The D.C. Circuit Court of Appeals has dismissed the first challenge to EPA's proposed Clean Air Act Section 111d rule to reduce greenhouse gas emissions from power plants (known as the Clean Power Plan) on the grounds that the rule is only a proposed rule, not a final one. The court's opinion can be found here. Petitioners, including energy companies and states, challenged the rule on two grounds. The first is that the rules would impose large economic costs on states and energy utilities to comply with the rules; the second is on the grounds that EPA lacks the legal authority to issue the rules because of a technical drafting glitch in the statute. The second is the more interesting of the arguments: the House of Representatives and U.S. Senate passed separate versions of the bill that were never reconciled. The House version appears to prohibit EPA from regulating emissions from power plants if power plants are already regulated under a different section of the Act, Section 112. The Senate version allows Section 111d regulation of power plants as long as the emissions themselves (as opposed to the power plants) are not regulated under Section 112 or under a different section of the Act.

The court refused at this stage in the rule making process to consider either argument on its merits. That's because the rule has yet to be finalized. As the court stated:

> The [petitioners] want us to do something that they candidly acknowledge we have never done before: review the legality of a proposed rule. But a proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules. We do not have authority to review proposed agency rules. In short, we deny the petitions for review and the petition for a writ of prohibition because the complained-of agency action is not final.

EPA is in the process of finalizing the Clean Power Plan rule; as of today the rule is being reviewed by the Office of Management and Budget and will likely be released by the end of the summer. Then the litigation battles will begin again. Today's decision is hardly the last word the D.C. Circuit will have on whether EPA's Clean Power Plan is an allowable interpretation of Section 111d. The arguments in *Murray Energy* will be resurrected along with a whole slew of new ones.