The Arizona Utilities Group

Comments on

Clean Energy Incentive Program

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The Arizona Utilities Group ("AUG") is pleased to comment on the Environmental Protection Agency ("EPA" or "Agency") proposed creation of the Clean Energy Incentive Program ("CEIP") discussed in the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units*, Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "111(d) Rule") and in *Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations*, Proposed Rule, 80 Fed. Reg. 64,996 (Oct. 23, 2015) (the "proposed FP Rule") and EPA's "Clean Energy Incentive Program: Questions and related issues about which EPA is seeking input and ideas," dated November 2015 and assigned non-regulatory Docket ID Number EPA-HQ-OAR-2015-0734.

The AUG is an ad hoc, unincorporated association of individual electric utilities, including for purposes of these comments, Arizona Electric Power Cooperative, Inc. ("AEPCO"), Arizona Public Service Company ("APS"), Salt River Project Agricultural Improvement and Power District ("SRP"), Tucson Electric Power Company ("TEP"), and UniSource Energy Services. The AUG participates on behalf of its members in Clean Air Act ("CAA") proceedings that may affect its members. Because all AUG members or their parents/affiliates own electric generating units ("EGUs") that are affected by the 111(d) Rule and all AUG members are either considering potential renewable resources or serve potential low-income communities covered by the proposed CEIP, all AUG members have a significant interest in this pending action.

The AUG appreciates this opportunity to share its views on this matter of public concern to AUG, its members, and their millions of residential, commercial and industrial customers across the State of Arizona and elsewhere.

Background on the CEIP Proposal

EPA first introduced the CEIP in the final 111(d) Rule and preamble, but stated that "EPA discusses the CEIP in the proposed federal plan rule, and will address design and implementation details of the CEIP, including the appropriate factor for determining equivalence between allowances and MWh and the definition of a low-income community for project eligibility purposes, in a subsequent action." 80 Fed. Reg. at 64,830. Nevertheless, EPA appears

to have finalized both the CEIP and critical aspects of its design and operational details in section 60.5737 of the 111(d) Rule. *See, e.g.,* 40 C.F.R. § 60.5737 (establishing eligibility, size of the EPA match, rate of match, requiring plan submittal to "have no impact on the emission performance of affected EGUs" and emissions monitoring and verification procedures). EPA did not state, however, how it would allocate the 300 million tons of matching allowances or emission rate credits ("ERCs") between renewable energy ("RE") and demand side energy efficiency ("EE"), between states, between applicants within states, or how ERCs would be generated for use in the matching pool, among important details that still need to be determined. *See id.*

In the proposed FP Rule, EPA proposed to "set aside" a number of allowances, or to require rate-based states or the rate-based Federal Plan to retire certain number of ERCs or to reset targets to create ERCs. *See* 80 Fed. Reg. at 65,001. This set aside would be the state's pro rata share of the 300 million based on the relative stringency of its reduction targets. EPA then requested comment on the size of the pool to be held for RE and EE. *Id*. In the mass-based plan, EPA proposed the actual set asides and requested comment on whether matching allowances should be limited to this amount. *See* proposed § 62.16235, Table 4 (establishing CEIP mass-based set-aside) & 80 Fed. Reg. at 65,025 (requesting comment on limiting matching to these values). EPA requests comment, but makes no proposal, for how the ERC set asides will be constructed. *See, e.g.,* proposed § 62.16431 ("pursuant to a process to be prescribed by the Administrator").

Comment 1. AUG objects to the piecemeal development of the CEIP, which deprives it and other members of the public of the opportunity to comment meaningfully. While AUG understands and is generally supportive of the concepts underlying the CEIP, AUG objects to the piecemeal way in which the CEIP is being developed and implemented. Instead of issuing an Advance Notice of Proposed Rulemaking that included the CEIP and requesting comment on the concept and then making a proposal for notice and comment, EPA has partially finalized the CEIP without notice and opportunity to comment (in the 111(d) Rule), partially proposed some aspects in the proposed FP Rule, but deferred much else, and offered a non-regulatory docket. This does not meet the agency's burden under the Administrative Procedure Act, 5 U.S.C. § 550 *et seq,* which requires that EPA present a real, concrete proposal for action.

Accordingly, AUG requests that EPA, after taking comment under the non-regulatory docket and the Federal Plan docket, propose a complete CEIP for comment, including any elements already purportedly finalized in the 111(d) Rule and proposed in the proposed FP Rule. AUG envisions that this could be done on a standard 30-day notice.

Comment 2. AUG believes that the proposed "matching" mechanism adds unnecessary complexity to the proposal and is either unworkable or potentially inconsistent with the statute as applied to a rate-based plan. It is unclear what EPA is seeking to accomplish by requiring states to "match" the CEIP allowances or ERCs, other than perhaps to leverage the number of allowances or ERCs being made available to EPA's preferred policy endpoints. While it is relatively straightforward to set aside allowances, as EPA has proposed to do in Table 4 of the proposed mass-based FP, *see, e.g.,* 80 Fed. Reg. at 65,066, it is much less straightforward to set aside ERCs to "match" the EPA proposal, as EPA implicitly acknowledged when it did not include a proposal for how it would "match" the ERCs in the proposed FP Rule. Either the targets need to be adjusted, which would make the FP more stringent than the Emissions Guideline, which EPA is not allowed to do, 40 C.F.R. § 60.27(e)(1) (Administrator shall prescribe "emission standards of the same stringency as the corresponding emission guidelines(s)"), or ERCs would need to be "taxed" from some parties generating ERCs to be placed in a pool to be retired. Unless EPA is proposing to tax the CEIP RE or EE project itself (for example, by deferring on an ERC-for-ERC basis ERCs that the project would earn in the first compliance period), it is not clear why one RE project should pay a tax to incentivize a competitor's project. Accordingly, EPA should consider dispensing in its entirety the state set-aside and simply providing its incentive program, using the same process for vetting and certifying allowance or ERC eligibility, with EPA actually issuing allowances or ERCs on a pro rata basis to qualifying projects.

Comment 3. Mass-based and rate-based CEIPs should be applied consistently. The AUG believes that the CEIP should be applied consistently between the mass-based and rate-based Federal Plans. The AUG does not support a program where a CEIP allowance match is required under one program (for example, mass-based allowances), but is not also required under the other program (for example, rate-based ERCs). Both programs should have the same fundamental design as it relates to matching.

Comment 4. The CEIP eligibility dates should be earlier. EPA has proposed to limit CEIP credit to those RE and EE projects that are commenced after September 6, 2018 for those states and tribes under the Federal Plan, *see* proposed 40 C.F.R. § 62.16231(a)(2) (mass-based plan); proposed § 62.16431(a)(2) (rate-based plan), or following submission of a final state plan to EPA, *see* 40 C.F.R. § 60.5737(a)(2). The AUG believes that postponing the date for commencing operation this far into the future will serve as a significant disincentive to starting new RE or EE projects between the current date and the date of plan submittal or September 6, 2018 (as applicable). AUG believes that the better public policy, consistent with reducing carbon intensity and spreading EE to low-income communities, would be to encourage RE and EE projects to commence as soon as possible, perhaps starting with the October 23, 2015 proposal. Such an approach, which does not penalize early construction, will likely diminish the rush to construct in 2018 and bring online in 2020 or 2021. Instead, a more orderly startup of RE and EE beginning in late 2016 and proceeding into 2020 would be expected.

Comment 5. AUG recommends that EPA consider using the congressionally-enacted definition of "low-income community" in Internal Revenue Code section 45D for purposes of defining a low-income community in the CEIP. In Section 45D of the Internal Revenue Code, Congress enacted a definition of "low-income community" as follows:

> **(e) Low-income community**
> **(1) In general.** The term "low-income community" means any population census tract if—
> **(A)** the poverty rate for such tract is at least 20 percent, or
> **(B)**
> **(i)** in the case of a tract not located within a metropolitan area, the median family income for such tract does not exceed 80 percent of statewide median family income, or
> **(ii)** in the case of a tract located within a metropolitan area, the median family income for such tract does not exceed 80 percent of the greater of statewide median family income or the metropolitan area median family income. [~~Subparagraph (B) shall be applied using possession-wide median family income in the case of census tracts located within a possession of the United States.~~]
> **(2)** [Not relevant]
> **(3) Areas not within census tracts**. In the case of an area which is not tracted for population census tracts, the equivalent county divisions (as defined by the Bureau of the Census for purposes of defining poverty areas) shall be used for purposes of determining poverty rates and median family income.
> **(4) Tracts with low population.** A population census tract with a population of less than 2,000 shall be treated as a low-income community for purposes of this section if such tract—
> **[(A)** ~~is within an empowerment zone the designation of which is in effect under section 1391, and~~]
> **(B)** is contiguous to 1 or more low-income communities (determined without regard to this paragraph).

> **(5) Modification of income requirement for census tracts within high migration rural counties**
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> **(A) In general.** In the case of a population census tract located within a high migration rural county, paragraph (1)(B)(i) shall be applied by substituting "85 percent" for "80 percent".
>
> **(B) High migration rural county.** For purposes of this paragraph, the term "high migration rural county" means any county which, during the 20-year period ending with the year in which the most recent census was conducted, has a net out-migration of inhabitants from the county of at least 10 percent of the population of the county at the beginning of such period.

26 U.S.C. § 45D(e). AUG has struck out some sections that do not appear appropriate in the CEIP context.

AUG believes that this definition presents several definite advantages. First, it was enacted by Congress and reflects a congressional determination of the point where communities are disadvantaged because of income stresses, both due to the poverty of some of their members (criteria (e)(1)(A)) and due to general impairment of income levels (criteria (e)(1)(B)). The IRS has adopted guidance helping to interpret IRC section 45D, which addresses some situations which diverge from the norm (lack of census tracts; high migration rural counties) and thus avoids the need to create a whole new set of legal guidance. This is a significant practical benefit. Finally, the levels suggested (20% of the community below poverty line) or median less than 80% of the state-wide or metropolitan median income, finds general support in a number of federal housing and low-income relief programs.[1] The AUG thus commends this definition and approach to EPA for its consideration. AUG is not, however, taking a final position on whether this definition is the best possible one under the proposed CEIP. AUG looks forward to the comments of others and, based upon those comments, will recommend its preferred definition in its final comments. AUG believes, consistent with Comment 1, that it would have been better for EPA to have completed an advance notice of proposed rulemaking on this point, proposed a definition based on feedback from the community, and then allowed commenters to comment on an actual proposal or to propose alternatives.

Comment 6. Low-income communities should include the businesses operating within them. AUG interprets EPA's use of "low-income communities" to include working with

[1] For example, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (approximately twice the federal poverty rate), the National Credit Union Regulations, 12 C.F.R. § 701.34(a)(2) (low income is 80% or less of the median state or metropolitan median family income), CHIP (150 to 400% of the federal poverty rate); LIHEAP (up to 60% of state median income). These programs address individual families; the strength of the New Market Tax Credit approach is its focus on communities.

businesses located within such communities to introduce energy efficiency measures. Working with businesses in such areas broadens the available EE options, may result in greater EE gains, and equally importantly, will help to introduce EE practices and concepts in communities that may otherwise have little experience with such programs. Although AUG does not believe that further definition is really needed, IRC section 45D provides some guidelines should EPA believe further limitations are necessary. AUG urges EPA, however, not to make the determination and demonstration of low-income community so burdensome as to discourage EE projects in these communities.

The AUG appreciates the opportunity to submit these comments. Please contact Eric Hiser, AUG counsel, at 480-505-3927 or ehiser@jordenbischoff.com, if you have any questions or need additional information.