Tuesday, August 25, 2015 1:54 PM ET Exclusive

Peabody: Clean Power Plan is energy policy 'masquerading as an emissions limit'

By Taylor Kuykendall

The U.S. EPA has been given a week to file a response to petitions to block the Clean Power Plan filed by the country's largest coal producer and multiple states.

In an Aug. 24 order, the U.S. Court of Appeals for the District of Columbia Circuit consolidated an emergency petition filed by Peabody Energy Corp. into a challenge brought by a coalition of states led by West Virginia. The EPA was given seven calendar days to respond to the petitions, and the petitioners will be granted another four days to respond to those petitions.

"Oklahoma is suing the EPA over the Clean Power Plan because we are asking the federal government to comply with the Clean Air Act, not because we need more time and flexibility to implement this unlawful plan," Oklahoma Attorney General Scott Pruitt said in a press release, noting deadline changes in the finalized rule.

The case follows an unsuccessful challenge led by Murray Energy Corp. to a draft version of the plan the court had ruled was premature. A motion to consolidate that case with the new challenges — filed after the final rule was announced — was denied in an Aug. 19 order. Murray has said it plans to ultimately prevail over the EPA with five new lawsuits.

In its filing, Peabody said the final version of the Clean Power Plan exceeds EPA's legal authority and threatens irreparable injury. The company is asking the court to stay the rule while it is being litigated.

"This court should not wait to address the critical threshold question of EPA's statutory authority, when so much hangs in the balance and irreparable harm is occurring now," the filing states. "To be sure, once the final rule is published in the Federal Register, aggrieved parties will file petitions for review, together with stay motions. But this petition is necessary now because there may well be a substantial delay in publication."

Peabody cites news reports that the agency could hold off publication of the 1,560-page rule until as late as December 2015, though the EPA has denied those reports. The rule requires states to file plans or detailed "initial submissions" by Sept. 6, 2016 — what Peabody called "an eyeblink in the context of the multi-year planning horizon of energy suppliers, utilities, and private industry." The company said compliance efforts will begin while the rule is being litigated, and similar to a ruling on the Mercury and Air Toxics rule, many of the impacts could hit the industry well before the court addresses the matter.

"The changes wrought by the final rule are unprecedented in their magnitude and resemble those arising from landmark legislation rather than from agency rules," Peabody's filing states. "Ironically, EPA touts the final rule as creating cap-and-trade systems, when a bill to do just that was rejected by Congress in 2009-2010."

Peabody notes in its filing that the fact that Peabody's public shares and bonds lost more than $90 million in value from the day before the rule was announced to the close of market the day after the announcement was demonstration of the damage the rule is now imposing. While Peabody stock was trading at $1.02 per share the day after the announcement, according to SNL Energy data, shares had climbed back to $1.57 by market close Aug. 24.

Peabody called the rule an "energy policy… masquerading as an emissions limit" and said it focuses on "arbitrarily" singling out the use of coal with an intention to "extinguish an entire industry." As an example, Peabody says the government regulates cars but "does not embark on a 'war' against the automobile."

"We are all CO2 emitters, and atmospheric CO2 is the intermingled result of all human activity and Mother Nature," Peabody writes. "Although EPA tries to cast this regulation in traditional air emissions terms, it is anything but."

The company insists the agencies' legal basis, which it has defended in multiple documents and court filings, is flimsy and an abuse of the powers given the agency by Congress.

"In short, Section 111(d) is far too thin a reed to support the dramatic change that EPA seeks to impose," the filing states. "Congress does not 'hide elephants in mouseholes.'"

The states had noted in one of their filings asking for consolidation of several suits that while the procedural posture of its case differs from Murray's, the "fundamental legal thread" is essentially the same. They claim the rule involves "the most far-reaching energy regulation in this nation's history" and that at the minimum states must begin working immediately to meet state plan deadlines.

"The Section 111 (d) Rule manifests EPA's policy judgement — never authorized by Congress — that coal-fired generation should be systematically disfavored," their filing states. "Beginning on [Aug.] 3, states were given only thirteen months to design, draft and submit at least initial state plans, which must demonstrate how the state will replace coal-fired generation with entirely different sources such as natural gas, wind power and solar power."

The rule has been widely celebrated by environmentalists and other supporters of action to reduce atmospheric carbon dioxide in an effort to mitigate the effects of climate change. In an Aug. 20 blog post, Mary Anne Hitt, the director of the Sierra Club's Beyond Coal campaign, said that because of the group's effort, carbon dioxide emissions could fall even further and faster than what was targeted by the EPA.

"As a West Virginian, I understand that this transition to clean energy poses significant challenges for parts of the country traditionally reliant on coal," Hitt wrote. "EPA recognizes it too, and has incorporated robust economic transition elements into the final Clean Power Plan. … Replacing dirty and outdated

coal plants with energy efficiency and clean energy will save money and save lives. That's just common sense."