SECOND RENEWED PETITION BY THE INSTITUTE FOR LIBERTY, AMERICANS FOR PROSPERITY, THE CENTER FOR RULE OF LAW, CAUSE OF ACTION, AND THE NATIONAL BLACK CHAMBER OF COMMERCE FOR RE-PROPOSAL OR, IN THE ALTERNATIVE, RECONSIDERATION AND STAY OF EPA’S PROPOSED UTILITY MACT RULE


Submitted by:

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On September 27, 2011, the Institute for Liberty, Americans for Prosperity, the Center for Rule of Law, and Cause of Action (“Petitioners”) brought a Petition for Re-proposal of the Utility MACT Rule1 based on EPA’s discredited underlying assumptions regarding electric reliability (the “Arising After Petition”). That petition requested that EPA properly assess the reliability impact of its Utility MACT Rule, reconsider its discretionary choices accordingly, and re-propose the rule to allow for meaningful public comment. Petitioners, joined by the National Black Chamber of Commerce, hereby renew that request, based on evidence submitted at a Federal Energy Regulatory Commission (“FERC”) Reliability Technical Conference, as well as a comprehensive assessment undertaken by the North American Electric Reliability Corporation (“NERC”), showing that EPA’s contemplated three-year compliance timeline is unfeasible and that EPA’s regulatory approach will force utilities to violate reliability standards promulgated under the Federal Power Act. The Utility MACT Rule, unless substantially modified from EPA’s proposal to render compliance feasible, will be arbitrary and capricious and will exceed the Agency’s discretion under the Clean Air Act.2

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2 This petition is filed in the Utility MACT docket. The Agency should consider the contents of this petition as comments on the Utility MACT proposed rule that are based on information that is centrally relevant to the rule, but that could not have been brought to the Agency’s attention during the comment period through the exercise of reasonable diligence. EPA should consider the petition
SUMMARY

EPA’s fundamental assumption that utilities would be able to implement its Utility MACT Rule’s requirements within three or four years, without impairing electric reliability, is contradicted by an ever-growing body of evidence arising after the close of the comment period in this proceeding. In testimony before FERC on November 29 and 30, 2011, representatives of utilities, regional transmission organizations ("RTOs"), state public utility commissions, and the FERC-designated Electric Reliability Organization (i.e., NERC) presented extensive evidence that the three-year compliance timeline for EPA’s Utility MACT Rule will cause widespread violations of NERC’s reliability standards, jeopardizing electric reliability in communities throughout the nation and putting utilities at risk of sanctions under the Federal Power Act ("FPA").

NERC’s 2011 Long-Term Reliability Assessment, released on November 28, 2011, also demonstrates that it will not be feasible for many utilities to comply with Utility MACT within a three- or four-year period. In this regard, NERC identifies EPA rulemaking as “the number one risk to reliability over the next 1 to 5 years.” See NERC, 2011 Long-Term Reliability Assessment, Att. A, at 73 (“2011 Assessment”). It also identifies the Utility MACT Rule’s implementation timeline as the primary
cause of this risk. *Id.* at 76. According to NERC’s analysis, “the loss of reliability support functions provided by coal-fired generation [that is forced to retire] may not be easily replaced given the time constraints.” *Id.* at 76. As a result, “the nation’s power grid will be stressed in ways never before experienced.” *Id.*

In light of this evidence, EPA may not continue to rely on its assumption that compliance is feasible and that, by extension, reliability will therefore be unimpaired. If it does, the Agency’s exercise of discretion in reliance on that assumption would be arbitrary and capricious and subject to judicial vacatur. In addition, this evidence of impossibility would render the Utility MACT Rule arbitrary and capricious, as well as contrary to the requirements of the Clean Air Act.

This same evidence also demonstrates that the Utility MACT Rule is incompatible with the requirements of the Federal Power Act because it will require the shutdown, whether permanently or temporarily, of facilities necessary to meet NERC reliability standards that are enforceable under the FPA. 16 U.S.C. § 824o(b)(1). The Clean Air Act does not authorize EPA to promulgate regulations that would cause or contribute to the violation of FPA requirements. If these defects cannot be corrected, that indicates that EPA’s decision to impose MACT requirements exceeds the Agency’s discretion under Clean Air Act § 112(n)(1)(A).

For these reasons and those set forth in the Arising After Petition and previous renewed petition, EPA should withdraw and re-propose Utility MACT and allow for additional public comment or, if the Agency believes that it lacks the discretion to
propose MACT standards for coal- and oil-fired electricity generating units ("EGUs") that are not impossible to fulfill and do not impermissibly conflict with Clean Air Act and FPA requirements, withdraw its proposal and end this rulemaking.

ARGUMENT

I. Compliance With Utility MACT’s Three-Year Timeline Is Impossible

EPA’s proposal for the Utility MACT Rule would impose stringent emissions limitations on coal- and oil-fired EGUs and would require that existing sources, to remain in operation, attain compliance with these standards within three years of its effective date, with the possibility of a one-year extension. 76 Fed. Reg. at 25,102. See Clean Air Act §§ 110(i)(3)(A), (B). EPA assumed that the requirements of the proposed rule could be met within this timeframe, without adversely impacting electric reliability, and relied on that assumption in exercising its discretion. 76 Fed. Reg. at 25,054. But recent assessments of the U.S. electricity generating fleet and the Rule’s requirements demonstrate that EPA’s standards cannot be implemented within three or four years at any cost, due to the time necessary to plan, approve, permit, design, construct, and test upgrades and new capacity. The Utility MACT Rule will therefore require utilities to retire reliability-essential generating facilities before replacement capacity or additional transmission facilities can be constructed and to shut down temporarily, or limit the use of, reliability-essential generating facilities that cannot be upgraded prior to the deadline. The result will be a multi-year period of
impaired reliability while the industry races to complete construction of new facilities and upgrades to existing facilities.

A. The FERC Technical Conference Testimony And NERC’s 2011 Assessment Contradict EPA’s Assumption That Compliance Is Feasible Within Three Or Four Years

1. EPA Relies On The Assumption Of Feasibility

As explained at length in the Arising After Petition, EPA assumed that the Utility MACT Rule’s requirements “can be met without adversely impacting electric reliability,” 76 Fed. Reg. at 25,054, and then relied on that assumption in exercising its discretion over various aspects of the Rule.

EPA’s stated basis for this assumption was sparse. The Agency projected the mix of control technologies that would be required to comply with the proposed rule: “24 GW of FGD (scrubbers), 56 GW of DSI, 93 GW of additional ACI, and 3 GW of SCR.” RIA at § 8.4. The regulatory preamble simply states, without support, that several of these technologies (including DSI and ACI) “take significantly less than 3 years to install.” 76 Fed. Reg. at 25,054. As for the others—particularly scrubbers—the Agency states, also without support, that it has “assessed the ability to install the controls in 3 years (and determined that the controls could be installed in that timeframe),” but that “this would require the control technology industry to ramp up quickly.” Id. at 25,055. Additionally, the Agency states that wet scrubbing “typically takes a longer time to install” than other control technologies, but “EPA does not project use of wet scrubbing technology to meet the requirements of this proposed
rule.” \textit{Id.} at 25,054. Based on these assertions, the Agency concluded that all units would be able to meet either the three-year deadline or the deadline with a one-year extension. It therefore further assumed, as expressed in its regulatory impact analysis (“RIA”), that no units would be forced to shut down temporarily due to non-compliance with MACT requirements. \textit{See} RIA at § 8.6 (including only retirements in reliability assessment for 2015).

This “feasibility assumption” informed EPA’s exercise of discretion in proposing the process and parameters of the Utility MACT Rule. In particular, EPA made a number of discretionary decisions that expressly or implicitly relied on the assumption that they would not impair electric reliability, which EPA conceded to be an important aspect of the Rule. \textit{See, e.g.,} 76 Fed. Reg. at 25,054 (acknowledging the importance of “ensuring that both the requirements of the CAA and the need for a reliable electric system are met”). These include the following aspects that impact electric reliability: setting the initial proposed timetable for this rulemaking, which affects the ultimate timetable for compliance with any final rule; choosing to regulate HAPs that were not the subject of its “appropriate and necessary” finding and for which it has made no such finding; choosing to establish only five subcategories of sources, based on broad fuel type; choosing to set MACT floors independently for each pollutant; choosing to establish a “beyond-the-floor” emission limit for mercury

\footnote{In the alternative, EPA may have ignored reliability impacts in making these decisions, which would render them arbitrary and capricious.}
emissions from certain EGUs; and choosing not to set health-based emission standards for acid gases under Clean Air Act § 112(d)(4).

2. **FERC Receives Testimony Demonstrating That EPA’s Utility MACT Compliance Timeline Is Unfeasible And Will Impair Reliability**

EPA’s assumption that compliance with the Utility MACT Rule as proposed will be feasible in three years and that meeting the Rule’s proposed emission standards will therefore not impair electric reliability is flatly contradicted by testimony and evidence presented at FERC’s Reliability Technical Conference held on November 29 and 30, 2011.

First, utilities, RTOs, and other entities have been unable to complete substantial planning and compliance operations prior to issuance of the final rule, disproving EPA’s assertion that utilities would be able to undertake such “forward planning” to accelerate compliance with the Utility MACT Rule. 76 Fed. Reg. at 25,056. In large part, this is due to uncertainty regarding the parameters of the final rule, which in turn causes uncertainty regarding which units will be affected, how they will be affected, and what retrofits or new construction may be necessary. Michael Kormos of PJM Interconnection, LLC, explained the challenge:

Without knowing the specifics of which units might actually retire vs. which will retrofit, it is very difficult to pinpoint the exact reliability impacts and the breadth of transmission upgrades or other fixes that may be needed to address those actions. Moreover, generation owners will need to know the scope of the final EPA rules and their implementation timing before making retirement decisions. The best we can do at this point is identify, as PJM has done, the universe of “at risk”
generation and outline the impact of various scenarios in order to “bookend” the problem.

Kormos Testimony, Att. B, at 3. See also Monroe Testimony, Att. C, at 1 (describing similar uncertainty in the SPP region); FERC Transcript, Att. D, at 370 (Moeller) (describing why MISO has yet to establish a process to schedule retrofits); id. at 372-73 (“[W]e have seen some turbulence in what the rules will say. They might get easier . . . . Mercury has gone from very hard to not quite that hard. So that turbulence causes them a decision-making problem . . . . Is it a baghouse? Is it a scrubber? That sort of thing.”); id. at 278-79 (Topazi) (“[N]o one saw the condensable PM limit; no one saw that level in mercury; no one saw not having a work practice exception for start-up, shut-down malfunctions; no one saw the continuous emission monitoring for a 30-day rolling average. These things were not ever contemplated, in my view.”)

Indeed, contrary to EPA’s hopeful (but completely unsupported) reliance on “forward planning,” RTOs expect that this period of uncertainty will actually extend for a period beyond the publication of a final rule, as entities evaluate its requirements:

Haste makes waste. Time is needed to compile comprehensive plans based on final EPA rules, perform assessments to ensure reliability and effect on SPP’s Integrated Transmission Planning (ITP) process approved by the FERC in the near term (ITPNT), as well as associated impacts to longer term ten-year (ITP10) and twenty-year (ITP20) plans, evaluate and make adjustments as necessary to maintain reliability and effective markets in the interim, assess market conditions, etc. Although recent EPA regulations such as the final CSAPR rules were refined in October 2011, SPP members have yet to finalize compliance plans for 2012 given uncertainty about the pending EPA Mercury and Air Toxics
Standards (MATS) rules which are expected in mid-December 2011. MATS and other EPA regulations are expected to have a profound impact to existing generation resources within SPP in the 2014 – 2016 timeframe. As a result, time is needed for reviewing and understanding the final rules, for the development of compliance and mitigation plans by generator owner/operators, for the planning authorities in their aggregation and refinement of those plans into regional assessments, coordinating those plans with their neighbors since allowances are managed at the state, not RTO, level, and then having time to implement those plans.

Id. at 2.

Due to this uncertainty, utilities in regulated markets have been unable to secure permission from their regulators to begin compliance operations at this time. For example, Anthony Topazi, the Chief Operating Officer of the Southern Company, testified:

We have approached our state commissions, and trying to get ahead of the curve a little bit on some projects that we know clearly have to proceed as the rule is finalized. Our commissions did not approve those projects, because they have an obligation to ensure that what we're proposing to do is the least cost method for compliance. So therefore, they want to know what is the final rule, to make sure that we're not missing the mark in terms of what we're proposing.


Second, assessments undertaken by the ERO and utilities contradict EPA’s assertion that units could comply with the Utility MACT Rule with control technology that is relatively quick to install, such as dry sorbent injection (“DSI”). See 76 Fed. Reg. at 25,054. NERC’s Mark Lauby testified that DSI and similar technologies
would be, based on NERC’s assessment of EPA’s standards, insufficient to comply with Utility MACT. FERC Transcript, Att. D, at 239. The Southern Company’s Topazi testified, for example, that Southern is planning 15 to 20 baghouse projects at existing coal-fired plants that are already equipped with advanced control technologies, such as SCR and scrubbers. Topazi Testimony, Att. E, at 15. Southern expects to complete 100 Utility MACT-related generation, transmission, and pipeline projects. FERC Transcript, Att. D, at 195. EPA did not account for all of these types of projects in its impact and feasibility analyses.

Third, nearly all witnesses testifying on the reliability impact of EPA’s regulations presented evidence contradicting EPA’s assertion that the necessary upgrades and new construction could be completed within three or four years. See, e.g., FERC Transcript, Att. D, at 195 (Lauby) (“[M]ore time is needed”); id. at 173 (Lauby) (“NERC is concerned about the risk to reliability from retrofitting by 2015, environmental controls in over 500 units, representing over 250 gigawatts of capacity driven by the utility air toxics rule.”); id. at 181 (Farrell, Dominion and EEI) (“Given the large number of units affected, and the complexity of some compliance measures, the compressed three-year time frame for compliance is not sufficient.”); id. at 183 (Farrell) (“Experience has shown that certain compliance actions, for example, the construction of scrubbers or completion of transmission lines, simply take longer than three or four years to accomplish.”); Farrell Testimony, Att. F., at 2 (describing Dominion’s experience); Topazi Testimony, Att. E, at 5 (describing the Southern
Company’s assessment); id. at 13-14 (describing project timelines for installation of necessary controls); id. at 17 (describing the timeline to construct a natural gas pipeline); Akins Testimony, Att. G, at 7-8 (describing delay factors for which EPA failed to account, including permitting delays, state commission approvals, qualified labor availability, material procurement, and limited outage windows); FERC Transcript, Att. D, at 304 (Akins) (discussing AEP’s assessment and concluding that “it would take until 2020 to get this done”); id. at 307 (Akins) (discussing timelines for installation of control technologies and concluding that more than four years is necessary for required controls); id. at 356 (Moeller) (“[T]he compliance calendar of three years is likely unachievable by the majority of our generation assets in our footprint [MISO].”). In sum, the participants presented extensive evidence contradicting EPA’s assertion that, in the usual course of affairs, the installation of necessary controls and construction of new facilities could be completed within a three- or four-year timespan.4

Fourth, witnesses presented evidence concerning delays due to the difficulty of coordinating shutdowns for the installation of control technologies, a factor which EPA overlooked in its analysis. Thomas Farrell, Chairman and CEO of Dominion Resources, explained the issue:

Reliability concerns also arise when units are taken out of service to install controls. This work may include new pollution control equipment, replacement of a coal unit with a new generation facility, or even

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construction of transmission to preserve reliability upon closure of a coal unit. Most installation work can be only scheduled during limited periods in the fall and spring when demand is down. Much attention has been given to the shutdown scenario. However, the challenges of meeting load demand while scheduling control installations may be even greater. Simply stated, the MACT rule imposes an extremely compressed schedule in which to ensure that compliance work at all units is completed without disruption to electricity delivery. There is much evidence to show that this cannot be guaranteed. This is one reason we believe that an effective, transparent and uniform process is needed to allow individual units additional time to meet the requirements.

Farrell Testimony, Att. F, at 2-3. See also Akins Testimony, Att. G, at 5 (describing “tie-in” scheduling). The MISO RTO, in written testimony, explained that completing all necessary retrofits in its territory within three to four years is simply not possible for this reason:

The compliance time allowed by the proposed rule and the time required to accomplish the installation of new control equipment or capacity replacement is exactly the same, meaning owners of all these units must remove them from service simultaneously leaving inadequate generation resources to sustain reliable electricity supply. Obviously, 62,000 MW of generation cannot be removed from service simultaneously without interrupting loads in the region. In order for MISO to meet its reliability obligations, generator outage requests will be denied in order to maintain adequate supplies. The generation owners will thus face a conflict between complying with FERC tariff and NERC reliability requirements or EPA air quality rules.


Fifth, evidence suggested that compliance will also be delayed due to competition for resources and personnel. Southern’s Topazi, for example, testified that Utility MACT-related projects would require Southern to hire at least 60 percent more craft labor than it ever has at any one time, at the same time that neighboring
utilities are competing for the same labor. FERC Transcript, Att. D, at 212. See also id. at 317 (Moeller, MISO) (discussing supply-chain issues); id. at 321 (Kane, D.C. PSC) (discussing NARUC resolution recognizing competition for skilled labor and other resources); id. at 373 (Moeller) (“Just to think about it, we are going to have as a Nation something like 100,000 megawatts of steam plants order a baghouse on the same day—because they all have the same compliance clock.”); Akins Testimony, Att. G, at 7-8 (discussing qualified labor availability).

Sixth, witnesses presented evidence that the construction of additional transmission facilities necessary to maintain reliability while complying with the Utility MACT Rule would take longer than three to four years due to the time need for planning, permitting, and securing necessary rights of way—another factor that EPA overlooked in its analysis. For example, Betty Ann Kane, Chairman of the D.C. Public Service Commission, described how the construction of a single, short transmission project required the D.C. PSC to waive a six-month notice period and other requirements so that the project could be completed in a period of over three years, following approximately two years of planning. FERC Transcript, Att. D, at 324. Similarly, Dominion’s Farrell described a transmission projected necessitated by the Utility MACT Rule that is likely to take more than three or four years to complete. Farrell Testimony, Att. F, at 5. See also Topazi Testimony, Att. E, at 18 (projecting that transmission projects necessitated by the Utility MACT Rule will require at least six years).
Seventh, contrary to EPA’s assertion, evidence demonstrated that the “existing tools and processes for ensuring continued reliability,” such as “integrated resource planning and . . . advanced auctions for capacity,” 76 Fed. Reg. at 25,054, will not speed compliance or mitigate reliability impacts. Representatives of the RTOs testified that, although the resource planning process works well for its intended purposes—ensuring long-term reliability—it does not provide them the authority to prevent a unit from retiring or to override Clean Air Act requirements that conflict with reliability needs. See, e.g., Kormos Testimony, Att. B, at 6-7 (discussing inadequacy of the tools available to RTOs). See also FERC Transcript, Att. D, at 358 (Roberto) (discussing the multi-year timelines involved in the planning process); id. at 35 (FERC Commissioner Moeller) (same).5

Finally, based on the evidence presented at the conference, every witness testifying on the reliability impact of EPA’s regulatory actions concluded that additional time will be required to achieve full compliance with the Utility MACT Rule without substantially impairing reliability in the process. See FERC Transcript, Att. D, at 195 (Lauby); id. at 178 (Kormos); id. at 186 (Monroe); id. at 180-81 (Farrell); id. at 192 (Kathleen Barron, Exelon); id. at 195 (Topazi); id. at 200 (Wright). As

5 The witnesses and the majority of Commissioners expressed doubt that Federal Power Act § 202(c) authorizes the Secretary of Energy to excuse compliance with Clean Air Act requirements, even where those requirements cause a reliability emergency. See generally Raggio Testimony, Att. I; FERC Transcript, Att. D, at 368 (Commissioner Norris); id. at 385 (Commissioner LaFleur); id. at 395 (Chairman Wellinghoff). Another witness testified that the Section 202(c) power is discretionary in nature, operates independently of the reliability standards promulgated under the FPA, and may be a poor “fit” to handle the type of widespread reliability impacts caused by the Utility MACT Rule. See, e.g., Kormos Testimony, Att. B, at 11-12.
described in the Petitioners’ previous renewed petition, filed on November 2, 2011, all of the FERC commissioners have also recognized the need for extensions. Indeed, even Gina McCarthy, Assistant Administrator for the Office of Air and Radiation, EPA, conceded that there may be “localized reliability challenges that need[] to be fixed” as a result of the Agency’s rules. *Id.* at 166.

In sum, the evidence and views presented at FERC’s Reliability Technical Conference contradict EPA’s assumption that the utility industry can achieve compliance with the Utility MACT Rule within three or four years, without compromising reliability. To the contrary, the materials presented at the conference demonstrated that compliance within that timeframe is not feasible and that additional time will be required to complete upgrades of existing capacity and construct new generation and transmission facilities. Absent additional time, reserve margins will fall in many regions and sub-regions, reliability will be impaired at the regional and local levels, and, in some places, the “lights will go out.” FERC Transcript, Att. D, at 195 (Topazi). Given the evidence presented at the FERC conference, this point is now an established matter of fact.

3. **NERC Identifies EPA Regulations And Their Timing As The “Number One Risk To Reliability”**

EPA’s incorrect assumptions regarding feasibility and reliability are also contradicted by NERC’s 2011 Long-Term Reliability Assessment, released on November 28, 2011. *See generally* 2011 Assessment, Att. A, at 2 (summary of risks
NERC identifies EPA rulemaking as “the number one risk to reliability over the next 1 to 5 years.” Id. at 73. It also identifies the Utility MACT implementation timeline as the primary cause of this risk. Id. at 76. According to NERC’s analysis, “the loss of reliability support functions provided by coal-fired generation [that is forced to retire] may not be easily replaced given the time constraints.” Id. at 76. As a result, “the nation’s power grid will be stressed in ways never before experienced.” Id.

NERC’s 2011 Assessment identifies four “main reliability impacts” of EPA regulations. First, “a significant amount of generation retirements and de-rates associated with environmental controls may severely impact Reserve Margins if replacement resources cannot be built or acquired by proposed deadlines.” Id. at 76. NERC considers this outcome to be likely and its consequences to be potentially severe:

[T]he loss of reliability support functions provided by coal-fired generation may not be easily replaced given the time constraints. Studies demonstrate that regional reserve requirements could be compromised by the cumulative impact of EPA’s actions, which indicate that between 2012 and 2018, the nation’s power grid will be stressed in ways never before experienced and could pose a reliability concern. If the EPA intends to move forward with the implementation of the MACT rule as proposed in March 2011, the electric industry will need time to comply. Mechanisms must be in place to ensure required reliability units can provide the grid with support until alternative resources are put in place (e.g., generation or transmission).

Id. at 76. Specifically, NERC projects that 36 to 59 gigawatts of generating capacity in total will permanently retire as a result of EPA’s rulemaking activities, in addition to
the 38 gigawatts of retirements announced since NERC’s 2010 assessment. *Id.* at 117, 119. This is seven to ten times higher than EPA’s projection, contained in its proposed rule, of approximately 10 gigawatts in retirements and, according to NERC, will cause several regions to fail to meet resource adequacy requirements. *Id.* at 119. Although EPA has allowed for the possibility of a one-year extension, its proposed rule contained no mechanism to provide for the additional time that NERC states will be necessary. See 76 Fed. Reg. at 25,054.

In addition, “EPA regulations may result in the potential loss of a significant amount of generation, either through retirements or de-rates associated with powering on-site environmental controls equipment, during a short time frame (2012-2015).” 2011 Assessment, Att. A, at 76.

This second impact is exacerbated by the relatively long lead times necessary to construct new transmission facilities that take the place of retired generating capacity or connect new capacity with load centers. NERC explains:

As replacement generation is constructed, new transmission infrastructure may be required to interconnect these new generation resources. Transmission impacts need to be assessed and also given ample time for preventative measures to be put in place. Additionally, existing generation resources may not be deliverable due to transmission limitations in the existing system and enhancements may be needed in order to support Firm and reliable transmission service. Transmission system enhancements and reconfiguration may be necessary in some areas, which may create additional timing issues as new transmission facilities take longer to plan, design, and construct compared to generation facilities.

*Id.* at 75.
Difficulties in scheduling outages to complete retrofits to meet Utility MACT’s requirements may also delay compliance, forcing additional units off-line at the compliance deadline until they have been retrofitted. *Id.* at 77. NERC projects that between 576 and 677 coal-fired units, accounting for 234 to 258 gigawatts in generating capacity, will have to be retrofitted by the end of 2015, at the latest. *Id.* at 120. In addition, NERC’s analysis of EPA’s proposed standards concludes that units will be required to install more complicated control technologies, including scrubbers and baghouses, than EPA had assumed in the Utility MACT Rule. *Id.* at 141-42. This will increase the time required to achieve compliance, a point that even EPA concedes. 76 Fed. Reg. at 25,054 (scrubbing “typically takes a longer time to install” than the controls EPA assumed would be necessary to comply with the Utility MACT Rule).

Finally, resource constraints may also cause delays in completing retrofits. NERC explains that “there are a limited number of companies available to design, manufacture, and install scrubbers . . . potentially increasing the lead time for some units beyond 18 months.” 2011 Assessment, Att. A, at 77.

Overall, NERC concludes, “Successful implementation of the proposed EPA rules will be highly dependent on the amount of time the industry will be given to comply with future environmental regulations and that tools are in place within a timely manner to support the industry’s transition given the large number of units that must be retrofit.” *Id.* at 168. According to Mark Lauby, NERC’s Vice President and
Director of Reliability Assessment and Performance Analysis, NERC’s position, based on its assessment, is that three or four years is insufficient to complete the upgrades and construction necessary to comply with the Utility MACT Rule while maintaining electric reliability. “More time is needed to ensure NERC reliability standards can be met,” he testified at the FERC conference. FERC Transcript, Att. B, at 195.

B. **EPA Is Legally Obligated To Correct Its Assumption Regarding Feasibility**

An agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

Electric reliability is an important factor in this rulemaking. EPA concedes as much in its discussion of the compliance timeline contained in the preamble to the proposed rule. *See* 76 Fed. Reg. at 25,054 (acknowledging the importance of “ensuring that both the requirements of the CAA and the need for a reliable electric system are met”).

Rather than simply continue to rely on now-disproven assumptions to conclude that the Utility MACT Rule will have a negligible impact on reliability at any level, EPA must take account of the likelihood that compliance within the proposed
timeframe will be unfeasible and that the impact of resulting permanent and temporary shutdowns will impair electric reliability in communities across the nation. Failure to do so where EPA itself concedes the central importance of reliability would be to violate its statutory obligations under the Clean Air Act and the Administrative Procedure Act. See 42 U.S.C. § 7607(d)(9)(A); 5 U.S.C. § 706(2)(A).

C. The Utility MACT Rule’s Impossible Requirements Are Arbitrary And Capricious

D.C. Circuit law is clear that “[i]mpossible requirements imposed by an agency are perforce unreasonable” and therefore “must be regarded as arbitrary and capricious.” Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 940 (D.C. Cir. 1991) (citing D.C. Transit System, Inc. v. WMATA, 466 F.2d 394, 402 (D.C. Cir. 1972)). An agency may not impose by regulation requirements that, as a factual matter, are impossible to satisfy. Id. In this instance, ample evidence, described herein, demonstrates the widespread impossibility of compliance with the Utility MACT Rule’s standards in the time allowed, disproving EPA’s assumption to the contrary. Accordingly, the rule is arbitrary and capricious, and EPA must reconsider its discretionary choices to arrive at a rule that can actually be implemented by regulated entities.

D. The Utility MACT Rule’s Impossible Requirements Exceed EPA’s Discretion Under The Clean Air Act

Section 112 of the Clean Air Act requires EPA to prescribe, for listed source categories, emission standards that achieve “the maximum degree of reduction in
emissions of the hazardous air pollutants” that are “achievable for new or existing sources in the category or subcategory to which such emission standard applies” through “application of measures, processes, methods, systems or techniques.” Clean Air Act § 112(d)(2). In this instance, however, the evidence described above demonstrates that many existing sources cannot comply with the Utility MACT Rule’s emissions standards by application of any “measures, processes, methods, systems or techniques,” but may only achieve compliance by ceasing operation, which is not among the means of compliance contemplated by the statute. See id. Accordingly, those standards are contrary to the requirements of Clean Air Act § 112(d)(2). EPA is therefore obligated, based on the evidence of impossibility presented herein, to reconsider these standards (including its use of sub-categorization) and propose standards that satisfy the statutory requirements. If the Agency believes that this is impossible, due to conflicting statutory requirements, such as those of Clean Air Act § 112(d)(3), then it is obligated to consider alternative means of compliance, such as propounding health threshold standards under Clean Air Act § 112(d)(4).

E. If EPA Is Unable To Devise Feasible Standards, It Must Revise Its Finding That MACT Requirements Are “Appropriate And Necessary”

If EPA is unable to devise emissions standards for EGUs that comply with the requirements of Clean Air Act § 112(d)—that is, standards that are “achievable” for existing sources applying the means of compliance specified in the Act—then it must find under Clean Air Act § 112(n)(1) that imposing MACT requirements on EGUs is
not “appropriate and necessary” or act to delist EGUs from the Section 112(c) source category list.

In construing statutes, courts and agencies “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” United States Nat’l Bank v. Independent Ins. Agents, 508 U.S. 439, 455 (1993) (quoting United States v. Heirs of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)). “Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme,” such as where “only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” United Savings Ass’n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988) (citations omitted).

In this instance, Congress conditioned the imposition of MACT requirements for EGUs on a finding by EPA that such requirements are “appropriate and necessary.” Clean Air Act § 112(n)(1). EPA, however, ignored the limitations on its discretion inherent in this term, issuing a finding that failed to define the “appropriate and necessary” standard, failed to consider electric reliability, failed to consider whether the Agency could craft standards that comply with the requirements of Section 112(d), and ignored a host of other factors, including some specified in the statute. 65 Fed. Reg. 79,825 (Dec. 20, 2000). Instead, the Agency merely stated that regulation was “appropriate” because “electric utility steam generating units are the largest domestic source of mercury emissions, and mercury in the environment
presents significant hazards to public health and the environment” and “necessary” because “the implementation of other requirements under the CAA will not adequately address the serious public health and environmental hazards arising from such emissions.” *Id.* at 79,830.

EPA’s myopic focus on the phrase “appropriate and necessary” caused it to ignore critical statutory criteria that crystallized Congress’s views on the appropriate scope of the § 112 program. As described above, Congress set specific requirements for the substance of § 112(d) standards. The incompatibility of EGUs with the § 112 program under the terms that Congress set would demonstrate that subjecting EGUs to § 112 requirements is not “appropriate and necessary.” Accordingly, the Agency is obligated, based on the current record, to find that it is not “appropriate and necessary” to regulate EGUs under § 112 or, in the alternative, to take action under § 112(c)(9)(B) to de-list EGUs.7

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6 In the alternative, if the Agency believes, as it apparently does, that it has the authority to ignore or modify numerical statutory requirements to avoid “absurd results,” to achieve statutory compliance “one step at a time,” or to satisfy “administrative necessity,” then the Agency is obliged to do so in this instance and provide an extended period for existing sources to comply with MACT requirements. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010) (“Tailoring Rule”) (describing and applying “absurd results,” “administrative necessity,” and “one-step-at-a-time” doctrines).

7 If EPA believes that, based on *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), it cannot revise its “appropriate and necessary” finding or otherwise decline to issue § 112(d) standards, then it is obligated to take action, *sua sponte*, under Clean Air Act § 112(c)(9)(B) to de-list EGUs or to act on the delisting petition that is presently before it. *See* Petition of the Utility Air Regulatory Group for the De-Listing of Coal-Fired Electric Utility Steam Generating Units as a Source Category Subject to Section 112 of the Clean Air Act, Docket No. EPA-HQ-OAR-2009-0234-18036 (Aug. 4, 2011). Failure to do so would be arbitrary and capricious and contrary to law.
II. The Utility MACT Rule Is Incompatible With The Requirements Of The Federal Power Act

The evidence presented above demonstrates that the Utility MACT Rule’s unfeasible compliance timeline will force utilities, regional entities, and other regulated entities to violate NERC’s reliability standards promulgated under the FPA.

The Energy Policy Act of 2005, which amended the FPA, authorizes FERC to certify an Electricity Reliability Organization (“ERO”) that is responsible for developing and enforcing (subject to FERC’s oversight) “reliability standards that provide for an adequate level of reliability of the bulk-power system.” 16 U.S.C. § 824o(c)(1). In 2006, FERC certified NERC as the ERO. 116 FERC ¶ 61,062 (2006). FERC has subsequently approved over 120 reliability standards proposed by NERC, containing more than 1,600 specific requirements, giving them the force of law. § 824o(e)(1). NERC’s reliability standards address all aspects of operation of the bulk-power system, from resource demand and balancing to voltage and reactive requirements. In general, NERC’s reliability standards codify the industry’s best practices for maintaining reliable electric service at every level and through all foreseeable contingencies. As relevant here, they provide specific requirements for nearly all aspects of electricity generation and transmission that relate to reliability, including regional reserve margins, system performance standards under contingency conditions, and voltage regulation.
By requiring the temporary or permanent shutdown of units that are vital to maintain compliance with NERC’s reliability standards before replacement capacity or other mitigating measures can be completed, Utility MACT forces regulated entities to violate the FPA. To the extent that this conflict is a result of EPA’s discretionary choices in the Utility MACT Rule, those choices are, as a result, arbitrary and capricious and in excess of the Agency’s discretion under the Clean Air Act. But to the extent that this conflict is unavoidable, EPA’s interpretation of § 112 and decision to subject EGUs to MACT requirements exceed its discretion under the Clean Air Act and are therefore unlawful.

A. The Utility MACT Rule Would Require The Shutdown Of Generating Facilities Necessary To Comply With Federal Power Act Requirements

NERC recognizes that, without sufficient time to implement the controls required by the Utility MACT Rule and to replace retiring capacity with new generating and transmission facilities, utilities, RTOs, and other regulated entities will be forced to breach its reliability standards. See 2011 Assessment, Att. A, at 120. Specifically, in its 2011 Assessment, NERC provides the following recommendation to federal regulators, based on its analysis of the reliability impact of EPA’s regulatory actions:

The Electric Reliability Organization’s Reliability Standards and Regional Criteria must be met at all times to ensure reliable operation and planning of the bulk power system. Based on the results of this study, more time is needed in certain areas to ensure resource adequacy and local reliability requirements can be addressed during the transition and
compliance period. EPA, FERC, DOE, and state utility regulators, working together and separately, should employ the array of tools at their disposal and their regulatory authority to preserve bulk power system reliability, including the deferral of compliance targets and granting extensions where there is a demonstrated reliability need. Coordination among Federal agencies is necessary to ensure the industry is not forced to violate one regulation to meet another.

Id. at 121. In this way, NERC expressly recognizes that without additional measures to provide additional time to achieve compliance with the Utility MACT Rule’s requirements, regulated entities will be “forced to violate” requirements under the FPA.

Evidence presented at FERC’s Reliability Technical Conference, and discussed in greater detail above, also demonstrates that the Utility MACT Rule’s implementation timeline is incompatible with maintaining compliance with FPA requirements. See, e.g., Kormos Testimony, Att. B, at 9-10 (discussing conflict and concluding that additional time is needed “on a unit-specific basis, to address the reliability impacts of retrofitting units that cannot meet the MATS deadline”); FERC Transcript, Att. D, at 241 (Kormos) (“[R]etiring as many plants as is expected to retire is going to have an impact on reliability. It is a timing issue to us.”); Monroe Testimony, Att. C, at 12 (discussing conflicts between the Utility MACT Rule and NERC reliability standards within the SPP region); FERC Transcript, Att. D, at 187 (Monroe) (discussing specific projected violations of NERC standards within the SPP region); Akins Testimony, Att. G, at 14 (discussing conflict); MISO Testimony, Att. H, at 7-8 (same); Topazi Testimony, Att. E, at 5 (“[W]e attest that in 2015, and
possibly beyond, we will not be able to simultaneously satisfy both the requirements of the proposed Utility MACT rule and applicable reliability standards.”); id. at 11-12 (discussing conflicts).

For the same reasons that the Utility MACT Rule jeopardizes electric reliability, it also conflicts with NERC’s reliability standards that embody the industry’s best practices for providing reliable electric service.

B. Utility MACT Requirements That Conflict With The Federal Power Act Are Arbitrary And Capricious

As described above, impossible-to-fulfill regulatory requirements are arbitrary and capricious. Alliance for Cannabis Therapeutics, 930 F.2d at 940. This applies equally where impossibility is due to conflicting regulatory requirements. In Alliance for Cannabis Therapeutics, the D.C. Circuit ruled that an FDA requirement that a petitioner seeking to reclassify a substance under the Controlled Substances Act demonstrate its “general availability” and regular use in clinical settings was arbitrary and capricious due to FDA and DEA regulations imposing onerous requirements on the use and study of already-classified substances. Id. Accordingly, the court remanded FDA’s denial of the petition for further consideration and explanation by the agency.

EPA’s Utility MACT Rule similarly imposes requirements that are impossible to fulfill due to legally-binding requirements under the FPA. In particular, as described above, NERC’s reliability standards impose detailed and specific obligations on RTOs, utilities, and other regulated entities regarding all aspects of electric
generation and transmission, with the aim of ensuring consistent, reliable electric service across the nation. As demonstrated by NERC’s 2011 Assessment and the evidence and testimony presented at FERC’s Reliability Technical Conference, the Utility MACT Rule requires the temporary or permanent shutdown of numerous generating facilities before upgrades can be implemented or new capacity constructed to ensure continued compliance with NERC’s standards. Thus, if utilities comply with their obligations under the FPA, they will be unable to comply with the requirements of the Utility MACT Rule.

Accordingly, EPA is obligated, based on the evidence of impossibility presented herein, to reconsider the standards in its Utility MACT Rule (including its use of sub-categorization) and to propose standards that do not irreconcilably conflict with the requirements of the FPA.

C. EPA May Not Interpret Clean Air Act § 112 To Conflict With The Energy Policy Act Of 2005

To the extent that the EPA’s interpretation of the Clean Air Act and the requirements of the Energy Policy Act of 2005 conflict, it is the former that must give way. The Energy Policy Act of 2005, which enacted the FPA’s reliability provisions contained in 16 U.S.C. § 824o(c)(1), is Congress’s most recent, and its most specific, statement on electric reliability. By contrast, Congress has evinced no intention in Clean Air Act § 112, or in any other relevant statutory provision, to delegate control
over the operation of the nation’s bulk power system to EPA, which conspicuously lacks expertise in that area.

It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). That context includes “other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Further, “common sense” guides the inquiry “as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Id.*

Thus, in *Brown & Williamson*, the Supreme Court held that the Food, Drug and Cosmetic Act’s (“FDCA”) broad grant of power to FDA to regulate “devices intended for human use” did not confer jurisdiction to regulate tobacco products because such regulation would require the agency to ban such products, which the court found to be contrary to more recent and specific congressional enactments regulating tobacco marketing. *Id.* at 136-38. These latter enactments “created a distinct scheme to regulate the sale of tobacco products, focused on labeling and advertising, and premised on the belief that the FDA lacks such jurisdiction under the FDCA” and thereby “preclude the FDA from regulating tobacco products as customarily marketed.” *Id.* at 156. This conclusion, the Court explained, was reinforced by the importance of the issue, which suggested that “Congress could not
have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994)).

Reliable electrical service is no less a matter of great “economic and political significance” than tobacco marketing, as evidenced by the comprehensive scheme for the regulation of reliability contained in the Energy Policy Act of 2005 and described above. That Act effectively required FERC to certify NERC as the ERO and to adopt and enforce NERC’s system of reliability standards, greatly increasing FERC’s power and responsibility over the operations of utilities, RTOs, and other entities with reliability functions. 16 U.S.C. §§ 824o(c), (d). With respect to reliability, the Energy Policy Act of 2005 is specific and contemplates the adoption of standards (which were extant at the time of the Act’s enactment) that impose precise operational and planning requirements on regulated entities. By contrast, Clean Air Act § 112 is a general program, enacted in its existing form nearly 15 years prior to the 2005 Act, for the regulation of certain air pollutants and carves out an exception for EGUs, allowing their regulation only upon a showing that such regulation is “appropriate and necessary.”

While, unlike the case in *Brown & Williamson*, EPA may not be bereft of jurisdiction to impose emissions standards on EGUs under Clean Air Act § 112, that provision’s general requirements must be interpreted in harmony with the requirements of the Energy Policy Act of 2005. *Watt v. Alaska*, 451 U.S. 259, 267
(1981) (“We must read [two conflicting] statutes to give effect to each if we can do so while preserving their sense and purpose.”). In particular, to give effect to both statutes, Clean Air Act § 112 must be interpreted and applied so as to allow continued compliance with NERC’s reliability standards promulgated under the Energy Policy Act of 2005. With respect to EGUs, EPA must take care to craft standards that, while complying with the terms of Clean Air Act § 112, do not conflict with the Energy Policy Act of 2005 requirements. Accordingly, EPA exceeds its statutory discretion when it makes choices, as in its Utility MACT Rule, that cause its standards to conflict with NERC reliability standards. EPA is therefore obligated, based on the evidence of impossibility presented herein, to re-consider the standards in its Utility MACT Rule and to propose standards that do not irreconcilably conflict with the requirements of the FPA.

If EPA determines that this is not possible—that is, that any standards which comply with Clean Air Act § 112 would conflict with the Energy Policy Act of 2005—then EPA is obligated to implement the § 112(n)(1) “appropriate and necessary” standard so as to preclude regulation of EGUs under § 112. In this way, it may definitively avoid any conflict between the two statutory schemes.
CONCLUSION

For the foregoing reasons, as well as those set forth in the Arising After Petition and previous renewed petition, EPA should re-propose Utility MACT and allow for additional public comment or, if the Agency believes that it lacks the discretion to propose MACT standards for EGUs that are not impossible to fulfill and do not impermissibly conflict with FPA requirements, withdraw its proposal and end this rulemaking.

Respectfully submitted,

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ATTACHMENTS


B. Testimony of Michael J. Kormos, Senior Vice President, PJM Interconnection, LLC, Before the Federal Energy Regulatory Commission (“Kormos Testimony”)

C. Testimony of Carl A. Monroe, Executive Vice President and Chief Operating Officer, Southwest Power Pool, Inc., Before the Federal Energy Regulatory Commission (“Monroe Testimony”)

D. Transcript, FERC Reliability Technical Conference, November 30, 2011 (“FERC Transcript”)

E. Testimony of Anthony Topazi, Chief Operating Officer, Southern Company, Before the Federal Energy Regulatory Commission (“Topazi Testimony”)

F. Testimony of Thomas Farrell, Chairman and Chief Executive Officer, Dominion Resources, on behalf of the Edison Electric Institute, Before the Federal Energy Regulatory Commission (“Farrell Testimony”)

G. Testimony of Nicholas K. Akins, President and Chief Executive Officer, American Electric Power, Before the Federal Energy Regulatory Commission (“Akins Testimony”)


I. Testimony of Debra Raggio, Vice President, Government and Regulatory Affairs, and Assistant General Counsel, GenOn Energy Inc., Before the Federal Energy Regulatory Commission (“Raggio Testimony”)