

March 27, 2018

The Honorable Scott Pruitt  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Submitted electronically via Regulations.gov

**Attn: EPA-HQ-2017-0355**

**RE: Comments of Former FERC Commissioners Norman C. Bay, John Norris, and Jon Wellinghoff**

## **I. Introduction**

We appreciate the opportunity to provide these comments on the Environmental Protection Agency's ("EPA's") proposed repeal of the Clean Power Plan ("CPP").<sup>1</sup> We are a group of former Commissioners of the Federal Energy Regulatory Commission ("FERC"),<sup>2</sup> who were appointed by President George W. Bush or President Barack Obama. We are providing these comments based on our knowledge of federal energy law and regulation, the division between federal and state authority in the realm of energy policy, and the practical operation of the nation's electricity markets and electric grid.

In these comments, we respond to EPA's suggestion in the proposed repeal that the CPP may tread impermissibly onto the functions and authority of FERC.<sup>3</sup> This suggestion is unfounded. The CPP is fully consistent with EPA's traditional regulatory role, is similar in form and function to prior Clean Air Act ("CAA") programs affecting the power sector, and preserves the authority of FERC in the field of energy policy. While EPA and FERC regulate some of the same entities, their statutory aims are distinct, and the CPP respects the differences in authority between the two agencies.

Additionally, we write to emphasize that the CPP is consistent with ongoing trends in the power sector, is achievable at reasonable cost, and does not pose threats to reliability. Contrary to EPA's statements in the proposed repeal, the CPP does not "threaten[] to impose massive costs on the power sector and consumers" or affect the "national interest in affordable, reliable electricity."<sup>4</sup> Recent Energy Information Administration ("EIA") data shows that the country is nearly 80% of the way towards

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<sup>1</sup> See Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82. Fed. Reg. 48,035 (Oct. 16, 2017) [hereinafter "Proposed Repeal"].

<sup>2</sup> Jon Wellinghoff, Commissioner 2006-2013, Chairman 2009-2013. John Norris, Commissioner 2010-2014. Norman C. Bay, Commissioner 2014-2017, Chairman 2015-2017. The views expressed by the former Commissioners are their own.

<sup>3</sup> Proposed Repeal at 48,042 ("EPA solicits comment on whether the CPP exceeded the EPA's proper role and authority in this regard and whether the Agency's proposed reading in this notice, which limits the BSER to measures that can be applied to or at individual sources, would ensure that CAA section 111 has not been construed in a way that supersedes or limits the authorities and responsibilities of the FERC . . .").

<sup>4</sup> Proposed Repeal at 48,038.

achieving the CPP's emission reduction targets for 2030,<sup>5</sup> demonstrating the reasonableness of those requirements. Numerous independent analyses of the CPP likewise indicate that the costs of achieving the emission limits on power plants have fallen since the CPP was finalized. Further, federal and state electricity rate regulators have complementary and reinforcing authority to ensure grid reliability, EPA extensively considered the CPP's potential impacts to reliability when preparing the final rule, and many of the changes projected to occur under the CPP are already underway without causing any reliability issues.

## **II. The CPP Is Consistent with FERC's Authority Under the Federal Power Act.**

The CPP does not affect the respective roles of EPA and FERC, or infringe on FERC's authority under the Federal Power Act ("FPA"). EPA is the nation's environmental regulator, tasked with reducing pollution from a wide variety of stationary sources, including electric generating units. FERC is the nation's chief federal economic regulator for the power sector, and is charged under the FPA with ensuring rates for interstate transmission and wholesale sales are just, reasonable, and not unduly discriminatory or preferential. FERC also has carefully defined authority to protect the reliability of the electric grid.

The fact that the CPP may have impacts on the costs and competitiveness of certain types of generation does not mean that it intrudes onto FERC's authority. Numerous prior CAA regulations have had similar effects, as could any federal or state regulation that applies to generators, their work force, fuel source, or public safety. And FERC has always operated in a complex factual environment that requires it to consider the impacts that state and federal public policies have on wholesale rates. As the Supreme Court recently explained in a decision rejecting claims that FERC intruded upon state authority to regulate *retail* rates:

To set a retail electricity rate is thus to establish the amount of money a consumer will hand over in exchange for power. Nothing in . . . the FPA suggests a more expansive notion, in which FERC sets a rate for electricity merely by altering consumers' incentives to purchase that product. And neither does anything in this Court's caselaw. Our decisions uniformly speak about rates, for electricity and all else, in only their most prosaic, garden-variety sense. As the Solicitor General summarized that view, 'the rate is what it is.' It is the price paid, not the price paid plus the cost of a forgone economic opportunity.<sup>6</sup>

Just as FERC did not intrude onto state authority to set retail rates in *EPSA*, EPA does not "set rates" or intrude upon FERC's wholesale rate setting authority by regulating emissions that are a by-product of certain forms of generation. Indeed, a contrary approach would negate clear congressional intent to give the EPA the responsibility to regulate air and water pollution from stationary sources such as power plants.

### **i. FERC and EPA Have Separate Spheres of Jurisdiction and the CPP Respects These Boundaries**

FERC implements the FPA. Under the FPA, FERC has authority over "the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate

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<sup>5</sup> U.S. Energy Information Administration, *Monthly Energy Review* (Jan. 2018).

<sup>6</sup> *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 777-78 (2016) [hereinafter "*EPSA*"].

commerce.”<sup>7</sup> This authority also includes practices “that ‘*directly* affect the wholesale rate.’”<sup>8</sup> Under Sections 205 and 206 of the FPA, FERC ensures that the rates charged for wholesale electricity and transmission are “just and reasonable” and not unduly discriminatory or preferential.<sup>9</sup> Under Section 215 of the Act, FERC oversees the establishment and enforcement of reliability standards for the bulk power system.<sup>10</sup>

EPA implements many of the nation’s environmental laws, including the CAA. Under the CAA, EPA is tasked with regulating air pollution from many different kinds of sources, including sources in the power sector. Specifically, section 111 directs the Administrator to “prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant.”<sup>11</sup> Acting pursuant to this statutory authority, the CPP establishes emission limits on carbon pollution from certain existing sources, and provides a corresponding framework for States to implement and enforce those limits.<sup>12</sup>

The proposed repeal’s suggestion that the CPP is “regulation of the energy sector *qua* energy sector”<sup>13</sup> is misguided. The CPP—like EPA’s prior CAA regulations—sets forth emission limitations for power plants. Moreover, as described in more detail below, the CPP provides the States and power companies with broad flexibility to determine how best to achieve these limitations—including allowing the States to determine their own “glide path” for phasing in emission limitations from 2022 through 2030; to select between rate- or mass- based emission limitations; and to adopt market-based compliance programs that provide power companies with incentives to achieve cost-effective compliance.

The CPP does not dictate a specific energy mix, or require the adoption of particular energy policies by FERC. The CPP does not set wholesale rates for generators in the electricity markets, which is FERC’s core regulatory duty under the FPA. Nor does the CPP place any obligations on FERC. Indeed, none of FERC’s authorities under the FPA would be in any way diminished or altered if the CPP were fully implemented. To argue otherwise would “commit[] the logical fallacy of concluding that . . . actions that affect the wholesale price in some way are the same as . . . actions that set the wholesale rate.”<sup>14</sup> While the statutory responsibilities of EPA and FERC both relate to aspects of the power sector, their statutory aims are distinct, and “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”<sup>15</sup>

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<sup>7</sup> 16 U.S.C. § 824(b)(1).

<sup>8</sup> *EPSA*, 136 S.Ct. at 774 (citing *California Independent System Operator Corp v. FERC*, 372 F.3d 395 (D.C. Cir. 2004)).

<sup>9</sup> 16 U.S.C. §§ 824d(a), 824e(a).

<sup>10</sup> 16 U.S.C. § 824o.

<sup>11</sup> 42 U.S.C. § 7411(d).

<sup>12</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

<sup>13</sup> Proposed Repeal at 82,042 (italics in original).

<sup>14</sup> *Coalition for Competitive Elec. v. Zibelman*, 2017 U.S. Dist. Lexis 116140, at \*22 (S.D.N.Y. 2017).

<sup>15</sup> *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

Indeed, the emission limitations embodied in the CPP closely resemble other prior CAA programs, such as the Cross-State Air Pollution Rule,<sup>16</sup> the Clean Air Interstate Rule,<sup>17</sup> the Acid Rain Program,<sup>18</sup> and the NOx/SIP Call.<sup>19</sup> None of these analogous CAA regulations have intruded on FERC's authority, and FERC routinely considers the impacts of such rules in its own regulatory sphere. Similarly, regulations from a host of other agencies can increase generator costs – whether requirements from the Occupational Health and Safety Administration, the Pipeline Hazardous Materials Safety Administration, the Nuclear Regulatory Commission, National Surface Transportation Board, Mine Safety Health Administration, or Bureau of Land Management, to name but a few. To claim that FERC's authority over the wholesale electricity markets precludes these agencies from exercising their statutory authority would be nothing short of remarkable.

ii. FERC Regulates Electricity Rates Against a Complex Backdrop of Evolving State and Federal Policies

As noted above, that the CPP may affect markets subject to FERC's jurisdiction does not make the CPP unique – much less unlawful. FERC has always regulated against a backdrop of evolving state and federal environmental and clean energy policies.<sup>20</sup> These environmental requirements are just one part of the complex factual context that FERC responds to every day — together with market forces (such as long-term changes in fuel prices) and other public policy decisions that affect the energy system (such as labor policies and rules intended to protect public safety). And FERC routinely considers the impacts of this complex factual background on the economics of generation and wholesale electricity rates.<sup>21</sup> For example, FERC allows federal environmental compliance costs to be included in some calculations of market clearing prices.<sup>22</sup> FERC also allows environmental costs to be included in agreements designed to ensure reliability.<sup>23</sup>

FERC routinely considers the impacts of state public policies on the areas it regulates, which only underscores that FERC's authorities under the FPA do not have a broad preclusive effect. For example, just last year, FERC held a technical conference aimed at harmonizing wholesale electricity markets with

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<sup>16</sup> Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208, 42,252 (Aug. 8, 2011) (basing emissions budgets in part on “increased dispatch of lower-emitting generation.”).

<sup>17</sup> Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program; Revisions to the NO[X] SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

<sup>18</sup> 42 U.S.C. §§ 7651-7651o.

<sup>19</sup> See Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (“NOx SIP Call”).

<sup>20</sup> See, e.g. FERC, *Policy Statement Regarding the Treatment of Emissions Allowances in Coordination Rates*, 59 Fed. Reg. 65,930, (1995) (adopting a general ratemaking treatment of emissions allowances under the Acid Rain Program administered by EPA).

<sup>21</sup> See e.g., *New York State Public Service Commission v. New York Independent System Operator, Inc.*, 158 FERC ¶ 61,137 (Feb. 3, 2017).

<sup>22</sup> *Id.*; see also *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 at 159 (Dec. 19, 2001); *Southwest Power Pool, Inc.*, 146 FERC ¶ 61,050 (Jan. 29, 2014) (approving SPP tariff filing that included “externally imposed environmental run-hour restrictions” into the opportunity costs in marginal cost calculations).

<sup>23</sup> See e.g. *Midwest Independent Transmission System Operator, Inc.*, 109 FERC ¶ 61,157, 61,711-13 (Nov. 8, 2004) (allowing units that participate in System Support Resource (“SSR”) agreements to recover costs associated with complying with environmental regulations) *Id.* at 61,712 (rejecting claims that the SSR program conflicts with environmental requirements).

state public policies.<sup>24</sup> And another recent FERC initiative, Order 1000, *required* public utilities to consider state public policy goals (e.g., state renewable portfolio standards) in the regional transmission planning process that FERC oversees.<sup>25</sup>

Recent decisions by the Supreme Court and other federal courts have emphasized that FERC’s exclusive statutory authority is carefully circumscribed and does not broadly preclude state public policies affecting the power sector.<sup>26</sup> These cases have held that FERC’s exclusive authority is limited to situations where a state policy directly interferes with wholesale rates set by FERC.<sup>27</sup> Recent FERC orders have also acknowledged this limited sphere of exclusive jurisdictional authority.<sup>28</sup> This federal/state division of authority over the electricity markets from the FPA “envisions a federal-state relationship marked by interdependence.”<sup>29</sup> The Supreme Court has also recognized that “[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other.”<sup>30</sup>

Because so many activities in the aggregate affect the supply or demand for electricity, it would be unreasonable to consider any regulation that affects FERC-jurisdictional markets to be precluded by the FPA. Indeed, such a reading would preclude other agencies from acting in spite of the authority that Congress has given them. As the Supreme Court explained in *EPSA*:

[M]arkets in all electricity’s inputs— steel, fuel, and labor most prominent among them— might affect generators’ supply of power. And for that matter, markets in just about everything—the whole economy, as it were—might influence LSEs’ demand. So if indirect or tangential impacts on wholesale electricity rates sufficed, FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its

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<sup>24</sup> State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C. Technical Conference Docket No. AD17-11-000 May 1, 2017 and May 2, 2017.

<sup>25</sup> Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051, (July 21, 2011).

<sup>26</sup> See e.g., *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (“We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’”); *Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 97 (2d Cir. 2017) (rejecting claims that a Connecticut renewable energy program was preempted under the FPA because those policies “do not, for instance, require bids that are ‘tethered to a generator’s wholesale market participation’ or that ‘condition[] payment of funds on capacity clearing the auction.’”) (citing *Hughes*, 136 S. Ct. at 1299); *Zibelman*, 2017 U.S. Dist. Lexis, at \*41 (rejecting FPA preemption challenges to a New York state clean energy program as those programs “are payments for environmental attributes that are unbundled from and involve separate transactions than those for the wholesale sales of energy or capacity.”); *Village of Old Mill Creek v. Star*, 2017 U.S. Dist. LEXIS 109368, at \*32 (N.D. Ill 2017) (“States may influence, through regulation, which generators participate in FERC’s market, even though the end result may affect the wholesale market.”).

<sup>27</sup> *Hughes*, 136 S. Ct. at 1299.

<sup>28</sup> See *New York State Public Service Commission v. New York Independent System Operator, Inc.*, 158 FERC at pp. 2-3 (Feb. 3, 2017) (Concurring Opinion of Chairman Bay) (“After the decision in *Hughes*, the Commission cannot defend the application of [buyer-side market power mitigation rules to state clean energy policies] on the grounds that the states have overstepped their authority except in the rare situation where the state action impermissibly interferes with wholesale rates.”).

<sup>29</sup> *Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring).

<sup>30</sup> *EPSA*, 136 S. Ct. at 776.

vision of reasonableness and justice. We cannot imagine that was what Congress had in mind.<sup>31</sup>

That the CPP may affect the costs of generators does not make it different from prior CAA programs or state-level policies that FERC routinely accommodates in its ratemaking processes.

iii. FERC Provided Input on the CPP and Its Suggestions Were Reflected in the Final Rule

To avoid any possible inconsistency between EPA's and FERC's policies, EPA frequently solicited input from FERC during the development of the CPP. Throughout the rulemaking process, senior EPA officials met with each FERC Commissioner, and EPA Staff frequently communicated with FERC Staff.<sup>32</sup> FERC also held four technical conferences designed to elicit helpful feedback from stakeholders and to provide recommendations to EPA for the implementation of the CPP.<sup>33</sup> After these technical conferences, FERC recommended that EPA set up a process to continually monitor reliability issues as the CPP was implemented, and include a reliability safety valve in the final rule.<sup>34</sup>

FERC's input was ultimately reflected in the final CPP; EPA included the reliability safety valve, and moved the initial compliance deadline from 2020 to 2022, "[i]n no small part thanks to . . . [its] extensive consultation with key agencies responsible for reliability, including FERC."<sup>35</sup> Similarly, EPA set up an ongoing process to communicate with the Department of Energy ("DOE") and FERC as the rule was being implemented to ensure there would be no unexpected reliability issues.<sup>36</sup> At no time did FERC indicate that the CPP usurped its authority, and in fact, FERC acknowledged EPA's authority to oversee the approval of state plans under section 111(d) of the CAA:

[R]eliability also depends on factors beyond the Commission's jurisdiction, such as state authority over local distribution and integrated resource planning. Similarly, state authority to propose plans for compliance with the federal Clean Air act does not depend on or require Commission approval. The Commission also lacks specific statutory authority to build a new power plant or new transmission line. The Commission is not seeking to alter this balance of Federal and state roles or to assert authority over state plans [under the CPP].<sup>37</sup>

Accordingly, any claim now that EPA may have displaced the authority of FERC when promulgating the CPP would ignore the law and precedent, the voluminous record of EPA/FERC coordination, FERC's characterization of its own authority over aspects of the CPP when compared with EPA and the States, and the practical realities of the Commission's task of ensuring just and reasonable rates under the FPA, which plainly include consideration of federal and state public policies.

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<sup>31</sup> *Id.* at 774 (citations omitted).

<sup>32</sup> 80 Fed. Reg. at 64,707.

<sup>33</sup> Letter from Chairman Norman C. Bay and Commissioners Tony Clark, Collette Honorable, Cheryl LaFleur, and Philip Moeller to Janet McCabe, Acting Assistant Administrator for Air and Radiation, EPA (May 15, 2015), [Hereinafter FERC Letter].

<sup>34</sup> 80 Fed. Reg. at 64,707.

<sup>35</sup> *Id.* at 64,671.

<sup>36</sup> *Id.* at 64,879; *see also* EPA-DOE-FERC Coordination on Implementation of Clean Power Plan (Aug. 15, 2015), <https://www.ferc.gov/media/headlines/2015/CPP-EPA-DOE-FERC.pdf>.

<sup>37</sup> FERC Letter at 3.

### **III. The CPP Is Consistent With Power Sector Trends and Does Not Compromise the Reliability or Affordability of Electricity Supply.**

In its proposal, EPA also mistakenly claims that the CPP “threaten[s] to impose massive costs on the power sector and consumers” and may affect the “national interest in affordable, reliable electricity.”<sup>38</sup> These assertions are unfounded. The CPP builds on, and is in line with, current trends that are already underway in the power sector, and independent analyses have repeatedly found that the CPP imposes modest costs without threatening reliability. Additionally, there is a robust institutional framework for monitoring and protecting the reliability of the electric system that has been sufficient while changes in the generation mix continue to take place in the power sector.

#### **i. Federal and State Actors Have Complementary and Reinforcing Roles to Assure Grid Reliability**

The electric system is designed to deliver a commodity with unique characteristics. Unlike most goods, electric supply and demand must be balanced at all times to ensure availability. Should demand eclipse supply, reliability is threatened, in the form of power disruption (i.e., a blackout). Because of the unique characteristics of the sector, the electric grid is necessarily designed and operated to ensure reliability. Almost any change to an aspect of the grid — be it in planning, design, construction, or operation — is thoroughly reviewed for reliability impacts. To ensure reliability, grid planners typically employ probabilistic models to determine the overall amount of supply needed to meet expected demand.

The electric grid is overseen by federal, regional, and state entities that work together in complementary and reinforcing roles to preserve reliability. As discussed further below, this network of overseers has helped safeguard reliability in the face of dramatic change currently underway in our nation’s power sector, and is well equipped to deal with the continuation of these trends anticipated under the CPP. Federal and regional institutions with responsibilities for maintaining reliability include FERC, Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”), the North American Electric Reliability Corporation (“NERC”), and the eight Regional Entities recognized by NERC.

In carrying out its responsibilities under the FPA, FERC has issued a number of orders that illustrate its role in supporting grid reliability. Because electric reliability is intertwined with the planning, design, and operation of the electric grid, these Orders necessarily support grid reliability. For example, Order 888 requires that public utilities provide non-discriminatory service, Order 890 requires coordinated, open, and transparent transmission planning, and Order 1000 requires that public utilities participate in regional and interregional transmission planning processes. These Orders not only support a more robust, coordinated and transparent grid, but, given the role planning plays in assessing and ensuring the loss-of-load expectation standard is met, a more reliable one as well.

FERC also oversees ISOs and RTOs that direct transmission system operations for more than 60% of electric power supply in the United States. In addition to handling day-to-day operations, these entities support reliability by modeling and planning for long-term changes to the electric grid within their respective operating regions to ensure that sufficient supply will exist to meet expected future demand. These entities have a number of tools and practices available to safeguard reliable operation of the grid as well, including: running capacity auctions to ensure that sufficient resources are committed to be available at known future periods; determining if and when future transmission upgrades and facilities are

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<sup>38</sup> Proposed Repeal at 48,038.

needed; and entering into reliability-must-run contracts with resource owners, which provide for the retention of a unit wishing to deactivate, often because it has become uneconomic, but which is deemed to be necessary for reliability.

FERC is authorized under the Energy Policy Act of 2005 to designate and oversee an Electric Reliability Organization. This Organization, currently NERC, in turn oversees eight Regional Entities. NERC's specific role in the electric grid — to develop and monitor reliability standards — defines reliability requirements for planning and operating the bulk power system. These reliability standards are also overseen by Regional Entities, with oversight from NERC and FERC.

At the state level, Public Utility Commissions ("PUCs") and utilities support grid reliability. PUCs, which regulate local distribution and retail sales, serve as the state entities that oversee utilities. They are responsible for a variety of planning and retail ratemaking processes and, depending on the state, may be involved with forecasting and determining resource adequacy.

Utilities provide electric service to end users and must ensure that sufficient distribution exists to transmit electricity. Utilities must also purchase (or, in some cases, build) enough generation to fulfill demand in their service territories.

ii. The Grid has Experienced Rapid Change in Recent Years; Nonetheless Regulators and Grid Operators Have Maintained Safe, Reliable, and Affordable Electricity

Economic forces and technological innovation are driving transformational changes to our nation's electricity resource mix, yet the same long-standing practices and tools continue to keep the grid reliable. The use of coal-fired electricity generation has declined substantially: between 2005 and 2016, coal's share of generation dropped from nearly 50% to just 30%.<sup>39</sup> For the first time, in 2016, natural gas was the leading source of electricity generation at 34% of total generation.<sup>40</sup> Meanwhile, renewable energy development has continued to surge; in 2016, wind and solar accounted for 63% of utility-scale capacity additions.<sup>41</sup> At the same time, recent analysis by NERC found that reliability has continued to improve over the past four years.<sup>42</sup> NERC also found that bulk power system resiliency to severe weather continues to improve.<sup>43</sup> And a recent FERC order noted that "the extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience."<sup>44</sup>

Further, as we rapidly approach the CPP's emission reduction targets, wholesale power prices have continued to decline. According to EIA, monthly average on-peak wholesale electricity prices at major trading hubs across the United States were down 27% to 37% in 2015 compared with 2014<sup>45</sup> and

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<sup>39</sup> M.J. Bradley & Associates, *Coal-Fired Electricity Generation in the United States and Future Outlook* (Aug. 2017).

<sup>40</sup> *Id.*

<sup>41</sup> Denise A. Grab *et al.*, Institute for Policy Integrity New York University School of Law, *The Falling Cost of Clean Power Plan Compliance* (Oct. 2017).

<sup>42</sup> North American Electric Reliability Corporation, State of Reliability 2017 (June 2017), [http://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/SOR\\_2017\\_MASTER\\_20170613.pdf](http://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/SOR_2017_MASTER_20170613.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> Order Terminating Rulemaking Proceeding, Initiating New Proceeding, And Establishing Additional Procedures, 162 FERC ¶ 61,102, at 8 (Jan. 8, 2018) (citing comments of the various ISOs and RTOs).

<sup>45</sup> U.S. Energy Information Administration, *Wholesale Power Prices Decrease across the Country in 2015*, (Jan. 11, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=24492>.



during the first quarter of 2016, average wholesale electricity prices were 24% to 64% lower than during the same period in 2015.<sup>46</sup>

iii. Independent Analyses, Current Trends, and Experience With CAA Programs All Support the Feasibility of the CPP

Because of changes in the economics of power generation and policies unrelated to the CPP, power sector carbon dioxide (CO<sub>2</sub>) emissions in 2016 were 25% below 2005 levels – almost 80% of the way towards achieving the CPP’s emission reduction target of 32% below 2005 levels by 2030.<sup>47</sup> Preliminary EIA data also shows that power sector CO<sub>2</sub> emissions have continued to decline in 2017.<sup>48</sup> In the first 10 months of 2017, power sector CO<sub>2</sub> emissions were 4% lower when compared with the same time period in 2016.<sup>49</sup> Thus, the CPP tracks the general direction of macro trends in the power sector.

As a result of those trends, numerous independent analyses have confirmed that the CPP emission reduction targets can be achieved at modest cost and with no adverse effects on reliability. For example, a 2015 review by the National Renewable Energy Laboratory of multiple grid studies found that there are “multiple pathways towards compliance” with the CPP, and “the body of work taken as a whole shows that reliable and cost-effective compliance is possible.”<sup>50</sup> A 2017 report by the Institute for Policy Integrity similarly reviewed multiple recent modeling analyses evaluating recent declines in power sector CO<sub>2</sub> emissions and the concomitant decreases in CPP compliance costs.<sup>51</sup> In fact, a 2016 analysis by the Bipartisan Policy Center found that many states were already on track to meet CPP targets in the initial years of the program without any additional compliance expenditures.<sup>52</sup> This study credited the low price of natural gas, the extension of the renewable energy tax credits, and state-specific policies such as renewable portfolio standards for accelerating the transition towards the CPP’s targets.<sup>53</sup> And another recent report by the Rhodium Group also shows significant declines in power sector emissions since the CPP was finalized in 2015 and illustrates how many states are already on track to meet CPP targets.<sup>54</sup> According to the Rhodium Group, even without the CPP, power sector emissions are expected to be at least 27% below 2005 levels in 2030, if not more depending on market factors such as natural gas prices and renewable energy costs.<sup>55</sup> Rhodium Group also found that between 29 and 38 states would likely meet their targets through existing efforts.<sup>56</sup>

Another indication that the CPP does not threaten reliability or affordability is that many of the changes projected to occur under the CPP are already underway. Although the CPP does not set specific

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<sup>46</sup> U.S. Energy Information Administration, *Wholesale Power Prices in 2016 Fell, Reflecting Lower Natural Gas Prices*, (Jan. 11, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=29512>.

<sup>47</sup> U.S. Energy Information Administration, *Monthly Energy Review* (Jan. 2018).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> M. Ahlstrom *et al.*, National Renewable Energy Laboratory, Relevant Studies for NERC’s Analysis of EPA’s Clean Power Plan 111(d) Compliance (June 2015), <https://www.nrel.gov/docs/fy15osti/63979.pdf>.

<sup>51</sup> Denise A. Grab *et al.*, Institute for Policy Integrity New York University School of Law, *The Falling Cost of Clean Power Plan Compliance* (Oct. 2017).

<sup>52</sup> Jennifer Macedonia *et al.*, Bipartisan Policy Ctr., *Modeling the Evolving Power Sector and Impacts of the Final Clean Power Plan* (2016), <https://bipartisanpolicy.org/wp-content/uploads/2016/06/BPC-Energy-Clean-Power-Plan-Modeling.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> Larsen *et al.*, Rhodium Group, *What the CPP Would Have Done* (Oct. 2017).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

generation targets, EPA projected that under the CPP coal would provide 30% of total generation by 2025, and 28% of total generation by 2030.<sup>57</sup> According to recent EIA data, market forces have brought us to a similar point already, without any reliability consequences, as evidenced by robust system performance during the recent cold snap.<sup>58</sup> Additionally, several RTOs/ISOs have recorded high degrees (in many cases over 50% of demand) of renewables penetration without any reliability issues.<sup>59</sup> To be sure, the CPP, as a matter of policy, reinforces the market trends that are already occurring, secures the progress achieved to date, and helps ensure significant additional emission reductions. However, to claim that the CPP would threaten reliability or affordability would ignore the ways in which the current realities of the power sector align with the changes that were anticipated under the CPP.

The power sector's successful history of implementing Clean Air Act protections is further reason to expect that the CPP will not compromise the reliability or affordability of electricity. One recent example is the implementation of the Mercury and Air Toxics Standards, a rule that had significantly less compliance flexibility than the CPP. Despite this more restrictive compliance framework, and significant public debate and industry concern over the reliability implications of these standards, the nation's electric sector has taken steps to come into compliance with Mercury and Air Toxics Standards without any major reliability incidents and without any significant impact on the nation's electricity rates. Moreover, power companies are achieving the required toxic emissions reductions under the standard at a fraction of the costs predicted.<sup>60</sup>

Indeed, we are not aware of any instance in which a CAA regulation has been responsible for endangering resource adequacy.<sup>61</sup> This experience is a powerful tribute to the robust system of policies, institutions, planning processes, and operating practices — described in detail above — that protects grid reliability and that will continue to serve this function as the CPP is implemented. It also indicates that the power sector will readily be able to plan for and adjust to the requirements of the CPP, with its lengthy implementation deadlines and extensive compliance flexibilities. There is no basis for EPA to conclude that the CPP should be repealed because of concerns over its impacts on ratepayers or electric system reliability.

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<sup>57</sup> EPA, Regulatory Impact Analysis for the Final Clean Power Plan Rule, 3-27 (Aug. 2015).

<sup>58</sup> Tim Loh, *America's Power Grid Still Hangs Tough in Face of Winter Wallop*, Bloomberg, (Jan. 4, 2018), <https://www.bloomberg.com/news/articles/2018-01-04/america-s-power-grid-still-hangs-tough-in-face-of-winter-wallop>.

<sup>59</sup> See, e.g., *A Huge New Record in Southwest Power Pool*, Wind Insider (Mar. 22, 2018) (reporting that SPP set a wind-penetration record of over 60% without any reliability issues), <http://www.windinsider.com/index.php/16-industry/1309-a-huge-new-record-in-the-southwest-power-pool>; ERCOT, *ERCOT Quick Facts*, (Jan. 2018) (reporting that ERCOT set a wind-penetration record of 54% in October without any reliability issues), [http://www.ercot.com/content/wcm/lists/144926/ERCOT\\_Quick\\_Facts\\_11218.pdf](http://www.ercot.com/content/wcm/lists/144926/ERCOT_Quick_Facts_11218.pdf); Gavin Bade, *CAISO: Renewables Served 42% of California Demand on May 16, Setting Record*, Utility Dive, (May 18, 2017), (reporting that renewables served 42% of CAISO electricity demand on May 16, including 72% of the ISO's electricity during peak renewable production over the 2PM hour), <https://www.utilitydive.com/news/caiso-renewables-served-42-of-california-demand-on-may-16-setting-record/442926/>; ERCOT, *MISO, SPP, All Record New Wind Peaks*, RTO Insider (Nov. 23, 2015), <https://www.rtoinsider.com/rto-wind-records-19965/>.

<sup>60</sup> See Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 41 Fed. Reg. 24420, 24432 (Apr. 25, 2016) (citing an analysis that demonstrated the final cost of the Mercury and Air Toxics Standards is approximately one-quarter of what EPA originally estimated).

<sup>61</sup> Accord Susan Tierney et al., Analysis Grp., *Electric System Reliability and EPA's Clean Power Plan: Tools and Practices* 19 n.34 (Feb. 2015) ("To our knowledge, there has never been a resource adequacy event (e.g., a brownout or blackout) due to implementation of an environmental regulation.").

## **Conclusion**

For the reasons discussed above, the CPP does not interfere with the authority of FERC, nor does it threaten the affordability and reliability of the nation's electricity supply. EPA's suggestions to the contrary are incorrect and are not an adequate basis for its proposed repeal of this important measure to address climate change.

Sincerely,

Norman C. Bay

John Norris

Jon Wellinghoff