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August 3, 2011

United States Environmental Protection Agency
EPA Docket Center
Mail Code: 2822T
1200 Pennsylvania Ave, NW
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OAR-2009-0234

Re: National Emission Standards for Hazardous Air Pollutants from Coal-and-Oil-Fired
Electric Utility Steam Generating Units

Dear Administrator Jackson,

The North Dakota Public Service Commission (NDPSC) submits these comments on the Environmental Protection Agency's (EPA) proposed Utility MACT rule, as published in the Federal Register on May 3, 2011. The NDPSC appreciates the opportunity to provide its input related to the proposed rule.

The NDPSC is responsible, inter alia, for the regulation of the rates, terms and conditions of retail electric service provided by investor owned utilities in the State of North Dakota. We take this responsibility very seriously, and place a high priority on the availability of reliable and affordable electricity to North Dakota citizens. As economic and reliability regulators, the comments of the NDPSC do not attempt to speak to quantification of environmental costs and benefits associated with the proposed rule, rather they seek to highlight issues related to the operations of the electricity system.

Background

The NDPSC regulates three utilities that generate coal-based electricity from a total of twelve electric generating units (EGUs) that will be affected by the proposed Utility MACT. Three of these EGUs are in North Dakota, while nine are located in neighboring states. These

utilities estimate incurring a total of \$116.2 million in capital costs to comply with the proposed Utility MACT. While there are no indications that the proposed rule would single-handedly cause any unit retirements, it has been identified as a contributing factor in the planned retirement of two of these twelve units, resulting in 253 megawatts that must be replaced. Utilities have indicated that additional EGUs may be retired depending on the details of interrelated environmental regulations, including the proposed Utility MACT.

The costs associated with Utility MACT compliance and the replacement of retired capacity would ultimately be borne by ratepayers throughout these utilities' service areas, including North Dakota. The utilities anticipate rate increases that are directly attributed to the proposed Utility MACT rule. Two utilities expect rate increases in the range of four to eight percent, adding roughly four dollars to the average North Dakotan's monthly bill. The third utility approximates that a typical North Dakota customer could expect a rate increase of roughly two dollars per month.

The following comments are based on our analysis of the proposed rule and information obtained from the utilities within our jurisdiction.

1. The proposed rule does not adequately account for other proposed or anticipated interrelated rulemakings and their cumulative effect on the industry and economy.

The NDPSC is concerned that the estimated costs and effects of the proposed Utility MACT rule do not adequately account for other emission regulations and their collective effect on the industry and economy. EPA claims that the proposed rule will cost \$10.9 billion per year, while creating social benefits of \$42 to \$140 billion.¹ Other analyses have suggested that the social costs attributed to the Utility MACT may be much more severe when considering the cumulative impact of interrelated emission regulations on the coal-fired electric industry.

Executive Order 13563, issued January 18, 2011, provides that agencies must "take into account, among other things, and to the extent practicable, the costs of cumulative regulations."² EPA's approach to this particular rule does not follow this Order. While the Utility MACT estimates costs of compliance and anticipated retirements, it is the collective impact of all emission regulations affecting EGUs that the industry fears will create a snowballing cost effect, ultimately taking utilities to a point where they would have been better off investing in other base load generation sources. The proposed Utility MACT rule does not account for these concerns,

¹ 76 Fed. Reg. 24979.

² Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

and the resulting uncertainty places utilities in a very disagreeable position in terms of generation planning.

EPA's failure to consider the cumulative effects of interrelated rules is evidenced by indications that the Utility MACT, alone, would not cause any unit retirements by the utilities within the NDPSC's jurisdiction, but various environmental regulations will collectively retire two units, and possibly more. Utilities have further indicated that, while the replacement of retired units will create temporary construction jobs, these retirements will actually produce a net decrease in the full-time work force needed to operate and maintain new units.

The NDPSC believes that EPA should reassess the costs and impacts of the proposed rule, paying close attention to how all regulations affecting EGUs may affect the electric industry and the national economy.

2. The proposed rule's "total" particulate matter (PM) limit should be replaced with a "filterable" PM limit.

The ultimate goal of CAA Section 112(n), under which the proposed rule is promulgated, is to reduce mercury emissions from EGUs. The Utility Study conducted pursuant to CAA Section 112(n)(1)(A) determined that "Hg from coal-fired EGUs was the HAP of greatest potential concern"³, yet the proposed rule overwhelmingly relies on PM-related benefits to justify its costs. EPA estimates that only \$450,000 to \$5.9 million of proposed rule's estimated benefits are attributed to mercury (Hg) reductions, while \$53 to \$140 billion may be derived from PM reductions.⁴ The NDPSC believes that EPA has improperly extended the application of Section 112(n)(1)(A) and the 2000 determination that regulation of HAP emissions from EGUs was "appropriate and necessary" to apply to the unreasonably strict regulation of PM.

Despite the fact that PM is not a pollutant listed by Section 112, nor is it a surrogate for mercury, legal precedent has determined that EPA may use a surrogate to regulate other HAP metals under Section 112 if it is "reasonable" to do so.⁵ In the Utility MACT rule, EPA proposes the implementation of a "total" PM limit, which undoubtedly contributes to a large portion of the rule's estimated costs, as utilities would be required to replace existing PM controls with costly fabric filters.

³ 76 Fed. Reg. 24981.

⁴ 76 Fed. Reg. 24979.

⁵ National Lime Association v. EPA, 233 F.3d 625 (2000).

The NDPSC urges EPA to evaluate whether a “total” PM limit is “reasonable”, when a less-restrictive and more cost-effective “filterable” PM limit has been determined to sufficiently reduce HAP metals by the Boiler MACT rule. We also encourage EPA to consider the overall objective of Section 112(n) to reduce mercury emissions while considering the call of Executive Order 13563 to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs.”⁶

3. The proposed rule’s HAP-by-HAP approach to setting standards for new units makes the construction of new coal-fired power plants virtually impossible.

Utilities and consultants suggest, and the NDPSC agrees, that EPA’s proposed emission standards for new EGUs produce requirements so stringent that new units cannot be built to comply. The proposed rule relies on selected data reflecting the best performing unit with regards to each pollutant, regardless of the type of coal burned, pollution controls being used, or boiler type or size. The emission limit, or MACT floor, is proposed to be set so that EGUs must meet the best possible control for each individual pollutant. This pollutant-by-pollutant approach was determined to be reasonable for the Boiler MACT because there was “no technical problem in achieving the floor levels contained in the final rule for each HAP simultaneously.”⁷

The pollutant-by-pollutant, or “cherry-picked”, approach is not reasonable for the proposed Utility MACT, as EPA does not have data to suggest that *any* unit can meet each individual MACT floor. Further, the proposed MACT floors for new units are based on mutually inconsistent control technologies, as the building and operation of one pollutant control technology may preclude the operation of another.

The NDPSC urges EPA to replace its proposed pollutant-by-pollutant standards for new units with MACT floors that do not unreasonably prohibit the development of new coal-fired units.

4. The proposed rule does not offer a reasonable timeline for compliance.

The proposed rule’s three-year compliance timeline, with the possibility of uncertain one-year extensions, does not provide utilities with adequate time to install the emission controls required by the rule. Utilities speculate that competition for control resources and installation services will extend compliance operations well-beyond the proposed deadline. Additionally, the individual case-by-case approach for one-year extensions to the compliance period does not

⁶ E.O. 13563, *supra*.

⁷ 76 Fed. Reg. 15621.

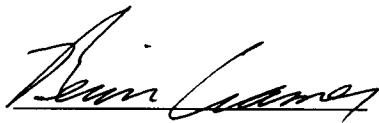
provide utilities with the certainty necessary for strategic planning in terms of investments and planned outages.

We believe that more flexibility for compliance, including greater certainty on any extensions, would be most helpful to achieve compliance in the most cost-effective manner and to minimize impacts on the affordability and reliability of service to ratepayers.

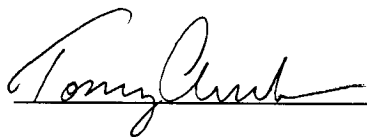
Conclusion

Because the proposed Utility MACT rule is so technically complex and its implications are so far-reaching, the NDPSC believes that EPA should take the time necessary to ensure that its assessment of the potential costs and benefits of the rule are as fully informed as possible. A reasonable extension of the evaluation period and rulemaking deadline would afford EPA with the opportunity to fully appraise the numerous important concerns that are being raised by the electric industry and regulators alike, which should be of the utmost importance during the nation's current economic difficulties.

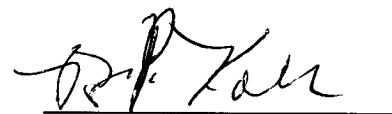
Sincerely,



Kevin Cramer
Commissioner



Tony Clark
Chairman



Brian P. Kalk
Commissioner