



NEWS RELEASE
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**PSC Submits Official Comments to EPA Outlining Concerns with
Proposed Regulations on Carbon Emissions**

BISMARCK, ND – The North Dakota Public Service Commission (PSC) today approved the submission of their official comments to the U.S. Environmental Protection Agency (EPA) regarding the proposed regulations on carbon emissions expressing serious concerns with reliability, affordability and taking away long-held state rights and responsibilities for utility planning and regulation. In those comments, the Commission outlines major concerns and states that they believe “the proposed rule is flawed and should not be finalized.”

Because of the fundamental flaws in the proposed rules and the risks it presents to the reliability of the U.S. electric industry and its regulatory structure, the Commission is urging the North Dakota Department of Health and other states to decline from developing state plans to implement the EPA’s rules.

"Today's filing by the Commission is another step in the ongoing battle against the EPA's overreach into state’s jurisdiction,” said Commission Chairman Brian Kalk. “It's unfortunate that the President and his EPA refuse to acknowledge how reckless this plan is and that it threatens to destabilize the power grid and drive up electricity costs for families and businesses."

If finalized, the rules will require each state to be responsible for creating and implementing a plan that will enable its fleet of electric generation units to meet an interim target from 2020-2029 and a more stringent final target in 2030 and beyond. The proposed rule sets a CO2 emission rate for each state based on EPA’s determination of what constitutes a “Best System of Emissions Reduction” for all existing power plants.

If finalized unchanged, EPA’s proposed rule would assume an average existing coal plant could install technology to reduce emissions significantly. The proposed rule fails to recognize substantial, recent investments that have significantly reduced carbon dioxide and other emissions in North Dakota.

One of the major concerns outlined in the comments is the Commission’s belief that the proposed rule is not authorized by federal law and takes away the Commission’s authority to regulate utilities, oversee planning of resources, and address the projected significant increases in demand for electricity. The Commission believes it’s important that the officials who were elected by the citizens of North Dakota and who are accountable to the state are able to do their job. “For the EPA to impose the rules, they must either entice North Dakota to take political ownership of the rigid, federally-prescribed emissions requirements, or EPA must succeed in forcing North Dakota to implement a national, top-

down emissions reduction program that compels the use of renewables, consumer conservation measures and the virtual elimination of lignite and other types of coal as fuels,” the comments state.

“The President, through the EPA, will dismantle our dependable and affordable electric system if these rules are adopted,” said Commissioner Randy Christmann. “They will replace the system of today with arbitrary objectives based on false facts. Sadly, they seem more concerned about appeasing the environmental activists than about maintaining the proper functioning of the electricity system.”

The Commission adds that the EPA is pressing states to incorporate into state plans assurances that the states will alter their laws to provide for enforcement under state police power. The proposed rule relies completely on trying to leverage state authority EPA cannot command.

Two of the other major concerns addressed include increased consumer costs and reliability of electricity should coal generation facilities be forced to shut down. The comments state that the carbon dioxide emission rate that EPA proposes for North Dakota and neighboring states directly or indirectly threatens the retirement of a significant amount of fossil-fuel generation in a timeframe that compromises reliability. In addition, the incremental cost of compliance for utilities would likely be several billion dollars – a cost which ultimately will be paid by residents and businesses.

“These proposed rules create sweeping, untested and technically unproven changes to our nation’s utility system, which is the pillar of our economy, public safety and way of life,” said Commissioner Julie Fedorchak. “The rules pose serious threats to reliability while promising negligible, if any, environmental gains. The requirements and timelines are unrealistic and fail to consider the basic technical realities of integrated utility systems and the functioning of the electric grid.”

The PSC held a “Symposium on EPA Carbon Regulation” in January and a conference in September titled “Electric Reliability: Keeping the Lights on in North Dakota.” A comment period was also held in October which gave electric utilities, electric cooperatives, other interested stakeholders and the public a chance to share their comments with the PSC. All of this information was used to prepare the PSC’s official comments to the EPA. EPA’s comment period ends on Dec. 1, 2014.

The North Dakota Public Service Commission is a constitutionally created state agency with authority to permit, site and regulate certain business activities in the state including electric and gas utilities, telecommunications companies, power plants, electric transmission lines, pipelines, railroads, grain elevators, auctioneers, commercial weighing devices, pipeline safety and coal mine reclamation. For more information, contact the Public Service Commission at (701) 328-2400 or www.psc.nd.gov.

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November 25, 2014

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**Re: Docket ID No. EPA-HQ-OAR-2013-0602
“Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units”; Proposed Rule, 79 Fed. Reg. 34829 (June 18, 2014)
(referred to as the “Proposed Rule”)**

Dear Administrator McCarthy:

The North Dakota Public Service Commission (“Commission”) respectfully submits these comments in response to the United States Environmental Protection Agency’s (“EPA”) above-referenced Proposed Rule that would establish an expansive and unprecedented federal program to regulate the production, delivery, and use of electricity in North Dakota. If finalized, EPA’s Proposed Rule would substantially increase rates North Dakota consumers pay for their electricity, and could significantly impact the reliability of the electrical service they receive. As such, the Commission respectfully requests that EPA fundamentally rethink the Proposed Rule.

I. SUMMARY OF NORTH DAKOTA PUBLIC SERVICE COMMISSIONS’ CONCERNS WITH THE PROPOSED RULE

A. The Proposed Rule Is Not Authorized by Federal Law.

- The Proposed Rule applies an unprecedented and unsupportable legal interpretation that the “best system of emissions reduction” for existing sources can include, among other things, homeowners and retail customers that do not generate any power or produce any emissions.
- The Proposed Rule fails to recognize substantial, recent investments that have significantly reduced carbon dioxide (CO₂) and other emissions in North Dakota.
- The Proposed Rule incorporates generic and unsupported expectations of levels of renewable generation and energy efficiency that, when applied to North Dakota, are extremely ambitious, almost certainly unachievable, and uneconomic under traditional standards.

B. The Proposed Rule Raises Significant Electric Reliability Concerns.

- The carbon emission rate that EPA proposes for North Dakota and neighboring states directly or indirectly threatens the retirement of a significant amount of coal-fueled generation in a timeframe that compromises reliability.

C. The Proposed Rule Threatens to Substantially Raise Electric Rates In North Dakota.

- Using conservative assumptions, the incremental cost of compliance for North Dakota utilities would likely be several billion dollars on a net present value basis. Compliance costs will increase the cost of providing electric service, which must be paid for by residents and businesses in North Dakota.
- In addition to new investment, North Dakota residents and businesses will also be responsible for paying remaining costs for useful existing facilities forced to retire prematurely by the Proposed Rule. The Proposed Rule places at risk **several billion dollars** of investments in existing coal-fired facilities in North Dakota that North Dakota ratepayers have only begun to pay off. Much of this investment has been constructed to comply with EPA requirements.
- Another rate impact to North Dakota customers will be the wholesale prices for energy purchased by North Dakota utilities and passed through to the North Dakota retail customers that use it. Higher wholesale prices resulting from the Proposed Rule will be compounded by federally approved locational marginal pricing employed by the regional transmission organizations that operate wholesale power systems in North Dakota.

For these reasons, and those discussed in greater detail below, the Commission is compelled to provide these comments.

II. THE NORTH DAKOTA PUBLIC SERVICE COMMISSION

The Commission is a state agency created by the North Dakota Constitution. N.D. Const. Art. 5, § 2. The authority of the Commission is set forth in the North Dakota Century Code. § 49-01, et. seq. The Commission has general jurisdiction over “[e]lectric utilities engaged in the generation and distribution of light, heat, or power.” § 49-02-01. The Commission establishes rates of all public utilities with the power to “originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities.” § 49-02-03. The Commission shall determine the value of property of every public utility “for the purpose of ascertaining just and reasonable rates and charges of public utilities.” § 49-06-01. The Commission “may approve, reject, or modify a tariff filed under section 49-05-06, which

provides for an adjustment of rates to recover jurisdictional capital costs and associated operating expenses incurred by a public utility to comply with federal environmental mandates on existing electricity generating stations,” including the federal Clean Air Act (CAA). § 49-05-04.2.

The citizens, businesses, and government of North Dakota depend on reliable electric service at reasonable rates. The Commission has a constitutional and statutory duty to ensure that North Dakotans receive a reliable supply of electricity at just and reasonable rates. Additionally, the Commission is responsible for authorizing the construction and operation of generation and transmission infrastructure in North Dakota that is needed to provide reliable electric service to customers and is otherwise consistent with North Dakota law.

The Proposed Rule is part of a series of EPA proposed regulatory initiatives, the subject of which the Commission held an initial “Symposium on EPA Carbon Regulation” on January 22, 2014, and heard from the U.S. EPA Region 8 Administrator, the North Dakota Department of Health, the North American Electric Reliability Corporation (NERC), a number of electric utilities and the interested public. Following publication of the Proposed Rule on June 18, 2014, the Commission held an informational session on September 10, 2014, entitled “Electric Reliability: Keeping the Lights on in North Dakota.” The Commission heard from a number of presenters – including a Commissioner from the Federal Energy Regulatory Commission (FERC), the Midcontinent Independent Systems Operation, Inc. (MISO), NERC, a number of electric utilities subject to the Commission’s jurisdiction and other utilities operating in North Dakota, and the public. See <http://www.psc.nd.gov/>

On October 8, 2014 the Commission issued an Order directing all utilities subject to the Commission’s jurisdiction to submit written responses addressing the several detailed questions concerning the Proposed Rule and its effect on North Dakota. (*See* Attachment A) The Commission also solicited input from other interested parties – including the U.S. EPA and the public. *Id.* The Order stated that information provided would assist the Commission in considering the issues and challenges involved in meeting growing demand for adequate and cost-effective electricity in North Dakota while at the same time considering the EPA Proposed Rule – including preparation of the Commission’s comments on the EPA’s Proposed Rules.

III. EPA’S PROPOSED REQUIREMENTS FOR THE STATE OF NORTH DAKOTA

EPA’s proposed standards of performance for existing power plants in North Dakota take the form of state-specific “rate-based” emissions targets, expressed as pounds of CO₂ per MWh. If finalized, the Proposed Rule will require each state to be responsible for creating and implementing a plan that will enable its fleet of electric generating units (EGUs) to meet an interim target rate from 2020-2029, and then a more stringent final target rate in 2030 and beyond. States must determine whether their EGU fleet complies with the interim rate by calculating the fleet’s average emission rate over the entire ten year period between 2020 and 2029. Thereafter, states will calculate their EGU fleet’s compliance with the final target rate by averaging emissions over a three-year rolling average period (e.g., 2030-2032, 2031-2033, etc.).

The Proposed Rule sets a CO₂ emission rate for each state based on EPA's determination of what constitutes a "Best System of Emissions Reduction" (BSER) for all existing power plants on a state-wide basis. Specifically, EPA determined that the best system for reducing CO₂ emissions from existing power plants is for states to implement the following four actions—or as EPA calls them, "building blocks":

- 1) Improve the heat rate efficiency of all coal-fired EGUs in the state by six percent;
- 2) Ramp up the operation of all existing natural gas combined cycle units (NGCC) in the state to a 70 percent capacity factor, and assume increased generation from these NGCC units offsets existing generation at coal-fired EGUs in the state;
- 3) Increase the percentage of renewables (excluding large hydro) used in the state to between 2% and 25%, depending on the state, and assume that nuclear plants under construction will be built and that 5.8% percent of all existing nuclear capacity does not retire; and
- 4) Increase the use of energy efficiency programs to reduce electricity consumption by 9% to 12% by 2030, depending on the state.

The Proposed Rule sets a 2030 final emission rate for North Dakota of 1,783 lbs./MWh of CO₂, with an interim 2020 emission rate goal of 1,817 lbs./MWh.¹ Further, EPA also seeks comment on the following "alternative goals" for North Dakota: 1,882 lbs./MWh for 2020-24 period and 1,870 lbs./MWh in 2025.² In setting the proposed North Dakota requirements, EPA used the 2012 EGU emission rates for each State as the starting point. For North Dakota, EPA reports the 2012 EGU emission rate was 2,368 lbs./MWh of CO₂.³ EPA arrived at the proposed interim and final emission rate goals utilizing a series of calculations and assumptions and the application of EPA's four "building blocks" as follows:

Step 1. 2012 plant-level data are summed to State-level values in a calculation that multiplied coal generation by the coal emission rates, NGCC by the emission rates, oil and gas steam generation by the emission rates, plus emissions from other electric generation sources, then divides that sum by total generation (coal, O&G, natural gas, and "other"). In the case of North Dakota, EPA found total generation exists of only coal generation. EPA's calculation resulted in a "baseline" emission rate of 2,368 lbs./MWh of CO₂.

Step 2. EPA then assumes that a 6% heat rate improvement at a facility will translate directly into a 6% reduction in the net CO₂ emission rate. Accordingly, EPA takes the coal

¹ 79 Fed. Reg. 34,957; Proposed Table 1 to Subpart UUUU of Part 60.

² *Goal TSD*, Appendix 2; See n. 8 *infra*. The detailed calculations for both the proposed state goals and the proposed alternate state goals are found in Appendices 1 and 2, respectively, of the *Goal TSD*.

³ *Goal TSD*, Appendix 1.

emission rate in the numerator and reduces it by 6%. At this point, the calculated emission rate for North Dakota is equal to 1,875 lbs CO₂/MWh.

Step 3. EPA assumes that NGCC are underutilized and there is a 70% or greater capacity factor at these facilities that is available for redispatch. EPA in essence reapportions fossil fuel generation by increasing NGCC generation and subtracting that generation from coal and O&G steam generation. For example, if coal accounts for 90% of generation in the State and O&G 10%, EPA assumes that coal generation would be reduced by 90% of the amount that NGCC is assumed to increase and O&G reduced by 10% of the amount by which NGCC increases. However, in the case of North Dakota, 100% of its generation is coal based. Accordingly, EPA does not reapportion coal generation by increasing NGCC since it is not deployed in North Dakota.

Step 3 also considers heat rate improvements and redispatch to NGCC capacity that is under construction, assuming a 55% capacity factor for these units. For North Dakota, EPA assumes a 0% NGCC redispatch factor, keeping the North Dakota rate to 1,875 lbs CO₂/MWh.

Step 4. EPA adds to the State goal denominator nuclear capacity as zero emitting and then considers a combination of existing renewable generation in the State and target renewable energy levels as informed by existing Renewable Portfolio Standards. The addition of these lower emitting emission rates to the denominator reduces the State emission goals further. For North Dakota, there is a 0 assumption for nuclear, and certain changes in existing and future renewables.

Step 5. EPA assumes a State-specific percent value that reflects total MWh sales that could potentially be avoided through demand-side energy efficiency measures. This amount increases each year over the ten-year period. These savings rates are then multiplied by 2012 retail sales and scaled by a factor of 1.0751 (which converts retail sales figures into a corresponding total net generation value that accounts for transmission and distribution losses) to obtain an avoided generation value in MWhs. This amount is then applied to the denominator. For North Dakota, EPA assumes a 1.39% reduction in 2020 through a 9.71% reduction in 2029, which reduces the 2030 rate to 1,783 lbs CO₂/MWh.

IV. EPA CANNOT REGULATE EXISTING SOURCES UNDER CAA § 111(d) BECAUSE THEY ARE ALREADY REGULATED UNDER CAA § 112.

The Commission acknowledges the existence of a fundamental threshold legal question with respect to the Proposed rule, namely, whether EPA even has the authority to issue it. By its own plain terms, CAA § 111(d) prohibits EPA from regulating under that section any existing source that is a member of a source category already regulated under CAA § 112 as a source of hazardous air pollutants. EPA issued its Mercury and Air Toxics Standards in 2012 for the express purpose of subjecting coal-fired EGUs to hazardous air pollutant regulation under CAA § 112. The Commission submits that EPA is therefore now barred from regulating the same EGUs under CAA § 111(d) and the Proposed Rule.

V. THE PROPOSED RULE CIRCUMVENTS THE COMMISSION'S AUTHORITY BY DIRECTING STATES TO COMPLY WITH EPA-DEFINED "BUILDING BLOCKS"

At its core, the Proposed Rule represents a complex effort aimed at forcing significant shifts in electrical generating capacity away from carbon-intensive EGUs to less carbon-intensive EGUs and zero-carbon generation. Such a monumental initiative adversely impacts North Dakota citizens, businesses and government. It also threatens North Dakota's ability to continue to use lignite and other coals as a low cost electricity generation option and a means to enable responsible development of the Bakken oil reserves that are critical to North Dakota's continued economic development.

Three of the four building blocks in the Proposed Rule involve regulatory targets apart from coal-fueled EGUs. Only one building block assumption -- average heat rate improvement of six percent for coal-fired EGUs -- is source-focused. Building blocks 2, 3 and 4 in the Proposed Rule assume that utilities can meet certain metrics outside the coal-fueled EGU. Although the Proposed Rule does not require states and utilities to actually implement these metrics, they define each state's CO₂ performance obligations.

The Proposed Rule sets firm CO₂ standards that must be met by North Dakota beginning in 2020 and accelerating through 2030. The Proposed Rule specifically prohibits North Dakota from making any "case-by-case" exceptions based on factors such as: (1) unreasonable costs of control resulting from plant age, location, or basic process design; (2) the physical impossibility of installing necessary control equipment; or (3) other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable. Finally, the Proposed Rule rejects the possibility of a "less stringent standard" or final compliance time.⁴ Instead, the Proposed Rule requires that any North Dakota CAA § 111(d) plan must show "achievement of emission performance equivalent to the goals established by the EPA, on a timeline equivalent to that in the Proposed Rule."

The Commission submits that the Proposed Rule rests on a legally impermissible definition of BSER. Even if EPA has the authority to issue CAA § 111(d) regulations governing CO₂ emissions from coal-fueled EGUs, the Proposed Rule impermissibly intrudes upon North Dakota's express authority under CAA § 111(d) to "establish" state-specific standards of performance. Under CAA § 111(d), EPA's authority is limited to adopting a "procedure" under which "each State shall submit to the Administrator a plan which (A) establishes standards of performance...." The Proposed Rule is far more than procedural. Rather, the Proposed Rule would usurp North Dakota's CAA and state law authority to "establish" performance standards by dictating what the standards must be. Additionally, EPA has structured the Proposed Rule in a way that would prevent North Dakota from considering "the remaining useful life of the

⁴ See EPA's Proposed Rule, at 520.

existing source” in applying a state-established performance standard. CAA § 111 also says nothing about setting the “best system of emission reduction” on a state-wide basis.

Block (1) – Increasing Coal Plant Efficiency By 6 percent: EPA looked at what technology is available inside a coal plant’s fence-line and determined that the average existing coal plant could install technology to reduce emissions by 6 percent. The Proposed Rule assumes that a state’s affected coal-based EGU fleet could achieve, on average, a six percent improvement in heat rate leading to a six percent reduction in CO₂ emissions (BSER Building Block 1). *See* 79 *Fed. Reg.* 34,861. EPA’s proposed six percent heat rate improvement (HRI) value is comprised of two elements: 1) a four percent reduction attributable to operations and management (O&M) “best practices”; and 2) a two percent reduction due to higher cost hardware “equipment upgrades” that were identified in a 2009 Sargent & Lundy (S&L) Report⁵ concerning potential efficiency improvements at coal-based EGUs.⁶ *See id.* at 34,860. EPA also claims that fuel costs savings largely will offset the costs related to any efforts to improve heat rates through O&M best practices or equipment upgrades. *See id.* at 34,861.

Heat rate of an EGU is not a constant value and varies significantly due to numerous factors which can have both positive and negative effects. Variability comes from basic unit design, fuel characteristics, operating load conditions, age/condition of equipment, maintenance and cleanliness of components. Further, coal-fired steam generating EGU’s are not designed with the same heat rate. North Dakota utilities’ existing coal fleets are comprised of units of various ages, which were designed by different manufacturers to burn different types of coal. North Dakota utilities have a long history of implementing heat rate improvements due to the fuel savings that can be realized and this experience has involved both equipment upgrades and O&M practices. In an effort to determine what reasonable heat rate improvement opportunities for coal-fueled EGUs may exist in North Dakota, the Commission consulted with the operators of these facilities. Taking responses received into account, the Commission believes a statewide heat rate improvement of 2 percent is the best that could be achieved. With regard to North Dakota, the Commission believes this information is superior to the broad assumptions EPA used in developing the Proposed Rule. EPA has made no effort to consider these circumstances at EGUs in North Dakota. EPA’s 6 percent criteria is arbitrary as applied to North Dakota EGUs.

The Commission also believes that EPA inappropriately used the 2009 S&L Report to assume that the types of improvements estimated by S&L are equally applicable and achievable at each and every coal-fired power plant in the country. Notably, S&L itself has recently evaluated the Proposed Rule’s reliance on (and characterization of the 2009 S&L Report) and fundamentally rebuked EPA’s mischaracterization of its earlier analysis. *See* Sargent & Lundy Letter to National Rural Electric Cooperative Association, dated October 15, 2014. (*See* Attachment B).

⁵ *See* Davis Hasler, *Coal-fired Power Plant Heat Rate Reductions* Sargent & Lundy (Jan. 22, 2009).

⁶ EPA also proposed an “Alternative State Goal,” also cited as “Option 2,” which derived state goals using only the four percent “best practices” component of EPA’s analysis.

Block (2) – Re-dispatching NGCC Units On A State-Wide Basis: Forcing a natural gas plant to operate instead of a coal plant is not a “technology” that goes inside the fence-line of the coal plant in question. This block looks at re-dispatching plants on a state-wide basis—not on a utility-footprint basis. In other words, EPA is asserting that the best technology available for a coal-fueled EGU owner to reduce its carbon emissions is, in many instances, for a different plant owner to increase its generation elsewhere. North Dakota has no NGCC generating capacity.

Block (3) – Increased Renewables With Less Nuclear Retirements: This block is even further beyond coal-fueled EGU’s than Block 2. It would not just require utilities to operate their plants differently—it would actually require them to build new renewable plants or, at a minimum, purchase energy from such new plants. Put another way, the Proposed Rule states that the best technology available to reduce a given coal-fueled EGU’s CO₂ emissions is for the plant owner to build a new plant elsewhere.

Block (4) – Increasing Demand-Side Energy Efficiency: This block assumes that states/utilities can implement demand-side energy efficiency, such that customers use as much as 12% less energy by 2030 to offset coal-fueled EGU generation.

EPA’s energy efficiency assumptions made in the Proposed Rule present the following reliability issues and cost impacts:

- EPA overestimates the amount of energy efficiency expected to reduce electricity demand over the compliance timeframe. The results of overestimation have cascading implications to electric transmission and generation infrastructure needs.
- The offsetting requirements in more coal retirements, greater utilization of natural gas generation and the expansion of renewable energy resources in a constrained time period are well beyond the feasible expansion expectations resulting in anticipated reliability constraints.
- Substantial increases in energy efficiency programs exceed recent trends and projections. Several sources have published reports, analysis, and forecasts for energy efficiency that do not align with the Proposed Rule assumed declining demand trend.
- The Proposed Rule assumptions severely underestimate cost and do not reflect the capital investments that would otherwise be required by utilities to meet growing electricity demand. Cost for additionally needed generating capacity will be passed along to electric ratepayers, increasing their bills for electricity.
- The assumptions made under Building Block 4 significantly underestimate the cost associated with the proposed expansion of energy efficiency measures. These additional costs were not accounted for in EPA’s cost analysis, will be passed along to electric ratepayers in North Dakota and ultimately increase the electric power bills of the average electric customer.

EPA issued a Notice of Data Availability (“NODA”) on October 28, 2014. The NODA seeks comment on a variety of proposed changes to the states “goal” setting without providing a revised rule or the associated time to fully comment on the proposed changes. In the case of North Dakota, these potential “changes” may result in a significant further increase in the stringency of any final North Dakota compliance obligation, and with any increase to the stringency of the standard comes the incremental and unavoidable costs of compliance.

The Commission is concerned about the significant impact of the very recent additional EPA proposal for creating a minimum value of re-dispatched coal to non-existent NGCC power plants or to co-firing natural gas in existing coal-fired boilers. Further, EPA is proposing another potential means for increasing the stringency of a state “goal” by adding incremental renewable energy and energy efficiency to the “goal” which replaces fossil generation pro-rate or prioritizes the re-dispatch of fossil generation based on historic emissions. In addition to these substantive infirmities in the NODA, the Commission objects to the lateness of the NODA-raised issues in the comment period for the Proposed Rule. It is especially concerning that EPA would seek comment on changing the goal without providing a new proposed rule. Instead, EPA merely states “this adjustment to goal-setting formula would yield more stringent state goals.”

The Commission’s position on issues raised by the NODA are:

- EPA should eliminate the interim goal.
- If EPA retains an interim goal, EPA should allow North Dakota credit for early adoption of renewable energy in demonstrating compliance with the interim goal.
- EPA should adjust the interim goal to account for the realities associated with increased utilization of natural gas generation.
- Any final rule must allow states to consider remaining useful life and other factors in applying standards of performance to any particular source.
- EPA has not undertaken the technical or economic analyses required to adjust the Building Block 3 and 4 methodologies.
- EPA cannot rely on an unidentified “regional approach” to calculating renewable energy requirements in any final rule.
- EPA lacks the legal authority to establish emission rate requirements premised on the re-dispatch of coal-fired generation to new natural gas combined cycle EGUs.
- EPA has failed to adequately demonstrate that co-firing with natural gas at existing coal-fired EGUs represents BSER.

- EPA cannot proceed with utilizing a regional approach for Building Block 2 without providing greater specificity and undertaking the required technical and economic analyses.
- EPA must provide greater specificity regarding the impacts of utilizing baseline data from 2010 and 2011 on individual state requirements.

VI. THE PROPOSED RULE THREATENS BOTH NEAR-TERM AND LONGER-RUN ELECTRIC SYSTEM RELIABILITY IN NORTH DAKOTA

The Proposed Rule raises concerns about electric reliability in North Dakota, throughout the region, and the country. The Proposed Rule would require wholesale shifts in the way electricity is generated in this country and does so without regard to the need for expanded electric and natural gas transmission infrastructure. EPA's failure to consult with the North American Electric Reliability Corporation (NERC) in a meaningful way to ensure that the Clean Power Plan can be implemented without grave threats to reliability singularly requires that the Proposed Rule be withdrawn.

Section 215 of the Federal Power Act authorizes FERC to approve and enforce reliability standards developed by NERC and various regional reliability entities. 16 U.S.C. § 824o. The Proposed Rule acknowledges that reliability is an issue of concern but ultimately rests on a conclusion that it provides sufficient "flexibility" to avoid reliability concerns. 79 Fed. Reg. at 34,836. The Technical Support Documents do include one entitled "Resource Adequacy and Reliability Analysis." Unfortunately, the report was prepared without substantive consultation with and input from either FERC or NERC.

North Dakota is within the area of a regional transmission organization (RTO) known as the Midcontinent Independent System Operator (MISO). To date, MISO has limited its review to an economic-only analysis⁷, and will undertake the issues of reliability and transmission security in the next phase of its analysis.⁸ For this reason alone, EPA should allow MISO adequate time to study the impacts of the Proposed Rule in its territory.

Although EPA has recognized the enormous undertaking it is imposing on the states, and allows them an additional year (or two) to develop and submit their plans, the extension of time for the development and approval of state plans means that there could be as little as six months between final federal approval of a state plan and the beginning of the first compliance period in

⁷ MISO's "GHG Regulation Impact Analysis — Initial Study Results," September 17, 2014, can be found at: <https://www.misoenergy.org/Library/MeetingMaterials>.

⁸ See Regional State Committee meeting agenda and Clean Power Plan report at: <http://www.spp.org/publications.pdf>.

2020, if everything proceeds according to EPA's proposed schedule. Six months is clearly inadequate to allow for the type of reliability assessment that is typically performed by the regional transmission organizations to take place, let alone for the construction of the replacement resources and transmission mitigation measures that will be necessary to assure grid reliability. The magnitude of the coal plant retirements projected in EPA's integrated planning model runs is ten times the magnitude of the retirements that were projected for MATS, and EPA's projections for retirements under the MATS rule were vastly understated. And the period for compliance from the time of final promulgation of the MATS rule to the extended deadline available through the states was four years. There is simply not enough time to implement changes of this magnitude by 2020, nor should they be implemented.

NERC recently completed its preliminary reliability review of the assumptions and potential reliability impacts of the Proposed Rule. NERC is a not-for-profit international regulatory authority whose mission is to ensure the reliability of the bulk power system in North America. NERC develops and enforces Reliability Standards; annually assesses seasonal and long-term reliability; monitors the bulk power system through system awareness; and educates, trains, and certifies industry personnel. NERC's area of responsibility spans the continental United States, Canada, and the northern portion of Baja California, Mexico. NERC is the electric reliability organization for North America, subject to oversight by the Federal Energy Regulatory Commission and governmental authorities in Canada.

NERC's recent assessment – *Potential Reliability Impacts of EPA's Proposed Clean Power Plan* – examines the potential reliability aspects resulting from its anticipated implementation. In order to continue operating the bulk power system safely and reliably, more detailed and thorough analysis is needed to determine whether the assumptions are feasible and consistent with the requirements of bulk power system reliability. This assessment provides the foundation for future reliability analyses and evaluations required by the electric reliability organization, stakeholders and federal and state policy makers to ensure the system maintains reliability. The stated goal of these studies was to create a framework with realistic timelines that accommodate the expected infrastructure deployments needed to support bulk power system reliability, while achieving the claimed objectives of the Proposed Rule.

The Proposed Rule would substantially accelerate that shift and proposes a very different mix of power resources than exists today. NERC expressed concern with the Proposed Rule that there must be further detailed engineering analysis to demonstrate whether the assumptions and targets are feasible in the timeframe proposed. NERC plans to provide additional information on the Proposed Rule in the *NERC 2014 Long-Term Reliability Assessment*, expected to be released soon, which provides a forward looking and independent perspective on the adequacy of generation, demand-side resources and transmission systems needed to maintain and enhance reliability over the next 10 years. Again, EPA should not finalize the Proposed Rule in the absence of this critical analysis. NERC also plans to conduct three additional assessments as the rule is finalized and implemented, including an analysis that provides a more detailed examination of generation and transmission adequacy and reliability impacts in 2015.

VII. THE PROPOSED RULE THREATENS TO CIRCUMVENT THE COMMISSION'S RESOURCE PLANNING AUTHORITY

The interplay of federal and state jurisdiction over the generation, transmission, and sale of power is an established legal field. The federal government exercises jurisdiction over the interstate transmission of electricity and sales of power for resale.⁹ However, it is a well-settled principle of law that the states retain jurisdiction and control over generating facilities and intrastate electric reliability determinations associated therewith. The Federal Power Act (FPA) explicitly states that its jurisdiction shall “extend only to those matters which are not subject to regulation by the States” and “shall not have jurisdiction . . . over facilities used for the generation of electric energy.”¹⁰

In short, the individual states (like North Dakota) retain ultimate authority for determining the adequacy of their power generation resources.¹¹ In determining the adequacy and reliability of its system, North Dakota must balance various public interest concerns and technical considerations to maintain sufficient and efficient service at just and reasonable rates. The overarching technical and policy concern in this area is the appropriate generation mix to be employed by jurisdictional utilities. The Proposed Rule severely invades North Dakota's authority to make such determinations.

Utility generation assets are long-lived, and the decisions to invest in those assets are preceded by a rigorous investigation of alternatives in order to assure that the utility's duty to serve is fulfilled at the lowest reasonable cost to customers. In North Dakota, IRP process results in long-range plans that seek the optimal combination of resources to meet forecasted load requirements at the lowest reasonable cost. The Proposed Rule ignores the existing rigor of the North Dakota IRP process and the state level decisions and orders that govern it, in an attempt to decree a new standard to which North Dakota would have to comply.

Once utility assets are placed in service, that investment is ratably charged back to customers so long as the asset remains “used and useful” in the provision of utility service. Over time, assets may become less efficient, not have the same capabilities as other assets of more recent design, or have operating expenses that differ from the estimates made when the asset was new. But those circumstances do not prompt the premature retirement of those assets. Instead, state Commissions closely evaluate and monitor resource types, capacity, fuel usage and cost, condition of the resources, anticipated retirements, and have investigated the prudence of additional capital investments to improve unit efficiency and lower emissions for years in advance, all for the benefit of customers. Various scenarios and sensitivity analyses are

⁹ Federal Power Act, 16 U.S.C.A. § 824(a).

¹⁰ 16 U.S.C.A. § 824(a) & 824(b)(1).

¹¹ See also, Resolution Relating To the Federal/State Jurisdictional Boundaries in Setting Generation Resource Adequacy Standards, Adopted by the National Association of Regulatory Utility Commissioners (NARUC) Board of Directors, July 27, 2005, <http://www.naruc.org/Resolutions/FederalStateBoundarie>.

conducted, major assumptions are reviewed, and revenue requirements are evaluated to determine the incremental impacts of changed circumstances. The Commission engages in an ongoing and iterative regulatory process that allows for careful planning and review, and timely reaction to the dynamic changes in load characteristics and resource mix.

Capacity additions are made under these process guidelines and are traditionally secured from the asset type that provides the most benefit to customers at the least cost, while satisfying the need for adequate and reliable service. Uneconomic choices are discarded in favor of the more economic and reasonable options. State IRPs, and specifically the North Dakota IRP process, is established to allow the utility, customers, other stakeholders and the Commission to review the planning assumptions, projected fuel costs, and resource options with sufficient frequency to adjust to changes in technology, fuel prices, economic conditions, and other factors in a reasoned way. Orders and directives of the Commission, including this inclusive stakeholder process, would be discarded by the Proposed Rule, in favor of a system of arbitrary goals built on inaccurate information and disregard for the proper functioning of the electricity system, all to the detriment of North Dakota, the Commission, utility customers and other stakeholders.

The Proposed Rule would provide EPA with authority to exercise federal jurisdiction over the most fundamental elements of the electric industry in North Dakota including basic generating resource decisions from constructing new resources to closing existing plants (and everything in between), as well as matters specific to retail issues. However, a fundamental tenet of the FPA is the express division of authority between the state and federal governments over issues of generation, transmission, distribution, and sale of electricity. 16 U.S.C. §§ 824 et seq. (2012).

The FPA acknowledges that “Federal regulation ... extend[s] only to those matters which are not subject to regulation by the States[,]” thus preserving the traditional role of the states. *Id.* at 824(a); The FPA, FERC and the U.S. Supreme Court collectively establish that there is a “bright line” that places these issues squarely within state authority, and deny the federal government or its agencies the power to regulate in these arenas. *See Fed. Power Comm ‘n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (“FPC v. SCE”). Thus, local service issues, including reliability of local service, authority over integrated resource planning, the need for additional generating capacity, the type of generating facilities to be permitted, and demand-side management, as well as the power to impose retail stranded cost charges, ratemaking, and even matters of retail transmission are all within the exclusive province of the states. *Id.*; *New York v. FERC*, 535 U.S. 1 (2002) (citing Order No. 888, at 31,782, n.543 and n. 544); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm ‘n*, 461 U.S. 190, 212 (1983); *see also, e.g., Electric Power Supply Ass ‘n v. FERC*, 753 F.3d 216, 224 (D.C. Cir. 2014) (“the Federal Power Act unambiguously restricts FERC from regulating the retail market”). Most if not all — of the programs in building blocks 2-4 are within the exclusive purview of state regulators, including rate making and resource planning. *See N.D.C.C. 49-02 et. seq.* These programs have been developed pursuant to well-established state sovereign

powers over matters relating to electricity regulation, including determining the appropriate mix of generating resources within a state consistent with state energy policies. *See New York v. FERC*, 535 U.S. 1 (2002).

The Proposed Rule and its building block approach completely disregard not only the historic legal role of the Commission, but the plain language of the FPA and Supreme Court rulings defining the line between state and federal regulation of the electric utility industry.

VIII. THE PROPOSED RULE WOULD IMPROPERLY COMMANDEER AUTHORITY HELD BY NORTH DAKOTA AND THE COMMISSION

No federal agency may exercise regulatory jurisdiction not delegated to it by Congress, delegated instead to another federal agency or reserved by the Constitution to the states.¹² With respect to electricity, the question is which sovereign controls, the state or federal government? After decades of refinement, the lines of authority are clear. The regulation of utilities “is one of the most important functions traditionally associated with the police power of the states.”¹³ Moreover, “States retain the exclusive authority to regulate the retail market.”¹⁴ Although there is a federal role in regulating the transmission of wholesale power, Congress has delegated that to the FERC, not the EPA. Accordingly, the EPA has no authority over the generation, transmission and dispatch of electricity.

For the EPA to impose the last three building blocks on North Dakota, EPA must either entice North Dakota to take political ownership of the rigid, federally prescribed emissions requirements, or EPA must succeed in forcing North Dakota to implement a national, top-down emissions reduction program that compels the use of renewables, consumer conservation measures and the virtual elimination of lignite and other types of coal as a fuel.

In an exercise in creative labeling, the Proposed Rule uses terms like “flexible,” “goals,” “targets” and “guidelines” to suggest deference to North Dakota. At the center of the Proposed Rule, however, is an inflexible mandate. The Proposed Rule declares that “because the state goals are an integral part of the emission guidelines the framework regulations authorize the EPA to establish, the goals are binding, and the states, in their CAA Section 111(d) plans, must meet those goals.”¹⁵ In its State Plan Considerations Technical Support Document, issued in June, EPA declares on page 13 that state plans “will need to ... [p]rovide a mechanism(s) for legal action if affected EGUs are not in compliance.” The EPA directs that these enforcement schemes could include “legislation directing state executive branch agencies or independent state

¹² *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006).

¹³ *Arkansas Elec. Coop. Corp v. Arkansas Pub. Serv. Com.*, 461 U.S. 375, 377 (1983).

¹⁴ *Electric Power Supply Ass’n v. FERC*, 753 F.3d 216, 222 (2014).

¹⁵ 79 Fed. Reg. at 34898 (emphasis added).

authorities to follow through on obligations under a state plan.”¹⁶ The Proposed Rule contains other similar directives.¹⁷

To protect federalism, the Supreme Court of the United States has barred the federal government from usurping the authority of the states,¹⁸ and has prohibited state officers from being forced to administer federal programs.¹⁹ The federal government may not “compel the states to enact or administer a federal regulatory program.”²⁰ The Supreme Court’s “anti-commandeering” doctrine began with District of Columbia v. Train. In Train, the Supreme Court found similar EPA overreach of constitutional proportions.²¹ Following decisions by the Fourth and Ninth Circuits, which separately struck down the EPA’s vehicle emissions rules on statutory grounds²² in order to avoid resolving what the Supreme Court has described as “grave constitutional problems,”²³ the D.C. Circuit invalidated the EPA’s auto regulations on both statutory and constitutional grounds. That Court rejected the EPA’s attempt “to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program.”²⁴

District of Columbia v. Train repudiated “the novel approach of empowering a federal agency to order unconsenting states to enact state statutes and regulations, thereby converting state legislatures into arms of the EPA.”²⁵ When EPA admitted the unsoundness of the auto emissions rule, the Supreme Court vacated and remanded it for consideration of mootness.²⁶ Since Train, the anti-commandeering doctrine has grown in significance. In 1997, the Supreme Court ruled that “[t]he federal government may neither issue directives requiring the states to address particular problems, nor command the states’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”²⁷ In 2012, the Sixth Circuit

¹⁶ State Plan Considerations Technical Support Document (EPA-HQ-OAR-2013-0602-0463) at 17 (June 18, 2014).

¹⁷ See e.g., 79 Fed. Reg. at 34837 (“In this action the EPA is proposing state-specific, rate-based goals that state plans must be designed to meet.”); id. at 34833 (“While this proposal lays out state-specific goals that each state is required to meet, it does not prescribe how a state should meet its goals.”); id. at 34835 (“On the other hand, [o]nce the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO2 goal.”).

¹⁸ See *Printz v. United States*, 521 U.S. 898, 925 (1997).

¹⁹ *New York v. United States*, 505 U.S. 144, 188 (1992).

²⁰ *Id.* at 144.

²¹ See *Printz*, 521 U.S. at 925.

²² See *Maryland v. EPA*, 530 F.2d 215, 226 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 838-42 (9th Cir. 1975).

²³ *Printz*, 521 U.S. at 925.

²⁴ *Train*, 521 F.2d at 974, vacated and remanded as moot sub nom. *EPA v. Brown*, 431 U.S. 99 (1977) (per curiam).

²⁵ *Id.* at 984.

²⁶ *EPA v. Brown*, 431 U.S. 99 (1977).

²⁷ *Printz*, 521 U.S. at 935.

applied anti-commandeering principles to hold that state officials could not be enjoined to enforce, or penalized for nonenforcement of, the provisions of a state implementation plan that the state elected to no longer enforce, despite the EPA's rejection of its request to amend.²⁸

With the Proposed Rule, EPA is pressing states to incorporate into state plans assurances that the states will alter their laws to provide for enforcement under state police power. The Proposed Rule presumably pursues this route because EPA cannot itself promulgate the Proposed Rule as a federal implementation plan since Congress has not given EPA any authority over power generation or distribution. Instead, the Proposed Rule relies completely on trying to leverage state authority EPA cannot command. Because EPA lacks state police powers and because one state legislature cannot bind future state legislatures, the rule cannot work nationally as intended, and thus runs the risk of being regarded as inherently arbitrary and capricious.²⁹ The federal government may entice states to cooperate with federal programs, but only if that partnership preserves true choice for the states. While Congress could use its power under the Commerce Clause to preempt state law with federal law that is federally administered, it has not done so with respect to state authority over retail power.

IX. THE PROPOSED RULE INTERFERES WITH THE COMMISSION'S ABILITY TO ADDRESS SIGNIFICANT PROJECTED DEMAND FOR INCREASED POWER GENERATION IN NORTH DAKOTA

North Dakota is experiencing double-digit load growth in the western portion of the state due to the development of the Bakken oil reserves. The North Dakota Transmission Authority (NDTA) commissioned Kadrmas, Lee and Jackson, Inc. (KLJ), an engineering, surveying and planning firm, to complete the Williston Basin Oil and Gas Related Electrical Load Growth Forecast (PF 12) and project future electrical load growth in the 43-county Williston Basin area. (See Attachment C).

The Study forecast an expected electrical load growth for the next 20 years, from 2012 to 2032, in the study area which spans regions across North Dakota, South Dakota and Montana. Numbers and figures were calculated from a demand amount averaged between historically observed energy use values and maximum oilfield electrical load requirements, and represent the study's most likely (consensus) scenario. Energy use for prior years was provided by the Partners and used to establish a 2011 baseline.

By the end of the study period in 2032, the 43 counties within the Williston Basin are projected to require 2,512 megawatts (MW) of additional electrical demand, related to oil and

²⁸ *Sierra Club v. Korleski*, 681 F.3d 342, 348–50 (6th Cir. 2012).

²⁹ *Independent Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (“An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”); see *Public Serv. Co. of N. Mex. v. Federal Energy Regulatory Comm'n*, 653 F.2d 681, 692-93 (D.C. Cir. 1981) (“Indeed, uniform application of a properly established principle is often the means by which an agency avoids arbitrary and capricious action.”).

gas development, to accommodate population growth, new ancillary business development and more than 30,000 additional wells.

The results of the extensive Study will be used by the State of North Dakota and certain utilities to effectively plan for critical infrastructure needs and development in North Dakota, South Dakota and Montana. The study and report includes analysis of petroleum-sector commercial and industrial development, employment, population growth and secondary employment. The Commission shares EPA's concern that "state plans for emission reductions ... must be consistent with a vibrant and growing economy and supply of reliable, affordable electricity to support that economy."³⁰ Efficient existing lignite-fueled baseload electric generation facilities should not be prohibited by the Proposed Rule from being available for meeting the substantial electrical demands in North Dakota. The Proposed Rule directly threatens the ability of existing lignite generation to address these demands.

X. THE PROPOSED RULE WILL IMPOSE ADVERSE INTERSTATE CONSEQUENCES

The Proposed Rule assigns disparate carbon emission rates to States whose utilities are engaged in interstate operations and markets. This circumstance presents further concerns and complications. The different State requirements create difficulties for interstate electrical facilities and markets that, even if workable, could force fundamental changes to an industry that serves as the backbone for North Dakota and the national economy. Although such changes have the potential to compromise reliable electric service at just and reasonable rates for customers, the Proposed Rule fails to provide meaningful guidance on how to reconcile disparate carbon emission rates with the interstate nature of the electric industry. Some of the interstate complications are identified below.

A. Treating States Differently Creates the Potential for Additional Stranded Costs Associated With Multi-State Operations.

Electric utilities whose operations traverse state boundaries are often obligated under state franchises and laws to serve retail customers in multiple States. Such multi-state obligations necessitate the construction and operation of facilities located in and across more than a single State. Thus, in addition to North Dakota's requirements under the Proposed Rule, North Dakota may be affected by the carbon emission rates set in, for example, Montana, South Dakota, and Minnesota. If, like North Dakota, those States are not allocated reasonable emission rates and flexibility for achieving compliance, North Dakota residents and businesses may face additional stranded costs and additional costs for the construction and operation of new generation needed to replace affected generation located outside of North Dakota.

³⁰ 79 Fed. Reg. 34,837. See also 79 Fed. Reg. 34,844 ("The U.S. economy depends on [the electric] sector for a reliable supply of power at a reasonable cost.").

B. The Proposed Rule Fails To Address Conflicts With FERC-Regulated Electric Markets Used To Establish Just and Reasonable Rates.

For many years, the federal government has been actively encouraging, and in some instances requiring, the regional and inter-regional coordination of electric industry construction, operation, and markets. FERC has aggressively encouraged the creation and membership in regional transmission organizations (“RTOs”).³¹ FERC has also recently required all transmission owning utilities to participate in regional transmission planning similar to that which occurs in RTOs.³²

The tension between FERC’s regional accomplishments and EPA’s Proposed Rule, including that regulation’s disparate treatment of States, is undeniable. The Proposed Rule challenges the regional economic dispatch currently employed. Under the Proposed Rule, CO₂, dispatch considerations may vary from State to State. Additionally, States must make significant decisions about whether fossil-fuel units will be forced to retire or operate under substantial environmental constraints, both of which can detrimentally affect reliability and customer rates regulated by FERC.

Accordingly, if States (or utilities) are not provided sufficient assurance that environmental compliance can work in a regional market, much of FERC’s progress building those markets will be undermined. Yet, as discussed below, the Proposed Rule fails to provide the States with meaningful guidance on how to reconcile the federal environmental requirements of the Proposed Rule that conflict with federally approved markets, ratemaking standards, and reliability requirements implemented under the Federal Power Act.

1. Regional Unit Dispatch May Be Forced To Occur on an Environmental Basis Rather Than on an Economic Basis.

In the region where North Dakota is located, the foundation of energy markets is economic dispatch. The objective of economic dispatch, which North Dakota utilities used long before RTO integration, is to optimize the electric system for the purpose of minimizing costs to customers.³³

³¹ See, e.g., *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 71 Fed. Reg. 43,294 (2006), *order on reh’g*, Order No. 679-A, 72 Fed. Reg. 1152 (2007), *order denying reh’g* 119 FERC ¶61,062 (2007).

³² See *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶61,132 (2012), *order on reh’g*, Order No. 1000-B, 141 FERC ¶61,044 (2012).

³³ For purposes of directing a 2005 study, Congress defined economic dispatch as “the operation of generation facilities to produce energy at the lowest cost to reliably serve consumers, recognizing any operational limits of generation and transmission facilities.” 42 U.S.C. §16,432.

Limits to the operation of fossil-fuel units due to changes to environmental permits are also expected to result from the Proposed Rule.³⁴ Substantial permit limitations may force environmental dispatch, rather than the economic dispatch long used in North Dakota and most other parts of the country. This would be a significant change of course for most of the industry. As explained by FERC Commissioner Clark, “[t]o go beyond [the past practice of allowing incurred costs to be included in economic bids] by changing the fundamental market dispatch algorithms in the ways some have suggested would be a major change, to say the least.”³⁵ FERC Commissioner Philip Moeller echoed the significance of such a shift, recognizing that “markets would need to be fundamentally altered and redesigned to implement EPA’s proposal to accommodate environmental dispatch...Changing from economic dispatch to environmental dispatch is truly a fundamental change that would require a complete redesign of markets to include essentially a carbon fee on any resources that emit carbon dioxide.”³⁶

If the Proposed Rule requires a change in the objective of regional unit commitment and dispatch from cost minimization to environmental policies, economic dispatch would be supplanted by environmental dispatch. The complexity of re-dispatching a system that has been constructed and operated under a different regulatory and market paradigm is substantial. Given all the operational complexities, and the 2020 date when compliance obligations begin, it is difficult to envision how the Proposed Rule can accommodate economic dispatch. Similarly perplexed is FERC Commissioner Moeller, whose agency has oversight over the markets that currently are based on economic dispatch. Commissioner Moeller has succinctly stated: “[i]t is not clear ... how State compliance plans could be implemented in electricity markets.”³⁷

2. CO₂ Dispatch Considerations Vary From State to State.

Each State must determine for itself how to comply with the Proposed Rule, which, as discussed above, may require significant dispatch constraints. The nature and magnitude of operational constraints pursued are likely to vary from State to State since each State’s generation facilities and carbon emission rates are different.

The effect of environmental dispatch or permit limits on the operation of generating units that emit carbon would extend well beyond those units. To replace a unit’s economic energy during restricted periods, other supply resources would have to be able and available to increase energy production (during peak and non-peak periods). For example, this dynamic, if feasible in an area, could occur through re-dispatch of additional natural gas to replace coal, as contemplated by the Proposed Rule.

³⁴ 79 Fed. Reg. 34,862.

³⁵ Written Statement of the Honorable Tony Clark, FERC Commissioner, to the U.S. House Committee on Energy and Commerce at 3 (July 29, 2014).

³⁶ Written Statement of the Honorable Philip Moeller, FERC Commissioner, to the U.S. House Committee on Energy and Commerce at 3 (July 29, 2014).

³⁷ *Id.*

And, as is almost always the case, location is critical for maintaining a reliable system for customers. For the energy from non-economic generation units able and available to increase production necessary to meet customer demand during times when the operation of other units is restricted, the unrestricted (or less restricted) units must be properly located.

How this can be accomplished under the Federal Power Act is unclear. The Proposed Rule asserts that States “would have authority to impose measures such as ... dispatch limits.”³⁸ However, for States in RTO regions, as North Dakota is, dispatch is coordinated not by the States, but by the RTO.³⁹ FERC Commissioner Clark has stated that “States do not have authority to unilaterally compel dispatch of a unit in a FERC jurisdictional wholesale market.”⁴⁰ And FERC Commissioner Moeller has stated that it is not clear “how an RTO could prioritize various State Implementation Plans over its own market dispatch.”⁴¹ Thus, the States face significant jurisdictional uncertainty about their ability to achieve compliance through environmental permit limitations and the re-dispatch necessary to operate within such limitations.

3. Regional CO2 Markets Will Be Difficult to Establish Because of the Unlawful and Disparate State Targets.

Parts of the Proposed Rule encourage the States to band together to achieve compliance on a regional scale. However, the inequity of the disparate carbon emission rates and the uncertainty regarding compliance make it difficult to envision how this will happen. By assigning disparate State emission rates, the Proposed Rule tilts the playing field against States that, like North Dakota, are assigned excessively low carbon emission rates for existing units below the emission rates required of new units. That the Proposed Rule seeks to aggressively and unlawfully expand the scope of the Clean Air Act beyond resources that generate power and emit pollutants further complicates attempts at regional compliance through cooperation. Those aspects of the Proposed Rule in particular appear to invite litigation rather than cooperation.

XI. THE COMMISSION IS CONSTRAINED IN ITS ABILITY TO FULLY COMMENT ON THE PROPOSED RULE

The Commission has evaluated the technical documents released by EPA in support of the Proposed Rule. The responses to the technical issues raised in the Proposed Rule contain the preliminary results of that evaluation, but the Commission reserves the right to supplement and correct the responses herein based on further evaluation. The Proposed Rule is complex, and the

³⁸ 79 Fed. Reg. 34,888.

³⁹ *Id.* (“On the regional level, ISO/RTOs control dispatch and are responsible for reliable operation of the bulk power system.”).

⁴⁰ Written Statement of the Honorable Tony Clark, FERC Commissioner, to the U.S. House Committee on Energy and Commerce at 4 (July 29, 2014).

⁴¹ Written Statement of the Honorable Philip Moeller, FERC Commissioner, to the U.S. House Committee on Energy and Commerce at 4 (July 29, 2014).

supporting information includes modeling inputs, databases, analyses, and other information that appears to be incomplete, or that cannot be fully evaluated without access to additional information not placed in the EPA rulemaking docket.

XII. CONCLUSION

The Commission provides these comments on the Proposed Rule because it is not consistent with the federal Clean Air Act and because the framework set forth in the Proposed Rule would fundamentally intrude upon traditional powers reserved to the State of North Dakota and the Commission. Further, even if EPA had the authority to promulgate a final rule based on the building block approach set forth in the Proposed Rule, the technical basis for the calculation of the North Dakota CO₂ emission requirements in that proposal contains numerous serious errors. For all of the reasons set forth above, the Commission believes that the Proposed Rule is flawed, and should not be finalized. Should EPA choose to address the several infirmities in the Proposed Rule, an entirely new proposal should be made the subject of a future public notice and comment period.

Sincerely,

Brian Kalk,
Chairman

Julie Fedorchak
Commissioner

Randy Christmann
Commissioner

cc: Honorable Jack Dalrymple, Governor
Terry Dwelle, Director North Dakota Department of Health
Wayne Stenehjem, North Dakota Attorney General