



STATE OF ARKANSAS

THE ATTORNEY GENERAL
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Environmental Protection Agency
EPA Docket Center
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

**RE: Docket No. EPA-HQ-OAR-2013-0602;
Comments submitted electronically**

To Whom It May Concern:

Please accept these comments to be included in the administrative record for Docket No. EPA-HQ-OAR-2013-0602 regarding EPA's proposed Clean Power Plan, promulgated under Section 111(d) of the Clean Air Act ("the proposed rule").

As Attorney General, I directly represent the interests of Arkansas's utility ratepayers, as well as the broader concerns of all of the citizens of the state. The proposed rule will have a devastating effect upon the interests of these ratepayers, as well as upon the economy of Arkansas. In addition, the proposed rule so significantly exceeds the authority granted to EPA by Congress that it should be withdrawn in full. Even if EPA had the authority to promulgate a rule of this breathtaking scope, the unrealistic goals imposed upon Arkansas in the proposed rule are arbitrary and unfair and they should be reconsidered.

The rule as proposed will require Arkansas to meet an almost 45% reduction in carbon emissions from electric generating units ("EGUs") by 2030. This is the 6th highest rate of reduction in the nation, imposed upon a state that currently ranks 46th in per capita income. There can be no question that the proposed rule will have a huge impact on our state's utility rates, and these rate increases will disproportionately impact low income Arkansans. In sum, the proposed rule falls hardest on one of the poorest states in America. This drastic reduction creates an economic inequity for Arkansas when compared with other states. While I recognize the importance of reducing our carbon emissions, it is also important to balance necessary change with the economic and social costs imposed upon our citizens.

There are several areas of the proposed rule that concern the State of Arkansas and, as Attorney General; I will focus on those most pertinent to Arkansas utility ratepayers. Additional concerns are discussed in the comments submitted by the Arkansas Public Service Commission and Arkansas Department of Environmental Quality. I urge EPA to carefully consider all of the comments submitted on behalf of the State of Arkansas when considering the propriety of the proposed rule itself and when finalizing the rule and setting goals for Arkansas.

1. Deadlines for state plans and implementation

I begin by thanking EPA for extending the comment period, as I requested in my August letter to Mr. Garbow. The proposed rule and its implications are extremely complex and I appreciate EPA's willingness to allow more time for review of the rule and formulation of comments. I would like to point out, however, that some of the materials crucial to evaluation of the proposed rule, including the example rate to mass conversion, were made available too late for my staff and I to fully evaluate despite the extended comment period. These should have been provided sooner or there should have been more time allowed to adequately review and comment on that information.

Turning to the state plan, the time permitted to develop and finalize it is far too short to allow Arkansas to develop an

appropriate plan. The time frame contemplated in the proposed rule, including all options for modest extensions of the deadlines, simply does not provide the state with any realistic opportunity to develop a state plan, explore regional options and then obtain EPA approval for the plan as proposed to begin implementation.

If the rule becomes final in June 2015 as is currently proposed, Arkansas will then have only one year to develop a state plan. This is patently inadequate. For example, I anticipate that the development of a state plan will likely require the Arkansas General Assembly to draft and pass legislation enabling and authorizing certain aspects of the plan. However, the Arkansas General Assembly will not have the opportunity to even consider any necessary complementary legislation until 2017, which is the next regular session after the expected date of the final rule. However, the legislation will need to be in place before the state can submit its plan to EPA for approval, meaning that the state plan cannot be finalized before mid-2017 at the earliest. Under the current proposed rule, by the time the legislation can be passed, the state will have already missed some of the proposed deadlines for its renewable goals.

Another reason to avoid premature finalization of a state plan is to allow all the pending EPA air rules to be finalized first, so that appropriate economic decisions on the future of existing power plants can be made. I expect that proposed changes to different air standards may affect the available run times of EGUs, including both coal and natural gas fired units. Economic decisions on the future of power plants depend heavily on their availability to generate electricity. Accordingly, some EGUs may be shut down, significantly idled, or otherwise unable to generate an optimal amount of energy in the near future as a result of air pollution rules. Power plants are by their nature long-term investments--the less a plant will be available to operate long-term, the less sense it makes to make large investments, including costly pollution controls.

For example, if an aging coal plant cannot be operated economically once retrofitted, the end result will be an

economic burden that will fall in the first instance on those investing in our state energy infrastructure and may ultimately be borne by the rate payers. Knowing the impact of all the rules and their associated compliance costs will greatly aid in efficient resource planning. In order to develop a state plan that properly accounts for EGUs that will continue operation under all pending EPA air rules, there must be sufficient time to allow evaluation of all the rules to make sound economic decisions before the state plan is finalized and submitted to EPA for approval.

Second, Arkansas may wish to consider and implement a regional approach to compliance as permitted under the proposed rule. However, the one-year time frame is simply unrealistic to allow sufficient time to consult with other states to determine whether a regional approach is feasible. Any regional approach will be complicated and will require consideration of many different issues not present in an individual state plan. The rule as proposed only allows for two years for this approach. That is not realistic and the time frame should be extended.

Finally, EPA should allow more time to implement the plans. New electric infrastructure requires many years to plan, permit, and construct. Lawsuits, even those lacking in any substantial merit, unavoidably prolong the process and cast uncertainty on what will really be required in the final project. Requiring plan implementation as early as 2017 to meet an interim goal in 2020 is far too aggressive and too abrupt to allow Arkansas utilities to meet the challenges of the proposed rule in a manner that is cost-effective for their ratepayers and does not cause reliability issues. In recognition of the long-term horizons for utilities, I believe the interim goal should be removed. Compliance will be much less burdensome if EPA allows the states to have a glide path instead of a cliff.

Alternatively, if EPA does not remove or extend the time frame for the interim goal, then EPA needs to allow for an extensive assessment of the reliability impacts, so that some allowance can be made if compliance with the rule would negatively affect electric reliability. There also needs to be a possibility of

some additional flexibility to prevent negative reliability impacts due to states trying to meet the goals set for them by EPA.

For these reasons, Arkansas requests: (1) at least two additional years to submit a state implementation plan; (2) at least two additional years to develop a regional plan; and (3) removal of the interim goal timeframe or at least an extension to 2025 with the final goal to be met no earlier than 2035; or for a reliability assessment with the possibility of additional flexibility to prevent negative reliability impacts.

2. Response to October 27, 2014 Notice Of Data Availability

In the October 27, 2014 Notice of Data Availability, EPA solicited comments relating to the glide path, the building block methodology, and the goal setting equation.

First, regarding the glide path, I welcome changes that ease implementation of the interim goals. Early credit for emissions reduction would help ease this interim goal. In addition, early credit would send a signal to states encouraging early action on emerging problems.

Arkansas prefers EPA phasing in building block 2 and allowing for a more gradual glide path instead of the current cliff facing our state. The electric grid is a complex machine and the implementation of building block 2 represents a major change in operations. Such a change will not be quick or easy. Furthermore, I believe that regional compliance plans will be needed to provide the lowest cost solutions. As noted above, regional plans will be complex and time-consuming to develop and implement.

I appreciate EPA's recognition of the disparate impacts between states that have invested in Natural Gas Combined Cycle units ("NGCC") and those that have not. Most generation is operated in order to meet regional needs, so it makes sense to apply building block 2 on a regional basis as well.

EPA should also consider the disparities in renewable potential between states. For example, Arkansas is in an unusual position in that we sit next to windy states, but have little wind potential of our own. The same wind turbine will produce considerably more electricity for the same investment in Kansas, Oklahoma, or Texas than it will in Arkansas. For that reason, EPA should consider both the regional potential and the in-state potential in setting its target. Most importantly, EPA should structure its rule in a way that encourages placement of renewable energy facilities in consideration of the location of the resources, and not state lines on a map.

EPA also solicited comments regarding whether it should change its formula regarding building blocks 3 and 4 to not only add resources, but also to remove 2012 fossil generation. I caution that when adding one type of resource, the effects on other resources is a difficult and complicated determination. If EPA wishes to subtract existing generation in its goal setting, then it should carefully model any changes to make it more likely that these generation changes will actually occur in the way suggested in the formula.

Finally, EPA requested consideration of other time periods for a baseline year as opposed to just 2012. I continue to support a multi-year approach, but believe that consideration should be given to 2013, not just earlier years.

3. Response to November 6, 2014 Additional Information

The EPA provided additional information on November 6, 2014 to give more insight and guidance on the Translation of the Emission Rate-based CO2 Goal to the Mass-based equivalents. Arkansas and many other states had been requesting this information for months. The late addition of this information left the states without sufficient time to fully evaluate this translation and try to determine which approach would be best for the state. This information and translation will impact our review of the rule and how it is implemented. Arkansas would requests additional time to review and comment on the

translation and also for flexibility from EPA in converting the rate-based to mass-based goals.

4. Application of Building Block 1 to Arkansas

The goal calculations used by EPA assume a 6% heat rate reduction from coal fired EGUs. However, Arkansas has two coal plants that are less than three years old and one in the middle of costly upgrades and improvements to meet the EPA Mercury and Air Toxics Standards ("MATS") rule. The new plants in particular are unlikely to be able to achieve a 6% heat rate improvement because those units are already operating at a low heat rate. Also, operating the coal-fired plants at a lower generation capacity will increase the average heat rate of the plants. Finally, I note that between 2012 and 2020, at least one of Arkansas's coal plants will be retrofitted for MATS compliance. Doing so will increase the heat rate, making the 6% reduction even more unreasonable and unachievable.

5. Application of Building Block 2 to Arkansas

Fuel switching from coal to natural gas will require the early retirement of coal plants, increase fuel costs, require additional infrastructure to deliver the increased volume of natural gas, and result in an increase in natural gas prices due to the increased demand. The current estimates are that Arkansas utility bills will likely increase 10-30%. It will also negatively impact the reliability of service until infrastructure and supply can adjust.

Arkansas's coal plants were designed and built to provide baseload power, while the non-merchant NGCC units were designed to provide electricity during periods of higher demand. To change the purpose and design of these units so drastically will have a substantial adverse impact on utility rates and the reliability of service. Requiring coal plants to run at a lower capacity than they were designed to do will have the paradoxical effect of significantly reducing the efficiency of those plants, in addition to the wasted costs of closing plants with many years of remaining useful life.

In addition, there are significant problems with the calculation of Building Block 2 for Arkansas. I share the concerns expressed in the joint comments of the Arkansas Department of Environmental Quality and Arkansas Public Service Commission, including accounting for the Pine Bluff Energy Center, EPA's use of nameplate capacity instead of summer-rated capacity, air permit limitations, natural gas delivery constraints, and electric transmission limitations. All of these issues need to be fully reviewed and addressed by EPA in the final rule.

I request that: (1) the emissions goal be recalculated to account for the above concerns; and (2) the timeframe for implementation and interim and final goals be extended as requested in Item #1, above, to allow for appropriate planning and to soften the economic impact on consumers.

6. Application of Building Blocks 3 and 4 to Arkansas

EPA's renewable energy goal for Arkansas is based on the Kansas Renewable Portfolio standard ("RPS"). That standard is based on nameplate capacity of the renewable resource, and not on the energy generated. Also, Kansas counts existing hydropower and includes a bonus multiplier for in-state renewable generation. Because of this, the Kansas RPS appears to be more stringent than it actually is, and Arkansas, as a member of Kansas's region, has been given significantly overstated renewable resource goals. In fact, in the preamble to the proposed rule, EPA states that the renewable standard will be set based upon renewable generation and not capacity. However, this does not seem to have been the case with Arkansas's region.

EPA's Building Block 4 goals are based on a very aggressive implementation of energy efficiency. Energy efficiency programs tend to drive up rates, even when weighed against avoided generation and fuel savings. Although program participants' bills may decrease, the fixed cost of paying for existing assets is spread over a smaller pool of purchases, and some customers may never have a meaningful opportunity to participate. These non-participants then pay more than they would have had

traditional resources been purchased instead. This adversely affected group includes some of our poorest citizens who cannot afford energy efficiency investments, and industries and other consumers that may already be doing all they can to save electricity.

I suggest that the impact of these problems can be decreased by eliminating renewable energy sources and energy efficiency from the emissions reduction goal, but still allow them to be counted towards compliance with the overall goal. This will allow states to determine the appropriate level of energy efficiency and renewable energy sources based on the characteristics of each state, and will eliminate the incentive to build renewable infrastructure in sub-optimal locations.

7. Enforcement

The proposed rule does not provide any guidance or information as to what EPA envisions for a federal plan if a state is unable or unwilling to submit an acceptable state plan. In order for states to fully evaluate the impact of a potential federal plan, EPA should fully describe the components and the path for implementation of a federal plan.

In addition, there is also insufficient information regarding how the proposed rule would be enforced by EPA or the states, making it impossible to determine whether comments on enforcement are appropriate. The lack of information on enforcement also leaves state planners and utilities at a disadvantage while attempting to predict all of the potential impacts of the rule. The final rule should make clear how EPA contemplates that the rule would be enforced, so that the states and industry are on notice and can plan accordingly.

8. Legal authority

As has already been pointed out by many other states, the authority of EPA to regulate carbon dioxide on such a broad scale is questionable at best. The proposed rule is certain to be challenged as beyond the scope of EPA's authority, and as

currently drafted, that challenge is likely to be successful, thus delaying or even defeating the goals EPA seeks to achieve. I encourage EPA to address these issues now and to conform the scope of the proposed rule to the limits of its authority, and thereby save every interested and affected party from the additional economic and environmental costs certain to result from this ill-advised proposed rule. I will discuss the legal issues of most significant concern below.

First, the proposed rule is unlawful because EPA regulates coal-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412 ("CAA"), and therefore Section 111(d) cannot authorize the proposed action in this context. Section 111(d) specifically prohibits EPA from invoking Section 111(d) where the "source category...is regulated under section [112]...." 42 U.S.C. § 7411(d)(1)(A)(i). Under *Chevron*, agencies are entitled to some deference in their interpretation, but no deference applies when the language of a statute is plain and unambiguous, as it is here. Therefore, the plain language of the CAA will prevail and the proposed rule will be invalidated. The EPA should not attempt to expand its authority and regulate coal-fired plants under both Sections 111(d) and 112 of the CAA.

Second, although I believe that regulation under Section 111(d) is not appropriate because EGUs are regulated under Section 112 of the CAA, even assuming that Section 111(d) is applicable, the proposed rule is also improper because EPA has not completed Section 111(b) "new source" regulation of carbon dioxide emission from coal-fired power plants. Under Section 111(d)(1)(a)(ii), there must be a performance standard for new sources as a condition precedent to the development of such a standard for existing sources. Currently, the Section 111(b) rule for "new source" emissions has been proposed, but is not finalized and the requirement is thus not met.

Third, the proposed rule would vastly increase EPA's encroachment into the management of states' energy generation and usage. Rather than addressing air pollution, which is the crux of EPA's authorized responsibility over the states, the proposed rule seems to be attempting to impose a national energy

policy in the guise of air pollution regulation. That is clearly beyond EPA's legal authority to act.

Fourth, the proposed rule mandates what each state *must* achieve, rather than what EPA is actually authorized to do by Section 111(d), which is: provide guidelines and appropriate procedures for states to use in establishing standards of performance for sources under their jurisdiction. This is a vast departure from the approach taken with the implementation of other limits set by the CAA or other EPA rules.

Fifth, it has not been adequately demonstrated that the proposed rule reflects the best integrated approach for emissions reductions. Although some of the pieces of the approach may potentially work separately, it has not been shown that they will work together. Further, some of the different pieces will not function synergistically, e.g. improvements in heat rates in coal plants may not be achievable when they are forced to operate at a lower capacity factor. The lack of adequate demonstration therefore does not meet the requirements to be "best system of emission reduction" ("BSER") for standard of performance for emission reduction as required by the statute and EPA implementing regulations. 42 U.S.C. 7411(a)(1); 40 C.F.R. §§60.20-60.29 (2013).

Sixth, the proposed rule attempts to force states to regulate energy consumption and generation of every kind through the guise of reducing emissions from fossil fuel-fired power plants. This application "beyond the fence line" goes beyond Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply to existing power plants themselves. See e.g., 40 C.F.R. § 60.21 ("adequately demonstrated *for designated facilities.*" (emphasis added)); 40 C.F.R. §60.21(b) (A "designated facility" means "any *existing facility* which emits a designated pollutant and which would be subject to a standard of performance for that pollutant if the existing facility were an affected facility.") (emphasis added)). The proposed rule is therefore inconsistent with the plain language of the existing regulations and the Clean Air Act itself.

Finally, the proposed rule is inconsistent with the long-recognized balance of authority between state and federal regulators under the Federal Power Act, 16 U.S.C. § 791, et al. The CAA provides only for EPA to establish guidelines and does not give it the authority to impose strict mandates on the states. Section 111(d) does not directly authorize EPA to establish standards of performance for existing sources. It merely directs EPA to "prescribe regulations which shall establish a procedure similar to that under CAA §110 under which each state shall submit to EPA a plan which...establishes standards of performance" for existing sources within the state. CAA § 111(d)(1). This proposed rule exceeds the authority given to EPA.

Conclusion

In sum, the proposed rule will require Arkansas to make very large and costly reductions in carbon dioxide emissions and the goals set do not adequately consider the unique circumstances facing the state in making these reductions. The implications for my state will be far reaching and will impose a great economic hardship. I believe that EPA should allow the states more control over the reductions that are achievable and the timing of implementation. Further, EPA's legal foundation to issue the proposed rule is highly questionable. Taking this together with the arbitrary manner in which the proposed rule has been proposed, the rule will face numerous legal challenges and will likely be ultimately overturned.

I therefore urge EPA to consider my comments as well as the comments submitted by other Arkansas stakeholders and to either withdraw the proposed rule or amend it to reduce the enormously disproportionate adverse impact on Arkansas.

Sincerely,



Dustin McDaniel
Attorney General