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September 2, 2016

Hon. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OAR-2016-0033, Clean Energy Incentive Program

Dear Administrator McCarthy:

On behalf of the Commonwealth of Kentucky, the Energy and Environment Cabinet (Cabinet) respectfully submits the following comments, pursuant to the request for public comment published in the *Federal Register* on June 30, 2016 regarding EPA's proposed rule regarding the Clean Energy Incentive Program Design Details.¹ The Clean Energy Incentive Program (CEIP) is a critical element of the Clean Power Plan (CPP). Without the CEIP, many states may not be able to comply with their respective emission goals established in the CPP.²

Due to the stay of the CPP by the U.S. Supreme Court,³ the Cabinet finds the proposed rulemaking inappropriate. The Supreme Court's directive is rare and reflects the importance of staying all parts of the rulemaking, including the CEIP. It is unreasonable for states to expend money and resources during the stay of the CPP. In fact, twenty-nine (29) states requested the stay to avoid expending significant and unrecoverable resources.

In previous comments on the proposed federal plan for the CPP, the Cabinet stated, that "[w]ithout a clear indication of fundamental issues such as definitions, terms, requirements,

¹ 81 FR 42940.

² The Cabinet disagrees that the CEIP program is "optional." EPA's disapproval of the state CEIP or failure to participate in the CEIP would have a significant impact on the remainder of a state's final Clean Power Plan. This is particularly true for a mass-based plan, as the CEIP must be a set-aside. Either, EPA should make the program truly optional as to not provide a disadvantage to a non-participating state or the state should have an opportunity to determine where the CEIP set-aside allowances go if the EPA disapproves the state's CEIP program.

³ On February 9, 2016, the United States Supreme Court stayed the CPP "pending disposition of the applicant's petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari if such writ is sought. [.. if the writ is denied, it shall terminate automatically or if it is granted, shall terminate when the Court enters its judgment..]" *West Virginia, et al. v. EPA, et al.* (Order List: 577 U.S.)

timing and distribution of allowances, and the basic design of the program's mechanics, the Cabinet is unable to provide meaningful comment on the CEIP, which is a critical element to compliance under a federal plan as proposed."⁴ The Cabinet's previous comments highlight that the CEIP is an integral compliance measure in the Clean Power Plan. To fully evaluate the regulatory impacts, the rules should be proposed in a single rulemaking. This is especially true since EPA has altered CPP terms in the CEIP.⁵ Due to the interrelatedness of the CEIP and the CPP, this proposed rulemaking contradicts the directive of the Supreme Court's stay of the CPP.

The CEIP is based on unrealistic and technically unsound renewable energy and energy efficiency projections. The renewable energy projections for the CEIP are based on the same flawed methodology used within the CPP.⁶ The CEIP is a location specific program while the CPP renewable energy projections are based on a state's ability to access renewable energy projects through the market. This incentivizes economically inefficient renewable energy development in locations and creates an unfair advantage to states with greater renewable energy potential. Also, the CEIP creates a double-penalization for states like Kentucky as the goal was reduced in the final plan after EPA adopted a regional approach while the CEIP program is proposed and based on the ability of each individual state.

In addition, distributed generation penetration is highly dependent on state policy. EPA is flawed in assuming historic annual capacity additions.⁷ Using historical assumptions for future predictions incorrectly assumes the permanence of state policies that support distributed generation and therefore creates unfair geographical preferences for development in states that have aggressive distributed generation policies. EPA's analysis is unrealistic in that it is based on "aggressive, upper-bound estimates" and fails to substantiate the claim that solar is the most appropriate distributed energy resource for low income communities.

EPA estimates 46% of energy efficiency savings are from conservation voltage reduction (CVR) programs.⁸ EPA has incorrectly estimated the benefits and applicability of CVR given the feeder specific limitations of a successful CVR project. EPA's assumption that CVR can be "implemented in 50% of all high value feeders in low income communities"⁹ is arbitrary and capricious.

⁴ Comments submitted by the Energy and Environment Cabinet relating to "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Units Constructed on or Before January 8, 2014; Model Trading Rules, Amendments to Framework Regulations" (80 FR 64966; Docket ID: EPA-HQ-OAR-2015-0199-0641).

⁵ Further regulatory uncertainty is created by changing definitions outside of the CPP itself. EPA is also basing project eligibility on "commence commercial operation" instead of "commence construction" as in final CPP and further defining what is a "low income community." Clarification of these terms should be accomplished through revisions to the CPP.

⁶ *TSD Clean Energy Incentive Program Design Details Proposed Rule Renewable Energy and Low Income Community Projects Potential* (June 2016), p. 1-4.

⁷ *TSD Clean Energy Incentive Program Design Details Proposed Rule Renewable Energy and Low Income Community Projects Potential* (June 2016), p. 3,


⁸ *TSD Clean Energy Incentive Program Design Details Proposed Rule Renewable Energy and Low Income Community Project Potential* (June 2016), p. 7.

⁹ *TSD Clean Energy Incentive Program Design Details Proposed Rule Renewable Energy and Low Income Community Project Potential* (June 2016), p. 13.

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In conclusion, EPA must withdraw this proposal until the stay of the CPP issued by the U.S. Supreme Court has been lifted. Thank you for this opportunity to comment on the proposed rulemaking. If you have any questions or concerns regarding these comments, please contact me at your convenience.

Sincerely,


Charles G. Snavely
Secretary