AMERICAN COALITION FOR CLEAN COAL ELECTRICITY

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

In the Matter of Regulation No. 18, Arkansas Air Pollution Control Code Third Party Rulemaking — **Docket No. 08-005-R**

and

In the Matter of Regulation No. 26, Regulation of the Arkansas Operating Air Permit Program Third Party Rulemaking — **Docket No. 08-006-R**

COMMENTS OF AMERICAN COALITION FOR CLEAN COAL ELECTRICITY

Introduction

The American Coalition for Clean Coal Electricity (ACCCE) appreciates the opportunity to submit these comments. ACCCE is an association of electric utilities, coal mining companies, railroads and associated companies that advocate public policies that advance environmental improvement, economic prosperity, and energy security. ACCCE believes that the robust utilization of coal – America's most abundant energy resource – is essential to providing affordable, reliable electricity for millions of U.S. consumers and a growing domestic economy. Further, ACCCE is committed to continued and enhanced U.S. leadership in developing and deploying new, advanced clean coal technologies that protect and improve the environment.

We urge the Commission to deny the petitions filed in these dockets. Contrary to the assertions of the petitions, the regulatory changes sought would have the very real and immediate effect of beginning full-scale regulation of carbon dioxide (CO_2) in Arkansas, well ahead of any

federal requirement to do so. This would lead to huge costs for Arkansas consumers and businesses and to an unprecedented expansion of this Commission's regulatory authority.

Because of the dramatic effects these requested regulatory changes would have, the necessary rulemaking proceedings would be lengthy, costly and controversial, and would require a great deal of underlying analysis. Such proceedings are, at least, premature and wasteful. Congress is considering a national program for controlling greenhouse gases ("GHGs"), and the Environmental Protection Agency ("EPA") is considering a national GHG regulatory program under the Clean Air Act. The program that Congress and/or EPA ultimately adopts could make a separate Arkansas program administered by this Commission unnecessary. At a minimum, it would affect the type of program this Commission should adopt. The Commission should deny the petitions, not proceed to rulemaking at this time, and await the outcome of the federal program.

Discussion

The petitions ask this Commission to include CO_2 in the definition of "air contaminant" for purposes of this Commission's Regulation 18 and Regulation 26. The petitions state that doing so would not result in any new regulatory standards, procedures, or requirements and even refers to the requested change in definition as merely as an "update." These statements, however, are disingenuous. The requested definitional change, in fact, would greatly expand the number of sources subject to this Commission's jurisdiction and which could not be built or operated without an air quality permit.

To understand the full effect of the requested revision, we must look at how the term "air contaminant" is used in the Arkansas statutes and regulations. The Arkansas Air Pollution Control Act, Section 8-4-310, makes it unlawful to "construct, install, use, or operate any source capable of emitting air contaminants without having first obtained a permit to do so." Arkansas Rule 18, Section 18.301, states that "no person shall cause or permit the operation, construction,

or modification of a stationary source, which actually emits … 25 tons per year or more of any other air contaminant without first obtaining a permit from the Department." Similarly, Arkansas Rule 26, Section 26.305 provides that all "recognized air contaminant emissions from a part 70 source [a source regulated under Rule 26] shall be included in a part 70 permit."

Therefore, if the term "air contaminant" includes CO_2, these provisions will subject all sources that emit more than 25 tons of CO_2 in a year to permitting requirements.

This would be an unprecedented expansion of this Commission's permitting authority. Although 25 tons per year may be a great deal of traditional air pollutants like sulfur dioxide and nitrogen dioxide, it is a minuscule amount of CO_2. Any 10,000 square foot building – about the size of a very large house - that relies on natural gas or oil for heating likely emits around 25 tons of CO_2 per year. Thus, if "air contaminant" is revised to include CO_2, thousands of facilities would have to get air permits that have never been required to do so before – schools, churches, hotels, hospitals, assisted living facilities, retail stores, restaurants, sports arenas, office buildings, and many others. These facilities would be subject to the Arkansas air permitting program simply for running their heaters.

The petitions are also disingenuous in arguing that the proposed definitional change is a necessary "update" in light of the Supreme Court's Massachusetts decision. Massachusetts held that greenhouse gases, including CO_2, are "air pollutants" for purposes of the federal Clean Air Act ("CAA"). But the regulatory consequence of defining CO_2 as a CAA "air pollutant" and defining it as an "air contaminant" under this Commission's Regulations 18 and 26 are entirely different. As the Supreme Court explicitly found, the fact that a substance is a CAA "air pollutant" does not, in and of itself, trigger regulatory consequences. EPA must first find that the "air pollutant" may reasonably be anticipated to endanger public health or welfare, sometimes referred to as an Endangerment Finding, and determine an appropriate regulatory program. The Court did not order EPA to make an Endangerment Finding for CO_2 or order it to regulate. To

the contrary, it remanded the case for EPA, in its discretion, to make, or not make, an Endangerment Finding.[1]

As a result, at present, there is no federal CO_2 regulation. EPA has announced its intention in the near future to issue an Advance Notice of Proposed Regulation (ANPR) to consider proposing CAA greenhouse gas regulations. The public will have an opportunity to comment on the ANPR, and then EPA sometime in the future may or may not issue a proposed Endangerment Finding and regulations, and such proposal, if issued, will trigger another round of comments.

In contrast, defining CO_2 as an "air contaminant" under this Commission's regulations, as petitioners request, automatically triggers regulatory consequences. Unlike the Clean Air Act, once a substance has been defined as an "air contaminant" under this Commission's regulations, a facility emitting above the 25 ton per year threshold is automatically subject to this Commission's regulations. No endangerment finding must first be made. Thus, while the Supreme Court's decision did not trigger regulatory consequences, the regulatory change requested here would result in a drastic regulatory change.

For the same reasons, the Petitions are also disingenuous in claiming that the requested definitional change would not result in regulations more strict than federal law. Federal law currently does not provide for CO_2 regulation, but Arkansas law would if the petitions are granted.

Indeed, even if CO_2 is eventually regulated under the Clean Air Act, the federal regulation will be considerably less stringent than sought here. The emission thresholds under the Clean Air Act for Prevention of Significant Deterioration construction permits and Title V operating permits is 100 tons per year if the source is within one of the 28 statutorily listed

[1] *Massachusetts v. EPA*, 127 S. Ct. 1438, 1460-64 (2007).

sources or 250 tons per year if the source is in an unlisted category.[2] Here, the threshold would be 25 tons per year. Ironically, the Sierra Club, one of the petitioners here, recently told Congress that the statutory 100/250 ton per year thresholds are too low for CO_2 and should be revised upward. As its representative stated, "Sierra Club believes that imposing individual permitting requirements on CO2 sources emitting at that [100/250 ton per year] level is unnecessary and that the appropriate regulatory threshold for such permitting is more likely to be in the range of 5,000 – 10,000 tpy."[3] Yet here the practical effect of their requested revision would be a 25 ton per year threshold.

Because the regulatory change requested by petitioners would be more stringent than federal regulation, it could not be adopted without following the procedures set forth in section 3.5 of Regulation 8, including preparation of an extremely detailed Economic Impact/Environmental Analysis. Given the dramatic regulatory consequences the regulatory change would unleash, and the large cost to society if this Commission were to regulate CO_2, the Commission would in any event need to provide for a great deal of analysis and public comment before regulating CO_2 as requested. The process would inevitably be highly time-consuming and expensive. Indeed, as indicated by the global warming science statements made in the petitions, the Commission would likely need to conduct a detailed review of the science.

For all of these reasons, the Commission should not initiate rulemaking proceedings as requested and proceed down the regulatory path that is sought. Arkansas on its own can do nothing about global climate change. Congress is actively considering climate change legislation, and although no final action is expected this year, a national program seems inevitable at some point given the positions of both presidential candidates. As stated, EPA is about to initiate rulemaking proceedings. At this time, the significant regulatory undertaking

[2] 42 U.S.C. §§ 7475, 7479.
[3] Testimony of David Bookbinder, Chief Climate Counsel, Sierra Club, Before the House Select Committee on Energy Independence and Global Warming, March 13, 2008, p. 9.

petitioners recommend is premature and wasteful given the prospect of a federal program. The petitions should be denied.

Thank you again for the opportunity to present these comments.