

ATTACHMENT 3

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June 9, 2015

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debra.jezouit@bakerbotts.comU.S. Department of Justice
Environment & Natural Resources Division
United States Department of Justice
PO Box 23986, L'Enfant Plaza Station
Washington, DC 20026-3986Re: Request for Rehearing of *Delaware Dep't of Natural Res. & Env'tl. Control v. EPA*, No. 13-1093 (D.C. Cir. 2015)

Counsel:

On behalf of the Class of '85 Regulatory Response Group ("Class of '85" or "Group"),¹ I am writing to request that EPA petition the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") for panel rehearing or rehearing en banc of *Delaware Dep't of Natural Res. & Env'tl. Control v. EPA*, No. 13-1093 (D.C. Cir. 2015) ("*DDNREC*"), which involves a challenge to the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") and the New Source Performance Standards ("NSPS") for Reciprocating Internal Combustion Engines ("RICE"). The Group requests that EPA encourage the D.C. Circuit to revise its decision so that maintenance and readiness testing procedures for emergency backup generators, which were not at issue in the case, are no longer included in the court's reversal.

DDNREC dealt specifically with a challenge to the 100-hour emergency demand response exception for emergency backup generators, which was added to the RICE NESHAP and NSPS in 2013.² As promulgated, the 2013 changes to the rules allow emergency backup generators to operate for up to 100 hours per year in emergency demand response programs. The court held that the promulgation of the demand response exception was arbitrary and capricious because EPA failed to respond to serious objections made during the comment period and relied on faulty evidence. Although the challenge was limited to the emergency demand response

¹ The Class of '85 is a voluntary ad hoc coalition of approximately 30 electric generating companies from around the country that is actively involved in the development of regulations to implement the Clean Air Act. The Group is directly impacted by this case because members of the Class of '85 own and operate emergency generators. A list of the Class of '85 members that are supporting this letter is attached.

² See 78 Fed. Reg. 6,674 (Jan. 20, 2013).

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provisions located at 40 C.F.R. §§ 60.4211(f)(2)(ii)-(iii) and 63.6640(f)(2)(ii)-(iii), the D.C. Circuit vacated all of 40 C.F.R. § 60.4211(f)(2) and 63.6640(f)(2), which also address maintenance and readiness testing for emergency backup generators. *See* 40 C.F.R. §§ 60.4211(f)(2)(i) and 63.6640(f)(2)(i). These provisions allow emergency generators to operate in non-emergency situations to perform maintenance and readiness testing. *See id.* Once the D.C. Circuit's mandate is issued, the provisions authorizing emergency generators to operate to perform maintenance and readiness testing will be eliminated, even though these subsections were never at issue in the case.

The court's elimination of the maintenance and readiness testing provisions has inadvertent and dangerous implications for emergency generators across the country. Ending authorization of maintenance and readiness testing is contrary to longstanding EPA policy, which recognizes that the ability to conduct these types of tests is necessary for safe and appropriate operation of an emergency engine. Owners of emergency generators must be able to ensure that their machines will work properly in the event of an actual emergency. Examples of emergencies include the interruption of the flow of electric power from a local utility to critical networks or equipment, as well as fires or floods that threaten the normal power supply.³ Without authorization for maintenance and readiness testing, there is no way to ensure that the emergency generators built to supplement power in these types of scenarios are operating properly and able to respond in an emergency. The court's order therefore threatens the ability of emergency generators to provide essential energy supplies during emergency situations. Since the focus of *DDNREC* was not on maintenance or readiness testing, the court could not have intended these far-reaching and risky consequences.

In some situations, owners and operators of emergency generators are required to comply with strict maintenance and readiness testing requirements promulgated by regulatory agencies other than EPA. For example, emergency generators located at nuclear facilities are subject to periodic inspection and testing to assess the continuity of the systems and the condition of the components. *See* U.S. Nuclear Regulatory Commission, Regulatory Guide 1.9, *Application and Testing of Safety-Related Diesel Generators in Nuclear Power Plants* (March 2007); 40 C.F.R. Part 50, App. A Criterion 18 – “Inspection and testing of electric power systems.” These requirements ensure the reliability of systems critical for safe operation of nuclear units. If the maintenance and readiness testing provisions in the RICE NESHAP and NSPS are eliminated, emergency generators that operate to conduct periodic testing to comply with the requirements of other agencies would automatically lose their “emergency” designation under the RICE NESHAP and NSPS. Given that the maintenance and readiness testing provisions were not at issue before the D.C. Circuit, it is unlikely that the court intended its decision to have such far-reaching consequences.

³ *See* 40 C.F.R. §§ 63.6675 and § 60.4219 (definitions of emergency stationary RICE).

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Elimination of the maintenance and readiness testing provisions would leave owners and operators with two unacceptable options: (1) forgo maintenance and readiness testing and risk unreliable operation during an emergency situation; or (2) perform maintenance and readiness testing, which is sometimes required by other statutes or regulations, and be out of compliance with the emergency generator requirements in the RICE NESHAP and NSPS. For these reasons, the Group respectfully requests that EPA petition the D.C. Circuit for panel rehearing or rehearing en banc to revise its decision so that the vacatur is limited to 40 C.F.R. §§ 60.4211(f)(2)(ii)-(iii) and 63.6640(f)(2)(ii)-(iii), which were the subsections of the regulations that were at issue in the case. This would ensure that the maintenance and readiness testing provisions for emergency generators, located at 40 C.F.R. §§ 60.4211(f)(2)(i) and 63.6640(f)(2)(i), remain in place.

We appreciate your consideration of this request. If you have any questions regarding the Group's request for a rehearing, please contact me at debra.jezouit@bakerbotts.com or 202.639.7728.

Sincerely,



Debra Jezouit

cc: Melanie King, EPA

CLASS OF '85 REGULATORY RESPONSE GROUP

AES Corporation

Arizona Electric Power Cooperative, Inc.

Arkansas Electric Cooperative Corporation

City of Lakeland

City of Tallahassee

Cleco Corporation

Cogentrix Energy Power Management, LLC

Dairyland Power Cooperative

Entergy Services, Inc.

Florida Municipal Electric Association

Florida Municipal Power Agency

Gainesville Regional Utilities

Great River Energy

Hawaiian Electric Company, Inc.

Indianapolis Power & Light Company

Integrus Energy Group

JEA

National Grid

NextEra Energy, Inc.

OGE Energy Corp.

Orlando Utilities Commission

Portland General Electric

PowerSouth Energy Cooperative

PPL Corporation

Tampa Electric Company

Westar Energy

Western Farmers Electric Cooperative

Wisconsin Public Service Corporation

Xcel Energy Inc.