Electric
Reliability
Coordinating
Council

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November 14, 2011

VIA E-MAIL

The Honorable Cass R. Sunstein
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Re: **Request for Meeting: National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; 76 Fed. Reg. 24976 (May 3, 2011)**

Dear Administrator Sunstein:

On behalf of the Electric Reliability Coordinating Council (ERCC), I hereby request a meeting with you to discuss issues relating to the above-captioned U.S. Environmental Protection Agency (EPA) draft final rule (hereinafter referred to as "Utility MACT ") recently submitted to the White House Office of Management and Budget (OMB) for review.

ERCC is a group of power-generating companies that provide reliable and affordable power to millions of consumers in geographically diverse regions of the United States. ERCC members have long supported commonsense interpretation of the Clean Air Act in order to ensure electric reliability, affordability, safety and environmental protection. The principal concern we would like to raise with you concerning Utility MACT deals with electric reliability, but we have included materials in this letter regarding other aspects of EPA's benefits analysis.

Electric Reliability Concerns

- EPA's Missing Reliability Analysis

As an organization concerned with the impact of this rule on electric reliability, we were particularly alarmed to learn that the original preamble to the rule submitted to OMB on February 19, 2011, contained pertinent questions regarding reliability for interagency review. However, when the preamble was signed by the Administrator on March 16, 2011, these questions and any analysis related to them were missing.

Specifically, recent examinations of hundreds of thousands of pages of docket materials by Congressional and industry sources indicate that the original preamble contained a section entitled "What are the energy impacts?" in which EPA flatly stated that it "is aware that concerns have been expressed by some, even in advance of this proposed rule, that this regulation may detrimentally impact the reliability of the electric grid." At that time, EPA further conceded that "sources integral to reliable operation" may be retired due to the rule, an outcome that "could result in localized reliability problems." EPA's blithe and unsupported assurance that it can address "both clean air and electric reliability" in that document seems at variance with EPA's public position that there is no risk at all to reliability. See "The EPA's Reliability Cover-Up," *Wall Street Journal*, Nov. 14, 2011.

By the time the preamble was signed in March or published in May, these observations and questions regarding reliability had been removed. Yet there is nothing to suggest any changes to the rule itself had been made to justify this administrative sleight of hand.

- Potential Impacts on Reliability

Simply put, the Utility MACT affects some 40% of baseload capacity and almost half of U.S. net generation. The Federal Energy Regulatory Commission (FERC) is holding a technical conference on November 29-30, 2011, to gather information regarding the potential threats to electric reliability that may be posed by Utility MACT and other EPA rules. Final written submissions are due to FERC on December 9, 2011 – a scant week before the EPA is due to finalize the rule and hardly enough time for comments to be sensibly incorporated into a final work product. To date, FERC's only analysis of the EPA rules was reported in an August 1, 2011, letter to the ranking member of the Senate Energy and Natural Resources (ENR) Committee, Senator Lisa Murkowski (R-AK). The FERC staff analysis referenced there found that 81 gigawatts of generating capacity is 'very likely' or 'likely' to be taken off line by 2018 due to coal plant retirements and downgrades resulting from the rule. For the entirety of this correspondence file, see the Senate ENR website at http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=e4a227e1-9ec8-4b24-ad3a-1fc0d9c28462

Other reports also reveal substantial capacity at risk. FBR Capital found that the combination of Utility MACT and the transport rule could force the retirement of 30-70 GW of the lowest cost electricity generating capacity. *Reuters*, Dec. 13, 2010. NERC, as cited below, found that Utility MACT and other EPA rules could reduce electric generating capacity by 46 to 76 GW. Bernstein Research and Credit Suisse considered the Utility MACT and transport regulations

taken together. These reports project retirements of plants contributing as much as 70 GWs of generating capacity by 2015. ICF in its report concluded that concurrent with substantial retirements, 83-100 GWs of scrubbers and 172-194 GWs of fabric filter systems, or "baghouses," would have to be installed by 2015—more than have ever been installed historically. These hurried installations undermine reliability and represent lost capacity that will need to be replaced.

To place what's at stake in perspective, one report noted, the FERC staff analysis says the EPA rules endanger "about 8% of all U.S. generating capacity. Merely losing 56 gigawatts—a midrange scenario in line with FERC and industry estimates—is the equivalent of wiping out all power generation for Florida and Mississippi. In practice, this will mean blackouts and rolling brownouts, as well as spiking rates for consumers." An EPA Moratorium, *Wall Street Journal*, Aug. 29, 2011.

Most recently, there has been discussion of a 'safety valve' to be added to the rule in some form or fashion. While we believe that the Agency's concession that there is a reasonable reliability concern is a step in the right direction, we nevertheless have several concerns. First, in our experience, it is far more preferable to have a sensible timeframe for implementation and underlying standard than it is to try to waive or diminish requirements once a program is underway. Second, we agree with the view recently expressed in a November 9, 2011, letter from Senators Murkowski and James Inhofe (R-OK), the ranking members of their respective Committees, to you and Administrator Jackson. In it, they observe that "hastily shoe-horning" a safety valve may be insufficient to address reliability concerns and lacks the requisite administrative process to formulate an appropriate provision.

- Views from the States

Concern with reliability is widely shared by some 27 states as reflected in briefs filed in the deadline case regarding Utility MACT, letters from governors, and rulemaking comments filed by public service commissioners and other state officials. For example, attorneys general representing half the states noted that Utility MACT "has the potential to undermine significantly the reliability of our Nation's electrical supply and significantly increase the cost of electricity to the consumer." *Amer. Nurses Ass'n v. Jackson*, Civ. No. 1:08-CV-02198-RMC.

Of particular interest are the views of state public utility commissions – the frontline for reliability concerns – around the nation. The Pennsylvania Public Utility Commission found that the rule "could lead to expensive upgrades at greater cost to ratepayers or premature retirement of fossil units which could compromise system reliability." The Public Utilities Commission of Ohio wrote to EPA that, "The current and foreseeable economic environment indicates that Ohio's ratepayers will be hard-pressed to absorb rate-shock due to the implementation schedule advanced in the proposed rule." The Public Utility Commission of Texas found that if the rule had been in effect, "Texans would have experienced rolling outages and the risk of massive load curtailment" during the warm summer months. The Alabama Public Service Commission found that that "compliance obligations and timeline associated with the proposed rule will threaten the reliability of the electric supply in Alabama with similar consequences resulting at the national level as well."

Because of these concerns, the National Association of Regulatory Utility Commissioners has stated that it "advocates flexibility in the implementation of this and other rules to avoid compromising electric system reliability while minimizing cost impacts to consumers. Flexibility will enable the EPA to accommodate the highly localized and regional nature of electricity services and avoid reliability issues." All comments from Utility MACT Docket, EPA-HQ-OAR–2009–0234; EPA-HQ- OAR–2011–0044.

- View from the Grid Operators

FERC Chairman Wellinghoff, in an attempt to distance himself from the FERC staff analysis cited above, recently suggested that the independent system operators were in a better position to evaluate actual localized and regional reliability challenges presented by the EPA rules. The Midwest ISO (MISO) answered that call, and on October 31, 2011, released a new study reviewing the impacts of four major EPA rules, including the Utility MACT. The costs of complying with these rules over the next two decades would be as high as $33 billion in the Midwest region and would impact some 200 coal-fired units representing 32,000 MW of capacity –resulting in retirement of up to 12,652 MW of that capacity. MISO, *EPA Impact Analysis: Impacts from the EPA Regulations on MISO*, Oct. 31, 2011. MISO's recent work dovetails with earlier concerns raised by other RTOs. Joint comments on Utility MACT were filed by MISO, along with four other RTOs (ERCOT, NYISO, PJM and SPP). In part, they observed that "if the impact of the EPA rulemakings increases retirements to the point of creating reliability violations without providing for adequate time to respond to the reliability concerns, this could undermine the reliability of the electric grid for an unacceptable prolonged period." See EPA-HQ-OAR-2009-0234 et seq docket.

The North American Electric Reliability Corporation, or NERC, October 2010 study analyzed the combined impact on reliability of four key EPA rules (Utility MACT, interstate transport rule, 316(b), coal combustion residuals disposal regulations) and concluded that from 78 GW of generating capacity is at risk for retirement by 2015. Id. docket. Subject to FERC oversight, NERC develops and enforces reliability standards; assesses adequacy annually via a 10-year forecast and winter and summer forecasts; monitors the bulk power system; and educates, trains, and certifies industry personnel.

- Placing Contrary Views in Perspective

Reports have been submitted to the docket – largely from economic competitors with a vested interest in decreasing the viability of coal-fired generation and thereby increasing the clearing price of energy for consumers – that dispute adverse reliability claims from the rule. In short, these reviews claim that the rule's impact falls within the minimum reserve requirements necessary for reliable operations. Unfortunately, these reports are highly suspect on several grounds. First, the generation and transmission of power takes place on an interrelated grid. Reserve margin assessments are based in part on the ability to back up power from one location with power from another. To say that the impact of a plant's retirement is within reserve margin fails to take into account the probability that the plant's continued operation – even if only occasional – may be necessary for the stability of operations elsewhere. Second, these assessments must admit that those areas most reliant upon coal-fired capacity are indeed likely to face profound price, supply, and reliability concerns. Third, in the event of extraordinary events,

only the additional peak-load capacity supplied by coal-fired facilities are likely to provide the resilience necessary to address potential weather-related blackouts or even cyber-security threats to critical infrastructure. And last, the facile reliance in these reports on EPA emergency authorities fails to take into account the continued disagreements between EPA and the U.S. Department of Energy regarding whether or not emergency orders actually forestall Agency enforcement actions.

- Downside Consequences

The downside impacts of reduced electric reliability are substantial and must be taken into account in any responsible analysis of the Utility MACT. As the Institute of Electrical and Electronics Engineers (IEEE) has stated, "a reliable supply of electricity is more than just a convenience, it is a necessity; the global economy and world's very way of life depends on it." IEEE, Reliability and Blackouts, at http://electripedia.info/reliability.asp (accessed Nov. 11, 2011). IEEE further observed that, "Even minor occurrences in the electric power grid can sometimes lead to catastrophic 'cascading' blackouts. The loss of a single generator can result in an imbalance between load and generation, altering many flows in the electricity network." The direct costs to high-technology manufacturing in the San Francisco Bay Area alone during the California blackouts alone ran as high as one million dollars a minute due to lost production. The relatively brief Northeast blackout of 2003 cost business about $13 billion in lost productivity. G.F. McClure, Electric Power Transmission Reliability Not Keeping Pace with Conservation Efforts, *Today's Engineer (online)*(Feb. 2005).

These are actual costs with empirical support – not the speculative, modeled benefits produced by EPA and subject to double counting, as described below.

Benefits

Under the requirements of two Executive Orders on regulatory process (more fully discussed below), EPA prepared a cost-benefit analysis to support its view that Utility MACT will provide net benefits to society.

- Placing EPA's Benefits Analysis in Context

The Agency's sole basis for issuing Utility MACT is a regulatory determination that then-EPA Administrator Carol Browner made in December 2000 that it was "appropriate and necessary" to regulate certain HAPs from power plants This determination was based almost entirely on the Administrator's concern about mercury emissions from coal-fired power plants. Not surprisingly, the majority of the proposed rule deals with mercury reduction requirements for coal-fired power plants.

It stands to reason that the vast majority of benefits claimed by EPA to justify the proposed rule must be the result of reductions in mercury emissions. But the Agency's cost-benefit analysis tells a very different story. According to EPA, the benefits to society of the mercury-reduction requirements are in the range of $500,000 to a maximum of $6.1 million in total (i.e. not even annual) benefits. In other words, in a rule estimated by EPA to cost $11 billion annually, the

maximum total benefit of reducing emissions of mercury—the emissions of which serve as the primary basis for the rule—is $6.1 million.

EPA asserts, however, that its proposal is justified based on cost-benefit analysis because the rule will provide benefits of up to $130 billion ever year. Yet virtually all of the benefits come from reducing PM2.5.

Based on EPA's own analysis, virtually all the benefits of Utility MACT come from reducing PM2.5 in areas of the country that already meet the PM2.5 NAAQS. EPA says that public health in areas that meet the NAAQS is protected with an adequate margin of safety. Yet now, EPA claims that tens of thousands of people living in those areas are killed because of exposure to PM2.5 It is true that some environmental advocates now argue that the annual annual PM2.5 NAAQS should be lowered from 15 ug (the current level) to as low as 13 ug. But more than 90 percent of the benefits that EPA claims under Utility MACT come from areas where PM2.5 concentrations are below 13 ug.

Although mercury is the Agency's legal justification for the Utility MACT, EPA argues that it must also regulate non-mercury HAPs such as certain metals (e.g. nickel, selenium, etc.) emitted in trace amounts and acid gases (e.g. hydrogen chloride and hydrogen fluoride) that, according to EPA, do not pose a meaningful risk to public health. While some health risks from emissions of non-mercury HAPs are discussed in the proposed rule and the RIA (presumably implying health benefits from reducing such emissions), EPA does not make any attempt to quantify the benefits that will be achieved by reducing these emissions. What is discussed at some length is that control technologies for non-mercury HAPs included in the proposed MACT standard result in reductions of emissions of PM2.5 and SO2. In fact, EPA's analysis admits that virtually all (i.e. 99+ percent) of the estimated $53 to $140 billion in annual benefits are due to reductions in PM 2.5.

- Failure to Demonstrate Least Burdensome Alternative

Nowhere does EPA explain whether there is a less costly way to achieve these benefits, which is puzzling because Congress has created a whole separate program to regulate PM2.5 – and it is very different from the MACT approach that EPA is now proposing. Although EPA is aggressively implementing the program that Congress created to regulate PM2.5, this program is much more flexible than the MACT program and would be a much more cost-effective way of regulating PM2.5 from power plants.

Why should this matter to the public? Because EPA is mandated to find the most cost-effective solution for the regulatory priority (here: controlling mercury emissions from power plants) How can the Agency possibly conclude that it is a good deal for society to impose an annual cost of $10.9 billion to achieve benefits of $6.1 million?

- Double Counting the Benefits of Existing Programs

The other reason this type of analysis matters is that EPA has already controlled emissions of PM2.5 by setting a national ambient air quality standard ("NAAQS") under section 108 of the Clean Air Act. In doing so, EPA has set a level of PM2.5 that it has found to be sufficient to

public health and welfare with an adequate margin of safety. Areas of the country that have already attained this level of PM2.5 (i.e., that are in "attainment") are presumably therefore already safe from any health risks; Other areas that have not yet reached this level (i.e. are in "non-attainment") are already required to implement market-wide reductions in PM2.5 to get into attainment.

In explaining how it developed the baseline for its benefits analysis, EPA's RIA states that "EPA did not consider actions states may take in the future to implement the existing ozone and PM2.5 NAAQS standards[.]" Of course, as it did for the Utility MACT, EPA's proposed NAAQS for PM2.5 contained an estimated analysis of the benefits of PM2.5 reductions. By not including these benefits in the baseline of the Utility MACT, EPA is essentially claiming these same benefits a second time to justify another regulation. Put a different way, the only way EPA can possibly claim more benefits from reductions in PM2.5 is to go beyond the controls it has already put in place under the PM2.5 NAAQS. Doing so, however, is completely contrary to Congress' intent to regulate PM2.5 under a different section of the Clean Air Act and contrary to EPA's own claims that the PM2.5 NAAQS is sufficient to protect public health and welfare. See ERCC Comments (Aug. 4, 2011) at Utility MACT docket above. It is, in essence, double counting of benefits already attributed to other previous air quality initiatives.

Public Health Dis-Benefits

- Placing Benefits in Context: Taking Note of Trade-Offs

You have written that regulatory decisions often "neglect tradeoffs," dangerously so "when an effort to regulate a risk ends up producing other, more serious risks. But there is reason for concern whenever people neglect the costs and burdens associated with risk regulation." C. Sunstein, Risk and Reason: Safety, Law, and the Environment (2002) at 290. You also caution that a regulation that costs too much may injure public health by undermining resources available to extend longevity. As you note, "if regulations increase poverty, and decrease wealth, they will increase risk as a result." Id. at 136-37.

President Obama seems to second your concerns regarding the neglected tradeoffs. In his Executive Order 13563 of January 18, 2011, the President wrote that, "Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation." He further asked OMB to work with agencies to identify the "least burdensome tools for achieving regulatory ends" and to "take into account benefits and costs, both quantitative and qualitative." The President called upon regulatory agencies to propose and adopt regulations "only upon a reasoned determination that its benefits justify its costs" and which "impose the least burden on society." Later, in Executive Order 13579 some six months later, the White House reconfirmed that, "Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation." This careful analysis was to include in part retrospective consideration of whether such regulations were "excessively burdensome" and when such facts were found called for modification designed to substitute approaches that were "less burdensome in achieving the regulatory objectives."

- Proposed Utility MACT Makes Matters Worse: Public Health Tradeoffs

Unfortunately, EPA has failed to place Utility MACT in the context that you recommended and the President ordered. The rule is likely to adversely affect public health in three ways: by increasing the cost of medical care and treatment; by imposing real threats on human health by suppressing economic growth and the improved health it brings; and by focusing on expensive rulemakings with little incremental benefits when those resources, if more sensibly deployed could save many times more lives.

With respect to treatment costs, it is important to note that U.S. hospitals spend $8.5 billion annually on energy, often equaling between one and three percent of a hospital's operating budget. Additionally, EPA estimates, in the U.S., the health sector is the second most energy-intensive commercial sector resulting in more than $600 million per year in direct health costs and over $5 billion in indirect costs. The average cost of power per square foot for hospitals is approximately $2.84. Under the EPA's proposed rule, energy costs are estimated to increase 23.5% over the next decade. Hospital administrators will have no choice but to pay attention to the cost of energy as these surging energy costs will squeeze hospital budgets like never before. Without adequate power supply, built upon a foundation of stable and cost-effective coal-fired generation, the healthcare sector and the American public can expect rapidly increasing costs that consumers can ill-afford.

The economic impacts cited earlier will also directly impact public health. Placing unnecessary economic constraints on the U.S. economy, in a time of recession, is unwise and detrimental to sound public health policy as, based on decades of research, continuously-employed individuals experienced, on average, an additional life expectancy of four to five years. Comparably, the direct effect of reducing unemployment has been estimated to prevent up to 2,500 premature deaths a year. In contrast, additional unemployment may significantly harm public health. A report to Congress' Joint Economic Committee by Dr. Harvey Brenner showed the impacts of unemployment on public health. Brenner found that a one percent increase in the unemployment rate was associated with a two percent increase in premature deaths. In 2004, Brenner used his econometric models to estimate the public health results from reducing coal-generated electricity. For example, with a substantial reduction in coal-fired power, Brenner found the result would be between 170,000 and 300,000 premature deaths.

Placing EPA regulations in a broader public health perspective, it is clear that the proposed Utility MACT standard is not among the wisest of societal investments in addressing premature mortality. President Obama himself has recognized the need to keep cost-effectiveness in mind when he ordered EPA to protect public health and the environment "while promoting economic growth, innovation, competitiveness, and job creation." Failure to allocate resources based on cost-effectiveness quite literally costs lives. Experts at the Harvard School for Public Health have estimated that expensive environmental rules literally save 100 times fewer lives than when the federal government redeployed those assets addressing higher risks. This tremendous differential in health impacts explains why EPA should not be so cavalier in its benefits analysis. ERCC Comments (Aug. 2, 2011) in Utility MACT docket above.

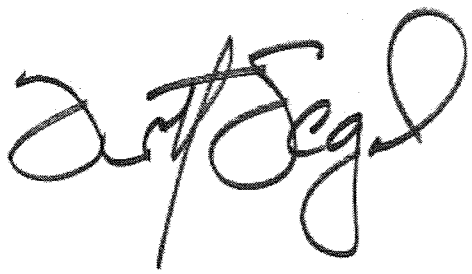
On September 22, 2011, seven noteworthy health care professionals who also serve in the U.S. House of Representatives raised many of these same public health tradeoff concerns directly with Administrator Jackson. Their letter of inquiry is attached for your review.

Meeting Request

It is our understanding that, on or about November 7, 2011, EPA submitted the rule to OMB for review. As noted above, we would greatly appreciate the opportunity to discuss our views on the proposed finding and offer information to you and your staff on the potential impact of Utility MACT on electric reliability and the failure of the Agency to take this matter seriously into account.

Thank you for your consideration of this request and please contact me or my assistant David Mann at (202) 828-5845 to schedule a mutually convenient date and time. We look forward to a constructive discussion.

Sincerely,



Scott H. Segal, Director

Electric Reliability Coordinating Council

Cc: Staffs, CEA, CEQ, EPA, NEC, OIRA/OMB, OSTP