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Summary

The Air Quality Committee (AQC) is required to deny this petition because the North Carolina General Assembly has expressly prohibited the Environmental Management Commission (EMC) from adopting any rule that is more restrictive than a federal rule pertaining to the same subject matter. N.C. Gen Stat. 150B-19.3.

Notwithstanding the legal prohibition, the petition should be denied on public policy grounds.

- First, without any government intervention – in fact, perhaps because of the lack of government intervention, - market forces have already reduced North Carolina's Greenhouse Gases (GHG) by more than 24% since 2005.

- Second, approving this petition will result in massive increases in energy costs. The cost of energy is one of the most important considerations of large manufacturer. Our State continues to be passed over by large manufacturers looking to expand. Last month Toyota rejected North Carolina. Duke Energy has already announced several major rate increases as a result of solar integration and coal ash cleanup. This petition, if passed, will ensure continued rate increases for years to come. North Carolina will no longer be able to compete with other southeastern states for economic expansion. The Petitioners will argue that enacting his petition will lower energy costs. If this is true ask yourself the following two questions:
    - Why haven't Duke Energy and Dominion Energy, who are required by law to generate energy using a least-cost model, enacted these provisions years ago?
    - Why haven't Virginia, South Carolina, Georgia, Alabama, Kentucky, Tennessee, or Florida adopted the regulations proposed by the petitioner.

Discussion

The Petitioner readily admits that in 2014 the EMC found that N.C. Gen. Stat. 150B-19.3 prohibited the approval of these type of petitions. However, the Petitioner then attempts to argue that the Commission's 2015 approval of regulations developed in response to the Clean Power Plan (CPP) now allows this Commission to adopt regulations far exceeding the federal government's regulations on GHGs. The Petitioner's argument fails for three reasons.

First, N.C. Gen. Stat 150B-19.3 controls this decision. Even if the Petitioner's characterization of the EMC's actions in 2015 are correct (and they are not), statements and actions taken by previous commissions are not binding and have no legal precedential value. There is no doctrine of *stare decisis* as applied to the EMC. *See* Attachment A for discussion of the Petitioner's incorrect characterization of the EMC's prior actions.

Second, the argument advanced by the Petitioner simply ignores altogether the current federal regulation of GHGs. The United States Supreme Court has already upheld the federal EPA's authority to regulate GHGs. Using this authority, the EPA has regulated GHG emissions from virtually all mobile sources and all stationary sources.

- Mobile Sources
    - Light Duty Regulations were enacted in 2010. These regulations limit GHG emissions from cars, SUVs, minivans, and other light trucks. "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule," 75 Federal Register 25324, May 7, 2010.
    - Medium and Heavy-Duty Engines and vehicle regulations were enacted in 2011. See "Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles; Final Rules," 76 Federal Register 57106, September 15, 2011
- Stationary Sources
    - In the landmark Supreme Court decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) the Court upheld EPA's authority to require Best Available Control Technology (BACT) on all significant increases in GHG emission from any stationary source that otherwise triggers major New Source Review. Every stationary source in North Carolina is subject to this requirement if they trigger NSR. See 15A NCAC 2D .0530.

While the Petitioner may disagree with the manner in which the federal EPA has regulated the "subject matter," their displeasure does not amount to a failure to regulate the "subject matter."

Finally, the Petitioner's argument, if accepted, would effectively eliminate the General Assembly's express prohibition under N.C. Gen Stat. 150B-19.3. The Petitioner argues that "subject matter" can be parsed to create gaps – areas where the federal government is not regulating - thereby freeing themselves from the prohibition. This argument proves too much.

Every regulatory body must decide where to draw the line in regulating "subject matter." The hundreds of New Source Performance Standards (NSPS) and Maximum Achievable Control Technology Standards (MACT) contain thousands of applicability thresholds and certain requirements that apply depending on size and emission rate. For example, the electric utility MACT governing mercury emissions, MACT Supart UUUUU, applies to electric generating units (EGUs) greater than 25 MW. Under Petitioner's theory, the "subject matter" covered by federal government is not mercury emissions from EGUs but instead mercury emissions from EGUs greater than 25 MW. Similarly, even one of the most commonly applicable NSPS standards for storage tanks, Subpart Kb, provides that when storing certain liquids, the only requirement is for the owner to keep a record of the size of the tank. There are no control requirements at all. Under Petitioner's theory, the "subject matter" of Subject Kb is not the control of volatile organic compounds from storage tanks, but rather the control of volatile organic compounds form storage tanks of a certain size storing a certain liquid.

Under this theory the EMC would be free to fill in the literally thousands of gaps in these regulations. The correct interpretation is that that these are not gaps but rather decisions made by regulators deciding how best to regulate the "subject matter." If the EMC accepts this petitioner's interstitial, or gap-filling, approach to "subject matter" there will be virtually nothing left of prohibition of 150B-19.3.

Attachment A

The Petitioner mischaracterizes the EMC's prior actions to erroneously conclude that the "subject matter" is not currently regulated. The Petitioner attempts to explain why statements made by the EMC in 2015, in response to the EPA mandate to adopt regulations in response to the Clean Power Plan (CPP), reversed the EMC's 2014 position that N.C. Gen. Stat 150B-19.3 prohibits adopting petitions like the one in front of the Commission today. However, the petition mischaracterizes that position as contradictory with a later rule-making as follows (from page 9 of the petition):

> Prior to the EMC's adoption of its 111(d) interpretation of what constitutes the same subject matter, the EMC Chair adopted a conflicting interpretation during prior citizen rulemaking proceedings. For example, in response to a rulemaking petition submitted by Petitioner Turner in 2014, then-Chairman Benne Hutson reasoned that the term "same subject matter" refers to carbon dioxide emissions rather than the source of those emissions, and therefore the existence of any federal carbon dioxide regulation, regardless of the source(s) regulated, wholly prevents the EMC from adopting new carbon dioxide rules. Chairman Hutson explained that since there were federal regulations on some forms of carbon dioxide emissions, the EMC was powerless to enact rules on unregulated sources, thus adopting an overly broad interpretation of the term "same subject matter."14

In fact, then Chairman Hutson was absolutely correct in his interpretation of "same subject matter" when noting that NCGS 150B-19.3 would prohibit the petitioned-for rulemaking. The EPA has regulated not just CO_2 but a group of gases collectively referred and regulated as GHGs including methane. The EPA has and is regulating these gases from a variety of sources including motor vehicles, combustion sources and a wide variety of emission sources.

The petitioner then attempts to argue that the EMC implicitly changed its position of "same subject matter" when it drafted a rule in response to the Federal requirement under Section 111(d). The petitioner confuses the limitations imposed by Section 111(d) of the Clean Air Act (CAA) and the limitations imposed upon the EMC through §150B-19.3. From page 9 of the petition:

> In 2015, the EMC proposed its Clean Air Act Section 111(d) rules ("111(d) Rules") "to satisfy a similar federal requirement" to the Clean Power Plan.12 The "similar federal requirement" language refers to the State's general, delegated authority under the federal Clean Air Act's Section 111(d) to enact air emissions rules, rather than the Clean Power Plan's specific requirements.13 Therefore, under this nonbinding interpretation, the EMC adopted an interpretation of Section 150B-19.3's language to allow that the EMC may adopt carbon dioxide rules pursuant to its general, delegated authority under the Clean Air Act. It follows from the EMC's interpretation of its 111(d) authority that the EMC has necessary statutory authority to adopt the rule requested herein by petitioners with

> respect to carbon dioxide-emitting sources. Such sources are not already regulated by federal rule.

The petitioner's argument confuses the EMC's duty under §143-215.107(a)(10) with the prohibition under §150B-19.3. In implementing §143-215.107(a)(10), the EMC recognized that Section 111(d) only allows the regulation of emission sources. The EMC drafted a rule consistent with Section 111(d). Because the rule was required under federal law, §150B-19.3 did not apply. But the petitioners argue that because Section 111(d) limits regulation to an individual emission source, that only those sources are "similar subject matter" under §150B-19.3. The petitioners bury their argument in a footnote saying that the EMC's 111(d) rule, because it was inconsistent with the rule offered by the EPA at the time, meant that the EMC had narrowly interpreted "same subject matter" to "free" them from promulgating the EPA offered rule.

Nothing could be further from the truth. First of all, in drafting a rule pursuant to Section 111(d) the EMC was simply acting on its duty to implement Section 111(d) of the CAA under §143-215.107(a)(10). Secondly, even if this requirement did not exist, the rule was less restrictive than the EPA proposed rule (in fact, it was simply "Building Block 1" of EPA's 4 Block rule) and therefore would not have been subject to the prohibition under 150B-19.3. The EPA had, in the eyes of the EMC, offered a model rule that was inconsistent with the CAA Instead, the EMC choose to offer a rule it felt was consistent with the law. In fact, the EPA has since pointed to the NC draft as a possible model for other states to follow.

> The process that the State of North Carolina used in the development of its draft rule,9 in response to the Clean Power Plan (CPP), may provide a useful example of a process a State could go through to determine unit-level emission standards based on technology that can be applied at or to a source.10 In that draft rule, North Carolina developed a menu of potential heat rate improvements. The State then examined these potential opportunities on a unit-by-unit basis, determined that some units had opportunities for cost-effective improvements and developed unit-specific emission standards consistent with those rates. North Carolina determined that other units did not have such opportunities (for reasons including that a given heat rate improvement opportunity was not applicable to a particular unit, that it had already been applied, or that the unit was scheduled to retire soon (i.e., RUL)).

(see page 19, https://www.eenews.net/assets/2017/12/18/document_cw_01.pdf)

The Petitioners attempt to confuse these two issues is disingenuous.

The simple fact is that the Federal Government is currently regulating GHG emissions (including methane) under the CAA with the CPP as simply one example. Despite the legal questions regarding that rule, the Federal Government has for some time and continues to regulate GHGs from all stationary sources under the New Source Review program. EPA also regulates GHGs from motor vehicles under Title 2 of the

CAA. These efforts to regulate GHGs, including methane, is the subject matter referred to under §150B-19.3 as stated by former Chairman Hutson. Hence, the EMC is prohibited from the desired rulemaking unless it qualifies under one of the exemptions in 19.3.

Being subject to §150B-19.3, this petition does not qualify for any of the exemptions under that law. In particular, the proposed rulemaking is not required to address "a serious, unforeseen threat to public health, safety, or welfare" under §150B-19.3(a)(1) for the following reasons.

In 2013 the UN's IPCC downgraded the risk and immediacy of the effects of anthropogenic GHG emissions on global warming. While Dr. James Hansen originally told Congress in 1988 that the rate of global warming would be 0.5 degree C per decade until 2050, the latest prediction by the IPCC is 0.1 - 0.23 degrees C per decade with their "best" guess being closer to the lower end of that prediction. This means that while arguably unknown (since the models do not appear to be robust), the seriousness of global warming has diminished since 1988.

https://cei.org/sites/default/files/CEI%20Petition%20for%20Rulemaking%20on%20Endangerment%202017%20corrected.pdf

https://wattsupwiththat.com/2014/01/01/ipcc-silently-slashes-its-global-warming-predictions-in-the-ar5-final-draft/

https://judithcurry.com/2014/01/06/ipcc-ar5-weakens-the-case-for-agw/

To call global warming unforeseen would be saying elected officials are unaware of this argument and have failed to act. While being aware does not mean they must act, they have taken several actions, however misguided for the state, which arguably directly address carbon emissions. Senate Bill 3 in 2007 and House Bill 589 in 2017. Both of these bills required a subsidized increase in renewable, or “zero” carbon energy production. For the EMC to say this is an “unforeseen” threat they need to write rules to address would be laughable if not so dangerous to the state and its citizens.

In addition, market forces have already reduced GHG emissions from North Carolina and the country by seeing a dramatic increase in the use of natural gas at the expense of coal combustion. (see, for example, https://www.forbes.com/sites/jamestaylor/2017/01/02/u-s-carbon-dioxide-emissions-fall-to-lowest-since-1991/#5fc64122479f)

Finally, consistent with the public policy of §150B-19.3, imposition of restrictions more severe than those required by the Federal Government would put North Carolina at an economic disadvantage with surrounding States.