

**ORAL ARGUMENT SCHEDULED FOR JUNE 2 AND 3, 2016****IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMPETITIVE ENTERPRISE  
INSTITUTE, *et al.*,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *et al.*,

*Respondents.*

Case No. 15-1488  
(and consolidated cases)

**PROPOSAL REGARDING ORAL ARGUMENT FORMAT**

In response to this Court's letter of March 28, 2016, Petitioners Competitive Enterprise Institute, Buckeye Institute for Public Policy Solutions, Independence Institute, Rio Grande Foundation, Sutherland Institute, Klaus J. Christopher, Samuel R. Damewood, Catherine C. Dellin, Joseph W. Luquire, Lisa R. Markham, Patrick T. Peterson, and Kristi Rosenquist (collectively "CEI") respectfully submit the following proposal regarding oral argument beginning June 2, 2016, in the consolidated cases involving review of EPA's Clean Power Plan rule ("the Rule").

As requested in the Court's letter, the parties did confer on a joint proposal, but were unable to reach agreement on an issue of central importance to the CEI

petitioners. CEI believes the Court would benefit from oral argument on EPA's fundamentally flawed consideration of the cost and benefits of the Rule.

EPA and its supporting Intervenors also include the cost-benefit issue in their oral argument proposal. Joint Proposal of Respondent EPA and Supporting Intervenors Concerning Format for Oral Argument 4 (Apr. 28, 2016) (listing relevant sections of the briefs in final segment of proposed argument format).

Most of the issues on which the other Petitioners propose to forgo oral argument turn on fact-specific details in the record and concern the legality of specific aspects of the Rule. *See* Joint Proposal of Petitioners and Petitioner-Intervenors Regarding Oral Argument Format 9–10 (Apr. 28, 2016). By contrast, EPA's fundamentally flawed cost-benefit analysis raises a purely legal question—whether a regulation promulgated under CAA § 111(d) is arbitrary and capricious when its costs far exceeds its domestic benefits. And this cost-benefit question concerns the legality of the Rule as a whole, for “when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.” *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

Oral argument would allow the Court to clarify the parties' briefing on EPA's cost-benefit analysis of the Rule. *See* Opening Br. on Procedural and Record-Based Issues 69–71; EPA Br. 156–59; Reply Br. on Procedural and Record-Based Issues 31–

32. In particular, oral argument would assist the Court's consideration of such questions as the following:

- Must EPA consider the Rule's costs *in relation to its benefits*, in light of the Supreme Court's instruction that "[i]t is not ... rational ... to impose billions of dollars in economic costs in return for a few dollars in ... benefits"? *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Or may EPA use arbitrary baselines such as the costs of reducing "*other* pollutants"? EPA Br. 156 (emphasis added) (citing 80 Fed. Reg. at 64,750).
- Is the cost-benefit analysis in EPA's Regulatory Impact Analysis ("RIA") unreasonable because, in weighing domestic costs against the estimated global benefits of carbon reduction, EPA arbitrarily "compar[es] apples to oranges"? *Nat'l Ass'n of Home Builders*, 682 F.3d at 1039–40.
- Is the RIA's cost-benefit analysis unreasonable because its reliance on global benefits violates the relevant statutory purpose of "protect[ing] ... *the Nation's* air resources" for "*its* population"? CAA § 101(b) (emphasis added).

CEI proposes a modest allocation of 10 minutes per side devoted to EPA's analysis of the Rule's costs and benefits. CEI proposes that this argument would follow "Adequately Demonstrated" and "Achievability" Issues on the second day of oral argument. CEI would be represented at oral argument by C. Boyden Gray.

Thus, CEI proposes the following modification of the other Petitioners' proposed schedule:

<b>Day 1: June 2, 2016</b> <b>Clean Air Act Statutory Authority Arguments</b>		
<b>#</b>	<b><u>Issue</u></b>	<b><u>Minutes Per Side and Counsel</u></b>
<b>IA</b>	<ul style="list-style-type: none"> <li>• <b>Generation Shifting Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § I</li> <li>○ Petitioners' Core Legal Issues Reply Br. §§ I, II</li> <li>○ EPA Br. § I (excluding § I.C)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 30 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Elbert Lin, Solicitor General of the State of West Virginia</li> <li>○ <u>For Non-State Petitioners:</u> Peter D. Keisler</li> </ul> </li> <li>• 30 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 60 minutes</b>
<b>IB</b>	<ul style="list-style-type: none"> <li>• <b>Section 112 Exclusion Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § II</li> <li>○ Petitioners' Core Legal Issues Reply Br. § III</li> <li>○ Petitioner-Intervenors' Opening Br. §§ I, II (portions)</li> <li>○ Petitioner-Intervenors' Reply Br. § I</li> <li>○ EPA Br. § II</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 25 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Elbert Lin, Solicitor General of the State of West Virginia</li> <li>○ <u>For Non-State Petitioners:</u> Allison D. Wood</li> </ul> </li> <li>• 25 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 50 minutes</b>
<b>IC</b>	<ul style="list-style-type: none"> <li>• <b>State Authority Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § III</li> <li>○ Petitioners' Core Legal Issues Reply Br. § IV</li> <li>○ EPA Br. § I.C</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 15 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Paul M. Seby, Special Assistant Attorney General for the State of North Dakota</li> <li>○ <u>For Non-State Petitioners:</u> Peter D. Keisler</li> </ul> </li> <li>• 15 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 30 minutes</b>
<b><u>Total Time Day One: Two Hours and Twenty Minutes</u></b>		

<b>Day 2: June 3, 2016</b>		
<b>Procedural, Record-Based, and Constitutional Issues</b>		
<b>#</b>	<b>Issue</b>	<b>Minutes Per Side and Counsel</b>
<b>IIA</b>	<ul style="list-style-type: none"> <li>• <b>Notice Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Procedural and Record-Based Issues Opening Br. § I</li> <li>○ Petitioners' Procedural and Record-Based Issues Reply Br. § I</li> <li>○ EPA Br. § IV</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 20 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Matthew H. Frederick, Deputy Solicitor General of the State of Texas</li> <li>○ <u>For Non-State Petitioners:</u> Thomas A. Lorenzen</li> </ul> </li> <li>• 20 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 40 minutes</b>
<b>IIB</b>	<ul style="list-style-type: none"> <li>• <b>“Adequately Demonstrated” and “Achievability” Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Procedural and Record-Based Issues Opening Br. §§ II, IV.C, V</li> <li>○ Petitioners' Procedural and Record-Based Issues Reply Br. §§ II, IV</li> <li>○ EPA Br. §§ V, VII</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 40 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Misha Tseytlin, Solicitor General of the State of Wisconsin</li> <li>○ <u>For Non-State Petitioners:</u> F. William Brownell</li> </ul> </li> <li>• 40 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 80 minutes</b>
<b>IIC</b>	<ul style="list-style-type: none"> <li>• <b>Cost-Benefit Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Procedural and Record-Based Issues Br. § IV.D</li> <li>○ Petitioners' Procedural and Record-Based Issues Reply Br. § III.D</li> <li>○ EPA Br. § VI.B</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 10 minutes for CEI Petitioners: <ul style="list-style-type: none"> <li>○ <u>For CEI Petitioners:</u> C. Boyden Gray</li> </ul> </li> <li>• 10 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 20 minutes</b>
<b>IID</b>	<ul style="list-style-type: none"> <li>• <b>Constitutional Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § IV</li> <li>○ Petitioners' Core Legal Issues Reply Br. § V</li> <li>○ Petitioner-Intervenors' Opening Br. §§ II (portions), III, IV</li> <li>○ Petitioner-Intervenors' Reply Br. §§ I (portions), II, III</li> <li>○ EPA Br. § III</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 20 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> David B. Rivkin, Jr.</li> <li>○ <u>For Non-State Petitioners:</u> Laurence H. Tribe</li> </ul> </li> <li>• 20 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 40 minutes</b>
<b>Total Time Day Two: Three Hours</b>		

## CONCLUSION

For the foregoing reasons, CEI respectfully requests that the Court adopt this proposal for oral argument.

April 28, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

April 28, 2016

/s/ Adam R.F. Gustafson  
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