



State of the Debate on EPA Section 111(d) Rulemaking

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A Memorandum for ELCON Members

February 2015

EXECUTIVE SUMMARY

This memorandum presents a comprehensive “state of the debate” analysis of the published positions of stakeholder and public interest groups based on the comments filed at EPA and the ongoing debate on this rulemaking in Congress. The point of view of this analysis is to identify stakeholders and stakeholder coalitions who are most affected by the rule and who question EPA’s legal authority to promulgate the rule or, in the alternative, seek extensive changes to the specific mandates that are being proposed. This includes the States, State regulators, investor-owned utilities, municipal and rural cooperative utilities, and other relevant stakeholders.

In the Clean Air Act, the US Congress reserved a substantial role for the States. This is particularly true for the implementation and enforcement of the federal standards. The US Chamber of Commerce’s Institute for 21st Century Energy has published a comprehensive analysis of State comments regarding the section 111(d) rulemaking. Noteworthy are twelve issues identified by the States that demonstrate the breadth and severity of their concerns. These concerns generally frame the entire debate on the rule and the important ones are discussed here.

Legality of the Rule—The section 111(d) rule—the Clean Power Plan—is likely to provoke one of the biggest legal challenges of the long-history of the Clean Air Act, and the battle in the courts has already begun. A bedrock principle of administrative law is that an agency action cannot be challenged until it is final. Three cases already pending before the DC Circuit attempt to get around that procedural hurdle. While the pending cases are, at best, long shots, several coalitions of affected stakeholders are preparing challenges to the legality of the final rule following its expected issuance this Summer. The most notable and well-funded are the Utility Air Regulatory Group (UARG), the American Coalition for Clean Coal Electricity (ACCCE), and The Associations (a coalition of trade groups representing manufacturers that is facilitated by the National Association of Manufacturers (NAM) and the US Chamber of Commerce). In comments filed at EPA, 32 States questioned EPA’s legal authority to promulgate the rule.

Impact on Electricity Prices, Jobs and the Economy—The Clean Power Plan will have various positive and negative effects on consumers and the economy—with the positive effects being clearly more theoretical than the negative. Theoretical or not, these impacts have been estimated from the perspective of EPA and two representative groups that have opposing views on the rulemaking: Natural Resources Defense Council (NRDC) and the American Coalition for Clean Coal Electricity (ACCCE). The EPA and NRDC studies paint a more positive picture of the rulemaking’s economic impacts. The ACCCE does the opposite. At least 28 States raised concerns in their official public comments regarding the potential adverse impact of electricity rates, jobs and the local economy.

Impact on Electricity Reliability – It is widely recognized by opponents of the Clean Power Plan that the proposal is likely to threaten the reliability of the grid. Some supporters of the rule have expressed concern as well. And at least 32 States raised similar concerns in their filed comments. EPA’s modelling of the impact of its proposed rule on the power sector was not sufficiently realistic to capture transmission constraints or changes to reserve margins. Most importantly, EPA did not assess the impact to reliability if projected retirements of coal-fired generating units are not immediately replaced on a one for one basis. Recent independent reliability assessments emphasize this point. NERC issued a preliminary review of the assumptions and potential reliability impacts of the proposed rule. The NERC Report identifies three

general concerns related to the changes in resource mix and the consequent reliability issues that would be forced by the proposed rule. First, NERC is concerned that the infrastructure improvements necessary to support more natural gas generation (both new NGCC and pipeline delivery capability) cannot be achieved in accordance with EPA's proposed compliance schedule. Second, the proposed rule would constrain the availability of NERC-defined Essential Reliability Services (ERSs), such as load following, regulation and ramping services. Third, NERC warns that increases in distributed energy resources (DERs), such as rooftop photovoltaic arrays, under the proposed rule will pose significant challenges to system operators. In recognition of the reliability concerns of NERC, some utilities and (especially) the ISO/RTO Council (IRC) that represents ISOs and RTOs are proposing a "Reliability Safety Valve" that would delay the retirement of coal-fired power plants that are deemed necessary for reliability purposes.

Technological Assumptions & Associated Impact on Compliance Flexibility and Achievability—State and stakeholder comments on the rule repeatedly emphasize that the EPA's assumptions regarding the technological feasibility of its four Building Blocks do not take proper account of many of the existing constraints within the interconnected electric grid and past actions related to each Building Block. NERC, EEL, APPA, NRECA, The Associations, and more than half the States expressed concerns about the achievability of one or more the Building Blocks.

Accelerated Timeline for Finalization and Implementation—Timing is one of the biggest concerns regarding implementation that is equally shared by opponents and supporters of EPA's actions. One industry observer said that the rule "provides great flexibility for how states can achieve the required CO₂ reductions" but "hardly any flexibility on when to achieve them." At least 34 states believe that the proposed response and compliance schedules are unreasonably short for such a complex rule. NERC, EEL, APPA, NRECA, and The Associations shared this concern.

Achievability of the Rule's Interim Targets—More problematic than implementation timelines is the interim reduction target set in the proposed rule. States must begin meeting the interim target in 2020. It has the effect of mandating a minimum pace of implementation and front-loading emission reductions. EEL, APPA, NRECA, and 30 States strongly oppose the interim targets.

The 2012 Baseline Year & Credit for Early Action—Many States have mandated Renewable Portfolio Standards (RPS) and extensive energy efficiency (EE) programs that are often funded by utility ratepayers. The rulemaking's 2012 baseline year effectively penalizes such States for early action, especially given the fact that those early actions likely deployed the more cost-effective wind sites and EE measures (the so-called "low hanging fruit"). There is also another potential early action problem and that is early action credit for actions taken between 2014 and 2020 the start of the compliance period. The rulemaking more or less assumes that States will be using this near-term period to develop and implement the requisite programs and does not explicitly recognize existing State programs that can easily be ramped up. Over 33 States raised concern about one or the other early action issues in their comments to EPA. The Clean Energy Group, EEL, APPA, NRECA, and The Associations also weighed in on these issues.

Treatment of Nuclear Generation-- EPA recognizes in the rule that maintaining the existing nuclear fleet is a cost-effective carbon abatement strategy. The proposed rule assumes that six percent of the nuclear capacity in States with nuclear plants are "at risk" of premature retirement. EPA also assumes that nuclear plants currently under construction in Georgia, South Carolina and Tennessee are already operating with a capacity factor of 90 percent. But the proposed rule will not preserve nuclear power plants at risk of premature shutdown, and creates a significant penalty for those States that have taken steps to maintain a diversified portfolio of generating assets and reduce carbon emissions by building new nuclear power plants. In comments to the EPA, 24 States have expressed concern regarding the treatment of nuclear generation in the proposed rule. NARUC, EEL, APPA, NRECA, The Associations, and the Clean Energy Groups also have the same concerns.

Lack of Consideration of Stranded Costs--EPA's proposed rule will compel many utilities to prematurely shut down coal-fired power plants. The costs of these stranded assets will be passed on to consumers and

businesses, resulting in higher electricity costs. For many facilities, these costs will be on top of the millions of dollars spent to comply with the MATS and other EPA regulations. It is estimated that MATS alone will cause 50 gigawatts of coal-fired generating capacity, 16 percent of total 2012 coal capacity, to close before 2020. Despite a clear requirement in the Clean Air Act that the EPA consider the remaining useful life of power plants when developing regulations, by the EPA's own admission its proposal will force the premature closure of up to an additional 49 gigawatts of coal capacity. In comments to the EPA, 22 different States raised these concerns in their public comments.

Estimation of Plants' Generation Capacity and Resultant Impact on State Targets--EPA's proposed rule assumes that all power plants can run at "nameplate capacity." This results in the inappropriate inflation of State targets, and has the most impact on Building Block 2 calculations, resulting in the significant exaggeration of Building Block 2's potential. At least 16 States raised these concerns in their public comments. EEL, APPA, NRECA, and The Associations raised the same concern.

Congress vs. the Administration--The Obama Administration has made it clear that it hopes to achieve much of its reduced-carbon agenda through regulation rather than through legislation, in large part because the Republican majorities in each house of Congress are highly unlikely to approve any carbon reduction proposals put forth by the White House. Republicans will try to stymie the Administration's agenda in a number of ways.

What will the House Do?--Members of the House can be expected to introduce legislation restricting EPA directly and legislation to require EPA (and other agencies) to provide cost analyses of any major regulations. The Energy and Commerce Committee, as it did last Congress, will approve a variety of such measures on close to party-line votes. Action will begin soon. Appropriations for EPA are the jurisdiction of the Appropriations Committee's Subcommittee on Interior, Environment, and Related Agencies. Although there may be efforts to reduce EPA funding and/or to restrict their implementation of certain programs, in recent years Congress has approved few, if any, appropriations bills on a stand-alone basis, instead utilizing a Continuing Resolution or Omnibus Resolution to provide government funding. In the past these bills have rarely contained major policy initiatives. The House leadership is quite mindful that their present majority is short of the two-thirds (290 votes) necessary to override the near certainty of a Presidential veto should any of the anti-EPA, anti-111(d), bills get passed by both houses.

What Will the Senate Do? --Legislative jurisdiction over EPA falls to the Committee on Environment and Public Works (EPW), chaired by Sen. James Inhofe (R-OK). Sen. Inhofe is well known for his skepticism about the science behind global climate change data, and he has been critical of the Administration's Clean Power Plan. Legislation in the Senate also faces an additional hurdle as most measures need 60 votes to proceed. Getting six Democrats - in order to get a total of 60 Senators - will be approached on a bill-by-bill basis. Sometimes it will be achieved, other times it will not. And, as in the House, if any legislation to restrict EPA activity should pass the Senate and House, it would almost certainly face a presidential veto. And no one has seen a way to find the 67 Senators needed to override.

What is the Role of FERC and the Department of Energy? --The role of the FERC in determining the impact of EPA's Clean Power Plan on the reliability of the electricity grid has been and will be a combination of policy and politics. Opponents of EPA's 111(d) rule have argued that reducing carbon emissions by closing existing coal-fired generation plants and replacing them to a large degree with power supplied by renewable energy sources could harm the grid's reliability. Chair Cheryl LaFleur has announced a series of FERC Technical Conferences on reliability and how reliability will be impacted by Rule 111(d). There will be a national conference in Washington on February 19 followed by three regional conferences.

Although the Department of Energy (DOE) has no direct role in developing or implementing the Clean Power Plan, Secretary Ernest Moniz has stated that the overall issue of advancing the President's Climate Action Plan at the top of DOE's agenda for 2015. ✎