

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Commission Role Regarding )  
Environmental Protection Agency’s ) Docket No. AD12-1-000  
Mercury and Air Toxics Standards )  
)

**COMMENTS OF  
THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) January 30, 2012 Notice of White Paper, the New England States Committee on Electricity (“NESCOE”) hereby files these Comments in the above-captioned proceeding.<sup>1</sup>

On January 30, 2012, Commission Staff published a White Paper that “explains staff’s position on how the Commission should advise the Environmental Protection Agency (“EPA”) on requests for extension of time to comply with EPA’s Mercury and Air Toxics Standards (“MATS”).”<sup>2</sup> In order to address a “specific and documented reliability concern,” EPA may rely “for identification and/or analysis of reliability risks upon the advice and counsel of reliability experts,” including the Commission.<sup>3</sup> Staff’s proposal outlines the process by which the

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<sup>1</sup> *Commission Role Regarding Environmental Protection Agency’s Mercury and Air Toxics Standards*, Notice of White Paper, Docket No. AD12-1-000 (Jan. 30, 2012).

<sup>2</sup> Staff White Paper on the Commission’s Role Regarding Environmental Protection Agency’s Mercury and Air Toxics Standards, Docket No. AD12-1-000 (Jan. 30, 2012) (“White Paper”), at 1.

<sup>3</sup> 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) (“Enforcement Policy”), at 2.

Commission would review and analyze the information submitted as part of a MATS compliance extension request and provide advice to EPA on the request.

NESCOE appreciates the opportunity to provide comments on staff's proposal and generally supports the proposal's procedural framework. The New England states urge the Commission to conduct *de novo* reviews of MATS compliance extension requests and respectfully request that the Commission establish a process that provides for the input of EPA-identified reliability experts in these proceedings.<sup>4</sup>

## I. Communications

Pursuant to Rules 203 and 2010,<sup>5</sup> the persons to whom correspondence, pleadings, and other papers in regard to this proceeding should be addressed and whose names are to be placed on the Commission's official service list are designated as follows:

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## II. Description of the Commenter

NESCOE is the Regional State Committee for the New England region. NESCOE is governed by a board of managers appointed by the Governors of Connecticut, Maine,

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<sup>4</sup> “[T]he EPA will . . . rely for identification and/or analysis of reliability risks upon the advice and counsel of reliability experts, including, but not limited to . . . state public service commissions and public utility commissions.” Enforcement Policy, at 2.

<sup>5</sup> 18 C.F.R. §§ 385.203 and 385.2010 (2011).

Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff administered by ISO New England, Inc.<sup>6</sup> NESCOE's mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long term, consistent with maintaining reliable service and environmental quality.<sup>7</sup>

### III. Comments

National emission standards must be applied consistently across the country to give effect to their environmental purpose and to ensure equitable contributions toward meeting the nation's environmental objectives. Such consistent application must be achieved irrespective of differences that exist in the particular reliability analyses conducted by electric generating units or by regional planning authorities. The process the Commission adopts to enable it to provide counsel to the EPA on the administration of national emission standards should have as its cornerstone the identification of consistent analysis applied uniformly across the country.

Pursuant to Section 112 of the Clean Air Act ("CAA"),<sup>8</sup> the EPA finalized its national emission standards for hazardous air pollutants from electric generating units ("EGU").<sup>9</sup> This rule, more commonly known as MATS, will regulate the emissions of mercury, acid gases, and other toxic pollutants from coal- and oil-fired electric generators. Affected entities will have

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<sup>6</sup> ISO New England, Inc., 121 FERC ¶ 61,105 (2007).

<sup>7</sup> See *Joint Petition for Declaratory Order to Form a New England Regional State Committee*, The Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Docket No. EL04-112-000 (Jun. 25, 2004).

<sup>8</sup> 42 U.S.C. § 7412(i)(3)(A) (2006).

<sup>9</sup> 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, 77 Fed. Reg. 9304-9513 (2012) (to be codified at 40 C.F.R. pts. 60 and 63).

three years to attain compliance with the emission limits contained therein. The CAA also allows Title V Permitting Authorities to grant one-year extensions to the compliance deadline for EGUs that are unable, despite best efforts, to comply within three years so that they may install pollution control devices. Finally, EPA’s Office of Enforcement and Compliance Assurance has the authority under CAA Section 113 to permit EGUs to operate in non-compliance for up to an additional year to address a “specific and documented reliability concern.”<sup>10</sup> In order to properly evaluate the reliability concern, “EPA intends to consult, as necessary or appropriate on a case-by-case basis, with FERC and/or other entities with relevant reliability experience.”<sup>11</sup> This provision of EPA’s enforcement policy, under the Administrative Order (“AO”) authority of Section 113(a), would only apply to units that are “critical for reliability purposes.”<sup>12</sup>

To provide EPA with advice and counsel regarding the reliability concerns that form the basis for an AO request, Commission Staff proposes a process for the Commission to follow in its White Paper. As the EPA requires the owner or operator of an EGU to file a copy of the request for an AO with the Commission, staff proposes the request be filed with the Commission Secretary. Under staff’s proposal, the request would be classified as an informational filing and assigned an Administrative Docket number. The proposal would designate the Commission’s Office of Electric Reliability as the lead office charged with attending to the informational filing. Staff proposes the Commission review the informational filing to determine “whether, based on the circumstances presented, there might be a violation of a Commission-approved Reliability Standard.”<sup>13</sup>

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<sup>10</sup> Enforcement Policy, at 2.

<sup>11</sup> Enforcement Policy, at 7.

<sup>12</sup> Enforcement Policy, at 2 (citing 42 U.S.C. § 7413(a)).

<sup>13</sup> White Paper, at 7.

NESCOE does not anticipate that reliability issues will arise in New England due to compliance with MATS. The region's organized wholesale electricity markets, stringent emission limits for new power plants, and the economics of competition have generally imposed discipline on New England's generation fleet, resulting in the dispatch of thermally efficient generation resources. New England has made progress in reducing regional air emissions as a result of using cleaner fuels to generate electricity and implementing emission control technologies.

Given that New England has already committed significant resources to reducing air emissions, the region has an interest in ensuring that the process for reviewing AO requests is performed in a fair and consistent manner and does not result in continued economic penalties for early adopters of pollution control methods.<sup>14</sup> Such a process must ensure that New England, a downwind region, does not continue to suffer the adverse environmental and economic impacts associated with the emissions addressed by MATS.

***A. The Commission Should Review AO Request Informational Filings De Novo***

The White Paper requests comments on whether the Commission should accord some level of deference to the reliability analyses performed by planning authorities as part of an EGU's AO request.<sup>15</sup> In order to provide the EPA with consistent, expert advice on whether there might be a violation of a Commission-approved Reliability Standard, the Commission should conduct an objective *de novo* review of the AO Request informational filings. To be

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<sup>14</sup> All else equal, resources that have already made the investments to meet EPA requirements have a higher cost of production than resources that have not made similar investments. As a result, these so-called 'first-movers' are competitively disadvantaged relative to later-adopting resources. Perpetuating the competitive disadvantage, in effect, penalizes early compliance and exacerbates regulatory uncertainty.

<sup>15</sup> White Paper, at 7.

clear, NESCOE does not suggest that the Commission perform its own reliability analysis or alter any interpretations of existing reliability standards. Rather, NESCOE suggests that FERC review *de novo* the inputs and assumptions, as well as the conclusions, included in such filings. As planning authorities across the country use different analytical methods and input assumptions in studies, FERC should rely upon, but not defer, to the conclusions reached by the EGU owner/operators or planning authorities. In many cases, these inconsistencies in such EGU owner/operators or various planning authorities' analyses are not evident absent a detailed review.

As the EPA's MATS is a national standard with national environmental implications, it must be applied consistently across planning authorities pursuant to uniform analysis. A *de novo* review by the Commission will enable uniform evaluation of the specific means by which EGU owners/operators and/or planning authorities conducted the analysis. Further, a *de novo* review will also enable the Commission to assess whether each planning authority performed a particular reliability analysis pursuant to the same standards they used in prior reliability analyses. Applicants for extension requests should not benefit from unconventional or inordinately stringent reliability analyses. The EPA's Office of Enforcement and Compliance Assurance is relying on the Commission to provide expert counsel on highly-technical subject matter and deference to the regional planning authorities may not be compatible with EPA's policy to bring reliability-critical units into MATS compliance. For these reasons, the Commission should conduct its reviews *de novo*.

***B. The Commission Should Establish a Process That Allows Reliability Experts to Provide Input Into the Commission’s Informational Filing with the EPA***

The White Paper also proposes that “the Commission should not permit entities to intervene in the preparation of the Commission comments to the EPA” on whether there might be a violation of a reliability standard with regard to an individual EGU’s approach for compliance with MATS.<sup>16</sup> The White Paper envisions the Commission receiving copies of any comments received by the owner/operator of the EGU as part of its AO Request informational filing. Staff proposes that the Commission may consider these comments, when appropriate, in the development of its advice to EPA, but that the Commission would not be required to address any comments received on the informational filing.<sup>17</sup>

The purpose of EPA relying upon the Commission’s advice and counsel is to enable it to fully understand associated reliability risks. EPA intends to rely on reliability experts, including state public service commissions (“PSC”) and public utility commissions (“PUC”), to properly characterize and evaluate claims of reliability risk associated with complying with MATS. Therefore, the Commission should establish a formal process that would permit the entities identified by EPA as reliability experts to provide input in the Administrative Dockets opened to process the AO request informational filings. The EPA-identified reliability experts can provide meaningful context and interpretation to the review of the informational filings’ reliability analyses. An EPA-identified reliability expert could also help to identify and explain differences between an EGU owner/operator’s reliability analysis and their planning authority’s analysis to assist the Commission’s assessment.

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<sup>16</sup> White Paper, at 7.

<sup>17</sup> White Paper, at 7-8 n. 21.

NESCOE recommends that the Commission establish a process under which the Commission would issue a preliminary draft of the informational filing to be submitted to the EPA and provide the opportunity for reliability experts to comment on the draft. The Commission should use these comments to refine its filing with the EPA. While NESCOE recognizes that the EPA administrative process provides the opportunity for reliability experts to file comments directly with the EPA, comments provided to the Commission would assist the Commission's efforts to provide an informational filing to EPA that reflects the expertise and diverse perspectives of entities involved in ensuring reliability.

NESCOE understands the Commission's interest in administrative efficiency and recognizes that the EPA administrative process timelines will impose resource constraints on the Commission. However, the Commission's review of specific and documented reliability concerns could include consideration of cross-seam implications with the input of multiple reliability experts without compromising that efficiency. In addition, a process that involves reliability experts early and imposes strict schedules could meet the necessary timelines and provide an appropriately comprehensive filing with the EPA.

Finally, the Commission's review of AO request informational filings may require consideration of issues outside the scope of Section 215 of the Federal Power Act.<sup>18</sup> The timing, feasibility, and economics of measures intended to remedy a potential reliability risk associated with the non-operation of a critical unit may lie outside the scope of Section 215's Reliability Standard. Certain EPA-identified reliability experts, including state PSCs and PUCs, could provide comments to assist the Commission's consideration of these issues. Permitting these types of entities to comment, and considering their comments, would enhance the quality of the

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<sup>18</sup> 16 U.S.C. § 824(o) (2006).

