**Executive Summary of State/Industry Petitioners’ brief in the challenge of the CPP**

D.C. Federal Appeals Court Procedural & Record-Based Brief

The brief addresses the procedural and technical (or “noncore”) issues associated with the CPP rulemaking process under a 22,000 word court-imposed limit. They are classified as noncore issues because they are conceivably correctable, or at least partially so, by EPA if the court remands all or part of the CPP back to EPA accompanied by a decision identifying the errors the court views as material. The major issues identified in the brief are as follows:

* The final rule is not a logical outgrowth of the proposal. The rulemaking process under the Clean Air Act requires a legitimate notice and comment process. Interested parties are to be afforded an opportunity to comment on a proposed rule followed by a final rule, accompanied by a technical record supporting the final rule, where the final rule incorporates reasoned decision-making, as opposed to “arbitrary and capricious” rulemaking. Here, the final rule simply does not resemble the proposal at all. As just one example, the rule sets nationally uniform performance rates for coal and natural gas facilities, whereas the proposal set output-based emission rates. Thus, there was no opportunity to comment on this and other fundamental parts of the CPP. EPA’s material circumvention of the rulemaking process is a serious procedural error requiring CPP vacation.
* Clean Air Act Section 111 requires specific findings, determinations, and requirements as part of the mandated performance standards and emission guidelines-setting process that the CPP fails to provide. The CPP fails to meet these required elements throughout the rule. These failures are the hallmark of arbitrary and capricious rulemaking requiring vacation or partial remand.

The CPP has not adequately demonstrated the “best system of emission reduction” (BSER). The CPP defines BSER as the entire electric grid, and EPA has not shown it capable of meeting the required reductions or maintaining grid reliability. Accordingly, the performance standards (for coal and natural gas facilities) have not been shown to be “achievable” as specifically required.

Individually, EPA has not shown that the CO2 reductions associated with the three BSER building blocks (heat rate improvements for coal, generation shifting to natural gas facilities, and increases in renewable energy) are “achievable” as required. In fact, the rulemaking record is devoid of any reasonable showing that the building blocks can accomplish the required goals.

* If BSER is the entire electric grid, as defined in the CPP, then EPA arbitrarily and capriciously leaves portions out and fails to account for certain grid aspects.

The CPP has failed to account for needed infrastructure to function as the BSER EPA presumes. New transmission and gas delivery needs are not addressed to accommodate additional renewable additions and natural gas demands. The CPP has failed to address particular institutional and infrastructure issues such as electric cooperative mandates to supply affordable and reliable electric power, and state or regional impediments such as limited interstate transmission or local clean air prohibitions prohibiting more natural gas unit operation.

Inexplicably, the CPP leaves out portions of the electric grid as BSER such as renewable generation and nuclear generation constructed before the CPP, and has failed to consider important BSER aspects such as continued goal achievability with retiring nuclear units. These shortcomings are arbitrary and capricious, and penalize low-emitting and non-emitting sources.

* The various CPP shortcomings, as cited above, function to place an impossible burden on the states to craft a plan to meet CPP objectives. States like Montana, Kentucky, and North Dakota lack the necessary generation resources within their states to achieve the required emission reductions. Interstate trading is not an identified part of BSER, thus EPA cannot rely on it to demonstrate goal achievability.