United States Senate

WASHINGTON, DC 20510

March 5, 2024

Hon. Michael S. Regan
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Letter concerning the Environmental Protection Agency's Supplemental Notice of Proposed Rulemaking to the New Source Performance Standards for Greenhouse Gas Emissions from New, Modified and Reconstructed Fossil Fuel-Fired: Electric Generating Units.

Dear Administrator Regan:

As the Ranking Members of the U.S. Senate Committee on Small Business and Entrepreneurship and U.S. Senate Committee on Environment and Public Works, we write to you in response to the Environmental Protection Agency's (EPA) proposed regulations for greenhouse gas (GHG) emissions from new and existing power plants under Sections 111(b) and 111(d) of the Clean Air Act.[1] Specifically, I am urging the EPA to address the issues raised in the Small Business Advocacy Review (SBAR) panel in regards to affected small entities.

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), the EPA must assess the impacts of rules on small businesses, small nonprofit organizations, and small governmental jurisdictions (collectively, "small entities"). If the EPA determines that a proposed rule will have a "significant economic impact on a substantial number of small entities," it must convene a Small Business Advocacy Review (SBAR) Panel[2] and prepare an initial regulatory flexibility analysis (IRFA).[3] The EPA, following a Pre-Panel Outreach Meeting for Small Entity Representatives (SERs) related to its proposed 111(b) New Source Performance Standards, came to the inaccurate conclusion that this rulemaking would *not* have a "significant economic impact on a substantial number of small entities."[4] Due to this improper certification, the EPA failed to perform the required SBAR panel. However, in response to significant public comments raising

[1] New Source Performance Standards for Greenhouse Gas Emissions 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, 88 Fed. Reg. 33240 (proposed May 23, 2023) (to be codified at 40 C.F.R. pt. 60).
[2] 5 U.S.C. § 609(b).
[3] 5 U.S.C. § 603.
[4] If the Agency determines the proposed rule will not have a "significant economic impact on a substantial number of small entities," the Agency head may certify to such a conclusion and need not prepare an IRFA. 5 U.S.C. § 605(b). The certification statement must include a "factual basis for the certification." *Id*.

concerns about the impact this rule will actually have on small entities, the EPA announced on July 13—after the rule was proposed—that it would in fact convene a SBAR panel.

Although the Agency's decision to convene a SBAR panel is appreciated, the many comments received by SERs make it clear there is widespread concern that the EPA has severely underestimated the impact of this rule on small entities. Furthermore, the comments collected by the SBAR panel seem to have had minimal impact on the IRFA released by the agency,[5] with the EPA failing to modify or reassess its original assumptions regarding the impact to small entities, even after receiving numerous critical comments from SERs. For instance, the EPA in its IRFA may have significantly undercounted the number of small entities affected, stating that only 10 small entities will be affected by the proposed rule, with none having compliance costs greater than 1 percent of generation revenues. By the EPA's own admission, this analysis continues to rely on compliance costs established in the Notice of Proposed Rulemaking original proposal, which many SERs argued is fundamentally flawed. Furthermore, the EPA recognized in its IRFA a number of caveats, limitations, and "key areas of uncertainty" in which the agency admits that "significant changes to one or more of these assumptions could result in a different estimate of compliance costs and therefore the finding of no SISNOSE [significant economic impact on a substantial number of small entities] for this action".

It is difficult to reconcile the vast delta between the EPA's estimated impact on small entities versus SER's estimation of the number of impacted small entities and the cost they will have to endure from the EPA's ruling. This is especially relevant as these entities will now have to work to meet consumer expectations of reliable and affordable power. The majority of electric cooperatives and many public power utilities qualify as "small entities" under the RFA.[6] This includes 61 of the nation's 63 generation and transmission (G&T) cooperatives, which are owned by the distribution cooperatives they serve. Approximately 1,300 of the nation's 2,000 or so public power utilities have 10 or fewer employees and serve towns, villages, or counties with fewer than 10,000 people, and all but 144 of the nation's public power utilities would be considered a "small governmental jurisdiction" under the RFA. Comments received by the SERs convened by the Panel reinforce this, with the National Rural Electric Cooperative Association (NRECA) stating that all but two of their 900 member cooperatives are "small entities". The East Kentucky Power Cooperative (EKPC) echoes this sentiment when they stated all but the three largest electric cooperatives qualify as small businesses under SBA's standards.[7]

Further, the EPA's IRFA continues to base its total cost assessment on small entities over a period of one single year, 2035,[8] while SER's argue that small entities will be incurring costs for several years as they design, construct, and operate covered units. In contrast, the EPA's own

[5] Initial Regulatory Flexibility Analysis, New Source Performance Standards for Greenhouse Gas Emissions 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 (received Nov. 15, 2023).
[6] 5 U.S.C. §§ 601-12
[7] Panel Report of the Small Business Advocacy Review Panel on EPA's Proposed Rule New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units, 17-18, (received Nov. 15, 2023).
[8] *Id* at 6.

cost-benefit analysis of the broader proposed rule covers expected impacts from 2024-2042, a nearly 20-year span, as compared to its one-year estimation for small entities. A single-year snapshot is insufficient to properly determine the rule's potential cost impact on small entities.[9]

The Regulatory Flexibility Act also requires the EPA to consider and address in its IRFA any significant alternatives to the proposed rule that would accomplish the same objectives while minimizing significant economic impacts on small entities. The SBAR Panel identified three regulatory flexibility alternatives: subcategorization (such as potential exclusions or subcategories of small entities subject or not subject to this rule), reliability (power interruptions if replacements cannot be put in place before older technology is retired), and (re)analysis, in which it reiterated concerns with the EPA's analysis underpinning its proposed rule. Regarding the first two alternatives: subcategorization and mechanisms for reliability relief, the entirety of the EPA's discussion in the IRFA is relegated to a few short paragraphs, merely restating SERs' concerns and the EPA's soliciting comment on these alternatives "to help further understand the impacts on small businesses."[10] Thus, there was little to no substantive discussion on the alternatives raised by the SBAR Panel in the IRFA from the Agency's perspective. In the third alternative raised by the Panel, the IRFA fails to comment on the many concerns raised by SERs, continuing to adhere to its original analysis. For instance, SER's have cautioned the EPA has majorly miscalculated its projected cost of hydrogen borne by small entities. Rather than adequately addressing this underestimation, the EPA disregarded this concern raised by small entities as a mere "caveat or limitation" to its IRFA. The EPA also fails to address in its IRFA other concerns raised by SERs, such as access to natural resources, availability of supporting infrastructure and logistics of on-site carbon or hydrogen storage, compliance costs of source to sink carbon storage and sequestration, and the effects of the final rule on the communities small entities serve, including any disproportionate impacts on such communities.[11]

The regulatory decisions the EPA makes now will determine if there are enough resources to meet tomorrow's energy needs. We must recognize the need for time and technology development before taking our nation down an energy path that prioritizes speed over practicality. It is also imperative that the EPA follow the law on these proposed regulations and SBAR panel, not only to hear directly from, but to actively consider and respond accordingly to the unique impacts it will have on small electric utilities as they maintain electric reliability and affordability.

Accordingly, we urge the EPA to ensure that the findings of the SBAR panel and comments on the recommended regulatory alternatives are fully addressed and accounted for prior to its final rulemaking. It is critical that the EPA alleviate the concerns raised by affected small entities and consider the unique impacts these proposed regulations will have on small electric utilities as they maintain electric reliability and affordability.

---

[9] U.S. Env. Prot. Agency, Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act 20-21 (Nov. 2006), https://www.epa.gov/sites/production/files/2015-06/documents/guidance-regflexact.pdf.

[10] *Supra* note 7, at 15-16.

[11] *Supra* note 7, at 33-34.

Sincerely,

Joni Ernst
Ranking Member
U.S. Senate Committee on
Small Business & Entrepreneurship

Shelley Moore Capito
Ranking Member
U.S. Senate Committee on
Environment & Public Works