

The National Rural Electric Cooperative Association

Petition for Reconsideration  
Office of the Administrator, U.S. Environmental Protection Agency

Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility  
Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)  
[EPA-HQ-OAR-2013-0602]

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The National Rural Electric Cooperative Association (“NRECA”) hereby requests, pursuant to section 307(d)(7)(B) of the Clean Air Act (“CAA”), 42 U.S.C. § 7607(d)(7)(B), that EPA reconsider the final rule entitled, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.” 80 Fed. Reg. 64,662 (Oct. 23, 2015) [EPA-HQ-OAR-2013-0602] (the “Final Rule”). Specifically, NRECA seeks reconsideration of EPA’s treatment of NRECA’s request that the Final Rule include a robust dynamic reliability safety valve provision. Such a provision would adjust or postpone the Final Rule’s emission targets to ensure that the reliability of the nation’s electric supply is not jeopardized by the Final Rule. Despite the fact that EPA has included robust reliability safety valve provisions in other rulemakings affecting the electric utility industry (*e.g.*, the Mercury and Air Toxics Rule), EPA failed to include such a mechanism in the proposed rule here. The public thus has not had an opportunity to comment on the notably weak safety valve provision EPA included in the Final Rule. Public comment is critical because the new provision falls far short of ensuring that individual sources can meet unexpected electricity needs, such as might occur during heat waves, extreme cold spells, or due to the unexpected retirement or failure of other units, such as nuclear units. A one-time, 90-day reprieve from emission standards – never to be repeated regardless of what exigencies may arise in the future – simply is not sufficient to ensure the reliability of the nation’s electric supply.

### **PROCEDURAL BACKGROUND**

On June 18, 2014, EPA proposed “emission guidelines” for carbon dioxide (CO<sub>2</sub>) emission from existing affected electric generating units (EGUs) under CAA section 111(d). 79 Fed. Reg. 34,830 (June 18, 2014). NRECA submitted extensive comments on that proposal. *See* Comment by National Rural Electric Cooperative Association (Dec. 1, 2014) [EPA-HQ-OAR-

2013-0602-33118] (“NRECA Comments”). NRECA commented on numerous aspects of EPA’s proposal, including the absence of, and the critical need for, a dynamic reliability safety valve provision and other tools necessary for states to effectively ensure electric supply reliability. *Id.* at 163-68.

On August 3, 2015, the EPA Administrator signed the final Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. The Final Rule was published in the *Federal Register* on October 23, 2015. *See* 80 Fed. Reg. 64,662 (Oct. 23, 2015). The Final Rule contains a new reliability safety valve provision, 40 C.F.R. § 60.5785(e),<sup>1</sup> the adequacy of and requirements for which have not been subject to public comment.

On October 23, 2015, NRECA and thirty-seven of its member generation and transmission cooperatives filed a petition for review of the Final Rule in the Court of Appeals for the District of Columbia Circuit. *See Nat’l Rural Elec. Cooperative Ass’n v. EPA*, 15-1376. That case has been consolidated with other challenges under the lead case of *West Virginia v. EPA*, No. 1363 (D.C. Cir.).

## DISCUSSION

Under CAA section 307(d)(7)(B), the Administrator must convene a proceeding for reconsideration of a promulgated rule and provide the same procedural rights that would have been afforded if the information was available at the time the rule was published if, in relevant part, the grounds for the objection arose after the public comment period, but within the time for judicial review, and if such objection is of central relevant to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). NRECA’s petition for reconsideration satisfies these criteria: EPA did not

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<sup>1</sup> All citations in this petition to the Code of Federal Regulations are to the soon-to-be-codified provisions under the Final Rule unless otherwise stated.

include a reliability safety valve in the proposed rule, and NRECA and its members thus have had no opportunity to comment on the unduly limited reliability safety valve provision that EPA adopted in the Final Rule.<sup>2</sup> This petition is also timely, submitted within the time for judicial review.

**A. A Robust Dynamic Reliability Safety Valve Is Critical To Ensure Uninterrupted Electric Grid Operation.**

As NRECA explained in its comments on the proposed rule, “[t]he resources on the grid and their ability to serve consumers’ energy needs change dynamically in response to intentional and unintentional changes in grid architecture, changes in market design and market conditions for the different participants, changes in technology, fires, floods, ice storms, and even economic growth and contractions.” NRECA Comments at 166; *see also id.* at 166-68. Events that affect reliability – thereby affecting a particular EGU’s need to generate more electricity than anticipated and resulting in increased CO<sub>2</sub> emissions – also include large changes in available electric generation or electric transmission capabilities, fuel shortages or costs that impair the ability to acquire fuel, including fuel transportation shortfalls, extreme weather events, natural disasters, acts of war, or changes in the laws, regulations, and rules affecting resource availability. *See, e.g.,* ERCOT Analysis of the Impacts of the Clean Power Plan, *Final Rule Update* (Oct. 16, 2015), available at [http://www.ercot.com/content/news/presentations/2015/ERCOT\\_Analysis\\_of\\_the\\_Impacts\\_of\\_the\\_Clean\\_Power\\_Plan-Final\\_.pdf](http://www.ercot.com/content/news/presentations/2015/ERCOT_Analysis_of_the_Impacts_of_the_Clean_Power_Plan-Final_.pdf) (recognizing that unanticipated retirements could “pose challenges for maintaining grid reliability . . . . if multiple unit retirements occur within a short timeframe, there could be periods of reduced system-wide resource adequacy and localized transmission reliability issues”); Lanny Nickell,

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<sup>2</sup> NRECA also fully joins the objections to the Final Rule raised by the Utility Air Regulation Group (“UARG”) in a contemporaneously-filed petition for reconsideration.

SPP Presentation to CenSARA, “Regional Implications of the Clean Power Plan” at 22 (Oct. 21, 2015) (reporting that there is “a risk of electric service interruptions and potential violations of NERC standards” if Clean Power Plan compliance begins and generator retirements occur before generation and transmission infrastructure is added or if replacement generation capacity is added before additional transmission infrastructure is built).

To ensure that reliability is not jeopardized by unforeseen and unavoidable circumstances or systemic changes in the availability and operability of electric energy resources, EPA must put in place a sufficiently dynamic reliability safety valve (as detailed in Section D of this petition) that allows affected EGUs to request relief for affected states, regions, and utility entities in an approved state or multi-state plan or in a federal plan.<sup>3</sup> EPA has not done so, and it has not given the public a chance to comment on the limited safety valve provision EPA ultimately adopted in the Final Rule.

**B. EPA’s New Safety Valve Provision.**

The new safety valve provision is unduly restrictive, allowing for only a *single* 90-day period in which the affected EGU is permitted to meet a standard other than the emission standard established for the EGU under the relevant state plan. 80 Fed. Reg. at 64,877; *see also* 40 C.F.R. § 60.5785(e). The reliability safety valve is triggered by “an emergency situation that threatens reliability,” 40 C.F.R. §5785(e)(1), but that phrase is not defined, and it is not entirely clear what kind of event would qualify as such an emergency.

EPA also adopted myriad requirements that must be met before the new reliability safety valve is triggered. To trigger the safety valve, the State must notify EPA within 48 hours of an

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<sup>3</sup> Notably, although EPA provided a reliability safety valve in the Final Rule (however inadequate), EPA has not included such a provision in its proposed Federal Implementation Plan.

event that it is necessary to modify the emission standards for a reliability-critical EGU or EGUs for up to 90 days. 80 Fed. Reg. at 65,878; *see also* 40 C.F.R. §§ 60.5785(e)(1), 5870(g)(1). That notification must inform EPA of the emergency situation being addressed, identify the affected EGU or EGUs that are reliability-critical, and specify the modified emission standards at which the affected EGU or EGUs will operate.<sup>4</sup> 80 Fed. Reg. at 65,878; *see also* 40 C.F.R. §§ 60.5785(e)(1), 5870(g)(1). EPA will consider that notification as a short-term modification to the state plan. 80 Fed. Reg. at 65,878; *see also* 40 C.F.R. § 60.5785(e)(1).

A follow-up notification must be submitted to EPA 7 days later with more detailed information. 80 Fed. Reg. at 65,878; *see also* 40 C.F.R. §§ 60.5785(e)(1), 5870(g)(2). If the State fails to submit that documentation within the specified time period, the affected EGU(s) will be required to resume operations under the originally-approved emission standards under the state plan, regardless of the emergency at hand. 80 Fed. Reg. at 65,878; *see also* 40 C.F.R. § 60.5785(e)(1). During the 90-day period, emissions that exceed the obligations of an affected EGU or EGUs need not be offset and will not be counted against the State's overall goal or emission rate for affected EGUs. 80 Fed. Reg. at 64,879-80.

After that 90-day period, however, if the emergency continues, the State is required to revise its plan to accommodate and offset the increased emissions in excess of the applicable state goals or performance rates. *Id.* at 64,877-79; 40 C.F.R. § 60.5870(g)(3)(ii). In other words, after 90 days, *any* excess emissions beyond what is authorized in the originally-approved state plan will count against the state's overall goal or emission rate, effectively penalizing non-reliability-critical EGUs for that emergency event, even if that emergency event is continuing.

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<sup>4</sup> It is not clear whether EPA will accept an estimate of such emissions; it is highly unlikely that a State would know with any degree of certainty what modified emission standard is necessary within 48 hours of a triggering emergency.

Importantly, if a second reliability emergency arises that requires an affected EGU to operate above its individual goal or rate, no additional grace period is provided within which that EGU can operate above its rate or allowance without having to off-set those increased emissions. The State also will be required to immediately revise its state plan. 80 Fed. Reg. at 64,879.

None of those requirements were made available for public comment.

**C. The Final Rule’s Reliability Safety Valve Is Too Restrictive.**

EPA’s new safety valve provision does not provide the sector the flexibility necessary to maintain adequate and reliable electric service in the event of an emergency or unforeseen event or future changes to available generation. As NERC has described, the safety valve “[p]rovides limited flexibility if a state encounters an unexpected reliability concern” and is “[d]esignated as a short-term (90 day) narrowly focused fix.” NERC Presentation by John Moura, Director of Reliability Assessment and System Analysis, Member Representatives Committee Meeting, “Clean Power Plan Final Rule: NERC Reliability Assessment Plan (Phase II)” at 5 (Nov. 4, 2015), available at <http://www.nerc.com/gov/bot/MRC/Agenda%20Highlights%20nad%20Minutes%202013/MRC-Presentations--November-4-2015.pdf> (see page 29 of the combined slide deck). As such, NERC recognizes it is “[n]ot likely to provide large benefits to states during the compliance period.” *Id.*

Because EPA has gone “outside the fence” in defining the best system of emission reduction in the Final Rule, the ability of any State to achieve the rate or goal set by EPA depends on an interplay among different resources. It also rests on a critical assumption: that the interconnectedness of the grid will be constantly assured (or at least will experience minor interruptions for no more than 90 days) – *e.g.*, transmission capacity will be built in time to satisfy new generation needs, financing for new projects will be available, permitting will not

hold up the new generation required under the “shift” away from higher-emitting EGUs mandated by the Final Rule, lower- or zero-emitting resources will not break down, units will not retire unexpectedly before new generation is in place, and damage from natural or manmade disasters will not have prolonged effects. *See* MISO Presentation, National Conference of State Legislatures Clean Power Plan Policy Workshop, “The Changing Mix: Reliability and Infrastructure Needs at 4 (Nov. 10, 2015), available at <http://www.ncsl.org/Portals/1/Documents/energy/Bilas-present.pdf> (recognizing that “[m]ore transmission and gas pipeline capacity [is] likely needed,” that “[s]iting of infrastructure [will be] driven by [the] location of new generation & other factors” and may depend on whether siting is “[n]ear existing transmission, or gas pipelines,” and questioning whether the rule will “jeopardize resource adequacy at a local/regional level” and whether “states and utilities [will] have enough time to build & permit new resources”); *see also id.* at 12 (stating that “[t]he impacts of the CPP will be national in scope”).

**D. EPA Should Take Public Comment and Adopt a Robust Dynamic Reliability Safety Valve.**

Accepting public comment on the adequacy of EPA’s reliability safety valve provision will assist EPA in creating a workable and dynamic mechanism to provide the necessary grid and electric supply reliability. NRECA believes that an effective safety valve would include, *inter alia*, the following elements:

**1. Identification of triggering events**, including unforeseen and unavoidable circumstances or systemic changes in the availability and operability of electric energy resources. Triggering events should include (but not be limited to) large changes in available electric generation or transmission capabilities; fuel shortages or costs that impair the ability to acquire fuel, including fuel transportation shortfalls; extreme weather events; natural disasters;

acts of war; or changes in the laws, regulations, and rules affecting the availability of electric generation, transmission capabilities, or fuel.

**2. Clarification of who may apply for relief:** the owner and/or operator of an affected EGU should be permitted to petition EPA for relief, joined by an affected State or States, a RTO/ISO, and/or NERC-certified balancing authority (but such joinder should not be required).

**3. Revised content for a petition for relief, including:**

a. A description of the circumstances relating to adequate and reliable electric service that petitioner(s) believe make full or timely compliance with a state or federal plan's emission reduction budget, target, or milestone impossible, impracticable, or unreasonable;

b. An accounting of the amount by which CO<sub>2</sub> emissions are likely to exceed the budget, target, or milestone in order to ensure adequate and reliable electric service and an estimation of the duration of the anticipated exceedance;

c. A description of actions that have been or may be undertaken to remedy or mitigate the exceedance while ensuring adequate and reliable electric service, or an explanation of why such actions are impossible, impracticable, or unreasonable;

d. If mitigating actions are identified, an explanation of which actions the State, region, or entity has implemented or proposes to implement, together with an implementation schedule and an estimate of annual CO<sub>2</sub> emissions deviations from the state or federal plan during and following implementation of the selected actions; and

e. A request for temporary or permanent adjustment in the State, region, or entity's emission budget, target, or milestone as the situation requires.

**4. Expanded available relief and remedial actions:** Petitioners should be able to request prospective and/or retrospective relief from a CO<sub>2</sub> emissions budget, target, or milestone on an annual or multi-year basis to the extent required and based on the annual CO<sub>2</sub> emissions deviations estimated in the petition. EPA would have the right of annual review to ascertain that affected States, regions, and/or entities granted relief are taking the remedial actions specified in the petition to remedy the triggering circumstances (*i.e.*, the circumstances that necessitated the granted relief). Should such remedial actions become no longer viable, the affected parties should have the right to submit a revised petition identifying the factors causing the originally-identified remedial actions to be no longer viable and proposing different remedial actions or, if necessary, further relief from the state or federal plan's emission budget, target, or milestone.

**5. Scope of relief:** EPA should not, as a condition of petition, approval or partial approval, require emissions offsets and should not impose noncompliance penalties for any actions or inactions that are the subject of an approved petition or partially approved petition. Such relief should include, but not be limited to, adjustments in the compliance obligations of the affected EGUs. The availability of relief should not be limited to any particular number of triggering events, but should be granted whenever warranted. EPA should allow the relevant state or federal plan to be amended to the extent required to reflect the relief granted.

**6. Necessary due process and procedural protections, including:** A petition for relief that is submitted prior to an emissions compliance or true-up date should toll that date until EPA approves or denies the petition. EPA should be required to evaluate the petition for completeness within a reasonable time, not to exceed 60 days after submittal. EPA also should be required to request additional information within that 60-day period if additional information is needed to complete the petition. Within 30 days after the initial 60-day period has run, or if

additional information is submitted in response to a request by EPA, within 30 days after such information is submitted, EPA should propose to either grant or deny the petition, or to grant the petition in part and deny the petition in part, and should submit that proposal to the *Federal Register* for publication. EPA should take comment on its proposed action for a period of 30 days. After considering any comments submitted, EPA should take final action within 30 days of the close of the comment period in accordance with 42 U.S.C. § 7607.

**7. Mandatory consultation with FERC on reliability:** FERC should be the lead agency on matters related to the reliability of the bulk electric system, consistent with FERC's authorities under the Federal Power Act and in light of FERC's extensive expertise. Accordingly, EPA should request consultation with and guidance from FERC in matters relating to reliability of the bulk electric system as contained in a petition for relief and shall give deference to FERC's response. EPA should not be permitted to deny a petition in whole or in part without requesting such consultation from FERC.

As part of its responsibilities under the Federal Power Act, FERC as appropriate should address whether the triggering event described in the petition will affect the bulk electric system in such a way that is detrimental to adequate and reliable electric service. FERC should be required to provide its findings to EPA within 30 days for use in evaluating the petition for relief. EPA could depart from FERC's recommendations relating to reliability of the bulk electric system only if EPA adequately explains its reasons for doing so and does not act arbitrarily and capriciously.

**8. Provision for final agency action and judicial review:** EPA's action granting or denying a petition for relief in full or in part should be considered a final agency action. EPA's failure to act on a petition within the time periods provided under the dynamic reliability safety

valve provision should also be considered final agency action, reviewable in the United States Court of Appeals for the appropriate circuit in accordance with 42 U.S.C. § 7607(b).

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Because the public was not provided any opportunity to review and comment on EPA's new limited safety valve provision, and because this issue is of central and critical relevance to the workability of the Final Rule and the reliable operation of the electric grid, EPA should grant NRECA's petition for reconsideration and accept public comment on this issue.<sup>5</sup> NRECA also welcomes the opportunity to answer questions or discuss these issues further with EPA.

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<sup>5</sup> EPA also should grant reconsideration on the grounds raised in UARG's petition.