



August 20, 2001

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Mary J. Hutzler
Acting Administrator
Energy Information Administration
EI-80, FORS 2F-081
1000 Independence Ave., S.W.
Washington, DC 20585

Dear Ms. Hutzler:

As Chair of the Ozone Transport Commission (OTC), I would like to thank you for meeting with our representatives regarding the proposed Energy Information Administration (EIA) confidentiality policy for collecting and disclosing electricity data (66 FR 14562-14566).

OTC was created by Congress under the Clean Air Act Amendments of 1990 to coordinate ground-level ozone air pollution planning in the Northeast and Mid-Atlantic region of the U.S. Environmental Commissioners and Secretaries and Air Pollution Control Officials from Connecticut, Delaware, the District of Columbia, Maine, Maryland, New Hampshire, New Jersey, New York, Massachusetts, Pennsylvania, Rhode Island, Virginia, and Vermont comprise OTC.

While we generally support EIA's proposals concerning form changes and the collection of specific data elements, we remain extremely troubled by proposed changes in the confidentiality treatment accorded these data. As we have emphasized in written comments and in direct communication with your staff, the public interest value of continued access to electric generator data collected by EIA is difficult to overstate. States, other Federal agencies, academics, utility regulators, non-governmental organizations and the public rely on EIA data for a variety of analytical and regulatory purposes. Lack of access to data, or access only to highly aggregated data, will severely impair future State and Federal efforts to design and implement policies that are based on sound science and economics and are aimed at protecting vital consumer and environmental interests and ensuring truly competitive markets.

EIA's recently circulated "alternate" proposal fails to allay these concerns and continues to fall significantly short of our needs for detailed and timely data, especially with respect to useful thermal output, monthly and seasonal emissions and generation, and plant-level operation. Absent any compelling or specific demonstration of competitive harm arising from current EIA confidentiality policies - which we believe has not been demonstrated - we strongly urge you to refrain from changing those policies in ways that not only undermine the broad public interest in access to information, but are fundamentally inconsistent with EIA's own mission and purpose. The following points elucidate OTC's position:

Bruce S. Carhart
Executive Director

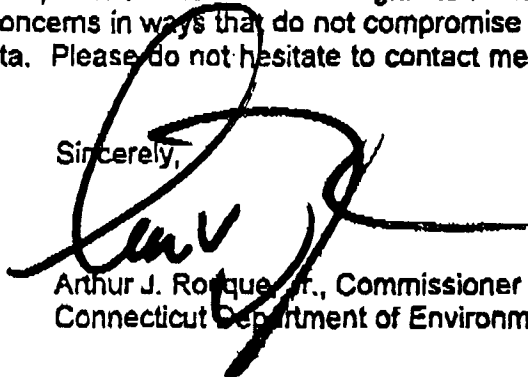
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1. **Fuel quantity, fuel quality data, and useful thermal output data are critical elements for States in developing and implementing air pollution control programs.** This includes setting and enforcing sulfur dioxide (SO₂) and nitrogen oxides (NO_x) allowance cap-and-trade programs, environmental disclosure programs, combined heat and power regulatory initiatives, and output-based environmental standards (i.e., generation performance standards). Interest in output-based standards as a means of promoting more efficient plant operation and leveling the regulatory playing field between competitive generators has grown steadily in the Northeast and nationally. Several OTC have already put such standards in place, and others are planning to adopt them. However, output-based regulations cannot be implemented without accurate data on emissions and electric as well as useful thermal output. Attached is a table that outlines some of the specific data required to implement output-based standards.
2. **Data are needed on a monthly basis; annually aggregated data are not adequate to satisfy vital policymaking and regulatory enforcement needs.** For example, the design of a comprehensive Generation Information System (GIS) being implemented to support a variety of public policies (including disclosure, renewable portfolio standards, and emissions performance standards) in New England is based on monthly emissions and generation data. This reflects the fact that data collected by the Independent System Operator are aggregated on a monthly basis for purposes of financial settlements and the fact that the emissions characteristics and capacity utilization of many individual generators fluctuate widely over the course of a year. Because some important environmental problems (such as ozone smog) have a specific seasonal component, these fluctuations matter and environmental regulators need access to information at a much finer level of temporal resolution than annually. States routinely use data for cost-effectiveness analyses, expressing those analyses in dollars per ton and dollars per kilowatt hour; at a minimum, monthly - not annually aggregated - data for generation and emissions are necessary for those analyses. Annually aggregated data will also be significantly less useful from the standpoint of analyzing and remedying market power problems in deregulated electric markets.
3. **Some of the data EIA proposes to treat as confidential are currently publicly available from other sources.** Many States routinely collect some of the data elements that EIA proposes to hold confidential. These include fuel inputs, generation, electrical outputs, and thermal outputs. These data are publicly available through facility-specific air permits (which may also include heat rate data), and compliance, emissions, and other reports. Since these data are already in the public domain, EIA's proposal for confidentiality for those data elements is misplaced.
4. **Data collection efforts should continue to be comprehensive, as they have been in the past, and should not be restricted to a "sample" of generators.** During a recent meeting with you, we learned that EIA changed its data collection procedures in January 2001, so that it was using the same form for utility and non-utility sources but collecting data from only a sample of sources. Your staff indicated, as a reason for maintaining confidentiality for certain data elements, that generators included in this sampling should not be unfairly disadvantaged by data disclosure. We strongly believe the far more appropriate response to this concern is to return to EIA's earlier practice of including all sources above a given size threshold. If administrative resources are an issue we would be happy to discuss alternative methods for reducing the burden of data collection in ways that still serve important regulatory and analytical needs.

5. EIA has not provided the demonstration of competitive harm necessary to justify proposed changes in its confidentiality policies. As we, and others, have indicated in earlier written comments, EIA's policies should be grounded in a strong presumption of interest in access to information. That means the "burden of proof" should rest with those who seek greater confidentiality, not with the public or those who serve the public by making use of EIA information. We are not aware that any such demonstration of specific competitive harm has been provided as the basis for EIA's proposed policy changes. Power markets operate in real time, whereas EIA data typically become available after a lag of 30 days or more. Even certain power generators have indicated in their comments that the data EIA collects is unlikely to be of competitive value given this time lag. The alternative to comprehensive data collection and dissemination by EIA is an inconsistent patchwork of State regulations and FOIA requests, as States need access to these data, notwithstanding. This would result in an increased reporting burden on the power industry without any benefit, since States would collect the data, and it would be publicly available. Failing to disclose the data could do more to undermine competitive markets and disadvantage smaller more recent entrants than the situation established under your 1998 policy in which the collection of data and the disclosure of data apply equally to all market participants.

As you know, Congress is seriously considering output-based, multi-pollutant initiatives to reduce the adverse environmental and public health impacts of power generation. If passed, the development and implementation of such programs will rely heavily on data - including fuel quality/quantity and useful thermal output data - that EIA currently collects. Thus, while access to these data is currently critically important for air pollution control programs, the need for continued access to these data is likely to grow, not diminish, in the near future. We therefore urge you, at minimum, to (1) maintain your current confidentiality policies and (2) revisit your earlier - and to our knowledge unannounced - decision to adopt a sampling approach with respect to some important generator data. We appreciate your interest in our views on these very important issues and will be glad to work with you to help resolve legitimate confidentiality concerns in ways that do not compromise the public's vital interest in access to generator data. Please do not hesitate to contact me if you have any questions.

Sincerely,



Arthur J. Roque, Jr., Commissioner
Connecticut Department of Environmental Protection

Attachments

Cc: Sen. James Jeffords, Senate Environment and Public Works Committee
Sen. Bob Smith, Senate Environment and Public Works Committee
Spencer Abraham, DOE
Francis Blake, DOE
Robert Brenner, EPA
Curt L. Hébert, Jr., FERC
Jeffrey Holmstead, EPA
Robert M. Schnapp, EIA
Gov. Christine Todd Whitman, EPA
OTC Members