DAIRYLAND POWER
COOPERATIVE

October 6, 2011

Honorable Lisa P. Jackson
Office of the Administrator
Environmental Protection Agency
Room 3000, Ariel Rios Building
1200 Pennsylvania Ave, NW
Washington, DC 20460

PETITION FOR RECONSIDERATION AND REQUEST TO STAY THE FINAL RULE ENTITLED "FEDERAL IMPLEMENTATION PLANS: INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND OZONE AND CORRECTION OF SIP APPROVALS"

Docket No. EPA–HQ–OAR–2009–0491
76 *Fed. Reg.* 48208, *et seq.*, August 8, 2011

Pursuant to 5 U.S.C. § 705 and 42 U.S.C. § 7607(d)(7)(B), Dairyland Power Cooperative ("Dairyland") respectfully requests that the U.S. Environmental Protection Agency ("EPA") grant reconsideration and an immediate stay of the compliance deadline and effective date of EPA's Final Rule signed July 6, 2011, titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States, " 76 Fed. Reg. 48208 *et seq*. (August 8, 2011) ("Cross-State Rule") as it applies to Wisconsin.

INTRODUCTION

Dairyland hereby endorses and incorporates the legal arguments applicable to Wisconsin utilities made by Wisconsin Public Service Corporation ("WPSC") in its Amended Petition for Reconsideration ("PFR") filed on September 30, 2011 ("WPSC

PFR").[1] In addition, Dairyland seeks in this Petition to demonstrate the impracticality of raising an objection to the Final Rule in comments to the Proposed Rule, and how the issues raised are of central relevance to the outcome of the rule.

Given substantial legal and factual problems with the rule, Dairyland asks the EPA to immediately stay the final rule as to Wisconsin and reconsider it.

I. BACKGROUND

The United States Environmental Protection Agency ("EPA") issued the above-referenced Cross-State Rule under the Clean Air Act ("CAA") as a replacement for its Clean Air Interstate Rule ("CAIR"). 70 *Fed. Reg.* 25162, *et. seq.*, April 26, 2006. EPA had issued CAIR pursuant to the "good neighbor" provision of the Clean Air Act, § 110(a)(2)(D)(i)(I),[2] 42 U.S.C. § 7410(a)(2)(D)(i)(I).

A. The *North Carolina* Decision

On July 11, 2008, The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") issued an opinion on judicial review of CAIR, in which it found "more than several fatal flaws in the rule." *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008) (*per curiam*). A subsequent December 23, 2008 ruling left CAIR in place until EPA issued a new rule to replace CAIR in accordance with the July 11, 2008 decision.

The fatal flaws cited by the D.C. Circuit included the ability of utilities in upwind states to freely trade emission allowances and to conceivably purchase allowances rather than install any controls, thereby allowing a state to avoid reducing its significant contributions to nearby states. *Id.* at 906-908. The D.C. Circuit held that the "good neighbor" provision requires EPA to "actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind nonattainment areas." *Id.* at 908.

The D.C. Circuit also found that although EPA's consideration of cost is allowed in determining whether a state is contributing a "significant" level to downwind

[1] Wisconsin Public Service Corporation Petition for Reconsideration and Request to Stay the Final Rule Entitled "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone Correction of SIP Approvals," Docket No. EPA-HQ-OAR-2009-0491, September 23, 2011.
[2] Citations of the CAA herein are to the Act, not the U.S. Code.

pollution, EPA cannot "just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." *Id.* at 918. The D.C. Circuit further explained that the "good neighbor" provision "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution." *Id.* at 921.

B. Dairyland's Injury from the Cross-State Rule

Dairyland is a not-for-profit generation and transmission electric cooperative that is owned by, and provides the wholesale power requirements for, 25 separate distribution cooperatives in southern Minnesota, western Wisconsin, northern Iowa, and northern Illinois. Dairyland also provides wholesale power requirements by contract to 16 municipal utilities in Wisconsin, Minnesota, and Iowa. Dairyland provides electric services directly to its member cooperatives which in turn provide service to a population of over 600,000 member-consumers. Dairyland owns coal and natural gas fired electric generating units ("EGUs") with a total generating capacity of approximately 1,146 MW. In addition, Dairyland owns or purchases power from hydroelectric, landfill gas, manure digester, wind, biomass and solar generation.

The final Cross-State Rule burdens Dairyland's EGUs and other Wisconsin EGUs with annual "state budgets" for sulfur dioxide (SO_2) and nitrogen oxides (NO_x) that are less than actual 2010 emission levels and significantly less than projected 2012 emission levels. Even though the rule allows for trading of allowances, projected emission levels from Dairyland's EGUs and other EGUs in Wisconsin greatly exceed the total amount of allowances allocated, even when available emission control devices are employed. The limited "state budget" established in the final Cross-State Rule combined with similar under-allocations in many other states, seems likely to lead to shortage of allowances in 2012. Given this projected overall shortage of allowances, Dairyland and other Wisconsin utilities are faced with extremely limited options for compliance. Since, unless stayed, the Cross-State Rule will be effective in less than three months, it is technically infeasible to install and operate additional emission controls to reduce emissions by enough to effectively comply with the rule. EPA, by choosing to set such low "state budgets" for Wisconsin and to provide such a short period for compliance, has

unfairly put Dairyland and other utilities in Wisconsin in a potential position of having no choice but to limit their generation to comply with this rule.

The Cross-State Rule also provides Dairyland's EGUs and other Wisconsin EGUs with annual "state budgets" for SO_2 and NO_x that are grossly disproportionate to state budgets for many other states, thereby unfairly and illegally penalizing Wisconsin utilities, their ratepayers, and Dairyland's member-consumers. Dairyland's member-consumers are primarily rural residents already disproportionately suffering from the national economic downturn.

Dairyland estimates that the Cross-State Rule alone will potentially cause an increased cost of electric generation dispatch of $5.7 million plus costs for potential additional temporary air emission controls of $3.4 million, resulting in a potential for $9.1 million or more increase of 2012 costs. Based upon the 2011 annual wholesale rate, compliance with the Cross-State Rule will increase Dairyland rates by at least 2.9%, and introduce greater risk and uncertainty surrounding the impact of major generation shifts in the wholesale energy market operated by the Midwest Independent Transmission System Operator, Inc. ("MISO"). These estimates also do not reflect any costs associated with the long-term capital investments for Cross-State Rule compliance. If left in its current form, Dairyland expects further significant rate increases for its member-consumers related to the rule in the future, particularly since the Cross-State Rule ratchets down emission limits significantly in 2014 for SO_2.

Like WPSC and other Wisconsin utilities, Dairyland did not object to the proposed rule's budgets for Wisconsin during the rulemaking leading to the final Cross-State Rule because the proposed Wisconsin state budgets were more reasonable compared to those set in the final rule, and they appeared more equitable with respect to Wisconsin, its ratepayers, and Dairyland's member-consumers when compared to other states' proposed budgets. Now that Dairyland has reviewed the final Cross-State Rule and the much lower and disproportionate SO_2 and NO_x budgets for Wisconsin, Dairyland must take all appropriate steps to remedy this situation.

II. DAIRYLAND'S REQUEST FOR RECONSIDERATION AND STAY

Under the CAA, EPA's Administrator has no choice but to reconsider the Final Rule. The statute directs that the Administrator "shall convene a proceeding for reconsideration" if two showings are made: *first*, that it was either impracticable to raise the relevant objection during the comment period or the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and *second*, that the objection is of central relevance to the outcome of the rule. CAA § 307(d)(7)(B).

As WPSC argued in its petition and Dairyland reiterates, nothing in EPA's proposed rule – nor in any of EPA's subsequent "Notices of Data Availability" ("NODAs") – alerted Dairyland or any other person that EPA was drastically reducing Wisconsin's proposed state budgets from the state budgets in the proposed rule. Thus it was not only "impractical" for Dairyland to have objected to the final tonnage numbers during the rulemaking process, it was impossible. Additionally, the grounds for the objection clearly have arisen since the close of the public comment period, since the grounds did not arise until Dairyland first learned of the final tonnage numbers when reviewing the final Cross-State Rule. As described below, the state budget changes are indisputably central to the outcome of the rule. EPA is therefore obligated under CAA § 307(d)(7)(B) to reconsider the Wisconsin state SO_2 and NO_x budgets through an additional notice-and-comment process.

We are also requesting that EPA stay the final Cross-State Rule as applicable to the State of Wisconsin. As WPSC demonstrated and Dairyland endorses below, the Cross-State Rule fails to cure the "fatal flaws" the *North Carolina* decision found regarding CAIR and it violates CAA § 110(a)(2)(D)(i)(I). The "fatal flaws" are directly reflected in the state budgets for Wisconsin, which saddle Dairyland and its member-consumers with disproportionate burdens and costs. The final Cross-State Rule is fundamentally flawed as to Wisconsin – both factually and legally.

A. EPA Failed to Comply With the CAA and APA Notice and Comment Provisions When It Cut Wisconsin's State Budgets

Dairyland, like other Wisconsin utilities, was never made aware of the changes to the state budget between the proposed and final rule. *See* WPSC PFR Section II.A. The CAA notice requires that a "detailed explanation of [EPA's] reasoning" be included in the proposal, and that the proposal include: "(A) the factual data on which the proposed rule is based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983). The notice requirements exist to ensure fairness to the affected parties, to give affected parties the opportunity to develop evidence on the record, and to thereby enhance the quality of judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005). A final rule may differ from a proposed rule only if it is a "logical outgrowth" of the former, which does not occur where interested parties were expected to "divine [EPA's] unspoken thoughts" that resulted in a final rule "surprisingly distant" from the EPA's proposal. *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000).

EPA pulled an unlawful switch in the final rule arising to what the D.C. Circuit calls a "surprise switcheroo," thus violating notice-and-comment requirements. *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). EPA made significant and numerous changes to its state budget calculations in the Final Rule. First, EPA admits in its Response to Comments that between the Proposed and Final Rules, it "modified the methods used to determine state emissions budgets" by making "numerous updates and corrections to its significant contribution analysis for the Final Rule." Transport Rule Primary Response to Comments at 470. Second, EPA states that it made "significant updates for the IPM model for projecting EGU emissions." 76 Fed. Reg. at 48260. Finally, the Office of Management and Budget's report on interagency review observed

that EPA has produced a "significantly different rule than originally proposed" given the "sheer magnitude of change to the budgets of all the states."[3]

Nothing in EPA's proposed rule or the NODAs alerted Dairyland or any other affected Wisconsin utility that EPA was planning on making these "significant" and "numerous" changes. EPA has therefore violated the CAA's notice and comment procedures as to Wisconsin. If EPA does not reconsider and provide Wisconsin with a more adequate notice and comment period, Dairyland will be compelled to pursue judicial review in the D.C. Circuit.

Dairyland adopts and incorporates by reference Section II.A.2. of the WPSC PFR, and in addition notes the significant factual errors made by EPA with respect to Dairyland's EGUs. The Integrated Planning Model EPA used to assess emission profiles and impacts contains incorrect assumptions, including:

- That John P. Madgett Unit (approximately 370 MWs) had Selective Catalytic Reduction (SCR) control for NO_x online in 2010 and available for operation in 2012, when in fact SCR has not been installed at the unit and could not possibly be installed or operational by 2012.
- That the Genoa Unit 3 (approximately 295 MWs while burning 100% sub-bituminous ("PRB") coal) will have flue gas conditioning (SO_3 injection for improved particulate control) and activated carbon injection by 2012, when in fact it will not have such controls installed at the unit and could not possibly be installed or operational by 2012.[4] In addition, the listed heat rate is historically accurate but inaccurate when the unit is burning 100% PRB coal. When burning 100% PRB coal, the Genoa heat rate is considerably higher.
- That burning 100% PRB coal at Alma Units 1-5 would be possible in 2012 and the units would perform at specified heat rates and capacities, when in fact numerous modifications, operational changes, and

[3] *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review* ("OMB Summary of Interagency Working Comments"), Document EPA-HQ-OAR-2009-0491-4133 at 11 (posted July 11, 2011).

[4] EPA correctly assumed this unit has dry flue gas desulfurization (scrubber) for SO_2 control.

performance optimizations will be necessary before burning 100% PRB is possible.[5] If such a fuel switch were to occur, the resulting heat rates and capacities when using 100% PRB fuel will differ from the historical data in EPA's database. It is also important to note that Dairyland and many other Wisconsin utilities establish long term fuel and transportation contracts that are not easily changed on such short notice.

If Dairyland could have commented on EPAs revised final state budgets, EPA could have remedied these (and any other) errors prior to issuing the final rule. Corrections to these errors, along with corrections to errors in the IPM regarding other Wisconsin utilities, will significantly increase Wisconsin's state budgets for SO_2 and NO_x.

Dairyland therefore asks EPA to reconsider Wisconsin's state budgets, allow all of the sources in Wisconsin to comment, and fix all of its modeling errors and specious assumptions. During this time of reconsideration, EPA should stay the rule as to Wisconsin.

B. The Wisconsin State Budgets for SO_2 and NO_x Are Inequitable and Unlawful under the Clean Air Act and the D.C. Circuit's *North Carolina* Decision

The final rule does not consider each state's emission contribution when setting the state budgets or assurance provision caps, and imposes on Wisconsin an inequitable and unlawful burden in comparison to other states. EPA set the state budgets by determining "for specific costs per ton thresholds, the emission reductions that would be achieved in a state if all [covered units] . . . in that state used all emission controls and

[5] Dairyland previously commented on this issue and outlined numerous reasons why its units cannot switch to 100% PRB before January 1, 2012, including safety concerns, coal supply issues, and physical limitations of the plants based on design. *See* Dairyland Power Cooperatives Comments On Interstate Transport of Fine Particulate Matter and Ozone, Document EPA-HQ-OAR-2009-0491-2733, October 1, 2010; Dairyland Power Cooperative Comments On Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, Document EPA-HQ-OAR-2009-0491-3765, October 15, 2010. EPA states that it "updated its IPM modeling (see EPA IPMv.4.10 documentation) to better reflect the feasibility and cost-effectiveness of coal switching," but failed to fully address all of Dairyland's feasibility issues, and indicated "the rule does not require fuel switching at individual units," despite the fact that the cost of fuel switching at all units was factored into the state emission budget. Transport Rule Primary Response to Comments, Document EPA-HQ-OAR-2009-0491-4513 at 1158, 1507.

emission reduction measures available at that cost threshold." 76 Fed. Reg. at 48248. Even though EPA did check to ensure that all (or at least most) air quality problems would be resolved at the chosen cost per ton figures, the actual contribution of each state was not considered in any way. The resulting impact on Wisconsin is inequitable and unlawful.

Nearby states contribute substantially more than Wisconsin to downwind $PM_{2.5}$ nonattainment and maintenance problems, but Wisconsin bears greater and disproportionate reductions. EPA's significant contribution threshold is 0.15 μg/m3 for annual $PM_{2.5}$, meaning that states that have contributions below this amount are not "significantly contributing" to annual $PM_{2.5}$ nonattainment or maintenance problems in other states and are not included in the annual SO_2 and NO_x programs. 76 Fed. Reg. at 48236, 48240-41. States that are above the threshold for a receptor are considered "linked" with that receptor because, according to EPA, they "significantly contribute" to that receptor's air quality problems.

WPSC PFR Section II.B.1., adopted by Dairyland and incorporated herein by reference, reveals the disparity between Wisconsin and nearby state's contributions in the 2012 Base Case. For all of the receptors EPA identified as having "significant contributions" from Wisconsin, Wisconsin's contributions are substantially lower than nearby state's contributions. Yet Wisconsin under the Final Rule must eliminate 70% of its base SO_2 emissions, while only requiring Illinois to reduce approximately 10% of its emissions and Michigan to reduce 46% of its emissions compared to the 2014 base case.

Furthermore, Wisconsin is being forced to reduce more than its own significant contribution in order to allow other linked states to reduce less. This is impermissible according to CAA § 110(a)(2)(d)(i)(I) and the D.C. Circuit's *North Carolina* decision. 531 F.3d at 921. Despite Wisconsin eliminating all of its significant contributions at the $500/ton level, the Final Rule requires Wisconsin to further reduce its contributions solely due to the magnitude of the significant contributions of other nearby states on the same receptors. WPSC PFR Section II.B.2., incorporated herein by reference, reveals that Wisconsin is forced to reduce its contributions *below* its "significant contribution"

threshold in 2014 while other states, even after the mandated reduction in 2014 occur, greatly exceed the threshold.

Wisconsin is being impermissibly and illegally forced to reduce more than its "fair share." The Wisconsin budgets for SO_2 and NO_x are so fundamentally flawed that EPA should stay the Final Rule as to Wisconsin and reconsider it.

C. Wisconsin Likely Should Not Have Been Included in the Annual SO_2 or NO_x Programs, Based on EPA's Baseline Modeling

EPA's baseline data suggests that Wisconsin will likely have no significant contributions as of the $PM_{2.5}$ ccompliance date, which the EPA has admitted is April 2015, not 2012. 76 Fed. Reg. at 48277. EPA did not check as to whether a state's "significant contributions" are eliminated by the April 2015 deadline, as WPSC PFR Section II.C argues persuasively and Dairyland incorporates by reference herein. According to EPA's 2014 baseline data, Wisconsin's annual $PM_{2.5}$ significant contributions are almost entirely eliminated in 2014, with only one receptor (Wayne, MI) modeled exactly at the 0.15 μg/m3 level. By 2015, Wisconsin's contribution to this remaining receptor will likely be below the threshold. This means that by the compliance deadline in 2015, Wisconsin may not have had any significant contributions – but there is no way to determine this conclusively from the record because EPA did not calculate contributions for any year other than 2012. EPA's reliance on 2012 calculations is unreasonable, inequitable, and likely unlawful under the *North Carolina* decision, which directed EPA to align the rule with the nonattainment compliance deadlines.

Additionally, because the EPA uses 2005 as its base year from which future air quality could be forecasted, the EPA analysis does not reflect the reality that utilities have already reduced emissions as a result of CAIR. EPA calculated Wisconsin's baseline SO_2 emissions in 2012 to be 131,199 tons and 124,862 tons in 2014, while the actual data for 2010 reveals Wisconsin's emissions were 109,430 tons. By failing to examine the real world, present data compared to the 2005 base year projections, EPA violates case law that found it arbitrary for EPA to fail to address stark disparities between its projections and real world observations. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054 (D.C. Cir. 2001). If EPA included the CAIR-related reductions reflected in the real-

world data in 2010, Wisconsin's contributions in 2012 likely would not have been above the thresholds for inclusion in the annual SO_2 and NO_x programs.

Because EPA ignored real-world data despite knowing its projections were contrary to real-world, EPA has no choice but to reconsider and stay the Final Rule as to Wisconsin.

D. At a Minimum, Wisconsin Should Have Been Placed Into Group 2 for SO_2.

If Wisconsin is lawfully included in the Cross-State Rule, EPA should have included Wisconsin in Group 2 rather than Group 1 for SO_2 because Wisconsin has relatively small contributions to receptors that happen to be affected by many other states whose issues were not resolved at the $500/ton level. Even though Wisconsin's significant contributions are eliminated at this level, it is "linked" to the receptors because EPA relied on the 2012 baseline data – not the $500/ton level. Dairyland hereby incorporates by reference Section II.D. of the WPSC PFR, which reveals that EPA included Wisconsin in Group 1 because it happened to be "linked" to the same downwind receptors as the larger contributing states (like Illinois, Michigan, Indiana, and Ohio) and argues that EPA had no legal or factual basis for including Wisconsin in Group 1 for SO_2.

E. EPA's "FIP First" Approach Fails to Comply with the CAA

EPA's attempt to implement a Federal Implementation Plan ("FIP") under CAA § 110 before Wisconsin has had an opportunity to take a "first cut" at compliance violates the CAA. The CAA requires that states first address nonattainment with the NAAQS *within their own borders*, and, only after this has occurred, does the statute authorize EPA to find that the State Implementation Plans ("SIPs") of other states' are substantially inadequate to prohibit "significant contribution" to any remaining nonattainment in the downwind state. EPA's actions are contrary to the dual-federalism model contained in the CAA.

The direct regulation of only EGUs usurps Wisconsin's authority under CAA §§ 107(a) and 101(a)(3) to regulate within its own borders. Comments by the Utility Air Regulatory Group ("UARG") during the public comment period on the Cross-State Rule show through extensive analysis of statutory terms, legislative history, and case law how

EPA's "FIP First" approach violates the CAA. Dairyland endorses and incorporates those comments, as well as Section III of the Luminant Generation Company LLC ("Luminant") "Request for Partial Reconsideration and Stay of EPA's Final Rule" filed on August 5, 2011 which adds several points, including dispelling EPA's alleged rationale of authority for a FIP through a "finding of failure" of a state's SIP. Dairyland reiterates that the state of Wisconsin could not have adopted a SIP until Wisconsin knew the requirements its SIP must meet. This did not occur until the Final Rule was published on July 6, 2011.

EPA has left Dairyland and other Wisconsin EGUs with essentially only one method of compliance: derating and shutdown of generating units. This unit-level regulation by EPA violates the federal-state structure of CAA § 110(a). States must be given the ability to choose a variety of options to achieve SIP compliance, as Luminant argues in Section IV of its August 5 filing (incorporated herein by reference). Dairyland details in Section B of this Petition the reasons why it cannot meet compliance in any other manner other than decreased generation.

EPA should recognize that states must be given the flexibility to meet NAAQs in the manner they deem appropriate. Only after EPA finds such efforts inadequate can EPA issue FIPs. For this reason, EPA should reconsider and stay the Final Rule.

CONCLUSION

EPA's final Cross-State Rule is factually and legally insupportable as applied to Wisconsin. Failure to correct these problems will force immediate and costly rate increases on the member-consumers served by the Dairyland system and other consumers in the state. EPA should stay the rule as to Wisconsin while it conducts additional notice-and-comment rulemaking on Wisconsin's annual state budgets for SO_2 and NO_x.

Respectfully submitted,

DAIRYLAND POWER COOPERATIVE

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