December 1, 2014

VIA ELECTRONIC COMMENT

Attn: EPA-HQ-OAR-2013-0602

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Re: Standards of Performance for Greenhouse Gas Emissions from Existing Sources: Electric Utility Generating Units -- Docket No. EPA-HQ-OAR-2013-0602

To Whom It May Concern:

On June 18, 2014, the U.S. Environmental Protection Agency ("EPA") issued proposed "Carbon Emission Guidelines for Existing Stationary Sources: Electrical Utility Generating Units" (the "Proposed Rule") under the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1970), as amended (the "CAA"). 79 Fed. Reg. 34830 (to be codified at 40 C.F.R. pt. 60). The Texas Public Policy Foundation (the "Foundation") believes that the Proposed Rule exceeds EPA's statutory authority and is unconstitutionally coercive of state governments. Accordingly, the Foundation respectfully submits the present comments.

The Proposed Rule would require the governments of the several states to submit state plans under CAA § 111(d)(1) ("State Plan"), or face the imposition of a federal plan by EPA under CAA § 111(d)(2) ("Federal Plan"). The Proposed Rule provides little guidance on what the form and content of a Federal Plan would be, other than to indicate that, "If a state does not submit an approvable plan or initial submittal to implement and enforce the emission guidelines contained in this subpart by June 30, 2016, the EPA will implement and enforce a Federal plan, as provided in §60.5740 to ensure that each affected EGU within the state that commenced construction on or before January 8, 2014 reaches compliance with all the provisions of this subpart." 79 Fed. Reg. at 34954 (proposed C.F.R. § 60.5790). In turn, proposed § 60.5740 merely sets forth the required elements of an approvable State Plan. 79 Fed. Reg. at 34951-52. By threatening to shut down a

large fraction of electrical generating capacity, both the State Plan and the Federal Plan would force states to adopt wide-ranging regulations in conformity with EPA dictates on matters EPA would have no power to preempt and regulate directly. The Proposed Rule thus constitutes a particularly dangerous form of coercion. It threatens the health and safety of the states' ordinary citizens in order to force the states to regulate in areas entirely outside EPA's competence and authority.

In the context of greenhouse gas regulations, EPA's pattern of exercising the cooperative federalism power has demonstrated the need for enhanced federal court protection of the dual sovereignty of the states, a basic structural guarantee of the U.S. Constitution. Under the Proposed Rule, a Federal Plan would unconstitutionally punish states that refuse to submit a State Plan, and could not ensure that "each affected EGU"[*] reaches compliance with the Proposed Rule without exceeding the statutory and constitutional constraints on EPA's authority. The Proposed Rule is designed to leverage what EPA believes are its statutory authorities in order to shape state policies in areas that EPA essentially admits fall outside its statutory authorities. Moreover, the Proposed Rule arguably exceeds EPA's statutory authority in a number of ways, and EPA has failed to substantiate either the endangerment of $C0_2$ emissions from "affected EGUs" or the health benefits that would result from the Proposed Rule. Because of this significant coercion of the states, both the Proposed Rule's requirement of a State Plan, and the imposition of a Federal Plan, would constitute commandeering within the meaning of *New York v. United* States, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Because the Proposed Rule ultimately threatens noncompliant states with the forced retirement of electrical generating capacity, and hence large-scale power blackouts, EPA is threatening the health and safety of state residents in order to force states to alter their policies in areas that EPA could not preempt and regulate itself. The Proposed Rule is simply "a gun to the head." *See*, *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2604 (2012).

In the case of Texas, that gun would force the dismantling of the United States' most competitive electricity market. Beginning in 1997, the Texas Legislature and the Public Utility Commission of Texas (PUCT) took a series of major steps to make market competition, rather than regulatory fiat, the main determinant of price, reliability, and adequacy in the largest portion of the Texas market, under the Electric Reliability Council of Texas (ERCOT). Decisions to generate, sell, and buy electricity in ERCOT's "energy-only" market are almost entirely in the hands of the private sector, with economic dispatch being the primary determinant of which generating units and which fuels are called on to provide enough electricity to meet market demand. While some states could comply with the Proposed Rule within the confines of their current market structure, Texas would be forced to abandon market competition and completely restructure its market at a cost of tens of billions of dollars to Texas consumers and businesses. As discussed below, neither EPA nor any other federal agency has the authority to mandate the restructuring of the Texas electricity market.

[*] The Proposed Rule defines "Affected EGU" as "a steam generating unit, an IGCC facility, or a stationary combustion turbine that meets the applicability conditions in [proposed] § 60.5795" which in turn tracks the "existing sources" of CAA § 111(d)(1) with emissions above certain thresholds. Affected EGUs are therefore the "existing sources" of an air pollutant for which EPA may issue emissions standards under § 111(d)(1).

Discussion

When a state is faced with a choice between implementing a federal regulation and letting the federal government preempt the field and implement the regulation itself, the state must be able to choose of its "unfettered will," not "under the strain of a persuasion equivalent to undue influence." *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). The Court's doctrine of "cooperative federalism" presupposes that the federal government does not punish states that refuse to do its bidding. Perhaps more than any other agency EPA has demonstrated the flaw in that premise, and the Proposed Rule dramatically expands the scope for EPA abuse of the states.

In particular, the Proposed Rule seeks to force upon states choices with respect to policy areas that EPA could not preempt and regulate itself under its existing statutory authorities. This is not merely true of the choice between State Plan and Federal Plan. Even under a Federal Plan, the state would be forced to regulate in accordance with EPA's wishes in order to avoid further serious consequences for the state economy and the reliability of its electrical grid. The Proposed Rule's definitions of "Best System of Emissions Reduction," 79 Fed. Reg. at 34852, and "Affected Entities," 79 Fed. Reg. at 34955 (proposed § 60.5820), by their own terms apply to regulations and entities outside EPA's purview, which does not extend to dispatch decisions in the operation of a state's electrical grid.

As the experience of Texas shows, EPA routinely imposes onerous penalties on states that refuse to do its bidding. The Proposed Rule, which explicitly imposes a disproportionate burden on Texas however it chooses to proceed, will almost certainly result in additional massive losses for the state if it refuses to implement a State Plan. In *NFIB v. Sebelius*, the Court demonstrated a heightened sensitivity to the vulnerability of states in the face of federal coercion. The Proposed Rule is coercive of state governments in a number of ways that are unlikely to escape the Court's scrutiny. It also exceeds EPA's statutory authority in ways that are likely to lead to the Rule's invalidation by federal courts.

A. The Supreme Court's Doctrine of Cooperative Federalism

The U.S. Supreme Court has held that Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 288 (1981). The Court warned that, "Accountability is […] diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 169 (1992).[*] Likewise, in *South Dakota v. Dole*, a Spending Clause case, the Court noted, "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). As the Court explained in *Printz v. United States*, federal and state governments occupy separate spheres in a "structural framework of dual sovereignty" and states must remain "independent and

[*] In other words, "in matters" the federal government has either chosen not to preempt, or would not be able to preempt because of constitutional or statutory limitations. The latter situation is particularly relevant here.

autonomous within their proper sphere of authority." 521 U.S. at 928. If a federal law offends "the structural framework of dual sovereignty," it is categorically unconstitutional. *Id.* at 932.

For years, however, various forms of federal compulsion of state governments were allowed to stand because the Court decided that they constituted mere encouragement not crossing the line into compulsion. "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167 (quoting *Hodel*, 456 U.S. at 288.) In *Printz*, the Court pointed to *Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982) as cases were the Court "sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law." 521 U.S. at 925.

Hodel and *FERC* were steps on the road to the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The "traditional government functions" test applied in *Hodel* and *FERC* misstated the rule of *National League of Cities v Usery,* the most essential element of which was that the Tenth Amendment protects "States' ability to function effectively in a federal system" and their "separate and independent existence" within that system. *See*, *National League of Cities*, 426 U.S. 833, 851-52 (1976). *Garcia*, which overruled *National League of Cities*, replaced the "traditional government functions" test with the process federalism standard, to the effect that states are protected by the national political process, as theorized by Herbert Wechsler in "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954). *Garcia*, 469 U.S. at 552. The theory of process federalism has been roundly rejected in the academic literature, *see* Jessica Bulman-Pozen, "From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism," 123 *Yale Law Review* 1920 (2014), and was substantially undermined by the Court's subsequent rulings in *New York* and *Printz*. Those cases in effect revived the *National League Cities* standard of vindicating the "separate and independent existence" of the states. *Hodel*, *FERC*, and *Garcia* thus rest on the same precarious constitutional foundations, and the Proposed Rule will give the Court an occasion to revisit both *Hodel* and *FERC*.

As a threshold matter, there are grave reasons to doubt the that the Proposed Rule really lays out "federal standards" for state regulation as contemplated in *New York*, given the fact that each state is treated different under the Proposed Rule. In fact, the Proposed Rule's burdens would fall most heavily on Texas. *See generally*, Kathleen Hartnett White, *EPA as Overlord of U.S. Electric Power*, Texas Public Policy Foundation (October 2014) (noting that under the Proposed Rule, Texas is required to achieve 18 percent of the nation-wide CO_2 reductions).

Beyond the four corners of the Proposed Rule, the potential for EPA to unfairly punish states that refuse to implement its regulations was recently demonstrated when the state of Texas refused to modify its State Implementation Plan with respect to the CAA Title I Prevention of Significant Deterioration (PSD) preconstruction permit program and the CAA Title V operating permit program, with respect to greenhouse gases. As senior officials of Texas wrote to EPA, "On behalf of the State of Texas, we write to inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of

greenhouse gas emissions." Letter from Bryan Shaw, Chairman, Texas Commission on Environmental Quality, and Greg Abbott, Attorney General of Texas, to Lisa Jackson, Administration, U.S. Environmental Protection Agency, and Alfred Armendariz, Regional Administrator, U.S. Environmental Protection Agency, Region 6 (August 10, 2010). Under the "Tailoring Rule," 75 Fed. Reg. 31,514, 31,525 and 31,582 (June 3, 2010), as it was understood before its permitting provisions were invalidated by the Supreme Court, *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2449 (2014), EPA was required to take over permitting of greenhouse gas emissions for facilities subject to the Tailoring Rule, if a state refused to do so. EPA did so, but egregiously delayed issuance of the permits. As a result, Texas industries faced significant losses and pressed for the Texas Legislature to step in and provide for state permitting under the Tailoring Rule, in order to protect them from the results of EPA's inaction on the permits. Thus, with a gun to the head of Texas industries, EPA forced the state of Texas to back down and modify its State Implementation Plan. Texas did not choose to comply out of its "unfettered will," but rather was clearly "under the strain of a persuasion equivalent to undue influence." *See*, *Steward Machine Co.*, 301 U.S. at 590. The Court's doctrine of cooperative federalism presupposes that such abuses do not occur, and that states remain free of undue influence in choosing whether to cooperate in the implementation of a federal regulatory scheme. The experience of Texas demonstrates that the premise is unwarranted, and that states need enhanced protection from coercion when EPA seeks to impose its will on them.

At the Philadelphia Convention of 1787, James Madison noted the Convention's categorical rejection of the federal government's "making laws, with coercive sanctions, for the States as political bodies." 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911). Where federal law makes demands of state governments subject to a coercive penalty, there is commandeering. That, increasingly, has come to characterize EPA's relationship to state governments.

B. EPA Seeks to Shape State Policies in Areas Outside Its Authorities

There are compelling reasons to believe that if a state fails to file an approved State Plan, the Federal Plan would not be able "to ensure that each affected EGU" subject to the Proposed Rule "reaches compliance with all the provisions of" the Proposed Rule, as required by the Proposed Rule, 79 Fed. Reg. at 34,954 (proposed § 60.5790), without exceeding EPA's statutory authority and invading the reserved "dual sovereignty" of the states.

Even assuming that *Hodel* and *FERC* remain valid, the Court that sided with the federal government in those cases would have been unlikely to side with EPA in this case. In each of *Hodel* and *FERC*, the challenged statute merely created "preconditions to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926. The Proposed Rule can be readily distinguished from the statutes in *Hodel* and *FERC*: It seeks to use EPA's power to shape state policies in areas *not* subject to federal preemption under EPA's regulatory authority. In *New York*, the Court warned, "Accountability is [...] diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 505 U.S. at 169. The Proposed Rule would prevent state officials from regulating in accordance with the views of the local electorate in matters that not only are not preempted by federal regulation, but which EPA *could not* preempt under the

authorities that it claims under the CAA. Moreover the authorities that EPA claims under the CAA exceed the statutory limits to its power and will face a number of significant challenges.

1. BSER and the Building Blocks

The Proposed Rule identifies Best System of Emissions Reduction ("BSER") as consisting of four building blocks: heat-rate improvements for coal-fired EGUs (block 1); switching from coal-fired to natural-gas fired generation (block 2); switching from coal-fired to nuclear and renewable sources (block 3); and demand-side energy efficiency measures. 79 Fed. Reg. at 34,851. As the Proposed Rule explains:

> An important aspect of the BSER for affected EGUs is that the EPA is proposing to apply it on a statewide basis. The statewide approach also underlies the required emission performance level, which is based on the application of the BSER to a state's affected EGUs, and which the suite of measures in the state plan, including the emission standards for the affected EGUs, must achieve overall. The state has flexibility in assigning the emission performance obligations to its affected EGUs, in the form of standards of performance—and, for the portfolio approach, in imposing requirements on other entities—as long as, again, the required emission performance level is met. […]
>
> As discussed at length elsewhere, the EPA is proposing two alternative BSER. The first is the measures in building blocks 1 through 4 combined. This includes operational improvements and equipment upgrades that the coal-fired steam EGUs in the state may undertake to improve their heat rate by, on average, six percent and increases in, or retention of, zero- or low-emitting generation, as well as measures to reduce demand for generation, all of which, taken together, displace, or avoid the need for, generation from the affected EGUs. This BSER is a set of measures that impacts affected EGUs as a group. The alternative approach to BSER is building block 1 combined with reduced utilization from the affected EGUs in the state as a group, in the amounts that can be replaced by an increase in, or retention of, zero- or low-emitting generation, as well as reduced demand for generation.

79 Fed. Reg. at 38,490-91. Thus, the Proposed Rule seems to contemplate two alternative approaches for the State Plan. The state may establish pervasive regulations that include measures in all four building blocks, and regulate private and public entities in addition to affected EGUs. Alternatively, the state may regulate the emissions rate of affected EGUs exclusively, with the rest of the state's economy and regulations adjusting to replace the retired generating capacity.

The first approach would not lend itself to a Federal Plan, because EPA does not have, and does not claim, authority under CAA § 111(d) to determine BSER for a "standard of performance" that applies to any entity other than an "existing source" of an air pollutant subject to that subsection. Presumably, the Federal Plan would rely on some form of the second approach, imposing emissions rates on "existing sources" (i.e., "affected EGUs") exclusively. In practice that would mean generally retiring the amount of coal-fired generating capacity that could be substituted by the measures contemplated in blocks 2,3, and 4, and leaving the states to make up

the difference however the see fit, which would achieve roughly the same effect as a State Plan. In other words, states are forced to implement something like a State Plan whether they like it or not, in order to avoid blackouts on a massive scale.

This becomes clearer when we examine the building blocks in the Proposed Rule. CAA § 111(d)(1)(A) provides for each state to submit a plan that "establishes standards of performance for any existing source . . ." Only block 1, heat-rate efficiency improvements, is a measure that EPA can impose directly by regulation. The other three blocks, which constitute nearly all of the emission rate improvements under the Proposed Rule, envision the reorganization of substantially every aspect of a state's power sector. The Proposed Rule requires the substantial redispatch of coal-fired electric generation to natural gas-fired generation, without regard to the nature of state resources or the legal and technical difficulties of accomplishing this goal (block 2). The Proposed Rule also requires the deployment of new renewable or nuclear energy to replace existing fossil fuel-generated power (block 3), and limitations on the consumption of electricity through increased deployment of demand-side reduction and end-use energy efficiency measures (block 4). The binding emission goals for each state are sufficiently stringent that states will be unable to meet them without going beyond the traditional, inside-the-fenceline first block and significantly altering their energy and resource policies currently articulated in state law.

But these policy choices are not EPA's to make. Federal law explicitly reserves to the states the exclusive authority for managing their electrical resources, including the regulation of what type of fuels or resources should be used to generate electricity. 16 U.S.C. § 824(b). The Proposed Rule thus expands EPA authority beyond the statutory limits of the CAA, to the role of national electricity regulator.

In this regard, the Proposed Rule violates the core tenet of administrative law that "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *See*, *Dolan v. U.S. Postal Serv*., 546 U.S. 481, 486 (2006). Rather, statutory terms must be construed in light of the text of the provision as a whole, its context, its purpose, and relevant precedent and authority. *Id.* Furthermore, an agency cannot claim authority to exercise rulemaking power merely because that authority is not expressly denied to it. *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995). The ostensibly open-ended "definitional possibilities" of the word "system" cannot support EPA's attempt to override states' policy choices and impose energy and natural-resource policy on them.

Thus the Proposed Plan constitutes commandeering of state governments in two ways. First, the requirement of a State Plan is "enforced" with the cudgel of a Federal Plan about which the Proposed Rule provides almost no information, and which could be implemented in a punitive way. Second, the Federal Plan itself would constitute commandeering in a sense the Supreme Court has never upheld: The states would be faced with a Hobson's choice between accepting the loss of a large fraction of their electrical generating capacity, or transforming their electrical generating capacity, and end-user energy efficiency standards, in the ways required of an approvable State Plan, so as to make up for the EGU capacity that would be retired under a

Federal Plan. Under the Proposed Rule, states are required to regulate in conformity with EPA's dictates whether they file a compliant State Plan or accept imposition of a Federal Plan.

That is a clear violation of the prohibition articulated by the Supreme Court in *New York*:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives, the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction. A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

505 U.S. at 176 (internal citations and quotation marks omitted). Under the Proposed Rule, EPA is offering states a choice between two sets of incentives -- a State Plan and a Federal Plan -- to adopt wide-ranging regulations in conformity with EPA dictates on matters the EPA would have no power to regulate under its statutory authority. In order to achieve the standards required in the Proposed Rule, states must adopt regulations that affect entities and other matters "outside-the-fenceline," as envisioned by EPA's determination of BSER, even though EPA admits that CAA § 111(d) applies only to "existing sources" (i.e., affected EGUs). Thus, state regulation of matters that fall outside EPA's regulatory power is induced, in the case of a State Plan, by the threat of a Federal Plan, and in the case of a Federal Plan, by the emissions limitations of the Federal Plan itself.

In both cases, EPA is using its power under one program -- performance standards that apply to existing sources under § 111(d) -- in order to enforce state compliance with a program that involves things, from state regulation of electric utilities to end-user efficiency, that do not fall within EPA authority. In the Spending Clause context, the Court recently rejected a similar scheme of leveraging federal power under one program to force state compliance with another program. In *NFIB v. Sebelius*, the Court held that where the conditions attached to one program "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." 132 S. Ct. at 2604. "The threatened loss of over 10 percent of a State's overall budget […] is economic dragooning that leaves the States with no real option to but to acquiesce in the Medicaid expansion." Id. at 2605.

The states face a similar "economic dragooning" whether they elect a State Plan or a Federal Plan. Their choice ultimately boils down to either accepting a catastrophic loss of electricity supply or transforming their electricity sector in the ways envisioned by EPA as BSER, a

transformation which, under EPA's interpretation of its own power, it would not be able to impose upon the states.

2. Statutory Problems of the Proposed Rule

The foregoing analysis assumes that EPA's statutory powers are precisely what it claims in the Proposed Rule. But that assumption is by no means evident, and in fact the Proposed Rule faces a number of serious statutory hurdles, for it is quite clear that Congress never intended for the CAA to be used to confront the states with the choice forced upon them by the Proposed Rule.

The most serious challenge faced by the Proposed Rule is the statutory division of authority among EPA, the Federal Electrical Regulatory Commission (FERC), and the states, when it comes to electrical power generation. The CAA allows EPA to regulate emissions of pollutants *at their sources* -- but under § 111(d) it must share that authority with the states. The EPA's power under § 111(d) is limited to the following: establishing "a procedure similar to that provided by section 110 under which each state shall submit […] a plan which […] establishes standards of performance for any existing source" of air pollutants subject to that subjections; determining the BSER that states must take into account in devising the performance standards of an approvable state plan; approving or disapproving the proposed state plan; devising a federal plan in case of disapproval; and enforcing the performance standards.

The Federal Power Act, meanwhile, specifically reserves the regulation of electricity markets to FERC and further specifically limits FERC's authority to "only those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part [16 USCS §§ 824 et seq.] and the Part next following [16 USCS §§ 825 et seq.], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. § 824(b). FERC is vested with exclusive authority to regulate wholesale rates for resale of electric power in interstate commerce, *Minnesota by Attorney Gen. v Federal Energy Regulatory Com*. 734 F.2d 1286, 1287 (8th Cir. 1984), while "[s]tates retain exclusive authority to regulate the retail market." *Electric Power Supply Association v. FERC*, 753 F.3d 216, 221 (D.C. Cir. 2014).

FERC's authority over the market is even more limited in Texas, where 90 percent of the electrical demand is served by the wholly intrastate Electrical Reliability Council of Texas (ERCOT); hence the Federal Power Act gives Texas exclusive jurisdiction over nearly all the retail, wholesale, and transmission of electrical power in Texas. It is this situation that allowed Texas to succeed where almost all other states came up short during a nationwide movement to restructure electricity markets in during the 1990s. The resulting market structure maintains a clear separation of authority between environmental regulators (Texas Commission of Environmental Quality), utility regulators (PUCT and ERCOT), and the private sector. So while the TCEQ can regulate source emissions, the PUCT can regulate transmission and limited portions of the wholesale and retail markets, and ERCOT can manage the dispatch of electricity into the market, the vast majority of the activity in the market is handled in the private sector.

Thus no state regulatory agency, alone or in concert, would be able to implement the Proposed Rule. Nor does EPA or FERC have the authority to require them to do so.

Both the State Plan and Federal Plan would require Texas to reorganize its retail electric power market and wholesale intrastate power market, in accordance with EPA dictates, even though federal law reserves the subject matter to FERC, and further leaves retail and intrastate wholesale electricity sales to the "exclusive authority" of the states. In Texas, this is a commandeering not simply of state agencies but of the Texas Legislature, as well as a violation of the statutory limits on EPA power.

Another statutory problem lies in the determination of BSER to include entities and matters "outside the fenceline" of affected EGUs. CAA § 111(d)(1) authorizes *states* to establish performance standards using the BSER determined by the EPA administrator, according to a "procedure" for assessing state performance standards as part of a state plan. EPA formalized this procedure in its "implementing regulations" of 1975, which provides for "emissions guidelines" for appropriate pollutants. 40 Fed. Reg. at 53,340 (codified at 40 C.F.R. § 60.21). The Proposed Rule is such an "emissions guideline," but is unlike the others EPA has adopted under § 111(d)(1), because the BSER in other emissions guidelines have always been based on the control technologies potentially applicable to affected facilities. EPA has only once before tried to use its limited authority under this provision to establish a cap-and-trade program rather than a program involving emissions limitations imposed on specific sources under a typical BSER. However, that program, the Clean Air Mercury Rule (CAMR), was vacated by the *New Jersey v. EPA*, 518 F.3d 574 (D.C. Cir. 2008). In any case, the CAMR still imposed performance standards only on designated facilities, albeit as a group.

Yet another problem is that regulation of EGUs under CAA § 112 preempts regulation under § 111(d). EPA relies on what it calls an "ambiguity" created by differing amendments to 111(d) by the House and Senate in the Clean Air Act Amendments Act of 1990, P.L. 101-549 (the "1990 CAA Amendments"), and claims that its interpretation of this "ambiguity" is due deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Section 108(g) of the 1990 CAA Amendments, as published in the Statutes at Large provides: "(g) REGULATION OF EXISTING SOURCES- section 111(d)(1)(A)(i) of the Clean Air Act … is amended by striking 'or 112(b)(1)(A)' and inserting 'or emitted from a source category which is regulated under section 112'." Section 302(a) of P.L. 101-549, which lists conforming amendments related to the adoption of Title III (the overhaul of section 112), contains the following: "(a) Section 111(d)(1) of the Clean Air Act is amended by striking '112(b)(1)(A)' and inserting in lieu thereof '112(b)'." Both sections of P.L. 101-549 can be fully incorporated into the Act as amended without any conflict at all. As codified in the U.S. Code, Congress simply expanded the list of independent regulatory actions that would displace regulation under § 111(d).

3. EPA has not established the health benefits of the Proposed Rule

The Proposed Rule highlights the main points of its 2009 "Endangerment Finding", "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496 (Dec. 13, 2009). 79 Fed. Reg. at 34,841-44. But

nowhere does EPA claim that regulating greenhouse gas emissions from "existing sources" under CAA § 111(d) would mitigate any significant aspect of the claimed endangerment. EPA explains, Legal Memo at 28, that the necessary endangerment finding for the Proposed Rule is addressed in its proposed rule for New Source Performance Standards, 79 Fed. Reg. 1430, 1453-54 (January 8, 2014) (the "Proposed NSPS Rule").

In the Proposed NSPS Rule, EPA claims that, (1) that having found that power plants' emissions of criteria pollutants endanger public health and welfare, it can then regulate any other pollutant from power plants without any attribution of danger from that other pollutant; and (2) in any event, its Endangerment Finding for greenhouse gas emissions from mobile sources suffices to establish endangerment from power plants' emissions of greenhouse gases, because the magnitude of GHG from power plants is the same magnitude as that emitted from mobile sources. But CAA § 111(d) requires a showing that sources to be regulated under that section significantly contribute to an identified danger. EPA has not made the requisite findings, however, and both the Proposed Rule and the Proposed NSPS Rule could therefore be held to impose costs out of all proportion to benefits, without the rational basis that EPA must provide to support a rule under the CAA.

4. Other consequences of the Proposed Rule

As testified by FERC Commissioner Tony Clark before the U.S. House of Representatives Committee on Energy and Commerce, "this EPA proposed rule has the potential to comprehensively reorder the jurisdictional relationship between the federal government and states as it related to the regulation of public utilities and energy development." Submitted testimony, July 29, 2014.

Additionally, we note that, once approved by EPA, the State Plans themselves would result in a massive expansion of EPA's enforcement authority, particularly extending that enforcement authority, and its onerous penalties, into areas that do not fall within EPA's regulatory purview. This is because the obligations created by the State Plan would be enforceable by EPA, even if those obligations are imposed on "affected entities" that are not an "existing source" within § 111(d). Under a State Plan's end-user efficiency standards, a state could theoretically regulate the thermostat settings of private citizens. Those citizens would then become "affected entities" subject to EPA enforcement, including potentially massive penalties under CAA § 113.

The timing of Federal Plan imposition is another grave concern, one that impacts health and safety of state residents. States that intend to challenge the Proposed Rule will presumably refuse to submit State Plans. When the Federal Plan is imposed, those states may still be holding hope that one of the challenges will succeed, or that new political leaders will pull EPA back from fully implementing the Proposed Rule. Such states will have no desire to adjust their regulations and invest in new electrical generating capacity prospectively, on the timetable that would necessary to make up for the forced retirement of EGUs that exceed the performance standards specified in the Federal Plan. In those states, eventual implementation of the Federal Plan will simply result in a catastrophic loss of electricity for state residents, a harrowing prospect that endangers their very lives. The "gun to the head" in this case is therefore something more than purely figurative: EPA is ultimately threatening the health and safety of residents of states that

refuse to adopt its vision of state regulation of matters entirely outside its statutory authority. A more clear-cut, and more dangerous, example of coercion is difficult to imagine.

Conclusion

The Proposed Rule cannot be implemented without commandeering of state governments the service of a program that exceeds the EPA's statutory authority and the constitutional limits on its power. With respect to those states that oppose the Proposed Rule, the Proposed Rule arguably constitutes "much more than 'relatively mild encouragement'-- it is a gun to the head." *See*, *NFIB v. Sebelius*, 132 S. Ct. at 2604, quoting *South Dakota v. Dole*, 483 US. 203, 211 (1987).

The Foundation hopes that EPA will give further clarity to what a Federal Plan would consist of, and thereby offer states a choice that is meaningfully of their "unfettered will." In the meantime, given the significant delegation of enforcement authority to EPA that would result from a State Plan, and given the limited information about an eventual Federal Plan available in the Proposed Rule, there is little reason for states to submit compliant State Plans.

Thank you for your consideration of these comments.

Respectfully Submitted,

/s/

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