THE ATTORNEY GENERAL
STATE OF ARKANSAS
LESLIE RUTLEDGE

January 15, 2016

Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

RE: Docket ID No. OAR-2008-0699
Comments Submitted Electronically

To Whom It May Concern:

These comments are submitted to the administrative record in the above-referenced docket by the Office of Arkansas Attorney General Leslie Rutledge. The Attorney General responds to the Environmental Protection Agency's ("EPA") proposed supplemental finding of December 1, 2015 regarding the appropriateness of what is commonly known as Mercury and Air Toxics Standards ("MATS"). EPA concludes that consideration of cost does not alter its previous conclusion that regulation of coal- and oil-fired electric utility steam generating units ("EGUs") is appropriate and necessary under Section 112 of the Clean Air Act ("CAA"). See 80 Fed. Reg. 75,025 (Dec. 1, 2015). EPA contends that this supplemental finding supports the issuance of national emission standards for hazardous air pollutants ("NESHAP") for EGUs, also known as MATS. See 77 Fed. Reg. 9304 (Feb. 16, 2012).

EPA's supplemental finding is fatally flawed because it fails to comply with *Michigan v. EPA*, 135 S.Ct. 2699 (2015) and wholly neglects a crucial aspect of the proposed regulation's financial impact – how the regulation will affect the ratepayers who ultimately pay for retrofits to EGUs.

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First, the EPA nominally acknowledges the United States Supreme Court's mandate in *Michigan v. EPA*, 135 S.Ct. 2699 (2015) by claiming to engage in a cost analysis as directed by the Court. But it primarily relies on its own previous findings, which were the deficient factor identified by the Court, in stating that the benefit-cost analysis prepared in its earlier Regulatory Impact Analysis ("RIA") is adequate to serve as a consideration of costs as required by Section 112(n)(1)(A) and *Michigan v. EPA*. The EPA's response to *Michigan v. EPA* is really no response at all and does not seriously attempt to comply with *Michigan v. EPA*'s holding.

Second, the EPA's analysis is deficient in that it only considers some of the important factors impacting the regulation's costs. EPA chose to make a cursory examination of a limited amount of data and then to simply and unconvincingly declare compliance with the Supreme Court's directive. The deficiencies demonstrated in *Michigan v. EPA* still exist and are not cured by the supplemental finding. Specifically, the earlier RIA failed to give adequate consideration to the costs that will be borne by utility customers. EPA's supplemental finding and supporting Legal Memorandum ignore this vital consideration and primarily focus on the ability of the utility providers to comply with MATS. At best, this treatment is insufficient, and at worst, it represents a flippant disregard for the instructions of the United States Supreme Court. Such a limited consideration of costs utterly fails to satisfy the Supreme Court's ruling in *Michigan v. EPA*.

EPA's supplemental finding fails to specifically and thoroughly address the costs that will be borne by utility customers, including low-income individuals and small businesses. The RIA, relied upon heavily in the supplemental finding devotes only two paragraphs to consideration of projected retail electricity prices. *See* Regulatory Impact Analysis for Final Mercury and Air Toxics Standards, Section 3.9 at pages 3-22 to 3-23.

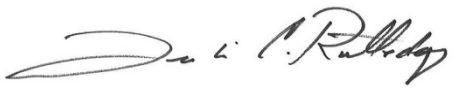
In *Michigan v.* EPA, the Court acknowledged that, "It will be up to the Agency to decide *(as always, within the limits of reasonable interpretation)* how to account for cost." *Michigan,* 135 S.Ct. at 2711 (2015) (emphasis added). But the Court also made it crystal clear that, "Although [the term "appropriate"] leaves agencies with flexibility, an agency may not 'entirely fail to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Id.* at 2702 (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). While the power sector's costs are addressed by EPA, this is only a partial analysis and is inadequate to meet the Court's directive. EPA's Legal Memorandum supporting the supplemental finding, concludes, "[I]t is important to consider whether the *power sector* can reasonably absorb the compliance costs associated with the [Maximum Available Control Technology] standards." *See* Legal Memorandum at 19. The second part of this vital analysis should have addressed how the ultimate payors, utility customers, would absorb the compliance costs. Instead of engaging in a detailed analysis of how

these costs will impact ratepayers, the EPA takes an opposite approach and indicates that the costs to the electric generating industry will be lessened by the pass-through to its retail customers. *See* 80 Fed. Reg. at 75,035. ("In addition, because the increase in electricity prices is in part due to the ability of many EGUs to pass their costs on to consumers, the estimated MATS compliance costs…are in fact less of a burden on owners of EGUs in the power sector.") Considering the gross inadequacy of EPA's analysis, its claims in the supplmental finding is, to paraphrase Justice Scalia, an entire failure "to consider an important aspect of the problem when deciding whether regulation is appropriate." *Michigan,* 135 S.Ct. at 2702 (2015)

For example, it is unreasonable to classify the purchase of electricity as a "discretionary" expenditure that utility retail customers can avoid. These customers, whether they are residential, small business, or large industrial customers, are dependent on electricity and the power sector. Thus, the costs that will be borne by retail utility consumers are "an important aspect of the problem" that should be considered when determining if regulation is appropriate under *Michigan v. EPA*.

As the RIA essentially ignores these costs and EPA adopts the benefit-cost analysis of the RIA in its supplemental finding, the supplemental finding does not support the conclusion that the final MATS is appropriate and necessary under CAA Section 112(n)(1)(A). The findings of the RIA are not sufficient to properly account for costs of regulation under Section 112(n)(1)(A). EPA should withdraw the supplemental finding and perform a thorough analysis of the costs that will be borne by retail utility consumers.

Sincerely,



Leslie Rutledge
Attorney General

cc: Sen. Tom Cotton
Sen. John Boozman
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