"SAFETY VALVE" DOES NOT SOLVE THE GRID RELIABILITY PROBLEMS CAUSED BY EPA'S POWER SECTOR RULES

NATIONAL MINING ASSOCIATION

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I. Introduction

The Environmental Protection Agency (EPA) and the PJM Interconnection, apparently on behalf of some but not all of the other regional transmission organizations (RTOs) and independent system operators (ISOs), are discussing the terms of a safety valve proposal that is intended to mitigate the danger that EPA's power sector rules pose to the reliable operation of the electric grid. Although the RTOs and ISOs have offered the proposal in a good faith effort to address the EPA rules, the proposal is no answer to the systemic grid reliability problems created by EPA. The proposal is conceptually and legally flawed and unlikely to work.

Indeed, at this point, discussion of the role of a safety valve in addressing EPA's rules is premature because no study has been done that authoritatively defines the nature of the reliability problems, particularly local reliability problems, that those rules will create. As discussed below, it is known that EPA has dramatically underestimated the number of units its rules will force into retirement and that the ensuing reliability problems could be widespread and significant. But no study has been performed that examines the location of the units that will retire and what impact those retirements will have on local operation of the grid, impacts that, although local in origin may cascade and "impact an entire region" and not "just the immediate area surrounding a power plant.[1]

As both the Federal Energy Regulatory Commission (FERC) and a number of RTOs have told EPA, the true impact of the EPA regulations cannot be known until the local grid-reliability impacts of EPA-forced retirements are determined. EPA has not performed that study nor has any other entity. Until such a study is done, the contours of the reliability problem that EPA's rules will create cannot be defined with sufficient specificity to define a workable solution, including what role a safety valve might play, if any. Absent the necessary study, the safety valve is like putting a band aid on a wound of unknown dimension.

Moreover, and critically, because the grid reliability impacts of the EPA rules have not been properly assessed, one of the great failings of the safety valve approach is that the cost of the solution to the problem EPA is creating is not known in advance. How much will it cost the country to replace the units that EPA is forcing to retire in order to maintain the integrity of the electric grid? How much will rates increase and how many jobs will be lost? These and other questions remain unanswered. The country, instead, is being asked to give a blank check to fund whatever solution proves to be necessary.

A related problem is that the safety valve provides virtually no role for state public utility commissions (PUCs). PUCs are the ultimate protectors of the interest of electric consumers, and, to balance the interest of ratepayers, utility shareholders and the public, most PUCs have

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[1] Statement by Thomas Farrell, II, Chairman and CEO, Dominion, on Behalf of the Edison Electric Institute, FERC Docket No. RC11-6-000 (Nov. 22, 2011).

integrated resource plan (IRP) requirements under which utility investments are planned through a process with stakeholder participation. The safety valve, however, creates a series of separate ad hoc processes in which utilities, and therefore possibly ratepayers, become potentially locked into funding future projects to replace EPA-forced retirements that have not been reviewed through the IRP process with ratepayer interests in mind. Indeed, the more than 6-page safety valve concept paper nowhere even mentions ratepayer interests.

Another failing of the safety valve is that it does not address the problem faced by the large number of units that can economically install controls to meet the rule and do not wish to retire, but which can't install the controls by the compliance deadline. A wealth of information was submitted in comments to EPA on the MATS rule that 3 and even 4 years is not enough time to install the controls needed to comply with the rule. The safety valve, however, does not apply to these units that do not wish to retire and instead would install controls if they had time to do so. Thus, the proposal does nothing to prevent relatively newer and more efficient units from being forced into retirement solely because they need more time to come into compliance, thereby making a bad reliability situation worse. Nor does the safety valve address the "challenges of meeting load demand while scheduling control installations," which the Edison Electric Institute has stated may constitute an "even greater" reliability problem than managing retirements.[2]

There may also be significant legal problems associated with the safety valve, including the lack of EPA and FERC authority under the Clean Air Act (CAA) and Federal Power Act (FPA), respectively, to take the actions contemplated by the safety valve, as well as the failure of EPA to provide for notice and comment rulemaking on the safety valve proposal. And even putting aside the questionable legal basis under which EPA would allow units to operate beyond the compliance time periods set forth in the CAA, the mechanism under which EPA would excuse these CAA violations evidently is a consent decree between EPA and the utility. But utilities may be reluctant to enter into consent decrees which require them to concede they are violating the statute and that may contain provisions that they find to be disadvantageous.

Moreover, the safety valve cannot ensure generators that they will be immunized against penalties arising from citizens suits where they violate CAA requirements, even if they do so with EPA's consent. Thus, the safety valve does not provide the certainty generators need in avoiding conflicts between energy and environmental regulators. The safety valve mechanism is also cumbersome and does not provide a certain outcome – either that the compliance extension will be granted or that revenues will be sufficient to support continued operation if the extension

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[2] *Id.* And, as PJM recently stated, "PJM and the other RTOs made clear that EPA needs to provide similar unit-specific relief where the RTO or other reliability authority determines that retrofit of units needed for reliability cannot be accomplished within the four years allotted under the MATS rule." Testimony of Michael J. Kormos, Senior Vice-President PJM Interconnection, L.L.C., FERC Docket No. AD12-1-000 (Nov. 22, 2011). (But note, the proposed MATS rule does not even provide for a four-year compliance period; it provides for a three-year compliance period with the possibility of a one-year extension in some cases).

is granted. Utilities may therefore opt to close down generation rather than pursue the safety valve, and this is a result regulators cannot prevent under current law.

Plainly, the first step in developing a solution to the reliability impacts of EPA's regulations is to undertake a study that defines the problem that needs solving. At this point, however, instead of doing a study to define the problem, a premature and, at best, woefully incomplete solution is being negotiated under extreme time pressure and without broad stakeholder input and notice and comment rulemaking, as EPA rushes to complete the MATS rule and put it into effect. Even supporters of the safety valve in concept recognize that "[t]he safety valve proposal ... would provide regional solutions to a specific reliability constraint, but ***the magnitude of the relief required should not be overlooked.*** Relief from the application of the rules to maintain resource adequacy begs ***a host of new and complicated questions*** around how to judge which generators are allowed outages and in what order."[3] And, the leading proponent of the safety valve, PJM, concedes that "***the number of potential retirements and retrofits, and the tight timeframe associated with the same, could be unprecedented in scope, thus 'stress-testing' these tools to a degree to which they have not been utilized before*** .... [t]he Reliability Safety Valve is hardly bullet proof."[4]

A far more logical approach would be either for EPA to delay promulgating the rule until the study is done, or at a minimum for EPA to promulgate the rule but delay placing it into effect until the study is done.[5] What should not occur is what appears to be happening now, where EPA may adopt the rule with the fig leaf of what is likely to be, at best, some concept-level ideas for a safety valve – and then pretend that the reliability problem has been solved when it hasn't.

II. The Reliability Problem

Entities with grid reliability responsibility and expertise have raised concerns and indeed alarm about the effect EPA's power sector regulations will have on the grid:

- The Southwest Power Pool (SPP), the RTO approved by FERC to plan and operate the regional transmission system and wholesale electric market in 8 southwestern states, informed EPA on September 20 that SPP's analysis of the Cross-State Air Pollution Rule (CSAPR) "indicates ***serious, negative implications to the reliable operation of the electric grid in the SPP region raising the possibility of rolling blackouts or cascading outages that would***

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[3] Comments of the Midwest Independent Transmission System Operator, Inc., FERC Docket No. AD12-1-000 (Nov. 22, 2011) (emphasis supplied).

[4] Testimony of Michael J. Kormos, Senior Vice-President PJM Interconnection, L.L.C., FERC Docket No. AD12-1-000 (Nov. 22, 2011) (emphasis supplied).

[5] EPA promulgated the "Industrial Boiler MACT" rule in compliance with a court-ordered Consent Decree but nevertheless delayed putting the rule into effect.

likely have significant impacts on human health, public safety and commercial activity."[6]

- A September 1, 2011 study by the Electric Reliability Council of Texas (ERCOT), the entity that operates the electric grid and manages the deregulated market for most of Texas, concluded that Texas is at risk of rolling blackouts this Winter and next Summer as a result of EPA's rules.

- A new study just issued by the Midwest Independent Transmission System Operator (MISO), the RTO for a 12-state region and the Province of Manitoba, concluded that the number of retirements that will result from EPA's rules will be far higher than EPA projects and that the cost of compliance with those rules within the MISO region could be as high as $33 billion. The MISO study identified hundreds of millions of dollars in transmission upgrades needed to mitigate those retirements that cannot be permitted and constructed by the time the EPA's Mercury and Air Toxics Standards (MATS) rule goes into effect. As MISO recently told FERC, "***[r]eliability in the Midwest will be severely challenged through implementation of the proposed rules.***" According to MISO, "MISO expects generation retirements to eliminate all generation capacity above minimum capacity requirements."[7]

- FERC's Chairman criticized the methodology employed by most studies of the impact on reliability of EPA's rules performed to date (including the EPA analysis), which simply count retiring megawatts, but ignore local reliability concerns. Chairman Wellinghoff described these studies as producing "irrelevant" results, because they failed to assess the location where EPA-forced unit retirements will occur. FERC staff also criticized EPA's failure to assess each of its power sector regulations cumulatively with all of its other power sector regulations. An August 4, 2011 joint letter by several RTOs and ISOs to EPA made the same points.

- A preliminary analysis by the FERC Office of Electric Reliability last year determined that 131 GW of electric generation was "very likely," "likely," or "somewhat likely" to retire as a result of EPA's regulations.

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[6] Emphasis supplied. *See also* SPP November 30, 2011 comments to FERC in Docket No. AD12-1: "These EPA Rules will have a significant impact on our nation's utility industry."

[7] Comments of the Midwest Independent Transmission System Operator, Inc., FERC Docket No. AD12-1000 (Nov. 22, 2011) (emphasis supplied).

- The North American Electric Reliability Corporation (NERC), which is the Electric Reliability Organization under section 215 of the FPA to which FERC has delegated authority to promulgate reliability standards and protect reliable operation of the nation's power grid, produced a study showing a far larger number of EPA-forced retirements than EPA estimates.[8] NERC is scheduled to issue a new reliability assessment very soon, but EPA has not built any time into its rulemaking process to consider the new report.

- Forty-four separate appeals have been filed of the CSAPR, including some by multiple parties and trade associations, with more than 20 parties filing motions to stay the rule on the ground that the rule will cause them imminent irreparable injury. Regardless of whether these motions meet the very high judicial standards for obtaining a stay, they are indicative of widespread concern in the utility industry as to the industry's ability to comply with just the CSAPR alone, much less the MATS rule and EPA's other power sector regulations as well.

- The Southern Company recently filed testimony with FERC saying "[w]e have concluded that ***the EPA regulations cannot be fully implemented consistent with our responsibility to provide adequate reliability and without interruption or rationing of electricity service*** until not less than six years after the Utility MACT regulation and requirements become final .... There is <u>not</u> an adequate basis for the EPA to conclude that the reliability of the electric grid can be adequately maintained under the directives imposed by the Utility MACT rule."[9]

- Westar Energy filed similar testimony: "largely because of the short time line for implementation allowed by EPA, evidence available to the [Federal Energy Regulatory] Commission and EPA demonstrates that **CSAPR poses a grave threat to reliability of the electric system .... Westar would need to 'shed load' that is, implement rolling blackouts – from April through August because the reduced generation necessitated by CSAPR compliance would be substantially less than customer demand for electric energy.**"[10]

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[8] *See* North American Electric Reliability Corporation, "*2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations*," Oct. 2010.

[9] Statement of Anthony Topazi, Chief Operating Officer, Southern Company, FERC Docket No. AD12-1-000 (Nov. 22, 2011) (underlined emphasis in original, other emphasis supplied).

[10] Response of Westar Energy, Inc. and Kansas Electric Company to Request for Evidence of Commissioner Philip D. Moeller, FERC Docket No. AD12-1-000 (Nov. 22, 2011) (emphasis supplied).

III. The Safety Valve Proposal

Because the safety valve proposal is being negotiated in secret, the specific terms of the proposal as it currently exists are not publically available. The discussion below pertains to the proposal as set forth in the following entry in the MATS rule docket: Docket No. EPA-HQ-OAR-2009-0234 (October 21, 2011).

Under the proposal, an electric generating unit (EGU) that intends to retire as a result of the MATS rule but wishes to keep operating past the rule's 3-year compliance deadline must, within one year of the effective date of the rule, apply for certification that it is a Reliability Critical Unit (RCU). To obtain such certification, the EGU must demonstrate that it is needed to maintain reliability and that a replacement resource cannot be on line within the 3-year period. This certification is issued by the applicable RTO or ISO if the unit is located in a region covered by an RTO or ISO. If the unit is not in a region covered by an RTO or ISO, the certification is divided into pieces and is issued, in part, by FERC, "the regulatory authority(ies) that has jurisdiction over reserve margin/resource adequacy requirements for the region/state in which the EGU is located," and the "regulatory authority that has jurisdiction over the entity responsible for implementing the solutions; for example, the state PUC for the state in which the EGU is located, FERC, etc."

Once the certification is obtained, the EGU may submit a Compliance Extension Request to EPA, with notice of the filing to the applicable state PUC, the applicable RTO/ISO, and FERC. Within 60 days of submission of the request, "The EPA shall approve a complete Compliance Extension Request" if the relevant analyses demonstrates to EPA the EGU is needed to maintain reliability. Compliance Extensions shall be for up to one year after the 3-year compliance period with the possibility of one or more supplemental up to one-year extensions. Any unit granted a Compliance Extension shall not be subject to CAA penalties for operating in violation of the Maximum Achievable Control Technology (MACT) standards set forth in the MATS rule.

IV. The Safety Valve May Lack Legal Foundation

As creatures of statute having no inherent "constitutional or common law existence or authority, federal agencies, including EPA and FERC," cannot act without specific authority conferred upon them by Congress.[11] As a result, the authority that FERC and EPA will exercise under the safety valve approach must be grounded in, for purposes here, the FPA (FPA) and the CAA, respectively. An agency is bound to act within its statutory authority, and may not

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[11] *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (if EPA lacks authority under the Clean Air Act, then its action is plainly contrary to law and cannot stand"); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (2007), *citing Nat'l Ass'n of Regulatory Util. Comm'n*, 475 F.3d 1277, 1286 (D.C. Cir. 2007); *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

"bootstrap itself into an area in which it has no jurisdiction by ... violating its statutory mandate."[12]

The safety valve proposal, however, calls on EPA and FERC to take action for which they have not been granted specific legislative authority. Under the proposal, EPA could grant extensions to the compliance deadlines set forth in the CAA, even though nothing in the statute authorizes it to do so and indeed expressly forbids such extensions except based on findings and determinations that would not be made as a part of the safety valve mechanism. As regards FERC, the safety valve puts FERC in a position to regulate planning studies conducted by NERC and its Regional Entities and Planning Authorities and to grant reliability certifications. These actions are beyond the limited grant of authority to FERC under Section 215 of the FPA.

A. EPA and the CAA.

1. EPA Cannot Use Enforcement Discretion to Adopt a Program of Compliance Extensions at Odds with the Compliance Extension Provisions of Section 112(i) of the CAA.

The time periods for complying with the MACT standards are clearly set forth in the CAA. Under Section 112(i)(3)(A), EPA must set compliance deadlines of no more than 3 years from the effective date of a MACT standard. Under Section 112(i)(3)(B), the Administrator or a state with a Title V program can grant up to a one-year extension "if such additional period is necessary for the installation of controls." Under Section 112(i)(4), the President may exempt a facility from a MACT standard for a period of up to 2 years, and for additional periods of up to 2 years "if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so."

The safety valve proposal is not authorized under this authority. It is not authorized under the one-year extension provision of Section 112(i)(3)(A) because the purpose of a safety-valve extension is not to allow the unit more time to install controls but instead to allow more time for a replacement unit or transmission expansion to be built. And it is not authorized under Section 112(i)(3)(B) because nothing in the mechanism as written provides for Presidential findings or a Presidential issuance of an exemption.

There has been discussion that EPA could implement the safety valve through an exercise of its enforcement discretion by entering into a consent decree with a unit that has received the necessary certification from an RTO/ISO or FERC and other entities. But no explicit authority exists for EPA to make a blanket determination in a rule that it will simply ignore statutory compliance deadlines when it determines that it is in the public interest to do so. Otherwise, EPA would always be able, under the guise of enforcement discretion, to ignore Congress'

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[12] *Office of Consumers' Counsel v. FERC,* 655 F. 2d 1132, 1142 (D.C. Cir. 1980).

commands and instead implement a program that the agency thinks best. Agencies, however, have no such power.[13]

2. EPA Consent Decrees Do Not Immunize Generators from Citizens Suits and State Regulatory Action.

Additionally, whatever authority EPA may be assumed to have to enter into consent decrees allowing sources to violate CAA requirements, no basis exists to presume that such consent decrees immunizes the source from liability arising from citizens suits. During the 2001 California energy crisis and again in the case of the Mirant Alexandria, Virginia coal plant in 2007, generators became subject to penalties for violating air quality permits as a result either of citizens suits or state environmental agency action even though the violations had been consented to by EPA.[14] There is no reason to conclude that the result would be different today under the safety valve.

3. EPA Cannot Adopt the Safety Valve Without First Undertaking Notice-and-Comment Rulemaking.

EPA cannot adopt the safety valve proposal as a part of the MATS rule because the proposal has not been subject to notice and comment. A conceptual version of the proposal was presented to EPA in comments by a group of RTOs and ISOs, but EPA has not ever proposed any version of a safety valve and asked the public to comment. Similarly, it appears that EPA has held several meetings with different entities to discuss the safety valve, but most interested parties and the public at large have not been given an opportunity to participate in those or other meetings, and the description that EPA provided in the public docket of the meetings it has held are cursory at best. For EPA now to adopt a safety valve mechanism as part of its rule would violate basic principles of notice and comment rulemaking.[15]

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[13] *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (enforcement discretion does not excuse "abdication of statutory responsibility"), at 838 (Brennan, J. concurring) (enforcement discretion reviewable where "agency engages in a pattern of nonenforcement of clear statutory language" or where "agency has refused to enforce a regulation lawfully promulgated and still in effect ... It may be presumed that Congress does not intend administrative agencies, agents of Congress, to ignore clear jurisdictional, regulatory, statutory or regulatory commands....").

[14] *See* FERC testimony of Debra Raggio, Vice President, Government and Regulatory Affairs, and Assistant General Counsel, GenOn Energy, Inc., FERC Docket No. AD-12-1-000 (Nov. 29, 2011).

[15] Nor may EPA commit to adopt or follow the safety valve as part of the preamble to the MATS rule yet argue that EPA could do so without observing rulemaking procedures on the ground that such commitment is not part of the MATS rule itself. *Community Nutrition Institute v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (adoption of policy "cabining ... an agency's prosecutorial discretion" held to rise to the level of a legislative rule).

B. FERC and the Federal Power Act.

1. FERC Role in the Safety Valve Exceeds Its Statutory Authority.

Under the safety valve, in non-ISO/RTO regions, FERC is given two roles in determining whether a compliance extension is appropriate. First, an EGU must have its transmission reliability analysis "certified" by FERC to ensure that that particular unit is needed for reliability. Second, the EGU must obtain a separate certification verifying that "solutions to resolve reliability issue(s) caused by deactivation of the EGU cannot be placed in service prior to the MATS rule compliance timelines." This certification potentially must also be obtained from FERC ("[t]he certification shall be obtained from the regulatory authority that has jurisdiction over the entity responsible for implementing the solutions; for example, the state PUC for the state in which the EGU is located, FERC, etc.). Both of these roles exceed FERC's authority under Section 215 of the FPA.[16]

The Energy Policy Act of 2005 granted the Commission authority to engage in specific activities to ensure electric reliability.[17] Under Section 215 of the FPA,

> The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c) of this section, any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 824 (f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.[18]

Under this statute, FERC's reliability jurisdiction is not plenary; it is limited to certifying the applicable Electric Reliability Organization (ERO), approving reliability standards and ensuring compliance with those standards. Additionally, the Commission may also review a penalty for a violation of a reliability standard that is filed by an ERO.[19]

Chairman Wellinghoff highlighted the Commission's limited statutory authority over electric reliability in an August 1, 2011 letter to Senator Lisa Murkowski, stating that "the data

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16 16 U.S.C. § 824o (2006).

17 Energy Policy Act of 2005, Pub. L. 109-58, Sec. 1201 *et. seq.* (2005).

18 16 U.S.C. § 824o(b) (2006).

19 *Id.* at (e)(2).

and tools available to FERC staff are limited and incomplete. In addition, Section 215 of the FPA does not allow the Commission to order new facilities to be built."[20]

In addition, Wellinghoff's testimony before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce described what he believes are limits on the Commission's reliability authority under FPA Section 215.[21] He testified that FERC merely "has a role to play" when it comes to electric reliability and that "[u]nder Section 215 of the Federal Power Act, the Commission's role and responsibilities in ensuring the Bulk-Power System operates reliably is to establish and enforce electric Reliability Standards developed by the Electric Reliability Organization (ERO), which is the North American Electric Reliability Corporation (NERC)."[22] Wellinghoff also noted that Section 215 "does not authorize the ERO or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services."[23]

The role for FERC envisioned by the safety valve clearly exceeds this discrete statutory authority. In non-ISO/RTO regions, the Planning Coordinator for the region in which the EGU is located is responsible for transmission reliability analysis. A Planning Coordinator is defined by NERC as "the responsible entity which coordinates and integrates transmission facility and service plans, resource plans and protection system."[24] FERC is not granted authority under Section 215 of the FPA to certify a transmission reliability analysis conducted by a Planning Coordinator or any other body, or otherwise certify that a particular generating unit is needed for reliability.

Nor is FERC empowered to regulate or second-guess, for purposes of the CAA, judgments by public utilities regarding whether specific transmission and generation upgrades can be available by the MATS rule compliance deadline. Moreover, under the Reliability Standards, the responsibilities of a Planning Coordinator, or any other registered entity under the NERC functional model, are limited to compliance with approved Reliability Standards that carry obligations for Planning Coordinators. There is no direct responsibility to FERC for any Planning Coordinator.

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20 *See* August 1, 2011 Letter to Senator Lisa Murkowski, at 6, *available at* http://murkowski.senate.gov/public/?a=Files.Serve&File_id=0942ce17-3b12-4643-99ba-8fe2f5a7680a. While FPA Section 202 provides the Secretary of Energy with some emergency authority to keep an existing unit running, the Safety Valve makes no attempt to reconcile that authority with the compliance extension under the Safety Valve.

21 *See* September 14, 2011 Testimony of Chairman Jon Wellinghoff, *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/091411/Wellinghoff.pdf.

22 *Id.* at 5-6.

23 *Id.* at 6, *citing* 16 U.S.C. § 824o(i)(2) (2006).

24 *See* NERC Glossary, *available at* http://www.nerc.com/files/Glossary_of_Terms_2011October26.pdf.

2. The Safety Valve May Also Be Unduly Discriminatory.

The safety valve may also be unduly discriminatory in its application. While some disparate treatment may be necessary as between regions with or without RTOs, subjecting non-RTO utilities to a scheme of government regulation that does not apply to utilities in RTO regions is unduly discriminatory. Under the safety valve, non-RTO utilities must receive an RCU "certification" from FERC under a process not yet developed. RTO utilities need not apply to the federal government at all for their certification – they can receive it from the RTO, a process that is likely to be simpler and faster. There is no basis in law to justify this disparate treatment.

3. Section 202(c) of the FPA Cannot Be Relied on as an Ultimate Backstop.

Some parties have argued that reliability issues that may arise from the EPA regulations can ultimately be resolved through application of Department of Energy authority under Section 202(c) of the FPA. Based on its experience in the 2001 California energy crisis and the more recent experience with the Alexandria, Virginia Mirant plant, GenOn Energy, Inc. provided recent testimony to FERC demonstrating that these arguments are ill-founded.[25] As PJM's FERC testimony showed, even just obtaining timely cooperation among environmental and energy regulators during these crises – cooperation on which the safety valve is dependent proved problematic during these crises: "... the process was slow and incomplete .... A matter which should have been seen as an exercise of the two agencies [DOE and EPA] executive responsibilities instead became steeped in judicial processes which delayed relief and stilted communication.[26]

4. Like EPA, FERC Must Undertake Notice-and-Comment Rulemaking in Order to Carry out Safety Valve Functions.

As stated, the safety valve proposal assigns FERC the role of issuing certifications. Even if FERC has statutory power to take those actions, it cannot do so without adopting rules under which those certifications will be issued. FERC cannot issue such certifications ad hoc. These implementing rules must be adopted under notice-and-comment rulemaking procedures.

V. The Safety Valve Is Not in the Public Interest, Co-opts the Legitimate Role of State PUCs, and Could Commit the Country to a Costly Electricity Future

EPA's power sector rules will force a large number of units to retire, an unknown number of which are necessary for the reliable operation of the grid. Because EPA's reliability study is,

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[25] *See* FERC testimony of Debra Raggio, Vice President, Government and Regulatory Affairs, and Assistant General Counsel, GenOn Energy, Inc., FERC Docket No. AD-12-1-000 (Nov. 29, 2011).

[26] Testimony of Micahel J. Kormos, Senior Vice President PJM Interconnection, L.L.C. (Nov. 22, 2011).

in the words of the FERC Chairman, "irrelevant," there is no hard information as to the number of reliability-critical units that are at risk. Thus, because the extent of the problem is not defined with specificity (although it is known that the problem is significant), the necessary solution – including the cost of the solution – is also unknown.

The authors of the safety valve mechanism did not proffer any estimate as to how much their solution to the reliability problems created by the EPA-forced retirements will cost. Indeed, there is no mechanism within the safety valve that ever provides for an estimate of overall costs or even for considering costs in the safety valve process. Units that must retire are granted a limited time to continue in operation until the replacement resource is brought on line, but the cost of the replacement resource is never considered. As the Public Utility Commission of Ohio recently told FERC, "***[i]f reliability becomes a problem from retirements, then Ohio's customers may become subject to costly above-market solutions.***"[27] MISO told FERC that EPA's rules could force a change in dispatch under which MISO will be forced to dispatch peaking units, leading to operational issues and "the larger impact to MISO" of "**the likelihood that energy prices will be higher to reflect the typically higher operating costs for peaking units than for baseload units.**"[28]

Worse, the agencies charged with protecting the interest of ratepayers – state PUCs – have almost no role in the safety valve despite recognition by reliability coordinators that "state retail regulators have an important role to play in preserving the reliability of the electricity grid."[29] Under the safety valve, the entire role of PUCs consists of being notified when a unit submits a Compliance Extension Request to EPA, and that request is made only after the necessary regulatory certification has been granted. Any ability of a PUC to influence EPA's granting of such request is limited by the fact that EPA must act on the request within 60 days. Moreover, EPA is only authorized to consider reliability issues in granting such a request, not rate impacts (even assuming EPA would consider rate impacts in any event).

State PUCs will thus be left with an impossible choice when rate-regulated utilities seek to recover the cost of constructing the replacement facilities. The PUCs can grant the request in retail rates, in which case rates to consumers will increase. Alternatively, the PUC can deny the request because of rate concerns, in which case either the facility does not get built and reliability is impaired, or the facility does get built and the financial viability of the utility is damaged.

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[27] Comments Submitted on Behalf of the PUCO, Docket No. AD12-1-000 (Nov. 30, 2011) (emphasis supplied).

[28] Comments of the Midwest Independent Transmission System Operator, Inc., FERC Docket No. AD12-1-000 (Nov. 22, 2011) (emphasis supplied).

[29] *Id.*

Moreover, the ad hoc nature of the safety valve takes utility planning outside the normal IRP process. Instead of an IRP process where reasonable and prudent long-term investment decisions are made with stakeholder input, the safety valve mechanism provides for the making of critical resource retirement and replacement decisions in expedited processes by entities such as RTOs and ISOs whose primary mission does not encompass reasonable rates to consumers.

The safety valve mechanism, thus, is not conducive to – and indeed is openly hostile to – the goal of maintaining reasonable electric rates to consumers at a time of great economic difficulty. By writing the interests of ratepayers and the PUCs who protect those ratepayers out of the process, the safety valve has the potential for creating, or at least failing to mitigate, great economic harm.

The Ohio PUC has explicitly called for modification of the safety valve proposal to provide a formal role for state PUCs.[30] The need to formalize state PUC involvement is another reason to slow down the highly rushed manner in which the safety valve is now being considered. As MISO has stated, "[i]t is MISO's intent to engage the states we serve to ensure that this unusual resource adequacy risk [caused by EPA's regulations] is well understood as the majority of our states carry a state statutory obligation to resource adequacy. ***This, potentially, may be another source of conflict for generation owners as they experience conflicting obligations to their states and the EPA.***"[31]

VI. The Safety Valve Does Not Consider Future EPA Regulations

The safety valve is designed to address the MATS rule and it also takes into consideration the already-promulgated CSAPR as well. But EPA has also proposed but not yet finalized coal ash and water intake structure rules, and is about to propose performance standards for utility greenhouse gas emissions under section 211 of the CAA. The safety valve thus is intended to solve only a portion of the problem EPA's rules will create and is therefore premature.

Indeed, in the MATS rulemaking preamble, EPA recognized that utilities need to adopt "integrated" strategies to address all of EPA's power sector rules, and EPA promised to provide guidance as to such strategies in its forthcoming greenhouse gas performance standards rulemaking. As EPA stated:

> EGUs are the subject of several rulemaking efforts that are either are or will soon be underway. In addition to this rulemaking proposal, concerning both hazardous air pollutants under section 112 and criteria pollutant NSPS standards under

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[30] Comments Submitted on Behalf of the PUCO, FERC Docket No. AD12-1-000 (Nov. 30, 2011).

[31] Comments of the Midwest Independent Transmission System Operator, Inc., FERC Docket No. AD12-1-000 (Nov. 22, 2011) (emphasis supplied).

> section 111, EGUs are the subject of other rulemakings, including ones under section 110(a)(2)(D) addressing the interstate transport of emissions contributing to ozone and PM air quality problems, coal combustion wastes, and the implementation of section 316(b) of the Clean Water Act (CWA). They will soon be the subject of a rulemaking under CAA section 111 concerning the emissions of greenhouse gases. EPA recognizes that it is important that each and all of these efforts achieve their intended environmental objectives in a common-sense manner that allows industry to comply with its obligations under these rules as efficiently as possible and to do so by making coordinated investment decision and, to the greatest extent possible, by adopting integrated compliance strategies.[32]

EPA went on to say that, in the upcoming greenhouse gas performance standards rulemaking, it would consider how to facilitate the industry's adoption of these integrated compliance strategies:

> Thus, EPA recognizes that it needs to approach these rulemakings, to the extent that its legal obligations permit, in ways that allow the industry to make practical investment decisions that minimize costs in complying with all of the final rules, while still achieving the fundamentally important environmental and public health benefits that the rulemakings must achieve. The upcoming rulemaking under section 111 regarding GHG emissions from EGUs may provide an opportunity to facilitate the industry's undertaking integrated compliance strategies in meeting the requirements of these rulemakings. First, since that rulemaking will be finalized after a number of the other rulemakings that are currently underway are, the Agency will have an opportunity to take into account the effects of the earlier rulemakings in making decisions regarding potential GHG standards for EGUs.
>
> Second, in that rulemaking, EPA will be addressing both CAA section 111(b) standards for emissions from new and modified EGUs and CAA section 111(d) emission guidelines for states to follow in establishing their plans regarding GHG emissions from existing EGUs. In evaluating potential emission standards and guidelines, EPA may consider the impacts of other rulemakings on both emissions of GHGs from EGUs and the costs borne by EGUs. The Agency expects to have ample latitude to set requirements and guidelines in ways that can support the states' and industry's efforts in pursuing practical, cost-effective and coordinated compliance strategies encompassing a broad suite of its pollution-control

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[32] 76 Fed. Reg. 24,976, 25,057 (May 3, 2011).

obligations. EPA will be taking public comment on such flexibilities in the context of that rulemaking.[33]

The safety valve, however, is being offered before EPA has examined how it expects utilities to comply in an "integrated" way with all of its power sector rules and before it has taken public comment on proposals EPA evidently intends to make as to compliance "flexibilities." This reemphasizes that the safety valve is a solution to a problem that is not yet known. Again, the logical approach to the reliability impacts that EPA's power sector rules will cause is for EPA to delay implementation of the MATS rule until a study is done of how all of EPA's rules will affect electric reliability, and then design an appropriate solution.

VII. The Safety Valve Won't Work

A. If Reliability Impacts Are Studied, Understood, and Planned for, a Safety Valve would Either Not Be Needed or Would Play Only a Minor Role in Protecting Reliability.

The premise of the safety valve appears to be that it is a backstop mechanism that is unlikely to be invoked frequently because most coal-fired units will be available and compliant in 2015 when the MATS rule goes into effect. As noted, that premise is contrary to the evidence. Forcing large amounts of coal-fired capacity into retirement and then scrambling to decide which units to temporarily keep on line until replacements can come on line is not a rational or cost-effective way of protecting the system. An orderly phase-in of power plant rules, with time built in to invest in replacement capacity and transmission, is a much more preferable approach.

B. The Safety Valve Does Not Address Units that Only Need More Time to Install Controls and Do Not Wish to Retire.

Units that are made uneconomic by EPA's rules and which therefore must retire are only a subset of the units endangered by these rules. A large number of units can still be competitive if they install the necessary controls (although the cost they must recover in rates will still increase significantly), but many units may not be able to install controls within the 3-year compliance deadline, even if that deadline is extended by EPA or state authorities by one year under Section 112(i)(3)(A) of the CAA. The safety valve proposal, however, does not address these units. Unless the compliance time period is extended, these units will be forced into retirement, dramatically increasing the number of retirements and exacerbating the reliability problem.

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[33] *Id.*

C. The Safety Valve Won't Solve the Key Problem – It Can't Keep Units from Retiring.

The RTOs originally proposed the safety valve on the premise that they lack the authority to compel a unit to stay on beyond the notice periods in each RTO tariff, even if the unit is critical for local reliability. As PJM told Exelon when it sought to retire the Eddystone and Cromby units: "As you are aware, regardless of whether Deactivation of a generating unit would adversely impact the reliability of the Transmission System, the Generation Owner may deactivate its generating unit, subject to section 113.1 notice requirements."

The safety valve does not address this fact. Under the safety valve, a retiring unit is not compelled to seek an RCU designation even if its retirement could impact local reliability. Nor does EPA or FERC have (nor should they have) the authority to compel RCU status. As noted below, without rate certainty, even units that might wish to continue doing may choose to retire immediately rather than spend time and capital pursuing a complicated, short-term, multi-agency exemption process when there is no guarantee that the unit will be dispatched or otherwise compensated for staying on line or even that its exemption request will be granted.

D. The Exemption Process Is Entirely Too Burdensome To Be Attractive.

Under the safety valve, a unit voluntarily willing to go through the exemption process must obtain multiple certifications from the RTO/ISO or from potentially multiple agencies if not located in an RTO/ISO area. Only after these multiple certifications are obtained can an EGU even apply to EPA for a Compliance Extension, which may or may not be granted.

This process might be attractive if it provided some certainty at the end – but it does not. EPA does not have to grant the exemption. Moreover, as noted below, an EPA Compliance Exemption does not provide rate certainty. There is no reason to believe that a retiring unit would voluntarily go through this complicated regulatory maze just to achieve a limited Compliance Exemption that still leaves the unit at risk for operating at a loss depending on future market factors.

E. There Is No Reliability-Related Support for 1-year Extension Construct.

The safety valve provides for up to a one-year extension of the 3-year compliance deadline. Further extensions are possible, but they are limited to up to one year each and only after a new certification process is undertaken. There is, however, no reliability-related reason for limiting extensions to one year. Significant transmission infrastructure and replacement generating capacity takes, at a minimum, 3-5 years to put in place to mitigate the impacts of a baseload facility retirement. In addition, several RTOs have capacity markets that are run three years in advance. A unit cannot be expected to bid three years forward in RTO capacity markets without the certainty of not being exposed to EPA compliance liability.

F. RCU Designation Is Undesirable Because It Provides No Rate Certainty – the Key Retirement Determinant.

A significant flaw of the safety valve is that it ignores a central driver of generator retirement and unavailability – revenue. What revenue can a unit expect if it receives an RCU designation? The safety valve provides no RCU adder or other "reasonable opportunity" to recover even its incremental operating costs. For example, a Compliance Exemption from the EPA rules has no impact on that unit's ability to clear in an RTO market.

"Reliability must run" or "RMR" contracts are no answer to this problem. RMR contracts are cost-of-service rates that historically have been derived through long, detailed, contentious litigation at FERC (rates that FERC has determined are costly and inefficient). In addition, each RTO tariff has its own RMR timelines and tariff rules, which do not align at all with the safety valve.

Supporters of the EPA rules have cited the "Cromby" and "Eddystone" retirements in PJM (units owned by Exelon) as effective use of backstop RMR contracts to keep units on line when needed for local reliability. In fact, those cases illustrate precisely why the safety valve *won't* work.

Exelon provided its notice to PJM of the retirements of its Cromby and Eddystone units in December 2009 having concluded that "future cash flows will be significantly negative for the [Cromby and Eddystone] Units because they will require costly project investment to maintain their operability and because their dispatch will be limited due to environmental restrictions." After long negotiations with PJM, and Pennsylvania environmental regulators, Exelon agreed to an RMR contract, which it filed at FERC in June 2010. As it has historically done with cost-of-service rates, FERC set the RMR rates for evidentiary hearing. After settlements with parties who objected to the rates, the settlement RMR agreements were finally accepted by FERC in May 2011 – *17 months after the retirement notification was made* – well beyond the 90 days notice required for retirement decisions in PJM.

The safety valve does not address this critical lack of rate certainty and depends entirely on a unit voluntarily running the multi-agency regulatory gauntlet that the safety valve creates without any reasonable expectation of how it will be compensated during its exemption period.

G. The Safety Valve Takes Local Reliability Out of the Hands of the Experts.

Under the safety valve proposal, the critical decision to grant a Compliance Extension rests with EPA. Even if a unit is deemed to be a RCU, EPA is not bound to grant the Compliance Extension. It is no answer that EPA might provide some deference to the reliability experts in making the exemption determinations. Deference or not, EPA will have the final say on local reliability, and EPA does not have the technical expertise or regulatory mission to make ultimate decisions on reliability.

H. The Safety Valve Does Not Solve the Hobson's Choice of Complying with Reliability or Environmental Obligations.

Generating units must not be put in the untenable position of having to choose between running to maintain local reliability (and avoiding FERC civil penalty authority) and complying with EPA rules (and avoiding EPA penalties and enforcement actions). Regulators must solve this Hobson's Choice, but the safety valve does not because EPA is not bound to adhere to the decision of the reliability experts. If EPA denies a Compliance Extension request even where the energy agencies have made the necessary certification, the unit will face a situation where it has been notified that its retirement or unavailability would threaten reliability, but EPA will penalize it for continuing to run. What choice should it make?

Even if EPA grants the Compliance Extension, a generator is not compelled to keep running under the safety valve proposal if market conditions do not support running. At that juncture, a unit faces a new dilemma – should it keep running without any rate certainty (likely at a loss) for an indefinite period of time on the backs of its shareholders, cooperative members, or municipal owners? Or, should it protect its owners' investment by retiring at the earliest possible date notwithstanding the reliability impacts?

Moreover, in deregulated markets, the reliability risk may not be on the generator. Thus, the generator may have no incentive to pursue the cumbersome and expensive exemption process but may choose to limit its liability through retirement or unavailability. The reliability deficiency will not fall on the generator but on the balancing authority operator and the load serving entities.

I. The Safety Valve Requires a Notice Period for Retirements that Conflicts with the Retirement Notification Requirements in RTO Regions.

As the RTOs wrote to EPA, their tariffs require little advanced notice of retirements, but allow time for the RTO to study the local reliability impacts. The safety valve requires that a retiring EGU tell the RTO as soon as possible after its decision, in direct contravention of tariff rules. Retirement decisions are commercially very sensitive – RTO stakeholders have not even begun to consider, much less consent to, filing to change tariff rules on this point.

J. The Safety Valve Was Developed Without Input from Non-RTO Regions.

The safety valve concept appears to have been negotiated between EPA and several, but not all, RTOs. However, roughly half the country is not in the geographic footprint of an RTO and the RTOs have no expertise in regions outside their own footprints. State regulatory commissions are key players both inside and outside of RTOs and they have been left out of this process (or treated in a subservient manner), and left out of the safety valve proposal.

K. The Safety Valve Ignores NERC Reliability Structures.

The safety valve also fails to utilize well established NERC reliability assessment processes, including a planned 2012 special reliability assessment, which are backed by mandatory compliance with the NERC reliability standards. In addition, it does not address reliability requirements for which the RTOs are not accountable and/or not knowledgeable to assess.

VIII. Conclusion

The safety valve proposal is no solution to the reliability problems created by EPA's rules. A safety valve of some kind may ultimately be needed, but the first step in addressing the reliability impacts of EPA's rules is the undertaking of a comprehensive study of the units likely to retire, where those units are located, what the local reliability impacts will be, and what types of replacement units or transmission expansion are needed, including their cost and timeline for becoming operational. Once the study is completed, judgments can be made as to whether the EPA rules should be modified in the public interest and what mechanisms may be needed to mitigate unavoidable impacts. Critically, this study must be done before EPA's rules are adopted or go into effect so that the results of the study can inform the rules ultimately implemented. Any other action will jeopardize the reliability and affordability of electricity.