

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

American Nurses Association, *et al.*,

Plaintiffs,

v.

Lisa P. Jackson, Administrator  
of the United States Environmental  
Protection Agency, *et al.*,

Defendants,

Utility Air Regulatory Group,

Defendant-Intervenor.

Case No. 1:08-CV-02198-RMC

**Motion For Leave To File *Amicus Curiae* Brief In Support Of  
Defendant-Intervenor UARG's Motion To Modify Consent Decree**

The Institute for Liberty, the Center for Rule of Law, and the Freedom Though Justice Foundation hereby move for leave to participate as *amici curiae* in the above-captioned case in support of Defendant-Intervenor Utility Air Regulatory Group.<sup>1</sup>

**Memorandum Of Points And Authorities**

Amici are nonprofit organizations that regularly participate in regulatory proceedings to promote informed rulemaking premised on the best possible data and information and to protect Americans' rights under the law. These purposes led Amici to participate in the U.S. Environmental Protection Agency's ("EPA") "Utility MACT" rulemaking to bring to the Agency's attention recently released materials that cast doubt on its fundamental assumptions concerning Utility MACT's impact on reliable electric service and, those assumptions being no longer reliable, the

---

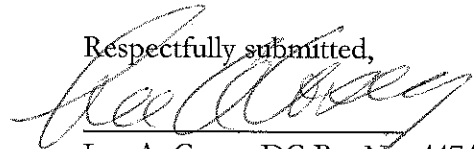
<sup>1</sup> Defendant-Intervenor UARG does not oppose this motion. Plaintiffs do not consent to, and plan to oppose, this motion. Defendants take no position.

complete absence of data or information supporting the Agency's approach of ignoring reliability. As such, Amici have a specific interest in the outcome of this rulemaking and, in particular, in EPA's ability to assess its proposed rule's impact on reliability and, as necessary, to adjust its approach in light of that information, while affording an opportunity for public participation in this process.

The Consent Decree entered by this Court, as it currently stands, precludes EPA from taking these steps. EPA assumed that its Proposed Rule would not impair reliability and ended its analysis there. Yet a detailed preliminary assessment undertaken by the Office of Electric Reliability ("OER") of the Federal Energy Regulatory Commission demonstrates that Utility MACT is likely to cause far greater retirements of generating capacity than projected by EPA and pulls the legs out from under EPA's assumption of continued reliability. The Consent Decree deadline does not allow sufficient time for EPA or any other party to undertake a proper analysis of, and response to, the OER study. It does not allow sufficient time for EPA to consider a forthcoming assessment by the North American Electric Reliability Corporation that will be the first to assess the local reliability impact of EPA's Utility MACT proposal in light of EPA's other Clean Air Act rulemakings. It does not allow sufficient time for EPA to meaningfully reconsider its approach to reliability. And it does not allow sufficient time for public participation in any Agency action to address reliability issues. Extending the Consent Decree deadline is a prerequisite to EPA granting Amici's petition and providing proper consideration to the reliability issues raised in this rulemaking.

Accordingly, Amici respectfully request that the Court grant this Motion and file the accompanying brief.

Respectfully submitted,



Lee A. Casey, DC Bar No. 447443  
*Counsel to the Institute for Liberty,  
the Center for Rule of Law, and the  
Freedom Through Justice Foundation*

Dated: October 10, 2011

### Certificate Of Service

I hereby certify that I have served a copy of this Motion For Leave To File Amicus Curiae Brief In Support Of Defendant-Intervenor UARG's Motion To Modify Consent Decree, and a copy of each attachments and exhibit, by overnight mail, postage prepaid, on the following counsel:

Eileen T. McDonough  
Environmental Defense Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 23896  
Washington, DC 20026


John T. Suttles, Jr.  
Southern Environmental Law Center  
601 West Rosemary Street  
Suite 220  
Chapel Hill, NC 27516

John A. Mueller  
Chesapeake Bay Foundation, Inc.  
6 Herndon Avenue  
Annapolis, MD 21403

Ann B. Weeks  
Clean Air Task Force  
18 Tremont Street  
Suite 530  
Boston, MA 02108

James S. Pew  
Earthjustice  
1625 Massachusetts Avenue, N.W.  
Suite 702  
Washington, DC 20036

F. William Brownell  
Hunton & Williams LLP  
2200 Pennsylvania Avenue, N.W.  
Washington, DC 20037

  
Lee A. Casey, DC Bar No. 447443

Dated: October 10, 2011

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**American Nurses Association, *et al.*,**

**Plaintiffs,**

**v.**

**Lisa P. Jackson, Administrator  
of the United States Environmental  
Protection Agency, *et al.*,**

**Defendants,**

**Utility Air Regulatory Group,**

**Defendant-Intervenor.**

Case No. 1:08-CV-02198-RMC

**Memorandum Of *Amicus Curiae* The Institute For Liberty, Center For Rule Of Law,  
And Freedom Though Justice Foundation In Support Of  
Defendant-Intervenor UARG's Motion To Modify Consent Decree**

## TABLE OF CONTENTS

Interest Of Amici.....	1
Background.....	2
A.    EPA Failed To Assess The Reliability Impact Of Its Proposed Rule.....	2
1.    EPA Assumes Its Rule Will Not Impair Electric Reliability.....	2
2.    An Assessment By FERC’s Office of Electric Reliability Calls Into Doubt EPA’s Assumption Of Continued Reliability .....	4
3.    EPA Fails To Address Fundamental Errors In Its Reliability Analysis Identified By FERC’s Office Of Electric Reliability .....	5
B.    FERC Acknowledges The Need For A “Safety Valve” Mechanism To Address The Proposed Rule’s Reliability Impact And Schedules A “Reliability Technical Conference” On EPA’s Rules.....	6
C.    The Consent Decree Deadline Precludes EPA’s Consideration Of The First Reliability Assessment To Study The Local Reliability Impacts Of The Utility MACT Proposed Rule .....	7
D.    Amici Curiae Petition EPA To Seek Additional Time To Address The Issues Raised By The Office Of Electric Reliability Assessment .....	9
Argument.....	10
I.    Because EPA Can No Longer Assume Unimpaired Reliability, “The Science And Analysis Require More Time” .....	10
A.    EPA’s Can No Longer Rely On Its Assumption Of Continued Reliability.....	10
B.    The Consent Decree’s Deadline Will Not Allow EPA To Address Electric Reliability.....	11
II.   The Consent Decree Deadline “Is No Longer Equitable” In Light Of EPA’s Obligation To Assess The Proposed Rule’s Impact On Electric Reliability .....	13
Conclusion.....	14

## INTEREST OF AMICI

Amici are nonprofit organizations that regularly participate in regulatory proceedings to promote informed rulemaking premised on the best possible data and information and to protect Americans' rights under law.

The Institute for Liberty is dedicated to defending the rights of individuals and businesses against undue encroachments by government that impair economic and civil liberties. It produces academic research on health, economic, and regulatory policy and, through its Center for American Regulatory Engagement, helps ordinary Americans participate in the regulatory process to ensure that their views are represented.

The Center for Rule of Law is a non-profit entity dedicated to educating the public about issues affecting the rule of law. The Center's legal scholars and policy experts analyze the rule of law dimensions in matters ranging across regulation, litigation, international trade rules, competition law, property rights, intellectual property, securities and corporation law, administrative and constitutional law, and other governmental decisions.

The Freedom Through Justice Foundation is a non-profit, nonpartisan public interest firm that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote social and economic freedoms. Through information requests under the Freedom of Information Act, regulatory comments, and legal actions, the Foundation seeks to address key threats to economic freedom.

As described further below, Amici have filed a petition in the U.S. Environmental Protection Agency's ("EPA") "Utility MACT" rulemaking docket to bring to the Agency's attention recently released materials that cast doubt on its fundamental assumptions concerning Utility MACT's impact on reliable electric service and, those assumptions being no longer reliable, the complete absence of data or other information supporting the Agency's regulatory approach of ignoring

reliability. The petition also requests that the Agency allow public comment on highly-expert information regarding reliability that the Agency unlawfully excluded from the public rulemaking docket. As such, Amici have a specific interest in the outcome of this rulemaking and, in particular, in EPA's ability to assess its proposed rule's impact on reliability and, as necessary, to adjust its approach in light of that information. Extending the Consent Decree's final rulemaking deadline is a prerequisite to EPA granting Amici's petition and providing proper consideration to the reliability issues raised by its Utility MACT proposal.

## **BACKGROUND**

Unless it is amended to provide an extension, the Consent Decree will require EPA to promulgate a final rule without any meaningful assessment of that rule's impact on reliable electric service across the nation.

### **A. EPA Failed To Assess The Reliability Impact Of Its Proposed Rule**

#### *1. EPA Assumes Its Rule Will Not Impair Electric Reliability*

In its Proposed Rule, despite acknowledging "the need for a reliable electric system," 76 Fed. Reg. 24,976, 25,054 (May 3, 2011), EPA considered the potential impact of Utility MACT on the reliability of the electricity system only with respect to determining the default deadline for compliance, and even this consideration was cursory. EPA assumed, based in part on its own regulatory impact analysis, that "the requirements of the proposed rule can be met without adversely impacting electric reliability." 76 Fed. Reg. at 25,054. It rested this conclusion on four subsidiary assumptions.

First, EPA assumed that "the expected number of retirements is less than many have predicted," such that retirements would not impair reliability. *Id.* EPA projected that only 9.9 gigawatts of coal-fired capacity—or about 3 percent of total coal-fired capacity—would be uneconomical by 2015 and therefore would be retired. EPA, Regulatory Impact Analysis of the

Proposed Toxics Rule: Final Report § 8.6 (2011) (“RIA”). Due to what it characterized as the small magnitude of retirements, the Agency concluded that average reserve margins in regions of the country would remain “significantly higher than required,” providing an adequate buffer against electricity shortfalls. 76 Fed. Reg. at 25,055. As such, the Agency concluded that it need not “address the potential for more localized transmission constraints,” which “should be manageable with existing tools and processes.” *Id.*

Second, EPA assumed that “the compliance schedule . . . can be met,” such that capacity will not be offline due to an inability to complete installation of required control technologies by the compliance deadline, with the possibility of a one-year extension. 76 Fed. Reg. at 25,054.

Third, EPA “assume[d] that adequate transmission capacity is available to deliver any resources located in, or transferred to, [a] region.” RIA § 8.6. In effect, this is to assume that outages can occur only, if at all, at the regional level and that sub-regional and localized outages simply do not exist.

Fourth, EPA implicitly assumed that it is appropriate to assess the adequacy of reserve margins while ignoring the effects of contemporaneous or planned regulatory actions other than Utility MACT. *See* 76 Fed. Reg. at 25,055. These actions include the Cross-State Air Pollution Rule, Coal Combustion Residuals regulation, and Clean Water Act § 316(b) Cooling Water Intake Structure regulation.

Based on these assumptions, the Agency exercised its discretion to set a three-year compliance deadline, 76 Fed. Reg. at 25,055, while otherwise ignoring reliability concerns with respect to every other aspect of the proposed rule, presumably on the basis that, because the rule would not impair reliability, the Agency need not consider reliability in the exercise of its discretion.



2. *An Assessment By FERC's Office of Electric Reliability Calls Into Doubt EPA's Assumption Of Continued Reliability*

After the close of the comment period in the Utility MACT rulemaking, the Senate Energy and Natural Resources Committee released materials it had received from FERC describing a preliminary, but detailed, reliability assessment of Utility MACT undertaken by FERC's Office of Electric Reliability ("OER").<sup>1</sup> Notably, this assessment had been presented to EPA on October 27, 2010, but EPA declined to enter it into the rulemaking docket or to acknowledge it in the proposed rule or any accompanying material.

The OER assessment projected the widespread retirement of coal-fired generating capacity due to EPA's rulemaking agenda. OER Assessment Presentation, Ex. 1, at 13. Specifically, the assessment found 40 gigawatts of coal-fired generating capacity "likely" to retire, with another 41 gigawatts "very likely" to retire. *Id.* It found that EPA's rules would reduce electricity reserve margins in all but one of the regions studied, *id.* at 20, and would result in potentially inadequate reserve margins, well below reference figures, in six of the regions. FERC, Impact to 2018 Reserve Margins, NERC and OER Comparison, Ex. 2.

OER also described the reliability consequences of such capacity losses. First, the losses could threaten "the ability of the electric system to supply the aggregate electric power." OER Assessment Presentation, Ex. 1, at 22. Second, the losses could threaten "the ability of the electric system to withstand sudden disturbances." *Id.* at 22-24. Third, the magnitude of retirements called into question the "deliverability" of remaining energy resources to the load. *Id.* at 22.

OER concluded that these potential problems would require extensive further study, data collection, and modeling. *Id.* at 22 ("Planning Studies are needed to determine the deliverability of

---

<sup>1</sup> These materials are available on the website of the Senate Energy and Natural Resources Committee, [http://energy.senate.gov/public/FERC\\_EPA\\_Responses/FERC\\_EPA\\_Responses.zip](http://energy.senate.gov/public/FERC_EPA_Responses/FERC_EPA_Responses.zip). Relevant supporting materials are attached to this brief as Ex. 1-7.

the energy resources to the load.”); *id.* at 24 (“The worsening trend suggests that comprehensive reliability studies by regions are needed to evaluate the effect of coal retirement.”). EPA declined to acknowledge, implement, or respond to these recommendations.

3. *EPA Fails To Address Fundamental Errors In Its Reliability Analysis Identified By FERC’s Office Of Electric Reliability*

The materials released with OER’s reliability assessment cast further doubt on EPA’s assumption of unimpaired reliability.

Throughout the development of the proposed rule, EPA consistently ignored OER criticisms that the Agency was relying on unfounded assumptions to arrive at unrealistically low estimates of retirements. For example, in a November 4, 2010, conference call, OER explained why “a holistic approach when studying the impacts of the EPA rules is necessary, whereas EPA would like to do individual best case studies.” FERC, November 4 Meeting Summary, Ex. 3. On February 16, 2011, OER discussed its concerns that EPA’s modeling failed to properly account for “transfer limits, capacity additions and the cumulative impact of all the upcoming EPA regulations.” Wellinghoff Letter, Ex. 4, at 14. Yet during a conference call on March 14, 2011, EPA staff stated that “they had retooled their analysis, slightly *downgrading* the amount of expected retirements as a result of Clean Air rules.” *Id.* (emphasis added). OER repeated its concern that “[EPA’s] modeling did not take into account the cumulative effect of its proposed regulations.” *Id.* On April 13, 2011, OER again criticized “modeling inconsistencies” in EPA’s “forecast [of] which coal fired power generation units will be retrofitted or retired by 2015 as a result of [Utility MACT].” *Id.* at 15. And on April 27, 2011, EPA staff stated that they “remain[ed] confident” in their projection of few retirements “despite reviewing questions, industry studies and news supplied by FERC staff” which appeared to contradict EPA’s projections. FERC, April 27 Meeting Summary, Ex. 5.

OER’s own re-analysis of EPA’s retirement projections demonstrates the effect of EPA’s methodological lapses and unjustified assumptions. For example, of the plants for which EPA did

not project a likelihood of retirement, OER found 47,000 megawatts of capacity “very likely” to retire, and 3,800 megawatts “likely” to retire. FERC, Comparison of EPA and OER Projections, Ex. 6, at 1. Accounting for this difference is OER’s consideration of factors that EPA simply ignored, most notably the cumulative impact of EPA’s rulemaking agenda. OER Assessment Presentation, Ex. 1, at 2.

Beyond lapses in projecting retirements, materials prepared by OER identified numerous fundamental errors in EPA’s assumptions regarding the effect of retirements on reliability. In particular, according to OER, EPA ignored *nearly every major factor* affecting reliability in assuming that Utility MACT would not impair reliability. These include “[t]ransmission flows in the grid,” “voltage implications of closures,” “frequency implications of closures,” and “black start” capabilities.<sup>2</sup> FERC, FERC and DOE Review, Ex. 7, at 1.

EPA made no effort to correct any of these errors. *See, e.g.*, RIA § 8.6 (continuing to “assume[] that adequate transmission capacity is available to deliver any resources located in, or transferred to, [a] region”).

**B. FERC Acknowledges The Need For A “Safety Valve” Mechanism To Address The Proposed Rule’s Reliability Impact And Schedules A “Reliability Technical Conference” On EPA’s Rules**

On September 14, 2011, all five FERC commissioners appeared before the House Subcommittee on Energy and Power to address the topic “Impacts of the Environmental Protection Agency’s New and Proposed Power Sector Regulations on Electric Reliability.” They were in full agreement that further actions will be necessary to protect reliability at the local level from threats due to EPA’s rulemaking agenda, in general, and from Utility MACT, in particular. Specifically, they discussed the need for a “reliability safety valve” “that would permit a case-specific extension of

---

<sup>2</sup> A black start unit is one that can start autonomously following an outage, without needing to draw current from the grid, an essential feature for recovering from outages.

time for compliance by a retiring generator needed to implement reliability solutions to replace the resource.” Spitzer Testimony, Ex. 8, at 3. *See* Hearing Transcript, Ex. 9, at 31-32. Media reports have noted that the Commission’s position that such a process is necessary stands in opposition to EPA’s conclusion that reliability will not be threatened.<sup>3</sup>

Underscoring this point, on October 7, 2011, FERC announced that it would hold a two-day “technical conference” on the “reliability of the Bulk-Power System” and, in particular, “reliability concerns that may arise in the course of compliance with Environmental Protection Agency regulations.” FERC, Notice of Technical Conference, Ex. 10, at 1. This conference will be held on November 29-30, 2011, two weeks after the Consent Decree deadline for promulgation of a final rule. *Id.*

**C. The Consent Decree Deadline Precludes EPA’s Consideration Of The First Reliability Assessment To Study The Local Reliability Impacts Of The Utility MACT Proposed Rule**

The final rulemaking deadline set by the Consent Decree precludes EPA’s consideration of a comprehensive long-term reliability assessment by the North American Electric Reliability Corporation. NERC is the designated Electric Reliability Organization (“ERO”) under § 215 of the Federal Power Act to which FERC has delegated authority to promulgate reliability standards and protect reliable operation of the nation’s power grid. *See* 16 U.S.C. § 824o(a). The NERC assessment will be released in the month of November. Testimony of Gerry Cauley, President and CEO, NERC, before the Subcomm. on Energy and Power, H. Comm. on Energy and Commerce, April 7, 2011.

NERC’s 2011 assessment will be the first nationwide reliability assessment (1) to assess the local reliability impacts of EPA’s proposed Utility MACT rule, rather than rely on assumptions as to

---

<sup>3</sup> *See* Editorial, Inside the EPA, *Wall St. J.*, Sep. 26, 2011, at A16 (“You don’t need a safety valve if there isn’t a threat to safety.”)

its requirements, and (2) to assess the impact of EPA's proposed Utility MACT rule in conjunction with the rest of the Agency's rulemaking agenda.

NERC's annual assessment is the only tool that assesses electric reliability from the bottom-up and is able to identify the specific local impacts of federal policies that affect the power system. The annual report includes reliability assessments prepared by each regional reliability organization overseen by NERC, as well as by Independent System Operators ("ISOs") and Regional Transmission Operators ("RTOs"). These regional assessments evaluate historical demand, projected demand growth, reserve margins, and changes in generation and transmission capabilities. *See, e.g.,* NERC, *2010 Long-Term Reliability Assessment* 71 (2010) ("2010 Assessment"), Ex. 11. They take account of transmission constraints and other factors that may impair local reliability within the region. *See, e.g., id.* at 72-79 (regional assessment of Florida Reliability Coordinating Council ("FRCC")). As such, these assessments are fine-grained, projecting the impact of retirements, new construction, market shifts, and regulatory initiatives several years into the future to identify possible impairments to reliability and measures to address them.

Although NERC's 2011 assessment may allow EPA to fulfill its statutory obligation to consider electric reliability in setting MACT standards for power plants, the Consent Decree's November 16, 2011, deadline will necessarily preclude the Agency from doing so.

**D. Amici Curiae Petition EPA To Seek Additional Time To Address The Issues Raised By The Office Of Electric Reliability Assessment**

On September 27, 2011, Amici Curiae petitioned EPA to re-propose Utility MACT to take account of the materials discussed in this brief, all of which came to light after the close of the rulemaking's comment period. *See* Petition To Re-Propose, Ex. 12. EPA has a legal obligation, the Petition explains, to take account of all important aspects of the problem before it, and particularly those factors identified by Congress, such as cost and electric reliability. Petition To Re-Propose, Ex. 12, at 35-38. *See Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); Clean Air Act §§ 112(n)(1)(B), (d)(2), 42 U.S.C. §§ 7412(n)(1)(B), (d)(2). While EPA might have been justified in relying on an assumption regarding reliability if that assumption had some support, its assumption regarding reliability impacts has now been conclusively rebutted by expert information from another federal agency, one with a substantial interest in, and responsibility for, electric reliability. Petition To Re-Propose, Ex. 12, at 27-31. Thus, the Petition concluded, EPA has an obligation, in light of the OER assessment and supporting materials, to evaluate the impact of its Utility MACT proposal, along with related proposed rules, on local reliability and to consider reliability impacts in exercising its discretion with respect to matters that might affect reliability, such as setting emissions standards and categorizing units. *Id.* at 35-38. Further, because this will require EPA to reverse its position and to consider a factor that it had not considered in the Proposed Rule, the Agency is obligated to publish a supplemental notice of proposed rulemaking, allow the public adequate time to comment on the Agency's response to the reliability issues identified by the Petition, and adequately consider and respond to such public comment. *Id.* at 38-43.<sup>4</sup>

---

<sup>4</sup> The Petition also proposed that, if necessary, EPA could promulgate a final rule and then stay its effectiveness, as the Agency did in its Boiler MACT rulemaking. Petition To Re-Propose, Ex. 12, at 60-64. EPA's legal authority to stay a rule indefinitely, however, is uncertain, and this course of action presents substantial uncertainty and legal risk. *See Sierra Club v. Jackson*, No. 11-1278 (D.D.C.

## ARGUMENT

In response to concerns raised by Defendant-Intervenor Utility Air Regulatory Group (“UARG”) that the timeframe for EPA’s Utility MACT rulemaking “may be too hasty for the critical and expensive regulatory decisions that will be made,” this Court offered that, “[i]f the science and analysis require more time,” the Court would allow it. Memorandum Opinion at 2 (Dkt. No. 31) (“Mem. Op.”). There can be no question that more time is required for EPA to analyze and account for the rule’s impact on electric reliability.

### **I. Because EPA Can No Longer Assume Unimpaired Reliability, “The Science And Analysis Require More Time”**

The accelerated rulemaking schedule necessitated by the Consent Decree precluded the completion of any comprehensive assessment of the reliability impact of EPA’s Utility MACT proposal within the comment period. Although the November 16, 2011, deadline may have been appropriate at the time, given EPA’s assumption that its Proposed Rule would have little or no impact on reliability, the Agency can no longer rely on that assumption and must address, rather than minimize or ignore, reliability concerns.

#### **A. EPA’s Can No Longer Rely On Its Assumption Of Continued Reliability**

The Office of Electric Reliability assessment directly and materially undermines EPA’s reliability assumption. Whereas EPA projected the retirement of only 9.9 gigawatts of coal-fired generating capacity due to Utility MACT, OER’s assessment concludes that over eight times that amount—81 gigawatts, in total—is either “likely” or “very likely” to retire due to EPA’s rulemaking agenda, undercutting the Agency’s assumption of few retirements. OER Assessment Presentation, Ex. 1, at 13. That amounts to nearly one-quarter of coal-fired generating capacity, and eight percent

---

\_\_\_\_\_  
Sep. 27, 2011) (denying EPA’s motion to dismiss challenge to EPA’s administrative stay of its Boiler MACT rules).

of total U.S. generating capacity. OER's analysis, unlike EPA's, considers both Utility MACT and other recent and planned regulatory actions by the Agency that affect coal-fired EGUs, demonstrating the significant cumulative impact of the rules and undermining EPA's assumption that Utility MACT's effects could reasonably be considered in isolation from other regulatory requirements on generators. *Id.* at 2, 13.

As described above, OER projected significant reductions in regional reserve margins, which would raise the likelihood, severity, and duration of unplanned electric outages. FERC, *Impact to 2018 Reserve Margins, NERC and OER Comparison*, Ex. 2. It explained that retirements due to EPA's proposed Utility MACT rule could impact electric adequacy, operating reliability (in the form of frequency response, voltage profile, thermal loading, and stability), and deliverability. OER Assessment Presentation, Ex. 1, at 22. "The worsening trend [in voltage profile and local thermal loadings] suggests that comprehensive reliability studies by regions are needed to evaluate the effect of coal retirement," OER concluded. *Id.* at 24. EPA has conducted no such studies and therefore has no basis to assume that the components of electric reliability will be unaffected by retirements due to Utility MACT.

**B. The Consent Decree's Deadline Will Not Allow EPA To Address Electric Reliability**

Because EPA is unable to rely on the overriding assumption that its rulemaking activities will not impair electric reliability, it must assess the specific impacts that its discretionary decisions will have on electric reliability at the regional and local levels, which is where the impact of reliability shortfalls is felt. Unless the Consent Decree's deadline is extended, EPA cannot possibly satisfy this obligation.

Rather than rely on now-insupportable assumptions to conclude that Utility MACT will have a negligible impact on reliability at any level, EPA must take account of the likelihood that the rule will cause and contribute to the mass retirement of generating capacity, that compliance within the



proposed timeframe will be unfeasible, and that the impact of resulting permanent and temporary shutdowns will be felt in communities across the nation. Failure to do so, especially 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).

EPA must consider reliability with respect to aspects of Utility MACT other than timing. For example, the Clean Air Act expressly requires EPA to consider “energy requirements” in setting MACT standards. Clean Air Act § 112(d)(2), 42 U.S.C. § 7412(d)(2). The same provision requires that the Agency take costs into consideration. *Id.* Another EGU-specific provision requires EPA to evaluate the “technologies which are available to control [hazardous air pollutant] emissions” from EGUs and “the costs of such technologies,” Clean Air Act § 112(n)(1)(B), 42 U.S.C. § 7412(n)(1)(B), further suggesting that cost must be a factor in regulation of EGUs under Clean Air Act § 112.

These are vital considerations. Regulations that impede electric reliability necessarily impose costs on consumers, businesses, regulated entities, and the economy writ large, in the form of power outages, rolling blackouts, tighter equipment maintenance windows, and other consequences of uncertainty in utility operations. *See generally* Kristina Hamachi LaCommare and Joseph H. Eto, *Understanding the Cost of Power Interruptions to U.S. Electricity Consumers*, available at <http://certs.lbl.gov/pdf/55718.pdf>. Outages can also put human health at risk<sup>5</sup>, and even life itself.<sup>6</sup>

---

<sup>5</sup> *See, e.g.*, Mike Anton, Louis Sahagun and Richard Marosi, More than 4 million lose power in major blackout, *L.A. Times*, Sep. 8, 2011 (describing impact of recent blackout, including evacuation of a nursing home, cancellation of surgeries, and the discharge of raw sewage into San Diego Bay).

<sup>6</sup> *See, e.g.*, Robin DeMonia, Alabama tornadoes: Early power outages blamed in storm deaths, *The Birmingham News*, Sep. 26, 2011, [http://blog.al.com/spotnews/2011/09/alabama\\_tornadoes\\_early\\_power.html](http://blog.al.com/spotnews/2011/09/alabama_tornadoes_early_power.html); Power outages, one death reported in Northeast heat wave, CNN News, Jul. 6, 2010, [http://articles.cnn.com/2010-07-06/us/heat.wave\\_1\\_heat-wave-heat-advisories-outages](http://articles.cnn.com/2010-07-06/us/heat.wave_1_heat-wave-heat-advisories-outages).

EPA is obligated to consider electric reliability in exercising its discretion to establish standards under § 112. This requires that it study the problem in a concerted fashion, assemble data and make projections based on sound methodological principles, such as those employed by NERC and RTOs in their assessments. Only then will EPA be able to exercise its judgment in an informed fashion and publish a revised proposed rule for public comment. These necessary steps will, of course, take time, far more than the few weeks remaining before the Consent Decree's deadline for promulgation of a final rule.

**II. The Consent Decree Deadline “Is No Longer Equitable” In Light Of EPA’s Obligation To Assess The Proposed Rule’s Impact On Electric Reliability**

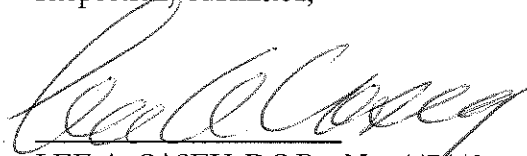
In light of EPA's obligations, the procedural injuries to interested parties if EPA fails to carry out its obligations in a considered and transparent fashion, and the danger to the public if the Agency proceeds without addressing Utility MACT's impact on reliability, the Consent Decree “is no longer equitable.” Fed. R. Civ. P. 60(b)(5). In particular, “the decree has become unworkable due to unforeseen obstacles,” *U.S. v. Caterpillar, Inc.*, 227 F.Supp.2d 73, 80 (D.D.C. 2002) (internal quotation omitted), viz. EPA's complete failure to undertake any comprehensive reliability assessment at any stage in the rulemaking process and the recent release of reliable information from FERC and OER demonstrating that EPA's assumptions were unfounded. Such an assessment is required, as a matter of good public policy and as a matter of law.

For the Agency to move forward with a final rule at this time would be “detrimental to the public interest.” *Id.* The Agency is uninformed of its Proposed Rule's impact on reliable electric service, unequipped with any process or tool to identify or address reliability hotspots or bottlenecks, and (if it proceeds on schedule) apparently unconcerned at the consequences for Americans forced to endure unplanned outages and rolling blackouts. Proceeding under these circumstances would be nothing short of reckless. The Court should not be a party to such an action, and EPA should not be able to point to the Consent Decree to justify its recklessness.

## CONCLUSION

The Consent Decree's final rulemaking deadline will prevent EPA from taking proper account of a factor that Congress has identified in the Clean Air Act and that has enormous implications for health, safety, and well-being of Americans. Unless the Court grants the Defendant-Intervenor's motion, EPA will issue a final rule in the absence of any reliable information on the sub-regional and local reliability impacts of its proposal and, in so doing, put the health, safety, and well-being of millions of Americans at risk. Accordingly, the Court should grant that motion and modify the Consent Decree to extend its November 16, 2011, deadline for promulgating final emissions standards.

Respectfully submitted,



LEE A. CASEY, DC Bar No. 447443  
MARK W. DELAQUIL, DC Bar No. 493545  
Baker & Hostetler LLP  
Washington Square, Suite 1100  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5304  
Phone: 202.861.1500  
Facsimile: 202.861.1730  
Email: lcasey@bakerlaw.com  
*Counsel to the Institute for Liberty,  
the Center for Rule of Law, and the  
Freedom Through Justice Foundation*

Dated: October 10, 2011

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**American Nurses Association, et al.,**

**Plaintiffs,**

**v.**

**Lisa P. Jackson, Administrator  
of the United States Environmental  
Protection Agency, et al.,**

**Defendants,**

**Utility Air Regulatory Group,**

**Defendant-Intervenor.**

Case No. 1:08-CV-02198-RMC

**Exhibit List To Memorandum Of Amicus Curiae The Institute For Liberty,  
Center For Rule Of Law, And Freedom Though Justice Foundation In Support Of  
Defendant-Intervenor UARG's Motion To Modify Consent Decree**

- Ex. 1 Office of Electric Reliability, Potential Retirement of Coal Fired Generation and its Effect on System Reliability, Oct. 27, 2010 ("OER Assessment Presentation")
- Ex. 2 FERC, Impact to 2018 Reserve Margins, NERC and OER Comparison
- Ex. 3 FERC, November 4, 2010, Meeting Summary
- Ex. 4 Letter from Jon Wellinghoff, Chairman, FERC, et al., to Senator Lisa Murkowski, Ranking Member, Senate Energy Committee (Aug. 1, 2011) ("Wellinghoff Letter")
- Ex. 5 FERC, April 27, 2011, Meeting Summary
- Ex. 6 FERC, Comparison of EPA and OER Projections
- Ex. 7 FERC, FERC and DOE Review
- Ex. 8 Testimony of Marc Spitzer, Commissioner, FERC, Before the Subcomm. on Energy and Power, H. Comm. on Energy and Commerce, Sep. 14, 2011 ("Spitzer Testimony")
- Ex. 9 Transcript: The American Energy Initiative: Impacts Of The Environmental Protection Agency's New And Proposed Power Sector Regulations On Electric Reliability: Hearing Before the Subcomm. on Energy and Power, H. Comm. on Energy and Commerce, Sep. 14, 2011 ("Hearing Transcript")

Ex. 10 FERC, Notice of Technical Conference, Oct. 7, 2011.

Ex. 11 Excerpt from NERC, *2010 Long-Term Reliability Assessment* (2010) (“2010 Assessment”)

Ex. 12 Petition By The Institute For Liberty, Americans For Prosperity, The Center For Rule Of Law, And The Freedom Through Justice Foundation For Re-Proposal Or, In The Alternative, Reconsideration And Stay Of EPA’s Proposed Rule, 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, Sep. 27, 2011 (“Petition To Re-Propose”)