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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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December 1, 2011

The Honorable Cass R. Sunstein  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
Eisenhower Executive Office Building  
1650 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear Administrator Sunstein:

On November 1, 2011, the House Committee on Oversight and Government Reform held a hearing entitled “Lights Out II: Should EPA Take a Step Back to Fully Consider Utility MACT’s Impact on Job Creation?” The hearing sought to examine whether the Environmental Protection Agency (EPA) has sufficiently analyzed the impacts of the Utility MACT rule and fulfilled its obligation under Executive Orders 12866 and 13563, the Administrative Procedure Act, and other statutes governing the rulemaking process.<sup>1</sup> As you are aware, EPA is slated to issue the final Utility MACT rule on December 16, 2011, pursuant to the terms of a consent decree. The rule was transmitted to the Office of Information and Regulatory Affairs (OIRA) on October 24, 2011. Based on these hearings, there is significant concern that this rule will impose a tremendous burden on the economy both directly through implementation costs, and indirectly through higher electricity rates. In addition, there is concern that this rule could unintentionally jeopardize the reliability of our electric grid.

The Attorney General for the Commonwealth of Virginia, Ken Cuccinelli, expressed many of these concerns to the Committee on November 1, 2011.<sup>2</sup> As you know, General Cuccinelli and 24 other Attorneys General from across the country asked the D.C. Circuit Court to grant EPA another year to work on the regulation. Mr. Cuccinelli’s testimony articulated the concerns outlined in the amicus brief filed by this

<sup>1</sup> Executive Order 13563 Fed. Reg. 76 3821 (Jan. 21, 2011).

<sup>2</sup> *Lights Out II: Should EPA Take a Step Back to Fully Consider Utility MACT’s Impact on Job Creation?: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112<sup>th</sup> Cong. (2011) (testimony of Hon. Ken Cuccinelli, Attorney General, Commonwealth of Virginia).

group. These Attorneys General believe that EPA has not conducted an adequate analysis of the rule.<sup>3</sup> After holding two hearings on the matter, and sending multiple letters to EPA and the Federal Energy Regulatory Commission (FERC), the Committee shares many of these same concerns. Accordingly, I respectfully request that OIRA return the rule to the agency with instructions to study the impact that the rule will have on job creation as a result of higher energy costs, analyze the impact the rule could have on the reliability of the electric grid, and complete an adequate analysis of the comments received.

As you correctly stated in testimony before the Committee, “Agencies must propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, a clear endorsement of cost-benefit analysis [and] tailor its regulations to impose the least burden on society.”<sup>4</sup> Echoing your point and as part of its oversight responsibilities, this Committee has investigated the adequacy of EPA’s analysis with respect to the impact Utility MACT will have on the economy and on job creation. The Committee is not satisfied that EPA has conducted a good faith analysis of the employment impact of the rule. EPA Deputy Administrator Bob Perciasepe testified that 9,000 net jobs will be created as a result of the Utility MACT rule.<sup>5</sup> However, Mr. Perciasepe conceded that EPA’s jobs analysis failed to look at the impact that higher energy prices would have on employment.<sup>6</sup> While the regulatory impact analysis clearly states that “... Industries that use electricity will face higher electricity prices as a result of the toxics rule, reduce output, and demand less labor,” EPA did not “quantify these as potential employment gains or losses.”<sup>7</sup> While EPA has refused to conduct this analysis, others have. A study by National Economic Research Associates found that average retail electricity prices will increase by an average of 6.5 percent and result in a loss of 186,000 jobs per year due to the cumulative impact of the rules.<sup>8</sup> This omission flies in the face of the cost benefit analysis agencies are required to undertake as specified by Section 1 of Executive Order 13563 issued by President Obama.<sup>9</sup>

The Committee is also troubled by EPA’s failure to adequately study the impact that this and other EPA regulations will have on grid reliability. During the rulemaking

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<sup>3</sup> Brief for the State of Michigan, et al as Amici Curia Supporting Defendants, *American Nurses Assoc. v. Jackson*.

<sup>4</sup> *How a Broken Process Leads to Flawed Regulations: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112<sup>th</sup> Cong. (2011) (testimony of Cass Sunstein, Administrator, OIRA).

<sup>5</sup> *Lights Out II: Should EPA Take a Step Back to Fully Consider Utility MACT’s Impact on Job Creation?: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112<sup>th</sup> Cong. (2011) (testimony of Bob Perciasepe, Deputy Administrator, EPA).

<sup>6</sup> *Lights Out: How EPA Regulations Threaten Affordable Power and Job Creation: Hearing Before Subcomm. On Regulatory Affairs, Government Spending and Stimulus Oversight*, 112<sup>th</sup> Cong. (2011) (testimony of Bob Perciasepe, Deputy Administrator, EPA).

<sup>7</sup> Regulatory Impact Analysis of the Proposed Toxics Rule: Final Report Mar. 2011.

<sup>8</sup> National Economic Research Associates, *Potential Impacts of EPA Air, Coal Combustion residuals, and Cooling Water Regulations*, Sept. 2011.

<sup>9</sup> Executive Order 13563 Fed. Reg. 76 3821 (Jan. 21, 2011).

process, EPA and FERC conducted preliminary and infrequent reliability consultations.<sup>10</sup> However, these consultations came to an abrupt and premature end before the Utility MACT rule was officially proposed.<sup>11</sup> Noting this information gap, the Committee requested that FERC and EPA conduct studies of how the cumulative impact of EPA's utility regulations, including Utility MACT, could impair grid reliability.<sup>12</sup> However, both agencies have refused to do so.<sup>13</sup>

EPA's steadfast refusal to ascertain the impact its regulatory actions will have on grid reliability is troubling. Moreover, evidence suggests that early in the rulemaking process career staff at EPA did recognize the relationship between the regulations and grid reliability, including a discussion of it in drafts of the proposed rule.<sup>14</sup> However, all mention of grid reliability concerns was removed before the rule was formally proposed in May 2011.<sup>15</sup>

Local and regional power groups have been vociferous in expressing their apprehension toward EPA's actions and the rule's corresponding impact on grid reliability.<sup>16</sup> EPA's failure to acknowledge the impact its regulations could have on grid reliability in the notice of proposed rulemaking prevented these major stakeholders from providing meaningful comment on the rule and restricted the public from learning about the EPA staff's concerns about the impact of the rule.<sup>17</sup> Through these actions, it appears that EPA has purposefully ignored grid reliability issues. For instance, Mr. Perciasepe's November 1<sup>st</sup> statement that "the lights will not go out" reflects a disregard for concerns raised by numerous independent bodies.<sup>18</sup> Furthermore, EPA Administrator Lisa Jackson has brushed off these concerns as mere "industry lobbying."<sup>19</sup> In fact, just recently, the North American Electric Reliability Corporation (NERC), the quasi-governmental body

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<sup>10</sup> Letter from Jon Wellinghoff, Chairman, FERC to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform (Sept. 2, 2011) (on file with author).

<sup>11</sup> *Id.*

<sup>12</sup> Letter from Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Jon Wellinghoff Chairman, FERC (Oct. 20, 2011) (on file with author); Letter from Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Bob Perciasepe, Deputy Administrator, EPA (Aug. 19, 2011) (on file with author).

<sup>13</sup> Letter from Arvin Ganesan, Associate Administrator, EPA, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform (Oct. 3, 2011) (on file with author); Letter from Jon Wellinghoff, Chairman, FERC, to Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform (Nov. 3, 2011) (on file with author).

<sup>14</sup> Op Ed, *The EPA's Reliability Cover-Up*, WALL ST. J., Nov. 14, 2011.

<sup>15</sup> *Id.*

<sup>16</sup> Letter from John E. "Butch" Howard, Chairman, Pub. Serv. Comm'n of South Carolina, et al., to Kimberly Bose, Secretary, FERC (Sept. 1, 2011) (on file with author) (Six states have also filed petitions with FERC asking the Commission to examine the impacts of EPA's regulatory regime because the agency failed to do so itself.)

<sup>17</sup> Op Ed, *The EPA's Reliability Cover-Up*, WALL ST. J., Nov. 14, 2011.

<sup>18</sup> *Lights Out II: Should EPA Take a Step Back to Fully Consider Utility MACT's Impact on Job Creation?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112<sup>th</sup> Cong. (2011) (testimony of Bob Perciasepe, Deputy Administrator, EPA).

<sup>19</sup> Lisa Jackson, Op Ed, *Too Dirty to Fail*, L.A. TIMES, Oct. 21, 2011.

charged with ensuring the reliability of the electric grid, released its 2011 Long-Term Reliability Assessment, which identified EPA's utility regulations as the greatest risk to grid reliability in the near future.<sup>20</sup>

Finally, the Committee is concerned that EPA has not dedicated adequate time and resources to evaluating the public comments the agency has received. Mr. Perciasepe testified before the Committee that EPA received 22,000 unique public comments on the Utility MACT rule.<sup>21</sup> While the volume of public comments is far greater than any other rule issued by EPA that will impact the utility industry, EPA has dedicated the least number of days to analyze, respond to, and incorporate feedback from the public.<sup>22</sup> In addition to its own lack of meaningful analysis, it appears that EPA has negotiated a deadline for promulgation of this rule that effectively truncates OIRA's analysis of the rulemaking.<sup>23</sup>

In light of these concerns, the Committee asks you to return the regulation to EPA so that it may complete appropriate analysis of the rule. If you decline to take such action, please respond to the following questions:

1. Explain why you believe EPA has conducted adequate review of the large volume of comments received for Utility MACT given that they have only spent 134 days reviewing these comments.
2. Why has OIRA not insisted on 60 days to review the rule?
3. Why is OIRA not insisting on a thorough analysis of the employment impact of the rule?
4. Why is OIRA permitting EPA to ignore the cumulative impact its regulations are having on the utility sector and grid reliability?
5. Has OIRA considered and reviewed the findings of NERC's 2011 Long-Term Reliability Assessment<sup>24</sup> and if so, how did it impact OIRA's review of the Utility MACT rule?

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<sup>20</sup> North American Electric Reliability Corporation, 2011 Long-Term Reliability Assessment, Nov. 2011.

<sup>21</sup> *Lights Out II: Should EPA Take a Step Back to Fully Consider Utility MACT's Impact on Job Creation?: Hearing Before the H. Comm. on Oversight and Gov't Reform, 112<sup>th</sup> Cong. (2011)* (testimony of Bob Perciasepe, Deputy Administrator, EPA).

<sup>22</sup> EPA took 278 days to analyze the comments for the Cross State Air Pollution Rule, 345 days for the Clean Air Interstate Rule, and 350 days for the Clean Air Mercury Rule. EPA left itself only 134 days to analyze all of the comments for Utility MACT.

<sup>23</sup> Stipulation Filed in *American Nurses Assoc. v. Jackson* (Oct. 21, 2011).

<sup>24</sup> North American Electric Reliability Corporation, 2011 Long-Term Reliability Assessment, Nov. 2011.

The Honorable Cass R. Sunstein  
December 1, 2011  
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Please provide this information no later than 5:00 p.m. on December 15, 2011. If you have any questions about this request, please contact Joseph Brazauskas or Ryan Hambleton of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman



Jim Jordan  
Chairman  
Subcommittee on Regulatory  
Affairs, Stimulus Oversight and  
Government Spending

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Dennis Kucinich, Ranking Minority Member, Subcommittee on  
Regulatory Affairs, Stimulus Oversight, and Government Spending