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DEPARTMENT OF ENERGY

FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

The Commission's Role Regarding the
Environmental Protection Agency's
Mercury and Air Toxics Standards

Docket No. PL12-1-000

POLICY STATEMENT ON THE COMMISSION'S ROLE REGARDING
THE ENVIRONMENTAL PROTECTION AGENCY'S
MERCURY AND AIR TOXICS STANDARDS

1. The Commission issues this Policy Statement to explain how it will provide advice to the Environmental Protection Agency (EPA) for it to rule on requests for Administrative Orders (AO) to operate in noncompliance with EPA's Mercury and Air Toxics Standards (MATS).¹ As noted below, this Policy Statement does not represent the entirety of the Commission's efforts to monitor the impact of EPA regulations generally on bulk-power system reliability.

I. Introduction

2. On December 21, 2011, the EPA released the MATS final rule pursuant to its authority under Section 112 of the Clean Air Act (CAA).² The MATS final rule limits mercury, acid gases and other toxic emissions from power plants. Pursuant to Section 112(i)(3)(A) of the CAA, affected sources are required to comply within three years of

¹ National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, <http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-806.pdf>.

² 42 U.S.C. § 7412(i)(3)(A) (2006).

the MATS effective date. Pursuant to CAA Section 112(i)(3)(B), some affected sources are eligible for a one-year extension (i.e. for a total of four years).³

3. The EPA's Office of Enforcement and Compliance Assurance released a policy memorandum (EPA Policy Memorandum) dated December 16, 2011 describing its intended approach regarding the use of CAA Section 113(a) AOs with respect to sources that must operate in noncompliance with the MATS for up to a year to address a specific and documented reliability concern (i.e. for a total of five years).⁴

4. On January 30, 2012, Commission staff issued a White Paper seeking comment concerning staff's position on how the Commission should advise the EPA on requests for extension of time to comply with EPA's MATS. The Commission has considered all comments received in the formulation of this Policy Statement, which is limited in scope to how the Commission will handle an AO filing under CAA Section 113(a) for noncompliance with the MATS. This Policy Statement does not address the entirety of the Commission's efforts to monitor the impact of EPA regulations generally on bulk-power system reliability.

II. Background

A. Compliance with EPA's Mercury and Air Toxics Standards

5. Under Section 112(i)(3) of the CAA, affected sources must be compliant with MATS within three years, with an extension of up to one year available in certain cases.⁵ In addition to the up to four-year compliance period contemplated in Section 112(i)(3), the EPA Policy Memorandum describes a process by which certain affected sources can obtain an AO to operate in noncompliance for an additional year pursuant to Section 113(a) of the CAA. Specifically, the EPA Policy Memorandum contemplates that the EPA will receive AO requests: (1) concerning electric generating units (EGUs) that may

³ See *id.* § 7412(i)(3)(B).

⁴ The Environmental Protection Agency's Enforcement Response Policy For Use Of Clean Air Act Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury and Air Toxics Standard (Dec. 16, 2011), <http://www.epa.gov/compliance/resources/policies/civil/erp/mats-erp.pdf>.

⁵ The EPA Policy Memorandum refers to the date by which affected sources must comply under Section 112(i)(3) of the CAA (which includes the possible one-year extension under Section 112(i)(3)(B)) as the "MATS Compliance Date."

affect reliability due to deactivation; and (2) concerning EGUs that may affect reliability due to delays related to the installation of controls.⁶

6. The EPA Policy Memorandum states that an AO cannot be issued under Section 113(a) prior to the MATS Compliance Date in Section 112(i)(3).⁷ However, provided an owner/operator has timely submitted a complete request and provided appropriate cooperation, the EPA expects to give an owner/operator “as much advance written notice as practicable of the [EPA’s] plans with regard to such an AO.”⁸

7. The EPA Policy Memorandum states that in evaluating a request for an AO, the EPA will seek advice, on a case-by-case basis, from the Commission and/or other entities with relevant reliability expertise.⁹ However, the EPA’s issuance of an AO is not conditioned upon the approval or concurrence of the Commission or any other entity.

1. General Requirements for AO Requests

8. The EPA Policy Memorandum provides that within one year after the MATS effective date, an owner/operator should submit written notice of its compliance plans (Notice of Compliance Plans) with regard to each EGU it owns or operates to the planning authority for the area in which the relevant EGU is located. According to the EPA, the Notice of Compliance Plans should identify: (1) the units the owner/operator plans to deactivate and the anticipated dates of deactivation; and (2) the units for which it intends to install pollution control equipment or otherwise retrofit and the anticipated schedule for completion of that work.

⁶ EPA Policy Memorandum at 4.

⁷ *Id.* at 5.

⁸ *Id.*

⁹ The EPA Policy Memorandum states that “in light of the complexity of the electric system and the local nature of many reliability issues, the EPA will, for purposes of using its Section 113(a) AO authority in this context, rely for identification and/or analysis of reliability risks upon the advice and counsel of reliability experts, including, but not limited to, the Federal Energy Regulatory Commission (‘FERC’), Regional Transmission Operators (‘RTOs’), Independent System Operators (‘ISOs’) and other Planning Authorities as identified herein, the North American Electric Reliability Corporation (‘NERC’) and affiliated regional entities, and state public service commissions (‘PSCs’) and public utility commissions (‘PUCs’). The EPA will work with these and other organizations, as appropriate, to ensure that any claims of reliability risks are properly characterized and evaluated.” EPA Policy Memorandum at 2.

9. The EPA Policy Memorandum states that an owner/operator should, generally no less than 180 days prior to the MATS Compliance Date,¹⁰ submit a written request to the EPA¹¹ for an enforceable compliance schedule in an AO for the unit. An owner/operator should submit the following information for all AO requests:

(1) copies of the Notice of Compliance Plans provided to the planning authority or an explanation why it was not practicable to have provided such notice and a demonstration that such notice was provided as soon as it was practicable;

(2) written analysis of the reliability risk if the EGU were not in operation, which demonstrates that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would: (a) result in the violation of at least one of the reliability criteria required to be filed with the Commission, and, in the case of the Electric Reliability Council of Texas, with the Texas Public Utility Commission; or (b) cause reserves to fall below the required system reserve margin;

(3) written concurrence with the reliability risk analysis, or a separate and equivalent analysis, by the planning authority for the area in which the relevant EGU(s) are located, or, in the alternative, a written explanation of why such concurrence or separate and equivalent analysis cannot be provided, and, where practicable, any related system wide analysis by such entity;

(4) copies of any written comments from third parties directed to, and received by, the owner/operator in favor of, or opposed to, operation of the unit after the MATS Compliance Date;

¹⁰ The EPA Policy Memorandum also has provisions for an owner/operator to, in certain circumstances, provide less notice to the EPA and the Commission.

¹¹ This request is to be submitted electronically to the Director of the Air Enforcement Division in the EPA's Office of Enforcement and Compliance Assurance and the Regional Administrator of the EPA region in which the EGU is located, with a copy to the Commission. At the same time, an owner/operator should provide notice that it is seeking an AO to: (1) the planning authority, (2) any state public utility commissions or public service commissions with regulatory jurisdiction with regard to the relevant EGU, and (3) any state, tribal or local environmental agency with permitting authority under Titles I and V of the CAA, and any tribal environmental agency that does not have such authority, with jurisdiction over the area in which the EGU is located (collectively, "AO Notice Recipients").

(5) a plan to achieve compliance with the MATS no later than one year after the MATS Compliance Date, and, where practicable, a written demonstration of the plan to resolve the underlying reliability problem and the steps and timeframe for implementing it, which demonstrates that such resolution cannot be effected on or before the MATS Compliance Date; and

(6) identification of the level of operation of the EGU that is required to avoid the documented reliability risk and, consistent with that level, a proposal for operational limits and/or work practices to minimize or mitigate any hazardous air pollutant emissions to the extent practicable during any operation not in full compliance with the MATS.¹²

2. Specific Requirements for AO Requests

10. As stated above, the EPA Policy Memorandum states that the owner/operator of an EGU that wants to obtain an AO must, no less than 180 days prior to the MATS Compliance Date, submit electronically a written request for an enforceable compliance schedule. To request an AO for any EGU that is required to run for reliability purposes that, due to factors beyond the control of the owner/operator, have delays in installation of controls or need to operate because another EGU has had such a delay, the EPA Policy Memorandum states that an owner/operator should: (1) within a reasonable time of learning of a delay that it believes may result in an EGU being unable to comply by the MATS Compliance Date, provide to the planning authority for the area in which the relevant EGU(s) are located, written notice of the EGU(s) impacted by the delay, the cause of the delay, an estimate of the length of time of the delay, and the timeframe during which the owner/operator contemplates operation in non-compliance with the MATS; (2) within a reasonable time of learning that it is critical to reliability to operate the identified EGU(s) in non-compliance with the MATS after the MATS Compliance Date, submit electronically to the AO Request Recipients a written request for an enforceable compliance schedule in an AO for the EGU(s), which includes information responsive to as many of the general requirements discussed above as it is possible to provide at that time; and (3) at the same time the owner/operator submits its request for an AO, provide notice that it is seeking such an AO to the AO Notice Recipients.

B. Energy Policy Act of 2005 and Mandatory Reliability Standards

11. Section 215 of the Federal Power Act (FPA) requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which provide for the reliable operation of the Bulk-Power System,

¹² EPA Policy Memorandum at 6-7.

subject to Commission review and approval.¹³ On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of section 215 of the FPA governing electric reliability.¹⁴

III. Commission Policy for Advice to the EPA Under the EPA's Policy Memorandum

12. The EPA Policy Memorandum indicates that the EPA intends to seek advice, as necessary and on a case-by-case basis from the Commission, among others, as the EPA decides whether it will grant an AO to an owner/operator. The EPA Policy Memorandum makes clear that the EPA decision as to whether to grant an AO to an owner/operator is solely the decision of the EPA and that the concurrence or approval of any entity is not a condition for approval or denial of an AO request.¹⁵ The Commission believes that it is important to provide as much guidance to industry as possible as to how the Commission intends to provide advice to the EPA on any AO request. In developing this process, the Commission considered how to provide a fair and transparent process for communicating the Commission's expertise on reliability issues, while respecting that the EPA will seek the Commission's advice in a timely manner so that EPA can decide whether to grant certain AOs.

A. Commission Process for Advising the EPA Under the EPA's Policy Memorandum

Submittal of Information to the Commission

13. The EPA Policy Memorandum explains that when an owner/operator submits an AO request: (1) for EGUs that may affect reliability due to deactivation; and (2) for EGUs that may affect reliability due to delays related to the installation of controls, the owner/operator must provide a copy of the request to the Commission. This AO request must include an owner/operator's "written analysis of the reliability risk if the unit were not in operation, which demonstrates that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would . . . result in the violation of at least one of the reliability criteria required

¹³ 16 U.S.C. § 824o(d)(2).

¹⁴ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

¹⁵ EPA Policy Memorandum at 7.

to be filed with [the Commission]”¹⁶ In addition, the AO request will include the Planning Authority’s written concurrence with the owner/operator’s analysis, or a written explanation of why the Planning Authority’s concurrence cannot be provided.

14. As an initial matter, each AO request should be filed with the Commission. The Commission will treat any AO request filed with the Commission as an informational filing. The Commission will assign each informational filing a separate Administrative Docket (AD) number. The Commission’s Office of Electric Reliability will be designated as the lead office tasked with processing an owner/operator’s informational filing.

15. Each informational filing should include the same information that the owner/operator submitted to the EPA pursuant to the EPA Policy Memorandum. While the Commission does not propose mandating that Planning Authorities undertake specific types of analyses, the Commission identifies below certain types of information that are already available today and that the Commission commonly reviews when examining potential violations of Reliability Standards.¹⁷ Including this information as part of the materials an owner/operator submits to the EPA, and therefore to the Commission, would aid in the Commission’s review of the informational filing. It is essential that the Commission receive enough information to review the claims made by a requesting owner/operator so that the Commission can provide timely comments to the EPA. These types of information include, but are not limited to, system planning and operations studies, system restoration studies or plans, operating procedures, and mitigation plans required by the Reliability Standards.¹⁸ By suggesting what information would aid the

¹⁶ *Id.*

¹⁷ The Commission does not believe it is necessary to identify specific factors that each planning authority must take into account in assessing system reliability outside of the NERC planning standards. The existing processes used by the Planning Authorities to conduct reliability assessments, which are based on the NERC planning standards and performed under NERC’s oversight, appear to be sufficient. We encourage NERC to continue to work closely with the Planning Authorities to ensure that these existing processes adequately assess system reliability in the specific circumstances presented by compliance with EPA regulations. In addition, Commission staff is available to Planning Authorities and participants in these processes for consultation on these matters. Also, we expect Commission staff to monitor these processes through periodic outreach to Planning Authorities.

¹⁸ The Commission reviews power flow, dynamic, or other simulation results that support the Reliability Standards as well as the modeling assumptions used in these simulations. Modeling assumptions may include factors such as the base case used,

(continued...)

Commission in its review, the Commission is not requiring any specific analysis be done or indicating that this information must be submitted or what the EPA should consider, but rather what the Commission would find informative when reviewing potential violations of Reliability Standards.¹⁹

16. The Commission generally anticipates it would not have to seek additional information. The Commission is concerned that seeking additional information from an owner/operator of an EGU could delay or prevent the Commission from issuing timely comments to the EPA.²⁰

B. Scope and Standard of Review for Informational Filings

17. EPA states that the analysis provided in an AO request should demonstrate “that operation of the unit after the MATS Compliance Date is critical to maintaining electric reliability, and that failure to operate the unit would: (a) result in the violation of at least one of the reliability criteria required to be filed with the Commission, and, in the case of the Electric Reliability Council of Texas, with the Texas Public Utility Commission; or (b) cause reserves to fall below the required system reserve margin.” Commission review of an informational filing will be conducted pursuant to section 307(a) of the FPA, the Commission’s general investigative authority. The review will examine whether, based on the circumstances presented, there might be a violation of a Commission-approved Reliability Standard.²¹ In addition, the Commission’s comments to the EPA could also identify issues, pursuant to our other areas of authority, raised by the AO request for the

demand levels, modifications made to the base case, system transfers modeled, scheduled outages modeled, and contingencies tested.

¹⁹ We understand that these types of information are readily available today so that their submission should not impose a burden on the owner/operator.

²⁰ However, the Commission reserves the right to seek additional information regarding a filing when necessary.

²¹ A statement by the Commission indicating that circumstances presented “might” result in the violation of a Reliability Standard would not constitute a final determination under section 215 of the FPA that a Reliability Standard has or will be violated. That is, the Commission comments will reflect our preliminary view based on information presented about a possible hypothetical circumstance in the future, not a final agency action triggering civil penalties or other enforcement actions.

EPA to consider as critical to reliability.²² Further, an EGU's continued operation may have reliability impacts beyond those implicated by the Commission's jurisdiction. The EPA should look to NERC and state commissions, among the other entities it has enumerated, for guidance in those areas.²³

18. The Commission's jurisdiction under section 215 is over the ERO, Regional Entities, and all users, owners and operators of the bulk-power system "for purposes of approving Reliability Standards established under [section 215] and enforcing compliance with [section 215]."²⁴ Further, section 215 states that "this section 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."²⁵ In addition, section 215 specifically preserves authority of states over safety, resource adequacy, and even reliability as long as the latter does not conflict with the Commission's Reliability Standards.

19. While our comments to the EPA are largely limited to whether the issue in question may result in the violation of a Reliability Standard, we recognize that the EPA is not so limited in what it may consider in reviewing a request for an AO. Indeed, the EPA Policy Memorandum indicates that the EPA may also seek advice and counsel of reliability experts, including, state public service commissions and public utility commissions, RTOs and ISOs, Planning Authorities, NERC and affiliated regional entities – and we encourage them to do so. Nothing in this Policy Statement precludes NERC, state agencies or others from providing the EPA with information regarding resource adequacy and other local reliability concerns that are not addressed in the Commission's comments to the EPA.

20. The Commission will review the Planning Authority's analysis included in each informational filing to ensure that it was reasonable and sufficiently supported by the information supplied, recognizing the Planning Authority's knowledge of, and expertise on, local and regional conditions. The Commission would focus on whether the Planning Authority's reliability analysis has identified and supported, in a detailed and reasoned

²² For example, the Commission may determine that the potential closure of an EGU could trigger the Commission's jurisdiction outside of section 215 of the FPA. *See e.g., Exelon Generation Co., LLC*, 132 FERC ¶ 61,219 (2010).

²³ Commission staff will also be available to communicate with the EPA on any reliability-related issues to aid the EPA in its consideration of these issues.

²⁴ 16 U.S.C. § 824o(b).

²⁵ *Id.* § 824o(i)(2).

fashion, whether there might be a violation of a Commission-approved Reliability Standard.

21. The Commission will advise the EPA, as contemplated by the EPA Policy Memorandum, by submitting written Commission comments to the EPA based on the Commission's review of the information provided in the informational filing.²⁶ The Commission's comments would provide advice to the EPA on whether, based on the Commission's review of the informational filing, there might be a violation of a Commission-approved Reliability Standard. As noted above, the Commission's comments may also identify issues within its jurisdiction other than a potential violation of a Commission-approved Reliability Standard. The Commission comments will not address the appropriateness of granting or denying an AO.

C. Intervention and Other Procedures

The Commission's process will not provide for entities to intervene in the AD dockets.²⁷ The EPA Policy Memorandum generally anticipates that an AO request will be filed 180 days prior to the MATS Compliance Date and the Commission is concerned that allowing interventions may inhibit the Commission's ability to timely provide advice to the EPA. In addition, interventions are not available generally in a matter under investigation pursuant to Section 307(a) of the FPA. Yet the lack of a formal intervention procedure does not preclude an interested entity from being heard. The EPA Policy Memorandum requires an owner/operator requesting an AO to submit "[c]opies of any written comments from third parties directed to, and received by, the owner/operator in favor of, or opposed to, operation of the unit after the MATS compliance date."²⁸ These materials should also be included as part of the informational filing an owner/operator

²⁶ The Commission will vote on the Commission comments before submission to the EPA. Commission comments submitted to the EPA will be publicly posted on the Commission's eLibrary system under the applicable AD docket number. Differing views by any Commissioner will also be submitted to the EPA in writing and will be publicly posted on the Commission's eLibrary system.

²⁷ While the Commission will not seek comments on these informational filings, if comments are received by the Commission, these would be placed in the associated AD docket. Because these would be informational dockets, while the Commission may consider these comments, it would not be required to do so. Due to the nature of the Commission's comments as non-final agency action and the limited time for the Commission to act, the Commission does not anticipate responding to any comments that may be submitted in an AD docket.

²⁸ EPA Policy Memorandum at 7.

submits to the Commission under the requirements in the EPA Policy Memorandum.²⁹ While the Commission is not imposing any additional requirements, we anticipate that owners/operators will, consistent with the EPA Policy Memorandum, provide third parties with an opportunity to offer “written comments ... in favor of, or opposed to, operation of the unit after the MATS compliance date” before they submit their AO request.

IV. Conclusion

22. This Policy Statement explains how the Commission plans to advise the EPA under the EPA’s Policy Memorandum. The Commission believes the process appropriately takes into account the need for timeliness, fairness, and transparency, while respecting the Commission’s jurisdiction over electric reliability. As stated in the EPA Policy Memorandum, whether or to what extent the EPA considers or relies on the Commission’s comments, and whether to grant an AO to an owner/operator, will rest entirely with the EPA.

23. Additionally, we emphasize that this Policy Statement does not represent the entirety of the Commission’s efforts to monitor the impact of EPA regulations generally on bulk-power system reliability. For example, the Commission intends to continue addressing these issues with state commissions in a regular public forum, the National Association of Regulatory Utility Commissioners/FERC Forum on Reliability and the Environment. The Commission and its staff will also continue to review plans, reports and other information generated by the Planning Authorities, industry and other stakeholders regarding the impact of compliance with EPA regulations. To the extent additional analysis or evidence would aid the Commission’s efforts to monitor these issues, we will consider holding additional technical conferences or workshops.³⁰

²⁹ *Id.* at 5, 6.

³⁰ The Commission held a technical conference on these issues on November 30, 2011, in Docket No. AD12-1-000.

Finally, the Commission will monitor and promptly review proposals from regulated entities that may seek to modify their tariffs in order to reliably and efficiently comply with EPA regulations.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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