

When a court reviews agency actions under the CAA, the court should overturn actions that are: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) [in certain cases] without observance of procedure required by law." 42 U.S.C. § 7607(d)(9).

The Rule is arbitrary, capricious, an abuse of EPA's discretion, not in accordance with applicable law, in excess of EPA's statutory jurisdiction and authority, and was promulgated without observance of the procedures required by law. The Rule calls for an unprecedented shift in the way electricity is generated in this country and in individual states. Such a wholesale restructuring calls for an added degree of judicial scrutiny.

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."

Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

The Rule has deep "economic and political significance" affecting the entire power industry and rate-paying citizens. "[H]ad Congress wished to assign" EPA such power, "it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

III. Mandatory generation-shifting exceeds EPA's authority and undermines MEAG's statutory purpose.

The Rule aims to reduce power generation at fossil fuel-fired EGUs, shift generation to non-emitting energy resources, and re-dispatch the remaining fossil EGUs to utilize more natural gas. This is beyond EPA's authority and contravenes the goals of the CAA.

Reduced generation at EGUs is not the goal of CAA § 111(d). Yet this unlawful reduced generation requirement and goal appears throughout EPA's Preamble to the Rule. *See, e.g.,* 80 Fed. Reg. at 64,725 (explaining EPA's "purpose of reducing generation from CO2-emitting generating units"); *id.* at 64,732 ("the owner/operator of an affected EGU may help itself meet its emission limit by reducing its generation. … An owner/operator may take actions to ensure that it reduces its generation. For example, it may accept a permit restriction on the amount of hours that it generates."); *id.* at 64,754 ("The owner/operator of an affected EGU can reduce its generation, thereby lowering the unit's CO2 mass emissions.").

Under the design of the Rule, as utilities reduce their generation from fossil fuel-fired EGUs, they are to replace that fossil generation with new emission-free

facilities, and re-dispatch the remaining fossil generation to use more natural gas. *See id.* at 64,728; 64,726 (emission standards were based in part on "substitution of zero-emitting generation for CO2-emitting generation. This measure involves two distinct actions: Increasing the amount of zero-emitting generation and reducing the amount of CO2-emitting generation.").

Rather than regulating power output like EPA is attempting in the Rule, CAA § 111 is fundamentally a "technology-forcing" provision. *Sierra Club v. Costle*, 657 F.2d 298, 364 (D.C. Cir. 1981). *See also NRDC v. EPA*, 822 F.2d 104, 116 (D.C. Cir. 1987) ("the term 'standard of performance' is a term of art referring to technology-based standards"). Section 111 is designed to force EGUs to *improve* their performance, not reduce their generation; to reduce their *emissions*, not their output. *See* 42 U.S.C. § 7411. EPA even concedes that "[r]educed generation by itself does not fit within our historical and current interpretation of the [CAA § 111 best system of emission reduction]. Specifically, reduced generation by itself is about changing the amount of product produced rather than producing the same product with a process that has fewer emissions." 80 Fed. Reg. at 64,780. But that is precisely what EPA has done in the Rule. It has mandated, by its Rule design, reduced generation from fossil fuel-fired units, increased generation from entirely different types of non-emitting energy resources, and re-dispatching the remaining fossil generation to use more natural gas.

CAA § 111(d) only gives EPA the power to regulate "sources" of air pollutants. *See* 42 U.S.C. § 7411(a), (d). As construed by the courts, the limits of EPA's authority

over "sources" extend at most to the plant's boundaries. *See Chevron v. NRDC*, 467 U.S. 837, 847 (1984). *See also Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 739 (6th Cir. 2012) (allowing aggregation of emissions only from *physically* adjacent facilities under common control and with the same industrial grouping). CAA § 111 calls for an even narrower definition of "source." *See ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). This Court specifically rejected EPA's attempt to apply a "bubble" concept to the definition of "source" to allow emissions at one unit to offset another unit within the same plant, because it would be "incompatible with the language of the Act and contrary to its purpose." *Id.* at 329. Even EPA has never conceived of "source" to mean areas completely beyond the plant's boundaries (defined broadly), and in the Rule, EPA boldly maintains a CAA-compliant definition of "source." *See* 80 Fed. Reg. at 64,667 ("affected sources" means "fossil fuel-fired EGUs"). As EPA partially concedes, under the CAA "fossil fuel-fired EGUs" represent the limit of EPA's authority to regulate "existing sources." But EPA goes beyond that statutory limit by setting the CO2-emission standard at a level that *requires* the construction and expansion of non-emitting energy resources. This broad reach is unprecedented under the CAA and unauthorized by the statute.

EPA attempts to justify its requirements by citing previous rules touching upon generation shifting. Critically, in none of the rules did EPA set the emission levels based on generation shifting, and none of the rules involved generation shifting to facilities with zero emissions of the relevant air pollutant. For example, in the Cross

State Air Pollution Rule (CSAPR), EPA considered generation shifting to "lower-emitting," not non-emitting units, and, even then, not as a requirement but only a possible outcome affecting its cost projections. *See* 76 Fed. Reg. 48,208, 48,279-80 (Aug. 8, 2011). EPA's calculations of CSAPR's impacts to electricity generation showed no increase in renewable energy generation, only very minimal increase in nuclear generation, and a slight increase in natural gas-fired generation. *See* U.S. EPA, "Regulatory Impact Analysis for the Final Transport Rule," Docket ID No. EPA-HQ-OAR-2009-0491 (Jun. 2011), p. 261. Compliance with CSAPR was possible through on-site modifications such as the installation of scrubbers and use of a lower sulfur coal. These formed the foundation of EPA's analysis and were the focus of CSAPR. *See* 76 Fed. Reg. at 48,279-80. After CSAPR was finalized, many EGUs then did choose to comply through the installation of scrubbers, which EPA uses to support its analysis here that, having been able to pay that cost historically, utilities should be able to bear the costs of the Rule. *See* 80 Fed. Reg. at 64,750.

The impropriety of the Rule's generation-shifting mandate is further highlighted by EPA's inexplicable decision to set existing source standards at a level more stringent than the corresponding new source performance standards. Under the Rule, the standard for existing coal-fired units is 1,305 lbs. CO2/net MWh, while the standard for new coal-fired units is 1,400 lbs. CO2/gross MWh. *See* 80 Fed. Reg. at 64,961; 80 Fed. Reg. 64,510, 64,658 (Oct. 23, 2015). The Rule standard for existing natural gas combined cycle (NGCC) units is 771 lbs. CO2/net MWh, while the

standard for new NGCC units is 1,000 lbs. CO2/gross MWh or 1,030 lbs. CO2/net MWh. *See id.*

EPA's overreach undermines and interferes with MEAG's communities' local decision-making authority and with Georgia's statute that created MEAG and established its responsibilities. By law, MEAG's communities are contractually bound to EGUs that now must cease or limit their generation under the Rule. Those contracts last through 2054 and beyond and are irrevocable by statute because they collateralize revenue bonds. The communities' payments on those contracts must continue regardless of the Rule. While still paying for such contracts, MEAG's communities will now be forced to purchase additional energy resources, double-paying for their electricity. Such an attack on the communities' local authority to determine their power supply is so outside the purposes of the CAA that the state legislators who devised the MEAG statute could never have envisioned such a result.

EPA has no authority to require such a radical shift in electric generation in this country. The Rule is beyond EPA's authority and must be overturned.

IV. EPA's assumptions underlying the Power Plan Rule are unsupportable, arbitrary and capricious.

In addition to being beyond EPA's authority, EPA's generation-shifting mandate rests on incorrect and unsupportable assumptions. "EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule." *Columbia Falls Aluminum Co. v. EPA*,

139 F.3d 914, 923 (D.C. Cir. 1998) (internal citations omitted). EPA did not meet that burden. As a result, the Rule is arbitrary and capricious and must be overturned.

A. EPA assumes all utilities have a direct and fungible path for shifting existing generation to more favored renewable energy resources. MEAG does not.

EPA assumes owners of CO2-emitting units can simply shift generation to non-emitting energy resources. Because this assumption is incorrect in general and particularly incorrect for MEAG, EPA was arbitrary and capricious in its promulgation of the Rule.

EPA explains, "[U]tilities have significant control over the types of generating capacity they develop or acquire, and over the electricity mix used to meet demand within their service territories." 80 Fed. Reg. at 64,804. Further, "all owners of affected EGUs have a direct path for replacing higher-emitting generation with RE [renewable electricity] regardless of their organizational type and regardless of whether they operate in a cost-of-service framework or in a competitive, organized market." *Id.* at 64,805. The entire foundation of the Rule is EPA's perspective that utilities have an unfettered "ability to shift generation among various EGUs." *Id.* at 64,665. This position is incorrect.

MEAG does not have unfettered ability to shift generation among various EGUs or to change the electricity mix used to meet its communities' demands. By statute, MEAG's electricity output is governed by long-term contracts with its communities. Even if MEAG's fossil-fuel EGUs' capacity is eliminated or curtailed,

MEAG's communities will remain contractually obligated for the debt and costs associated with these EGUs, including significant recent costs to add state-of-the-art pollution controls. The communities would then also be required to pay for the costs of electricity from the types of non-emitting energy resources favored by the Rule.

EPA further explains that the "system of emissions reduction" it established was based on the "set of measures that presented themselves as a result of the fact that the operations of individual affected EGUs are interdependent on and integrated with one another and with the overall electricity system." 80 Fed. Reg. at 64,728. This assumption is false. EPA concedes that nuclear units are already operating at their maximum capacity and that renewable energy units are operating to the fullest extent possible. *See id.* at 64,795. EPA acknowledges that "[f]ossil fuel-fired EGUs are … generally the units that operators use to respond to intra-day and intra-week changes in demand." *Id.* Existing renewable energy facilities have no excess capacity to compensate for the decreased generation of fossil fuel-fired EGUs.

The only way to meet the nation's energy demand and comply with the Rule is to shift generation to non-emitting energy resources favored by the Rule. EPA's analysis of whether this is possible is largely based on historic trends, with no analysis of whether utilities could sustain that pace in the future. *See* 80 Fed. Reg. at 64,807-08.

EPA's assumptions about generation-shifting do not account for long-term contracts like MEAG's or for MEAG's communities' dependence on fossil-fuel

EGUs for electricity reliability. The Rule is arbitrary and capricious and this Court should vacate the Rule.

B. EPA's flawed assumption about "typical book lives" for existing EGUs understates real useful lives and disproportionately impacts MEAG.

Under § 111(d) of the CAA, EPA must allow the states to consider the useful lives of EGUs in any state plan, and if a state does not submit a compliant plan, EPA's federal plan must consider the useful lives of EGUs. *See* 42 U.S.C. § 7411(d)(1) ("Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."); 42 U.S.C. § 7411(d)(2) ("In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.").

Because EPA miscalculated the useful lives of the relevant EGUs, EPA did not craft adequate guidelines for the states' plans. EPA's failure to correctly determine the EGUs' useful lives also resulted in an underestimate of the Rule's costs, in violation of CAA § 111(a)'s directive that a standard of performance must account for cost (discussed further in Section V below). *See* 42 U.S.C. 7411(a)(1). Therefore, EPA's actions are arbitrary and capricious and in violation of the statute.

EPA simplistically assumed EGUs have forty-year useful lives and pollution control retrofits have twenty-year lives. *See* 80 Fed. Reg. at 64,872. EPA estimated these useful lives improperly by using "typical book lives" it identified through a purported review of the financial statements of certain utility and merchant generation companies. *See id.* Two problems are immediately apparent with this method. First, "typical book life" on a financial statement does not necessarily account for the upgrades, renovations, and retrofits companies perform on their EGUs, including those that maintain fuel efficiency and unit reliability. MEAG has invested substantial sums to preserve the actual useful lives of its EGUs for the benefit of its communities.

Second, EPA misinterprets the companies' financial statements. "Book" values and cost depreciations are driven by the complex regulated utility industry and do not directly parallel the actual number of years the EGUs will be in use. EPA and the states have mandated such rigorous pollution controls for EGUs that prolonged useful life is even more critical to the economic viability of the units. MEAG alone has invested over a half billion dollars in environmental enhancements at its four coal-fired EGUs over the past fifteen years. *See* MEAG's 2014 Annual Report, p. 60, available at http://www.meagpower.org/file/680c1f1b-fcf9-4d70-8460-0f0975d9be76.aspx.

MEAG planned to utilize its fossil fuel-fired EGUs at least through the end of its contracts with its communities, i.e. through and beyond 2054. As evidenced by

these contracts, those units are nowhere near the end of their true useful lives. But by EPA's calculations, MEAG should be retiring all its coal-fired units between now and when most of the Rule's requirements take full effect. *See id.*, p. 67 (the units were all constructed between 1976 and 1984). MEAG's EGUs are usable well beyond EPA's "typical book lives" estimate.

EPA's simplistic approach to useful life is arbitrary and capricious and contravenes EPA's statutory obligation to consider this factor and accurately calculate the costs of the Rule. The Rule must be overturned.

V. EPA misapplied the definition of "Standard of Performance" by failing to meaningfully consider costs to communities and individuals, including the disproportionately harmful impact on MEAG's communities.

EPA failed to comply with its mandate under the CAA to account for the Rule's costs to communities and individuals. EPA concluded, using an inappropriately simple algorithm, that the utilities could bear the increased cost of generating power. Not only was EPA incorrect in that calculation, but EPA did not meaningfully evaluate the costs of the Rule on communities and individuals. Because EPA failed to follow the requirements of the CAA in promulgating the Rule, the Rule must be overturned as arbitrary, capricious and beyond EPA's authority.

The CAA defines the term "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction … (*taking into account*

the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) . . ." 42 U.S.C. § 7411(a)(1) (emphasis added). This definition "require[s] the Administrator to take into account the cost of achieving such reduction … [and] counter-productive environmental effects of a proposed standard." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 431 (D.C. Cir. 1973).

As explained by the Supreme Court,

> Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.

Michigan v. EPA, 135 S. Ct. 2699, 2707-08 (2015) (internal citations omitted).

EPA's cost analysis errantly concluded that because utilities have borne similar cost increases from previous regulations, utilities can again bear the costs required by the Rule. *See* 80 Fed. Reg. at 64,750 ("The fact that many of these EGUs have chosen scrubbers in preference to shutting down is evidence that scrubber costs are reasonable, and we believe that the cost of these controls can reasonably serve as a cost benchmark for comparison to the costs of this rule."). This simplistic approach defies logic. If someone can afford a new house, it does not follow that she can afford two houses. Every round of CAA regulations makes continued operation of EGUs incrementally costlier. Adequate assessment of costs requires a closer look at

the operating margins and viability of the EGUs themselves. EPA did not do that and so did not comply with the CAA § 111(a).

Even more troubling, EPA did not account for the additional cumulative costs to communities and individuals. In the regulated world of utility companies, almost all cost increases ultimately appear on customers' utility bills. For MEAG's communities, the Rule will be particularly burdensome, because 100% of the costs flow to the retail electricity customers. Not only will the communities have increased costs from the construction of new emission-free units, but they must also continue paying for the EGUs whose generation will now be curtailed or prohibited altogether.

Further, EPA failed to consider the full health and environmental impacts of the Rule. The most immediate impact to MEAG's communities will be higher electric bills, which will directly translate into some low income and minority citizens being unable to afford electricity service or to trade off some other essential expense such as healthy food or quality health care. The Rule will also cause upward pressure on the price of natural gas used for space heating in MEAG's communities. This leads to real health and environmental hazards such as reduced use of climate controls (e.g. less use of air conditioning in the hot and humid summer months experienced by MEAG's communities), and reduced use of space heating. These impacts are significant. According to EPA, fires used as an alternative home heating and cooking source account for upwards of 25% of global black carbon emissions and two million premature deaths annually. *See* U.S. EPA, *Report to Congress on Black Carbon*,

"Mitigation Approaches for Residential Heating and Cooking" (Mar. 2012), available at http://www3.epa.gov/blackcarbon/2012report/Chapter10.pdf. Domestically, residential wood burning "accounts for 44% of polycyclic organic matter (POM) emissions and 62% of the 7-polycyclic aromatic hydrocarbons (PAHs), which are classified as probable human carcinogens." *Id.*, p. 207. In additional to personal comfort impacts, safe storage of medications and other temperature-sensitive products may be affected. The elderly and infirm are particularly challenged by inadequate climate controls.

By failing to account for the economic, health and environmental harms the Rule will cause communities and individuals, EPA did not adequately consider the disadvantages of its decision as required by *Michigan v. EPA*. EPA failed to complete its statutory directive under § 111 to account for cost in setting the standard of performance under the Rule. The Rule must be vacated, because it is arbitrary, capricious and contrary to § 111 of the CAA.

VI. EPA failed to fully evaluate and address the environmental justice impacts of the Rule on MEAG's low-income and minority communities.

EPA improperly applied its mandate under Executive Order 12898 (Feb. 11, 1994) to evaluate the environmental justice impacts of its actions. Because EPA failed to follow the requisite legal procedures, its promulgation of the Rule was arbitrary, capricious and an abuse of its discretion. *See Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (holding the failure to consider

environmental justice impacts is subject to judicial review under the "arbitrary and capricious" standard); 42 U.S.C. § 7607(d)(9)(D) (court should overturn actions done "without observance of procedure required by law").

EO 12898 obligates each agency to "make environmental justice part of its mission" by "identifying and addressing" the "human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." As also required by EO 12898 and to carry out its mandate, EPA issued an environmental justice policy to govern its actions. EPA implemented the goal of ensuring that "[n]o segment of the population, regardless of race, color, national origin, or income, as a result of EPA's policies, programs, and activities, suffers disproportionately from adverse human health or environmental effects, and all people live in clean, healthy, and sustainable communities." U.S. EPA, "The EPA's Environmental Justice Strategy" (Apr. 3, 1995), available at http://www3.epa.gov/environmentaljustice/resources/policy/ej_strategy_1995.pdf.

In the Rule, EPA attempts to connect global climate change and underprivileged communities. But EPA fails to consider the burdens of significantly higher electric bills on these communities, which have real world environmental and health consequences (*see* Section V above). The weight of these impacts will fall most heavily on those low-income and minority communities least able to absorb added economic challenges. Based on data from the U.S. Census Bureau, of the forty-nine communities MEAG serves, forty-five have higher poverty levels than the United

States' average, and forty-seven of the forty-nine communities have minority population percentages greater than the United States' average.

MEAG meets the needs of its communities by supplying reliable, cost-effective electricity and has done so at an overall emission rate well below industry averages and below the Rule's standards. MEAG's communities have contracted with specific EGUs at a cost that covers the historic investments MEAG made to build and upgrade these units. To spread the expense over time for the communities, the contracts extend through and beyond 2054. The Rule will result in the closing or significant curtailment of several of these EGUs, despite the communities remaining contractually responsible for the units' costs for the next forty years. These communities will then be required to obtain their electricity from elsewhere, at an even higher marginal cost, resulting in significant increases to individuals' electric bills.

Because EPA failed to meaningfully consider environmental justice as required by EO 12898 and its own policy and guidance documents, the Rule is arbitrary and capricious and enacted in contravention of procedures required by law. It must be overturned.

VII. EPA's Rule includes "backstop" and "corrective measures" requirements that would retroactively penalize otherwise compliant EGUs for others' failures, which would unfairly impact MEAG's communities.

Under the Rule, States must choose between two plan approaches: emission standards or state measures. *See, e.g.,* 80 Fed. Reg. at 64,709. When a state fails to

achieve its emissions rate or goal under either the state measures approach or certain versions of the emission standards approach, it must impose more stringent limits on utilities to retroactively compensate for the exceedance. These limits are imposed not only on any noncompliant utilities but also on utilities that met their emission standards. Penalizing innocent parties is beyond EPA's authority under the CAA.

The Rule requires the states to put a provision in their state measures plans that imposes a "backstop" triggered automatically if the state does not meet the mandated emission standards. *See* Fed. Reg. at 64,944 (40 C.F.R. § 60.5740(a)(3)). This backstop is stricter than the state's original standards and applies retroactively. As the Rule explains, "[t]he backstop emission standards must make up for the shortfall in CO2 emission performance." 80 Fed. Reg. at 64,837. Similarly, under certain versions of the state emission standards approach, the Rule requires "corrective measures" if the state fails to meet its emissions rate or goal. *See* Fed. Reg. at 64,943 (40 C.F.R. § 60.5740(a)(2)(ii)). "These corrective measures must ensure that the … CO2 emission performance rates or CO2 emission goals are achieved by your affected EGUs, as applicable, and must achieve additional emission reductions to offset any emission performance shortfall." *Id.*

EPA looks to two provisions of the statute for this assumed retroactive penalty authority. Neither provides adequate support for this unprecedented measure. First, EPA points to the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, 57 Fed. Reg. 13,498 (Apr. 16, 1992), which required that the

"SIP must contain means . . . to track emission changes at sources and provide for corrective action if emissions reductions are not achieved according to the plan." 80 Fed. Reg. at 64,868. But, critically, in that corrective action provision, there is no retroactive requirement "to increase the stringency of the plan by an amount that somehow makes up for any shortfall in attainment from prior years; instead the revised plan must demonstrate attainment going forward." *Id.* This is a fundamental distinction with the Rule, because it does not require any compliant unit to retroactively make up for a shortfall solely caused by noncompliant units. The CAA contains no authority for imposing such an unfair "backstop" or "corrective measure" provision on otherwise compliant sources.

EPA also points to the general "requirement for 111(d) plans to 'provide for implementation and enforcement.'" *Id.* But EPA's enforcement authority is limited to noncompliant entities. Under the "Federal Enforcement" section of the CAA, penalties are only to be issued to an entity that "has violated or is violating any requirement or prohibition." 42 U.S.C. § 7413(d)(1). And, even then, the penalty can only be assessed after an opportunity for a hearing, and in consideration of such relevant factors as "the violator's full compliance history and good faith efforts to comply." 42 U.S.C. § 7413(d)(2); (e)(1). Congress never intended § 111(d) to apply retroactively and penalize fully compliant entities.

The Rule's punishment of innocent parties is arbitrary and capricious and in excess of EPA's authority under the CAA. When agencies have previously attempted

to impose penalties far in excess of culpability, the courts have overturned the actions as arbitrary and capricious. *See, e.g., Corder v. United States*, 107 F.3d 595, 598 (8th Cir. 1997) (finding the agency's failure to include any mitigating factors in the fine calculation not to be an "exercise of informed agency discretion" but instead "another example of implementing regulations that reflect a hostile attitude… We conclude that a fine based entirely on this formula … must be overturned as arbitrary, capricious, and contrary to the statute."); *R Ranch Mkt. Corp. v. United States*, 861 F.2d 236, 239 (9th Cir. 1988), overturned by statute as recognized by *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) ("the goal of deterrence is not served by imposing sanctions on an employer who had no knowledge of and did not benefit from the predicate violations. To the extent the regulation permits such liability to be imposed, it must be deemed to be arbitrary and capricious.").

This inequitable penalization of innocent EGUs directly follows from EPA's attempt in the Rule to regulate whole systems of electrical generation rather than, as the CAA requires, individual sources that emit pollutants. If EPA mandated only that each source use the best available technology or other onsite system to reduce emissions, any penalties would necessarily correlate directly with the source's noncompliance. Instead, EPA is attempting to regulate the power supply system as a whole. As a result, it captures EGUs in its wake that are beyond its CAA enforcement authority, including fully compliant units.

This retroactive penalization would create unique difficulties for entities like MEAG that supply electricity through fixed, long-term contracts. To comply with the Rule, MEAG must first enter into new contracts sufficient to cover communities' electricity needs with new emissions-free units. But MEAG has no guarantee that, even if it succeeds in achieving EPA's emission standards, these efforts will be sufficient. If Georgia fails to meet its statewide emissions rate or goal, MEAG must not only meet new future targets but also compensate for other units' past failures. MEAG cannot draft contracts with its communities to capture such a wide range of possible outcomes. And MEAG's communities cannot budget for such uncertain future costs. The Rule's retroactive penalization scheme is arbitrary, capricious and exceeds EPA's authority under the CAA. It must be overturned.

Conclusion

The Power Plan Rule is the most comprehensive restructuring of the national electric utility industry ever attempted. EPA unearthed this newfound authority in a novel interpretation of CAA § 111(d), first enacted in 1970 and never before used to compel momentous shifts in power generation. This Court should be skeptical of EPA's sudden discovery "in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Congress typically "speak[s] clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.*

The Rule will significantly increase the cost of utility service, particularly for MEAG's communities, which are dependent upon long-term irrevocable contracts binding them to dedicated EGUs. MEAG has a statutory mandate to deliver reliable and economical electricity to its communities. The Rule threatens the local authority of MEAG's communities and the reliability and economy of utility service without adequate legal support. The Power Plan Rule is arbitrary, capricious, in excess of and contrary to EPA's authority under the CAA, and was promulgated in violation of mandatory regulatory procedures. MEAG requests this Court vacate the Power Plan Rule in its entirety.

This 23rd day of February, 2016.

Respectfully Submitted,

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Certificate of Compliance

The undersigned hereby certifies, pursuant to Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Garamond 14-point font.

This 23rd day of February, 2016.

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Certificate of Service

I hereby certify that I electronically filed the Brief of Amicus Curiae Municipal Electric Authority of Georgia with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the attorneys of record.

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