

ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSERVATION LAW)
FOUNDATION, et al.,)
))
Petitioners,)
))
v.)
))
UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY,)
))
Respondent.)

No. 13-1233; 14-1199

**RESPONDENT’S OPPOSED MOTION FOR VOLUNTARY REMAND
WITHOUT VACATUR**

Respondent United States Environmental Protection Agency (“EPA”) hereby moves for a voluntary remand without vacatur of EPA’s final decision on reconsideration of its Clean Air Act (“CAA”) emission standards for hazardous air pollutants for reciprocating internal combustion engines. EPA’s reconsideration decision addressed, *inter alia*, its revision of the subcategory of “emergency engines” to include reciprocating internal combustion engines that operate for up to 50 hours to support reliability of the local transmission or distribution system under certain circumstances (“the 50-hour provision”). *See* 79 Fed. Reg. 48,072

(Aug. 15, 2014); *see also* “*National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines; New Source Performance Standards for Stationary Internal Combustion Engines,*” 78 Fed. Reg. 6674 (Jan. 30, 2013) (“2013 Final Rule”). Counsel for all Petitioners and counsel for Intervenor for Petitioners have represented to EPA that they oppose this motion. Counsel for Intervenor for EPA have represented that they consent to this motion.¹

BACKGROUND

This case was severed from consolidated petitions for review challenging the 2013 Final Rule. *See* Docket Nos. 13-1093, 13-1102, and 13-1104. The 2013 Final Rule revised Clean Air Act (“CAA”) hazardous air pollutant emission requirements applicable to certain classes of stationary reciprocating internal combustion engines under 42 U.S.C §§ 7412(d) and 7411.

At issue in the original consolidated petitions for review was, among other things, EPA’s revision of the subcategory of “emergency engines” to include reciprocating internal combustion engines that operate for up to 100 hours per year for emergency demand response under certain circumstances (“the 100-hour provision”). *See* Docket No. 13-1093, Docket Entries 1472591, 1472863,

¹By separate motion, EPA is requesting that this Court hold the present briefing schedule in this matter in abeyance pending resolution of this motion for remand.

1473349, 1483471 (briefs of the parties). Oral argument on the original consolidated petitions was held on September 26, 2014, and the Court issued a decision partially adverse to EPA on May 1, 2015. *See Delaware Dep't of Natural Resources & Env't'l Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015) (“May 1, 2015 Decision”).

The May 1, 2015 Decision concluded that the 100-hour provision was arbitrary and capricious for several record-based reasons. *See id.* at 10-19. The Court left in place the remainder of the 2013 Final Rule, and indicated that EPA could “file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards.” *Id.* at 19 (quoting *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001)). EPA’s deadline for filing such a motion is July 15, 2015. *See* Docket Entry 1553910.

At issue in this related severed case is EPA’s final decision to revise the subcategory of “emergency engines” to include reciprocating internal combustion engines that operate for up to 50 hours to support reliability of the local transmission or distribution systems under certain circumstances different from those allowed under the 100-hour provision (“the 50-hour provision”). *See* 78 Fed. Reg. at 6679-80 (2013 Final Rule); 79 Fed. Reg. 48,072 (Aug. 15, 2014) (final action on reconsideration of the 50 hour provision); 40 C.F.R. §

63.6640(f)(4); Docket No. 13-1233, Docket Entries 1543305 (Delaware's Opening Brief) and 1543351 (Industry and Environmental Petitioners' Joint Opening Brief). Petitioners filed their opening briefs in this matter prior to the May 1, 2015 Decision. After the May 1, 2015 Decision, EPA requested and the Court granted a revised briefing schedule that requires EPA to file its brief on July 13, 2015, so as to allow EPA time to review the May 1, 2015 Decision and determine what implications it has for this matter. *See* Docket Entries 1551847, 1552511.

The 100-hour provision and the 50-hour provision were supported by different rationales and records. Nonetheless, some issues in this severed case are closely related to the issues raised in the original cases. Indeed, in their joint brief, Industry and Environmental Petitioners raise several record-based challenges in this case that are very similar to those raised in the original cases. *Compare* Docket Entry 1543351, 23-24, 25-31 (arguing that EPA failed to adequately respond to comments regarding the environmental and market consequences of the 50-hour provision and two alternatives proposed by commenters) *with Delaware*, 785 F.3d at 13-16; 16-18 (concluding that EPA failed to respond to comments regarding the market consequences of the 100-hour provision and an alternative proposed by a commenter). Thus, the May 1, 2015 Decision is highly instructive for this case and has caused EPA to reevaluate whether the record supporting the 50-hour provision is sufficient. Accordingly, EPA requests that the Court grant

EPA a voluntary remand of the 50-hour provision without vacatur so that EPA can reevaluate the 50-hour provision in light of the Court's May 1, 2015 Decision.

ARGUMENT

Agency decisions are not carved in stone. Instead, an agency must consider the “wisdom of its policy on a continuing basis,” for example, “in response to changed factual circumstances.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citations omitted). “[W]hen an agency action is reviewed by the courts the agency may take one of five positions,” one of which is “seek[ing] a remand to reconsider its decision because of intervening events outside of the agency’s control” *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1027-28 (Fed. Cir. 2001). Indeed, “[a]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts.” *B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). This Circuit “commonly grant[s]” motions for voluntary remand in order to preserve the courts’ and the parties’ resources. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993); see also *Anchor Line Ltd. v. Fed. Maritime Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“[W]hen an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the

agency”). While remand “may be refused if the agency’s request is frivolous or in bad faith . . . if the agency’s concern is substantial and legitimate, a remand is usually appropriate.” *SKF USA, Inc.*, 254 F.3d at 1029.

Here, circumstances have changed significantly since EPA issued its final decision on reconsideration of the 50-hour provision on August 15, 2014. Specifically, since that time, the Court held oral argument and decided the consolidated challenges to the 100-hour provision. In the decision, the Court concluded that EPA’s response to comments on certain issues—the 100-hour provision’s effects on the reliability and efficiency of energy markets, and an alternative proposed by a commenter for limiting the applicability of the provision to certain areas of the country not served by organized capacity markets—were inadequate. *See Delaware*, 785 F.3d at 13-16, 16-18. Additionally, the Court “encourage[d] EPA to solicit input from [the Federal Energy Regulatory Commission (“FERC”)],” given EPA’s stated aim of supporting system reliability through the 100-hour provision. *Id.* at 18.

EPA intended the 50-hour provision to address a different need than the 100-hour provision—that of local electric reliability and distribution rather than grid reliability at the bulk power system level. EPA therefore required different conditions in order for the provision to be triggered, and provided a different rationale to support the provision. *See* 78 Fed. Reg. at 6679-80; Exhibit A at 7-8,

EPA-HQ-OAR-2008-0708-1549 (“Response to Comments on Reconsideration”). However, the same Industry and Environmental Petitioners challenge the 50-hour provision for reasons very similar to those for which they challenged the 100-hour provision. *See, e.g.*, Docket Entry 1543351 at 23-24; 25-31. Namely, Industry and Environmental Petitioners argue that EPA did not sufficiently respond to comments regarding the 50-hour provision’s effects on the energy market. *See id.* at 23-24 (arguing that “applying the 50-Hour Exemption in densely populated areas served by regional transmission organizations . . . will perversely encourage the dispatch of polluting diesel engines at the expense of much cleaner alternatives” and that “[d]ue to these competitive dynamics, over time EPA’s rule is likely to result in a mix of generation resources that is more harmful to the environment than it would otherwise be”). Industry and Environmental Petitioners also specifically identify two alternatives proposed to EPA for limiting the provision to areas most in need of the provision, and contend that EPA did not sufficiently explain its rejection of those alternatives in favor of nationwide application of the provision. *See id.* at 25-31 (arguing that “commenters urged . . . that EPA apply the exemption only in the rural areas for which it purportedly is needed” but that “there is no evidence that EPA considered those suggestions or seriously grappled with the alternatives before simply declaring that a sub-national rule would be too hard to implement”).

The Court's holding in the May 1, 2015 Decision regarding EPA's obligation to respond to similar comments has caused EPA to reevaluate whether its consideration of and response to comments on the issues raised by Industry and Environmental Petitioners is sufficient. During remand of the 50-hour provision, EPA intends to further consider and respond as appropriate to comments regarding the 50-hour provision's effects on the reliability and efficiency of the energy market, and its assessment of the two alternatives identified by commenters. EPA also intends to seek input from interested parties and FERC regarding whether there exists a compromise alternative for application of the provision that would both support local reliability and address the concerns that commenters raised. Thus, although EPA does not admit error and may not ultimately reach a different conclusion than it did on initial reconsideration of the 50-hour provision, remand of the 50-hour provision will serve the interests of judicial economy by possibly mooting or significantly narrowing the issues that Petitioners have raised in this litigation. Additionally, remand will serve to improve the record to address the types of concerns raised by the Court in the May 1, 2015 Decision with respect to the 100-hour provision. To the extent that any interested party is not satisfied with any final action on remand, that party may obtain review of that agency action in this Court in accordance with CAA section 307(b), 42 U.S.C. § 7607(b).

Remand without vacatur is the most appropriate procedural mechanism that

will allow EPA to complete the remand process. In determining whether to remand without vacating the agency's decision, the court considers "the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (declining to vacate an inadequately supported rule because the agency could adequately explain its rationale on remand and vacatur would have disruptive consequences for the industry). Indeed, this Court has allowed rules to remain in place on remand even where they have been found to be arbitrary, capricious, or otherwise contrary to law. *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

Here, there has been no adjudication concluding that there are deficiencies with respect to the 50-hour provision. The record-based deficiencies the Court identified with respect to the 100-hour provision do not compel any conclusion that the separate 50-hour provision is contrary to law. Thus, vacatur is not warranted here. *See, e.g., NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (granting vacatur when a "wholesale revision on remand" was needed).

Furthermore, vacatur of the 50-hour provision pending remand would have considerable disruptive consequences for rural electric cooperatives, businesses, and others that rely on emergency engines during periods of exceptionally heavy

stress within a region or sub-region when electricity from regional power generators is not available. Indeed, during the reconsideration process, many parties commented that the 50-hour provision was critical to allow emergency engines to operate to support the reliability of the local transmission and distribution system and that the 100-hour provision did not adequately address local reliability issues. *See* Exhibit A at 2-4, Response to Comments on Reconsideration. Commenters stated that use of emergency engines in such circumstances is “often critical to the safe and reliable operation of local electric systems, which in turn support larger regional systems,” and that the 50-hour provision provides “flexibility for local system operators to quickly deal with emergency reliability issues to avoid sudden local power outages that may damage customer and utility-owned equipment, threatening critical infrastructure and public health.” Exhibit B at 6-7, EPA-HQ-OAR-2008-0708-1527 (Comment submitted by Julia M. Blankenship, Director, Energy Policy and Sustainability, American Municipal Power, Inc.). Commenters also explained that preventing failures at the local transmission and distribution level helps avoid cascading effects that could result in bulk power or region-wide disruptions or blackouts. *See* Exhibit C at 4, EPA-HQ-OAR-2008-0708-1501 at Attachment 4 (Email to Courtney Higgins from Melanie King, USEPA on January 4, 2013). In light of the

potential for serious adverse impacts on local system reliability, vacatur during remand is not appropriate here.

Finally, it is EPA's responsibility in the first instance to set a timetable with respect to reevaluation of the 50-hour provision. *See Int'l Union, United Mine Workers of Am. v. Dep't of Labor*, 554 F.3d 150, 155 (D.C. Cir. 2009) (declining to impose a schedule on remand); *North Carolina*, 550 F.3d at 1178. The Agency intends to conclude reconsideration within a reasonable period of time. The appropriate remedy, however, for any unreasonable agency delay in issuing a final decision is mandamus. *See North Carolina*, 550 F.3d at 1178; *NRDC v. EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007). Thus, while Petitioners may ask the Court to impose a deadline for EPA's action on remand, no such deadline is warranted.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court remand the 50-hour provision to the Agency for further consideration without vacatur and without setting a timetable for such consideration.

DATED: June 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of RESPONDENT'S MOTION FOR VOLUNTARY REMAND WITHOUT VACATUR via Notice of Docket Activity by the Court's CM/ECF system, on June 30, 2015, on counsel of record:

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Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

Subject: Response to Public Comments on Notice of Reconsideration of National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines and New Source Performance Standards for Stationary Internal Combustion Engines ("Response to Comments Document")

From: Melanie King, Energy Strategies Group

To: EPA Docket EPA-HQ-OAR-2008-0708

Date: June 16, 2014

On January 30, 2013, the U.S. Environmental Protection Agency finalized amendments to the national emission standards for hazardous air pollutants (NESHAP) for stationary reciprocating internal combustion engines (RICE) in 40 CFR part 63, subpart ZZZZ and the New Source Performance Standards (NSPS) for Stationary Internal Combustion Engines in 40 CFR part 60, subparts IIII and JJJJ (78 FR 6674). Subsequently, the EPA received three petitions for reconsideration of the final rule. On September 5, 2013, the EPA announced reconsideration of, and requested public comment on, three issues raised in the petitions for reconsideration. The three issues are as follows:

- Timing for compliance with the ultra low sulfur diesel (ULSD) fuel requirement for emergency compression ignition (CI) engines that operate or are contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in 40 CFR 63.6640(f)(2)(ii) [emergency demand response] and (iii) [deviations of voltage or frequency of 5 percent or more], or that operate for the purpose specified in 40 CFR 63.6640(f)(4)(ii) [local system reliability].
- Timing and required information for the reporting requirement for emergency engines that operate or are contractually obligated to be available for more than 15 hours per calendar year for the purposes specified in 40 CFR 63.6640(f)(2)(ii) and (iii), or that operate for the purpose specified in 40 CFR 63.6640(f)(4)(ii), and the timing and required information for the analogous reporting requirement in the NSPS.
- Conditions in 40 CFR 60.4211(f)(3)(i), 60.4243(d)(3)(i) and 63.6640(f)(4)(ii) for operation for up to 50 hours per calendar year in non-emergency situations as part of a financial arrangement with another entity.

The purpose of this document is to present a summary of the public comments on the September 5, 2013, notice of reconsideration and the EPA's responses to those comments. This summary of comments and responses discusses the basis for the EPA's decision not to propose any changes to the regulations at this time for these three issues. The EPA received 33 public comments on the notice of reconsideration. A listing of all organizations submitting comments, their affiliation and the Document ID for their comments is presented in Table 1. All comments can be obtained online from the Federal Docket Management System at <http://www.regulations.gov>. The docket number for this rulemaking is EPA-HQ-OAR-2008-0708. In this document, commenters are identified by the last four digits of the Document ID of their comments.

2.6 Comment: Commenter 1525 urged the EPA to wait until 2015 for the increased reporting requirements to take effect. According to the commenter, the notice forms required to be filed in 2013 presented major problems for many in Indian Country. The commenter stated that the calculators provided on the web site were inaccurate or inoperative until very near the end of the reporting period. The commenter believed it would be preferable for the EPA to postpone the enhanced requirements and spend the time to create a clear and well defined process with proper forms and reporting chains rather than rushing and having to repeat the process.

Response: The commenter appears to be referring to a different reporting requirement than the reporting that is the subject of the September 5, 2013, notice. As discussed in the response to comment 2.1, the EPA is not instituting the reporting for emergency engines used in financial arrangements until 2015.

3.0 Conditions for Operation for up to 50 Hours per Year in Non-Emergency Situations

3.1 Comment: Fourteen commenters (1514, 1515, 1517, 1518, 1519, 1522, 1526, 1527, 1532, 1533, 1535, 1540, 1542, 1543) supported the limited operations provided in the rule. Commenters believed these limited operations are essential and the flexibility provided in the Final Rule is necessary. Commenters stated that the regulation is clear as to the limited circumstances that an emergency engine may be dispatched for non-emergency purposes. Commenters urged the EPA not to put further constraints on the ability of local balancing authorities or local transmission and distribution operators to dispatch emergency engines to avert potential voltage collapse or line overloads. Furthermore, according to commenters, the regulations require compliance with North American Electric Reliability Corporation (NERC), regional, state, public utility commission or local standards or guidelines for dispatching an engine, and so utilities are not at liberty to devise and apply different criteria on a case-by-case basis. Commenters indicated that concerns about the enforceability are misplaced given the engine owner/operator must identify and record the dispatch and the specific standard and protocol being followed, all of which must be reported. Commenters stated that this documentation of the standard or guidelines will provide sufficient evidence of the need to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area.

Commenter 1514 noted that the local power authority has inherent incentive not to limit the dispatch of these engines to times when power demands are threatening system stability, given the cost of paying for their use. Commenter 1514 also stated that it is appropriate to allow the local system operator to make decisions regarding the use of emergency engines to prevent local power interruption, given the local system operator's expertise with localized power disruptions. The commenter noted that the Electric Reliability Council of Texas has detailed rules on when resources are dispatched.

Commenter 1540 stated that "making the conditions more prescriptive and more restrictive," as requested by the petitioners, "unnecessarily reduces needed operational flexibility and substitutes regulatory language for the expertise of system operators in unique case-by-case situations." The commenter "urges the EPA not to make this portion of the rule more specific and restrictive."

Commenters 1515 and 1519 stated "the local control authority's day-to-day management of the localized load reductions caused by the loss of a line or substation due to bad weather, cars hitting poles, and other actions that take one or multiple facilities out of service is crucial to providing reliable service

in the more rural areas. These types of voltage issues are localized in nature and do not create cascading effects to the bulk electric system. In reality, it is the day-to-day actions of the local control authority to maintain local reliability that is at the heart of avoiding the FRCC [Florida Reliability Coordinating Council] from declaring emergency alert levels.” They also added that “sudden events, such as the loss of a baseload generating unit, may not rise to a Level 2 emergency alert being declared, but standby diesel generation may still be needed temporarily to maintain reliability. The occasional, temporary use of standby generation capacity is a key reliability tool that should not be restricted unnecessarily.”

Commenter 1518 stated that in many instances “reliability issues occur at a sub-regional level and the reliability planning activities and execution would not be detectable at the transmission levels of the bulk electric system level.” Commenter 1518 noted that this is a particular challenge for those who serve rural communities: “These rural systems have fewer backup options and often, only a single distribution line available to some of their customers. With distances stretching for as many as 50 or more miles from the nearest substation, emergency action to support the local grid often affords limited choices, one of which includes the use of RICE generators. In these situations, the RICE units can help mitigate a local emergency by supporting the grid’s reliability.”

Commenter 1527 stated that emergency engines “are often outside the direct control of an RTO [Regional Transmission Organization] (or equivalent balancing authority) and the North American Electric Reliability Corp.,” but “they are often critical to the safe and reliable operation of *local* electric systems, which in turn support larger regional systems.” Commenter 1527 also stated that a “broadly defined use category will maintain the flexibility for local system operators to quickly deal with emergency reliability issues to avoid sudden local power outages that may damage customer and utility-owned equipment, threatening critical infrastructure and public health. At the same time, limiting the use of this category to area sources, limiting its use to no more than 50 hours per year, and requiring the dispatch decision to follow reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines all serve to limit the possible misuse of this category.”

Commenter 1542 noted that RTOs, or transmission providers in areas without RTOs, monitor their systems continuously, but they do not necessarily track small, localized concerns, and it is at those levels that state and local regulatory agencies and load serving utilities have always played crucial roles in both setting standards and maintaining reliable supply to customers. The commenter stated that the EPA has created a set of requirements that appropriately recognizes that those responsibilities are often divided up in different ways depending on the location and configuration of individual systems. According to the commenter, the transmission grid is not the same everywhere, nor do operators maintain the same visibility into every level of operations. There are important differences between the way the grid is monitored in a rural, highly dispersed system such as the electric and transmission system in Kansas and the more redundant grids of New Jersey or Delaware. The commenter noted that its members would face blackouts if the rule lacked contingencies under which RICE could be operated to address voltage drops that occur infrequently but with some degree of regularity (e.g., once every year or two, during severe weather events), where it is not feasible (or even environmentally preferable) to address those voltage drops either through transmission expansion or redundancy, or through new full-scale power plants. The commenter stated that the condition that “NERC, regional, state public utility commission or local standards or guidelines” must underlie the decision to dispatch the units ensures that reliability standards imposed by all levels of the transmission and distribution system can be implemented to avoid blackouts and other impingements on service. According to the commenter, while appropriately broad in scope, this condition cannot be interpreted to be vague or poorly targeted – it permits the operation of the units only for reliability purposes pursuant to established reliability guidelines. The commenter indicated that the rule as currently written reasonably gives space only within the scope of reliability practices that

follow “specific...standards or guidelines” as implemented by a “local balancing authority or local transmission and distribution system operator.” The commenter stated that the petitioners’ concerns are not warranted and contain no on-the-ground facts contrary to those presented in these comments. According to the commenter, the EPA should also reject the suggestion from petitioners that this provision should include a self-limiting termination date because the petitioners have presented no evidence that the provisions would result in uncontrolled or excessive dispatch of RICE units, particularly where the units are expensive to run and unlikely to be dispatched unless they are the only option. The commenter stated that the EPA has, however, directed that such dispatches be recorded and reported, which should be sufficient to allow the EPA to identify any issues with dispatch of RICE units under these rules, should any arise that would warrant further action by the Agency.

Six commenters (1513, 1520, 1521, 1523, 1534, 1538) indicated that the provision for emergency engines to operate for up to 50 hours per year for the non-emergency situation specified in 40 CFR 60.4211(f)(3)(i), 60.4243(d)(3)(i) and 63.6640(f)(4)(ii) should be removed. Commenters stated that engines participating in demand response programs or other financial arrangements should be required to meet strict emission limits equivalent to the NSPS non-emergency engine requirements. Commenter 1534 recommended the definition of emergency include only “true emergencies” and be defined as “Emergency” means (1) an electric power outage due to: a failure of the electrical grid; on-site disaster; local equipment failure; or public service emergencies such as flood, fire, natural disaster or severe weather conditions (e.g., hurricane, tornado, blizzard etc.); or (2) when there is a deviation of voltage or frequency from the electric public utility to the premises of three percent or greater above, or five percent or greater below, standard voltage or frequency with no other RTO allowances. According to the commenter, the capacity value of these engines should not be allowed to be used to meet planning reliability requirements. The commenter indicated that limiting the use of uncontrolled engines, especially older dirty diesel engines, will limit the amount of harmful pollutants emitted and reduce public exposure to prevent adverse health impacts.

Commenter 1516 stated that engines operating for-profit should not receive any exemption from environmental standards imposed upon other stationary generators who are subjected to strict requirements to operate. According to the commenter, there is nothing unique or special about these units that necessitates preferential treatment for the control of the emissions that will result, and the EPA need not accept the false assumption that without these engines, the reliability of the bulk power system would be jeopardized. Commenter 1521 expressed similar comments. Commenter 1516 stated that the EPA should not grant a pollution exemption without sufficient, credible and verifiable data on the impact that the pollution exemption will have on the environment and human health.

Commenter 1537 stated that uncontrolled RICE should not be used for demand response unless there is a bona fide emergency, and the EPA should include specific guidance about the situations that constitute an emergency. The commenter also asked that the EPA recognize that some agencies may have existing requirements that forbid the use of emergency generators in non-emergency situations (other than routine testing for operational capability) and ensure that the RICE regulations not preclude these more stringent programs.

Commenter 1529 urged the EPA to sunset the 50-hour provision by January 1, 2015, which would allow local system operators adequate lead time to make any changes necessary to ensure future reliability. Commenter 1529 also requested that the EPA narrow the circumstances under which engines can operate for local transmission and distribution issues to address concerns regarding the enforceability of the rule. The commenter recommended that the EPA amend 40 CFR 60.4211(f)(3)(i)(B),

60.4243(d)(3)(i)(B) and 63.6640(f)(4)(ii)(B) to replace the word “intended” with “necessary” and remove the word “potential.” Commenter 1548 disagreed that the language should be modified as commenter 1529 suggested. According to commenter 1548, the word “necessary” in condition (B) would be superfluous because condition (C) already requires that any dispatch must be pursuant to established reliability protocols and standards. Commenter 1548 opposed the removal of the word “potential” because it is unclear what value such a change would add; according to the commenter, local reliability use of RICE is generally triggered automatically when the line and equipment readings reach levels of engineering concern, making “potential” a relatively meaningless addition to the language.

Commenter 1529 also requested that the EPA amend 40 CFR 60.4211(f)(3)(i)(A), 60.4243(d)(3)(i)(A) and 63.6640(f)(4)(ii)(A) to clearly define that the provision applies only to RICE in areas with the particular transmission and distribution constraints for which this provision was designed. One approach suggested by the commenter is to limit the allowance to “area source emergency RICE in areas served by only one transmission line and with no alternative means to transmit power into the local distribution system.” Commenter 1548 disagreed that an eligibility test based on system configuration would be universally workable because all systems are not built the same.

Commenter 1545 indicated that it believed the current criteria are too indistinct and could allow uncontrolled RICE to operate in many situations where electric reliability is not truly threatened. The commenter said that the final rule states that the exempt dispatch must follow “reliability... protocols,” but does not place any parameters on what rules would satisfy this element of the exemption. Additionally, the uncontrolled RICE must provide power to the facility where it is located or “to support the local transmission and distribution system;” the commenter believed it is unclear what “support” means with respect to this criterion. The commenter argued that earning money for the local transmission system operator through participation in energy or capacity markets could constitute such “support.” The commenter also stated that the final rule also fails to provide any guidance for how either the local transmission and distribution system operator or the EPA can determine whether any particular dispatch of RICE is “intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.” According to the commenter, by introducing intent into the determination of whether the provision in 40 CFR 63.6640(f)(4)(ii) applies and using such an attenuated formulation of the conditions that such dispatch is intended to mitigate—local transmission or distribution constraints that might result in voltage collapse or line overloads, which could, in turn, result in interruption of power in a localized area—this exemption could very easily swallow the rule and allow the operation of uncontrolled RICE in circumstances where the alleged threat to the electricity system is indiscernible. The commenter stated that potential reliability problems for a subset of rural distribution systems does not justify an exemption for all emergency RICE regardless of where they are located, and suggested that the following additional criteria based on low customer density should be added: “The local balancing authority or local transmission and distribution system operator dispatching the engine has fewer than 14 customers per mile of electric distribution line, averaged over the respective local balancing authority’s balancing area or local transmission and distribution system operator’s service territory.” Commenter 1523 expressed similar concerns that engine owners could misinterpret the EPA’s language and engines could be “dispatched” without their operation meeting the intent of the EPA’s allowance. The commenter provided a hypothetical scenario where an electric cooperative would attempt to use the 50 hours to operate engines in a peak shaving program for financial gain. Commenter 1548 disagreed with the recommendation to add an eligibility test based on population density. The commenter stated that in the rural areas across Kansas and other states, one often finds that populations cluster in small groups remote from other populations; these population clusters are like islands that may be quite small in size

and far from the next island, but there is no guarantee that the density of these population clusters does not exceed the density cutoff that commenter 1545 would like to impose.

Commenter 1536 stated that the EPA should consult with RTOs regarding the appropriate base level amount of hours necessary to accommodate real emergency demand response needs. Commenter 1541 stated that the operation should be restricted to "localized situations" that mirror the definition of an Energy Emergency Alert (EEA) Level 2, and recommended that the EPA consult with RTOs to coordinate efforts on the definition and understanding the necessary criteria for the increased hours of non-emergency situations.

Response: Public commenters on the June 7, 2012, proposed amendments to the RICE NESHAP indicated that the proposed provision for operation of engines for emergency demand response did not address situations where the local balancing authority or transmission operator has determined that there are conditions that could lead to a blackout for the local system, and used emergency engines to prevent local system failures. The commenters indicated that many of these systems do not operate under the governance of RTOs or independent system operators (ISOs); RTO and ISO alerts are triggered based on regional problems with the grid and do not usually cover smaller transmission and distribution lines. The EPA agreed with the commenters that it would be appropriate to include additional situations where the local transmission and distribution system operator has determined that there are conditions that could lead to a blackout for the local area. The conditions under which an engine could operate needed to encompass the varying emergency operating procedures for local systems all over the U.S., and the EPA could not identify a specific criterion for local systems like an EEA Level 2 that would be applicable nationwide for local transmission and distribution system operators. Through consultation with the local transmission and distribution system operators, the EPA developed criteria for the conditions under which the engines could be used for up to 50 hours per year in local grid emergency situations. The EPA specified in the January 30, 2013, final rule that existing emergency stationary RICE at area sources could be used for up to 50 hours per year if the following conditions are met: (1) the engine is dispatched by the local balancing authority or local transmission and distribution system operator; (2) the dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region; (3) the dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines; (4) the power is provided only to the facility itself or to support the local transmission and distribution system; and (5) the owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine.

The EPA has determined that the provision in the current rule for operation up to 50 hours per year to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region should be retained. The majority of public commenters on the September 5, 2013, notice of reconsideration said that a provision for limited operation of emergency engines when there are conditions that could lead to a blackout for the local area is appropriate. The EPA agrees with these commenters. The EPA does not agree with the commenters who indicated that the provision should be removed, or sunset by January 1, 2015. Dating back to the original RICE NESHAP in 2004, the EPA has a long history of regulating emergency engines as a separate subcategory in the NESHAP and NSPS for stationary engines, and establishing different standards for emergency engines. The EPA has done so based on significant considerations, including, for area sources of HAP, the high cost of add-on controls, given the amount

of time emergency engines operate, concerns that emergency engines may not operate long enough for a catalyst to reach the temperature needed to reduce emissions, the impracticability of operating the engine to test emissions when the engines operate so infrequently and at unpredictable times, the need for these engines to be operated with little time for startup and the possibility that add-on controls could inhibit the ability of emergency engines to accomplish their time-critical functions. The commenters who indicated that the provision for limited operation for engines at area sources of HAP should be removed, or that requested the provision be sunset by January 1, 2015, did not present any information to show that the considerations would not apply to emergency engines used in very limited circumstances when the local transmission and distribution system operator has determined that there are conditions that could lead to a blackout for the local area. The broader issues raised by some commenters regarding operation of emergency engines in general outside of blackout conditions were discussed fully in the context of the rulemaking and are beyond the limited issue raised in the Federal Register regarding the EPA's allowance of 50 hours of annual operation for those limited circumstances, and the conditions the EPA required for such operations.

Regarding the comments that engines operating for-profit should be treated as non-emergency engines, the EPA evaluated the cost effectiveness of add-on controls for emergency engines that are used a very limited number of hours per year for emergency situations and required maintenance and testing. Because these engines are typically used only a few hours per year, the costs of add-on emission control are not warranted when compared to the emission reductions that would be achieved. The few hours per year historically required for local reliability situations does not change this analysis, which indicates very high costs per ton of emissions reduced. The EPA does not agree that the revenue generated from the operation of the source should be subtracted from the cost of add-on controls and other compliance requirements when evaluating the cost-effectiveness of the control. The payments that units get for being available for local reliability situations for a limited number of hours per year are separate from the question of the cost of the controls per ton of pollutant reduced. The EPA does not subtract the money an owner or operator may make from the use of a source, either directly or indirectly, from its calculation of costs per ton of pollution reduced, as both the regulated and unregulated scenarios presume that the source does operate and earns the funds resulting from such operation. (Obviously, no pollution source would ever operate were there not some benefit to such operation for the owner or operator.) Inclusion of such funds in this calculation, aside from introducing an element that is not directly relevant to the question of cost-effectiveness of the emission control, would subject these owners and operators to cost effectiveness tests never required for other sources, including those sources that are competitors with these sources. The commenters did not provide information to show that add-on controls are generally available and widely used for stationary emergency engines, or that they would be effective given the limited operation of the engines.

Regarding comments noting that some state or local areas have more stringent requirements for use of emergency engines, the EPA's stationary source regulations do not act to preempt more stringent state or local measures (see Clean Air Act section 116, 42 USC 7416). States that believe it is appropriate to regulate the use of stationary emergency engines more stringently than the EPA are free to do so. The EPA's regulations under section 111 and 112 apply nationally, so it is appropriate that areas with more serious pollution concerns regulate in a more stringent manner than what may be appropriate nationally.

Some commenters were concerned that the current criteria are too indistinct, and that owners/operators would use the provision to operate engines in situations where electric reliability is not actually threatened. However, the provision is specifically limited to situations where the dispatch is intended to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region. In addition, as

other commenters noted, the rule clearly indicates that the dispatch must follow reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines. Thus, the current regulations already require that the operation must be pursuant to established standards or guidelines, and the owner/operator must document the entity that dispatched the engine and the specific standard or guideline that was followed. See 40 CFR 63.6640(f)(4)(ii)(C) [“The dispatch follows reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines”] and 63.6640(f)(4)(ii)(E) [“The owner or operator identifies and records the entity that dispatches the engine and the specific NERC, regional, state, public utility commission or local standards or guidelines that are being followed for dispatching the engine.”]. The EPA and the state or local air pollution control agencies that are implementing and enforcing the rule will be able to verify whether or not the engines operated in situations where reliability was threatened. For example, a commenter indicated that the Electric Reliability Council of Texas (ERCOT), the sole balancing authority and transmission operator for Texas, specifically defines “dispatch” and has detailed rules on when and how a resource is dispatched. The implementing and enforcing authority for a unit dispatched in Texas could use the facility’s records to verify whether the dispatch followed the ERCOT standards. In addition, the reporting requirements of the final rule allow the EPA to receive information regarding the use of these engines for local reliability; the EPA can monitor whether the circumstances for use of this provision need to be further clarified in the future.

The EPA does not agree with the commenters that the provision could be used to operate in situations where reliability is not threatened. Commenter 1523 provided an example of an electric cooperative that would seek to use the 50 hours for a peak shaving program that is designed to reduce costs and electric rates, which would clearly not meet the criteria of mitigating local limitations to avert voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region. The EPA agrees with commenter 1548 that the wording changes suggested by commenter 1529 are not necessary for the reasons stated by commenter 1548. While some commenters suggested possible wording changes, the EPA believes that it is important to ensure that dispatch be available to avoid potential voltage collapse or line overloads and does not believe it is appropriate for the language to be too restrictive for effective dispatch. The EPA believes that the existing language already indicates that this provision should only be used where electric reliability is threatened and where the local balancing authority or system operator believes dispatch of RICE to be the most reasonable alternative. As a result of the reporting requirements in the final regulations, the EPA will receive information regarding the use of these engines for local reliability and can monitor whether the circumstances for use of this provision need to be clarified in the future.

Some commenters suggested that the operation should be limited to areas with particular transmission or distribution constraints or low population density. The commenters who suggested a limitation to these areas did not provide any information to show that the considerations that justified the subcategory for emergency engines were limited to engines in areas with transmission or distribution constraints or a low population density. The EPA believes that there may be no reasonable way to distinguish the particular areas that may be in the greatest need for this provision from those that have greater redundancy in their connections. In any case, while this provision is generally intended for less well-served areas, it was not solely intended to be used only in those areas. Consequently, the EPA determined that it would not be appropriate to define the subcategory based on population density.

3.2 Comment: Five commenters (1517, 1518, 1528, 1530, 1532) recommended that the condition in 40 CFR 60.4211(f)(3)(i)(B), 60.4243(d)(3)(i)(B) and 63.6640(f)(4)(ii)(B) be expanded to include NERC

EEA Level 1 language without referring to EEA Level 1 to cover sources that do not operate under NERC standards. The commenter recommended the inclusion of additional text to condition (B) as follows:

(B) (i) The dispatch is intended to mitigate local transmission and/or distribution limitations to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region or (ii) *the Balancing Authority, Reserve Sharing Group, or Load Serving Entity foresees or is experiencing conditions where all available resources are committed to meet firm load, firm transactions, and reserve commitments, and is concerned about sustaining its required Operating Reserves, and non-firm wholesale energy sales (other than those that are recallable to meet reserve requirements) have been curtailed.*

According to the commenters, the additional conditions would ensure that the commenter's members maintain their ability to run their RICE for distribution voltage support and when their third party transmission provider cannot provide an adequate voltage level.

Response: The EPA does not agree that EEA Level 1 is the appropriate trigger for operation of these engines for grid emergencies at the local system level. The intent of the rule is that the engines should be operated for grid emergencies when a blackout is imminent, and the commenters did not provide information to show that an EEA Level 1 alert corresponded with an imminent blackout or that the current regulations are not adequate to meet the limited intent of the provision.

3.3 Comment: Two commenters (1512, 1546) said that the EPA should not place any restrictions on the operation for up to 50 hours per year in non-emergency situations as part of a financial arrangement. According to the commenters, emergency units are normally only called on for a very limited number of non-emergency hours each year for enhancing system reliability. The commenters stated that the narrowly defined "non-emergency" circumstances in 63.6640(f)(4)(ii) equate to a near collapse of the electrical system, which is not consistent with a "non-emergency." The commenters said that these circumstances do not necessarily account for situations where the local balancing authority or transmission operator for the local electric system has determined that electric reliability is in jeopardy or, where the local distribution system operator (such as a municipal light department) has determined that there are conditions that could lead to a blackout for the local area. According to the commenters, since every possible scenario cannot be foreseen or listed, and since each regional independent system operator may have slightly different dispatch rules and definitions, it is not reasonable to attempt to narrowly define the 50 hours under which these engines can operate.

Commenter 1512 believed that, as written, the rule does not allow for the operation of an emergency engine to self-supply power to a facility that has a switchyard temporarily out of service for maintenance. For example, the Stony Brook Energy Center receives its power through a 345 kV line from a substation owned by the local utility. When switchyard maintenance for NERC and FERC requirements is conducted on either the local utility switchyard or the Stony Brook switchyard, normal power is not available. According to the commenter, because this is not an "emergency" under the rule, Stony Brook cannot use its relatively clean and efficient Tier 2 emergency engines, but must bring in temporary, portable diesels which may have higher emission rates. The commenter indicated that this does not make any sense from an environmental or economic viewpoint.

Response: The EPA does not agree with the commenters that emergency engines should operate for 50 hours per year in financial arrangements for any purpose. The commenters did not provide detailed

information about what the additional uses of the engines would be for those hours and whether they would appropriately be considered emergency use of the engine. The EPA has carefully circumscribed the uses of emergency engines such that their use is related to emergency situations or to the required testing and maintenance of the engines, and, where financial arrangements are involved, operation in situations where grid reliability is in danger, and we also circumscribed the amount of time that the engines could be used for those purposes. If an operator wishes their engines to be generally available for non-emergency purposes, they can do so as long as they meet the requirements for non-emergency engines. Regarding the comment that the Stony Brook facility would be forced to bring in portable engines, the EPA notes that the facility could specify that portable engines brought on-site are Tier 2 or better.

3.4 Comment: Commenter 1518 recommended that the EPA add language in 40 CFR 63.6640(f)(4)(ii), 40 CFR 60.4211(f)(3)(i), and 40 CFR 60.4243(d)(3)(i) to state that 50 hours currently allocated for “non-emergency situations” are allocated for either “non-emergency situations”, or “emergency situations” to address local grid reliability.

Response: The commenter did not provide a justification as to why the current wording is inappropriate, and furthermore, the change recommended by the commenter would potentially introduce confusion between the situation described in 40 CFR 63.6640(f)(4)(ii) versus the situation described in 40 CFR 63.6640(f)(1), and the corresponding provisions in the NSPS.

3.5 Comment: Two commenters (1517, 1532) believed that the EPA cannot set limitations on financial arrangements for existing RICE units. The commenters do not believe the Clean Air Act provides any authority to the EPA to alter or govern business contracts.

Response: The EPA is not setting limitations on financial arrangements for engines. Rather, the EPA is distinguishing among classes and types of engines when establishing NESHAP and NSPS, as allowed under sections 111 and 112 of the Clean Air Act. The EPA is defining the subcategory of emergency engines. The NESHAP and NSPS for stationary engines do not set limitations on financial arrangements; they merely specify the applicable emission standards for engines.

3.6 Comment: Commenter 1543 requested that the EPA clarify that emergency generators owned by utilities can be used consistent with the requirements of 40 CFR 60.4211(f)(3) and 63.6640(f)(3) to avert voltage collapse and line overload.

Response: On January 9, 2014, the EPA issued a letter responding to a request for clarification of this issue from this commenter. In the letter, the EPA indicated that the language in subpart ZZZZ regarding emergency engines dispatched under a financial arrangement with another entity was not intended to prohibit utilities from dispatching engines that they own and operate for the 50-hour non-emergency operation provision. That response letter provides the further clarification requested.

3.7 Comment: Commenter 1544 recommended that use of emergency generators for peak shaving be prohibited, unless the generator is fully permitted and equipped with BACT-level controls for HAP, PM and NOx.

Response: As extensively discussed in the summary of public comments and responses for the June 7, 2012, amendments to the RICE NESHAP, which can be found in the rulemaking docket at document

number EPA-HQ-OAR-2008-0708-1491, the EPA determined that engines used for peak shaving are classified as non-emergency engines, and must meet the emission standards for non-emergency engines.

3.8 Comment: One commenter (1539) said that more needs to be done to include other technologically available means to prevent electrical power interruptions to critical areas of our nation's infrastructure that have direct impacts on the public's immediate health and safety, or that of the environment. The commenter said that areas such as air traffic control, emergency communication centers, hospitals, water treatment and public water supply systems and wastewater treatment and disposal facilities should take preemptive early actions based on the advanced early warnings available for severe weather events that often occur just prior to any voltage and frequency variations. According to the commenter, in areas of the nation subjected to severe weather and lightning storms, unless some revisions are allowed for these critical areas to use the best technologically available information in taking preemptive actions to ensure the public's immediate health and welfare, and environment, the 100 hour per year operational threshold currently allowed in the rule should be raised to 150 or 200 hours to account for any local preemptive actions that need to be taken.

Response: The comment that more should be done to prevent electrical power interruptions to critical infrastructure is outside the scope of this reconsideration. The commenter did not provide any information to justify raising the threshold from 100 hours. The rationale for setting the threshold at 100 hours was extensively discussed in the summary of public comments and responses for the June 7, 2012, amendments to the RICE NESHAP, which can be found in the rulemaking docket at document number EPA-HQ-OAR-2008-0708-1491.

4.0 Other

4.1 Comment: Commenter 1525 urged the EPA to clarify that there is no limit on use of emergency generators in emergency situations.

Response: The regulations already specify that there is no time limit on the use of emergency stationary RICE in emergency situations. See 40 CFR 60.4211(f)(1), 60.4243(d)(1) and 63.6640(f)(1).

4.2 Comment: Commenter 1525 urged the EPA to allow the use of emergency generators for up to 100 hours per year for any combination of maintenance and load sharing operations. Commenter 1526 stated that the hours provided for non-emergency situations as part of a financial arrangement should be not be capped at 50 and should be not be curtailed below the 100 hours allowed for non-emergency situations.

Response: This comment is outside the scope of this reconsideration. The EPA already addressed similar comments in the summary of public comments and responses for the June 7, 2012, amendments to the RICE NESHAP. The summary of public comments and the EPA's responses can be found in the rulemaking docket at document number EPA-HQ-OAR-2008-0708-1491.

Exhibit B



November 4, 2013

Via Electronic Filing: a-and-r-docket@epa.gov

Attn: Docket ID No. **EPA-HQ-OAR-2008-0708**

Copy to: king.melanie@epa.gov

Air and Radiation Docket and Information Center

Environmental Protection Agency

Mail Code: 2822T

1200 Pennsylvania Avenue, NW

Washington, DC 20460

**RE: Notice of Reconsideration of Final Rule; Request for Public Comment
(*Federal Register* / Vol. 78, No. 172, September 5, 2013, pp. 54606-
54612):
National Emission Standards for Hazardous Air Pollutants for
Reciprocating Internal Combustion Engines; New Source Performance
Standards for Stationary Internal Combustion Engines
(Docket: EPA-HQ-OAR-2008-0708)**

Dear Sir or Madam:

On behalf of the organization and its membership, American Municipal Power, Inc. (collectively AMP) respectfully submits these comments in response to EPA's notice of reconsideration of the final rule establishing National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (RICE NESHAP) and New Source Performance Standards for Stationary Internal Combustion Engines (Docket: EPA-HQ-OAR-2008-0708) and request for public comment, as published in the *Federal Register* on September 5, 2013 (*Federal Register* / Vol. 78, No. 172, pp. 54606-54612).

AMP has participated in this docket previously, including the public meeting held in January 2011 at EPA's Research Triangle Park facilities and filing written comments

in February 2011, February 2012, and August 2012. AMP also endorses the comments on the reconsideration as offered by the American Public Power Association (APPA).

Background on American Municipal Power, Inc. (AMP)

AMP is a not-for-profit corporation founded in 1971 and headquartered in Columbus, Ohio. AMP's principal mission and purpose is to provide cost-effective, reliable power supply to 129 members in seven states, including 128 member communities in six states (Kentucky, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia), plus the Delaware Municipal Electric Corporation, Inc., which is a joint action agency representing nine municipal electric systems in the state of Delaware. AMP's member municipal electric systems are owned by their customers, and the vast majority of AMP's members are communities with fewer than 5000 customers.

AMP and its member communities maintain a diversified portfolio of power generation assets and are regional leaders in the deployment of renewable generation. For example, AMP built and currently operates the 42 megawatt (MW) Belleville Hydroelectric Plant on the Ohio River as well as Ohio's first utility-scale wind farm. In 2012, AMP added over 3 MW of ground-mounted solar to our power supply portfolio. In addition, AMP currently has under construction four run-of-the-river hydroelectric projects along the Ohio River totaling approximately 300 MW (one additional project representing 48 MW is in the licensing stage of development). AMP is also using power purchase agreements (PPAs) to include wind and landfill gas in our renewable power supply portfolio.

In addition to being a regional leader in renewable power development, AMP also has a history of operating fossil-fueled base load electric generating units (EGUs) in Ohio, and several AMP members operate municipally owned coal-fired power plants. AMP and many of its members also own or operate distributed generation units and other facilities that utilize reciprocating internal combustion engines (RICE units), which are now subject to the NESHAP rules and are therefore most pertinent to this docket. The addition of distributed generation units at strategic locations across AMP's geographic footprint has helped provide needed back-up power to both fossil and renewable generation units, particularly during weather or other emergency situations, including times when the local distribution system has experienced constraints.

Most of AMP's municipal members qualify as small governments and/or small utilities for the purposes of the Small Business Administration protections under the Regulatory Flexibility Act (RFA).

Relation to Electric Transmission and Distribution System

The Federal Energy Regulatory Commission (FERC) has jurisdiction over the wholesale power and transmission sales by public utilities engaging in inter-state transactions. In the mid-1990s, FERC created the Open Access Transmission Tariff (OATT). The OATT contains rules for transmission service requests, purchasing transmission service, and scheduling electric power. Public utilities were required to file OATTs for FERC review and acceptance.

In the late 1990, FERC expanded the OATT concept to include the creation of centralized electric system operators called regional transmission organizations (RTOs), primarily in the Northeastern and Midwestern U.S. Public utilities that own transmission facilities were encouraged to transfer control of their facilities to the RTOs. Over time the RTOs expanded the markets they operate to include energy, capacity, and ancillary service such as voltage support and reserves.

As noted above, AMP's members are located in Delaware, Kentucky, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia. AMP's members typically operate highly localized systems that are used to distribute electricity to end use consumers within their municipal borders. AMP's members do not own and operate transmission facilities that are used for regional transfers of bulk electric power. As such, AMP's members are "transmission dependent utilities;" in other words, AMP's members depend on the transmission facilities owned and operated by other utilities in order to transmit power from generation resources to their distribution systems.

Because of the municipals' dependence on other utilities for transmission, AMP's members must participate in the RTO markets (e.g., the vast majority of AMP's members are in the PJM Interconnection [PJM] RTO, while a few are in the Midcontinent Independent System Operator [MISO] RTO). AMP's comments on the RICE rules should be taken in the context of the requirement that AMP and its members must work within and comply with the rules of these RTO markets.

Overview of Comments

As the reconsideration of the final RICE NESHAP rule is open for only three distinct issues, AMP will limit our comments to those issues. AMP concurs with EPA's interpretation of the final rule as it relates to the timing for compliance with the ultra-low sulfur diesel fuel requirements and the timing and required information

for the annual reporting requirement for emergency engines. In addition, AMP also wishes to reinforce EPA's position in the final rule relative to the criteria for operation of up to 50 hours annually for non-emergency situations. AMP's position on these three issues is further explained in the following sections.

Specific Comments

1. Timing for Compliance with the Ultra-Low Sulfur Diesel (ULSD) Fuel Requirement for Emergency Compression Ignition (CI) Engines

AMP supports EPA's position that the ULSD fuel requirement should commence in January 2015 to give sources appropriate time to meet the final rule's requirements and make any needed physical adjustments to engines. Replacing low sulfur diesel fuel with ULSD fuel is not a simple product substitution. One of the differences between low sulfur diesel fuel and ULSD is lubricity. Failure to lubricate internal parts in the manner originally designed for existing engines can result in significant increases in operations and maintenance costs, perhaps even reduced service life of the machine. Lubricity deficiencies can probably be remedied or at least ameliorated with fuel additives and accelerated preventative maintenance. Owner/operators of existing CI engines need the time proposed by EPA in the final rule (January 2015 versus May 2013, as proposed by the petitioners) to consult with vendors and internal staff to develop operation and maintenance strategies designed to counteract possible negative impacts to the engines from the required fuel switch.

Some communities that generate electric power with combustion turbines may store a large amount of diesel fuel for use when natural gas supplies are curtailed. In many cases, natural gas curtailment is a relatively rare event, resulting in long periods of time, perhaps years, before the existing fuel inventory is exhausted. Emergency and black start CI engines are often co-located with combustion turbines and supplied from the same bulk storage tanks. To avoid unnecessary disruptions and significant costs with replacing existing fuel stockpiles, EPA should maintain the provision that existing diesel fuel purchased (or otherwise obtained) prior to 01 January 2015 may be used until depleted.

2. Timing and Required Information for the Reporting Requirement for Emergency Engines

AMP urges EPA to reject the petitioners' arguments that the reporting requirement begin with the 2013 calendar year, with the first report due early in 2014. Indeed, this request by the petitioners is ridiculous, particularly given that it is already November 2013 and EPA is still "reconsidering" the final rule. AMP also urges EPA

to reject the petitioners' request that the amount and type of diesel fuel used in the engines be included in the report – this request is unnecessary if the ULSD fuel requirement is being met and thus also places an unreasonable measurement and reporting burden on regulated entities.

Owner/operators of emergency engines have invested, and continue to invest, a significant effort over the prior months of 2013 to develop procedures and recordkeeping methods designed to maintain and document compliance with the RICE NESHAP operating limitations. Preparing this information for electronic submission to EPA will require another substantial effort.

Requiring EPA to develop and implement the compliance reporting tool in a few months does not allow EPA sufficient time to properly test and de-bug the tool. Forcing implementation of an inferior product will further complicate what is already a complex rule and lead to frustration and confusion on the part of regulated entities. Moreover, it is not clear that submission of this information to EPA improves compliance over the short run. If EPA suspects non-compliance, hard copy data is available upon request.

3. Criteria for Operation for up to 50 Hours per Year for Non-Emergency Situations

AMP urges EPA to reject the petitioners' requests for additional (yet unspecified) restrictions on units operating for up to 50 hours annually for non-emergency situations. The petitioners' vague claims that the final rule's requirements were indistinct and difficult to enforce – without providing suggestions for improvement – provide sufficient reason to EPA to reject them.

Through this rulemaking process, AMP and other commenters have outlined the importance of local authorities being able to use their knowledge of their own systems and needs when faced with emergency decisions. The use of many RICE units by smaller electric systems, including those owned and operated by many AMP members, generally occurs “behind the meter” at distribution voltages. These units, including units that are not participating in a RTO's emergency demand response (EDR) program, are often outside the direct control of an RTO (or equivalent balancing authority) and the North American Electric Reliability Corp. (NERC). That is not to say that the operation of these RICE units is purely incidental to regional transmission systems; on the contrary, they are often critical to the safe and reliable operation of *local* electric systems, which in turn support larger regional systems. For example, the utilization of RICE units in a community to correct a *local* electric

system voltage or frequency drop could prevent that local situation from spreading to other interconnected communities.

AMP understands EPA's concern that RICE units as a whole should not be completely free to operate without modifications whenever a local authority decides its own "emergency" situation applies. However, the highly variable and relatively infrequent nature of the operation of most of these units at the local level does not lend itself to a blanket solution. While an RTO-level decision-making threshold (i.e., Energy Emergency Alert [EEA] Level 2) may be appropriate for units under RTO control, many small, behind-the-meter units that serve important emergency functions and are otherwise used to support the reliability of local systems will be outside the view or control of an RTO.

Many municipal electric utilities are located in areas that may have difficulty importing power due to regional transmission constraints during periods of peak demand or other system emergencies. Transmission constraints can be affected by a number of factors including electricity demand, the status of electrical equipment and electricity injection from generators. These factors can vary widely over short periods of time and short distances during system emergencies. The possible scenarios that might threaten local reliability are almost too numerous to list. Therefore, it is best to leave the definition of this use category in its current form.

A broadly defined use category will maintain the flexibility for local system operators to quickly deal with emergency reliability issues to avoid sudden local power outages that may damage customer and utility-owned equipment, threatening critical infrastructure and public health. At the same time, limiting the use of this category to area sources, limiting its use to no more than 50 hours per year, and requiring the dispatch decision to follow reliability, emergency operation or similar protocols that follow specific NERC, regional, state, public utility commission or local standards or guidelines all serve to limit the possible misuse of this category.

Importantly, EPA acknowledges and AMP concurs that emissions are not expected to increase under this proposal, as the amount of total allowable hours remains at 100. Further, by being able to rely on smaller, more localized units in these situations, RTOs and other balancing authorities should be able to reduce their reliance on more remote units, where line losses could result in greater emissions.

Since AMP's member communities began implementing the RICE NESHAP rules on May 3, 2013, it is instructive to cite a few examples where "local reliability" was the reason for non-emergency use. AMP notes two examples below where the final

rule's flexibility allowed for continued operation of critical units during non-emergency situations to prevent local outages.

Example A: During periods of high ambient temperatures and relative humidity, *COMMUNITY A* began experiencing voltage sags in the range of 11,800 to 12,000 volts. In addition to the adverse weather conditions, a transformer protection relay in one of *COMMUNITY A*'s substations failed. To protect customer computer systems and prevent a system outage, *COMMUNITY A* shut down the primary feed to the substation. A secondary feed was used to energize the substation, and an emergency RICE unit was dispatched to reduce load and stabilize system voltage at 12,500 volts.

Example B: *COMMUNITY B* was notified by the regional transmission operator several times last summer that its transmission feed would be opened unless load could be significantly reduced. The RTO had to reduce system load to prevent a network outage due to transmission constraints resulting from equipment failures. *COMMUNITY B* requested voluntary curtailments from its customers and operated an emergency RICE unit until the RTO cancelled the emergency.

Whether local outages could have been avoided *without* the flexibility of the final RICE NESHAP rule is not the point – the point is that the final rule's existing provisions did allow these communities to respond in a reasonable and responsible manner to operating conditions that threatened essential local power supply. Those provisions should be maintained and the petitioners' requests for additional restrictions rejected.

Conclusion

AMP and our members appreciate the opportunity to provide these comments in support of these three aspects of EPA's final rule. Should you have any questions or need additional information, please feel free to contact Julia Blankenship, director of energy policy and sustainability, at jblankenship@amppartners.org or 614/540-0840.

Exhibit C

USCA Case #13-1233 Document #1560303 Filed: 06/30/2015 Page 2 of 7
From: King.Melanie@epamail.epa.gov
Sent: Friday, January 04, 2013 9:25 PM
To: Cortney Higgins
Cc: VanLare.Paula@epamail.epa.gov; Balsarak.Paul@epamail.epa.gov
Subject: Fw: FW:
Attachments: NRECA RICE recommendations.docx

Hi Cortney,

I wanted to pass this along in response to the comments from SBA today that the rural co-ops have indicated that reporting of hours of operation would be an unreasonable burden.

Below is the feedback we got from NRECA on whether their members were amenable to filing information electronically.

-----Forwarded by Melanie King/RTP/USEPA/US on 01/04/2013 09:21PM -----

To: Melanie King/RTP/USEPA/US@EPA, RobertJ Wayland/RTP/USEPA/US@EPA, Joseph Goffman/DC/USEPA/US@EPA, Peter Tsirigotis/RTP/USEPA/US@EPA
From: "Cronmiller, Rae E." <rae.cronmiller@nreca.coop>
Date: 10/31/2012 03:44PM
Cc: "Cromwell, Ted T." <ted.cromwell@nreca.coop>
Subject: FW:

(See attached file: NRECA RICE recommendations.docx)

Greetings. NRECA has conferred with our membership regarding the issues raised in connection with the RICE June 7, 2012 proposal. This e-mail and attachment represents our summary recommendations and answers to several questions posed by EPA over the several months.

Regarding the following questions. Would your members be willing to file electronically with EPA on annual basis, hours and time durations of RICE dispatch for emergency demand response to begin in several years? Yes. We have to note that the utility knows when and why their dispatch of emergency RICE was ordered. However the utility has no way of knowing if the owner ran the unit for more or less than the time requested, although the total annual operated hours of each RICE would be recorded at the RICE site by a non resettable hours meter as required by the existing regulations. We also note that if the owner "takes the unit offline" without being dispatched by the utility, we would not know those hours of operation, but again, they would be recorded by the no resettable hours meter.

Would you members be willing to use ultra low sulfur diesel fuel for RICE dispatched for emergency purposes? Yes, for emergency dispatch to maintain reliability at the sub-bulk power (non RTO/ ISO) level. We assume your question was directed at our efforts to broaden RICE emergency use at the local level to maintain local reliability. We have no position on whether those RICE responding to EE2 regional power alerts (capacity markets) for example would agree to an ultra low sulfur fuel mandate.

The attachment provides text recommendations addressing the following areas: 1. Suggested Language in red identifying entity responsibility for ordering RICE dispatch following protocols necessary for maintaining local reliability as a follow up to Melanie's question late last week. This language is an amendment to what was submitted earlier as 63.6640(f)(ii)(b) in effort to further define appropriate RICE emergency dispatch at the local level. We have included the background materials submitted earlier as well.

2. For economic demand response beyond the 2017 sunset, we suggested in an earlier meeting with EPA to allow RICE operation beyond the sunset if the RICE was equipped with crankcase ventilation (CCV) and utilized ultra low sulfur diesel fuel along with the requirements included in Table 2d for emergency RICE (this could be defined as GACT). We have attached language pursuant to this earlier suggestion.

3. For annual hours of operation, as we noted in our earlier written comments, the penalties for exceeding the annual cap are severe and not justified for accidental noncompliance. We believe defining compliance on a three year annual rolling average is equitably justified here. We have included language to allow compliance with both the 100 hour cap and the 50 hour economic demand response cap based on the three year rolling average concept. After all whether emergency or economic demand response, all RICE use here is unplanned and cannot be predicted months or even days ahead of time.

Lastly we do appreciate all your efforts to understand our concerns that reliable and affordable and electric power be maintained throughout rural America. The last few days here in Washington D.C. area and the northeast corridor are vivid reminders of how important RICE generation can be in times of distress. Our members pride themselves in providing excellent power quality and reliability even in rural and remote areas. We endeavor to assist them in this RICE effort.

Please feel free to contact us should you have any questions.

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Adding a more practical definition of emergency demand response

§63.6640(f)

(ii) – *Emergency stationary RICE may be operated for emergency demand response for periods in which:*

- (a) *the regional transmission authority, or equivalent balancing authority and transmission operator has declared an Energy Emergency Alert Level 2 (EEA Level 2) as defined in the North American Electric Reliability Corporation Reliability Standard (NERC) EOP-002-3 Capacity and Energy Emergencies, or*
- (b) *the dispatch follows reliability, emergency operation or similar protocols that either directly or indirectly follow NERC, regional, state, public utility commission or local standards or guidelines¹ when called upon by a reliability coordinator, balancing authority, transmission operator or one of their designees; or a local municipal authority to mitigate local transmission and/or distribution limitations so as to avert potential voltage collapse or line overloads that could lead to the interruption of power supply in a local area or region.*

(iii) *Emergency stationary RICE may be operated for periods where this is a deviation of voltage or frequency of 5 percent or greater below standard voltage or frequency².*

Demand Response Background

A key component³ in ensuring electric reliability at bulk power electric system level includes measures taken to prevent system failures, including those at the sub-regional or local distribution levels. Appropriate actions do avoid cascading effects that otherwise result in bulk power or region-wide disruptions or even blackouts⁴. In many cases potential reliability issues at the sub regional levels are not detectable at the bulk electric system level because reliability planning activities are not always conducted at voltages below transmission levels⁵. Even so, electric systems having sub-transmission or distribution networks necessarily falling outside of FERC or federal jurisdiction has very significant incentives to take measures as necessary to prevent these system failures and ensure local sub-transmission and distribution reliability. Further, there are potentially heavy penalties associated with the failure to adhere to NERC reliability standards. In some areas of the US, there are also requirements imposed by regional, state or local entities, even those which occur at lower voltages.

Reliability or emergency action protocols guiding these sub-regional electric system operations might be administered by any one of several entities, but they are similar in purpose to those at the bulk electric system levels, which is to provide guidance for operation to avoid system failures and preserve reliability at the local level.

Limiting emergency RICE operation to situations when EEA level 2 is incurred might prohibit or at the very least strongly discourage necessary RICE operation at local second-contingency

¹ <http://www.nerc.com/page.php?cid=2120>

² Modern generating equipment may not be operated at frequencies below 5% of 60Hz.

³ Elements of electric system reliability planning include the assurance of adequate installed capacity, available energy producing resources, and sufficient transmission infrastructure to meet anticipated customer loads at design voltage and frequency conditions.

⁴ This second condition leading to the interruption of service is commonly called a second contingency, that is, an event that by itself would not lead to an interruption of service (line interruption due to weather-related events), but which following on the heels of an earlier event (the unplanned generating unit outage) has the combined effect of causing the loss of load.

⁵ Bulk electric system (BES) transmission voltage level is that which is greater than 100Kv. Voltage levels below those are simply called “sub-transmission” or distribution.

conditions that would otherwise ensure electric reliability and power quality, and would more broadly ensure the integrity of the nation's bulk power systems. Extending allowed emergency RICE use that follows or mirrors protocols established by NERC or other organizations having responsibilities for bulk electric system reliability or emergency operation, (such as that referenced under EEA Level 2), will ensure that RICE regulations do not jeopardize the local or sub-regional grid reliability which is also necessary to protect human health.

In practice, the use of RICE generators should be allowed when called upon by the balancing area authority to mitigate local transmission and/or distribution limitations so as to avert potential (pre-contingency) voltage collapse or line overloads that, if no mitigation was to occur, could lead to the interruption of power supply in a local area⁶. These steps are more akin to meeting EEA Alert Level 1 where actions are taken in anticipation of an energy deficiency to prevent an escalation. These events can occur even when a balancing area or region has more than adequate energy resources to meet their load, but deliverability into a local area is constrained due to transmission or sub-transmission outages that are either planned or unplanned or areas with inadequate transmission available to import power. While these types of interruptions can result in power loss to thousands of consumers, they do not rise to the EEA level 2 because they are not energy related and they may not materially impact Bulk Electric System reliability (i.e., cascading transmission outages or instability) or they are within a Transmission Operator footprint in non-RTO / ISO areas. Today, these types of interruptions are routinely identified by Transmission Operators who, anticipating low-voltage situations, take appropriate steps which may include the operation of RICE generators as a pre-contingency measure to mitigate the loss of load due to the occurrence of a second-contingency event.

These events can be and are documented on a local level. Operation of RICE generators for such circumstances should be allowed when the responsible Transmission Owner/Operator has a documented mitigation plan approved by the appropriate regional coordinating group that provides for RICE generators to operate. The mitigation plan may specify procedures and alternatives for mitigating the interruption; such alternatives could include measures such as the implementation of demand-side management, reduction in supply to interruptible customers, and load shedding on a pre-contingency basis in addition to the use of RICE generators. The use of emergency generation including RICE generation is preferred to any preventable black out.

Under an approved mitigation plan, the Transmission Operator would direct load-serving entities and distribution providers in the local affected area to reduce load on a pre-contingency basis to avert localized voltage collapse or line overloads. Use of RICE generators, which are within the local area, can accomplish all, or part of the required load reduction and thus support voltage stabilization to mitigate the interruption before it can impact the bulk electric system. RICE generator use should be permissible anytime they meet the requirements of a mitigation plan facilitating pre-contingency load interruption as documented in a regional, or Reliability Coordinator wide, transmission advance assessment. Distribution Providers and Load Serving Entities should also be permitted to use RICE generators in response to a Transmission Operators (Transmission Service Provider) directive to reduce load and to support voltage requirements on a pre-contingency basis to avert a blackout of the local area. In those instances when mitigation plans have not been developed and approved in advance of the event, evidence (voice recordings of directives or emails) can be retained to demonstrate that operation was for reliability purposes and in response to a NERC Transmission Operator directive.

⁶ Mitigating pre-contingency actions that can be undertaken include shifting loads between or among different transmission lines, shifting loads among or between different distribution lines or circuits, the operation of municipal generation, load control by shedding interruptible loads and implementing demand response measures, public appeals to reduce the use of electricity, and finally rotating outages. These are also post-contingency actions when restoring the grid after the loss of load.

Allowing compliance with emergency demand response using annual hours of allowed operation based on three year rolling average

Compliance with any hours of limitation in §63.6640 shall be based on a calendar year three-year rolling average with the first annual compliance period beginning three years after the year in which the June 7, 2012 proposal is finalized.

Rolling Average Background

The very nature of emergency RICE annual operation is based on unpredictable circumstances that require use of these units to address reliability⁷ and emergency operations⁸. Data on these triggering events demonstrate that the annual limitation on average is expected to be well below the numerical limitations in the existing and proposed RICE regulations. However, as several commenters have noted in the response to the June 7, 2012 proposal certain events such as those that have occurred in the past, while rarely occurring, may necessitate emergency RICE operation that surpasses the proposed annual limitations.

Currently, EPA's proposal would permanently bar any RICE unit from maintaining its "emergency status" if its operation exceeds any of the proposed annual hours of limitation thresholds. The requirement is unnecessarily draconian and would severely penalize RICE owners and operators who took actions necessary to ensure reliable power for consumers during rare unanticipated events.

Incorporating a three-year rolling annual average would allow RICE owners and operators latitude to operate the RICE units in these instances without undue concern of losing emergency status. By determining annual compliance over a three-year averaging period there is a high probability that, even if a unit's individual yearly operation should surpass an annual threshold, the three-year annual rolling average limitation could most likely be met.

NRECA Recommended Language for Load Management

§63.6640(f)(4) Existing emergency stationary RICE located at area sources of HAP may be operated for up to 50 hours per calendar year in non-emergency situations. The 50 hours of operation in non-emergency situations are counted as part of the 100 hours per calendar year for maintenance and testing and emergency demand response provided in paragraph (f)(2) of this section.

(i) Prior to April 16, 2017, the 50 hours per year for non-emergency situations can be used for peak shaving or non-emergency demand response to generate income for a facility, or to otherwise supply power as part of a financial arrangement with another entity if (sic) engines is operated as part of a peak shaving (load management program) with the local distribution system operator and the power is provided only to the facility itself or to support the local distribution system.

(ii) On or after April 16, 2017, the 50 hours per year for non-emergency situations cannot be used for peak shaving or non-emergency demand response, or to otherwise supply power as part of a financial arrangement with another entity, except this prohibition excludes continental (lower 48 states) emergency stationary RICE hours of operation utilized to supply off grid power provided that compression ignition emergency RICE utilize ultra-low sulfur diesel fuel (15 ppm) and install either a closed

⁷ Pre-contingency actions or measures

⁸ Post-contingency actions or measures

or open crankcase filtration system as appropriate for the engine, and follows management practices as described in Table 2d of Subpart ZZZZ.

(iii) Compliance with the hours of limitation in §63.6640(f)(4) for emergency RICE used in non-emergency situations shall be based on a calendar year three-year rolling average with the total hours not to exceed 100 in any calendar year and with the first annual compliance period beginning three years after the year in which the June 7, 2012 proposal is finalized. The owner/operator must maintain records on the hours of usage according to §63.6655.

Load Management Background

As described in the NRECA comments on EPA's June 7, 2012 proposal, EPA provided justification for allowing emergency RICE engines limited additional usage as this usage up to 100 hours annually would pose no adverse health or environmental impacts and further, to allow small electric cooperatives and other entities located at area sources that use these engines to maintain voltage and electric reliability. EPA decided however to restrict the use of emergency RICE for load management to only 50 hours annually with a sunset effective April 17, 2017. The proposal provided no rationale for restricting economic demand response (load management) resulting in limited economic benefit through reduced rates for cooperative customers while allowing demand response provisions that also provide an economic benefit to unit owners that participate in capacity markets.

The language NRECA has provided above adds control requirements for emergency RICE engines utilized for off-grid load management or demand response activities after the currently proposed April 17, 2017 sunset. Specifically, NRECA recommends that after April 17, 2012, continental emergency RICE units that install CCV controls, use ultra sulfur fuel and follow management practices be allowed to provide off grid power for up to 50 hours annually (or using a rolling average as described above). This combination of technologies and management practices would further reduce fine particulate emissions and metallic hazardous air pollutants. This is a reasonable balance further reducing emissions from these limited use (50 hours or less) area sources, without requiring the costly retrofits that would be necessary to meet the MACT limit that was designed for units operating up to 1000 hours or more.

Recordkeeping and reporting requirements would follow §63.6655 which already requires a) non-resettable hour meters that cannot be tampered with, b) owner/operator documentation of both the hours and types of usage. We think this provision clearly requires documentation and explanation for all hours of RICE utilization. Additionally under NERC requirements, utilities are required to document outages including the reason for the outage, the length of the outage, and steps taken to mitigate the outage and when power was restored. This combination of requirements provides clear documentation for purposes of compliance and enforcement.