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Michael S. Regan
Administrator, Environmental Protection Agency
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Submitted Electronically via Regulations.gov

Re: Comments on the Supplemental Notice of Proposed Rulemaking Titled “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule” by the Attorneys General of the State of West Virginia, Alabama, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia (Docket No. EPA-HQ-OAR-2023-0072)

Dear Administrator Regan:

Your agency has issued a supplemental notice of proposed rulemaking on its proposed rule, “New Source Performance Standards for Greenhouse Gas Emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.” *See* 88 Fed. Reg. 80,682 (Nov. 20, 2023) (“Supplemental Notice”). This Supplemental Notice follows an initial notice of proposed rulemaking in May 2023, in which EPA proposed aggressive new source performance standards under Section 111 of the Clean Air Act for coal-, natural gas-, and oil-fired power plants. *See* 88 Fed. Reg. 33,240 (May 23, 2023) (“Proposed Rule”).

We explained in our previous comment that EPA’s Proposed Rule went far beyond the agency’s statutory authority by setting unrealistic standards that will force coal- and natural-gas-fired plants to close. *See* State of W. Va., *et al.*, Comment Letter on Proposed Rule Establishing New Source Performance Standards for Greenhouse Gas Emissions (Aug. 8, 2023), <https://tinyurl.com/4ht9usa4> (“States Comment”). We stand by our previous comment. The Proposed Rule reshapes the nation’s electricity grid in a destructive and unlawful way. Implementing the Proposed Rule will kill jobs, raise energy prices, and hurt energy reliability. No wonder so many commenters have already come out against it.

The Supplemental Notice recognizes that the Proposed Rule will have unintended consequences, specifically focusing on small businesses and grid reliability. But rather than cutting its losses and reversing course, EPA uses the Supplemental Notice to task commenters with coming up with ways to save the EPA's own regulatory misadventure. But EPA cannot abdicate or delegate its responsibility to "take into account" the Proposed Rule's costs and energy impacts. And facts that have developed since the Proposed Rule confirm that both costs and reliability are good reasons *not* to issue the rule at all. We urge EPA to abandon its latest effort to cripple America's energy and power industries before it's too late.

BACKGROUND

Section 111 of the Clean Air Act directs EPA to determine the best system of emission reduction (BSER) available to address air pollutants from certain stationary sources. *See* 42 U.S.C. § 7411(a)(1). In determining the BSER, EPA must "tak[e] into account the cost of achieving such reduction and ... energy requirements." *Id.* EPA must also establish that its selected BSER is "adequately demonstrated." *Id.*; *see also Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) ("An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way."). And EPA must comply with the Regulatory Flexibility Act, which generally requires EPA to determine a rule's economic impact on small entities and explore ways to reduce any significant impact on a substantial number of those entities. *See* 5 U.S.C. § 601, *et seq.*

When it comes to fossil-fuel-fired power plants, EPA has failed to meet Section 111's requirements. In 2015, EPA finished the Clean Power Plan (CPP), 80 Fed. Reg. 64,662 (Oct. 23, 2015), which set emission reductions standards so low that it was impossible for existing power plants to comply using any then-existing technologies or process improvements. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022). Several States, including West Virginia, challenged that rule, and the Supreme Court granted a stay pending review. *West Virginia v. EPA*, 577 U.S. 1126 (2016). EPA then repealed the CPP, finding that the rule had "significantly exceeded" the agency's statutory authority. 84 Fed. Reg. 32,520, 32,523 (July 8, 2019). Yet the D.C. Circuit vacated that repeal, reading Section 111(d) broadly to allow EPA to consider all types of measures. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 946 (D.C. Cir. 2021). Last year, though, the Supreme Court reversed the D.C. Circuit, holding that EPA had been right—the second time—to reject the CPP, as EPA lacked authority under Section 111 to require the broad measures the D.C. Circuit and the CPP imagined. *West Virginia*, 142 S. Ct. at 2616.

Shortly after, EPA issued the Proposed Rule, which marked yet another attempt by the agency to re-interpret Section 111 in new and expansive ways. 88 Fed. Reg. 33,240. Recognizing that it couldn't directly compel so-called "generation-shifting" after *West Virginia*, the Proposed Rule instead indirectly forces generation-shifting through impossible-to-meet BSERs that the industry has no chance of meeting. So, much in the same ways the CPP did, the Proposed Rule would force plants to close and compel a switch to lower-emitting fuel sources like wind and solar.

West Virginia and twenty other States have already explained why this backdoor attack on *West Virginia* is unlawful for several reasons in an extensive comment. Many others agreed.

With the Supplemental Notice, EPA at least recognizes that the Proposed Rule will have significant economic impacts on small entities and raise reliability concerns across the grid. 88 Fed. Reg. at 80,683. It asks commenters to suggest mechanisms that could minimize those concerns. *Id.*

But in doing so, EPA concedes that it has received several comments confirming criticisms we made in our initial comments on the Proposed Rule. For instance, entities explained that “neither hydrogen co-firing nor carbon capture and storage (CCS) can be BSER because neither technology is commercially available or viable in very rural areas.” 88 Fed. Reg. at 80,683. And the agency heard how “increased energy costs, transmission upgrade costs, and infrastructure encroachment” will “directly affect” “economically disadvantaged communities.” *Id.* Energy reliability was also a serious concern, so much so that regulated entities have pressed for ways “to enable [energy-generating units] to operate notwithstanding [the EPA’s proposed] compliance schedules, based on a showing of reliability need.” *Id.* at 80,684. And EPA’s Proposed Rule has not adequately accounted for “situations outside the control of affected sources (e.g., delay in the issuance of a relevant permit needed to meet the standards of performance, infrastructure delays, or supply chain disruptions) that could lead to adverse impacts on grid reliability.” *Id.*

DISCUSSION

In our previous comment, we explained that EPA’s Proposed Rule departed from Section 111’s statutory text to adopt an unprecedented regulation that would force a sector-wide shift in electricity production, leading to increased energy costs and a destabilized energy grid.

The Supplemental Notice doesn’t fix any of those issues. Instead, it tasks commenters with suggesting alternative approaches that would reduce these burdens. But EPA can’t make commenters do its job. And ultimately, no amount of jiggering will meaningfully reduce the unlawful and inappropriate burdens the Proposed Rule will impose on energy producers, consumers, and the country.

I. EPA Cannot Outsource Its Responsibility to Account for Energy Requirements and Costs.

Section 111 requires EPA to “tak[e] into account” cost and energy requirements when determining the relevant adequately demonstrated BSER. 42 U.S.C. § 7411(a)(1). “EPA therefore must limit the magnitude of [the measures] it demands to a level that will not be exorbitantly costly or threaten the reliability of the grid.” *West Virginia*, 142 S. Ct. at 2612 (internal quotation marks omitted). Put differently, “our Nation’s energy needs and the possibility of economic disruption must weigh in [EPA’s] balance.” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). Even judges who have perceived Section 111’s reach to be broader have stressed that these considerations must be treated as “meaningful constraints.” *West Virginia*, 142 S. Ct. at 2629 (Kagan, J., dissenting).

But with the Supplemental Notice, EPA has offered a quiet confession that it didn't properly "account" for the relevant factors at the front end. Instead of "taking into account" the BSER, EPA now tasks commenters with analyzing "grid reliability needs that may arise during implementation of its final rules." 88 Fed. Reg. at 80,684. And it reveals that it has not done enough work to face the reality that its proposed BSER is not "commercially available or viable in very rural areas." *Id.* at 80,683. Costs could cripple the power industry—especially in rural areas—but EPA is now looking to an eleventh-hour request for information to shore up that problem.

EPA's failure to properly account for costs and reliability concerns could sink the Proposed Rule all by itself. Commenters (like the States) have already pointed out that EPA overlooked how the Proposed Rule would hurt small businesses and harm grid reliability. *See* States Comment at 43, 46-50. So truculently sticking with the same BSER anyway will render it arbitrary and capricious. After all, the D.C. Circuit, applying "a rigorous standard of review under section 111," has "in the past remanded section 111 standards for the seeming refusal of the agency to respond to what seem to be legitimate problems with [EPA]'s methodology." *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 429-30 (D.C. Cir. 1980) (internal quotation omitted).

EPA cannot now try to rely on commenters to do its "accounting" job after the fact. The statute's express references to cost and reliability considerations makes it plain enough that Congress wanted EPA to shoulder the task of doing the analysis—not just parrot back whatever suggestions friendly commenters might try to offer late in the game. And courts have not looked kindly on an agency's effort to set a substantive rule *first* while leaving the standards by which that rule will be judged for another day. *See, e.g., Chrysler Corp. v. Dep't of Transp.*, 472 F.2d 659, 678 (6th Cir. 1972). Perhaps most importantly, the Clean Air Act specifically requires EPA to include "the factual data on which the proposed rule is based" and "the methodology used in obtaining the data and in analyzing the data" in the "notice of proposed rulemaking ... published in the Federal Register." 42 U.S.C. § 7607(d)(3)(A)-(B). But EPA isn't doing that here; the most the States can hope for is some fuller disclosure in the *final* rule, which will come too late.

Relatedly, EPA also thwarts an effective notice-and-comment process by failing to provide the public with its thinking. EPA "has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). "Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decisionmaking." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). So while EPA says that it is considering "potential exclusions or subcategories," as well as grid reliability mechanisms, 88 Fed. Reg. at 80,683-84, the public won't have a "meaningful opportunity" to comment on the Proposed Rule because it doesn't know what EPA has in mind. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009).

EPA should have gathered the information it needed and considered all relevant factors *before* it issued the Proposed Rule. It didn't, so it should start over.

II. New Reports Confirm That the Proposed Rule Threatens an Already Vulnerable Energy Grid.

In our previous comment, we explained that EPA’s Proposed Rule would devastate long-term grid reliability. States Comment at 46. EPA must have noticed. 88 Fed. Reg. at 80,684. But new reports following the Proposed Rule confirm our fears.

For example, the Federal Energy Regulatory Commission and the North American Electric Reliability Corporation recently released its assessment of the energy markets and electric reliability for Winter 2023. FERC notes that natural gas and coal provide the largest share of net winter capacity: “Combined, natural gas- and coal-fired generation are forecast to provide the majority of electricity generated in the United States this winter, at 55.4%.” FERC, 2023 WINTER ENERGY MARKET AND ELECTRIC RELIABILITY ASSESSMENT 12 (Nov. 16, 2023), <http://tinyurl.com/3xa3xzbk>. FERC also notes that “[r]etirements predominantly come from” coal and natural-gas plants, but as plants close, some regions will face “a negative net change in net winter capacity.” *Id.* at 21, 23. And NERC’s 2023 long-term assessment is perhaps even bleaker. See Peter Behr, *Grid Monitor Warns of Blackout Risks as Coal Plants Retire*, E&E NEWS (Dec. 14, 2023, 6:37 am), <https://bit.ly/48oKftd>.

Or consider a report by the New York Independent System Operator (NYISO), which manages New York’s power supply, that New York’s grid is vulnerable to reliability problems as “[t]he pace of generator retirements exceeding the pace of resource additions poses a significant risk to grid reliability.” NYISO, 2023-2032 COMPREHENSIVE RELIABILITY PLAN 6 (Nov. 28, 2023), <http://tinyurl.com/yck26smv>. And “[w]hile “no coal fired generators operate in New York,” NYISO still recognizes that the Proposed Rule may impact “resource availability in regions neighboring New York.” *Id.* at 27-28. So even New York recognizes that coal is vital to maintaining grid reliability—something the Proposed Rule ignores. And they are hardly alone; other grid operators have said the same. See, e.g., Steven Ferrey, 1 L. OF INDEP. POWER § 5:40.70 (2023) (explaining how ISO-New England recently “identified retirements of fossil fuel generators coincident with the seasonal constraints on the natural gas pipeline system as major risks to grid reliability over the next decade”).

To see the role coal plays in grid stability, EPA need not look further than winter storm Elliott in December 2022, which knocked out power to hundreds of thousands of Americans in the southeastern U.S. on Christmas Eve. A recent FERC review found that the cold weather reduced natural gas production while demand for electricity and heating surged. So even natural gas—typically seen as reliable in cold weather—is not fool-proof. FERC, INQUIRY INTO BULK-POWER SYSTEM OPERATIONS DURING DECEMBER 2022 WINTER STORM ELLIOTT 21 (Nov. 7, 2023), <http://tinyurl.com/56jvyxw8>. But the Proposed Rule worsens grid instability by replacing coal and natural gas for energy sources like wind and solar. These changes “potentially expose the grid to more stability risks.” *Id.* at 151. No wonder, then, that Congress specifically intended that the EPA would “not exacerbate existing problems, e.g., produce adverse effects on the coal market.” *Sierra Club v. Costle*, 657 F.2d 298, 331 (D.C. Cir. 1981).

EPA appears uninterested in these reliability concerns—at least in the Proposed Rule. After all, EPA “did not study the reliability impacts of its proposal” in the Proposed Rule. FERC, COMMISSIONER DANLY’S INITIAL RESPONSE TO RANKING MEMBER BARRASSO AND RANKING MEMBER CAPITO 1 (Nov. 8, 2023), <http://tinyurl.com/496wz8ty> (emphasis removed). Instead, it considered resource adequacy. 88 Fed. Reg. at 33,246. But resource adequacy looks at whether each power region has enough “adequate generating resources to meet projected load and generating reserve requirements,” while reliability “includes the ability to deliver the resources to the loads, such that the overall power grid remains stable.” *Resource Adequacy Analysis Technical Support Document*, EPA-HQ-OAR-2023-0072-0034, at 2 (May 24, 2023), <http://tinyurl.com/a9wx9vv4>. Worse still, the Proposed Rule makes fossil-fuel-fire plant retirements even *more* likely, exacerbating the problem that so many present reports say is the chief vulnerability in our grids. The D.C. Circuit has deemed an EPA rule arbitrary and capricious when it disregarded comments on reliability like these. *See Del. Dep’t of Nat. Res. & Env’t Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015), as amended (July 21, 2015).

Perhaps recognizing as much, EPA now calls for comments on grid reliability. 88 Fed. Reg. at 80,684. But EPA needed to consider grid reliability when it promulgated the Proposed Rule. *Delaware Dep’t of Nat. Res. & Env’t Control*, 785 F.3d at 18 (noting grid reliability is a “cost” EPA needs to consider when achieving emission reductions). It’s especially appalling that EPA failed to do the necessary work from the beginning given that, for years now, “many (but not all) of the federal, regional, and state regulators responsible for maintaining the reliability of electricity markets have objected to one or more of EPA’s rules aimed at controlling emissions from coal-fired power plants.” David E. Adelman & David B. Spence, *Ideology vs. Interest Group Politics in U.S. Energy Policy*, 95 N.C. L. REV. 339, 375 (2017).

One final point: as we explained in our previous comment, any reliability study needs to consider the combined effect of all the actions EPA has taken and expects to take over the next few years. *See States Comment* at 48. Evaluating each rule separately fails to capture the true costs of what EPA proposes. And it’s especially wrong to evaluate the effects of these regulatory initiatives individually when they’re all concededly part of the same federal anti-carbon initiative. *Cf. O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 236 (5th Cir. 2007) (explaining, in the NEPA context, that an agency cannot improperly “divide artificially” a federal action to minimize the effects of the overall scheme). But as best we can tell, EPA is continuing to ignore the reliability impacts of its other regulatory efforts.

EPA should start over and do the work it needed to do from the beginning.

III. The Proposed Rule Will Crush Smaller Entities With Costs.

We expect that you will hear directly from the smaller entities who will be most harmed by the Proposed Rule. But we briefly note that this issue presents another example of how EPA has taken only a half-baked approach to substantial and important parts of its regulatory task.

As we explained in our previous comment, implementing the Proposed Rule’s new technologies will require serious capital costs. *See States Comment* at 23. For example, the

Proposed Rule estimates that using carbon capture and sequestration will increase capital costs by 115% and incremental operating costs by 35%. 88 Fed. Reg. at 33,298. The same is true for hydrogen co-firing, which faces transportation and infrastructure hurdles along with technological limitations. *See* States Comment at 39. To finance these upgrades, power plants typically raise capital by using unit-operating revenue as collateral. Am. Pub. Power Ass'n, Comment Letter on EPA's Federalism Consultation on Clean Air Act Section 111(d), 111(b), and MATS RTR Rulemakings 4 (Nov. 21, 2022), <https://tinyurl.com/vtzspajf>. But the Proposed Rule hamstring that method of raising capital because both proposed BSER technologies decrease future output. *See, e.g.*, 88 Fed. Reg. at 33,302 (projecting net power output to fall by over 10% with co-firing).

EPA declares that plants should just get bigger. 88 Fed. Reg. at 33,302 ("Although the use of CCS imposes additional energy demands on the affected units, those units are able to accommodate those demands by scaling larger, as needed."). But smaller power plants—the focus of this part of the Supplemental Notice—cannot just "scal[e] larger." They often provide power to smaller, rural communities, so investing hundreds of millions of dollars into specialized pipelines to transport carbon and hydrogen co-firing just doesn't make sense even if they could somehow afford it. Even if they could afford these enormous capital costs, they may not have room to install the CCS system because of its large footprint. *See* States Comment at 22-23. So most smaller power plants will be forced to adopt expensive, less efficient technology. They will then pass these costs along to consumers. And finally, forcing these plants to grow and consolidate also presents yet another headache for grid reliability; maintaining a host of smaller energy producers is often seen as an important part of maintaining grid stability. *See, e.g.*, Joseph P. Tomain, *The Democratization of Energy*, 48 VAND. J. TRANSNAT'L L. 1125, 1136-37 (2015).

With the Proposed Rule, then, everybody loses.

It's EPA's job—not the commenters—to secure reliable, affordable, and environmentally responsible energy for everyone. The Proposed Rule fails that mission. And nothing in the Supplemental Notice changes that. EPA should table its doomed plan.

Sincerely,



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