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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
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September 7, 2011

By Electronic Mail and U.S. Mail

The Honorable Lisa P. Jackson
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW, Room 3426 ARN
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OAR-2009-0234

Dear Administrator Jackson,

On August 3, 2011 I wrote to you asking for the opportunity to comment in the proceeding referenced above ("Utility MACT Proposed Rule"). My request was prompted by correspondence I received on August 1 from the members of the Federal Energy Regulatory Commission (the Commission or FERC). The Commissioners were responding to a letter I delivered to them on May 17, 2011. My correspondence to the Commission and the replies I received, my letter to you of August 3, and the discrete subject of the comments reflected in this letter, all relate to the potential impact on electric reliability if the Utility MACT Rule is implemented as proposed.

Arvin Ganesan, EPA's Associate Administrator of Congressional and Intergovernmental Relations, telephoned the Republican Staff Director of the Senate Energy and Natural Resources Committee and said you would accept additional comment from me based on the FERC correspondence. I appreciate that. This letter contains that additional comment. In it, I also renew the requests that I made in my earlier letter that you extend to any member of Congress, or any member of the public who otherwise submitted comments in the Utility MACT Proposed Rule proceeding by the August 4 comment deadline, an opportunity to comment on the question of potential electric reliability impacts as they may be informed by the correspondence I received from the Commission on August 1. Please also place this letter in the record of the Utility MACT Proposed Rule.

Among Federal agencies, FERC alone is in the position to ensure that electric reliability is protected. That is why I continue to believe that we must ensure that there is time and a full opportunity for FERC to be able to do its job with the same thoroughness with which it approaches other electric reliability matters. We must also be sure that the results of the Commission's work and any actions it may direct be taken by regulated entities can be made a part of the record on EPA's rulemakings -- in this case the Utility MACT Proposed Rule.

The disclosure on August 1, 2011 that the Commission has not conducted "any full study" of the impact of the proposed rule on electric reliability but, instead, has made only a preliminary and informal assessment, is highly material new information. The documents FERC provided on August 1 show that at least as early as October 2010, the Commission's staff prepared and presented to EPA and the Council on Environmental Quality its preliminary conclusions about "likely" and "very likely" retirements of electric generating units as a result of the EPA's various pending rule-makings. That presentation also provided, among "next steps," that "[i]ndustry must be directed to openly assess the reliability and adequacy impacts of retirement of at-risk units." Congress has clearly designated FERC as the Agency that would direct and independently evaluate such an assessment if, of course, it were to be conducted by industry.

Unfortunately, nearly a year later, the Commission's analysis of this important reliability question appears to have remained "informal," "limited," "preliminary," and based only on "public data." Given the Commission's statutory role, and the apparatus established by the Federal Power Act to protect reliability, for your Agency to proceed without such analysis, particularly in light of the discussion of reliability in the Utility MACT Proposed Rule, would leave a gap in the record which is a hallmark of decision making that courts have found arbitrary and capricious. Moreover, if reliability threats develop as a result of the implementation of the Utility MACT Rule, should it be implemented as thus far proposed in this docket, the consequences would and should fall squarely on EPA.

The Commission's analysis, although preliminary, appears to call into question key conclusions and assumptions concerning energy impacts underlying the Utility MACT Proposed Rule. The large sum of plant retirements projected in the analysis recently provided by FERC, although on the high end of the range of retirements projected by studies conducted by a number of organizations, is approximately eight times greater than the 9.9 gigawatts estimated by your Agency in the Utility MACT Proposed Rule. EPA's estimate is also the absolute lowest of the projections of retirements of which I am aware.

Although you have acknowledged the importance of reliability, you appear to have assumed, perhaps due to your much lower estimates of retirements, that reliability concerns did not appreciably affect decisions regarding timing and key aspects of the proposed rule. Whatever may have been the initial merits of EPA's assumptions about energy impacts, which of necessity include reliability concerns, FERC's projections, especially when coupled with its acknowledgement that it "has not conducted any full

studies" of reliability, clearly render these assumptions no longer viable and cast serious doubt on the particulars of the Utility MACT Proposed Rule.

With this in mind, in order for EPA to comply with its legal obligations, you should defer the promulgation of the final rule, obtain from FERC a full analysis of the proposed rule's impact on reliability based on most current information, re-propose it and then re-open the comment period, asking how key regulatory components should take electric reliability into account. This course would allow the public and your Agency the necessary opportunity rationally to assess and consider the rule's impact on reliability. Such a process would permit, indeed require, FERC and other entities responsible for overseeing the nation's bulk power system to go beyond aggregate estimates, to assess the reliability impact of your proposal on a region-by-region basis, and to identify areas where the risk to reliability would be unacceptable.

Thank you for your consideration.

Sincerely,

Lisa A. Murkowski
Ranking Member