

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

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NORTHWESTERN CORPORATION)
d/b/a NORTHWESTERN ENERGY)
)
Petitioner,)
)
v.)
)
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, and)
GINA MCCARTHY, Administrator,)
United States Environmental Protection)
Agency)
)
Respondents.)
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No. 15-1378
(Consolidated, Lead Case
No. 15-1363)

**PETITIONER NORTHWESTERN CORPORATION’S
PRELIMINARY AND NONBINDING STATEMENT OF ISSUES**

Pursuant to the Court’s orders of October 29, 2015, ECF No. 1580895, and November 30, 2015, ECF No. 1585786, Petitioner NorthWestern Corporation, d/b/a NorthWestern Energy (“NorthWestern”), hereby submits this preliminary and nonbinding statement of issues.

1. Whether the Environmental Protection Agency (“EPA” or the “agency”), in the final rule entitled “*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*,” 80 Fed. Reg. 64,661 (Oct. 23, 2015) (“Final Rule”), improperly defined “best system of emission

- reduction” (“BSER”) under Section 111(d) of the Clean Air Act (the “Act”) to provide the agency with unfettered authority.
2. Whether in the Final Rule EPA failed to adequately consider costs as required under Section 111(d) of the Act in determining the BSER.
 3. Whether in the Final Rule EPA improperly imposed performance standards that cannot be achieved without the closure of existing coal-fired electric utility generating units (“EGUs”).
 4. Whether in the Final Rule EPA improperly exceeded its regulatory authority under Section 111(d) of the Act.
 5. Whether in the Final Rule EPA improperly interpreted “source” under Section 111(d) of the Act to include owners, grid operators, and combinations of sources, including sources (e.g., renewable generation sources) that are outside the scope of the “stationary source” category defined in Section 111(a) of the Act.
 6. Whether in the Final Rule EPA improperly failed to set performance rate standards under Section 111(d) of the Act that are based on a “system” that is “adequately demonstrated” for existing EGUs.
 7. Whether in the Final Rule EPA improperly imposed on Montana performance standards that are not achievable by Montana utilizing the “system” identified as EPA’s definition of best system of emission

reduction.

8. Whether in the Final Rule EPA improperly imposed on Montana performance standards that are not achievable by Montana without resorting to interstate trading of emissions, which EPA cannot require under Section 111(d) of the Act.
9. Whether EPA acted contrary to Congressional intent by setting standards for existing source EGUs in the Final Rule that are more stringent than the standards EPA is setting for new source EGUs in the final rule entitled “*Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*,” 80 Fed. Reg. 64,510 (Oct. 23, 2015).
10. Whether EPA’s Final Rule is unlawful as a threshold matter because it engages in regulatory activities that Congress has preserved as the exclusive province of state public utility commissions.
11. Whether the Final Rule’s “state measures” state plan type option unlawfully purports to allow EPA to adopt state law measures that apply to entities other than affected EGUs -- and thus are outside the scope of the Act -- as federal law.
12. Whether the Final Rule’s “leakage” requirement for mass-based state plans is unlawful because it attempts to regulate the operation of non-affected

- EGUs and makes mass-based programs more stringent than rate-based plans.
13. Whether EPA's Final Rule is arbitrary and capricious as applied to NorthWestern because the Final Rule requires NorthWestern to achieve additional emissions reductions in its generation asset portfolio despite the fact that NorthWestern's portfolio is already in compliance with the final 2030 emissions rate targets set in the Final Rule.
 14. Whether EPA's decision in the Final Rule to exclude all existing hydro and to not credit wind and solar renewable energy generation sources constructed before 2013 for compliance under rate-based plans is arbitrary and capricious.
 15. Whether EPA contravened the Clean Air Act and the Administrative Procedure Act by failing to provide adequate notice of and opportunity to comment on the requirement that mass-based state plans must address "leakage" to non-affected EGUs.
 16. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the methodology for determining "equivalence" between the mass- and rate-based performance standards.
 17. Whether EPA exceeded its authority under Section 111(d) of the Act by regulating EGUs that undergo a modification that results in an hourly

increase in carbon dioxide emissions of 10 percent or less.

18. Whether EPA contravened the Clean Air Act and Administrative Procedure Act by failing to provide adequate notice and opportunity to comment on the mass-based goal for the state of Montana.

NorthWestern reserves its right to modify or supplement this statement of issues, as well as to address these and other issues in more detail in future pleadings.

December 18, 2015

Respectfully submitted,

/s/ William M. Bumpers

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2015, I caused a copy of the foregoing to be served by the Court's CM/ECF System on all counsel of record in this matter who have registered with the CM/ECF System.

/s/ Megan H. Berge

Megan H. Berge