

-Info-Public Service Commission

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Subject: Otter Tail Power Company's Response to ND PSC Order on 111d
Attachments: Response to ND PSC Order on 111d.pdf

Attached please find Otter Tail Power Company's Response to ND PSC Order on 111d.

If you have questions, please direct them to Mark Bring at mbring@otpc.com or (218) 739-8922.

Thank you.

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**STATE OF NORTH DAKOTA
BEFORE THE
PUBLIC SERVICE COMMISSION**

**Public Service Commission
EPA Proposed 111d Regulations
Information**

Case No. AD-14-736

**Otter Tail Power Company's Comments to Order Directing Response
to Certain Questions**

Otter Tail Power Company representatives participated in the Commission's January 22, 2014 "Symposium on EPA Carbon Regulation", the August 19, 2014 workshop to investigate the effects of the EPA's Proposed section 111(d) Rule, and the September 10, 2014 conference entitled "Electric Reliability: Keeping the Lights on in North Dakota."

On October 8, 2014, the Commission issued an Order in the above-referenced matter, ordering utilities to submit comments addressing issues identified in several questions set forth in the Order. According to the Commission's Order, information received by the Commission will be used when preparing the Commission's comments on the U.S. Environmental Protection Agency's (EPA) proposed regulation entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (Proposed Rule), 79 Fed. Reg. 34830 (June 18, 2014).

Otter Tail Power Company now respectfully submits the following written responses to the questions set forth in the Commission's Order.

QUESTIONS

- a. Do you agree or disagree with the methodology EPA used to calculate North Dakota's proposed emissions reduction goal?

Otter Tail disagrees with the methodology EPA used to calculate North Dakota's proposed emissions reduction goal. The individual building blocks EPA proposes as the “best system of emission reductions” (BSER) are arbitrary, capricious, and contrary to law.

In the Proposed Rule, EPA stretches the statutory term “system of emission reduction” beyond all recognition, transforming what previously has been interpreted as a term referring to technological and operational improvements *at a specific electric generating unit* (EGU), into something that would authorize EPA to take command of the entire electric grid. Under the guise of section 111(d) of the Clean Air Act, EPA attempts not only to require heat-rate improvement projects at coal-fired EGUs under building block 1 (which may be legally permissible, if technically feasible) but also to require re-dispatch of power from coal-fired EGUs to lower-emitting natural gas-fired EGUs under building block 2, re-dispatch from fossil fuel-fired EGUs to zero-emitting renewable energy sources under building block 3, and increase demand-side energy efficiency under building block 4. Put another way, EPA proposes a definition of BSER which allows it to unlawfully: (1) require “outside the fenceline” reductions from sources other than the “affected facility”; (2) require reductions from facilities and measures beyond the regulated source category; and (3) define reductions or elimination in demand for a good (i.e., electric energy) as a means of controlling emissions associated with the production of that good.

- b. Do you agree or disagree that the statewide “goal” established by EPA for North Dakota is really an enforceable requirement, if finalized?

Because EPA’s Proposed Rule would usurp the role the Clean Air Act reserved for states, and unlawfully prescribe binding specific emission goals for each state, Otter Tail disagrees that the statewide “goal” established by EPA for North Dakota is an enforceable requirement, if finalized.

Section 111(d) of the Clean Air Act assigns federal and state regulators distinct and separate, but complementary, responsibilities in the process of regulating air pollutant emissions from existing sources, thus embodying the principle of cooperative federalism. EPA violates both the plain text of the statute and the fundamentals of this cooperative federalism principle in the Proposed Rule by usurping functions the Clean Air Act plainly reserves to the States.

The Clean Air Act limits EPA's role in regulating existing sources to three tasks: setting a "procedure," identifying BSER, and providing a federal plan where a State fails to submit a compliant plan of its own. In particular, the Clean Air Act instructs EPA to establish procedures by which each State submits a plan establishing standards of performance for existing sources within its borders. The Clean Air Act instructs EPA to determine BSER by identifying a finite, adequately-demonstrated system of emission reductions upon which the States are to rely in setting the applicable standards of performance.

Section 111(d) reserves to the *States* the power to establish the "standards of performance" for existing sources based on EPA's designated BSER, and to apply those state-developed standards to existing sources on a unit-by-unit basis. Unlike the new source category under section 111(b) (for which EPA itself is authorized to establish the performance standard) *only States* can establish standards of performance for sources in an existing source category under section 111(d).

In the Proposed Rule, EPA usurps the role the Clean Air Act created for the States, unlawfully prescribing binding specific emission goals for each State, which are then relegated to the role of mere functionaries, implementing the substantive standards of performance and binding statewide emission reduction goals EPA has established. If a particular source within a State cannot feasibly or reasonably implement BSER as EPA has envisioned it, then States have

no power under the Proposed Rule to change the emission reduction goal EPA has set for it based on that inability. Instead, the State must either shut down or curtail that source's operation in violation of the statute's command that States be permitted to consider factors such as an existing facility's remaining useful life in determining whether or to what extent to apply a standard to it, or the State must shift the emission reduction burden to other sources inside the State (thus impermissibly subjecting those other sources to "BSER-plus"). This unprecedented interpretation of EPA authority cannot be reconciled with the plain text of the Clean Air Act or the principles of cooperative federalism it enshrines.

EPA has long recognized that its role in developing state-specific existing source emission guidelines is limited. In the preamble to EPA's 1975 rules establishing the framework for developing existing source emission guidelines, EPA explained that it used the term "emissions guidelines" rather than "limitations" to make it clear that the guidelines were not intended to be binding requirements but rather "criteria for judging the adequacy of State plans."¹ From the very beginning, then, EPA has recognized that its pronouncements are merely nonbinding "guidelines," and that the States are to set and apply the specific standards of performance.

With its Proposed Rule, EPA abandons its prior restraint and exceeds its statutorily-limited role of identifying appropriate procedures and a finite system of emission reductions that the States themselves are to consider in establishing and applying state-specific standards of performance for existing sources in a source category. Instead, EPA is unilaterally requiring the States to meet EPA-developed, state-specific emission reduction goals by 2030.

These goals are premised on EPA's faulty conclusions about the amount of emissions that may be eliminated through the maximum effective deployment of four disparate building

¹ 40 Fed. Reg. at 53,343 (Nov. 17, 1975).

blocks across the universe of existing sources within each State. In so doing, the Agency has set for the States precisely the type of binding “limits” that both the statute and EPA’s regulations prohibit. At the same time, it has left the States almost no ability to effectively consider the sorts of source-specific factors that Congress intended the States to be able to consider in applying the standards of performance they developed.

Accordingly, the Proposed Rule must be revised before it may be lawfully finalized. A lawful final emission guideline must be limited to identifying the BSER that the EPA has determined has been adequately demonstrated for coal- and gas-fired designated facilities and specifying the procedures for submission of state plans to establish and apply standards of performance.

- c. Do you agree or disagree EPA’s Proposed Rule is not consistent with Section 111(d) of the federal Clean Air Act and North Dakota statutes because it would take away the state’s primary authority for setting the emission standard?

Otter Tail agrees that EPA’s Proposed Rule is not consistent with section 111(d) of the federal Clean Air Act and North Dakota statutes because it would take away the state’s primary authority for setting the emission standard.

In stark contrast to section 111(b) of the Clean Air Act, which gives EPA the authority both to determine BSER and to establish the standards of performance for *new* sources in a category, section 111(d) assigns EPA only a limited role in regulating emissions of air pollutants from *existing* sources. Section 111(d) envisions the regulation of existing sources as a joint activity, carving out discrete and separate tasks for EPA and state authorities—an exercise in cooperative federalism. Under this section of the Clean Air Act, EPA determines BSER, sets the “procedures” under which States submit plans to implement BSER, and reviews those plans to

ensure that they comply with the Clean Air Act. The *States*, meanwhile, establish the actual standards of performance and apply those standards to each individual source in the State.

By establishing the standards of performance itself and specifying binding, statewide emission reduction goals, providing States with little leeway for determining how those standards apply to each individual existing source and no flexibility to adjust the emission reduction goals in the event that affected facilities cannot fully implement any element of BSER, EPA exceeds its lawful authority.

- d. Do you agree or disagree that the Proposed Rule conflicts with the Commission's statutorily-defined rate-setting and resource planning objectives?

Otter Tail agrees that the Proposed Rule sets up potential conflicts with the Commission's statutorily-defined rate setting and resource planning objectives. See response to Question a.

- e. Do you agree or disagree that the Proposed Rule would override the resource planning authority and discretion of the Commission?

See response to Question d. Whether or not the Proposed Rule (if finalized in its present form) would override the authority and discretion of the Commission is a legal question upon which the courts would be required to weigh federal law and Constitutional principles relating to American federalism.

- f. Do you agree or disagree that the Proposed Rule raises concerns about electric reliability in North Dakota?

Otter Tail agrees that the Proposed Rule generally raises concerns about electric reliability. EPA itself projects nearly 180 gigawatts of generation capacity will retire between 2010 and 2020 in response to the Proposed Rule and other factors, such as EPA's previously finalized Mercury and Air Toxics Standards (MATS) rule. Otter Tail is concerned about national and regional generation adequacy, capability of the natural gas pipeline system to

adequately supply additional natural gas generation, and the viability of the interconnected system with changing dispatch patterns (primarily due to reduced coal generation, increased natural gas generation, and increasing intermittent renewable generation). Otter Tail is without sufficient knowledge or information to agree or disagree that the Proposed Rule raises concerns about electric reliability in North Dakota specifically, but acknowledges that the state is experiencing increased electricity demand to serve load growth (primarily in the Bakken Shale) and that EPA proposals (including, but not limited to, EPA's proposed New Source Performance Standards under section 111(b)) limit utilities' flexibility to meet this increased demand.

- g. Do you agree or disagree that the Proposed Rule has a significant impact on North Dakota's ability to continue to use lignite and other coals as a low cost electricity generation option?

Otter Tail agrees that the Proposed Rule could have a significant impact on North Dakota's ability to continue to use lignite and other coals as a low cost electricity generation option. Fundamentally, the Proposed Rule would tend to require reduced coal-fired generation - - and increased natural gas generation, renewable generation, and energy efficiency.

Dated: October 27, 2014.

Respectfully submitted,

OTTER TAIL POWER COMPANY

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