FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

December 13, 2011

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Dear Administrator Sunstein:

The Environmental Protection Agency (EPA) is expected to issue shortly its final Utility MACT rule. This rule is estimated to impose $11 billion in new costs annually on the economy, and threatens electricity generating capacity in critical regions of the nation – increasing risks that electric power will not be available to many households and businesses when it is most needed.

We remain deeply concerned that EPA's analysis and interagency coordination relating to this rule have been insufficient to inform EPA, Congress, or the public about whether this regulation poses unacceptable risks to the public health, welfare, or safety. We are also concerned that the regulation falls substantially short of President Obama's requirement that regulations promote economic growth, competitiveness and job creation.

Notably, the President's January 2011 Executive Order 13563 requires that regulations be based on the "open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole." To date, this does not appear to have occurred with regard to the Utility MACT rule. On November 9, 2011, the Energy and Commerce Committee ("Committee") sent the attached letter to EPA seeking information regarding the extent to which EPA has consulted with federal, state and local entities responsible for providing reliable, affordable electricity, including the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC), state public utility commissions, and other planning authorities. The letter also requested that EPA explain how it would incorporate the most up-to-date and authoritative reliability assessments and technical analyses prepared by NERC and other entities. While EPA

has provided us with some responsive information, the agency has failed to provide a complete response to our inquiries.

In light of this situation, we write to request that you take steps to ensure EPA fully considers and addresses the significant concerns about costs and reliability raised in the rulemaking process, and at the FERC Technical Conference held November 29-30, for which the comment period closed December 9, 2011. We also request that you provide to this Committee any analysis submitted to your office during your review of this rule demonstrating that the adequacy, reliability, and affordability of the bulk power supply at regional and local levels will not be threatened by this rulemaking and will therefore not endanger public health, welfare, or safety for any part of the United States.

Thank you for your prompt attention to this matter. Should you have any questions, please contact Mary Neumayr or Patrick Currier of the Majority Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Ed Whitfield
Chairman
Subcommittee on Energy and Power

Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Henry A. Waxman
Ranking Member, Committee on Energy and Commerce

The Honorable Bobby L. Rush
Ranking Member, Subcommittee on Energy and Power

The Honorable Diana DeGette
Ranking Member, Subcommittee on Oversight and Investigations

Enclosure

FRED UPTON, MICHIGAN
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WASHINGTON, DC 20515–6115

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Minority (202) 225–3641

November 8, 2011

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

Pursuant to Rule X and XI of the Rules of the U.S. House of Representatives, the Committee on Energy and Commerce seeks information relating to EPA's pending Utility MACT rule, which is currently scheduled to be issued by December 16, 2011.

We write specifically to request information concerning the agency's ability to review and respond to public comments, assess relevant technical information, and conduct appropriate interagency review under the current schedule. We also request information regarding the extent to which EPA has consulted with the Federal Energy Regulatory Commission, North American Electric Reliability Corporation, state public utility commissions, regional transmission organizations, and other regional and local market stakeholders with responsibility to assure an affordable and reliable supply of electricity. Finally, we seek information about any potential "safety valve" approach EPA is considering in response to public comments or proposals submitted to the agency, as well as information relating to electric reliability concerns.

Accordingly, please find attached to this letter questions and document requests as well as instructions relating to the requests for documents. Please provide the written responses and documents requested by no later than two weeks from the date of this letter. Should you have any questions, please contact Mary Neumayr of the Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman

Ed Whitfield
Chairman
Subcommittee on Energy and Power

Cliff Stearns
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Bobby L. Rush, Ranking Member
Subcommittee on Energy and Power

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

Attachments

INFORMATION & DOCUMENT REQUESTS

1. The proposed Utility MACT rule, published on May 3, 2011, is currently scheduled to be finalized by December 16, 2011. The public comment period ended August 4, 2011, and according to EPA, it has received over 900,000 comments on the proposed rule, including 22,000 unique comments.

   a. Explain how it is feasible for EPA to review and respond by the December 16, 2011, scheduled issuance date to the more than 22,000 unique comments received. Please include in your response the resources, including federal and contractor FTEs, and timetables, that have been allocated for review and responding to public comments.

   b. Explain how it is feasible to conduct a thorough and appropriate interagency review of the rule by December 16, 2011. Please include in your response the amount of time that has been allocated for interagency review.

2. On October 7, 2011, FERC announced that it will hold a two-day Commissioner-led Technical Conference on November 29-30, 2011, to address the reliability of the Bulk-Power System and emerging issues, including reliability concerns which may arise in complying with EPA's regulations.

   a. Does EPA intend to consider and incorporate the results of this technical conference into the final Utility MACT rule? If not, please explain why not.

   b. If so, explain how EPA plans to review and incorporate the results of this technical conference into the final Utility MACT rule prior to the December 16, 2011, deadline.

3. The North American Electricity Reliability Corporation (NERC) is expected to issue its latest annual long-term reliability assessment in mid or late November 2011.

   a. Does EPA intend to consider and incorporate the results of NERC's reliability assessment into the final Utility MACT rule? If not, please explain why not.

   b. If so, explain how EPA plans to review and incorporate the results of NERC's reliability assessment into the final Utility MACT rule prior to the December 16, 2011 deadline.

4. The preamble to EPA's Utility MACT rule, published in the *Federal Register* on May 3, 2011, states that:

   "EPA itself has already begun reaching out to key stakeholders including not only sources with direct compliance obligations, but also groups with responsibility to assure an affordable and reliable supply of electricity including state Public Utility Commissions (PUC), Regional Transmission Organizations (RTOs), the

National Electric Reliability Council (NERC),[1] the Federal Energy Regulatory Commission (FERC), and DOE."

a. Please describe EPA's outreach to state public utility commissions, providing the date of any contacts, the persons involved in the discussions, the nature of the discussions, and the EPA action and disposition of any such action responsive to the discussion.

b. Please describe EPA's outreach to RTOs, providing the date of any contacts, the persons involved in the discussions, the nature of the discussions, the EPA action and disposition of any such action responsive to the discussion.

c. Please describe EPA's outreach to the NERC, providing the date of any contacts, the persons involved in the discussions, the nature of the discussions, the EPA action and disposition of any such action responsive to the discussion.

d. Please detail any meetings EPA has had with other regional and local market stakeholders in which EPA's power sector regulations have been discussed.

e. Does EPA plan to participate in any meetings in the future with state PUCs, RTOs, NERC, or other regional and local stakeholders? If yes, please indicate the specific meetings EPA intends to participate in. If not, please explain why not.

5. At a March 14, 2011, meeting described in responses to the Committee provided by FERC Chairman Wellinghoff on July 27, 2011, "EPA CAD staff proposed to conduct bi-weekly conference calls with FERC to keep each other informed of any developments." In his September 14, 2011, testimony before the Committee's Subcommittee on Energy and Power, Chairman Wellinghoff indicated that discussions between FERC and EPA were "ongoing." However, based on information that had been provided with Chairman Wellinghoff's July 27 response to the Committee, it appears that substantive contacts between FERC and EPA ceased after May 3, 2011.

   a. Have there been subsequent contacts since May 3, 2011, between FERC and EPA regarding the potential impacts of EPA's power sector rules on reliability? If yes, please provide a record and description of all such contacts, and provide copies of all documents that reflect those contacts.

6. The record of the discussions between EPA and FERC indicate that FERC on a number of occasions recommended that EPA undertake a cumulative impact analysis of EPA's power sector regulations.

   a. What has EPA done in response to FERC's recommendations? Has EPA conducted such a cumulative analysis? If yes, please provide a copy of any such analysis.

[1] For purposes of these requests, NERC refers to both the North American Electric Reliability Corporation and its predecessor, the North American Electric Reliability Council.

7. In his September 14, 2011, testimony before the Committee's Subcommittee on Energy and Power, FERC Chairman Wellinghoff referred to a "safety valve" approach to address the impact EPA's power sector rules could have on electric reliability.

   a. Is EPA considering a "safety valve" approach? If so, describe the safety valve approach EPA is considering.

   b. What legal authority does EPA have to implement the safety valve approach contemplated?

   c. Has EPA consulted with stakeholders, other than RTOs, regarding a safety valve approach, such as FERC, NERC, other planning authorities, state public utility commissions, or industry stakeholders?

   d. Please describe all discussions regarding a safety valve approach that have occurred between EPA and FERC, RTOs, ISOs, other regional bodies, NERC, or state public utility commissions.

   e. Does EPA intend to provide public notice and an opportunity to comment on any safety valve proposal being considered, including the proposal submitted to EPA by various RTOs on August 4, 2011, and October 14, 2011? If not, please explain why not.

   f. Please provide all documents relating to EPA consideration of a safety valve proposal or approach to address reliability issues in the agency's proposed power sector rulemakings.

8. In his September 14, 2011, testimony to the Committee, Chairman Wellinghoff testified that EPA's estimate of nation-wide generator retirements was "irrelevant" and that the real focus should be on localized reliability impacts.

   a. Has EPA prepared a new reliability analysis that evaluates localized reliability impacts? If yes, please provide copies of any such analysis.

   b. If not, does EPA intend to prepare a new reliability analysis that evaluates localized reliability impacts? If yes, when does EPA plan to release that analysis? If no, please explain why not.

9. In his July 27, 2011, response to the Committee's May 9, 2011, letter, Chairman Wellinghoff states that:

   "In discussions concerning the EPA efforts to model the effect these regulations could have on electric generation retirements, Commission staff recommended that such efforts should include the modeling of transfer limits, placement and timing of capacity additions and the cumulative impact of all the upcoming EPA regulations. Specifically, the Commission staff identified the following reliability

considerations: (1) regional resource adequacy, (2) deliverability and transmission flows on the grid, (3) black start units and (4) voltage and frequency response."

a. Has EPA accounted for any of these factors in assessing the impact of its regulations on electric reliability? If so, please explain how.

b. Did any of EPA's reliability assessments include modeling of transfer limits within regions? If so, please explain how.

c. Did any of EPA's reliability assessments account for black start units? If so, please explain how.

d. Did any of EPA's reliability assessments account for voltage and frequency response? If so, please explain how.

10. According to Chairman Wellinghoff's July 27, 2011, response to the Committee, as recorded at a November 4, 2010, meeting, "EPA CAD staff has been seeking assistance from FERC staff in analyzing the effect on reliability of the Maximum Achievable Control Technology (MACT) rule for which they would provide further data as produced by their model in December 2010."

    a. What type of assistance did EPA seek?

    b. Did FERC provide it? If so, describe specifically the assistance FERC provided and please provide all documents relating to such assistance.

11. FERC staff appears to have expressed concerns to EPA that EPA's assumptions regarding the timeline necessary for construction of new resources were too aggressive and did not reflect realities of planning, permitting, financing and constructing new generating plants.

    a. Please provide any EPA evaluation or response to concerns of FERC staff.

    b. Please explain how the timing of EPA's regulations, and in particular the compliance deadlines in the CSAPR and Utility MACT rule, are consistent with the planning horizons of the electric sector.

12. According to Chairman Wellinghoff's July 27, 2011, response to the Committee, in an October 27, 2010, meeting between EPA, FERC and CEQ, the following statement was recorded: "FERC staff stated that renewable generation may not provide a one to one replacement for the capacity that is retiring given the different characteristics of the units."

    a. Does EPA believe that renewable generation provides a one to one replacement for coal-fired generation capacity that may retire as a result of these rules? If so, please describe the basis for such conclusion and the effect it has on EPA's analyses of the effect of its regulations on the reliability of the electric grid.

b. Do any of EPA's analyses of the Utility MACT rule include an assumption that renewable generation provides a one to one replacement for coal-fired generation capacity that may retire as a result of these rules? If so, please describe which analyses make such an assumption and the relevance to the analysis undertaken.

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.

2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.

3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.

4. Each document should be produced in a form that may be copied by standard copying machines.

5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.

6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.

7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.

8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.

9. The Committee requests electronic documents in addition to paper productions when possible. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

12. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

13. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

14. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee staff regarding the method of delivery prior to sending any materials.

15. In the event that a responsive document is withheld on any basis, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document.

16. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

17. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the

Committee, identified in a privilege log provided to the Committee, as described in (15) above, or identified as provided in (10) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms "you" or "your" means and refers to you as a natural person and the United States Environmental Protection Agency (the "EPA") and any of its offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on behalf or under the control or direction of the EPA; and includes any other person(s) defined in the document request letter.

8. The term "EPA" refers to the United States Environmental Protection Agency and any of its offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on behalf or under the control or direction of the EPA.