

**TESTIMONY OF KENNETH T. CUCCINELLI, II**  
**ATTORNEY GENERAL OF VIRGINIA**  
**to the U.S. House of Representatives**  
**Committee on Oversight and Government Reform**  
**November 1, 2011**

Chairman Issa, Ranking Member Cummings, and members of the committee, I am Ken Cuccinelli, and I serve as attorney general for the Commonwealth of Virginia. I want to thank the committee for its kind invitation to speak about the MACT rule, the process by which it is being pursued, and the effects it has on real people.

One of my statutory duties as attorney general is to serve as consumer counsel in ratemaking proceedings before the Virginia State Corporation Commission, the body that sets the rates that utilities charge customers in Virginia. This means I represent the interests of citizens and businesses that use electricity when there is a rate proceeding before the commission. In fact, my office recently completed rate hearings related to the two largest electric utilities in Virginia—Appalachian Power, an AEP operating company, which serves most of southwest Virginia; and Dominion Virginia Power, which serves a significant portion of the rest of the state. In short, when electric utilities seek increases in rates charged to customers, I am the customers' lawyer, advocating for fair rates.

As I am sure you recognize, public utilities that are subject to having their rates set by state commissions like Virginia's SCC are entitled under the United States Constitution to recover the costs they are required to incur in the course of serving their customers, plus a reasonable rate of return. This means that, if the necessary expenses of providing electricity go up, utilities are entitled as a matter of constitutional law to recover those expenses from their customers. By definition, expenses to comply with federal environmental laws and regulations are necessary and prudent expenses for an electric utility to incur.

Thus, every time new environmental regulations are placed on electric utilities, customers pay for them directly. The burden is not borne by the companies directly, but by their customers to whom the costs are passed on by law—whether those customers are small businesses that are barely making payroll and may be forced to close, families who can barely make their mortgage payments, or single mothers just getting by. If they use electricity, they are the ones who pay directly for these regulations. So when the EPA imposes things like the MACT rule, it has a direct and substantial effect on the lives of ordinary people.

This is not to say that environmental regulations are inherently bad or that they should automatically be rejected because they impose some costs. However, it does mean that both the agency that imposes the regulation and this committee should make sure that the agency follows the proper procedures to make certain that the alleged benefits of the regulation outweigh the real world costs. Unfortunately, the EPA has recently been

pushing through regulations without following normal procedures and without making such assessments. The MACT rule is just one such example.

In its Regulatory Impact Analysis related to the rule, EPA noted its belief that the MACT rule will create new jobs to ensure compliance with the new regulations. But it also conceded that the rule would increase electric prices and would harm at least certain sectors of the job market. Yet EPA made no attempt to quantify existing jobs that will be lost. The EPA stated:

Industries that use electricity will face higher electricity prices as a result of the toxics rule, reduce output, and demand less labor. **We do not currently have sufficient information to quantify these as potential employment gains or losses.**

Because there is no dispute that the MACT rule will increase electricity prices, there is also no question that, nationwide, it will close some businesses and further strain families that are just surviving at the margin.

However, for at least a part of my state, Virginia, the situation is even bleaker. The MACT rule, while raising electricity prices generally, directly increases prices for electricity produced by coal. As I noted before, Appalachian Power supplies a significant portion of the electricity in southwest Virginia, and a majority of its power supply is generated from coal. So the poorest citizens of my state will face the largest electric price increases because of the MACT rule.

However, the problem is even worse than that. One of the major industries in Southwest Virginia is coal mining. To the extent that these regulations and others like them make coal more expensive and less desirable to use, the economy of southwest Virginia will not simply be worsened by increased energy prices, but will be devastated by the destruction of a major industry and the jobs that go along with it. These factors are certain to worsen an already bad economic situation – likely on a geometric progression – creating an economic death spiral.

Whatever one thinks the benefits of the MACT rule are, a decision of whether it is prudent policy simply cannot be made without considering these impacts on the electricity customers and the economies like those in southwest Virginia and throughout the United States. Yet, as conceded in its own Regulatory Impact Analysis, the EPA states affirmatively that it seeks to impose the rule despite not having “**sufficient information to quantify**” the potential negative effects of the MACT rule.

Given EPA’s admission of having insufficient information, you may wonder how we got here. I suggest that this should be a red flag for everyone involved in House oversight, whether you agree with the MACT rule or not. For a regulation of this import, there has been a relatively short review period set by EPA—104 days to review and contemplate the more than 960,000 public comments regarding the impact of the rule. This is in stark

contrast to other significant rules in which the EPA has set review periods of more than a year.

How was such a small review period set? It occurred because of a practice that should make every member of this committee uneasy: Groups that support the position that EPA wishes to take sued the EPA and then, in a friendly settlement, EPA agreed to the short review period. Even if you fully support the MACT rule, this gaming of the system should bother you as an affront to proper procedure and the rule of law. No rule that is truly worthy needs these types of tricks to pass muster. Even if you agree with the MACT rule, some day, the shoe will be on the other foot, and you will be right to decry the abuse of the process. So this body should make sure that the process is not abused like this to gain a particular result.

This obvious attempt to get done through a consent decree something which apparently could not have been justified following normal procedures was so outrageous that I, along with 23 other states attorneys general, as well as the governor of Iowa and the territory of Guam, filed an amicus brief in the district court in Michigan asking the court to not approve the consent decree's short time period.

The fact that half of the states in the union, represented by elected Republicans and Democrats alike, filed an amicus brief in a district court proceeding is extremely unusual. Generally, we wait until the court of appeals or Supreme Court level to get involved. This tells you how significant this rule is and what an affront to normal process the consent decree is.

In response, the EPA added 30 days to the review period. This was an attempt to lessen public pressure, but it was not a serious response to the significant problem.

Once again, I wish to state that I am not here to criticize all environmental regulation or the concepts of clean air and clean water. As a father of seven children who have to live on this earth for the better part of this century, I care that they live in a world of clean air and clean water. However, it is incumbent on the EPA, and on Congress when it delegates its power to the EPA, to make certain that the proposed benefits of a rule outweigh the costs. Here, we have a rule that everyone agrees will do at least three things:

- First, it will increase electricity prices. Estimates are that prices will increase between 10 and 35 percent. For business struggling to meet payroll or families on fixed incomes, a 10 percent increase – let alone a 35 percent increase – in a monthly electric bill is a financial death blow.
- Second, it will lessen electricity supplies nationwide. Because retrofitting plants to meet the standards will be prohibitively expensive, there is no question that certain plants will close and that the nation's available electricity supply will decrease. The EPA concedes that at least 10 gigawatts of electricity will be removed from the nation's power grid, while other estimates place the figure at

more than 80 gigawatts. That will place more upward pressure on prices and likely cause brownouts and blackouts at periods of peak demand.

- Third, the rule will create massive job losses. While the EPA says it cannot quantify the number of lost jobs, it acknowledges that jobs will be lost. There are estimates of 180,000 jobs lost per year for each year between 2013 and 2020. Of particular interest to me are estimates that 20,000 coal jobs will be lost, causing states in the Appalachian coal region to lose approximately 50,000 jobs each due to ripple effects. Southwest Virginia simply cannot afford the loss of 50,000 jobs.

Given these real world issues, it is not good enough for EPA to say it lacks sufficient information to quantify these negative effects. It needs to collect the information before imposing the rule to make sure the benefits outweigh the costs. If it needs more time, it should take it and not game the system by entering into a consent decree that shortens the ordinary time for review while maintaining it does not have sufficient information on critical issues.

Thank you again for the opportunity to address these issues.

---

*States involved in the amicus brief in the district court in Michigan, which asked the court to not approve the consent decree's short time period: MICHIGAN, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, INDIANA, KANSAS, COMMONWEALTH OF KENTUCKY, LOUISIANA, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, COMMONWEALTH OF VIRGINIA, WEST VIRGINIA, AND WYOMING. ALSO TERRY E. BRANSTAD, GOVERNOR OF THE STATE OF IOWA, ON BEHALF OF THE PEOPLE OF IOWA; AND THE TERRITORY OF GUAM.*

# Attorney General Ken Cuccinelli

Kenneth T. Cuccinelli, II was elected Attorney General of Virginia and sworn into office on January 16, 2010. As Attorney General, he is responsible for overseeing an office of over 425 employees.

Some of the key duties of the Attorney General are:

- to serve as the attorney for the government of the Commonwealth and its agencies, providing them with legal advice and representation in court;
- to uphold and defend the United States and Virginia constitutions and to defend the constitutionality of Virginia laws when they are challenged in court;
- to clarify the law for his clients through official legal opinions;
- to prosecute sexual predators and gang members;
- to protect the elderly and the incapacitated from abuse and neglect;
- to conduct or assist in criminal investigations and prosecutions in certain cases, such as Medicaid fraud, money laundering, theft of state property, environmental crimes, and computer crimes;
- and to enforce state laws that protect businesses and consumers from scams and fraud.

Prior to serving as attorney general, he served in the Senate of Virginia from August 2002 to January 2010. As a state senator and private attorney, he worked to improve the Commonwealth's mental health system. In private practice, he served as a court-appointed attorney for individuals in Virginia's involuntary civil commitment process. After joining the Senate in 2002, he passed legislation that provided for more humane treatment of the mentally ill.

He has also been a champion for Virginian's property rights, sponsoring a law (and now backing a constitutional amendment) to dramatically curb the state's eminent domain power, so private land can no longer be taken by government from one private owner and given to another, merely to increase tax revenues, economic development, or private gain.

He made government more transparent and accountable to its citizens by sponsoring a law to put the state's detailed budget online in a format that citizens could easily understand.

As attorney general, Mr. Cuccinelli works to protect consumers from scams and fraud, take the worst sexually violent predators out of our communities, put gang members in jail, and save taxpayers millions each year by prosecuting Medicaid fraud in the commonwealth.

Attorney General Cuccinelli earned a degree in mechanical engineering from the University of Virginia, a master's degree in International Commerce and Policy from George Mason University, and his juris doctor from the George Mason University School of Law and Economics.