THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

The Honorable Ed Whitfield
Congress of the United States
House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Attn.: Will Batson, Legislative Clerk
via Email and U.S. Mail

November 30, 2015

Dear Chairman Whitfield:

Thank you for the opportunity to testify at the October 22, 2015 hearing entitled "EPA's CO2 Regulations for New and Existing Power Plants: Legal Perspectives." This letter responds to the additional question from the Honorable Frank Pallone, which states:

> In his testimony for the hearing, Mr. Gifford said, "The ambition of this Rule toward the electric sector is totalistic; that is, it needs to fundamentally reorder the traditional federal-state division in the power sector, and force rearrangement of the state institutions dealing with electricity . . . in practice, this means that state utility commissions . . . give way to state unified carbon resource planning under the auspices of the state air regulator.
>
> Do you agree with Mr. Gifford's assessment of the rule's impact on the electric sector? Please explain.

My response is as follows:

I disagree with Mr. Gifford's assessment of the rule's impact on the electric sector because it overlooks how existing legal frameworks at the state level actually operate. Indeed, the law and facts demonstrate that the "totalistic" vision he describes is unfounded. First, it is notable that state public utility commissions (PUCs) have long considered environmental factors in exercising their traditional powers over electricity generation and rates within their borders. For example, numerous state PUCs require Integrated Resource Planning (IRP), which involves evaluating and comparing electricity generation alternatives and is conducted in connection with licensing or rate proceedings.[1] At least twenty-seven states currently require IRP, and it can be a valuable tool for considering the carbon impacts of the electric sector.[2] States have also developed methodologies for valuing electricity generation externalities when they consider electricity fuel sources and engage in capacity planning.[3] The same PUCs are also already a part of the approximately two-thirds of states that have other low-carbon initiatives, like Renewable Portfolio Standards.[4]

Second, the Clean Air Act's (CAA) cooperative federalism structure has been in place for decades. Under this structure, most state environmental agencies are responsible for administering the CAA, including issuing permits, monitoring, and enforcing the laws that relate to electric generating units.[5] PUCs are accustomed to this structure, which is unchanged by the Clean Power Plan and new source standards.

Third, to the extent state PUCs and environmental agencies engage in additional cooperation as a result of the Clean Power Plan, the results are beneficial. As a matter of administrative law, interagency coordination stands to improve decisionmaking and help guard against judicial remands.[6] Further, state agencies have already begun to coordinate under the leadership of various national organizations.[7] For example, the National Association of State Energy Officials (NASEO) has partnered with the National Association of Regulatory Utility Commissioners (NARUC) and the National Association of Clean Air Agencies (NACAA) to form the "3N" group.[8] 3N has provided numerous resources addressing state compliance from the perspective of multiple state regulatory bodies, and has facilitated ongoing dialogue between them.[9]

Finally, the Clean Power Plan's flexibility helps ensure that states can select the compliance approaches that best fit their own state agency structures and authorities. There is no requirement in the Plan that state environmental agencies usurp the traditional authority of state PUCs. Instead, the Plan contemplates cooperation and tailoring to ensure that states as well as PUCs retain their authority.

I appreciate the opportunity to provide this response and would be happy to respond to any additional questions.

Sincerely yours,

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[1] *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 111, 106 Stat. 2776, 2795 (codified as amended at 16 U.S.C. § 2621(d)(7) (2012)) (directing utilities to implement ISP); Rachel Wilson

[2] For a helpful description of how Arizona, Colorado and Oregon use integrated resource planning, see Rachel Wilson & Bruce Biewald, *Best Practices in Electric Utility Integrated Resource Planning*, REG. ASSISTANCE PROJECT, 6–16 (June 2013), http://www.raponline.org/document/download/id/6608 [http://perma.cc/SX9Q-J7AH].

[3] William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014).

[4] For an up-to-date list, see DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, www.dsireusa.org (last visited Sept. 11, 2015) [http://perma.cc/54W6-PDTX].

[5] *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013) (providing overview).

[6] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1146-49 (2012).
[7] *See* Emily Holden, *Will tension between lawmakers and regulators hamstring the Clean Power Plan?*, ENERGYWIRE, June 29, 2015, at http://www.eenews.net/stories/1060021010 ("[a]ir and electric regulators are interacting more and getting along better than ever").
[8] NASEO, STATE 111(d) RESOURCE HUB, at http://111d.naseo.org/ (last visited July 21, 2015).
[9] *See* Regulatory Assistance Project, *Preparing for 111(d): 10 Steps Regulators Can Take Now* 2 (2014) (emphasizing need for "regular and detailed dialogues" between state agencies).