CENTER FOR ENVIRONMENTAL ACCOUNTABILITY

# COMMENTS OF THE

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*Comments on*
*New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emissions Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule; Supplemental Notice*

**88 Fed. Reg. 80,682 (November 20, 2023)**
**Docket No. EPA–HQ–OAR–2023–0072**

**SUBMITTED DECEMBER 20, 2023**

The Center for Environmental Accountability (CEA) submits these comments on the United States Environmental Protection Agency's (EPA) supplemental notice *New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule*, 88 Fed. Reg. 80,682 (November 20, 2023) (the Supplemental Notice).

CEA is a 501(c)(3) organization devoted to educating the public and government on the importance of transparency and accountability in the areas of environmental and energy policy. CEA's work is driven by its core principles, including a commitment to the rule of law, to a clean environment, and to a healthy human environment founded on a strong economy and vibrant communities animated by people gainfully employed in all the occupations of human flourishing. CEA understands that adherence to law requires respect for the proper roles of each branch of government and for the respective roles of the federal government and of state governments. CEA recognizes that the public interest requires a balance of environmental stewardship, resource development, and energy access and security, and that environmental remediation functions best when targeted at those communities injured by unlawful pollution.

## I. Introduction.

In striking down the Clean Power Plan, the Supreme Court taught that EPA cannot use Section 111 of the Clean Air Act (CAA) to impose its preferred energy policies on the nation. Our comments on EPA's initial Proposal[1] commencing this new rulemaking demonstrated that it is a pretextual pursuit of that same policy goal, to force coal- and gas-fired power plants to shut down and deter the construction of new ones, compelling a shift to wind and solar generation.

The pretextual form of the regulation is a fifteen-year-plan during which coal and gas plants must adopt measures not currently available, in clear violation of the statute's requirement for EPA to identify a "system of emission reduction" that "*has been* adequately demonstrated."[2] Whatever ability EPA has to include projections of reasonable future technological development for new plants into its rules—and, as our Initial Comments show, it's a limited one[3]—no court has ever ruled EPA has any such authority for *existing* plants. Indeed, there are good reasons to believe it has none.

Our Initial Comments also showed that EPA did not analyze whether this new rule would impair the reliability of the nation's electricity markets. EPA has now issued a Supplemental Notice

[1] EPA-HQ-OAR-2023-0072-0027-0703 (CEA Initial Comments).

[2] CAA 111(a)(1), 42 U.S.C. § 7411(a)(1) (emphasis added).

[3] *See* CEA Initial Comments 16-30, *esp.* 17-21, demonstrating that the D.C. Circuit caselaw EPA relies on (none of which the Supreme Court has affirmed) deals only with new sources, that it derives from a dubious borrowing of principles from caselaw dealing with other statutory provisions whose text and structure, unlike Section 111, explicitly contemplate "lead time" allowing EPA to include future technological development in its regulations, and that even this caselaw contemplates a radically shorter timeframe for phased imposition of regulatory requirements than that in EPA's Proposal).

soliciting broad comment on that issue—after falsely claiming in the Proposal that it had already analyzed it and found no cause for alarm. Yet, EPA has still not provided its own analysis, despite prompting from other federal agencies. EPA's participation in the November 2023 conference that the Federal Energy Regulatory Commission (FERC) convened to discuss reliability generally and the reliability implications of the Proposal in particular provided no such analysis, or even any meaningful reassurance on this front, and instead left the distinct impression that EPA views this question as an annoyance—as somebody, anybody else's problem.

EPA has now dug itself quite a hole. It's required by statute to consider this aspect of the problem, and the Supplemental Notice demonstrates that EPA recognizes reliability is central to the validity of this rulemaking. But the agency either cannot or will not show its cards and forthrightly tell the public what effect it thinks its rule will have on reliability. Meanwhile, gloomy news for those championing a stampede to renewables, and statements by high-ranking Administration officials confirming the Proposal's pretextual nature, darken the legal horizon. Unless EPA completely changes course and adopts an approach in keeping with the limits of its statute and the set of systems of emission reduction that actually have been "adequately demonstrated," this rule will join the Clean Power Plan in the dustbin of regulatory history.

## II. EPA's Supplemental Notice and its presentation at FERC's reliability conference do nothing to remedy its failure to analyze the reliability impact of its Proposal, and this dooms its rulemaking.

There's no way to sugar-coat this. EPA has not provided *any* analysis of reliability, either in its Proposal, its Supplemental Notice, its appearance before FERC on November 9, 2023, or in any other forum that we can identify. But EPA is required to consider reliability, both as a matter of its governing statute and as a matter of basic rationality. Its utter failure to do so is a fatal flaw in this rulemaking. Even if it finally, grudgingly churns out something it can label a "reliability analysis" when it finalizes the rule, this cannot remedy its refusal to provide the public with any concrete analysis on which to comment. EPA's cavalier attitude towards this crucial issue confirms that its renewed attempt to transform our nation's electricity market under the guise of source-specific pollution control, if finalized, must and will meet the same fate as the illegal Clean Power Plan: judicial vacatur.

### A. EPA is required to analyze reliability.

Our Initial Comments demonstrated that, at least in the context of this rulemaking, a consideration of reliability impacts is statutorily required.[4] And even if it weren't,[5] EPA's

[4] CEA Initial Comments 43-46.

[5] But there are compelling reasons why it is. The three parenthetical factors that CAA 111(a)(1) requires EPA to "tak[e] into account" when determining the "best system of emission reduction" "that has been adequately demonstrated" are "[1] the cost of achieving such reduction and [2] any nonair quality health and environmental impact and [3] energy requirements." The second factor, health and environmental impacts, is on its face not merely a consideration of impact on the source. Our Initial Comments demonstrated that the first factor, cost, can't be read to be so limited either. CEA Initial Comments 24-31.

discussion of the issue in its Proposal and here rightly flags this issue as an "important aspect of the problem"[6] that EPA must consider, not skirt, within the four corners of a proposed analysis, a final rule, and comment responses. Unless and until EPA actually demonstrates that its rule will not impair reliability and proceeds to solicit public comment on its demonstration, this rulemaking is fatally flawed as a statutory matter, unreasoned in view of the record, and defective as a procedural matter.

### B. EPA failed to analyze reliability in its Proposal.

Our Initial Comments demonstrated that EPA did not analyze the reliability effects of its Proposal.[7] What we didn't point out at the time, but feel compelled to say now, is that EPA lied and told the public that it did. The Proposal claimed that "[t]he EPA has evaluated the reliability implications of the proposal in the Resource Adequacy Analysis TSD [Technical Support Document]."[8] *No, it hasn't.*

Our Initial Comments noted that this TSD explicitly defines resource adequacy as a different concept than reliability, and that the TSD explicitly says that it is addressing the former, not the latter.[9] The docket reveals that we weren't the only ones to notice this. The original version of the TSD, as sent through the Office of Information and Regulatory Affairs (OIRA) for interagency review,[10] was titled "Resource Adequacy *and Reliability Analysis* Technical Support Document" (emphasis added). On its first page, this initial draft claimed "[t]he results presented in this document further demonstrate, for the specific cases illustrated in the Regulatory Impact Analysis (RIA), that the implementation of these rules can be achieved without undermining resource adequacy *or reliability*." (Emphasis added.) But a reviewer from OIRA or another agency[11] *struck these last two words*, and added this explanatory comment: "[C]onsider

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Therefore, on basic statutory interpretation principles alone, one shouldn't read the third factor to be limited to *the source's own* energy requirements.

*But see* 88 Fed. Reg. at 33,274/1 (EPA saying only that "[e]nergy requirements may include the impact, if any, of the air pollution controls on the source's own energy needs."). As our Initial Comments noted, EPA is careful not to say that it's reading these words to *only* require it to analyze the source's own energy needs. Indeed, EPA doesn't really offer *any* explicit construction of those words.

[6] *See Motor Vehicle Mf'rs Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[7] CEA Initial Comments 46.

[8] 88 Fed. Reg. at 33,246/3.

[9] CEA initial Comments 46 (observing that EPA in the TSD defines "resource adequacy" as the existence of sufficient generation resources to meet demand, and "reliability" as "the ability to deliver the resources to the loads, such that the overall power grid remains stable," and says that it is addressing the former, not the latter).

[10] This draft, with interagency comments thereon, is docketed at https://www.regulations.gov/document/EPA-HQ-OAR-2023-0072-0027, specifically the file available at that site titled "04-01-23 - TSD - Resource Adequacy – Comments."

[11] The edits and comments on this interagency review document, as is standard practice, are anonymized.

definition [*sic*] resource adequacy as a core part of reliability, but then only using resource adequacy subsequently throughout the document."

And so EPA dutifully did label its analysis as merely one of resource adequacy—at least within the four corners of the TSD itself. But no one seems to have alerted the drafter of the Proposal's preamble that this TSD document *does not analyze reliability*. How such a crucial "interagency" observation, which is memorialized in the public docket and whose validity EPA concedes per its revisions to the TSD, did not result in corresponding changes to key Preamble assertions which the TSD was drafted to support, is anyone's guess. We therefore find ourselves in a Kafkaesque situation, where EPA is now asking the world to comment broadly on "potential reliability issues,"[12] *without ever having conducted its own reliability analysis*.

Another aspect of the interagency documentation reveals just how little attention EPA paid to reliability in its formulation of the TSD and Proposal. The draft and interagency comments also reveal that it was from an interagency commenter that EPA received references to the only sources the final version of the TSD does cite regarding reliability.[13] The TSD cites to these studies to support its claim, at 2, that "reliability continues to be maintained under high variable renewable penetration scenarios"—precisely the evaluation that the Proposal's preamble falsely claims EPA itself had conducted.

Our Initial Comments faulted EPA for merely waving its hands at these two studies and generally asserting that a "range of studies have outlined how reliability continues to be maintained under high variable renewable penetration scenarios," without identifying where and how these studies do so or how their analysis relates to EPA's Proposal or provides any supports for that Proposal's ungrounded, conclusory assertions that it will not impair reliability.[14]

But further consideration of the docket reveals that it's far worse than that: EPA didn't actually have these studies in mind at all when designing the Proposal. It included a general reference to them only when an interagency commenter suggested that it do so, but there's no evidence anyone at EPA even read these documents; they certainly didn't analyze them or apply them to the rulemaking at hand. And it didn't conduct any reliability analysis for the Proposal, despite falsely claiming it had. Taken together, these facts demonstrate how seriously EPA takes the reliability implications of its rulemaking: Not at all.

### C. EPA's putative Supplemental Notice of Proposed Rulemaking fails to analyze reliability.

EPA's *Federal Register* publication of November 20, 2023 styles itself as a "Supplemental notice of proposed rulemaking." It's far from clear whether it deserves that title, since it doesn't

[12] 88 Fed. Reg. 80,682/1, *see also id.* at 80,683/3.

[13] *Compare* the first substantive page of the draft TSD, and the interagency review bubble thereon, *with* the first substantive page of the final version, EPA-HQ-OAR-2023-0072-0034, which dutifully cites these two studies.

[14] *See* CEA Initial Comments 47 n.34 (*citing Portland Cement*, 486 F.2d at 400 ("A generalized reference, to a work as a whole, will avail the agency little if a problem arises on judicial review.").

*propose* to do anything. EPA is essentially providing what would more typically come at the *beginning* of a rulemaking process, in the form of an "*Advanced* Notice of Proposed Rulemaking," the instrument it and other agencies typically use to solicit broad input on a range of scoping topics *before* designing and proposing an actual regulatory proposal. Because of this, there is so little of concrete substance to react to here that the public is being deprived of any ability to provide informed comment. That this document comes now, at this stage, in combination with the document's vacuity, shows that EPA is *still* not taking reliability issues seriously. Instead, the Agency is simply checking a box for political, "optical" reasons. We suppose it's not surprising that EPA under this Administration would act in this manner, but it must not be condoned.

As an initial matter, this document was patently first drafted to address small business issues (important matters, but beyond the scope of these comments), with reliability awkwardly shoehorned in as an afterthought. We submit that this is the inescapable conclusion from reading this (brief) document. But if a "smoking gun" is desired, here it is:

> H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
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> This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy because this action *only solicits comments on* regulatory alternatives for *small businesses*."[15]

The italicized language, located within the "alphabet soup" addressing statutory and Executive Order review requirements at the back of the Supplemental Notice, would, we infer, have been an accurate description of the original internal draft of this document. But the body of the document in its published form, after what we can only assume was a hasty insertion of check-the-box solicitation of comment on reliability, repeatedly solicits comment on reliability *beyond the small-business context*: "In addition, the EPA is soliciting comment on whether to include mechanisms to address potential reliability issues raised by small business *and other commenters* . . .";[16] "Because mechanisms to address reliability concerns are relevant to many entities in the electricity sector, we are *more broadly* soliciting comment on reliability issues" beyond the small-business context.[17]

Just as in the initial Proposal EPA corrected its TSD to accurately say that it only analyzed resource adequacy, not reliability, but still made the bold, false claim in the preamble to the Proposal that the TSD analyzed reliability, so too here EPA seems to have added broad solicitation of reliability comment in the body of the Supplemental Notice at the last minute

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[15] 88 Fed. Reg. at 80,685/1 (emphases added).

[16] *Id.* at 80,682/1 (emphasis added)

[17] *Id.* at 80,683/3 (emphasis added). EPA again stresses that it "will consider all comments we receive on this issue [i.e., 'broader considerations of reliability in the context of this rulemaking']," *id.* at 80,604/1. *All means all*, EPA. As tempting as it will be to deem out of scope much of the instant comment and other comments you'll receive on your Supplemental Notice, we urge you to resist the temptation.

without reflecting that change in the EO 13211 statement's description of the scope of the document.

EPA in the Supplemental Notice repeatedly alludes not just to the input of the Small Business Advocacy Review (SBAR) Panel, but also to other commenters on the Proposal: the "and other commenters" reference noted above,[18] a reference to "reliability concerns raised by small businesses, which were similar to concerns raised by some commenters on the proposed rules,"[19] and again to "potential reliability impacts" raised by the SBAR panel, "many of [which] concerns were similarly raised by commenters on the May 2023 proposal."[20]

Yet EPA *never describes* these reliability concerns in any detail. There is no sign from the Supplemental Notice that EPA has actually read, let alone grappled with, any of these comments; the Agency does not cite, quote, or summarize the concerns in any meaningful way. What's more, this one-way traffic carries over to forums specifically designed to elicit substantive discussion from EPA on this precise issue. As the discussion below of its participation in the FERC reliability conference will further show, the Agency is deaf to the concerns that we and others raised in our comments in our Proposal.

Second, EPA's Supplemental Notice only provides the following concrete (if you can call them that) subjects for further comment with respect to reliability:

- "[t]ools and mechanisms already available to balancing authorities, RTOs, ISOs, and other reliability authorities to address reliability challenges";
- "Circumstances and conditions that should be accounted for in a [presumably new, as opposed to the 'already available' ones referenced in the preceding item] mechanism or mechanisms to address reliability concerns . . ."
- "The technical form and structure of such a mechanism or mechanisms . . . ."
- "Detailed descriptions of other reliability mechanisms . . ."
- "What information would be ample and appropriate, but not overly burdensome, to substantiate the need for and use of such a mechanism or mechanisms . . . ."
- "Lessons learned from" the "architecture" and "use" of "any previously proposed or finalized reliability mechanisms . . . ."

These are precisely the avenues of inquiry EPA should have pursued *before* writing a word of its Proposal. But at this juncture it's meaningless to solicit input on these points—and does not provide any signal to the public of what it can expect in any final rule—without an analysis from EPA submitted for public comment showing what it thinks the reliability impact of the Proposal

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[18] *Id.* at 80,682/1

[19] *Id.* at 80,683/3.

[20] *Id.* at 80,684/1.

will be, a proposal of specific mechanisms to address that impact, and an explanation of why EPA thinks those mechanisms will address that impact. *There's no there there*.

EPA's farcically broad solicitation of comment here is futile because it dances around the central issue. Other commenters on the Supplemental Notice will doubtless take it at face value, supplying reams of analysis and suggestions for how the reliability impact (which in the Proposal EPA seemed to think would be nonexistent) can be mitigated. But the core issue isn't whether EPA has provided sufficient lead time for industry to implement this allegedly "adequately demonstrated" BSER, or sufficient safety valves; it's whether the scale of renewable ramp-up EPA is projecting is compatible with reliable and affordable electricity. It is not proper rulemaking to allude to concerns without describing them, take open-ended comment on "mechanisms" to address these concerns you haven't described, while providing no suggestion of what you, the regulating agency, believe is the relationship between the "mechanisms" and the problem, which you, as the agency, leave unspecified and unanalyzed.

### D. EPA failed to provide a reliability analysis of its Proposal in its appearance at FERC's conference on that very subject, the docket of which EPA now must treat as part of its own rulemaking docket.

In addition to its false claim that EPA analyzed reliability, the Proposal also falsely claimed that EPA had "consulted with the DOE and the Federal Energy Regulatory Commission (FERC) in the development of these proposals."[21] FERC Commissioner Danly submitted a comment letter in response to the Proposal pointing out that this was self-evidently not the case:

> I submit this comment to provide a necessary correction . . . The EPA did not consult *the Commission*. I understand that consultation with Commission staff on limited subjects did indeed occur. I also understand that, in the course of that consultation, *Commission staff did not provide either modelling or a substantive review* of the Proposed Rule's reliability effects. . . .
>
> When proposing a rule with such profound consequences, responsible decision-making requires hard data. Absent input from the Commission, based on detailed analyses by Commission staff, *it is nearly impossible to imagine that the EPA could be in a position to reach an informed conclusion regarding the reliability consequences* of its Proposed Rule.[22]

In our Initial Comments, we noted that FERC had provided initial notice of the November reliability conference, to include discussion of the reliability implications of the Proposal, only days before the Proposal's comment period closed. And we felt compelled to issue a notice of our own to the Agency in that regard:

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[21] 88 Fed. Reg. at 33,247/1.

[22] Letter from James P. Danly, Commissioner, FERC, to Hon. Michael S. Regan, Administrator, U.S. Environmental Protection Agency (Aug. 8, 2023), *docketed at* EPA–HQ–OAR–2023–0072 (Danly Comment) (emphases added).

> EPA should expect to receive petitions to reopen the comment period and supplement its Proposal, depending on the results of this forthcoming Technical Conference.[23]

As it happens, EPA has indeed reopened its comment period, although, as noted above, it has not supplemented its Proposal in any meaningful regard with respect to reliability. As an initial matter, EPA must treat the transcript of FERC's reliability conference,[24] and all comments submitted on FERC's docket for that conference, as comments filed in its own rulemaking docket.

The EPA official holding himself out as responsible for overseeing EPA's rulemaking, Joe Goffman,[25] acceded to this at the FERC conference:

> COMMISSIONER CHRISTIE: I'm going to presume that since you're in the fifth inning, you would like the record of this proceeding today to be shipped to you to be part of that record; correct?
>
> MR. GOFFMAN: Sure, yes.[26]

That's the *record* of the proceeding, not merely its *transcript*, EPA. That means *everything* filed in FERC Docket AD23-9-000. Here's FERC's "eLibrary" webpage: https://elibrary.ferc.gov/eLibrary/search. Have fun.[27]

We want to be crystal clear about what this means. EPA is now estopped from denying that FERC's record is to be treated as "part of [its] record." Nor can EPA claim surprise or lack of notice on its part. Three months and one day before the conference, Commissioner Danly had already informed EPA that FERC's own docket must be treated as part of EPA's own. *See* Danly

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[23] CEA Initial Comments 44 n.29.

[24] Federal Energy Regulatory Commission, 2023 Reliability Technical Conference, Docket No: AD23-9-000 (Nov. 9, 2023) (Transcript).

[25] We can't help but note here that Mr. Goffman is also widely recognized as one of the, if not *the*, designers of the illegal Clean Power Plan. *See, e.g.*, Maxine Joselow, Biden taps environmental expert to head EPA's air office as it tackles climate rules (*Washington Post* Mar. 8, 2022) ("Goffman first joined the EPA's air office in 2009 at the outset of the Obama administration. He played a key role in crafting the Clean Power Plan . . . ."), *available at* https://www.washingtonpost.com/climate-environment/2022/03/08/biden-taps-head-environmental-protection-agencys-air-office-eyeing-climate-rules/.

In addition to his stewardship of the new rulemaking providing yet another piece of evidence that the new Proposal is a pretextual way to achieve that illegal rule's forbidden goal, *see generally* CEA Initial Comments, the fact that this official, with a long and notorious history of involvement in EPA's attempt to transform the power sector, appeared at FERC's reliability conference only to say essentially nothing of substance, as explained below, highlights the cavalier attitude EPA has taken to the reliability implications of its new rulemaking.

[26] Transcript 185:13-17.

[27] FERC originally slated the end of its comment period for December 14, but later extended that deadline to December 20, the same date that EPA's supplemental comment period closes.

Comment 3 ("I urge the EPA to extend the comment period in [its] docket in order to afford FERC the opportunity to lodge the record of its upcoming technical conference, including the comments FERC receives from the public, in the administrative record for [its] proceeding.").

We don't know exactly what FERC intends to do in this regard,[28] so we're doing it ourselves: We hereby incorporate by reference the FERC docket in its entirety to our comments. EPA, disregard that docket at your peril. EPA must review the FERC record in its entirety, just as it would comments directly submitted in the first instance to its own rulemaking docket. Any failure to provide adequate responses to material comments in *either* docket will leave any final action arising from EPA's rulemaking vulnerable on judicial review.

It is entirely a situation of EPA's own making that it now has ample comment on reliability before it, much of it adverse, both in its own docket and in FERC's as incorporated by consent and by reference, without the Agency having ever presented its own reliability analysis. Deferring to others for analysis of reliability impacts, while studiously ignoring the issue except to evade it and belatedly cast around for kludges in a threadbare Supplemental Notice, is no way to craft environmental regulation. And it carries consequences. EPA must now lie in this bed that it has made through its calculated refusal[29] to put its own name to a reliability analysis and submit it for public comment.

We now turn to EPA's participation in FERC's conference. It runs 36 pages in the transcript, a full third of which is in the form of a lengthy prepared opening statement from Mr. Goffman, another 8 pages a colloquy between FERC's chair and Mr. Goffman that we think it's fair to characterize as friendly, and then 16 pages of questions from the other Commissioners and Mr. Goffman's . . . responses, at least in the literal sense of that word.

Both in his opening statement and his colloquies with the Commissioners, Mr. Goffman's statements on reliability generally and the reliability implications of the Proposal can be grouped under the following four headings:

- (1) Reliability analysis is a "process" or a "dialogue";[30]

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[28] We note that the week before FERC's and EPA's comment periods on their respective dockets closed, FERC's Chief of Staff posted on FERC's docket a letter to Mr. Goffman, "welcom[ing him] to review the Reliability Technical Conference proceeding record" and noting that, "[i]n addition to the conference's transcript, the record includes speaker statements, pre-conference comments and statements from the Commissioners, as well as post-technical conference comments."

[29] There were at least three points during the past year when EPA could and should have changed course in this regard. The first was during its preparation of the Proposal, when the interagency review comments noted that its self-styled, then-draft "reliability analysis" TSD was nothing of the sort. The second was when FERC issued notice in August that it would be holding a conference to specifically address the Proposal's reliability implications. The third was EPA's own participation in that November conference. In baseball, three strikes means you're out. Here, it also means Hanlon's razor no longer applies.

[30] *See* Transcript 164-65 ("We plan continued engagement with FERC staff, you, with grid operators, balancing authorities and reliability institutions to guarantee that we have detailed and up to date information on the reliability implications of the proposed rule."), 166 ("EPA's understanding of what

- (2) Timelines for compliance can be extended, and more flexibilities can be afforded;[31]
- (3) Non-, quasi-, and intergovernmental organizations such as RTOs and reliability entities exist;[32]
- (4) We'll figure it out in the final rule.[33]

None of these provide any substance beyond what's in the Proposal. None of these address EPA's statutory obligation to consider "energy requirements." None of these provide a belated substantiation of the Proposal's false claim that "[t]he EPA has evaluated the reliability

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reliability is, which is every bit as much of a process, and for a learning experience in terms of what we need to do to support that process."), 167 ("[W]hat we refer to as our reliability analysis or really resource adequacy analysis, was to create a framework for further discussion."), 168 (discussing lessons ostensibly learned from a prior regulation of power plants under another CAA section) "[T]he real kind of lived experience of the professional experts who are to my left and to my right, and in large numbers back at headquarters was that reliability is a process, and from the purposes of what we need to know and do when we do pollution regulation, so we have to be in dialogue. And we were doing our best in the proposal to try to structure that dialogue."), 178 ("[T]his is very much a work in process" [indeed!] . . . .").

[31] *See* Transcript 161 ("We intend, with this proposal, and we'll certainly consolidate this at final, is to provide ample lead time for compliance"), 162 ("A fourth feature of flexibility is actually inherent in the state planning process that Section 111 D of the Clean Air Act authorized"), *but see* CEA Initial Comments 55-65 (demonstrating that the Proposal would illegally constrict state discretion), 178 ("[U]ltimately I think what we are going to have to do is go back to the features that we proposed in terms of compliance timelines, the way we subcategorize facilities that have different functions, maybe in terms of the stringency, and provide more flexibility perhaps in order to accommodate these changes, you know.").

[32] *See* Transcript 168 ("[W]e might need to make [changes in the Proposal] . . . . in order to accommodate, for example, that lead time, so that reliability entities can respond to their planning and identifying measures that need to be taken."), 172 ("One of the things that we are hearing a lot about since the proposal is that states and utilities and system operators, we'd like to know a lot more than what we actually put in the proposal about what options they have to adopt so-called flexibility mechanisms."), 180 ("[V]ery often EPA's rules are the center of attention, but they're never the center of the ultimate mechanism and system for ensuring reliability."), 182 ("[F]ive or six features of this particular rule. . . . were intended to accommodate changes in the system that change the problem statement for system operators.").

[33] *See* Transcript 158-59 ("We're committed to continuing that engagement over the coming weeks and months so that we can assure that we arrive at a final rule for reducing climate pollution in the power sector that is effective, that's workable, and is fully compatible with maintaining reliable and affordable electricity."), 167 ("[S]ince this is a proposal and not a final rule, in many ways our approach was to sort of set the stage for the kind of ongoing inquiry we need to continue to do to finalize something that works . . . ."), 178 ("[W]e have to become more informed, more educated about that [*i.e.*, that 'the kinds of system management challenges that the system operators are facing, you know, are not quite the same as they were five or ten years ago.', *id.*], and then figure out how to feed that back into the design of the final.").

implications of the proposal." Instead, all of them highlight different aspects of the substantive defects and procedural irregularities that mar, and will ultimately doom, this rulemaking.

The first and fourth categories are confessions of deliberate failure to provide notice and opportunity for comment on what EPA thinks the reliability implications of its Proposal are and how it intends to address them. They by themselves signal that EPA's Proposal was half-baked and procedurally flawed. Indeed, given the sorry state of the record, Mr. Goffman's musings about reliability as a "process" register as the regulatory version of "we must pass it to know what's in it." Which roughly translates to "we must implement the Proposal in order to analyze its impact on reliability."

The second category highlights the multiple, fatal flaws that we and others objected to in our comments on the Proposal—in brief, that it constitutes an unauthorized "fifteen-year-plan" to force technologies online at scale under a statutory provision that requires EPA to identify a "best system of emission reduction which . . . . *has been* adequately demonstrated," rather than one that *might be* available several presidential terms into the future. But even then, Mr. Goffman envisions EPA needing to riddle the BSER with more holes than Swiss cheese to mitigate the risk of crashing the grid.[34]

The third, in which Mr. Goffman repeatedly seems to suggest that because other entities exist whose task is to manage retirements and ensure reliability, EPA can rely on their existence and their charge notwithstanding its own statutory obligation to consider energy requirements, is even more troubling. There were hints of this mindset already in the Resource Adequacy TSD's expression of an "expect[ation]" that these other entities could ensure that retirements resulting from EPA's rule would be carried out "through an orderly process."[35] *See* CEA Initial Comments Of course, the very thing any such process would have to be "ordered" around is precisely what EPA refuses to analyze—the reliability impact of its Proposal. This points to a basic conceptual flaw in EPA's approach: a bald presumption that EPA's final rule will not (could not) materially undermine RTOs' and other responsible parties' ability to keep the lights on. Until EPA produces a reliability analysis, and perhaps still then, this all amounts to little more than wishcasting.

Twice in eight years EPA has proposed an overhaul of the grid to force it away from its traditional fuel mix and towards a riskier, unproven one—the first time directly, and, per the Supreme Court, illegally; this second time indirectly and pretextually. And when confronted with questions about what it's doing to ensure our electric system can handle this pressure, EPA's representative at FERC's reliability conference now largely passes the buck and serves up a master class in magical thinking.

[34] Even if EPA *were* authorized to select a BSER that requires a fifteen-year-plan to implement—and our Initial Comments demonstrate that it is not—Mr. Goffman's discussion of this issue is a tacit confession that even at the end of that lengthy journey EPA's proposed BSER would *still* not be "adequately demonstrated."

[35] *See* CEA Initial Comments 48.

But even taking this third category at face value, testimony in other panels at FERC's conference suggests that all is not well on this front. A representative from MISO warned "there is much of [retirement planning and oversight] that is completely out of our control," and that "at least from a who has the responsibility for retirement, nobody has really the responsibility for is this retirement going to cause a resource adequacy problem."[36] And a representative from the Electric Power Supple Association (EPSA) spoke of "the development of policies that have—that are intended to achieve certain goals and are not necessarily including or looking at the impact on reliability."[37] There's more where that came from.[38] EPA is obliged, as we explained above, to sort through and respond to it all. Given its performance to date, we have no idea how it's going to even begin attempting to do so.

The rest of Mr. Goffman's appearance was equally concerning. In response to FERC Chair Phillips asking him to describe EPA's reliability analysis, his rambling answer boils down to a confession that EPA didn't conduct one.[39] This, of course, contradicts the Proposal's original fib to the contrary. In response to Commissioner Danly's concern about accelerated and excessive retirements resulting from the rule, he essentially said, "yeah, I'm worried too." In response to Commissioner Christie's question whether and how EPA analyzed how plants are expected to obtain financing to comply with the rule, he verbally shrugged. And, again in response to Commissioner Christie, when asked how much this rulemaking is expected to accelerate coal plant retirement above the baseline projection, he either feigned or spoke from an actual position of ignorance (we're not sure which possibility is more troubling) on that question.

He did at one point let slip just how pointed and fundamental criticism of the Proposal has been:

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[36] Transcript 56, 60.

[37] Transcript 47.

[38] *E.g.*: a speaker from Portland GE explaining that "this last summer we had sufficient generation capacity where transmission deliverability was really the challenge in getting those generating assets to load, again emphasizing the need to look at both transmission and generation to support resource adequacy," Transcript 40, which highlights the crucial difference between "resource adequacy" and reliability, and the inadequacy of EPA's analysis which only addresses the former (and does so in a highly flawed matter, *see* CEA Initial Comments 46-49; a speaker from NERC undermining the Proposal's unreasoned assumption that sufficient transmission will be build, *see id.* at 48, with the observation that "we're now looking at [electric demand] growth prospects of maybe 50, 100, 150 percent over the next 10 to 20 years. This is a country that hasn't proven its ability to develop infrastructure to support that. So we're going to need to figure out how to get transmission built. We're going to have to figure out how to speed the development of new resources onto the grid, and importantly, we need to figure out how to retain the stuff that we have to meet any of these policy objectives."), Transcript 22.

[39] *See* Transcript 166-68 (including this remarkable real-time confession: "So, in a way, our—what we refer to as our reliability analysis *or really resource adequacy analysis*, was to create a framework for further discussion.") (emphasis added).

> You know, there are other, you know, a common record is actually includes [*sic*] three or four other items that nicely set the agenda for us to go through in follow-up conversations *specifically around the overall practicality of the rule, and the reliability issues*.[40]

But apart from that, Mr. Goffman, how was the play?

## III. Developments since the initial comment period closed provide further evidence that the Proposal is both technically flawed and a pretextual vehicle for a policy goal that it is illegal for EPA to pursue using Section 111 of the Clean Air Act.

Our Initial Comments demonstrated that EPA's proposal to identify carbon capture and co-firing with "low-GHG hydrogen" as BSER (Best System of Emission Reduction), but only over a "fifteen-year-plan" time frame, was not in keeping with the statute. Our Initial Comments also demonstrated that the Proposal is a pretextual resumption of the illegal Clean Power Plan's forbidden policy goal: to reshape the nation's electricity markets under the guise of source-specific pollution control. In the three months and two weeks since the Proposal's comment period closed, additional evidence has mounted to support both these points.

First, we have seen a slate of bad news for those pinning their hopes on a massive expansion of renewable generation in the short and medium term, and cautionary analysis warning that EPA's proposal is unrealistic in this regard. The North American Electric Reliability Corporation (NERC) issued a report just last week that contained warnings about EPA's Proposal in unusually stark terms for this organization:

> While subject to change in the rulemaking process, proposed EPA regulations under Clean Air Act Section 111 to address carbon emissions from fossil-fired generators would result in an increase in the rate of generator retirements. . . . Additional generator retirements beyond currently expected levels have the potential to exacerbate energy, capacity, or ERS [essential reliability services] issues.[41]

Offshore wind power development has hit rocky shoals.[42] And political and popular opposition to carbon-dioxide pipeline projects in multiple states, and the resulting abandonment of major projects,[43] call into question EPA's projections about the feasibility of developing this

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[40] Transcript 184 (emphasis added).

[41] 2023 Long-Term Reliability Assessment (NERC Dec. 2023) 32, *available at* https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2023.pdf.

[42] *See, e.g.*, Scott Disavino, US offshore wind writedowns seen soaring with Orsted earnings (Reuters Oct. 31, 2023), *available at* https://www.reuters.com/business/energy/us-offshore-wind-writedowns-seen-soaring-with-orsted-earnings-2023-10-31/; Avi Salzman, America's Wind Power Woes Are Getting Worse (Barron's Sept. 8, 2023), *available at* https://www.barrons.com/articles/america-wind-power-woes-606a9c57.

[43] *See, e.g.*, Jeffrey Tomich et al., Scuttled CO2 pipeline renews debate about state hurdles (E&E News EnergyWire Oct. 23, 2023), *available at* https://www.eenews.net/articles/scuttled-co2-pipeline-renews-debate-about-state-hurdles/; Donnelle Eller, Navigator kills its $3.5B carbon capture pipeline across Iowa, South Dakota, other states (Des Moines Register Oct. 20, 2023), *available at*

infrastructure on anywhere near the scale and speed EPA's Proposal requires. Given that EPA's approach to reliability amounts to little more than dead-reckoning, these shifting currents against renewable development warrant a fundamental reassessment of this Proposal.

Even parties reasonably expected to support the Proposal have voiced concerns. The EFI Foundation, in a report headed by its leader, former Obama Administration Energy Secretary Ernest Moniz, noted:

> [M]ajor infrastructure deployments are needed in the next decade that may limit implementation, especially because of the highly decentralized nature of fossil generators and the regional electricity structures. EFI Foundation modeling finds that unabated coal would phase out by 2035, as adopting CCS on existing coal by 2030—per the proposal—faces major financial and permitting headwinds. Roughly a fivefold increase in solar, a threefold increase in wind capacity, and a sixfold increase in battery storage are needed by 2035 compared to today. . . . [T]he proposed BSERs are resource dependent and not equally available across the country. . . . EPA's proposal depends on rapidly overcoming permitting challenges of enabling infrastructure[.][44]

And Gina McCarthy, who as President Obama's EPA Administrator signed the Clean Power Plan, and as President Biden's National Climate Advisor touted for two years the current Administration's agenda, now calls for "debunk[ing] the myth of carbon capture and sequestration."[45] We suspect she intends something very different by this phrase than we do, but for once we agree with her: EPA's fifteen-year-plan to summon into being these unproven measures, and its proposed finding that they *have been* "adequately demonstrated," is indeed a "myth."

For his part, McCarthy's erstwhile colleague, John Kerry, the Administration's international climate "czar," provided additional evidence that the Proposal is pretextual, designed not to improve individual source's emission performance but to rework the nation's electric fuel mix, precisely what the Supreme Court held in *West Virginia*, when he said at this year's annual climate conference that the United States' policy is to forbid the construction of new coal plants

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https://www.desmoinesregister.com/story/money/business/2023/10/20/navigator-kills-its-carbon-capture-pipeline-in-iowa-other-states-ethanol-poet/71253882007/;

[44] How Much, How Fast?—Infrastructure Requirements of EPA's Proposed Power Plant Rules (EFI Foundation Oct. 2023) 4, 5, 40 (internal citation omitted), *available at* https://efifoundation.org/wp-content/uploads/sites/3/2023/10/EPA-H2-Infrastructure-1.pdf.

[45] Gina McCarthy Statement on Draft COP28 Climate Agreement December 12, 2023 (America Is All In Dec. 13, 2023), *available at* https://www.americaisallin.com/gina-mccarthy-statement-draft-cop28-climate-agreement.

and to "phase out" existing ones.[46] What is it about these international conferences that compels our nation's highest-ranking officials to give the game away like this?[47]

In short, the Proposal looks even more divorced from reality, and even more blatant pretext, with the benefit of three months' additional developments. EPA's unrelenting drive to use a source-performance provision to reshape our utility sector is heading the Agency off a cliff.

## IV. Conclusion.

EPA's in a box. If it modifies the Proposal by extending timelines, that only highlights the illegality of its approach; if a fifteen-year-plan isn't contemplated by the statute, a twenty-year-plan is even less so. If it instead or additionally provides more carveouts and exemptions, *that* only highlights the contrast between its proposed measures and the true meaning of "adequately demonstrated," which, as our Initial Comments demonstrated, is "it'll soon be widely available and it has a proven track record."[48] And if it punts to reliability and planning entities to clean up its mess, that abrogates *its own* statutory duty to consider "energy requirements," and confirms the central flaw in this rulemaking, which it shares with the illegal Clean Power Plan: an excessive imposition on FERC, state and local governments, and non-, quasi-, and intergovernmental organizations tasked with ensuring the lights stay on, running roughshod over the Federal Power Act's careful reservation of resource-mix decisions to the states. Any which way the Agency turns, the prospects of a final rule looking anything like the Proposal surviving judicial review are slim to none.

So what should EPA do? Our advice remains the same as in our Initial Comments: "less, more thoughtfully, and with more restraint." If EPA feels compelled to regulate here, it should identify a "best system of emission reduction" that *actually* "has been adequately demonstrated." And if it's not satisfied with any of the "system[s]" that may meet this statutory standard, it, the broader Administration, and their supporters in civil society are free to use appropriate channels to urge Congress to amend or create legislation empowering EPA or other executive agencies to impose their preferred measures.

For EPA to continue hurtling down this road is unwise. But we're no more optimistic than we were this past August that the Agency will heed this warning. So we want to close by directly addressing not the Administrator, who is a political appointee, nor Mr. Goffman, who's the same, but rather the civil servants in EPA's air and counsel's offices.

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[46] *See, e.g.*, Rebecca Falconer, Kerry: Coal power plants shouldn't be "permitted anywhere in the world" (Axios Dec. 4, 2023), *available at* https://www.axios.com/2023/12/04/john-kerry-cop-28-coal-plants-no-more-permits; Seth Borenstein, John Kerry says U.S. stands with 56 countries committed to phasing out coal power plants entirely (Fortune Dec. 4, 2023), *available at* https://fortune.com/2023/12/04/john-kerry-phase-out-coal-power-56-countries-cop28-dubai/.

[47] *Cf.* CEA Initial Comments 72 (discussing Administrator Regan's statement at a conference earlier this year that the Proposal "helps us to transition from heavily fossil fuel resources to clean resources").

[48] CEA Initial Comments 11 *et seq.*

We get it. You follow direction. It's all you can rightly do. But on some level, you must realize this is madness. Even if you share this Administration's goals, you know this proposal is both legally infirm and detached from policy reality. And so we'll end by borrowing a phrase from Churchill, as we did in our Initial Comments: the signature on this final rule will not be the end, but only the end of the beginning. The end will come in one or both of two forms, just as it did with the illegal Clean Power Plan: judicial vacatur, or a judicial stay pending a repeal and replace rule under a new Administration.

/s/

Marc Marie

President

Center for Environmental Accountability