



Summary of Vistra Energy Corp.'s Comments of EPA's Proposed ACE Rule

Vistra Energy Corp. ("Vistra") generally supports¹ the U.S. Environmental Protection Agency's ("EPA") proposed Affordable Clean Energy ("ACE") rule ("Proposed Rule")² to replace the EPA's Clean Power Plan ("CPP")³ but believes certain revisions and clarifications are necessary. In finalizing the ACE rule, Vistra encourages EPA to take into account the following principles: (1) the respective roles of the states and EPA under Section 111(d) and the Clean Air Act ("CAA") generally; (2) a properly narrow reading of the statutory text authorizing EPA's action under Section 111(d); (3) the states' authority to develop and implement standards of performance under Section 111(d); (4) a reading of the statute that correctly limits the best system of emission reduction ("BSER") to measures that can be applied to or at an individual source; (5) the required consideration of source-specific factors, such as cost and remaining useful life of affected sources; and (6) flexible compliance options for sources that permit them to choose the approach that best fits their specific scenario.

I. The Proposed Rule Is Properly Limited to Measures that Can Be Implemented at Individual Sources

In accordance with the statutory text of the CAA, the Proposed Rule recognizes that EPA's role under Section 111(d) is limited to determining the BSER, whereas states are responsible for establishing standards of performance for individual sources that reflect the application of the BSER, taking into account various factors such as cost and remaining useful life. In determining the BSER, EPA has properly limited its review to measures that can be implemented at the source itself.⁴ This approach is consistent with over 45 years of rulemakings under Section 111 for both new and existing sources.⁵ As a result, EPA has proposed that heat rate improvements ("HRI") are the

¹ Vistra's full comments on the Proposed Rule are available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-23823>.

² 83 Fed. Reg. 44,746 (Aug. 31, 2018).

³ 80 Fed. Reg. 64,662 (Oct. 23, 2015).

⁴ 83 Fed. Reg. at 44,749.

⁵ See generally 40 C.F.R. pt. 60, subpts. Cb-0000. EPA stated in the proposed repeal of the CPP that the Clean Air Mercury Rule ("CAMR") was an "exception" to this practice. 82 Fed. Reg. 48,035, 48,041 (Oct. 16, 2017) ("Proposed Repeal"). However,

BSER for coal-fueled electric generating units (“EGUs”), and Vistra supports that determination. However, EPA’s determination of the BSER was focused on HRIs at existing *coal-fueled* EGUs,⁶ and it has not properly identified a BSER for natural gas-fueled EGUs. Therefore, natural gas-fueled EGUs should be excluded from the final ACE rule.

II. States Must Have Maximum Flexibility in Establishing, Implementing, and Enforcing Standards of Performance

Although Vistra supports EPA’s determination that HRIs are the BSER for coal-fueled EGUs, the states must account for source-specific factors and limitations when establishing standards of performance. Looking to EPA’s determination of BSER, states are to establish standards of performance that reflect the BSER for each individual unit, taking into account, “among other factors, the remaining useful life of the existing source to which such standard applies.”⁷ Therefore, as EPA has proposed, this must be a source-specific determination. This is especially important here, where many variables can impact a source’s heat rate, and there are significant variations across the existing fleet of coal-fueled sources and even at a single source over time. Accordingly, Vistra encourages states to take into account a source’s remaining useful life, cost considerations, physical limitations of the source, fluctuations in performance depending on load, and potential reliability issues when establishing source-specific standards of performance.

Recognizing this variability, EPA’s emission guidelines should make clear that not every affected unit will be able to achieve reductions through the specific HRI measures identified by EPA,⁸ and the reductions achievable by a given measure will vary significantly between units and even the reductions achievable at a particular unit can be impacted by changes in the unit’s operating profile, type of fuel, implementation of additional environmental controls, and degradation of equipment and timing of maintenance. Given the source-specific nature of Section

the Proposed Repeal also acknowledged that CAMR was “ultimately predicated on measures taken at the level of individual sources,” *id.* at 48,041 n.14, and that rule simply allowed sources to trade emission allowances as a means of compliance, which is consistent with Section 111.

⁶ 83 Fed. Reg. at 44,760.

⁷ 42 U.S.C. § 7411(d)(1).

⁸ 83 Fed. Reg. at 44,756-57 (“The technologies and operating and maintenance practices . . . may not be available or appropriate for all types of EGUs . . .”).

111(d), it is necessary for states to consider a variety of factors when establishing standards of performance for individual sources.

Moreover, under Section 111(d), states have the authority to not only set source-specific standards but also to implement and enforce those standards in the way that works best for their state and affected sources. When implementing and enforcing standards, Vistra agrees with EPA that states “have flexibility in the measures and processes that they put in place for affected EGUs to meet their compliance obligations,” and “the state is free to give the source[s] flexibility to meet th[eir] standard[s] of performance using either BSER technologies or some other non-BSER technology or strategy.”⁹ Accordingly, states should be permitted to establish rate- or mass-based standards and unique compliance schedules for each source based on its particular situation.

Additionally, EPA’s emission guidelines should make clear that non-BSER measures may be used for compliance. Section 111 is not a “command-and-control” provision, and the CAA does not place limitations on how states may implement and enforce standards or on the methods sources may use for compliance with such standards. Accordingly, states should be permitted to implement averaging and trading programs for affected sources and should also allow sources to rely on retirements for compliance with the standards. These compliance mechanisms fit easily and lawfully within the statutory scheme and are consistent with other existing EPA regulations. Therefore, EPA’s emission guidelines should make clear they are permissible methods of compliance.

III. Conclusion

Vistra supports the development of emission guidelines for the regulation of CO₂ from existing coal-fueled EGUs. In finalizing the rule, Vistra encourages EPA to respect the roles provided to EPA and the states under Section 111(d) and to finalize guidelines that give states a full opportunity to take source-specific factors into consideration when developing standards of performance. Further, as discussed, Vistra supports the development of a regulation that facilitates the states’ ability to provide flexible market-based compliance options for affected sources.

⁹ *Id.* at 44,765.