There are three big takeaways from the utility industry's comments on EPA's proposed new climate rules. First, the industry seems to share progressive concerns about whether we can count on hydrogen and CCS (carbon capture and sequestration). Second, the industry *doesn't* invoke the major question doctrine, making it clear that it does not view such technology mandates as out of bounds for EPA in the future. Third, most of its comments are focused on timing issues. The industry does not endorse the Trump Administration's very narrow view of EPA's statutory authority.

Notably, the tone of the industry filing is that the industry is committed to the energy transition and is moving as fast as it can, much different than the stance of conservative opponents.

Technological Viability.

In terms of the viability of hydrogen and CCS, the industry tries to walk a fine line. It argues that these technologies have great potential. But at the same time, the industry underscores the technological, economic, and infrastructure challenges that would have to be overcome to allow widespread use by 2040. The industry also suggests that it may *never* be feasible to retrofit many of today's power plants with these technologies even if other barriers are overcome. Of course, this is par for the course: How often does an industry ever say that EPA's proposed standards are perfectly feasible?

The thrust of the industry's argument is that we can't be confident these technologies will be available for widespread use in the 2030s — or maybe ever. Apart from seeing the feasibility of these technologies as unproven, it raises the specter of "the numerous supporting infrastructure challenges regarding transportation of captured CO2" and "challenges related to permitting new storage facilities, including advocacy group opposition."

The industry also contends that current hydrogen blending projects "do not include components of the overall value chain that will be critical to the availability of low-GHG hydrogen blending throughout the power sector." In addition, the industry says, "low-GHG hydrogen production faces challenges that could limit achievability throughout the industry."

All of this supports progressive arguments against reliance on these technologies, at least in terms of the power sector. We do know, after all, that renewable energy and battery storage work.

The Dog that Didn't Bark: The Major Questions Doctrine

The state AGs who challenge EPA's approach argue that it violates the major questions doctrine. That doctrine limits the power of administrative agencies to issue rules of "vast economic and political significance." That's the doctrine the Supreme Court used to strike down Obama's Clean Power Plan in *West Virginia v. EPA*.

The power industry's approach is much different. The words "major question doctrine" appear nowhere in the document. Nor is there any reference whatsoever to *West Virginia v. EPA*. None.

The industry makes it clear that there is nothing intrinsically wrong with EPA's approach; it just doesn't think the approach is ready for prime time *yet*. In fact, the industry proposes that new gas power plants be retrofit-ready in case hydrogen and CCS do become usable at scale.

Unlike the state AGs, the industry does not lambast EPA's proposal as outrageous. The core argument is that the proposal has technical flaws and is overly optimistic about CCS and hydrogen use.

Legal Arguments.

The Trump Administration took an extremely narrow view of EPA's authority. Under the Trump view, EPA could only mandate efficiency improvements at power plants. It could not require fuel mixing (like the use of hydrogen). Nor could EPA require any kind of emission trading, even as a compliance mechanism.

The utility industry does not make any of those arguments and instead pushes trading as a compliance mechanism. The industry also supports EPA'S proposal to exempt power plants that have federally enforceable agreements to close down.

The industry's main legal argument is much narrower and relates to timing. It says that EPA cannot set a future date when a technology will be mandatory for the industry. The statute says EPA must chose a technology that "has been adequately demonstrated," from which the industry infers that it must already be capable of use at scale. The industry also relies on the fact that the regulations for new sources become immediately applicable to all sources constructed after it is proposed. Those seem like tenable readings of the statute but not inevitable ones.

EPA's reading of the statute is that the feasibility of these technologies for future use has

already been demonstrated because the evidence showing future feasibility already exists. In other words, EPA sees "has been demonstrated" to mean that the evidence already exists, not that the technology has already been used at scale. It also argues that a regulation with phased requirements is applicable to new plants built after it is proposed, step by step as the various phases go into effect.

The reason to favor EPA's approach is that it will give the industry the best basis for planning and will encourage the rollout of related infrastructure such as pipelines. In addition, one reason the technology hasn't been used at scale is that the industry has been more interested in talking about it rather than investing in it. The industry shouldn't get to control what technologies apply by simply failing to use them. I think these could be winning arguments, at least in the D.C. Circuit if not in the Supreme Court.

The industry also argues that it would have no legal recourse if it turned out that the technology was not in fact feasible when the compliance date comes around. That argument seems wrong to me. The Clean Air Act provision on judicial review does generally bar lawsuits against a regulation unless they're filed almost immediately. But there's an exception where crucial information only becomes available later. Industry could also petition for a delay in the rules and sue if that was denied. Just to eliminate doubt, EPA could include a mid-course evaluation of feasibility in the rule itself.

The Upshot

It would be hard to overemphasize the difference in tone and substance of the utility industry filing versus the overwrought attacks from fossil-fuel interests and conservatives. Unlike them industry is pitching this as a normal regulatory disagreement and claims to share EPA's goals. The utility filing may well be wrong, but at least it raises arguments that reasonable people would want to consider.

In the end, I'm struck by the fact that the utility filing sounds like it was written by lawyers, while the Republican AGs' filing sounds like it was written by politicians –which of course they are. We'll see which category the federal judiciary fits in.