

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Commission Role Regarding
Environmental Protection Agency's
Mercury and Air Toxics Standards

Docket No. AD12-1-000

Comments of the
ELECTRICITY CONSUMERS RESOURCE COUNCIL
("ELCON")

The Electricity Consumers Resource Council ("ELCON") appreciates the opportunity to comment on the "Staff White Paper on the Commission's Role Regarding Environmental Protection Agency's Mercury and Air Toxics Standards" ("Staff White Paper") dated January 30, 2012. The Staff White Paper is a timely response to the very serious concerns raised during the Commission's November 29-30, 2011 Reliability Technical Conference. During that conference, a diverse group of industry stakeholder groups warned the Commission that the electric industry, through no fault of their own, was not adequately prepared for the unprecedented onslaught of new regulatory mandates by the U.S. Environmental Protection Agency ("EPA"). The Staff White Paper addresses one of the more significant new requirements—EPA's Mercury and Air Toxics Standards ("MATS")—but others will follow. At the heart of industry's concerns are the unprecedented cost implications and the risk that subject power generators will face "double jeopardy" in that they may be forced to choose between violating a NERC Reliability Standard and violating an EPA rule. As a representative of industrial consumers whose economic health is depend on the affordability of power from the current stock of generation resources, ELCON shares those concerns.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and consume power in the footprints of all organized markets and other regions throughout the United States.

Background

On December 16, 2011, EPA finalized new national Clean Air Act standards to reduce mercury and other hazardous air pollutant (“HAP”) emissions from new and existing coal and oil-fired power plants. Under the Clean Air Act, EPA must mandate controls for HAPs from existing sources using “maximum achievable control technology” or MACT. Based on EPA projections, MATS will reduce mercury emissions by coal-fired power plants by 90%, reduce acid gas emissions from power plants by 88%, and reduce sulfur dioxide emissions from power plants beyond the reductions expected from EPA’s new Cross State Air Pollution Rule (“CSAPR”) by 41%.¹

EPA estimates that the incremental annualized cost of MATS to the industry in 2016 will be \$9.6 billion. This makes MATS one of the most expensive rules that EPA has ever promulgated. The compliance costs are real dollars that are recovered from ultimate consumers of electricity (of which at least a third of the costs are recovered from industrial consumers).

Under the Clean Air Act, affected sources generally must be compliant within three years. State and local permitting authorities may grant an extension of up to one year. On December 16, 2011, EPA issued a policy memorandum (“EPA Policy Memorandum”) describing its intended approach regarding the use of Administrative Orders (“AOs”) with respect to sources that must operate in noncompliance with MATS for up to one additional year (*i.e.*, a fifth year) to address reliability concerns.

¹ The DC Circuit stayed the CSAPR on December 30, 2011 pending judicial review.

ELCON Comments

A. The Scope of the Commission's Investigation Should Include Issues Related to MATS Compliance Costs, Such as Artificial Constraints Imposed on Owner/Operators that Needlessly Increase Costs Recovered from Consumers.

The EPA Policy Memorandum explains that when an owner/operator of generating unit subject to MATS submits to EPA a request for an AO, that the owner/operator also must provide a copy of the request to FERC. An AO request must include an owner/operator's "written analysis of the reliability risk if the unit was not in operation, which demonstrates that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would . . . result in the violation of at least one of the reliability criteria required to be filed with [the Commission... or Texas PUC] . . ., or cause reserves to fall below the required system reserve margin."³ In addition, FERC will also receive the Planning Authority's written concurrence with the owner/operator's analysis, or a written explanation of why the Planning Authority's concurrence cannot be provided.

The Staff White Paper proposes that the AO request filed with FERC should be treated as an informational filing. FERC staff also believes that the Commission's review of an informational filing should be focused on whether, based on the circumstances presented, there might be a violation of a Commission-approved Reliability Standard. However, the Staff White Paper seeks comments on the other elements outlined in the EPA Policy Memorandum and whether and how the Commission should review issues arising outside of a potential violation of a Reliability Standard under Federal Power Act section 215. This review would be conducted pursuant to Federal Power Act Section 307(a), the Commission's general investigative authority.

In view of the extraordinary compliance costs of MATS and its potential impacts on reliability, a prudent exercise of the Commission's involvement, such as the advice

³ EPA Policy Memorandum at 7.

and counsel it provides to EPA pursuant to the EPA Policy Memorandum, would include sensitivity to and awareness of the costs and other impacts on end-use consumers. ELCON is concerned that “haste makes waste” and that the failure to provide owners/operators with sufficient time and flexibility to prepare their compliance plans will lead to excessive costs, even beyond those projected by EPA. Therefore, ELCON strongly recommends that the scope of the Commission’s investigation include issues related to the full implications of MATS compliance costs including the identification of artificial constraints that needlessly increase costs recovered from consumers.

B. The Commission Should Defer to the Analyses by the Owner/Operator of the Reliability-Critical Units and the Relevant Planning Authority.

The AO request requires two levels of analysis: one by the owner/operator requesting the AO, and a second by its Planning Authority, which might be an ISO or RTO, or a Regional Entity such as SERC or WECC. According to the Staff White Paper, FERC staff has not determined if the Commission’s review of the AO request should be conducted *de novo* or should accord some level of deference to the Planning Authority’s analysis, and it seeks comment on this issue.⁴

ELCON believes that these entities have the requisite technical expertise and data to perform the necessary analysis. Any attempt to replicate their work by FERC staff is unnecessary and not a prudent use of the Commission’s resources.

C. The Commission’s Review of AO Requests Should Be Transparent and Open for Third-Party Comments.

The process envisioned by the Staff White Paper would not permit entities to intervene in a proceeding leading to the preparation of the Commission’s advice and counsel to EPA. Parties would be allowed to file comments but the Commission would not be required to address any comments received.

⁴ *De novo* would imply a new analysis conducted as if the Planning Authority had not done such an analysis.

ELCON disagrees. This process begs for transparency and public input. Any concern that analysis of an owner/operator's AO request might be slanted in any way can be reduced by exposing the analysis to full and open public scrutiny. Given the costs and other impacts associated with MATS, it is essential that the entities that must bear those costs be given every opportunity to weigh in with their views on the urgency for an AO or other relief.

D. Assessment of Reliability Impacts Should Factor in All Pending EPA Regulations that Will Apply to Power Generators.

MATS is one of several major EPA rulemakings that will impose compliance requirements on the electric industry. Others, for example, address cooling water intake, coal ash, NAAQS review, CSAPR and GHGs. Any analysis of the impact on reliability should recognize that a power generator's compliance plan may need to address the phase in and coordination of multiple new regulatory regimes, and FERC and EPA should recognize that the cost of compliance is better managed if the compliance planning is done on such a coordinated basis and not piece meal.

E. The Commission Should Support the Industry's Request for a Presidential Exemption.

While the AO provides for up to a maximum of an additional year to complete the retrofits, upgrades, or, in the extreme, build replacement capacity or new transmission lines, the entity will be technically in a state of non-compliance during that time. An AO does not extend the MATS Compliance Date. Thus any owner/operator that secures an AO is still subject to third-party or citizen lawsuits. An AO provides no protection against such lawsuits.

Section 112(i)(4) of the Clean Air Act authorizes the President to extend the compliance deadlines based upon a finding that "(1) the technology to implement such standard is not available, and (2) it is in the national security interest of the United States to do so." The President can delegate this authority to EPA or another federal

agency. The Edison Electric Institute (EEI) has recommended that the President use his authority under Section 112(i)(4) to allow more time in instances where:

- (1) The utility is taking diligent, good-faith measures to achieve compliance;
- (2) The needed technology is not available for installation, which would take into account time needed to obtain needed permits, regulatory approvals, financing, equipment and installation of equipment for final operation.); and
- (3) The appropriate RTO, NERC or appropriate state commission determines that an extension of time is necessary to address reliability issues or is consistent with the applicable state-approved integrated resources plan (or similar state process), which may take into account the potential reliability and economic impacts of compliance decisions.⁵

ELCON strongly supports the EEI recommendation. Like EEI, ELCON recognizes that FERC:

... has no authority to grant extensions of time for MACT compliance deadlines. That is EPA's role. But, as the agency Congress vested with oversight over the reliability of the electric grid, [we] urge this Commission, in the interagency review process or elsewhere, to strongly support our view that the MACT rules must be implemented in a way that preserves the reliability of the electric grid while diligent, good faith compliance efforts are pursued without placing the utility involved in violation of EPA rules. There is no doubt that reliable electric service is a primary component of our national critical infrastructure and essential to national security. *Id.* at 6.

⁵ Written Statement of Thomas Farrell, Chairman and CEO of Dominion Resources; Docket No. RC11-6-000, November 22, 2011 at 3.

Conclusion

ELCON appreciates the opportunity afforded by the Staff White Paper to urge the Commission's active involvement—however limited—with ensuring that MATS compliance planning by its jurisdictional utilities is done on an efficient, least-cost basis.

Respectfully submitted,

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Dated: February 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: February 29, 2012

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup