

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN NURSES ASSOCIATION,)
et al.,)

Plaintiffs,)

v.)

LISA P. JACKSON, Administrator of)
The United States Environmental)
Protection Agency, *et al.*)

Defendants,)

UTILITY AIR REGULATORY GROUP,)

Defendant-Intervenor)

NATIONAL MINING ASSOCIATION)
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Amicus Curiae)

Civ. No. 1:08-CV-02198-RMC

**AMICUS CURIAE BRIEF OF NATIONAL MINING ASSOCIATION
IN SUPPORT OF DEFENDANT-INTERVENOR UTILITY AIR REGULATORY
GROUP'S MOTION FOR EQUITABLE RELIEF FROM JUDGMENT OR ORDER
PURSUANT TO FED. R. CIV. P. 60(B)(5)**

October 11, 2011

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
BACKGROUND	5
ARGUMENT	7
I. THE FERC INFORMATION AND OTHER MATERIAL DEMONSTRATE THAT EPA HAS NOT ADEQUATELY CONSIDERED THE EFFECT OF THE MATS RULE ON THE RELIABILITY OF THE NATION’S ELECTRIC SYSTEM.	7
A. EPA Dramatically Underestimated the Number of Retirements the MATS Rule and Other Power Sector Rules Will Cause.	8
1. EPA’s failed to conduct cumulative analysis as recommended by FERC.	8
2. EPA’s failure to cumulatively assess reliability resulted in EPA seriously underestimating the number of units likely to retire as a result of the Agency’s regulations.	10
B. EPA’s Reliability Assessment Is Built on the Faulty Premise that Electricity Can Be Freely Transmitted Within Broad Geographic Areas and Does Not Take Into Account the Many Localized Constraints in the Electric Grid.	12
C. EPA Rejected FERC Input as to the Amount of Time Utilities Will Need to Comply with EPA’s Regulations.	15
D. EPA Either Failed to Consult with Agencies Having Responsibility for Grid Reliability or Failed to Include Those Consultations in the Record.	16
II. EQUITY REQUIRES MODIFYING THE CONSENT DECREE TO ENABLE EPA TO TAKE MORE TIME TO CONSIDER THE RELIABILITY IMPACTS OF THE MATS RULE.	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
Federal Register	
76 Fed. Reg. 24,976 (May 3, 2011).....	1
76 Fed. Reg. at 25,054.....	5, 6, 16, 18
76 Fed. Reg. at 25,057.....	10
76 Fed. Reg. 48,208, 48,346 (Aug. 8, 2011)	10

INDEX OF EXHIBITS

- Exhibit 1 Letter of Southwest Power Pool (Sept. 20, 2011).
- Exhibit 2 ERCOT, Impacts of the Cross State Air Pollution Rule on the ERCOT System, September 1, 2011.
- Exhibit 3 Letter of PJM Interconnection to EPA (Aug. 4, 2011).
- Exhibit 4 Letter from P. Moeller, Commissioner, Federal Energy Regulatory Commission to Honorable Lisa Murkowski, U.S. Senator, (Aug. 1, 2011).
- Exhibit 5 Letter from Honorable Lisa Murkowski, U.S. Senator Lisa Murkowski, U.S. Senator, (May 17, 2011).
- Exhibit 6 Letter from J. Wellinghoff, et al., Chairman, Federal Energy Regulatory Commission to Honorable Lisa Murkowski, U.S. Senator, (Aug. 1, 2011).
- Exhibit 7 Letter from M. Spitzer, Commissioner, Federal Energy Regulatory Commission to Honorable Lisa Murkowski, U.S. Senator, (Aug. 1, 2011).
- Exhibit 8 Response to Questions, J. Wellinghoff, Chairman, Federal Energy Regulatory Commission, Before the House Subcommittee on Energy and Power, (Sept. 14, 2011).
- Exhibit 9 Meeting notes of meeting among FERC, EPA, CEQ (Nov. 4, 2010).
- Exhibit 10 Testimony of C. LaFleur, Commissioner, Federal Energy Regulatory Commission, Before the House Subcommittee on Energy and Power, (Sept. 14, 2011).
- Exhibit 11 Federal Energy Regulatory Commission, Office of Electric Reliability, "Potential Retirement of Coal Fired Generation and its Effect on System Reliability (Preliminary Results)".
- Exhibit 12 Resource Adequacy and Reliability in the IPM Projections for the Toxics Rule, EPA-HQ-OAR-2009-0234-3063[1].
- Exhibit 13 Meeting notes of meeting among FERC, EPA, CEQ (Oct.27, 2010).
- Exhibit 14 Testimony of J. McKinney, Commissioner, Public Service Commission of West Virginia, Before the House Subcommittee on Energy and Power, (Sept. 14, 2011).
- Exhibit 15 Testimony of Stan Wise, Commissioner, Public Service Commission of Georgia, Before the House Subcommittee on Energy and Power, (Sept. 14,

2011).

- Exhibit 16 Testimony of J. Davis, Commissioner, Missouri Public Service Commission, Before the House Subcommittee on Energy and Power, (Sept. 14, 2011).
- Exhibit 17 Petition of South Carolina Public Service Commission to Federal Energy Regulatory Commission to Establish Joint Board.
- Exhibit 18 Petition of South Dakota Public Utilities Commission to Federal Energy Regulatory Commission to Establish Joint Board.
- Exhibit 19 Interagency Review Comments on draft proposed MATS Rule.
- Exhibit 20 Response to Questions, Commissioner Philip D. Moeller, Federal Energy Regulatory Commission, Before the House Subcommittee on Energy and Power (Sept. 14, 2011).

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Mining Association (“NMA”) is a national trade association whose members include producers, transporters and consumers of coal. NMA’s member companies mine over 75 percent of the coal produced annually in the United States from operations located in 26 states in every coal-producing region of the country. Most of the coal produced by NMA members is sold to coal-fired electric steam generating units (“EGUs”) that will be subject to what the Environmental Protection Agency (“EPA”) now refers to as its proposed Mercury and Air Toxics Standards (“MATS”) rule, 76 Fed. Reg. 24,976 (May 3, 2011), when that rule is finalized.

As discussed in more detail below, according to a preliminary estimate by the staff of the Office of Electric Reliability of the Federal Energy Regulatory Commission (“FERC”) that just recently became available, the MATS rule and EPA’s other power sector regulations place approximately 40 percent of the nation’s coal-fueled electric generation, or approximately 20 percent of total electric generation, at risk of early retirement.¹ FERC staff raised serious questions about the validity of EPA’s conclusion that the reliability of the nation’s electric grid will not be imperiled by the premature retirements of electric generating stations that the MATS rule and EPA’s other power sector rules will lead to.

The Utility Air Regulatory Group (“UARG”) has moved this Court for an order extending the November 16, 2011 consent decree deadline for promulgation of the MATS rule, in part, to allow the impact of the MATS rule on electric reliability to be considered. NMA is directly and immediately affected by the MATS rule. The MATS rule threatens to eliminate a

¹ As discussed below, FERC staff estimated that 81 gigawatts (“GW”) of coal-fired electric generating capacity is either ‘likely’ or ‘very likely’ to retire, and another 50 GW is ‘somewhat likely’ to retire, as a result of EPA’s regulations. 131 GW is about 40 percent of total coal-fired capacity in the United States, and coal-fueled capacity is about half of all electric capacity.

large portion of the market to which NMA's members sell coal. Additionally, many of NMA's members (both those that produce coal and particularly those that mine and smelter ore) use large amounts of electricity, the reliable supply of which is undermined by the MATS rule. If the consent decree deadline is extended, EPA will have the time to do the necessary analysis and to modify the rule in a way that is far less disruptive to coal-fueled generation and the electric grid.

INTRODUCTION AND SUMMARY OF ARGUMENT

NMA offers this amicus brief to bring new information that just recently became available to the attention of this Court demonstrating the seriousness of the threat that final promulgation of the MATS rule poses to the electric grid. This new information, which began to be released at the beginning of August and is still in the process of being produced, consists primarily of material submitted by FERC in response to congressional inquiry, as well as comments filed in the MATS rulemaking docket by other agencies having jurisdiction over and expertise in electric reliability. FERC is responsible for the reliable operation of the nation's bulk power electric system and maintains a large staff at its Office of Electric Reliability to carry out this function.² This new information was obviously not available to the Court when it entered the consent decree establishing the November 16, 2011 rulemaking deadline. This new information represents changed circumstances justifying the equitable relief UARG seeks in modifying that deadline.

The FERC information indicates that FERC's Office of Electric Reliability staff consulted with EPA regarding the impact of the MATS rule and other power sector rules that

² According to FERC's Strategic Plan, its "mission" is to ensure "reliable, efficient and sustainable energy for consumers," including "[p]romot[ing] the development of safe, reliable and efficient energy infrastructure that serves the public interest." See <http://www.ferc.gov/about/strat-docs/FY-09-14-strat-plan-print.pdf>.

EPA is simultaneously pursuing on electric reliability but that EPA rejected virtually all of FERC's recommendations. The information further indicates that FERC and other agencies consider EPA's own reliability assessment to be fundamentally flawed and that EPA has dramatically underestimated the number of electric generation stations that will be forced to close because of EPA.

Indeed, despite EPA's claim that its rules will not impair electric reliability, the new information reveals the following:

- FERC's Chairman, in congressional testimony on September 14 backed up by the testimony of the other four FERC Commissioners to the same effect, warned that EPA's methodology for assessing reliability impacts is so flawed as to produce results that are "irrelevant."³

- EPA's estimate of the amount of electric generation that its rules will cause to retire is dramatically below estimates of numerous bodies that have examined the issue. These include estimates by the North American Electric Reliability Corporation ("NERC"), which is chartered by FERC to monitor the reliability of the grid, as well as by FERC Office of Electric Reliability staff and financial institutions providing market research to investors. Indeed, as shown in information released on August 3, FERC staff preliminarily estimated that as much as 131 GW of coal-fueled generation are at risk from EPA's regulations. That is an astronomical number, as noted representing approximately 40 percent of the coal-fueled fleet or 20 percent of all electric generation in the country.⁴

³ *The American Energy Initiative: Impacts of the Environmental Protection Agency's New and Proposed Power Sector Regulations on Electric Reliability Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 112th Congress (September 14, 2011) (response of Jon Wellinghoff, Chairman, FERC, to question by Rep. Rush) ("Electric Reliability Hearing"). The hearing transcript is available on Lexis.

⁴ See discussion below at Argument I.A.2.

- Regional organizations having responsibility for the grid have expressed outright alarm at the impact EPA's regulations could have:

- The Southwest Power Pool ("SPP"), the Regional Transmission Organization ("RTO") approved by FERC to plan and operate the regional transmission system and wholesale electric market in 8 southwestern states, informed EPA on September 20 that its analysis *indicates serious, negative implications to the reliable operation of the electric grid in the SPP region raising the possibility of rolling blackouts or cascading outages that would likely have significant impacts on human health, public safety and commercial activity.*⁵

- A September 1, 2011 study by the regional entity having responsibility for the reliable operation of most of the Texas grid concluded that Texas is at risk of rolling blackouts this Winter and next Summer as a result of EPA's rules.⁶

- PJM Interconnection, the RTO for 13 Middle Atlantic and Midwestern states and the District of Columbia, informed EPA on August 4 that *"the analysis supporting the Proposed Rule has underestimated the risks to reliability of electric supply in light of the hard deadlines imposed pursuant to [Section 112 of the Clean Air Act, the statute under which EPA is promulgating the MATS rule]."*⁷

- FERC Commissioner Moeller told Senator Murkowski on August 1 that:

The recent and enduring heat wave that simultaneously impacted a large portion of the population of the United States underscores the essential and life-saving importance of electric reliability. With economic weakness and closed factories throughout the nation, you might have expected the available power plants to easily handle the heat wave. ***Yet the operators of the power grid relied on all of their available resources, including coal plants that are***

⁵ See Exhibit 1 at 2 (emphasis added).

⁶ See ERCOT, *Impacts of the Cross State Air Pollution Rule on the ERCOT System*, September 1, 2011, Exhibit 2 at 7.

⁷ See Exhibit 3 at 33.

*expected to be shut down because of EPA decisions, in order to ensure the reliability of the grid and the health and safety of the public.*⁸

- As discussed in more detail in UARG’s motion, NERC is scheduled to release a new study next month comprehensively assessing the impact of EPA’s regulations on electric reliability, yet EPA has indicated no intent to postpone issuance of the final MATS rule until that report is available and can be analyzed.

- On October 7, 2011, FERC scheduled a technical conference for November 29-30, 2011 to receive views from the public on electric reliability issues, including reliability issues arising from EPA’s regulations.⁹ On EPA’s current rulemaking schedule, it will promulgate the MATS rule without being able to take advantage of the information produced at this conference.

EPA seems to believe that it is required to ignore the concerns of agencies with actual responsibility for the reliable operation of the electric grid, which all have much better knowledge and information than EPA, and finalize the rule by the November 16, 2011 deadline. That result, however, is not required. As set forth in the UARG motion, this Court has equitable power to extend the deadline to enable EPA to satisfy its legal obligation to address the MATS rule’s impact on electric reliability.

BACKGROUND

EPA asserted in the MATS rule its belief “that the requirements of the proposed rule can be met without adversely impacting electric reliability.” 76 Fed. Reg. at 25,054. According to EPA, only “modest” amounts of new electric generating capacity will be required to replace electric generation forced to retire as a result of the rule, and this capacity can be installed within the compliance time periods set forth in the proposed rule. *Id.* As a check on these conclusions,

⁸ See Exhibit 4 at 7 (emphasis added.)

⁹ FERC, *Reliability Technical Conference*, Docket No. AD12-1-000 (Oct. 7, 2011).

EPA stated that “EPA itself has already begun reaching out to key stakeholders including not only sources with direct compliance obligations, but also groups with responsibility to assure an affordable and reliable supply of electricity including state Public Utility Commissions (PUC), Regional Transmission Organizations (RTOs), the National Electric Reliability Council (NERC), the Federal Energy Regulatory Commission (FERC), and DOE.” *Id.*

None of the consultations that EPA stated that it was having or would have with these agencies are reflected in the MATS rulemaking docket or the docket of any of EPA’s other power sector regulations. On May 17, 2011, Senator Lisa Murkowski, ranking minority member on the Senate Energy Committee, sent a letter to each of the five FERC Commissioners asking for information on the nature of any consultations between FERC and EPA concerning the impact of EPA’s power sector regulations on the reliability of the electric grid.¹⁰ On August 1, 2011, FERC Chairman Jon Wellinghoff and Commissioners John Norris and Cheryl LaFleur sent a joint reply, and Commissioners Phillip Moeller and Marc Spitzer each sent individual replies.¹¹ These letters were released by Senator Murkowski on August 3, 2011. The Wellinghoff et al. letter also provided a number of documents reflecting FERC-EPA contacts. These documents were not publicly released until the week of September 12, 2011.¹²

On September 14, 2011, the five FERC Commissioners testified before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, which held a hearing to address the impact of the EPA regulations on the reliable operation of the

¹⁰ See Exhibit 5.

¹¹ See Exhibits 4 (Commissioner Moeller), 6 (Chairman Wellinghoff and Commissioners LaFleur and Norris), and 7 (Commissioner Spitzer).

¹² These documents are posted on the Senate Energy Committee’s website at http://energy.state.gov/public/indic.cfm?FuseAction=IssueItems.View&Issueitem_ID=e4a227e1-9ec8-4b24-ad3a-1fc0d9c28462. Several are cited and attached as exhibits here.

electric grid. Each Commissioner provided prepared written and oral testimony, and each sent written post-hearing replies to follow-up questions from the subcommittee.¹³

ARGUMENT

It is obvious from the information that recently became available that EPA has not adequately considered the impact of the MATS rule on electric reliability. It is equally obvious that EPA does not have the time to do so by November 16. EPA, however, should not use the consent decree as an excuse to adopt regulations that place the electric grid in jeopardy. Strong equitable and public interest factors counsel in favor of modifying the consent decree deadline to enable EPA to take this new information into consideration.

I. The FERC Information and Other Material Demonstrate that EPA Has Not Adequately Considered the Effect of the MATS Rule on the Reliability of the Nation's Electric System.

The new information that has become available from FERC raises serious questions about the viability of EPA's conclusion that the MATS rule and its other power sector rules will not impair the reliability of the electric grid and EPA's ability to adequately assess reliability in the time remaining for it to promulgate a final rule. In particular, this information shows that: (1) EPA dramatically underestimated the number of retirements that the MATS rule will lead to, particularly because EPA failed to cumulatively assess the impact of all of its power sector regulations, as FERC recommended; (2) EPA's analytic approach produces results that are, in the words of the FERC Chairman, "irrelevant" in assessing the reliability impacts of EPA's rules, because it wrongly assumes that there are no impediments to the flow of power across broad regions of the country and fails to examine reliability in light of the many localized electric

¹³ The written testimony and responses to follow-up questions are available on the House Energy and Commerce Committee website at <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8896>. The follow-up response of Chairman Wellinghoff is attached as Exhibit 8.

transmission and delivery constraints on the grid; (3) EPA failed to heed FERC's warning that EPA's compliance deadlines were too short in light of the well-recognized barriers to the quick construction of new resources needed to replace retiring resources; and (4) EPA either did not consult with agencies having jurisdiction over electric reliability or did consult but failed to include a record of those consultations in the public rulemaking docket on which the public could comment.

A. EPA Dramatically Underestimated the Number of Retirements the MATS Rule and Other Power Sector Rules Will Cause.

1. EPA's failed to conduct cumulative analysis as recommended by FERC.

During the FERC-EPA staff consultations, FERC Office of Electric Reliability staff repeatedly asked EPA to comprehensively assess the cumulative impact of its power sector regulations. For example, one FERC note of an October 20, 2010 meeting said that EPA's analysis "focused only on the effects that the Transport Rules would have on the nation's electric generation capacity – specifically the reduction of coal plants [and] did not consider the cumulative impact from additional legislative initiatives, including water restrictions, coal ash byproduct sequestration or any renewable generation mandates."¹⁴ Similarly, FERC's notes of a November 4, 2010 meeting indicate that FERC's Office of Electric Reliability "wants EPA to use a holistic approach when studying the impacts of the EPA rule... whereas EPA would like to do individual best case studies."¹⁵ According to Chairman Moeller's August 1, 2011 letter to Senator Murkowski, based on information he received from FERC staff, "EPA's analysis is

¹⁴ See Exhibit 6 at 11.

¹⁵ See Exhibit 9.

apparently limited to the expected retirements caused by two of its rulings (does not include coal residuals, green house, clean water, and others).”¹⁶

FERC Commissioner LaFleur, in her testimony to the Energy and Power Subcommittee, best described the reason why cumulative analysis is needed:

For some time now, we have been hearing about the EPA’s proposed air and water regulations and their potential to affect our energy supply. *Although not all of these regulations are final, I believe it is important to consider them as a package when assessing their potential effect on reliability.* This is because the owner of a power plant will appropriately consider all of its EPA compliance obligations, among other factors, in determining whether it is economically feasible to retrofit or repower a unit, or whether it makes economic sense to retire the unit.¹⁷

Or, as FERC Chairman Wellinghoff stated in responses to questions from the Energy and Power Subcommittee following the hearing:

Question: Why did Commission staff take the position that it was important to cumulatively assess the impact of all the upcoming EPA regulations? During meetings with EPA staff, did EPA explain its preference for completing “individual best case studies” (as opposed to a cumulative assessment), as suggested in the documents accompanying the Commission’s July 27th letter?

*Answer: Commission staff took this position because the effects to system reliability are based on the cumulative impact of all the proposed regulatory factors. I do not know why EPA did not do a cumulative assessment.*¹⁸

EPA recognizes that the MATS rule is one of a series of related regulations, yet inexplicably refuses to examine the impacts of that rule cumulatively with all of its other power sector regulations. The rule itself states:

EGUs are the subject of several rulemaking efforts that either are or will soon be underway. In addition to this rulemaking proposal, concerning both hazardous air pollutants under section 112 and

¹⁶ See Exhibit 4 at 3.

¹⁷ See Exhibit 10 at 1 (emphasis added).

¹⁸ See Exhibit 8 at 2 (italics were used in the original for the answers to the questions).

criteria pollutant NSPS standards under section 111, EGUs are the subject of other rulemakings, including ones under section 110(a)(2)(D) addressing the interstate transport of emissions contributing to ozone and PM air quality problems, coal combustion wastes, and the implementation of section 316(b) of the Clean Water Act (CWA). They will soon be the subject of a rulemaking under CAA section 111 concerning the emissions of greenhouse gases. *EPA recognizes that it is important that each and all of these efforts achieve their intended environmental objectives in a common-sense manner that allows industry to comply with its obligations under these rules as efficiently as possible and to do so by making coordinated investment decisions and, to the greatest extent possible, by adopting integrated compliance strategies.*¹⁹

2. EPA's failure to cumulatively assess reliability resulted in EPA seriously underestimating the number of units likely to retire as a result of the Agency's regulations.

Unfortunately, despite recognizing that utilities need to adopt an integrated strategy for addressing *all* of EPA's rules, and despite FERC's firm recommendation that such a cumulative analysis is an integral part of a meaningful reliability assessment, EPA failed to conduct such a cumulative assessment for the MATS rule. As a result, EPA has not provided a credible estimate of the number of retirements that its rules will lead to. EPA estimated that its proposed MATS rule will cause 9.9 GW of electric generation to retire.²⁰ It estimated that a related rule, the recently promulgated Cross-State Air Pollution Rule, also known as the Transport Rule, will cause 4.8 GW of electric generation to retire.²¹ It has not provided any estimate of the retirements its other power sector rules will cause.

These numbers, however, are significantly lower than other estimates. FERC staff produced a preliminary analysis which they provided to EPA that concluded that 81 GW of

¹⁹ 76 Fed. Reg. at 25,057 (emphasis supplied).

²⁰ See Regulatory Impact Analysis for proposed MATS rule (March 21, 2011) at 8-35, available at <http://www.epa.gov/ttnecas1/regdata/RIAs/ToxicsRuleRIA.pdf>.

²¹ *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals*, 76 Fed. Reg. 48,208, 48,346 (Aug. 8, 2011).

electric generation is either “likely” or “very likely” to retire and that another 50 GW is “somewhat likely” to retire, for a combined total of 131 GW that are between “somewhat” and “very” likely to retire.²²

Although Chairman Wellinghoff questioned the utility of these estimates because they were based on preliminary information,²³ the huge disparity between EPA’s estimates and FERC staff’s estimates emphasize how low EPA’s estimate is. This conclusion is reinforced by the fact that EPA’s 4.8 + 9.9 GW retirement estimate is also far lower than a wide number of estimates made by industry and by financial institutions not affiliated with the regulated industry that produced reports providing market information to potential investors. A few of these studies are as follows:

Summary of Coal-Fired Retirement Projections

Analyst	Date of Publication	Retirement Projection (GW)
U.S. Energy Information Administration (EIA)	April 2011	45-73
NERA Economic Consulting	May 2011	48
FBR Capital Markets	March 2011	35-45
McIlvaine Company	March 2011	31-68
Edison Electric Institute (EEI)	January 2011	50
The Brattle Group	November 2010	50-66
ICF International	October 2010	75
Credit Suisse	September 2010	69

²² See Exhibit 11 at 13.

²³ See Exhibit 6 at 1.

Indeed, NERC, which as noted is chartered by FERC to monitor electric reliability, estimated that 33-77 GW of capacity would be forced to retire as a result of just some of EPA's rules.²⁴

In sum, because EPA failed to heed FERC's advice that the true impacts of any one EPA power sector rule cannot be accurately assessed without reference to all of EPA's other power sector rules, EPA's reliability analysis is merely "virtual." It analyzes a world in which utilities only have to comply with one rule instead of many. In the real world, however, as FERC tried to point out to EPA, utilities will be forced to comply with all of EPA's regulations, and this will cause far more retirements and result in a much greater threat to electric reliability than EPA recognizes.

B. EPA's Reliability Assessment Is Built on the Faulty Premise that Electricity Can Be Freely Transmitted Within Broad Geographic Areas and Does Not Take Into Account the Many Localized Constraints in the Electric Grid.

EPA's reliability assessment is also flawed because it incorrectly assumed that power on the grid flows freely within broad geographic regions. As stated in Commissioner Moeller's August 1, 2011 letter to Senator Murkowski, "according to Commission staff, the ICF model used by EPA [to assess reliability] is a pipes and bubbles tool which assumes transmission deliverability is not an issue within the region."²⁵ As a result, EPA's reliability analysis simply counts up generation capacity in broad geographic regions and determines whether EPA-forced retirements will cause that capacity to fall below necessary regional reserve margins. As an EPA Technical Support Document ("TSD") for the MATS rule states, "[w]ithin each model region,

²⁴ See North American Electric Reliability Corporation, "2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations," at II, Oct. 2010, available at, http://www.nerc.com/files/EPA_Scenario_Final.pdf.

²⁵ See Exhibit 4 at 4.

IPM [the model EPA uses to assess reliability] assumes that adequate transmission capacity exists to deliver any resources located in, or transferred to, the region.”²⁶

But that assumption is demonstrably wrong. As FERC repeatedly explained to EPA, power does not flow freely within regions, and therefore a true reliability assessment must focus on local reliability impacts. Importantly, because the grid is interconnected, local impacts to the system can cascade across large regions, as the nation learned a few weeks ago when the actions of a single utility worker at a facility outside Yuma, Arizona resulted in blackouts for about 1.5 million people in Arizona, New Mexico, California and Mexico.

As stated in Commissioner Moeller’s response to Senator Murkowski, referring to issues that relate to localized reliability concerns, “[a]ccording to the information that I received from Commission staff, they have pointed out to EPA that a reliability analysis should explore transmission flows on the grid, reactive power deficiencies related to closures, loss of frequency response, black start capability, local area constraints, and transmission deliverability.”²⁷ The need for a reliability analysis that includes localized transmission constraints and other operational issues was repeatedly emphasized to EPA by PJM in its August 4, 2011 comment letter to EPA on the proposed MATS rule. According to PJM, EPA’s “analysis *falls short in providing the detailed and rigorous examination of reliability as PJM has described in the previous sections, especially as applied to local reliability issues.*”²⁸

During the hearings before the Subcommittee on Energy and Power, all five FERC commissioners testified that the type of study that EPA performed that only looks at the amount of generation within broad regions and ignores local constraints was not adequate for assessing

²⁶ *Resource Adequacy and Reliability in the IPM Projections for the Toxics Rule*, EPA-HQ-OAR-2009-0234-3063[1], Exhibit 12 at 1.

²⁷ See Exhibit 4 at 3.

²⁸ See Exhibit 3 at 14 (emphasis added.)

the true reliability impacts of EPA's regulations. Chairman Wellinghoff went so far as to state that such studies were "irrelevant."²⁹ Commissioner Moeller further added:

*[W]hat really matters is how [retirements] impact operations and reliability at the local level, because of the specifics of load pockets and the physics of electricity flow. And I actually thought the FERC staff study was pretty good, because it went into a lot of the variable factors....*³⁰

And as Commissioner Spitzer stated,

The aggregate studies aren't helpful on the question of reliability. They have some merit in determining potentially wholesale power prices across the country and across the grid, but, as my colleagues have all pointed out, location matters in electricity. And substantial excess capacity in Nevada may not help the folks in Arizona where I come from if 3 coal plants disappear from the grid.³¹

The retirements that EPA's regulations will cause are of particular concern for local reliability because the smaller, higher-emitting plants that are most at risk from EPA's regulations tend to be located within transmission-constrained metropolitan areas (because these plants are older and were built before the metropolitan areas expanded around them). The newer plants tend to be larger and located at a distance from metropolitan areas. Commissioner Norris made this point in his testimony:

*[H]ere's my concern from a reliability perspective: smaller plants are typically dirtier and older, but there are advantages in the system to smaller plants. They ramp up and down faster, they might be in locations where the voltage support is key. And I can go through a variety of other examples of where they're located can make a lot of difference. And that's why I think we need to dig down deeper into the impacts here, because they will be a disproportionate number of smaller, older, dirtier plants affected. But their role in the overall electric grid needs to be better analyzed.*³²

²⁹ Electric Reliability Hearing, response of Jon Wellinghoff, Chairman, FERC, to question by Rep. Waxman.

³⁰ *Id.*, response of Philip D. Moeller, Commissioner, FERC, to question by Rep. Barton (emphasis added).

³¹ *Id.*, response of Marc Spitzer, Commissioner, FERC, to question by Rep. Rush.

³² *Id.*, response of John R. Norris, Commissioner, FERC, to question by Rep. Rush (emphasis added).

Both FERC staff and a number of FERC Commissioners recommended that EPA involve RTOs in assessing the local reliability impacts of the EPA rules. As set forth in the material provided to Senator Murkowski by Chairman Wellinghoff, at a February 14, 2011 meeting, “EPA and FERC staff discussed ways in which EPA staff could participate in regional transmission planning processes to monitor how utilities plan to comply with the EPA rules.”³³ On a March 14, 2011 conference call, “FERC staff shared the suggestion made by industry groups that the regional planning processes would be an excellent place for the EPA to receive further input regarding pending regulations effect on grid reliability.”³⁴ On an April 27, 2011 conference call, “[t]o more fully evaluate industry concerns, FERC staff suggested that the EPA follow up on earlier suggestions to engage in the regional planning process with entities such as PJM, MISO and SERC.”³⁵

There is no evidence in the record, however, that any of these recommended consultations between EPA and the RTOs ever occurred. And despite FERC’s view that EPA’s approach to assessing reliability was fundamentally flawed, EPA did not conduct an analysis based on local reliability issues.

C. EPA Rejected FERC Input as to the Amount of Time Utilities Will Need to Comply with EPA’s Regulations.

The record of contacts between EPA and FERC also shows that EPA disregarded FERC’s advice as to the time it would take for utilities to replace retired units in order to ensure reliability. According to FERC notes of an October 27, 2010 meeting:

The EPA representative also stated that there was enough time for new generation to come online by 2018 to offset coal retirements. OER staff responded by stating that with the current issues of long

³³ See Exhibit 6 at 13.

³⁴ See *id.* at 14.

³⁵ See *id.* at 15. MISO is a regional planning body for certain Midwestern states. SERC is a regional reliability coordinator for the Southeast.

lead time equipment, backlash against pipeline sitting and construction, transmission sitting and construction issues, along with other factors would slow the market response which may lead to inadequate reserve margins during the transition period.³⁶

Inexplicably, the discussion at the meeting centered around “the ability of such new generation to come online before the retirement of coal units is expected to begin between 2015 and 2018.” But the three-year MATS rule compliance period, assuming the rule is promulgated on November 16, 2011 and goes into effect as scheduled in early 2012, expires in early 2015 with the possibility of a one-year extension.

As was reemphasized in Commissioner Moeller’s August 1, 2011 letter to Senator Murkowski, “[t]he timing of the EPA regulations does not conform to the relevant planning horizons in the electric sector of our economy, one of the most capital-intensive sectors of industry. Transmission lines and power plants are often planned over a ten-year period, and in consideration of the long-lived nature of assets that are expected to be in service for more than forty years.”³⁷

FERC’s concern as to the time needed for new units to replace retiring ones is not reflected in EPA’s reliability analysis. And if the rule goes forward on November 16, 2011, given the statutory compliance time line, there will not be enough time to replace the units that will be forced to close.

D. EPA Either Failed to Consult with Agencies Having Responsibility for Grid Reliability or Failed to Include Those Consultations in the Record.

Despite EPA’s representation in the proposed MATS rule preamble that it had consulted or would be consulting with agencies having responsibility and expertise in the reliable operation of the electric grid, 76 Fed. Reg. at 25,054, there is little evidence of this in the MATS

³⁶ See “Meeting to Review Coal Retirements and EPA Regulations, Attended by EPA, CEO and FERC 10/27/10,” Exhibit 13 at 1.

³⁷ See Exhibit 4 at 7-8

rulemaking record. The consultations between FERC and EPA staff are not in the record, nor is there any evidence of consultations with NERC (despite NERC's conclusion that EPA's regulations would lead to far more retirements than EPA predicted)³⁸ or state PUCs. Without being specifically asked to and responding to the same rulemaking notice that EPA provided to the rest of the public, RTOs and ISOs filed comments on the proposed MATS rule, but there is no evidence that EPA otherwise consulted with these agencies. Representatives of three PUCs testified in Congress last month that their PUCs had not been consulted by EPA,³⁹ and two other PUCs filed petitions with FERC that also indicated that they had not been consulted.⁴⁰ Tellingly, the interagency review comments in the MATS rulemaking docket indicate that the Department of Energy ("DOE") recommended that EPA soften its claim that it has "worked closely with DOE" and "will continue to work" on the reliability issues associated with EPA's power sector regulations. DOE conceded in that review process that it had not evaluated the potential impact of these rules on the grid.⁴¹

Oddly, the MATS Rule preamble states that "[b]etween proposal and final, EPA will work with DOE and FERC to identify any opportunities offered by the authorities and policy tools at the disposal of DOE and/or FERC that can be pursued to further ensure that the dual goals of substantially reducing the adverse public health impacts of power generation, as

³⁸ See North American Electric Reliability Corporation (NERC), "2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations," Oct. 2010.

³⁹ See Exhibits 14-16.

⁴⁰ See State of South Carolina, "Petition for Creation of a Joint Federal-State Board to Study Electric Reliability," Sept. 1, 2011, Exhibit 17. The South Carolina petition asks FERC pursuant to section 209(a) of the Federal Power Act to convene a joint board with state regulators to study the impacts of EPA's power sector rules, including the Transport Rule. South Carolina stated that "[o]ur petition is motivated by concern that EPA is proceeding with a significant number of new power sector regulations that could lead to numerous retirements of electric generating units without *adequately consulting with agencies and stakeholders* with responsibility for the adequacy and affordability of electric service and without FERC and public service commissions fully understanding the cumulative impact of these EPA regulations." (emphasis added). See also Request to Establish Joint Board for South Dakota and the Upper Midwest Region – Notice of Intervention, FERC Docket No. ELII-62-0000, supporting the South Carolina Petition and expressing similar concerns, Exhibit 18.

⁴¹ See *Interagency Review Comments on draft proposed MATS Rule*, Exhibit 19 at 34-35.

required by the CAA, while continuing to assure electric reliability is maintained. 76 Fed. Reg. at 25,054. Nevertheless, EPA discussions with FERC ceased in May, right after EPA made this statement in the MATS rule proposal preamble.⁴²

II. Equity Requires Modifying the Consent Decree to Enable EPA to Take More Time to Consider the Reliability Impacts of the MATS Rule.

Plainly EPA's reliability assessment is flawed. As things now stand, EPA is set to issue regulations on November 16 that will undermine electric reliability. Indeed, the underlying premise of EPA's reliability analysis is that there is so much excess capacity in regional electric markets that EPA-forced retirements will not materially impact grid reliability.⁴³ But even ignoring local reliability concerns and just focusing on the adequacy of electric generation capacity on a regional level, experts in grid reliability fundamentally dispute EPA's conclusions, and their views as to the impact of EPA's regulations is highly concerning.

For instance, ERCOT recently produced an analysis showing that the ERCOT system operated right at its limits during this past summer and that EPA's regulations put that system at risk of rolling outages in 2012.⁴⁴ Similarly, as noted above, FERC Commissioner Moeller warned that despite the ongoing depressed economy, the grid relied on all available resources this past summer, including units that will close as a result of EPA's regulations.⁴⁵ As also noted above, on September 20, 2011, SPP warned EPA of rolling blackouts if the just the Transport Rule goes into effect.⁴⁶ And the potential impact of EPA's regulations on electric reliability is serious enough that FERC has scheduled a two-day technical conference in November to receive

⁴² See Exhibit 6 at 15.

⁴³ Resource Adequacy and Reliability in the IPM Projections for the Toxics Rule, EPA-HQ-OAR-2009-0234-3063[1], Exhibit 12.

⁴⁴ See Exhibit 2 at 7.

⁴⁵ See Exhibit 4 at 7.

⁴⁶ See Exhibit 1 at 2.

public input on the matter,⁴⁷ and NERC is scheduled in the same month to issue a report comprehensively assessing the reliability of the grid in light of the new EPA regulations.

The recent blackouts in the Southwest, following extensive blackouts in Texas and New Mexico last winter that affected about 4.4 million people,⁴⁸ underscore that the electric grid is frailer than EPA appreciates. It is bad enough when the lights go off because of a natural disaster such as Hurricane Irene; it would be a failing of government regulation of the first order if the country experiences blackouts because EPA did not take the time to consult with FERC and others to adequately consider the reliability impacts of its regulations.

Blackouts are more than just inconveniences. At the time of the Texas and New Mexico blackouts last winter, temperatures hovered around zero degrees.⁴⁹ As Commissioner Moeller's letter to Senator Murkowski said, the reliability of the grid affects "our public health and safety."⁵⁰ Blackouts mean no air conditioning in the summer, no heat in the winter, and no power to schools, hospitals, alarms, and street and traffic lights.

The jeopardy in which EPA is placing the electric grid, however, can be avoided. The Court was obviously unaware of the information that just became available when it established the rulemaking deadlines in the consent decree. Based on this information, the interests of equity counsel for modifying the consent decree based on these changed circumstances. Extending the deadline will allow EPA to consider this information and performs the necessary analysis to ensure that the MATS rule will not imperil electric reliability.

⁴⁷ FERC, *Reliability Technical Conference*, Docket No. AD12-1-000 (Oct. 7, 2011).

⁴⁸ Federal Energy Regulatory Commission and National Electric Reliability Corporation, *Outages and Curtailments During the Southwest Cold Weather Event of February 1-5, 2011* (Aug. 2011) at 1, available at, http://www.nerc.com/files/SW_Cold_Weather_Event_Final_Report.pdf.

⁴⁹ *Id.*

⁵⁰ See Exhibit 4 at 11.

CONCLUSION

The reliability concerns that are raised by the newly available information constitute changed circumstances that justify the Court's exercise of its authority to modify the consent decree deadline in the interest of equity. EPA should not finalize the MATS rule and trigger compliance deadlines until it has produced a credible electric reliability assessment with real input by agencies having the necessary jurisdiction and expertise, as well as by the public at large. In particular, the November 16 consent decree deadline should not become the reason for EPA's failure to do the necessary study when EPA could ask the Court to extend the deadline for good cause shown. Since EPA has not seen fit to ask for such an extension, the Court should grant UARG's motion so that EPA has adequate time to properly assess reliability *before* the rule goes into effect and actions are set in motion that will undermine the reliable operation of the grid. As FERC Commissioner Moeller stated in his response to questions from the Subcommittee on Energy and Power, "[i]t would be difficult to contend that analyzing the impact of the EPA rules should be conducted only after the EPA rules are finalized.... The power plants and transmission lines that are needed to ensure reliable service at rates that are both just and reasonable almost always require years to plan and construct."⁵¹

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⁵¹ See Exhibit 20 at 2.

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