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BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER

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Thank you, Chairman Whitfield, Ranking Member Rush, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning the legality of EPA's CO2 regulations for new and existing power plants. I am pleased to be returning to testify before your Subcommittee on another important issue of energy and environmental law.

I am Associate Dean for Public Engagement and Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform. My expertise relates to energy, environmental, and administrative law. I have authored numerous books, articles, and book chapters on these topics, and have particularly emphasized: (1) the links between administrative process and agency decisionmaking in the fields of energy and environmental law; and (2) the relationship of cost, reliability, and environmental attributes of electricity fuel sources to the wholesale electricity markets and the electricity fuel mix. Early in my career, I practiced as a civil engineer; that experience and training allows me to bring a technical perspective to energy and environmental law.

I am here to testify today based on my expertise, and my views are not those of my law school or other organizations to which I belong. I will focus my testimony on three topics: (1) how EPA's Section 111 regulations relate to electricity markets and why the regulations are important from a policy standpoint; (2) the regulatory framework that Congress established in passing the Clean Air Act (CAA); and (3) the legality of EPA's Section 111 regulatory activities.

Electricity Markets and the Clean Power Plan

The field of energy represents a complex interaction between energy resources, energy markets, and environmental externalities. Policies that do not consider these interactions have led to numerous dysfunctions. In fact, the wholesale electricity markets are currently struggling to properly value both grid reliability and the environmental characteristics of fuel sources or electricity services.[1] For example, nuclear power—a clean, reliable, and safe fuel source—is struggling to operate in the wholesale markets notwithstanding these beneficial attributes. Without policies that value reliability and the environment, we will see decreased diversity in our mix of electricity fuels and non-generation services, which threaten both grid reliability and our ability to flexibly respond to the climate change imperative.[2]

The New Source Performance Standards and Clean Power Plan (CPP) represent measured, reasonable approaches to correcting some of these flaws even while the electricity markets continue to operate reliably. By valuing zero- and lower-carbon fuel sources—not to mention non-generation resources like demand response and efficiency measures—EPA's new regulations make headway toward correcting fuel sources' environmental externalities while also promoting a diversity of resources on the grid.[3] Indeed, the Energy Information Administration's projections estimate that the electricity fuel mix of 2040 will be more diverse under the CPP than it is today. It will include a larger share of renewables, non-generation resources, and natural gas, it continues to include nuclear, and—contrary to popular perception—it will still include a significant amount of coal.[4] Overall, the CO2 regulations promote a cleaner portfolio of sources that are complementary to one another in maintaining grid reliability.

The bottom line is that energy decisionmaking must include consideration of the relative mix of fuel sources as well as the environmental implications of that mix. Given the current suite of statutes related to energy and the environment, no federal agency is better suited to undertake this task than EPA.

The Clean Air Act's Regulatory Framework

When this institution passed the Clean Air Act and its various amendments, it recognized that Congress could not anticipate every future air pollution problem. Rather, the statute is crafted to permit EPA—the agency with expertise in such matters—to regulate air pollution consistently with the purposes of the statute. Consider the famous decision *Chevron, U.S.A. v. Natural Resources Defense Council*.[5] There the Supreme Court upheld EPA's interpretation of the term "stationary source" to permit major sources of pollution to comply with emissions standards on a plant-wide, rather than stack-specific, basis. Critical to the Court's rationale in upholding the interpretation was that Congress delegated to EPA interpretive authority over the CAA's terms.

Chevron is an invitation to Congress to be clear when it does *not* intend an agency to exercise this interpretive authority, by being precise about what discretion is being delegated.[6] In general, Congress has issued clear directions to EPA that err on the side of *more* regulatory authority, not less.[7] And what has always remained intact is the broad statutory language of the CAA's definition of air pollutant—which, as we know, includes greenhouse gas (GHG) emissions[8]—and the imperative that EPA must regulate pollutants that endanger public health and welfare—as GHG emissions do.[9]

The CAA does something else that is important to understanding the legality of EPA's CO2 initiatives. In many of the air pollution programs, EPA is directed to consider some combination of the cost of compliance and the practicability of the means of compliance when setting standards. This does not require that EPA offer absolute proof that every source can meet every standard. Indeed, the CAA is considered a "technology-forcing" statute because it requires sources to come up to certain minimum standards such that there will be improvement in air quality.[10] The CO2 standards fit well within these statutory parameters: they bring about net economic benefits, they promote cleaner air,

and they can be achieved within the existing landscape of how electricity is generated and transmitted.

The Section 111 CO2 Regulations Are Lawful

Once EPA has found that a source category contributes to air pollution that endangers the public health or welfare, *the CAA requires* it to issue new source performance standards for the relevant source category.[11] The statute itself gives EPA the discretion to determine which pollutants from a given category should be regulated.[12] Here, EPA's regulation of CO2 from fossil-fueled sources is reasonable given its endangerment finding with respect to GHGs, the fact that electricity generation accounts for one-third of all GHG emissions, and the fact that these emissions far exceed new motor vehicle emissions, which have already been judged to contribute to endangerment.[13] Moreover, the final rule is more lenient than the proposed rule as a direct result of the participatory rulemaking process: the actual standards are easier for new sources to meet and are realistic in recognizing that—given low natural gas prices—new coal-fired power plants are unlikely to be constructed.[14]

The CPP can survive challenges based on EPA's authority for each of the primary legal challenges: the Section 112 exclusion issue and EPA's interpretation of "best system of emissions reduction" (BSER). First, given that this institution passed two competing amendments to Section 111(d), a reviewing court may conclude that Congress has not spoken directly to the precise issue at hand, justifying deference to EPA's reasonable interpretation. As exhaustively demonstrated in the preamble to the final CPP, EPA has provided a careful analysis that is permissible, reasoned, and consistent with the purposes of the CAA.[15] Likewise, EPA's interpretation of BSER—for which "system" is a capacious and imprecise term—is based on a reasonable analysis of the economics and structure of the electricity sector.[16]

Second, a reviewing court can uphold the CPP without ever applying the *Chevron* framework. Taking a cue from the Supreme Court's recent decision in *King v. Burwell*,[17] a court may determine that the issues here are sufficiently important that policy stability requires a court to decide the meaning of the relevant statutory provisions. The court should thereafter resolve the Section 112 exemption consistently with the purposes of the CAA to make clear that EPA has authority to regulate CO2 emissions from power plants. And the court should similarly interpret BSER to permit exactly the system-based approach that EPA has taken. Both results would be consistent with the CAA's purposes of protecting public health and welfare, and both would provide the regulatory certainty needed to ensure progress toward a more reliable and environmentally sound electric grid.

Conclusion

In sum, the New Source Performance Standards and CPP are sound policy steps toward addressing the most urgent issue of our time. The regulations are reasonable and realistic

in the way they account for both how the electric grid currently works, and how it can work even better toward reliability and climate change mitigation.

Thank you again for the opportunity to testify today. I look forward to your questions.

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[1] Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, – VAND. L. REV. – (forthcoming), *available at* http://ssrn.com/abstract=2584619; *see also* William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614 (2014) (exploring awkward fit between markets and traditional concept of public utility, particularly as related to climate change issues); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 58-62 (2014) (surveying FERC's attempts to adapt Federal Power Act to clean energy goals).

[2] Hammond & Spence, *supra* note 1.

[3] *Id.* at 21; IHS ENERGY, THE VALUE OF US POWER SUPPLY DIVERSITY (July 2014), *available at* https://www.ihs.com/info/0714/power-diversity-special-report.html.

[4] EIA, *Under the proposed Clean Power Plan, natural gas, then renewables, gain generation share*, May 27, 2015, at http://www.eia.gov/todayinenergy/detail.cfm?id=21392.

[5] 467 U.S. 837 (1984). The familiar two-step framework provides that courts must ask first whether Congress has directly spoken; if not, the statute is ambiguous and courts should defer to an agency's permissible interpretation. *Id.* at 842-43.

[6] *See, e.g.*, Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1 (2015) (describing judicial review provisions in Dodd-Frank Act).

[7] ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 435 (7th ed. 2015) (describing hazardous air pollutants regime in Clean Air Act Amendments of 1990).

[8] Massachusetts v. EPA, 549 U.S. 597 (2007).

[9] *See* Coal. for Responsible Reg. v. EPA, 684 F.3d 102 (D.C. Cir. 2014), *rev'd in part on other grounds*, 134 S. Ct. 2427 (2014) (upholding endangerment finding).

[10] *E.g.*, Union Electric Co. v. EPA, 427 U.S. 246, 269 (1976) ("Technology forcing . . . necessarily entails certain risks. But Congress considered those risks . . . and decided that the dangers posed by uncontrolled air pollution made them worth taking.).

[11] 42 U.S.C. § 7411(b)(1)(B); Am. Electric Power Co. v. EPA, 131 S. Ct. 2527, 2539 (2011)

[12] *Cf.* Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1229 (D.C. Cir. 2007) (calling similarly worded provision a "delegation of authority" both "explicit and extraordinarily broad").

[13] Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, -- Fed. Reg. –, at 102-09 (Aug. 3, 2015) [hereinafter NSPS].

[14] *Id.* at 17-19.

[15] Final Rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, -- Fed. Reg. –, at 246-47, 288 (initial release Aug. 3, 2015) [hereinafter CPP].

[16] *Id.* at 511.
[17] 135 S. Ct. 2480 (2015).