

EPA's CO₂ Rules and the Cooperative and Municipal Question

Regulatory Issues Implicated by the Proposed Rule



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Executive Summary

Limited or lack of jurisdiction over cooperatives and municipal utilities for activities covered by all Building Blocks presents significant implementation and enforcement hurdles. While cooperatives and municipalities that own and/or operate generation are subject to air quality regulations under the auspices of the state environmental regulator, few are subject to enforceable renewable energy mandates or energy efficiency requirements absent specific state legislation.

Many cooperatives and municipal utilities are not subject to enforceable state-level resource planning processes, which effectively proscribes the ability of state regulators to look at their activities holistically as required by the proposed CO₂ Emission Guidelines. At its core, given EPA's broad construction of the best system of emission reduction under Section 111(d), the proposed CO₂ Emission Guidelines function as an energy policy rather than a traditional Clean Air Act rule. This makes the state-level resource planning agency, *i.e.*, the PUC, the most appropriate forum in which to consider actions that fall under all Building Blocks holistically and in concert with one another. Most state PUCs lack this authority under existing state law.

A case study of Colorado illustrates the regulatory fragmentation with respect to cooperatives and municipal utilities. While the state environmental regulator has emission control authority for Building Block 1-related activities by affected generators, the state PUC has varying levels of resource planning authority and other regulatory authority over investor-owned utilities, cooperatives and municipalities. Investor-owned utilities are subject to significant PUC oversight and enforcement with regard to resource planning, RPS, and energy efficiency compliance; cooperatives and municipal utilities are subject to relaxed or no regulation in these areas. The Colorado conundrum suggests the need for comprehensive state legislation to implement an enforceable state Section 111(d) plan in many other states.

New state-level regulation of cooperatives and municipal utilities would override decades of regulatory precedent and directly conflict with the core purposes of cooperatives and municipal utilities. The cooperative and municipal utility 'DNA' centers on self-governance and local control - and with it - the ability to provide affordable and reliable power to members. These principles are reflected in comments on the proposed CO₂ Emission Guidelines by cooperatives and municipalities in various public forums and proceedings.

I. Introduction

In our earlier White Paper, “State Implementation of CO₂ Rules,” we discussed the institutional hurdles faced by states in implementing EPA’s proposed carbon rule. Briefly, we concluded that:

- states will likely need to pass legislation to make it possible for state air regulators and utility regulators to implement the rule;
- traditional non-state jurisdictional utilities will need to be made part of a unified state “Carbon Integrated Resource Planning (IRP)” process;
- states pursuing a multi-state solution will need to enter into an Interstate Compact to make the rule enforceable, which will likely require congressional approval.

That White Paper of necessity elided some of the more nuanced state institutional questions embedded in the proposed rule. As states and other stakeholders prepare comments on the rule, a subset of utilities has emerged as particularly challenged by the rule. Specifically, municipal and cooperative utilities share common governance and regulatory traits that makes implementation and enforcement of the rule particularly problematic.

The Opening Question for this Paper is:

What enforcement issues arise under the proposed rule given the scope of the Building Blocks and existing regulatory authority with regard to cooperatives and municipal utilities?

To date, state-level discussions have focused on whether a particular state can meet the CO₂ performance goal under EPA’s proposed rule to regulate carbon dioxide emissions (CO₂ Emission Guidelines) under 42 U.S.C. § 7411(d) of the Clean Air Act (Section 111(d)) from electric generating units (EGUs). However, compliance with the CO₂ Emission Guidelines is not merely a math problem. Municipal utilities, for the most part, are ‘self-regulating’ as a matter of state law. Generation and transmission cooperatives and their member distribution cooperatives are generally less-regulated than investor-owned utilities by state utility commissions. In addition, municipal and cooperative distribution utilities generally possess less scale than investor-

owned utilities.¹ Accordingly, state regulatory jurisdiction for Building Blocks 2, 3 and 4 of EPA’s proposed CO₂ Emission Guidelines is either uncertain or lacking in many states. Therefore, if cooperatives and municipalities do not “voluntarily” submit to state authority (as EPA has suggested), state legislation may be necessary in order to subject municipal and cooperative utilities to carbon remediation programs under Building Blocks 2, 3 and 4 (*i.e.*, “outside the fence”). Absent such legislation, oversight of these entities may be limited to the state air regulator under a Building Block 1-only (or “inside the fence”) plan.

The Hobson’s Choice, then, for municipal and cooperative utilities is to drastically alter their regulatory relationship to the state for carbon resource planning purposes through legislation; or endure a Building Block 1-only rate-based plan.

II. EPA’s Approval Criteria

As with our previous paper addressing state institutional issues, EPA’s approval criteria drive the discussion here:

EPA is proposing to evaluate and approve state plans based on four general criteria: 1) enforceable measures that reduce EGU CO₂ emissions; 2) projected achievement of emission performance equivalent to the goals established by the EPA, on a timeline equivalent to that in the emission guidelines; 3) quantifiable and verifiable emission reductions; and 4) a process for biennial reporting on plan implementation, progress toward achieving CO₂ goals, and implementation of corrective actions, if necessary.²

The first requirement demands that CO₂ emission reduction measures be enforceable by a regulatory entity. Therefore, enforceability ultimately dictates

¹ This is, to be sure, a generalization. Some cooperatives are regulated by state PUC/PSCs; most are not. Some municipal and cooperative utilities possess a great deal of scale; most do not. We thus generalize here, but recognize there are exceptions. By way of example, cooperatives in Arizona, Hawaii, Kentucky, Louisiana, Maryland, New Mexico and Vermont, among others, are subject to more holistic regulation than cooperatives in other states such as Alabama, Colorado, Idaho, Montana, Nebraska, and Nevada. This is not an exhaustive overview, however, and the complete regulatory scheme for cooperatives in all states is outside the scope of this White Paper.

² 79 Fed. Reg. 34,838 (June 18, 2014).

whether any state plan is approvable by EPA and in turn requires a hard look at *existing*, state-level regulatory authority over cooperatives and municipal utilities. Indeed, EPA's Technical Support Document (TSD) entitled "State Plan Considerations" acknowledges the enforceability issue with respect to cooperatives and municipal utilities:

Under a utility-driven portfolio approach, the entire suite of obligations under the plan *would be enforceable against the utility company, which would also be an owner and operator of affected EGUs*. If there are other affected EGUs in the state that are not owned and operated by a vertically integrated utility, a state plan might need to include other measures that address CO₂ emission performance by these affected EGUs.

A similar approach could be taken by municipally owned utilities or utility cooperatives, which often also engage in an IRP process. *However, state public utility commissions (PUCs) often do not regulate these utilities. As a result, implementation of a portfolio approach by these entities would introduce practical enforceability considerations under a state plan.*³

EPA's nebulous reference to "practical enforceability considerations" glosses over the fundamental issue for cooperatives and municipal utilities. While cooperatives and municipalities that own and/or operate generation are subject to air quality regulations under the auspices of the state environmental regulator, few are subject to enforceable renewable energy mandates or energy efficiency requirements absent specific state legislation. In the rare instance that cooperatives or municipal utilities must comply with such mandates, it is the PUC, *not the environmental regulator*, which is charged with monitoring and enforcing these requirements. Accordingly, even where overarching regulatory authority exists at the state level, the

³ EPA Office of Air and Radiation, *State Plan Considerations – Technical Support Document for Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, at 15-16, Docket ID No. EPA-HQ-OAR-2013-0602 (June 2014) (hereinafter *State Plan Considerations TSD*) (emphasis added), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602tsd-state-plan-considerations.pdf>.

regulatory authorities for the entire portfolio of potential actions under the proposed CO₂ Emission Guidelines are still divided.

III. The Building Blocks, Cooperatives and Municipal Utilities

A brief overview of the Building Blocks employed by EPA is necessary to inform this issue. As detailed in our previous papers, the four Building Blocks do not create *per se* compliance obligations. States do not have to meet the renewable energy and energy efficiency assumptions employed by EPA, assuming they can be met at all, or reduce the heat rate of all coal-fired EGUs by six percent. However, each state is ultimately responsible for achievement of its overall CO₂ performance goal (or an aggregated multi-state CO₂ performance goal, where applicable), and it is reasonable to expect that many states will seek CO₂ emission reductions through actions represented by each building block. Therefore, given EPA's approval criteria for Section 111(d) state plans, the relevant question is what regulator has *existing* authority to enforce measures contained in each building block. This is a different question than that addressed in our previous paper, which addressed state regulatory authority over utilities generally. The enforcement issue with regard to cooperatives and municipal utilities is even more daunting from a state implementation standpoint.

Building Block 1: This building block assumes that coal-fired EGUs can improve their heat rate by six percent. This is indicative of the traditional Clean Air Act regulatory regime, where EGUs are subject to specific emission rate requirements. These emission rate requirements typically fall under the enforcement jurisdiction of the state environmental regulatory agency. Cooperatives and municipal utilities, to the extent they own or operate affected generating units, are subject to these types of source-based regulations. This is consistent with how most states enforce National Ambient Air Quality Standards (NAAQS), the Regional Haze Program, and other Clean Air Act regulations.

Building Block 2: This building block assumes a 70 percent capacity utilization rate for combined-cycle gas-fired EGUs. This assumption depends upon dispatch protocols and re-dispatch among affected EGUs. Unlike Building Block 1, this is *not* indicative of the traditional Clean Air Act regulatory regime. Within organized markets, a regional transmission organization (RTO) or independent system operator

(ISO) serves as the system operator and controls dispatch. RTOs and ISOs are subject to the jurisdiction of the Federal Energy Regulatory Commission. In vertically-integrated states, dispatch is not specifically regulated by either PUCs or state environmental regulators. Therefore, the regulatory entity implicated by this building block is as uncertain as the precise contents of a state or multi-state Section 111(d) plan structured solely around dispatch protocols.

Building Block 3: This building block involves the calculation of a renewable portfolio standard (RPS) based on the average RPS of states in the same region of the country, and assumes usage of nuclear power plants based on existing and expected nuclear units. Some states have enforceable RPSs while others have voluntary or aspirational goals. In voluntary states, there is no applicable regulatory agency because the RPS is unenforceable.⁴ Where an enforceable RPS is in place, the state PUC is the typical regulator and enforcer of the requirement.⁵ However, cooperatives and municipal utilities are non-jurisdictional (either in whole or in part) in many states.⁶ Where cooperatives and municipal utilities are subject to an RPS, the PUC is typically the regulator, but its authority may be more narrow than its comprehensive, enforceable resource planning or rate-making authority over investor-owned utilities.⁷ As to nuclear power usage, this again would be in the regulatory province of a state PUC, assuming

⁴ The western states serve as an example of divergent approaches to renewable energy adoption. California and Colorado's RPS percentage is double that of Arizona, Montana and Washington. Idaho and Wyoming have no RPS. These state laws drive the amount of renewable energy penetration in each respective state along with the amount of resources that are available.

⁵ See, e.g., Cal. Pub. Util. Code §§ 399.11-399.32 (governing the California Public Utilities Commission); C.R.S. § 40-2-101 *et seq.* (governing the Colorado Public Utilities Commission); 20 ILCS 3855/1-75(c) (governing the Illinois Power Agency); 220 ILCS 5/16-115D (governing the Illinois Commerce Commission).

⁶ See, e.g., A.A.C. § R14-2-1801 (defining "affected utility" under Arizona law for RPS purposes); 69-3-2008, MCA (exempting any "cooperative utility" from the graduated RPS in Montana and providing that "[e]ach governing body of a cooperative utility that has 5,000 or more customers is responsible for implementing and enforcing a renewable energy standard for that cooperative utility that recognizes the intent of the legislature to encourage new renewable energy production and rural economic development, while taking into consideration the effect of the standard on rates, reliability, and financial resources").

⁷ See *State Plan Considerations TSD*, at 15-16.

the PUC has authority to approve a utility's resource plan.

Building Block 4: This building block assumes that states can achieve 1.5 percent demand reductions *annually* from energy efficiency measures.⁸ Further, EPA provides that "[s]eparate estimates were developed for each year to reflect the fact that energy efficiency programs that are implemented on an ongoing basis would be expected to produce larger cumulative impacts on total annual electricity usage over time."⁹ In states with enforceable energy efficiency goals or requirements, the state PUC is generally the regulator.¹⁰ Other states, however, have no enforceable energy efficiency requirements and therefore no regulator. Non-profit or for-profit entities may advocate and implement energy efficiency measures in these states, but there is no specific enforcement mechanism governing their activities. Presumably, to use Building Block 4, all distribution utilities within a state would need to be subject to an enforceable, auditable and verifiable energy efficiency/demand reduction program. Crucially, in many states there is no state PUC authority over municipal utilities and cooperatives to enforce these programs.

Generally speaking, the foregoing review illustrates that existing authority to enforce activities under all four building blocks is not concentrated within the exclusive jurisdiction of a single regulator. With respect to cooperatives and municipal utilities, state agencies have limited or no regulatory authority to enforce requirements related to increased gas dispatch (Building Block 2), increased renewable or nuclear adoption (Building Block 3), or energy efficiency targets (Building Block 4). Absent new legislation that expands jurisdictional authority over cooperative and municipal utilities, this creates a potentially insurmountable compliance gap. The case study in the following section illustrates the lack of uniform, consolidated regulatory authority over cooperatives and municipal utilities in Colorado.

IV. Case Study – Colorado Regulation of Cooperatives and Municipal Utilities

In Colorado, customers are served by different types of electric utilities:

⁸ 79 Fed. Reg. 34,896.

⁹ *Id.*

¹⁰ Colo. Rev. Stat. § 40-3.2-104; N.R.S. § 704.785; Cal. Pub. Util. Code §§ 381, 890-900, 399.15(b), 379.5.

Investor-Owned Utilities: Public Service Company of Colorado (Xcel Energy, Inc. subsidiary) (PSCo) and Black Hills/Colorado Electric Utility Company, LP (Black Hills Corporation subsidiary) (Black Hills).

Generation and Transmission Associations: For instance, Tri-State Generation and Transmission Association, Inc. (Tri-State), and its 18 Colorado-based cooperative member-systems.

Other Cooperatives: Holy Cross Energy, Intermountain Rural Electric Association (IREA), Grand Valley Power, and Yampa Valley Electric Association.

Municipal Utilities: Colorado Springs Utilities and Platte River Power Authority, among others.

The Colorado Department of Public Health and Environment (CDPHE) and its Air Quality Control Commission (AQCC) have authority over air quality issues and compliance for certain generating sources owned by these entities.¹¹ In addition, the Colorado PUC has varying degrees of regulatory authority over these entities. With respect to PSCo and Black Hills, the Colorado PUC has ratemaking authority, resource planning authority, and facilities jurisdiction, *i.e.*, approval authority over major construction such as

¹¹ Colo. Rev. Stat. § 25-7-109(1)(a) provides the AQCC with authority to “adopt, promulgate, and from time to time modify or repeal emission control regulations which require the use of effective practical air pollution controls: (I) For each significant source or category of significant sources of air pollutants; (II) For each type of facility, process, or activity which produces or might produce significant emissions of air pollutants.” Accordingly, the source, facility, process or activity in question must produce or have the capability of producing “significant emissions or air pollutants.” While Colo. Rev. Stat. § 24-4-103(12.5) provides Colorado state agencies with authority to adopt federal regulations by reference, the regulations proposed by EPA in the CO₂ Emission Guidelines do not override existing state law and alter the existing regulatory regime for cooperatives and municipal utilities. For example, while proposed 40 C.F.R. § 60.5750 allows states to “include existing requirements, programs and measures” in a state plan, it does not grant AQCC the authority to enforce existing RPS requirements against municipal utilities or energy efficiency requirements against cooperatives and municipal utilities. It also does not allow AQCC to seize existing authorities allocated to the Colorado PUC. AQCC remains limited to regulating sources, categories of sources, facilities, processes or activities “which produce[] or might produce significant emissions of air pollutants.” Colo. Rev. Stat. § 25-7-109(1)(a).

transmission lines, generating facilities, etc.¹² Colorado PUC authority over Tri-State is more limited. It lacks ratemaking authority over Tri-State and Tri-State is only required “to file its [IRP] with the Commission as a report rather than filing it for approval.”¹³ Tri-State’s member-systems and the other cooperatives in Colorado have voted to exempt themselves from Colorado PUC regulation pursuant to Colorado law. Therefore, these cooperatives are not subject to the resource planning jurisdiction of the Colorado PUC and do not need to file resource plans for approval. Finally, the Colorado PUC does not have resource planning or any other regulatory authority over municipal utilities.¹⁴ Accordingly, the Colorado PUC lacks approval authority over the resource planning activities of all utilities except PSCo and Black Hills.

This poses a challenge for implementation of the proposed CO₂ Emission Guidelines. At its core, given EPA’s broad construction of its Section 111(d) authority, the proposed CO₂ Emission Guidelines function as an energy policy rather than a traditional Clean Air Act rule. This makes the state-level resource planning agency, *i.e.*, the PUC, the most appropriate forum in which to consider actions that fall under *all* Building Blocks holistically and in concert with one another. In Colorado, however, this cannot be achieved under existing law because of the PUC’s limited resource planning jurisdiction over Tri-State and its complete lack of jurisdiction over distribution cooperatives and municipal utilities.

The existing framework for the Colorado RPS further illustrates the fragmented enforcement issues associated with the proposed CO₂ Emission Guidelines. In its current form, investor-owned utilities must achieve an RPS of 30 percent by 2020 on an escalating scale, and their activities are subject to a two percent retail rate impact cap.¹⁵ Tri-State, and cooperatives with more than 100,000 meters, must meet an RPS of 20 percent by 2020.¹⁶ Cooperatives with less than 100,000 meters and municipal utilities must meet an RPS of 10 percent by 2020,¹⁷ subject to a two percent

¹² Colo. Rev. Stat. § 40-5-101 *et. seq.*

¹³ Decision No. C10-0101, Colorado PUC Docket No. 09I-041E, at ¶ 16 (mailed Feb. 4, 2010).

¹⁴ Colorado Constitution, Art. V, § 35; *Town of Holyoke v. Smith*, 75 Colo. 286 (Colo. 1924); *City of Lamar v. Town of Wiley*, 80 Colo. 18 (Colo. 1926).

¹⁵ Colo. Rev. Stat. § 40-2-124(1)(c)(I).

¹⁶ Colo. Rev. Stat. §§ 40-2-124(1)(c)(V.5) & § 40-2-124(8)(b).

¹⁷ Colo. Rev. Stat. § 40-2-124(1)(c)(V).

retail rate impact cap¹⁸; however, municipal utilities may exempt themselves by majority vote.¹⁹ Moreover, while cooperatives and Tri-State merely file compliance reports with the Colorado PUC, investor-owned utilities are subject to fully-litigated proceedings regarding their RPS compliance plans.²⁰

When it comes to energy efficiency, Colorado law requires PSCo and Black Hills to meet certain energy efficiency goals established by the PUC by 2018. These goals are “at least five percent of the utility’s retail system peak demand measured in megawatts in the base year and at least five percent of the utility’s retail energy sales measured in megawatt-hours in the base year. The base year shall be 2006. The goals shall be met in 2018, counting savings in 2018 from DSM measures installed starting in 2006.”²¹ For purposes of this paper, however, the operative phrase in the statute enacting energy efficiency requirements is that “[t]he commission shall establish energy savings and peak demand reduction goals to be achieved by an investor-owned electric utility”²² Accordingly, the same enforcement fragmentation exists in the energy efficiency context as well, as investor-owned utilities are subject to statutory and administrative demand-side goals but cooperatives and municipal utilities are not.

There are several key takeaways from the discussion above. First, new legislation in the form of multiple bills was necessary to bring cooperatives and municipal utilities under limited Colorado PUC oversight for purposes of RPS compliance. These utilities did not voluntarily subject themselves to these requirements. Second, Colorado law continues to respect the traditional self-governance of the cooperatives and Tri-State by subjecting their RPS compliance to a less onerous oversight process than investor-owned utilities. Moreover, Colorado continues to defer to local regulation of municipal utilities by allowing for an exemption vote. Colorado law similarly respects cooperatives and municipal utilities’ regulatory independence by not subjecting these utilities to energy efficiency requirements. These considerations are important when read in concert with EPA’s proposed solutions to the cooperative and municipal utility jurisdictional conundrum, which we will explore in the following section.

¹⁸ Colo. Rev. Stat. § 40-2-124(1)(g).

¹⁹ Colo. Rev. Stat. § 40-2-124(5).

²⁰ Colo. Rev. Stat. § 40-2-124(8)(g)(III).

Further, the compliance obligation imposed on cooperatives and municipal utilities leaves a question as to whether EPA would consider it “enforceable” as a Building Block 3 action if relied upon in a state plan to meet the state’s CO₂ performance goal. Under Senate Bill 13-252, signed into law in 2013, Tri-State and IREA were subjected to heightened RPS requirements. However, Tri-State’s compliance report obligation is indicative of the more ‘hands-off’ approach used in Colorado for non-investor-owned utilities: “If [Tri-State as a qualifying wholesale utility] has not achieved such compliance [with the RPS] or does not anticipate continuing to do so, it shall explain why and shall indicate the steps it intends to take to meet the standard and by what date.”²³ The statute is noticeably silent on actual enforcement penalties in the event of noncompliance by cooperatives and municipal utilities.

The CO₂ Emission Guidelines also do not take into account the retail rate impact limitation of Colorado. To the extent the PUC does have enforcement authority over investor-owned utilities, that authority is limited by the two percent retail rate “cap,” which may be asserted by a utility to avoid penalties for failing to reach the RPS renewable energy percentage mandate.²⁴

In sum, it is an open question whether Colorado or similarly situated states can represent that existing measures are “enforceable” for purposes of compliance with the proposed CO₂ Emission Guidelines under Section 111(d) of the Clean Air Act.

V. EPA’s Suggested Solutions and the History and ‘DNA’ of Cooperatives and Municipal Utilities

One potential response to this enforcement and jurisdictional conundrum is for the state environmental regulator to take the lead and implement any state plan against the cooperatives and municipal utilities. While this has superficial appeal given environmental regulators’ history of implementing air quality rules and jurisdiction over generating units, it would be short-sighted both legally and practically. Legally, absent state legislation, state environmental agencies

²³ *Id.* This is in contrast with PUC enforcement authority over qualifying retail utilities under Colo. Rev. Stat. § 40-2-124(1)(i), which states in relevant part that the PUC may promulgate rules that include “enforcement mechanisms necessary to ensure that each qualifying retail utility complies with this standard, and provisions governing the imposition of administrative penalties assessed after a hearing”

²⁴ Colo. Rev. Stat. § § 40-2-124(g)(I)(A).

must necessarily limit themselves to a Building Block 1-only plan for cooperatives and municipal utilities, which would have the generation fleet bearing the entire burden of the CO₂ performance goal compliance obligation. Indeed, EPA implicitly suggests that states reference the draconian nature of a Building Block 1-only plan to get non-jurisdictional entities to voluntarily submit to broader jurisdiction and increased state-level oversight:

[A] municipal utility or utility cooperative might voluntarily submit to state authority as a condition of the state agreeing to let the entity implement a portfolio approach, in lieu of the application of certain direct CO₂ emission limits for affected EGUs owned and operated by such entities through a state regulation.²⁵

EPA recognizes new legislation as an alternate route to achieve this broader jurisdiction in the absence of “voluntary” submission to new state authority: “In some cases, new state statutory authority might be enacted to support a state plan, specifying enforceable obligations for these private or public third-party entities under the plan.”²⁶ “Voluntary” submission is tantamount to an EPA override of decades of statutory and regulatory precedent in many states, including Colorado as discussed in the previous section.

With some exceptions, it seems unlikely that cooperatives and municipal utilities would give up their limited regulation and/or self-governance absent legislation. Self-governance or local regulation is a cornerstone of the existence of cooperatives and municipal utilities. A passage from a seminal Colorado Supreme Court case, specifically in the municipal utility context, is telling here as it explains the importance of local control to these entities:

The central idea of government in this country was and is that in local matters municipalities should be self-governing . . . [I]t is said that one of the vital ideas in the American form of government is “that local affairs shall be managed by local authorities, and the general affairs by the central authority.”
...

²⁵ *State Plan Considerations TSD*, at 16.

²⁶ *Id.*

A plant owned and operated by consumers can never become a monopoly, nor can it be an instrument of oppression. Hence there is no room for the exercise of the police power [of the Colorado PUC]. The fixing of rates by the consumers through their agents, the Town trustees, cannot be an evil from which they need protection.²⁷

This language is nearly 90 years old but makes clear that state legislation, as opposed to “voluntary” submission to a new regulatory regime, is a far more likely outcome given the history and innate makeup of cooperatives and municipal utilities. In a similar vein, again using Colorado as an example, the Colorado General Assembly has recognized that cooperatives “are owned by the member-consumers they serve ... [and] regulated by the member-consumers themselves acting through an elected governing body.”²⁸ Therefore, cooperatives can, among their members, “determine the necessity of regulation by the public utilities commission ... [and may] exempt themselves from regulation by the public utilities commission.”²⁹

The cooperative and municipal utility ‘DNA,’ in addition to including self-governance and local control, centers on providing affordable and reliable power to members.³⁰ All facets of this DNA have been reflected in comments by cooperatives and municipal utilities in stakeholder and public forums regarding issues with the proposed CO₂ Emission Guidelines.

“Co-ops serve some of America’s communities most sensitive to, and least

²⁷ *Town of Holyoke v. Smith*, 75 Colo. at 289, 296.

²⁸ Colo. Rev. Stat. § 40-9.5-101.

²⁹ *Id.*

³⁰ An example is the current “Keep Electricity Affordable” campaign supported by Tri-State, the Colorado Rural Electric Association, the Nebraska Rural Electric Association, the New Mexico Rural Electric Cooperative Association, and the Wyoming Rural Electric Association. See Keep Electricity Affordable Home Page, available at <http://www.keepelectricityaffordable.org/>. Another example is the Take Action Tennessee effort driven by the Tennessee Electric Cooperative Association and National Rural Electric Cooperative Association (NRECA). See Take Action Tennessee Home Page, available at <http://www.takeactiontn.com/> (“The EPA’s proposal will increase power costs, jeopardize reliability, and threaten thousands of American jobs without any significant impact on global CO₂ emissions or climate change. Tennessee’s electric cooperatives are asking the EPA to reconsider their approach and make certain that affordable, reliable power is a part of Tennessee’s clean energy future.”)

able to afford, increases in the cost of energy. Electric co-ops require independence and flexibility to choose solutions based on the needs of the communities they serve, which thoughtfully take into account balanced consideration of affordability, reliability and environmental responsibility. America's not-for-profit, member-owned electric cooperatives remain laser-focused on the affordability and reliability of the electricity that powers our communities and will provide the EPA with detailed feedback after analyzing the proposal through that lens." – Jo Ann Emerson, NRECA, June 2, 2014

"Because Missouri's electric cooperatives are member-governed and member-controlled, our members' focus on electricity prices drives all our cooperatives' focus on costs. Unlike the state's investor-owned utilities whose customer rates are set by the Commission, any and all costs incurred by the cooperatives' three tiered system must be recovered from our members." – Association of Missouri Electric Cooperatives, Inc., Comments before the Public Service Commission of Missouri, August 26, 2014

"Since municipal utilities may face unique challenges that the investor-owned utilities may not, adjustments to the proposed rule specific to these rules are warranted Practically eliminating coal as a generation source will result in undue reliance on natural gas in times of supply deficits or disruptions and price spikes. It would be impractical and economically irresponsible to mothball coal plants needed to meet such events JEA has no reasonable access to significant wind resources Solar energy for electric power generation in Florida is inadequately reliable, difficult and costly to scale for baseload." – Jacksonville Electric Association, Draft Comments to EPA Regarding the Proposed Rule, September 14, 2014

"Was cooperative business model considered? ... Do the requirements infringe on other federal and state authorities? Do states' have the legal authority and

resources to implement the rule? [The proposed rule] [r]estructures the utility industry in a way that ignores costs to consumers and focuses largely on social and environmental policies." – Tri-State, Colorado PUC Commissioner Informational Meeting, August 25, 2014

"Blocks 1, 3 and 4 are not achievable in all cases and may impose additional burden on consumers ... Cost to AECC alone: \$74 million/year in 2020 increasing to \$184 million in 2030 ... [and] [l]ikely loss of most affordable, most reliable units." – Arkansas Electric Cooperatives, Presentation to 111(d) Stakeholders, August 28, 2014

VI. Conclusion

EPA's proposed "voluntary" submission by cooperatives and municipal utilities is a horse-trade between long-standing and established legal rights in exchange for purported compliance "flexibility" with a federal administrative rule. If adopted, the proposed rule would fundamentally transform the landscape of the cooperative and municipal utility industry. In the end, the regulatory disconnect and long history of self-governance and/or local regulation of cooperatives and municipal utilities described above leaves states with one of two options: (1) pass state legislation to create an appropriate regulatory authority that allows the state to develop an enforceable state plan against *all* generators for actions under *all* Building Blocks; or (2) turn over at least a portion of state-level resource planning to EPA and with it, state energy policy, through a federal plan for the state, at least insofar as that plan is aimed at a state's municipal and cooperative utilities.

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