



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

Docket ID: EPA-HQ-OAR-2013-0602

A Memorandum for ELCON Members

February 2015



INTRODUCTION

On December 1, 2014, over 4 million comments had been filed with EPA on the agency's landmark proposed rule under the Clean Air Act (CAA) section 111(d), also known as the Clean Power Plan. One energy pundit estimated that it would take 71 people working eight hours a day until June 2015 to read them all. June 2015 was the original deadline EPA established for completion of the rulemaking and the issuance of a Final Rule.

This memorandum for ELCON members presents a comprehensive "state of the debate" analysis of the published positions of stakeholder and public interest groups based on the comments filed with 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 directly 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. The most important concerns identified by these groups should be deemed candidates for modification or elimination in the Final Rule—should EPA decide to weaken the rule.

The most important of the trade associations discussed in this memo are the National Association of Regulatory Utility Commissioners (NARUC), the Edison Electric Institute (EEI), the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), and the Nuclear Energy Institute (NEI). The important coalitions are the Utility Air Regulatory Group (UARG), the American Coalition for Clean Coal Electricity (ACCCE), the Clean Energy Group (a coalition of low-carbon utilities), 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). ELCON is a member of the latter group.

The proposed rule, which was published in June 2014, seeks to achieve a 30% nationwide reduction in CO₂ emissions from the US power sector in 2030 compared to the emissions level in 2005. Using a base year of 2012, the proposed rule would establish emission rates measured in lbs/CO₂ per kWh each state must achieve in 2030. It also would establish interim goals for 2020 through 2029 that must be met on average over that period. The state-by-state emissions reduction goals proposed by EPA range from 11% (by North Dakota) to 72% (by Washington State) compared to 2012 emissions levels.

While the practical target of the proposed rule is emissions reductions from coal-fired generating units above 25 MWs, of the four “Building Blocks” EPA identified for achieving the state-level standards, only the first one is a so-called “inside the fence line” compliance option. The Building Blocks are: (1) heat rate improvements; (2) environmental dispatch; (3) zero or low emissions generation; and (4) demand-side energy management. Building Blocks 2 through 4 apply “outside the fence line” of the affected Electric Generating Units (EGUs).¹

RULEMAKING UPDATE

In January 2015, EPA revised the timing for issuing a final rule, which is now scheduled for Summer 2015. The agency also announced that it would issue final rules in related rulemakings for New, Modified and Reconstructed Power Plants under CAA Section 111(b). EPA also commenced a process for the development of a Federal Implementation Plan (FIP) — a compliance plan that would apply to any State that fails to submit or obtain EPA approval for a State plan. The draft FIP would be issued in Summer 2015 for public review and comment. The proposed due date for States to submit compliance plans to EPA is Summer 2016. These plans can be complete plans or initial plans with requests for 1- to 2-year extensions. The latter qualifies if the State intended to join a regional (multi-state) effort. The proposed due date for State plans with a 1-year extension is Summer 2017. The due date for multi-state plans is Summer 2018. The proposed beginning of the Clean Power Plan compliance period is Summer 2020.

THE DEBATE AT THE STATE LEVEL

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.² Noteworthy are twelve issues identified by the States that demonstrate the breadth and severity of their concerns. These concerns generally

¹ For a more detailed summary of the proposed rule, see *Electricity Consumers Resource Council, EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Utility Generating Units, Docket ID: EPA-HQ-OAR-2013-0602, A Memorandum for ELCON Members, July 2014 Revised.*

² US Chamber of Commerce Institute for 21st Century Energy, *In Their Own Words: A Guide to States’ Concerns Regarding the Environmental Protection Agency’s Proposed Greenhouse Gas Regulations for Existing Power Plants*, January 22, 2015. (“[US Chamber Report](#)”).

frame the entire debate on the rule and the important ones are used to structure this memorandum.

- Legality of the Rule
- Impact on Electricity Prices, Jobs and the Economy
- Impact on Electricity Reliability
- Technological Assumptions and Associated Impact on Compliance Flexibility and Achievability
- Presence of Mistakes and Errors Within the Rule
- Accelerated Timeline for Finalization and Implementation
- Achievability of the Rule's Interim Targets
- The 2012 Baseline Year & Credit for Early Action
- Treatment of Nuclear Generation
- Lack of Consideration of Stranded Costs
- Rule's Goals in Comparison to those set for New Power Plants
- Rule's Estimation of Plants' Generation Capacity and Resultant Impact on State Targets

Each State that filed comments cited in the US Chamber Report submitted its concerns on behalf of one or more State administrative offices or agencies, *e.g.*, office of the governor, office of the attorney general, State environmental agency, State department of natural resources, State public utilities commission, State department of agriculture, State department of health, State department of commerce, and State power authority.

The US Chamber analysis found that a majority of States raised concerns or objections in 8 of the 12 issue areas that were reviewed. For example, 32 States made legal objections, 28 raised significant concerns regarding compliance costs and economic impacts, 32 warned of electricity reliability problems, and 34 States objected to EPA's rushed regulatory timelines. These responses will be elaborated below as each issue is discussed.

An important State voice in the debate is the National Association of Regulatory Utility Commissioners (NARUC), the association of State public service commissioners who will be partially responsible for State implementation plans and cost recovery from utility ratepayers. NARUC's view is interesting because its membership weighs in on all sides of the debate. Commissioners in most States are political appointees or, if elected, win on the basis of his or her party orientation. To some extent, NARUC's position is a microcosm of the larger political debate on the rulemaking.

In a [letter](#) dated November 19, 2014 to EPA Administrator Gina McCarthy, NARUC expressed strong support for the agency's "outreach" about the Clean Power Plan and reiterated the principles in several NARUC resolutions on issues germane to the proposed rule. NARUC emphasized that the States and their affected utilities need flexibility with respect to complying with the proposed rule and that State commissions have a responsibility to ensure that the costs

to comply with environmental regulations are cost effective, and that decisions regarding fuel mix and resource adequacy are consistent with each State's integrated resource plan and unique needs for resource diversity. States should also be given credit for emissions reductions achieved to date.

NARUC insists that the EPA rulemaking "recognize the primacy of States [and] rely on both State utility and environmental regulators to lead the creation of emission performance systems that reflect the policies, energy needs, resource mix, economic conditions of each State and region."

NARUC also wants EPA to adopt in a final rule guidelines that "encourage States to preserve, life-extend, and expand existing nuclear generation," and provide States with "maximum flexibility to ... support energy efficiency measures stemming from the water-energy nexus." NARUC reminds EPA that the treatment and delivery of water and wastewater services requires 4% of all US energy consumption and that policy makers at all levels are examining opportunities to achieve greater efficiencies in water and energy usage.

THE MAJOR ISSUES IN THE DEBATE

Legality of the Rule

The Clean Power Plan rulemaking 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. At issue in one case is whether CAA section 111(d) allows regulation of GHG emissions from power plants, given that the plants' mercury emissions are already regulated under a separate section of the law (section 112). This issue arises from ambiguity in the law when House and Senate amendments to section 111(d) were never reconciled in the Conference Committee before the 1990 Clean Air Act Amendments was signed into law. EPA and environmental groups cite the US Supreme Court *Chevron* precedent that gives deference to agencies' reasonable interpretations of ambiguous statutes. Opponents counter by citing the more recent high court opinion in *Utility Air Regulatory Group v. EPA* that the agency cannot "rewrite clear statutory terms to suit its own sense of how the statute should operate."

Even before the proposed rule was issued in June 2014, many States were lining up in opposition to EPA's anticipated action. On September 11, 2013, the Attorneys General of seventeen states (and one State environmental regulator) submitted a legal memorandum to the EPA Administrator that drew a very distinct line between EPA and State authorities:

Section 111(d) is unambiguous in granting to states the sole authority to determine actual substantive standards as applied to individual sources. EPA's role is limited to establishing procedures whereby states develop and implement performance standards for existing EGUs.

On August 1, 2014, twelve States lead by West Virginia (*State of West Virginia, et al., Petitioners v. US EPA, Respondent*) petitioned the DC Circuit for review of the proposed rule. The Petitioners claimed that, even though the rulemaking was not final, judicial review should proceed because

of the circumstances of a 2010 settlement agreement between EPA and another group of States³ in which EPA had agreed to propose a rule addressing power plant GHG emissions by mid-2011. The Petitioners argue that EPA's regulation of power plants' hazardous pollutant emissions in 2012 rendered that prior agreement unlawful.

In a separate, somewhat novel challenge filed on June 18, 2014, Murray Energy Corporation (a West Virginia coal producer) argues that EPA has already made a "final" decision that it has the requisite legal authority and that the proposal should be blocked by the 1789 *All Writs Act*. While Murray Energy noted that such a move "may be relatively rare, a Court can and should issue a writ prohibiting an agency from taking an action beyond its power -- an *ultra vires* action -- before it is final."

A second case filed by Murray Energy in November 2014 challenges EPA's "final legal conclusion" that it has CAA authority to issue the proposed rule, arguing that the CAA does not even allow the agency to pursue the rule.

The DC Circuit has consolidated the two Murray Energy suits, an action that surprised EPA and environmental groups who were seeking their dismissal. The DC Circuit also has set the oral argument in the consolidated Murray Energy cases and the related twelve-state case for the same day, April 16.⁴

The debate on the Clean Power Plan has also been elevated among authorities on constitutional law. In [comments](#) submitted to EPA on December 1, 2014, on behalf of the Peabody Energy Company, Laurence H. Tribe, argued that EPA should withdraw the section 111(d) rule because it is unconstitutional. Tribe is the Carl M. Loeb University Professor at Harvard Law School, and a widely respected constitutional lawyer, "liberal legal icon," and former mentor to Barack Obama. Environmental groups attacked Tribe's comments as a "sell out to the Nation's largest coal producer." Tribe accused EPA of violating the separations of power and the principles of federalism, as well as the Fifth Amendment's due process and takings clause "by threatening to upset well-settled investment backed expectations developed in reliance on longstanding federal policy by singling out a few to bear the burdens that should be borne by society as a whole."

While the pending cases before the DC Circuit are at best, long shots, several coalitions of affected stakeholders are preparing for 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

³ The other states are: Alabama, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Dakota, South Carolina and Wyoming. The following trade associations representing manufacturers and other business interests are "amici" for the Petitioners: American Chemistry Council, American Coatings Association, American Fuel and Petrochemical Manufacturers, American Iron and Steel Institute, US Chamber of Commerce, Council of Industrial Boiler Owners, Independent Petroleum Association of America, Metals Service Center, and Pacific Legal Foundation.

⁴ The three-judge panel consists of Chief Judge Richard Roberts (a Clinton appointee), Judge Brett Kavanaugh (a George W. Bush appointee) and Judge Nina Pollard (an Obama appointee). The Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund have intervened in the case.

Association of Manufacturers (NAM) and the US Chamber of Commerce). ELCON is a member and financial supporter of the latter group. The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) also filed extensive legal arguments challenging EPA's authorities in their December 1, 2014 comments and they often join forces in judicial appeals where they have common interests.

UARG is a very large coalition of electric utilities and utility trade associations that has historically played a very active and prominent role challenging EPA regulations that are opposed by electric utilities. ACCCE, as its name implies, is a coalition of electric utilities that are owners of coal-fired electric generation. EEI's members who oppose the rulemaking are likely to join UARG or ACCCE in any appeal challenging the rule in the courts rather than position EEI to do so since a significant minority of EEI's members support the rule or are silent for fear of alienating their Blue State regulators.

The December 1, 2014 comments filed at EPA by UARG, ACCCE and The Associations contained exhaustive legal analysis refuting EPA authority to promulgate the GHG rule. And equally exhaustive were documents prepared by major environmental groups – notably the Natural Resource Defense Council (NRDC), the Sierra Club and Environmental Defense Fund (EDF) – who defend EPA.

The legal uncertainty of the Clean Power Plan is also inspiring a form of civil disobedience within the States' Rights community. The Federalist Society, a conservative/libertarian group whose basic premise is that "States exist to preserve freedom," issued an attack on the EPA rulemaking last November entitled, [EPA's Section 11\(d\) Carbon Rules: What if States Just Say No?](#) The group singled out the "outside the fence" measures (Building Blocks 2, 3 and 4) as an example of central government overreach and coercion. It did, however, agree that EPA had authority to implement a federal plan limited to "inside the fence" measures that directly targeted CO₂ emissions from coal-fired generators.

The American Legislative Exchange Council (ALEC), a Washington-based libertarian group representing conservative State legislators, has prepared two "model bills" for consideration by State legislatures with the express intent to slow or block State measures to comply with the section 111(d) rule. One [model bill](#) would require States to win approval from their legislatures before submitting the State plans to EPA. The other model bill would prohibit State authorities from preparing, submitting or implementing a compliance plan "until completion of judicial review."

In October 2014, Mike McKenna, a former Virginia State official who is now a prominent GOP strategist, circulated a memorandum to about 30 States that urged State authorities "to do either nothing or very nearly nothing" with respect to the rule. He reminded the States that:

EPA's ability to compel compliance is limited to the imposition of a federal implementation plan [FIP] and, ultimately, the suspension of highway funding to a State. While the imposition of a federal implementation plan is rare, long-term suspension of federal highway funding to a particular State is essentially non-existent.

At least one important policy maker – FERC Commissioner Tony Clark – has also counseled State authorities not to rush to compliance with the rulemaking until there is greater clarity on the

EPA's authority, and specifically, to delay development of their State implementation plans until EPA issues guidance on the terms of its FIP.

Rule's 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). At least 28 States raised concerns in their official public comments regarding the potential adverse impact of electricity rates, jobs and the local economy.

In its benefit/cost analysis—using its own modeling capability—EPA identified a number of potential economic impacts (positive and negative), including: (1) direct compliance costs incurred by owners of affected EGUs (and passed along, in part, to electricity consumers); (2) expenditures on power production facilities with low or no carbon emissions; (3) expenditures on energy efficiency measures; (4) changes in the markets for fuels (e.g., coal, natural gas) used to produce electricity; (5) the expected direct and indirect economic, health and environmental benefits from mitigation of climate change; and (6) public health benefits from reduction in combustion of fossil fuels.

EPA's [analysis](#) was based on two scenarios (called Options 1 and 2) that use the four Building Blocks at different levels of stringency. Option 1 involves higher deployment of the four Building Blocks but allows a longer timeframe to comply (2030) whereas Option 2 has a lower deployment over a shorter timeframe (2025).

EPA projects that the annual incremental compliance cost of the proposed Option 1 ranges from \$5.4 to \$7.4 billion in 2020 and from \$7.3 to \$8.8 billion in 2030 (in 2011 dollars), excluding the costs associated with monitoring, reporting, and recordkeeping.⁵ The estimated cost of Option 2 is between \$4.2 and \$5.4 billion in 2020 and between \$4.5 and \$5.5 billion in 2025 (in 2011 dollars). The estimated monitoring, reporting and recordkeeping costs for both options are \$68.3 million in 2020, \$8.9 million in 2025, and \$8.9 million in 2030 (in 2011 dollars). The annual incremental cost is the projected additional cost of complying with the proposed rule in the year analyzed and includes the net change in the annualized cost of capital investment in new generating sources and heat rate improvements at coal steam facilities, the change in the ongoing costs of operating pollution controls, shifts between or amongst various fuels, demand-side energy efficiency measures, and other actions associated with compliance.

Under Option 1, average nationwide retail electricity prices are projected to increase roughly 6 to 7 percent in 2020, and roughly 3 percent in 2030 (contiguous US), compared to base case price estimates modeled for these same years. Average monthly electricity bills are anticipated to increase by roughly 3 percent in 2020, but decline by roughly 9 percent by 2030 because increased energy efficiency will lead to reduced usage.

⁵ For context, total expenditures on electricity in 2012 were \$363.7 billion.

The average delivered coal price to the power sector is projected to decrease by 16 to 17 percent in 2020 and roughly 18 percent in 2030, relative to the base case (Option 1). EPA projects coal production for use by the power sector, a large component of total coal production, will decline by roughly 25 to 27 percent in 2020 from base case levels. The use of coal by the power sector will decrease by roughly 30 to 32 percent in 2030.

EPA also projects that the electric power sector-delivered natural gas prices will increase by 9 to 12 percent in 2020, with negligible changes by 2030 relative to the base case. Natural gas use for electricity generation will increase by as much as 1.2 trillion cubic feet (TCF) in 2020 relative to the base case, declining over time.

Renewable energy capacity is anticipated to increase by roughly 12 GW in 2020 and by 9 GW in 2030 under Option 1.

Respecting employment in the electricity, coal, and natural gas sectors, EPA projects an increase of approximately 28,000 to 25,900 job-years in 2020 for Option 1, state and regional compliance approaches, respectively. For Option 2, EPA's state and regional compliance approach estimates are an increase of approximately 29,800 to 26,700 job-years in 2020. EPA is also offering an illustrative calculation of potential employment effects due to demand-side energy efficiency programs. Employment impacts in 2020 could be an increase of approximately 78,800 jobs for Option 1 (for both the state and regional compliance approaches). For Option 2 demand-side energy efficiency employment impacts in 2020 could be an increase of approximately 57,000 jobs (for both the state and regional compliance approaches).

EPA's analysis of benefits examines the effect of lower demand leading to lower costs to consumers, along with the expected economic, health, safety and environmental benefits of the rule.

NRDC retained ICF International to analyze an NRDC proposal similar to the approach that EPA used in the proposed rule.⁶ Using NRDC's assumptions, ICF concluded that the Clean Power Plan would fuel a surge in energy efficiency investments, creating new jobs filled by electricians, roofers, carpenters, insulation workers, heating/air conditioning installers and heavy equipment operators, among others. This is largely driven by energy efficiency investments (Building Block 4) and the flexibility granted to States to meet the standards in ways that best meet their individual needs, such as accounting for their differing energy mixes. Overall, the analysis shows that those investments, while creating 274,000 jobs, can save households and business customers \$37.4 billion per year on their electricity bills. Specifically, US household customers save \$13 billion per year, or an average of \$103 per household, per year. US commercial and industrial customers save \$24.3 billion per year. There would also be more than \$50 billion in health and environmental benefits.

ACCCE retained NERA Economic Consulting to analyze the energy market impacts and costs of the proposed rule.⁷ NERA's analysis focused primarily on two scenarios for complying with the

⁶ Natural Resources Defense Council (NRDC), [Retail Electric Bill Savings and Energy Efficiency Job Growth from the NRDC Carbon Standard: Methodology Description](#), May 2014.

⁷ NERC Economic Consulting, [Potential Energy Impacts of the EPA Proposed Clean Power Plan](#), Prepared for: American Coalition for Clean Coal Electricity, American Fuel & Petrochemical Manufacturers,

EPA proposal. In one scenario, each state is assumed to use the least expensive (optimum) combination of the four Building Blocks proposed by EPA. In the other scenario, NERA's analysis assumes that certain real-world constraints might limit State compliance options.

The NERA model aligns with the US Energy Information Administration's *Annual Energy Outlook (AEO) 2014* reference case projection. In addition, NERA relied on EPA assumptions in many instances. The NERA analysis, however, could not capture all the real-world impacts of EPA's proposal. For example, the model assumes an ideal least-cost solution to meet the proposal's CO₂ emission requirements, and the results do not include potential impacts such as costs to upgrade the electric transmission grid and increase natural gas infrastructure.

The highlights of the ACCCE analysis are:

- Double-digit electricity rate increases are projected in 43 States, even if States do not have any constraints that could drive rates higher.
- 14 States could have peak-year electricity rate increases exceeding 20 percent.
- Compliance costs total \$366 billion to \$479 billion over 2017-2031, and annual compliance costs average \$41 billion to \$73 billion. This cost far exceeds the cost of the previously most expensive rule for power plants, the Mercury and Air Toxics Standards (MATS) rule, which costs \$10 billion per year.
- Consumers must spend \$560 billion on ways to cut electricity use.
- Coal retirements are projected to increase by at least 45,000 MW. Even without the Clean Power Plan, more than 70,000 MW of coal capacity have announced retirement, most of which are due to EPA policies. In total, the US could lose more than one-third of its coal-fired electric generating fleet by 2020.
- Natural gas prices could increase by as much as 29 percent.

Rule's Impact on Electricity Reliability

It is widely recognized by opponents of the Clean Power Plan that it is likely to threaten the reliability of the grid. Some supporters of the rule have expressed concern as well.⁸ And at least 32 States raised similar concerns in their filed comments. Even without any additional regulatory changes, electricity grids are currently being operated with very little margin for error. At a Senate Hearing in 2014, FERC Commissioner Philip D. Moeller explained that "the experience of this past winter indicates that the power grid is now already at the limit." Likewise, the Government Accountability Office (GAO) noted that existing EPA regulations, including MATS, the Cross

Association of American Railroads, American Farm Bureau Federation, Electric Reliability Coordinating Council, Consumer Energy Alliance, and National Mining Association. October 2014

⁸ The Clean Energy Group, whose members include utilities with extensive investments in nuclear and natural gas fired generation, doubts that the rule is achievable as proposed because of the interim compliance time frame. The group's December 1, 2014 comments addressed several issues that raise reliability concerns and solutions for mitigating the concerns.

State Air Pollution Rule (“CSAPR”), and the Clean Water Act Section 316 Cooling Water Intake Structures rule “may contribute to reliability challenges in some regions.”⁹

EPA’s modeling 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.¹⁰

On November 5, 2014, 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 rulemaking.

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. NERC expressed similar concern regarding the need for transmission infrastructure to accommodate increased natural gas and renewable generation—specifically that the construction of new transmission lines could take as long as 15 years to complete.

Second, the proposed rule would constrain the availability of NERC-defined Essential Reliability Services (ERSs), such as load following, regulation and ramping services. This outcome results from the intermittent nature of variable energy resources (VERs) such as wind and solar. While increased reliance on VERs should be met with an increase in reserve margins to maintain reliability, the proposed rule would result in reduced reserve capacity due to the retirement of coal-fired EGUs. NERC also noted that EPA’s estimate of retirements “may be conservative if the assumptions [in EPA’s Integrated Planning Model] prove to be unachievable. Developing suitable replacement generation resources to maintain adequate reserve margin levels may represent a significant reliability challenge, given the constrained time period for implementation.” In another study, NERC and the California Independent System Operator concluded that the reliability of bulk power supply can be diminished when renewable resources reach 20% or more of total supply—a number that EPA projects can be achieved or exceeded by 24 States.

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. This resource cannot be dispatched and is generally invisible to the operator, but will rely on the “system” for backup services, placing a greater and unpredictable demand for ERSs.

One of NERC’s most important recommendations is the need for detailed system evaluations that yield a “clear understanding of the complex interdependencies resulting from the rule’s

⁹ US Government Accountability Office (GAO), [EPA Regulations and Electricity - Update on Agencies’ Monitoring Efforts and Coal-Fueled Generating Unit Retirements](#), GAO-14-672, August 2014.

¹⁰ This section is adapted from [The Associations’ December 1, 2014 submission to EPA](#). The electric reliability material in the comments was originally prepared by ELCON’s John Hughes.

implementation.” EPA’s modeling of its proposed rule assumptions is not a detailed system evaluation. The Integrated Planning Model (IPM) used by EPA lacks the granularity and realism capable of identifying the real risk of the proposed rule at the operational level. IPM dispatches on a seasonal basis using load duration curves and regional load shapes, which is a gross generalization of actual real-time dispatch practices. Further, IPM does not effectively model individual power plants, does not model the random intermittency of wind and solar, relies on an unrealistic, simplified industry structure (i.e., 64 “model regions” in lower 48 States as proxies for the actual utilities and transmission operators), and relies on an even more simplified “model” of natural gas supply and demand. The necessary details to assess reliability are simply missing from EPA’s model.

In the absence of such necessary modeling by EPA, industry planning groups are beginning to prepare more detailed evaluations of the proposed rule’s potential impacts on grid reliability. For example, the Southwest Power Pool, Inc. (SPP) and the Electric Reliability Council of Texas (ERCOT) completed grid reliability analyses evaluating the likely impacts of the proposed rule.

The [SPP Reliability Assessment](#) has two parts: (1) evaluation of transmission system impacts (i.e., potential for bulk electric system equipment overloads and low voltages), and (2) evaluation of impacts to reserve margins. SPP determined that EPA’s assumptions in the proposed rule would impede reliable operation of the electric transmission grid in the SPP region, resulting in violations of NERC’s mandatory reliability standards and exposing the power grid to significant interruption or loss of load. These impacts result, in part, from the infeasibility of the compliance schedule in the proposal, which is too short to ensure the timely siting and construction of the necessary electric transmission, electric generation, and natural gas pipeline infrastructure within and across the appropriate planning areas.

SPP’s overall conclusion was that the proposed rule would pose a “serious risk” to reliability:

If the proposed CPP remains as is, the bulk electric system will be at serious risk of violating these limits [to ensure that transmission lines are not overloaded and voltage is maintained]. The likelihood that this outcome occurs dramatically increases if the timing of the issuance of the final rule effectively prevents the construction of electric system infrastructure necessary to facilitate compliance with the state goals being contemplated under the proposed CPP.

SPP conducted the transmission system impact evaluation in two parts. In the first part, SPP assumed available unused electric generation capacity that currently exists within the SPP region and surrounding areas would be used to replace the projected retired capacity. The second part of the transmission system impact evaluation assumed that the projected EGU retirements would be replaced by increased output of existing generation, including wind resources, and new generation capacity modeled according to resource planning information being utilized in SPP’s 10-year transmission planning assessment that is currently in progress. The assessment concluded:

The SPP region will experience numerous thermal overloads and low voltage occurrences under both scenarios studied. Results of the first part of the transmission system impact evaluation indicate that if the assumed EGU retirements were to occur absent requisite transmission and generation infrastructure improvements, the power grid would suffer

extreme reactive deficiencies ... that would expose it to widespread reliability risks resulting in significant loss of load and violations of NERC reliability standards.

Under the second scenario, SPP identified 38 overloaded elements in 6 States that SPP would have to mitigate through transmission planning. The SPP concluded that, “[unless the proposed CPP is modified significantly, SPP’s transmission system impact evaluation indicates serious, detrimental impacts on the reliable operation of the bulk electric system in the SPP region, introducing the very real possibility of rolling blackouts or cascading outages that will have significant impacts on human health, public safety and economic activity within the region.”

SPP also evaluated the impacts of the projected EGU retirements on SPP’s reserve margin. SPP’s minimum required reserve margin is 13.6% per load-serving entity. SPP concluded “that by 2020 SPP’s reserve margin would fall below 4.7%, which is 8.9% below SPP’s minimum reserve margin requirement and would result in a violation of SPP’s reliability criteria and NERC reliability standards.” By 2024, SPP estimated that its anticipated reserve margin would be -4.0%. The concerns over operating below NERC’s reserve capacity standards are particularly troubling, as States and system operators may be forced to decide whether to comply with EPA’s Section 111(d) rule or to comply with NERC’s reserve capacity requirements.

Likewise, the [ERCOT Analysis of the Clean Power Plan](#) noted significant concerns with the proposed rule, explaining “that, given the ERCOT region’s market design and existing transmission infrastructure, the timing and scale of the expected changes needed to reach the CO₂ emission goals could have harmful impacts on reliability.” In particular, ERCOT noted challenges associated with (1) the anticipated retirement of up to half of ERCOT’s existing coal-fired capacity, (2) integrating significant new intermittent wind and solar resources, and (3) infrastructure changes needed to address rapidly changing resource mixes. In light of these concerns, ERCOT evaluated the potential impacts of the proposed rule under two different scenarios, one where the emissions limits were applied as a modeling constraint that selected cost-effective means of reducing carbon intensity and one where carbon emissions fees were imposed on EGUs.

While ERCOT concluded that EPA’s emission reduction targets could be achieved over the long-term, it did identify significant reliability concerns associated with implementing the proposed rule and concluded that “it is evident that implementation of the proposed Clean Power Plan will have a significant impact on the planning and operation of the ERCOT grid.” Specifically, ERCOT highlighted transmission challenges associated with the loss of existing generating capacity near major urban centers, reduction in reserve capacity if existing coal-fired EGUs are retired too quickly, and challenges associated with integrating additional renewable energy capacity. In other words, even if the grid reliability challenges can be managed and resolved over the long term, EPA’s aggressive compliance schedule will pose risks to ERCOT’s ability to consistently supply consumers with reliable electricity.

In recognition of the reliability concerns of NERC, SPP and ERCOT, some utilities and (especially) the ISO/RTO Council (IRC) that represents ISOs and RTOs are proposing a “Reliability Safety Valve.” As explained by the IRC, the Reliability Safety Valve or RSV is a proposal to ensure that any federal CO₂ rule or related State implementation plan includes a process to assess, and, as relevant, to mitigate, electric system reliability impacts resulting from compliance actions.

The [RSV proposal](#), the IRC explains, can help to ensure outcomes that address reliability issues without affecting the policies underlying the compliance design of the Clean Power Plan. In 2012, the IRC worked with EPA to establish an enforcement policy related to the MATS rule that reflects the RSV concept. Although the RSV proposal for the section 111(d) rule differs slightly, the underlying reliability proposition is the same – allow for electric system reliability impact reviews related to compliance requirements and, where necessary, provide for appropriate compliance and/or enforcement flexibility to accommodate solutions to mitigate issues that would otherwise compromise reliability requirements.

The final rule could allow implementation of the RSV proposal by incorporating a reliability review conducted by the relevant system operator, working with the States and relevant reliability regulators, prior to finalization and approval of the State plan. The review would identify the reliability issues and solutions, which would be subject to appropriate regulatory review and approval. Reliability solutions could include appropriate compliance and/or enforcement flexibility in the short term, while a long-term reliability solution is developed and implemented. As an example, where a coal-fired power plant that might otherwise be retired is deemed essential for reliability purposes, the plant's retirement could be delayed and compensated with a reliability-must run (RMR) contract until a location-specific fix is completed.

NERC, APPA, and NRECA support a RSV as do a growing number of State regulators and environmental agencies. It is not clear if EEI supports a RSV.

There is some evidence that FERC is split on the merits of the RSV. Chairman LaFleur has publicly embraced the concept. FERC Commissioner Tony Clark said at an Energy Bar Association meeting last November that he hopes the EPA will "strongly consider" implementing a "safety valve" for reliability. FERC, for example, could look "across the spectrum at all the State plans as they come together to ensure that State plans don't go into effect until" FERC or a different agency "can certify that there's not going to be harm to reliability as the state implementation plans start getting implemented."

The National Mining Association (NMA), which represents the Nation's coal producers, is strongly opposed to a RSV. In a memorandum prepared for a 2011 FERC Technical Conference on reliability, it cited four reasons for opposing the mechanism as applied to EPA regulations: (1) it lacks a legal foundation; (2) it does not address costs and provides no meaningful role for States; (3) it does not consider forthcoming EPA regulations; and (4) it will not work.

Technological Assumptions and Associated Impact on Compliance Flexibility and Achievability

State and stakeholder comments on the proposed rule repeatedly emphasize that EPA's assumptions regarding the technological feasibility of its four Building Blocks do not account of existing constraints within the interconnected electric grid or past actions related to each Building Block. For example:

- EPA's 6 percent heat rate improvement goal for all coal-fired generating units ignores that equipment upgrades and maintenance best practices needed to achieve this ambitious goal have already been adopted at many plants. EEI, APPA, NERC, and 34 States raised concerns with the achievability of this Building Block.

- EPA’s goal of a 70 percent of capacity factor for NGCC plants does not account for the technical, seasonal, and infrastructure challenges that may inhibit this unprecedented level of dispatch from NGCC plants. EEI, APPA, NERC, and 35 States raised concerns with the achievability of this Building block.
- Among numerous other errors and shortcomings, EPA renewable energy targets mistakenly assume that all States within a particular EPA-defined region share the same average renewable energy potential, when they clearly do not. EEI, APPA, NERC, and 20 States raised concerns with the achievability of this Building Block.
- EPA’s energy efficiency goal of an eventual 1.5 percent improvement each year ignores that many States have already mature energy efficiency programs in place and that achieving EPA’s target will be extremely difficult under better economic conditions. EEI, APPA, NERC, and 17 States raised concerns with the achievability of this Building Block.

NERC and The Associations also identify flaws in the assumptions EPA used to qualify the Building Blocks as a Best System of Emissions Reduction (BSER).

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 proposed rule. 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.

EPA is taking the unprecedented step of attempting to fundamentally redesign the country’s electric utility sector and therefore it is not unreasonable that States and their jurisdictional utilities be provided with sufficient time to develop and implement their State plans in accordance with the scope and magnitude of the rule’s mandates. The US Chamber Report describes the method behind the madness:

EPA ... is requiring different compliance schedules for states pursuing individual or regional multi-state implementation plans in an inappropriate effort to force states to adopt the agency’s preferred regional approach. EPA is offering states that choose a regional approach an extension period twice as long as those choosing to go it alone. If left unaltered, states pursuing an individual implementation plan will find it extraordinarily difficult to meet EPA’s unreasonable schedule, which puts these states at risk of EPA attempting to impose federal implementation plans. EPA promised a flexible and cooperative approach, but its proposal falls well short of that goal by making it more difficult for states to go against the Agency’s obvious preferences. The EPA’s compliance schedule for producing implementation plans is so unreasonable that it should be withdrawn in its entirety and replaced with a more realistic timeline.

In addition to the 34 States that object to EPA’s rushed regulatory timelines, EEI, APPA and NRECA are also seeking relief from this mandate.

Achievability of the Rule's Interim Targets

Even 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. Environmental groups love this provision because it would likely produce total cumulative reductions in excess of the 30% reduction targeted for 2030. EPA justifies the interim targets claiming that the targets provide a smooth “glide path” to the 2030 goals. APPA, NRECA and 30 States strongly oppose the interim targets.

EI has recommended that if the interim targets are not eliminated outright that the year 2025 should be adopted instead. That would be consistent with the target date set in a recent accord for the US and China to reduce emissions by 26-28 percent from the 2005 base year level.

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”). The principle of diminishing returns limits those States after 2012 to the more costly options. 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, EEI, 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 estimates that the cost of keeping “at risk” nuclear plants operating is \$12-\$17 per metric ton of CO₂ abated. This compares very favorably to EPA's estimates that: (1) Adding renewable capacity costs \$10-\$40 per metric ton of CO₂ abated; (2) Increasing natural gas combined cycle power plant utilization rates to 70 percent costs \$30 per metric ton of CO₂ abated; and (3) Implementing demand-side management programs costs \$16-\$24 per metric of CO₂ abated. 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. Output from those plants is added to the denominator when calculating the State's intensity target, thereby driving down those States' emission rates.

The comments submitted by the Nuclear Energy Institute (NEI) to EPA summarize several significant shortcomings in the proposed rule regarding the “encouragement” of nuclear power plants. NEI asserts that 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.

According to NEI, there is no logical or factual basis to assume that six percent of the nuclear generation in every State with nuclear generation is “at risk.” Although there are nuclear plants at risk, they are generally located in States that are in the footprints of ISOs or RTOs, and not evenly distributed among all States with nuclear capacity. In some States, the six percent “at risk” factor may have perverse and unintended consequences. For example, a State could lose its nuclear generation, replace only six percent of it with other zero-carbon resources, still meet the intensity target, but total carbon emissions would increase. As a result, the six-percent nuclear factor does not achieve the intended result and provides no incentive for States to preserve nuclear capacity at risk.

For nuclear plants under construction, there is no logical basis to include output from these plants in the rule’s emission rate-setting formula. First, these plants are not complete and not operating. Their generating experience and their capacity to avoid emissions have yet to be established. Second, adding potential output from these plants to the denominator in the rate-setting formula reduces the State’s intensity target significantly, thereby penalizing states that have supported new nuclear plant construction. For example, South Carolina’s state target is 22 percent more stringent than it otherwise would be because of EPA’s treatment of Summer 2 and 3. Georgia and Tennessee’s targets are 14 percent more stringent on this basis. This is a substantial and unjustified penalty levied on just three States for no legitimate purpose related to the goals of the Clean Air Act.

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. The utilities that operate these facilities will be walloped economically if they cannot recover their investments before being obligated to shut down their coal-fired plants. 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 EPA consider the remaining useful life of power plants when developing regulations, by EPA’s own admission its proposal will force the premature closure of up to an additional 49 gigawatts of coal capacity. In comments to EPA, 22 different States raised these concerns.

Rule’s 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.” Actual generation is impacted significantly by temperature, humidity, and numerous other factors, and as a result, summer and winter capabilities in particular are significantly less than nameplate

capability. This results in the inappropriate inflation of State targets, and has the most impact on Building Block 2 calculations. Specifically, EPA bases State redispatch targets on the assumption that NGCC facilities operate at 70% of nameplate capacity, instead of net or seasonal capacity. For example, a comparison presented by the North Carolina Public Utility Commission showed that the use of nameplate capacity rather than seasonal capacity overestimates generation potential by about 9 percent. While perhaps a relatively minor issue at first glance, similar overestimates multiplied across every State and hundreds of generating facilities would result in a significant inflation of Building Block 2 potential. More importantly, if applied in practice as proposed in EPA's Building Blocks, the use of nameplate capacity to estimate redispatch potential could have reliability implications. For example, according to the Arizona Corporation Commission, EPA's use of nameplate capacity led to the unrealistic assumption that all Arizona utilities could meet load obligations in the summer through the redispatch of coal-to-gas. At least 16 States raised these concerns in their public comments. EEI, APPA, NRECA, and The Associations raised the same concern.

THE CLEAN POWER PLAN DEBATE IN CONGRESS

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. However, the leadership in the two houses is far from united as to what approach to use.

The Republican-controlled Congress can attempt to influence policy - i.e., to oppose the Administration's carbon agenda, exemplified by the proposed rule - in a number of ways. The most straightforward is to introduce legislation that either prohibits certain agency actions or predicates agency action on first meeting a certain threshold or conducting certain analyses. A second means of impacting policy is through the appropriations process - that is either reducing funds for certain agencies (such as EPA) or by stipulating that no funds be used for a specific purpose (e.g., reducing greenhouse gases). A third approach is to use the amendment process where provisions affecting carbon and other air emissions can be attached to other legislation. And a fourth mechanism is the oversight process - congressional committees can call witnesses from executive branch departments and agencies to testify about how specific programs are being implemented and the committees can also undertake studies on program operations (they can also ask the Government Accountability Office to conduct studies).

In the House

The House Energy and Commerce Committee issued a staff report last December listing their analysis of the proposed rule. The report reached five conclusions:

- There are fundamental legal questions about the EPA's authority to regulate in this area and, assuming such authority, the scope of that authority;
- EPA's plan would transform federal and State decision-making concerning the transmission and delivery of electric power in the United States;

- Many of the key assumptions in the EPA's proposed "Building Blocks" are unrealistic;
- The proposal would not be workable for potentially many States because of a host of implementation challenges; and
- The accelerated timeline for completing the rulemaking appears inadequate to respond fully to all substantive comments.

Members of the House can be expected to introduce legislation restricting EPA directly and legislation to require EPA (and other departments and agencies) to provide cost analyses of any major regulations (based on a cost impact threshold). The Committee, as it did last Congress, is likely to approve a variety of such measures on close to party-line votes. Action will begin soon.

Most of the legislative work will be done within the Subcommittee on Energy and Power, chaired by Rep. Ed Whitfield (R-KY). Other hearings and oversight will be conducted by the Subcommittees on the Environment and Economy and on Oversight and Investigations, chaired by Reps. John Shimkus (R-IL) and Tim Murphy (R-PA), respectively.

Appropriations for the Environmental Protection Agency are within the jurisdiction of the Appropriations Committee's Subcommittee on Interior, Environment, and Related Agencies. This Subcommittee is chaired by Rep. Ken Calvert (R-CA). DOE and FERC appropriations are handled by a different subcommittee. 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.

Additional hearings and studies on the proposed rule (and other EPA programs) could be undertaken by the Committee on Oversight and Government Reform which this Congress has a new Chairman, Rep. Jason Chaffetz (R-UT). The Committee, however, has limited legislative authority.

Regardless of what legislation the House may pass, if history is a guide the Senate is unlikely to consider most of the House-approved bills. That may change somewhat in the 114th Congress, given the new Republican majority, but scheduling procedures in the Senate will continue to restrict the number of bills that get "floor time." In addition, the House leadership is quite mindful that their now 245-vote majority (there is one vacancy, likely to be filled by a Republican), is short of the two-thirds requirement (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.

In the Senate

For Senate watchers, the most important phrase of the new Congress is "regular order." According to the new Majority Leader, Sen. Mitch McConnell (R-KY), bills brought to the Senate floor will be open to full debate and there will be no barring of amendments (in contrast, the former Majority Leader, Sen. Harry Reid (D-NV), frequently brought legislation to the floor with a number of pre-offered amendments, thus filling the "amendment tree" and limiting the ability of Senators to offer any additional amendments).

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 climate change, and he has been critical of the Clean Power Plan. Although he has not scheduled any hearings to date, observers expect substantial Committee activity.

Another vocal member of EPW is Sen. David Vitter (D-LA), who is also running for governor of Louisiana this year. Sen. Vitter jumped into the fray early, introducing a bill (S 66) to prohibit any regulation regarding carbon dioxide or other greenhouse gas emissions reduction in the United States until China, India, and Russia implement similar reductions. While the bill itself has little chance of passage, it is indicative of the rhetoric that Sen. Vitter and other members of EPW will inject into the debate on reducing carbon and greenhouse gases.

Although chairs of the Appropriations Committee subcommittees have not been named, Sen. Lisa Murkowski (R-AK), who will also chair the Senate Energy Committee, is the frontrunner to chair the Subcommittee on Interior, which funds EPA. While she is not as ardent as others in the debate to reduce carbon, she is a fierce critic of bureaucracy, and she has already expressed doubts about EPA's methodology in determining the benefits of its Clean Power Plan (including EPA's use of date on the "social cost of carbon"). Although Senate leaders are stating that they hope to pass individual appropriations bills this year, history argues against that approach and many foresee Congress considering some sort of Continuing Resolution at the end of the fiscal year in September.

Legislation in the Senate also faces an additional hurdle as most measures need 60 votes to proceed. Republican leaders were able to get six Democrats to sponsor the legislation to permit construction of the Keystone XL pipeline, but each of the six had supported the pipeline at some point in the past. 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.

THE ROLE OF OTHER ADMINISTRATIVE AGENCIES IN THE CLEAN POWER PLAN

At the Federal Energy Regulatory Commission (FERC)

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.

Early on, opponents of the Clean Power Plan began making the argument 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. One of the first to raise questions about reliability, early in the summer of 2014, was FERC Commissioner Phil Moeller (one of two Republicans on the Commission) who called for a "public and transparent" forum for a discussion of the issue by industry experts.

In contrast, FERC Chair Cheryl LaFleur (a Democrat) equivocated, first about how much EPA had consulted FERC on grid reliability when it developed the proposed rule, and, second, on how

active FERC should be now that the proposed rule is issued. She saw a clear difference in the roles of the two agencies – “EPA clearly has the authority under the enabling statutes to make environmental rules. We have the authority and the responsibility to make rules about reliability standards...and all the things that keep the lights on,” she said.

Many Republican Members of Congress began to focus on the “reliability issue” as a means of criticizing the proposed rule. In July 2014, the House Energy and Power Subcommittee called all four sitting Commissioners (and a nominee for the fifth seat) for a hearing on what role FERC had played in the development of the Clean Power Plan and what role FERC should play. The two Republican Commissioners, Moeller and Tony Clark, testified that FERC had virtually no input as EPA developed the proposed rule while Chairman LaFleur, in her testimony, resisted FERC playing a more active role.

Since then, under political pressure, Chair LaFleur has announced a series of FERC Technical Conferences on reliability and how reliability will be impacted by the Clean Power Plan. There will be a national conference in Washington on February 19 followed by regional conferences in Denver (February 25), Washington (March 11) and St. Louis (March 31). Participation is by invitation only. ELCON is part of a coalition coordinated by the National Association of Manufacturers which has requested an opportunity to provide a participant.

Commissioners may or may not participate in Technical Conferences. In the past individual Commissioners usually have shown up for a portion of Technical Conferences, when they are given the opportunity to ask questions, but the majority of the questions are asked by staff. In this instance, it is noteworthy that two of the Democratic Commissioners, Norman Bay and Collette Honorable, are relatively new (though Ms. Honorable previously served as a State commissioner in Arkansas and was President of the National Association of Regulatory Commissioners just prior to being named to FERC) and were not members of FERC when EPA was developing the proposed rule. Both of the new Democratic Commissioners are presumed to be reluctant to oppose the Clean Power Plan offered by the Administration, but all five Commissioners have (not surprisingly) insisted that they will not support any plan that jeopardizes grid reliability.

At the Department of Energy

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

The Secretary has said that the Department’s first Quadrennial Energy Review (QER), due for release next month, will examine the full impact of the Climate Action Plan. In total, Secretary Moniz has listed five areas where DOE will focus. They are: (1) utilizing the Department’s loan guarantee program; (2) funding projects through the Advanced Research Projects Agency – Energy (ARPA-E); (3) developing energy efficiency standards for appliances; (4) implementing the recent accord with China to achieve carbon reductions; and (5) releasing the QER and implementing its recommendations.

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