IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

DECLARATION OF RANDEL D. CHRISTMANN

Case No. 15-1380

I, Randel D. Christmann, state and declare as follows:

1. My name is Randel D. Christmann. I am over 21 years of age and am fully competent and duly authorized to make this Declaration. The facts contained in this Declaration are based on my personal knowledge and are true and correct.

2. I am an elected Commissioner on the North Dakota Public Service Commission ("Commission"). I have held my office as a Commissioner since January 1, 2013.

3. The Commission is a state agency established 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. Ch. 49-01 et seq., Titles 60 and 64 and Chapters 24-01, 24-09, 38-14.1, 38-14.2, 38-18, and 51-05.1. 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 supervises 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.

4. The Commission has a statutory duty to ensure that North Dakotans receive a reliable supply of electricity at just and reasonable rates. Additionally, the Commission is responsible for determining whether to authorize generation and transmission infrastructure in North Dakota that is needed by jurisdictional utilities to provide reliable electric service to customers and is otherwise consistent with North Dakota law. North Dakota Century Code Chapter 49-03.

5. In my current position, I am familiar with the Final Rule promulgated by the U.S. Environmental Protection Agency ("EPA") ("Final Rule") entitled Carbon Pollution Emission Guidelines for Existing Stationery Sources: Electric Utility Generating Units. 80 Fed. Reg. 64662 (October 23, 2015).

6. This Declaration has been reviewed by the other two members of the North Dakota Public Service Commission, Commission Chairman Julie Fedorchak and Commissioner Brian Kalk. The Commission held a public meeting on October 23, 2015 and voted to unanimously endorse the content and filing of this Declaration as the official position of the North Dakota Public Service Commission.

7. EPA's requirements in the Final Rule for North Dakota, which are second only to Montana in stringency on a percentage basis, require a 45% reduction in North Dakota's statewide average carbon dioxide (CO_2) emission rate by 2030. However, interim steps have been established by EPA in the Final Rule that require a rate of 1,671 lb/MWh for the 2022-2024 time period, 1,500 lb/MWh for the 2025-2027 period and 1,380 lb/MWh for the 2028-2029 period.

8. EPA's Final Rule requires an emission rate of 1,305 lb/MWh, which is 45% below North Dakota's 2012 baseline emission rate of 2,368 lb/MWh. The Final Rule provides North Dakota with an alternative to EPA's emission rate approach, where EPA prescribes a mass emissions limit of 20,883,232 tons may be implemented. EPA's mass emissions compliance alternative requires a 37% reduction from the 2012 baseline of 33,370,886 tons.

9. EPA's Final Rule requires North Dakota to address not only the emitting sources (coal-fueled power plants) but also extends beyond the boundary

of a stationary source and incorporates non-emitting sources (e.g. wind and solar generation) and redispatching power to lower emitting units. EPA's Final Rule also requires North Dakota to take into account reliability of the electrical system when developing North Dakota's plans, which has never occurred with any other air pollution control rule. The redispatch of power, protecting the reliability of the electrical system, and accounting for wind or solar generation have never before been federal compliance requirements when implementing an EPA rule.

10. Under the Final Rule, North Dakota must choose between two plan types—rate-based or mass-based, to satisfy EPA's aggressive emission targets. In a rate-based State Plan, North Dakota must require affected power plants to satisfy an average amount of carbon dioxide emissions per unit of power produced. The required target would be impossible for any existing North Dakota coal-fired power plant to meet and continue operating, unless that plant purchased emission credits from its "clean" competitors or greatly reduced its coal generation and replaced it with new renewable generation. In a mass-based State Plan, North Dakota must cap the amount of carbon dioxide emissions that the whole sector of affected power plants can emit per year. This type of Plan must include an enforceable emission limitation on power plants and may include additional policy programs, such as increasing renewable energy, tightening energy efficiency standards, and emissions trading.

11. At its core, the Final Rule represents a complex effort aimed at forcing North Dakota (and the Commission) to engage in a significant shift in North Dakota's electrical generating capacity away from carbon-intensive electric generating units to less carbon-intensive sources and zero-carbon generation. Such an extreme mandate 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, as a means to enable responsible development of the Bakken oil reserves that are critical to North Dakota's continued economic development, and as a necessary part of processing rather than flaring associated natural gas.

12. As part of EPA's rule development process, EPA evaluated the effects of the Final Rule using its Integrated Planning Model (IPM). In this analysis, EPA projected that six units of coal-fired generation (totaling more than 1,300 MW) in North Dakota would retire by 2020. This included the two units of the R.M. Heskett Station, M.R. Young Station Unit 1, Coyote Station, Spiritwood Station and one unit of the Coal Creek Station. In 2014, these units produced 9,672,068 megawatt-hours of electricity or 27% of the total generation in North Dakota. The units consumed nearly 8 million tons of lignite in 2014. This included 2.77 million tons from the Beulah Mine, 1.55 million tons from the Center Mine and 3.53 million tons from the Falkirk Mine. Based on EPA's scenario, the Beulah Mine

would shut down and production from the Center Mine would be reduced by approximately 40%. Production at the Falkirk Mine would be reduced by approximately 50%.

13. Although EPA indicates this is just one possible approach North Dakota may take to comply with the Final Rule, it is unfortunately a realistic scenario given the compliance requirements imposed on North Dakota by the Final Rule. Because North Dakota must reduce its emission rate by 45%, approximately each megawatt hour of North Dakota-based coal generation must be matched with a megawatt hour of zero carbon emitting generation in order to achieve compliance with the Final Rule. Energy efficiency improvements at North Dakota power plants are expected to only produce a 1%-2% increase in efficiency. Since there are no demand side energy efficiency programs (formerly Building Block 4) in North Dakota, the benefit from demand side energy efficiency is likely minimal.

14. Compliance with the Final Rule in North Dakota can only be accomplished by retiring coal plants, greatly curtailing their operations, adding prohibitively large amounts of renewable generation, or purchasing emission rate credits (ERC) or allowances. As such, North Dakota (and thus the Commission) has little actual flexibility to perform its statutory role. If coal generation is not curtailed in North Dakota, the affected utilities will have to purchase ERCs or mass allowances. At this time, the number of ERCs or allowances available is unknown

because the trading program has not been developed. This also makes the cost of the ERCs and allowances unknown. EPA has estimated the cost of compliance at $30 per ton. The cost to North Dakota utilities (ultimately North Dakota and other ratepayers) for the purchase of ERCs could be nearly $375 million per year. With an expanding economy and a large load growth predicted for western North Dakota because of oil and gas development, this makes planning extremely difficult and pushes utilities toward coal-fired plant closures. If plant closures occur, there is insufficient time to plan, design and construct new generation and transmission systems before the initial compliance date of 2022.

15. The shutdown or curtailment of coal-fired generation stations in North Dakota, the possible addition of 4,000-6,000 MW of wind generation, and the addition of backup generation for the wind generation will require a major redesign of the electrical generation and transmission system in North Dakota by 2018.

16. Absent a stay, the Final Rule will force North Dakota to make massive expenditures of time and resources designing State Plans. To participate in the design of any North Dakota plan, the Commission will need to conduct detailed interagency analyses and then consult with various stakeholders to determine what changes can plausibly be made to increase natural gas and renewable energy generation. This process will include an assessment of the forms of energy available to North Dakota, whether developing more new energy sources

is feasible, and what changes to North Dakota law would be required. In addition, because EPA's obligations in the Final Rule can be met through cooperative interstate regimes, North Dakota will need to engage in interstate consultation, determine the possible arrangements, and assess whether such arrangements are desirable to North Dakota.

17. Such Commission efforts associated with implementing EPA's requirements in the Final Rule represents an unprecedented preemption of the sovereign authority and discretion held by the Commission. *See* ¶¶ 4-5, above.

18. The Commission expects development of any North Dakota Plan will require multiple Commission staff employees for the three years from September 2015 to September 2018. The Plan development effort is expected to require the Commission to likely expend several million dollars from its existing budget resources for the current biennium. North Dakota's Legislature meets every two years and concluded its last session earlier this year. EPA's Final Rule was made public and signed after the end of the North Dakota 2015 legislative session. The legislature was not aware of these expenses and did not budget for them with respect to the Commission.

19. The Commission's substantial expenditure of human and fiscal resources associated with implementing the Final Rule will immediately distract

the Commission from serving its full regulatory mission, as directed by the North Dakota Legislature, causing further irreparable harm to the state and its citizens.

20. The Final Rule imposes a four-fold increase in EPA-mandated emission reduction requirements over EPA's proposed rule for North Dakota. The increased burden on North Dakota is larger than for any other state. North Dakota's goal in the proposed rule was 1,783 lb/megawatt-hour which required a 24.7% reduction from the 2012 baseline emission rate. The proposed rule allowed existing wind generation to be counted towards compliance, effectively making North Dakota's reduction requirement 10.7%. The Final Rule established a goal of 1,305 lb/megawatt-hour and does not allow existing wind energy to be counted towards compliance. The Final Rule requires North Dakota to reduce its carbon dioxide emission rate by 44.9% or 420% more than the proposed rule.

21. The Federal Power Act gives North Dakota exclusive authority to regulate our retail electricity market. In North Dakota, the Commission works with investor-owned utilities to determine the appropriate generation mix to meet forecasted load at the lowest reasonable cost. This ensures customers receive a reliable supply of electricity at just and reasonable rates. The Rule invades this authority and preempts the state from implementing its own renewable energy goals, and from maintaining sound management and cost control. Utilities are multi-jurisdictional organizations, susceptible to influences in each of their

operating areas. Utilities may choose the path of least resistance to appease the EPA and outside interest groups as long as they are assured full cost recovery. The "regulatory compact" is a long-standing principle that grants monopoly service to bring efficiency to capital intensive industries. However, this principle also requires clear regulatory oversight in place of competition to protect customers. The Commission ensures that utility companies do not necessarily take the easiest path at the expense of North Dakota Ratepayers. The Final Rule Plan strips the Commission of authority to do so.

22. The Final Rule raises significant electric reliability concerns. Seventy-eight percent of electricity sold in North Dakota comes from coal-fired generation facilities. We have very limited other baseload generation in the state. None of these facilities are currently scheduled for retirement, customers are still paying for them, and utilities have not begun the lengthy planning process involved with replacing these massive baseload power resources. More importantly, the impacts of retirements on reliability have not been modeled. The Final Rule places North Dakota in an untenable position to reengineer the state's electrical system and account for impacts on the power grid's reliability in a timeframe that is arbitrary and untested.

23. The Final Rule threatens to substantially raise rates in North Dakota. Although North Dakota has traditionally benefitted from low-cost electricity, the

Final Rule will cause significant rate increases. The cost to continue operating North Dakota plants at their current capacity would be $375 million annually based on the $30/ton cost used by the EPA. As an example, in a rate-based calculation, North Dakota would need to retire 770 megawatts of coal and replace it with 4,000-5,000 more megawatts of wind in order to meet our goal. This costs an estimated $1.5-2.0 million per megawatt based on the cost of recent wind farm projects in North Dakota. In addition to new investment, North Dakota residents and businesses will be responsible for paying remaining costs for useful existing facilities forced to retire prematurely. The costs of the infrastructure needed to serve new generation including transmission lines and pipelines to fuel combined-cycle power plants, all of which are passed along to customers, have not been included in cost estimates.

24. The Final Rule contains numerous significant, material elements of central relevance to the outcome of the Final Rule that EPA did not identify in the Proposed Rule. As such, the Commission, State of North Dakota and the public were not provided with any opportunity to comment on these new and wholly unexpected provisions. The Commission did not (and could not have) reasonably anticipated these changes. Below is a list of some aspects of the Final Rule for which EPA did not properly give notice in the proposal:

(a) EPA issued voluminous highly technical data and support documents essential to a thorough evaluation of the Proposed Rule as late as

October and November 2014, just days before EPA's close of the public comment period. These documents covered fundamental aspects of the Proposed Rule, ranging from building block methodology, the calculation of state-specific goals, emission reduction compliance trajectories, and the translation of emission rate-based goals to mass-based equivalents. This left insufficient time for North Dakota and the Commission to meaningfully study, evaluate, and comment on the Proposed Rule.

(b) EPA failed to identify in the Proposed Rule all of the potential changes it intended to make to allowances and compliance credits and its intention to undermine existing state Renewable Portfolio Standards programs with its ill-defined Emission Reduction Credit (ERC) program and the mass-based and rate-based trading programs. EPA's decision to include in the Final Rule provisions that disallow credit for a significant portion of North Dakota's existing renewable energy is not a logical outgrowth of the Proposed Rule and could not be anticipated.

(c) EPA did not identify in the Proposed Rule that renewable energy facilities constructed before 2013 would not receive compliance credits during compliance years. Nor did EPA identify that those facilities constructed before 2018 would be denied extra compliance credit from 2020-2021 under the Clean Energy Incentive Program (CEIP) because the CEIP does not credit any facilities built before the final State Plan submittal, which is due on or about September 6, 2018.

(d) EPA revised its "Building Blocks" methodology without giving the public an opportunity to comment on the material changes. The Rule's Building Blocks are the foundation of the performance standards, yet North Dakota did not have an opportunity to comment on the new assumptions for heat-rate improvements for coal plants, dispatch rates for natural gas plants, and expansion of renewable generation.

(e) The final rule provides an adjustment to the baseline fossil fuel-fired generation for several states due to high hydroelectric generation in 2012. These states include South Dakota, Minnesota and Montana which all border on North Dakota. In 2012, hydroelectric generation in North Dakota was 128% of normal. However, EPA denied North

Dakota an adjustment to its fossil generation based on arbitrary criteria including 1) generation had to be greater than 10 percent of total generation, 2) there had to be an increase of greater than 5 percent hydro generation relative to the 1990-2012 average generation, and 3) there had to be a greater than 5 percent adjustment to the state's fossil fuel generation (*CO_2 Emission Performance Rate and Goal Computation Technical Support Document for the CPP Final Rule; p.28)*. North Dakota and the Commission had no chance to provide comment on these criteria and the adjustments that were made.

(f) In addition, EPA applied the Building Blocks to affected sources in a new manner. The performance standards in the Final Rule were developed by applying the Building Blocks to three regional interconnection systems. This novel approach was not contemplated by EPA in the proposed rule.

25. The mandates in the Final Rule frustrate the authority of the Commission and constrain its ability to serve the citizens of North Dakota, as required by the North Dakota state statute. Unless a stay is immediately granted, the Final Rule will impose significant and irreparable harm on the State of North Dakota and it citizens through direct and immediate financial means and a loss of sovereign authority – including that held by the Commission pursuant to the North Dakota Constitution, and state and federal laws.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27, 2015.

Randel D. Christmann
Commissioner
North Dakota Public Service Commission

On this 27th day of October, 2015, before me personally appeared Randel D. Christmann, known to me to be the person described in the within and foregoing instrument and acknowledged to me that he executed the same.

Notary Public

(SEAL)

CHARLENE A MAGSTADT
Notary Public
State of North Dakota
My Commission Expires Jan. 7, 2016

Burleigh County, North Dakota

My Commission Expires: Jan. 7, 2016

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