

**Testimony of Mark L. Shurtleff,
Attorney General of Utah,
Before the House Committee on Energy and Commerce**

**The American Energy Initiative: Impacts of the Environmental Protection Agency's New
and Proposed Power Sector Regulations on Electric Reliability**

September 15, 2011

Thank you for the opportunity to testify here today.

As the Attorney General of the State of Utah, I am deeply concerned about recent actions taken by the Environmental Protection Agency in proposing new regulations to govern the people of my State. Of particular concern to me is the so-called Utility MACT Rule,¹ which the EPA now seems intent on adopting on or before November 16, 2011. Last month, I filed comments with the EPA in objection to that proposed rule. Indeed, eighteen Attorneys General from across the country – both Republicans and Democrats – filed several letters objecting to that proposal.²

The substance of my objections was that EPA had failed to assess the impact of the rule – on a cumulative basis – in light of all of its now-promulgated regulations, proposed regulations, and impending regulations governing electric power generation. Without such a cumulative analysis, neither EPA nor the public can understand the effect of all of these regulations on the

¹ ¹ “Maximum Achievable Control Technology Rule.”

² ² The other Attorneys General who submitted objections are: Hon. Luther Strange (R – Alabama); Hon. John Burns (R – Alaska); Hon. Dustin McDaniel (D – Arkansas); Hon. Thomas Horne (R – Arizona); Hon. Pam Bondi (R – Florida); Hon. Leonardo Rapadas (I – Guam); Hon. Gregory Zoeller (R – Indiana); Hon. Derek Schmidt (R – Kansas); Hon. Jack Conway (D – Kentucky); Hon. James Caldwell (R – Louisiana); Hon. Bill Schuette (R – Michigan); Hon. Jon Bruning (R – Nebraska); Hon. Wayne Stenehjem (R – North Dakota); Hon. Mike DeWine (R – Ohio); Hon. E. Scott Pruitt (R – Oklahoma); and Hon. Alan Wilson (R – South Carolina); and Hon. Marty Jackley (R – South Dakota)

reliability of the electric grid and, indeed, on the economy, jobs, and electricity rates to consumers.

Failing to cumulatively address the effect of such wide-sweeping regulatory activity is not only bad public policy, it is fundamentally at odds with the law. The President of the United States has given federal agencies clear directions about the procedures they must follow when they propose new regulations. Under an Executive Order issued by President Obama in January 2011 – Executive Order No. 13,563 – it is not enough for federal agencies to assess the effect of their regulations piecemeal. Instead, the Executive Order requires federal agencies to assess the *cumulative* impact of their proposed regulations.³ In proposing the Utility MACT Rule, the EPA violated this Executive Order because it did not perform any cumulative impact assessment. It was for this reason that I, along with several other Attorneys General – of both parties – called on the EPA to withdraw its proposed Utility MACT Rule, at least until such time as that agency conducts a cumulative impact analysis, as directed by the President.

The legal analysis that supports our position is set forth – chapter and verse – in the letter that we submitted to the EPA and that is attached to my written testimony filed with the Committee. Rather than repeat all those details here, let me point out that President Obama’s Executive Order on this point was not entirely new. Instead, it supplemented and reaffirmed a previous Executive Order issued by President Bill Clinton in 1993.

What President Clinton said – and what President Obama reaffirmed – is this:

Each agency shall tailor its regulations to *impose the least burden on society*, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining

³ ³ See 76 Fed. Reg. 3, 821 (Jan. 18, 2011).

regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations*.⁴

This requirement to take into account the cost of cumulative regulations goes back at least as far as President Ronald Reagan, whose own Executive Order required federal agencies, when they propose new regulations, to “tak[e] into account the condition of the particular industries affected by regulations . . . and other regulatory actions contemplated for the future.”) (Executive Order No. 12,291, in 1981.)⁵

When President Reagan, President Clinton and President Obama all agree on how federal agencies need to conduct themselves – and spanning what is now three decades – you would think that EPA would get the message and act accordingly. Unfortunately, EPA did not get the message. It proposed the Utility MACT Rule without performing a cumulative impact analysis. It has not used cumulative analysis to inform any of its other power sector rulemaking activity. And that is simply wrong.

Now let me be clear: I did not file comments with the EPA, and I did not come to Washington today, to complain about a mere technicality. Performing a cumulative impact analysis is extremely important from a practical perspective. If it is adopted, the Utility MACT Rule will not operate in isolation. Instead, there are a large number of related regulations that EPA has already adopted, proposed for adoption, or is currently considering proposing.⁶

⁴ ⁴ Executive Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Sept. 30, 1993) (emphasis added).

⁵ ⁵ See 46 Fed. Reg. 13,193 (Feb. 19, 1981) (emphasis added).

⁶ ⁶ These regulations include: (a) EPA’s now final regulations for “PSD” and “Title V” permitting for greenhouse gas emissions, the SO₂ and NO₂ NAAQS, and the Cross-State Air Pollution Rule, (b) the currently proposed Utility MACT Rule, coal ash rule and “316(b)” water intake structure rule, and (c) the impending rules for greenhouse gas new source performance standards for electric generators, new particulate matter NAAQS, and new ozone NAAQS (which, although delayed, are still on EPA’s agenda).

EPA should have conducted an analysis of how society will be impacted by the Utility MACT Rule, acting together with these other rules. Although the EPA has failed to do so, the private sector has done so – and the results are very disturbing.

The American Coalition for Clean Coal Electricity (“ACCE”), commissioned the highly-regarded National Economic Research Associates (“NERA”) to prepare a report. The initial NERA report shows that the combination of just two of these regulations, the Cross-State Air Pollution Rule and the Utility MACT Rule, will be a serious blow to the economy, causing a net loss of 1.4 million jobs by 2020!⁷ The combination of the two regulations will also cause a substantial increase in retail electricity prices, with the price increase estimated to top 23 percent in some areas of the country. Even for states where the projected increase may be small, we are – at the end of the day – one nation, and we prosper most when we all prosper together. These electricity price increases will cause direct harm in the states were they occur; but they will also cause indirect harm in other states as well.

I must emphasize that EPA has no credible basis for stating that these harms will not occur because, unlike the private sector, that agency has not conducted a cumulative impact analysis – even though the President’s Executive Order requires it.

The issue is not just the cost of electricity and the impact these costs will have on jobs and the economy. The reliability of the electric grid may be at stake as well. The events of last week illustrate why I am so concerned about this issue. What evidently was a mistake by a single utility worker at a facility in Yuma, Arizona, triggered a cascading effect that ended up blacking out almost 5 million people from Mexico to Orange County, California. According to press reports, during the outage, schools and businesses – including gas stations – were forced to

⁷ ⁷ The report can be found at http://www.americaspower.org/NERA_CATR_MACT_29.pdf.

close; commuters jammed roadways; the medically-fragile packed hospitals; and at least two sewage pumps failed; and that failure, in turn, contaminated a lagoon and a river that feeds into San Diego Bay. These events show that our electric grid is not only very interdependent, but that disruptions in one location can have far-reaching consequences. In light of these events, one would hope and expect that our nation's regulators would not proceed with a suite of regulations designed to restructure the utility industry without careful and complete analysis. Yet that has not happened with EPA's regulations.

In criticizing the EPA, I am aware that the agency is operating under a consent decree in the case of *American Nurses Association v. Jackson*. In that case, the EPA agreed to adopt a final rule for coal-fired and oil-fired electric generating units by November 16, 2011 – now just two months away.⁸ Perhaps, that looming deadline is the excuse it will use to explain its failure to conduct a cumulative impact analysis as the Executive Order requires. But the EPA did not have to agree to that deadline; and it is simply wrong for a federal agency to avoid its legal responsibilities by hiding behind a deadline of its own creation.

In any event, the deadline is not hard and fast. The same consent decree allows the EPA to go back to the court and seek an extension of time “for good cause shown.” Certainly, there is “good cause” for extending the court-supervised deadline when the agency has yet to consider the cumulative impact of the Utility MACT Rule in combination with the other rules it has already adopted and/or is now developing.

Hopefully, the EPA will seek such an extension. However, it is very unlikely that the EPA will take any action that would in any way slow down the ill-advised regulation that it has

⁸ ⁸ *American Nurses Assoc. v. Jackson*, No. 1:08-02198 (D.D.C.) (consent decree dated April, 2010).

proposed. And so, the matter now becomes an appropriate subject of *Congressional* action. I urge Congress to propose and enact legislation that defers the Utility MACT Rule and EPA's other major power sector regulations, at least until a cumulative impact analysis can be performed.

STATE ATTORNEYS GENERAL
A Communication from the Chief Legal Officer of the States of
Arizona, Florida, Guam, Indiana, Kansas, Kentucky, Ohio, Oklahoma and Utah.

August 4, 2011

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters – Ariel Ross Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Re: Proposed Utility MACT Rule:
EPA-HQ-OAR-2009-0234; EPA-HQ-OAR-2011-0044

Dear Ms. Jackson:

As State Attorneys General, we are writing because of our concern about the lawfulness of the procedures followed by the Environmental Protection Agency (“EPA”) in developing its recently proposed regulation, “Maximum Achievable Control Technology Rule” for utilities (“Utility MACT Rule”).

In our view, the EPA has not abided by the direction given to federal agencies – including the EPA – by President Barack Obama with respect to the procedures that agencies must follow to assess the *cumulative* impact of their proposed regulations. See Executive Order No. 13,563, 76 Fed. Reg. 3, 821 (Jan. 18, 2011). Given this lack of compliance, we ask that your agency withdraw its proposed Utility MACT Rule, at least until such time as your agency conducts a cumulative impact analysis, as directed by the President.

President Obama issued Executive Order No. 13,563 in order to make it clear that federal agencies are to assess the cost of cumulative regulations when they propose to impose new requirements on society, including businesses. His Executive Order “is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12,866 of September 30, 1993.”¹ Thus, in order to ascertain the full effect of Executive Order No. 13,563, it is necessary to turn to the previous Executive Order, cited by President Obama, on this subject.

Issued by President Bill Clinton, Executive Order 12,866 provides:

¹ Executive Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations.*²

This focus on a cumulative analysis reflects the view that government regulations should be examined for their overall effect, and not simply looked at in isolation. As Executive Order No. 12,866 explains, “[i]n deciding whether and how to regulate, agencies should assess *all* costs and benefits of available regulatory alternatives.”³

In evaluating the proposed Utility MACT Rule, a cumulative impact analysis is especially important because of the large number of related regulations the EPA has adopted, has proposed for adoption, and/or is currently considering proposing. Although EPA has not conducted its own cumulative analysis, the private sector has done so, focusing on the combined impact of the proposed Utility MACT Rule and the recently-adopted Transport Rule (a/k/a Cross-State Air Pollution Rule).

As you may know from the comments filed in opposition to the Utility MACT Rule, the American Coalition for Clean Coal Electricity (“ACCE”), commissioned the highly-regarded National Economic Research Associates (“NERA”) to prepare a report. The initial NERA report shows that the combination of the Transport Rule and the Utility MACT Rule will be a serious blow to the economy, causing a net loss of 1.4 million jobs by 2020.⁴ The combination of the two regulations will also cause a substantial increase in retail electricity prices, with the price increase estimated to top 23 percent in some areas of the country.

In our judgment, it would be arbitrary and capricious for your agency to adopt the proposed Utility MACT Rule without conducting a cumulative impact analysis. Even without Executive Orders No. 13,563 and 12,866, the dire results of the privately-commissioned NERA analysis would make it irresponsible for your agency to do so. Given President Obama’s directive – as set forth in those Executive Orders – we believe that it is especially inappropriate for your agency to proceed on its current course.

² Executive Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Sept. 30, 1993) (emphasis added). It should also be noted that the requirement for a cumulative impact analysis dates back to President Ronald Reagan, who required federal agencies, when they propose new regulations to “tak[e] into account the condition of the particular industries affected by regulations . . . and other regulatory actions contemplated for the future.”) (emphasis added). See Executive Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

³ *Id.* (emphasis added).

⁴ The report can be found at http://www.americaspower.org/NERA_CATR_MACT_29.pdf.

We ask that the proposed Utility MACT Rule be withdrawn until full compliance with those Executive Orders is achieved.

In making this request, we recognize that you have agreed to a consent decree that gives you a November 16, 2011 deadline for adopting a final rule governing coal- and oil-fired electric generating units.⁵ We also recognize, however, that the deadline is not set in stone, and that you are able to ask the court to extend the deadline "for good cause shown." The need for your agency to conduct a cumulative analysis – as required by Executive Orders No. 13,563 and 12,866 – would certainly constitute good cause, and we would be pleased to support the need for an extended deadline if you ask the court to grant it.

Sincerely,



Thomas Horne
Attorney General of Arizona



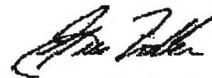
Jack Conway
Attorney General of Kentucky



Pam Bondi
Attorney General of Florida



Leonardo M. Rapadas
Attorney General of Guam



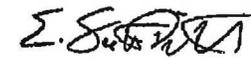
Gregory F. Zoeller
Attorney General of Indiana



Derek Schmidt
Attorney General of Kansas



Mike DeWine
Attorney General of Ohio



E. Scott Pruitt
Attorney General of Oklahoma



Mark L. Shurtleff
Attorney General of Utah

⁵ See *American Nurses Assoc. v. Jackson*, No. 1:08-02198 (D.D.C.).

**Summary of Testimony of Mark L. Shurtleff, Attorney General of Utah,
Before the House Committee on Energy and Commerce – September 15, 2011**

EPA is likely to adopt the Utility MACT Rule by November 16, 2011. But, EPA has failed to assess the impact of the rule on a cumulative basis – in light of other promulgated and proposed regulations. Thus, neither EPA nor the public can understand the effect of all of these regulations on the reliability of the electric grid, or on the economy, jobs, and electricity rates.

The law requires a cumulative analysis. Under Executive Order 13,563, issued in January 2011, federal agencies must assess the cumulative impact of proposed regulations. EPA failed to do so. A cumulative impact analysis is also important from a practical perspective. If adopted, the Utility MACT Rule will not operate in isolation. There are many related regulations that EPA has already adopted or has proposed or is currently considering proposing.

The private sector has conducted a cumulative analysis, and the results are very disturbing. A report prepared by the National Economic Research Associates (“NERA”) shows that the combination of just two regulations, the Cross-State Air Pollution Rule and the Utility MACT Rule, will cause (a) a net loss of 1.4 million jobs by 2020, and (b) a substantial increase in retail electricity prices, with the increase estimated to top 23 percent in some areas.

Moreover, reliability of the electric grid is an issue. Last week’s cascading blackout in the Southwest shows that our electric grid is very interdependent and that disruptions in one location can have far-reaching consequences. EPA should not proceed with a suite of regulations designed to restructure the utility industry without careful and complete analysis.

The EPA is under a consent decree to adopt a final rule for coal-fired and oil-fired electric generating units by November 16, 2011. But the EPA did not have to agree to that deadline; and it is simply wrong for an agency to avoid its legal responsibilities by using a deadline of its own creation. Moreover, the deadline is not hard and fast. The consent decree allows the EPA to seek an extension “for good cause shown.” There is “good cause” for an extension when the agency has yet to consider the cumulative impact of the Utility MACT Rule.

Unfortunately, it seems unlikely that the EPA will take any action that would slow down the ill-advised regulation that it has proposed. I urge Congress to propose and enact legislation that defers the Utility MACT Rule and EPA’s other major power sector regulations, at least until a cumulative impact analysis can be performed.