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

STATE OF WEST VIRGINIA, STATE OF TEXAS, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1363 and consolidated cases

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DECLARATION OF KARL R. RÁBAGO,
EXECUTIVE DIRECTOR, PACE ENERGY AND CLIMATE CENTER,
PACE UNIVERSITY SCHOOL OF LAW

I, Karl R. Rábago, declare as follows:

Background

1. I am currently the Executive Director of the Pace Energy and Climate Center ("Pace") project of Pace University, at the Pace Law School, in White Plains, New York.

2. I am an attorney licensed to practice law in Texas. I earned my bachelor's degree in management from Texas A&M University, my juris doctorate from the University of Texas School of Law, and post-doctorate master of laws

degrees from the United States Army Judge Advocate General's School (military law) and Pace Law School (environmental law).

3. I served as a Commissioner of the Public Utility Commission of Texas from 1992-1994. During that time, I worked to establish Texas' first commercial-scale wind farm, and I was appointed by Governor Ann Richards to co-chair and organize the Texas Sustainable Energy Development Council. I also served as Vice-Chair of the National Association of Regulatory Utility Commissioners (NARUC) Committee on Energy Conservation.

4. I also served as Deputy Assistant Secretary for Utility Technologies in the Office of Energy Efficiency and Renewable Energy at the U.S. Department of Energy from 1995-1996. My additional relevant experience includes service as vice president for Distributed Energy Services for Austin Energy, the municipal electric utility for Austin, Texas, from 2009-2012; director of Government and Regulatory Affairs for the AES Corporation, from 2006-2008; and group director for Energy and Building Solutions with the Houston Advanced Research Center, from 2003-2006. From 1996 to 1998, I served as Energy Program Manager at the Environmental Defense Fund.

5. In all, I have nearly 20 years of experience working in Texas and on Texas energy and environmental issues in various capacities. In these capacities, I have had the opportunity to work extensively on electric utility regulatory, legislative, and

policy issues; renewable energy development issues, voluntary markets for renewable energy; and other aspects of energy markets and regulation.

6. In preparing this Declaration, I have reviewed numerous documents, reports and on-line databases, including but not limited to: (a) the U.S. Environmental Protection Agency's ("EPA") final rule titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" dated August 3, 2015 (the "Clean Power Plan" or "CPP");[1] (b) numerous reports prepared by ERCOT including "ERCOT Analysis of the Impacts of the Clean Power Plan" ("ERCOT CPP Report");[2] (c) the Motion to Stay filed by Petitioners State of West Virginia, *et al.* ("Petitioners"); and (d) the respective Declarations of Richard A. Hyde, P.E., Executive Director of the Texas Commission on Environmental Quality ("Hyde Declaration") and Brian H. Lloyd, Executive Director, Public Utility Commission of Texas ("Lloyd Declaration") attached to Petitioners' motion.

7. In light of my experience and the materials that I have reviewed, I have personal knowledge of the state of power generation within Texas and within the

[1] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (October 23, 2015).
[2] ERCOT, *ERCOT Analysis of the Impacts of the Clean Power Plan* (October 16, 2015), http://www.ercot.com/content/news/presentations/2015/ERCOT_Analysis_of_the_Impacts_of_the_Clean_Power_Plan-Final_.pdf
[2] ERCOT, *ERCOT Analysis of the Impacts of the Clean Power Plan* (October 16, 2015), http://www.ercot.com/content/news/presentations/2015/ERCOT_Analysis_of_the_Impacts_of_the_Clean_Power_Plan-Final_.pdf

ERCOT region, including past and current trends and economic forces affecting the power generation mix within Texas and ERCOT.

8. The Rule described above is an EPA final rule implementing requirements under the federal Clean Air Act. The Texas Commission on Environmental Quality ("TCEQ") has been delegated responsibility for implementing and enforcing many Clean Air Act requirements in Texas, subject to oversight by EPA. The Public Utility Commission of Texas ("PUCT") is the Texas state agency with principal regulatory authority over electric service markets in Texas. As a result of my experience noted above, including my experience as a Commissioner for the PUCT, I am generally familiar with the processes by which the PUCT and the TCEQ, and other state agencies implement federal legal and regulatory obligations, such as those under the Clean Air Act.

9. In their declarations, Mr. Lloyd and Mr. Hyde seek to support the Petitioners' efforts to stay the operation of the Rule and to excuse the State of Texas from undertaking any efforts to prepare for and develop plans under the Rule. In particular, Mr. Lloyd and Mr. Hyde allege that the Rule will cause fundamental changes to the energy mix deployed in Texas, and will require unprecedented coordination between the state legislature and the relevant state agencies.[3] In fact, the exact opposite is true. Fundamental shifts in the Texas energy market began well

[3] Lloyd Declaration at ¶¶31-36, 88-93; Hyde Declaration at ¶11.

before adoption of the Clean Power Plan thanks to an abundance of low-price natural gas and a rapidly expanding market for wind power. Rather than undermine state policy, the Clean Power Plan is consistent with and supports existing Texas policies promoting renewable energy and energy efficiency.

The Texas Electric Generation Market is No Stranger to Change

10. In their declarations, Mr. Lloyd and Mr. Hyde assert that the Rule will require a fundamental and disruptive transformation of the electric generation fleet in Texas. This assertion is flawed in two key respects. First, the Texas electricity generation market is already undergoing significant change due to the operation of market forces unrelated to the CPP. That change has been toward greater investment in efficient, highly-affordable natural gas-fired combined-cycle generation and renewable energy. For example, recent ERCOT Capacity, Demand, and Reserve Reports reflect an addition of over 6,095 MW of gas fired generation and 8,886 MW of renewable energy since mid-2014.[4] In the same time period, over 3,120 MW of new gas generation and over 4,142 MW of new renewable generation has moved to

[4] ERCOT, *Report on Capacity, Demand and Reserves in the ERCOT Region* (Dec. 1, 2014) at 6-7, http://ercot.com/content/gridinfo/resource/2015/adequacy/cdr/CapacityDemandandReserveReport-Dec2014.pdf;

ERCOT, *Report on Capacity, Demand and Reserves in the ERCOT Region,(*May 4, 2015) at 5, http://ercot.com/content/gridinfo/resource/2015/adequacy/cdr/CapacityDemandandReserveReport-May2015.pdf;

ERCOT, *Report on Capacity, Demand and Reserves in the ERCOT Region,*(Dec. 1, 2015) at 5-6, http://www.ercot.com/content/gridinfo/resource/2015/adequacy/cdr/CapacityDemandandReserveReport-December2015.pdf.

"Operational Status."[5] During the same period, no new coal-fired generation was added. Thus, the Clean Power Plan is consistent with ongoing trends in the Texas electricity generation market.

11. Second, the Texas electricity generation market has undergone significant changes several times in the past several decades.[6] Substantial amounts of natural gas generation were added in the 1960s and 1970s. Although little coal generation was added between 1950 and 1975, a large amount of coal generation was added between 1975 and 1985. Two large nuclear power plants were brought on line between 1988 and 1993. And since 1999, when Texas passed electricity restructuring legislation that created a more market-based generation sector, the state has seen large additions of both natural gas and wind generation.

12. The historical evidence shows that Texas has often made significant shifts in the new generation capacity additions it has successfully integrated into the grid. Moreover, it has done so without compromising affordability or reliability. The following table demonstrates the changing nature of additions to the Texas electricity grid, and particularly the shift towards natural gas and wind beginning in 2000.[7] Texas' experience managing significant changes in its power sector, coupled with ongoing

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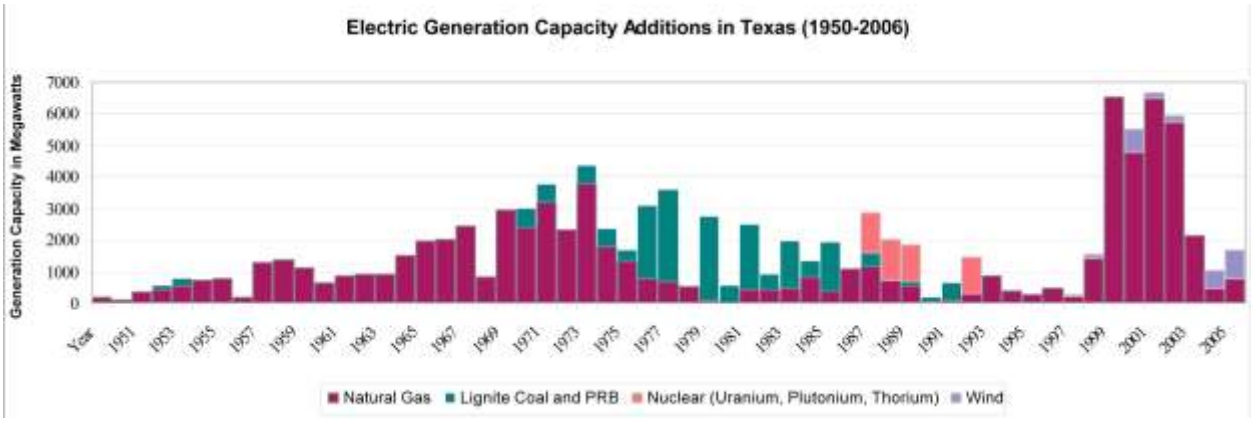
[5] *Id.*

[6] Report of the Texas House of Representatives Committee on Electric Generation Capacity and Environmental Effects, Select - 80th R.S. (2007) at 19-21, http://www.lrl.state.tx.us/scanned/interim/80/EL26e.pdf

[7] *Id.* at 20.

trends towards a cleaner generating portfolio, position the state well for the Clean Power Plan.



Texas Agencies and Power Companies Have Already Successfully Implemented Renewable and Energy Efficiency Policies

13. Texas has decades of experience implementing clean energy policies that are consistent with achieving compliance with the Clean Power Plan. As far back as 1993, Texas Governor Ann Richards signed Executive Order AWR 93-6, establishing the Texas Sustainable Energy Development Council ("SEDC").[8] I served as co-chair of the SEDC, whose mission was to "develop a strategic plan to ensure the optimum utilization of Texas' renewable and efficiency resource base."[9] The Resource Assessment Report issued by the SEDC stated that "[p]erhaps the most compelling

[8] Gov. Ann Richards, Executive Order AWR 93-6, Establishing the Texas Sustainable Energy Development Council (Mar. 14, 1993), http://www.lrl.state.tx.us/scanned/govdocs/Ann%20W%20Richards/1993/AWR93-6.pdf

[9] *Id.* at 1.

reason to reexamine current methods of producing energy is the increasing level of atmospheric carbon dioxide."[10]

14. As a sitting Public Utility Commissioner, I launched a project in 1993 in which investor-owned, municipal, and cooperative electric utilities were asked to report on actions and plans relating to the issue of climate change. This initiative reviewed the efforts by utilities in-state to explore and implement renewable energy, energy efficiency, and other options for reducing exposure and addressing the risks of climate change.

15. In 1999, the 76th Texas Legislature passed Senate Bill 7, which not only created a more competitive market structure for the Texas electricity industry within ERCOT, but also included a renewable energy goal of 2,000 MW (also known as the Renewable Portfolio Standard or "RPS").[11] The bill also directed PUCT and ERCOT to establish a trading system for renewable energy credits that has proven highly effective.[12] The RPS mandatory goal was subsequently raised to 5,000 MW by 2015 by the Legislature, which also added a non-binding target of 10,000 MW of renewable energy capacity by the year 2025. As of the end of 2014, ERCOT reported over

[10] Texas Sustainable Energy Development Council, *Texas Renewable Energy Resource Assessment – Survey, Overview and Recommendations* (July 1995) at 20, http://www.seco.cpa.state.tx.us/re/docs/re_study1995.pdf.

[11] Texas Legislature, S.B.7, 76th Leg. (1999), http://www.capitol.state.tx.us/tlodocs/76R/billtext/html/SB00007F.htm

[12] *Id.*; *see also* Tex. Utils. Code § 39.904(b).

16,000 MW of installed renewable energy capacity in Texas—well in excess of the 2025 RPS target set by the Texas Legislature.[13]

16. In addressing the impact of the Clean Power Plan on Texas' renewable energy policy, Mr. Lloyd makes two errors of logic. First, he argues that the Clean Power Plan would usurp Texas' renewable energy policy authority. The underlying policy to the Texas RPS was to establish a tradable credits system to support the market for renewable energy development. In that regard, Texas' policy has been highly successful. The Texas RPS was never meant to be a ceiling for renewable energy development; quite the contrary, it has been a floor upon which the market has been built. Texas retains its RPS in spite of the fact that the market has grown far beyond both the mandates and target of the RPS.[14] The Clean Power Plan does not disturb this approach: Texas' RPS can continue as is, providing a floor for renewable energy development in the state. The Clean Power Plan also provides Texas with the flexibility to expand its RPS to help meet its emissions targets, but the Rule does not mandate that the state do so.

17. Second, Mr. Lloyd alleges that the Texas legislature must pass legislation raising the RPS in order for any generation built after 2012 to count for compliance

[13] ERCOT, 2014 Annual Report on the Renewable Energy Trading Credit Program, https://www.texasrenewables.com/staticReports/Annual%20Report/2014%20ERCOT%20Annual%20REC%20Report.pdf

[14] Lloyd Declaration at ¶¶ 78-79.

purposes under the Rule.[15] This claim, even if correct, ignores the much broader and more important point. Legislative action has not been required in order for investors in Texas to build three times the capacity required by the Texas RPS. The renewable energy certificate tracking system has facilitated both compliance and voluntary markets, and can support the addition of new renewables without additional legislation. Given on-going market trends, renewable energy will likely be added to the Texas system and will support the state's compliance with the Clean Power Plan; a change in the Texas RPS is not required in order for that to happen.

18. In addition to establishing a state RPS, in 1999 Senate Bill 7, the Texas Legislature also established an energy efficiency goal for Texas utilities. The PUCT has successfully implemented this requirement through Substantive Rule § 25.181, which has been in effect, with amendments, since 2000. Under this policy, the PUCT establishes procedures for utilities to meet energy efficiency goals, and utilities offer energy efficiency programs to customers within their respective service territories. Programs may involve the installation of energy efficiency measures such as insulation or high efficiency lighting. Utilities can offer programs directed specifically at cities and schools to help local governments reduce operating costs and save energy.

[15] Lloyd Declaration at ¶ 80.

Utilities can also partner with independent, third-party service providers who are responsible for installing energy efficiency measures at residences and businesses.[16]

19. Like the Texas RPS, the Texas Energy Efficiency Program has been highly successful. A 2014 annual report on the program for the PUCT reported that "[i]n 2014, the majority of the Texas investor-owned utilities (IOUs) exceeded their statewide energy efficiency goals. The utilities achieved 541 gigawatt hours (GWh) of energy savings and 391 megawatts (MW) of peak demand reduction."[17] This further demonstrates that Texas is well on its way to meeting Clean Power Plan targets.

Conclusion

20. For all the reasons set forth above, it is my opinion that the declarations of Mr. Lloyd, on behalf of the Public Utility Commission of Texas, and Mr. Hyde, on behalf of the Texas Commission on Environmental Quality, fail to establish that the Clean Power Plan will cause imminent and irreparable harm during the pendency of Clean Power Plan litigation.

[16] Electric Utility Marketing Managers of Texas, "Texas Energy Efficiency" website, http://www.texasefficiency.com/index.php/utility-programs/program-basics

[17] Electric Utility Marketing Managers of Texas, Energy Efficiency Accomplishments of Texas Investor-Owned Utilities Calendar Year 2014, http://www.texasefficiency.com/images/documents/Publications/Reports/EnergyEfficiencyAccomplishments/eepr2014.pdf. Electric Utility Marketing Managers of Texas is a voluntary organization of electric investor-owned utilities formed to address utility industry energy efficiency issues.

21. I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct.

22. Executed on 7 Dec., 2015.

Karl R. Rábago