STF-JKA-2-9 Attachment N

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June 30, 2023

Via Electronic Mail
Filed in EPA Docket ID No. EPA-HQ-OAR-2023-0072

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Request for Further Extension of Comment Period

Dear Administrator Regan:

On June 16, 2023, the U.S. Environmental Protection Agency ("EPA" or "Agency") published a notice in the Federal Register announcing a 15-day extension of the comment period on EPA's proposed rules entitled "New Source Performance Standards for Greenhouse Gas Emission 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" ("Proposed Rules").[1] The deadline for filing comments on the Proposed Rules is now August 8, 2023.

While the Power Generators Air Coalition ("PGen")[2] appreciates that EPA gave a small extension of time and further appreciates that the Agency gave advance notice of this small extension, the amount of time provided for comment on the Proposed Rules remains inadequate. On May 23, 2023, PGen requested a 60-day extension of the comment period.[3] PGen again requests for EPA to extend the comment period on the Proposed Rules to at least September 22, 2023.

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[1] 88 Fed. Reg. 39,390 (June 16, 2023).

[2] PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies—public power, rural electric cooperatives, and investor-owned utilities—with a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen's members include leaders in the fundamental transition to cleaner energy that is currently occurring in the industry. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation. Additional information about PGen and its members can be found at https://pgen.org.

[3] Doc. ID No. EPA-HQ-OAR-2023-0072-0041.

As PGen explained in its previous letter, PGen members own and operate fossil fuel-fired electric generating units ("EGUs") that are the subject of the Proposed Rules, and many have resource plans that call for the addition of new "firm" power from fossil fuel generation that are also the subject of this rulemaking. As a result, PGen members have a powerful interest in the Proposed Rules.

The request to further extend the comment period until at least September 22, 2023, is appropriate and warranted for the following reasons:

Numerous entities have informed EPA of the need for an extension to enable meaningful comment on the Proposed Rules. PGen was not alone in asking for an extension of the comment period. The docket for this rulemaking, which is available on Regulations.gov, shows that at least 24 letters have been sent to EPA expressing concern that the comment period does not provide the time needed for the public to provide meaningful input on the Proposed Rules. These requests have been submitted by parties whose input is critical to the Proposed Rules, including requests from state environmental agencies and the ISO/RTO Council (which is charged with ensuring the reliability of the electric generating system). These letters overwhelmingly request EPA to provide 60 additional days for comment. Only 4 letters asked for less than that (30 days), and one letter asked for more (120 days). Moreover, since EPA announced it was extending the comment period by an additional 15-days, at least three letters have been filed to the docket explaining that the short extension does not solve the problem. Those letters all asked for a 60-day extension from the current deadline of August 8, 2023 (i.e., to October 9, 2023). Importantly, these are not the only letters that EPA has received. PGen is aware of several other similar requests that are not in the rulemaking docket.

Members of Congress have expressed concern that the comment period is insufficient. In a letter to you dated June 6, 2023, the Chair of the House Energy and Commerce Committee Cathy McMorris Rodgers and other members of the Committee expressed "disappoint[ment] that you declined the Committee's request to provide the public a reasonable period to respond to the Proposal. Considering its unprecedented technical and legal complexity, and EPA's past precedent on similar, less complex rulemakings, we ask that you extend the Proposal's comment period to at least 120 days." Similarly, the Ranking Member of the Senate Environment and Public Works Committee Shelley Moore Capito and other members of the Committee wrote you a letter on June 8, 2023, "to express serious concerns with the limited opportunities for public engagement in the rulemaking process for the" Proposed Rules. In a call with reporters after EPA provided the 15-day extension of time, she said she is "concerned that the EPA could only give us another 15 days…. [W]e asked for measurably more."[4]

A comment period of 120 days is less than the time period EPA has previously provided for comments on similar rules. Five separate rules encompass the Proposed Rules, and all of them

[4] Curtis Tate, West Virginia Public Broadcasting, *Capito: EPA's New Comment Period On Power Plant Rules Not Enough*, https://www.wvpublic.org/capito-epas-new-comment-period-on-power-plant-rules-not-enough/.

build on previous rulemakings where EPA promulgated the rules in smaller rulemaking packages *and* allowed for more time even though there was less material on which to comment. For example, when EPA proposed the new source performance standards ("NSPS") for new fossil fuel-fired EGUs in 2014, the Agency gave the public 120 days to file comments on the proposed rule. When it proposed emission guidelines for existing fossil fuel-fired EGUs later that year, it provided the public with 165 days to file comment. When the Agency proposed the Affordable Clean Energy rule and the repeal of the Clean Power Plan (two prior emission guidelines for existing fossil fuel-fired EGUs), it provided 192 days for comment. PGen's request for 120 days is eminently reasonable in comparison.

EPA is not subject to any deadlines that necessitate having a shortened comment period. There is no valid reason for EPA to provide a truncated comment period here. The Agency is not subject to any court order or consent decree that requires it to act by any date. EPA has begun the process for reviewing and proposing revisions to the NSPS within the eight-year statutory deadline, and the Clean Air Act does not contain any deadline by which emission guidelines must be promulgated.

EPA took over two years to work on the Proposed Rules yet is providing the public with only 77 days to analyze them and prepare comments—even though the Proposed Rules are extremely complex. When President Biden took office on January 20, 2021, he immediately directed EPA to reconsider and reverse the prior administration's rulemakings regarding greenhouse gas emissions from the electric power sector. After taking 841 days to release a signed pre-publication version of the Proposed Rules (and then releasing the proposed regulatory text and several key technical documents later), it is patently unreasonable to expect the public to be able to digest this information in 77 days and provide EPA with meaningful comments.

Failure to provide additional time violates the Administrative Procedure Act and the Clean Air Act. Courts have said that the Administrative Procedure Act's requirement to provide notice and comment (which the Clean Air Act mirrors in section 307(d)) is intended "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011); *accord Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process."). The current comment period – even with the additional 15-day extension – does not provide for meaningful public participation for all of the reasons set forth above as well as the reasons in our previous letter and letters submitted by numerous and diverse stakeholders requesting extensions. As a result, EPA should further extend the comment deadline so as not to violate the important principles set out in the Administrative Procedure Act and Clean Air Act that promote public participation.

For all of these reasons, PGen resubmits its request for the comment period to be extended by an additional 60 days to at least September 22, 2023. Because the deadline is rapidly approaching, PGen would appreciate being informed of any additional time that the Agency can provide as soon as possible.

Thank you for your consideration of this request.

Respectfully submitted,

/s/ *Allison D. Wood*

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