UNITED STATES OF AMERICA
BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY

Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals	))))	Docket No. EPA-HQ-OAR-2009-0491

PETITION FOR RECONSIDERATION
AND REQUEST FOR IMMEDIATE STAY
OF THE CROSS-STATE AIR POLLUTION RULE

Respectfully submitted,

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PETITION FOR RECONSIDERATION AND REQUEST FOR IMMEDIATE STAY OF THE CROSS-STATE AIR POLLUTION RULE

Pursuant to 5 U.S.C. § 705 and 42 U.S.C. § 7607(d)(7)(B), the Louisiana Public Service Commission ("LPSC"), through undersigned counsel, respectfully submits this Petition for Reconsideration and Request for Stay of the Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, commonly known as the Cross-State Air Pollution Rule ("CSAPR") published by the U. S. Environmental Protection Agency ("EPA") on August 8, 2011.[1] In support of this Petition and request for stay, the LPSC submits the following:

I. INTRODUCTION

The LSPC is the state agency in Louisiana that was constitutionally created and provided with jurisdictional authority to regulate both rates and services of public utilities and common carriers within the state.[2] In accordance with its constitutional mandate related to electric utilities, the LPSC strives to regulate all electric utilities within its jurisdiction in a manner that

[1] 76 Fed. Reg. 48,208 (Aug. 8, 2011) (hereinafter referred to as "CSAPR, 76 Fed. Reg. at ____."

[2] Louisiana Constitution, Article IV, Section 21.

provides adequate and reliable electric service at fair and reasonable rates to all Louisiana ratepayers. In this role, the LPSC provided comments on the proposed Clean Air Transport Rule ("CATR")[3] on October 1, 2010[4] and May 24, 2011.[5]

After the conclusion of the period for public comment, the EPA published CSAPR as its final interstate transport rule on August 8, 2011. The LSPC immediately invoked an investigation into CSAPR's impact on its regulated entities and, in turn, the citizens of Louisiana.[6] That investigation resulted in findings such as the imposition on Louisiana of a startling 42% reduction in ozone season NOx emissions.[7] These findings mandate a response from the LSPC and the State of Louisiana.[8]

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[3] Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210 (Aug. 2, 2010) (hereinafter referred to as "CATR, 75 Fed. Reg. at _____."

[4] Affidavit of Dr. David E. Dismukes, Exhibit A, Attachment 4 (hereinafter referred to "Dismukes Affidavit, Ex. A, at ¶ ___"). The LPSC retained the services of Dr. David Dismukes as a consulting expert as established in his affidavit attached and incorporated hereto as Exhibit A.

[5] Dismukes Affidavit, Ex. A, Attachment 5; *see*, *infra*, Section IV.A.

[6] *See* Dismukes Affidavit, Ex. A, Attachment 3, consisting of excerpts of LPSC "Docket No. R-29380, Subdocket B – An Investigation into the Ratemaking and Generation Planning Implications of the U.S. EPA Clean Air Interstate Rule," including written comments and transcripts of hearings. The LPSC initiated a rulemaking docket on February 22, 2006 to investigate the ratemaking and generation planning implications of the Clean Air Interstate Rule ("CAIR"). (*See* generally LPSC Docket R-29380.) This investigation into the CAIR rule naturally transitioned to an investigation of the ratemaking and generation effects of CATR as proposed by the EPA. Accordingly, the LPSC continued its investigation by opening a subdocket (LPSC Docket R-29380, Subdocket B) to specifically obtain stakeholder input from the public and all utilities subject to the jurisdiction of the LPSC in order to understand the impact on both rates and service for Louisiana citizens. After publication of CSAPR, the LPSC again requested comments from stakeholders and scheduled a technical conference in which all interested parties would have an opportunity to detail how they would be affected by CSAPR. By considering the information and data presented at the technical conference and gleaning information from the publicly filed comments in its rulemaking docket, the LPSC has now fully developed the record regarding the deleterious impact that CSAPR will have on both the reliability and affordability of electric service within Louisiana.

[7] Dismukes Affidavit, Ex. A, at ¶ 47.

[8] Louisiana's Department of Environmental Quality ("LDEQ") has also filed a Petition for Reconsideration with the EPA and both of these agencies, along with the State's Attorney General, will be filing a Motion for Review and Motion to Stay with the United States Court of Appeals, District of Columbia Circuit (the "D.C. Circuit").

CSAPR deviated significantly from CATR in ways that could not have been foreseen by the LPSC and will have a tremendous negative impact on Louisiana utilities but, more importantly, will have extremely adverse effects on Louisiana citizens. Further, CSAPR was adopted by the EPA without any apparent consideration of the LPSC's comments on CATR or, at a minimum, without the statutorily required additional notice and opportunity to comment further on many of the previously unannounced provisions included in CSAPR. Thus, in light of the procedural and factual defects in CSAPR and the significant harmful effect that CSAPR will have on the State of Louisiana and its citizens, the LPSC respectfully requests the EPA to reconsider CSAPR and immediately stay the rule as it applies to Louisiana as required by the Clean Air Act ("CAA")[9] and the Administrative Procedure Act ("APA")[10] as further discussed herein.

II. BACKGROUND

The CAA requires that the EPA promulgate certain primary or secondary national ambient air quality standards ("NAAQS") and ensure that each state meets these NAAQS within a specified time period.[11] Further, the CAA requires each state to devise an implementation plan that "prohibit[s] . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard."[12] In order to implement this "good neighbor"

[9] 42 U.S.C. § 7607(d)(7)(B).

[10] 5 U.S.C. § 705.

[11] 42 U.S.C. § 7408(a)(l)(A).

[12] 42 U.S.C. § 7410(a)(2)(D)(i)(I).

provision, the EPA issued CAIR in 2005 requiring certain states to reduce emissions of sulfur oxides ("SO_2") and nitrogen oxides ("NOx") that "significantly contributed" to nonattainment or "interfere with maintenance" of NAAQS in a downwind state.[13]

However, in *North Carolina v. EPA*,[14] the D.C. Circuit held that the EPA did not have the statutory authority to issue CAIR for multiple reasons, including the fact that the EPA did not attempt to measure and eliminate each state's contribution in an "isolated, state-by-state" manner.[15] On rehearing, [16] the Court then remanded the rule to the EPA, without *vacatur*, which allowed the CAIR rules to remain in place until the EPA issued a new rule on cross state air pollution to replace CAIR.

Some five years after issuing CAIR, on August 2, 2010, the EPA published CATR as its proposed new rule and proposed to limit SO_2 and NOx emissions from electric generation units ("EGUs") in thirty-two (32) states based on EPA's finding that the emissions from the EGUs contribute significantly to the nonattainment or interfere with maintenance of at least one of three NAAQS in a downwind state.[17] After receiving nearly 4,000 comments on the proposed rule and issuing three separate Notice of Data Availability ("NODA"),[18] the EPA published CSAPR

[13] Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005).

[14] 531 F.3d 896 (D.C. Cir. 2008).

[15] *Id*. at 907-908.

[16] 550 F.3d 1176 (D.C. Cir. 2008).

[17] CATR, 75 Fed. Reg. 45,210.

[18] *See* Notice of Data Availability Supporting Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 53,613 (Sept. 1, 2010); Notice of Data Availability Supporting Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone: Revisions to Emission Inventories, 75 Fed. Reg. 66,055 (Oct. 27, 2010); and Notice of Data Availability for Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone: Request for Comment on Alternative

which applies to twenty-seven (27) states in the eastern United States, including Louisiana. CSAPR identified Louisiana as significantly contributing to nonattainment in, or interfering with maintenance by, Texas with respect to the NAAQS for ozone at five (5) monitors in the Houston area based on modeling projections for 2012.[19] In order to remedy this alleged "significant contribution" to the nonattainment of the Houston, Texas area, CSAPR requires Louisiana EGUs to reduce ozone season NOx emissions by a startling 42% from its 2010 actual emissions level.[20] This requirement for Louisiana is the largest percent reduction in ozone season NOx allowances of any state under CSAPR.[21] Amazingly, CSAPR also implements a Federal Implementation Plan ("FIP") requiring compliance with these unreasonable seasonal NOx emission allowances beginning May 1, 2012.

III. GROUNDS FOR RECONSIDERATION OF CSAPR

The CAA mandates that the EPA initiate reconsideration proceedings when a party can show (1) that it was either impracticable to raise an objection during the comment period or the grounds for such objection arose after the period for public comment, and (2) that the objection is of central relevance to the outcome of the rule.[22] For the reasons set forth below, the LPSC submits that both of these statutory mandates for reconsideration have been met with respect to various aspects of CSAPR, including the specific allocation of emission allowances that the EPA set for individual states, the erroneous and skewed modeling that was used to support the rule,

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Allocations, Calculation of Assurance Provision Allowance Surrender Requirements, New-Unit Allocations in Indian Country, and Allocations by States, 76 Fed. Reg. 1,109 (Jan. 7, 2011).

[19] CATR, 75 Fed. Reg. at 45,246.

[20] Dismukes Affidavit, Ex. A, at ¶47.

[21] *Id*.

[22] 42 U.S.C. § 7607(d)(7)(B).

the process utilized by the final rule in setting a FIP with no consideration or deference to states, the effective date of the rule, and the lack of consideration of the reliability, rate, and health impacts of the final rule.[23]

The first prong of the test, the failure of the agency to provide an opportunity for notice and comment, is satisfied in this instance because the final rule was issued with significant variations that had not been published and made available for comment. The D.C. Circuit has noted that the notice requirements for agency rulemaking ". . . are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[24] Thus, discrepancies between proposed rules and final rules are carefully scrutinized to ensure that the notice and procedural requirements of the CAA are not circumvented by an agency action. The test, as articulated by the D.C. Circuit, is that ". . . an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."[25] In *Northeast Maryland Waste Disposal Authority v. EPA*,[26] the D.C. Circuit established that "[a] rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change

[23] Dismukes Affidavit, Ex. A, at ¶ 71.

[24] *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (quoting *International Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 407 F.3d 1250 (D.C. Cir. 2005) (internal citations omitted)).

[25] *Environmental Integrity Project*, 425 F.3d at 996 (citing *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir.1991)).

[26] 358 F.3d 936 (D.C. Cir. 2004) (internal citations omitted).

was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[27]

The changes contained in the final version of CSAPR could not have been anticipated, as discussed in each section below, and the differences are much more than mere discrepancies and are certainly not "logical outgrowths" of CATR. The LPSC did not receive notice of the provisions discussed below until the final rule was issued, and after the period for public comment was closed. Moreover, the requirements under CSAPR were even acknowledged by both the EPA and the Office of Management and Budgeting ("OMB") as fundamentally different from those contained in CATR, which was originally submitted by the EPA for comment.[28] As a result, it was impossible for the LPSC to comment on the specific provisions discussed herein and proposed and simultaneously established for the first time in CSAPR. Consequently, reconsideration of CSAPR by the EPA is mandatory under the CAA.

The second prong of the standard mandating agency reconsideration is also established as the LPSC's objections to CSAPR are clearly "of central relevance to the outcome of the rule." Both the statutory language of the CAA and the judicial interpretation of the term "central relevance" make clear that reconsideration is required to address errors in the rulemaking process of such a nature that "there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made."[29] The information presented below demands the conclusion that CSAPR's errors in process and substance are so consequential that

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[27] *Id*. at 952.

[28] CSAPR, 76 Fed. Reg. 48,208; and Summary of Working Comments on Draft Language under EO 12866 Interagency Review, Document EPAHQ-OAR-2009-0491-4133 at 11 (posted July 11, 2011).

[29] 42 U.S.C. § 7607(d)(8); *Northeast Maryland Waste Disposal Authority*, 358 F.3d at 947; *West Virginia v. EPA*, 362 F.3d 861, 869 (D.C. Cir. 2004).

reconsideration of the rule with appropriate attention to real world information will necessarily result in a dramatically different rule. Specifically, these errors include the EPA's procedure and process in implementing the rule, the modeling upon which the EPA relied for emission allowance allocations, and the EPA's failure to consider the impacts of these allocations upon Louisiana utilities' rates and service and upon the health, safety, and welfare of Louisiana citizens.

A. CSAPR violates the CAA because the allocation of EGUs and state-specific allowances are not related to Louisiana EGUs actual or projected contribution to the Non-Attainment of the Ozone NAAQS of the Houston Area, and are therefore arbitrary and capricious.

The CAA requires that upwind states follow a "good neighbor" standard and prevent pollution produced in the upwind state from causing a downwind state to be in nonattainment of the various pollution standards.[30] However, such upwind states are only required to reduce their actual, specific contribution on the downwind states rather than share the burden of compliance with other states that also impact the downwind state. The D.C. Circuit clarified in *North Carolina* that the EPA has "only those authorities conferred upon it by Congress" and that, even though EPA's "redistributional instinct may be laudatory," the CAA provides the EPA with "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."[31] Clearly, *North Carolina* stands for the proposition that the EPA must base its regulatory action on actual cause and effect data and may not rely on assumptions or generalities.

[30] 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[31] 531 F.3d at 921.

In CATR, the EPA proposed to set baseline emissions limits based on IPM modeling results that included the 2005 emissions inventory from NOx sources in Louisiana with adjustments to reflect actual emissions and heat input data for the EGUs and proposed an emissions budget for Louisiana in CATR of 21,220 tons beginning with the *2014* ozone season.[32] However, in CSAPR, the EPA used the IPM modeling results as the baseline emissions for Louisiana with no adjustment to the output to reflect a realistic level of generation from Louisiana EGUs, which resulted in a dramatic reduction of Louisiana's emissions budget to 13,432 tons beginning with the *2012 ozone season*.[33] The EPA then used further computer modeling to predict whether a state contributed to the nonattainment or interference of maintenance of certain NAAQS in another state.[34] In performing these modeling runs as the basis for Louisiana's emissions allowances, the EPA did not even attempt to determine whether Louisiana in fact – not just theoretically – accounted for actual significant contribution or interference with maintenance on the ozone monitors in Texas.

Based solely on the methodology and modeling used in CSAPR, the EPA "found" that Louisiana and nine (9) other states "significantly contributed" to the projected nonattainment of the 8-hour ozone NAAQS in the Houston, Texas area.[35] Further, the EPA found that Louisiana and five (5) other states were deemed to "interfere with maintenance" of the 8-hour ozone NAAQS in the Houston, Texas area based on this same, flawed modeling.[36] These findings are

[32] CATR, 75 Fed. Reg. at 45,291, Table IV.E-2.

[33] CSAPR, 76 Fed. Reg. at 48,263, Table IV.D-4.

[34] CSAPR, 76 Fed. Reg. at 48,238-48,246, Table IV.D-4.

[35] CSAPR, 76 Fed. Reg. at 48,263, Table IV.8.

[36] CSAPR, 76 Fed. Reg. at 48,263, Table IV.D-9.

not supported by the factual data as discussed in the LDEQ Petition for Reconsideration;[37] nevertheless, Louisiana EGUs are required to reduce emissions statewide by approximately 42% from the actual 2010 emissions.[38] By contrast, other states, such as Alabama and Georgia, received additional allowances of emissions in excess of their actual 2010 emission output despite the fact that they significantly contributed to projected nonattainment on the same monitors.[39]

EPA's draconian reductions in the baseline emissions for Louisiana bear no relationship with the actual or, for that matter, even the modeled impact that Louisiana has on the Houston area monitors. In fact, a simple state-by-state comparison of the NOx season allowances budgeted for each state regulated under CSAPR clearly shows that the rule violates any pretense of uniformity, equity, or rational relationship to the purported contribution on projected nonattainment included in CSAPR. Table 1 shows the budgeted ozone season NOx allowances for each state subject to CSAPR, as well as their actual 2010 emissions, the anticipated deficits based upon actual 2010 emissions, and the percent reductions required under CSAPR from the actual 2010 emissions.

[37] LDEQ Petition for Reconsideration, at pp. 11-12.

[38] *See*, *infra*, Table 1.

[39] This unexplained disparate treatment in CSAPR is persuasive evidence of the arbitrary and capricious nature of the final rule.

	Emissions in 2010 (tons NOx)	Emission Budget 2012-2013 (tons NOx)	Emissions Over or (Under) Budget (tons NOx)	Percent Change (%)
Alabama	27,849	31,746	3,897	14%
Arkansas	17,921	15,037	(2,884)	-16%
Florida	33,334	27,825	(5,509)	-17%
Georgia	26,790	27,944	1,154	4%
Illinois	21,371	21,208	(163)	-1%
Indiana	49,159	46,876	(2,283)	-5%
Kentucky	39,065	36,167	(2,898)	-7%
Louisiana	**23,172**	**13,432**	**(9,740)**	**-42%**
Maryland	9,428	7,179	(2,249)	-24%
Mississippi	16,089	10,160	(5,929)	-37%
New Jersey	5,192	3,382	(1,810)	-35%
New York	12,887	8,331	(4,556)	-35%
North Carolina	24,661	22,168	(2,493)	-10%
Ohio	47,582	40,063	(7,519)	-16%
Pennsylvania	58,211	52,201	(6,010)	-10%
South Carolina	13,769	13,909	140	1%
Tennessee	14,667	14,908	241	2%
Texas	68,446	63,043	(5,403)	-8%
Virginia	18,311	14,452	(3,859)	-21%
West Virginia	24,206	25,283	1,077	4%
Total	**552,110**	**495,314**	**(56,796)**	**-10%**

Table 1. CSAPR State Reductions

Louisiana will be required to incur the largest deficit in allowances for seasonal NOx emissions, in both percentage and absolute tons reduction, of any CSAPR-impacted state. Louisiana will be forced to achieve a 9,740-ton reduction from actual 2010 emissions, which is 114% greater than New York, 80% greater than Texas, and 62% greater than Pennsylvania. Moreover, states such as Alabama and Georgia received an increase in allowances from their 2010 actual emissions while allegedly contributing roughly half of the total of Louisiana's

purported contribution on the same monitors in Texas.[40] Yet for Louisiana, CSAPR forces a disproportionate reduction over its actual 2010 emissions while granting increased allowances to those other states. There is simply no explanation, rationale, or justification for the arbitrary assignment of such a large percentage reduction to Louisiana.

Moreover, rather than being rewarded for its past success at reducing overall EGU-related NOx emissions over the past decade,[41] Louisiana is penalized in CSAPR by a percentage and absolute level that is in no way comparable with any other states. The compliance implications of such an uneven and arbitrary application of air emissions regulations, developed more fully below and in the attached affidavit of Dr. David Dismukes, will have a profound negative impact on the citizens of Louisiana. It will also have a significant negative impact upon Louisiana's ability to recruit, retain, and develop business and industry relative to states that are clearly less significantly impacted by CSAPR.[42] Such a result fails to meet any standard of uniformity in regulatory treatment and is likely to bias the flow of economic activity engaged in interstate commerce between the CSAPR-impacted states.

B. The EPA used models that contain erroneous and inconsistent assumptions for Louisiana power markets and its EGUs in its development of CSAPR.

1. The models do not take into account significant intra-state and inter-state transmission constraints and the unrealistic level of power imports from out of state EGUs to meet loads within Louisiana.

The CSAPR allocations are based upon modeling approaches that fail to capture the reality of a number of significant transmission constraints throughout Louisiana, but especially in South Louisiana. While the IPM model notes that it has included Total Transfer Capabilities

[40] CSAPR, 76 Fed. Reg. at 48,245, Table IV.D-8.

[41] Dismukes Affidavit, Ex. A, at ¶¶ 43-45.

[42] *Id.* at ¶ 12.

between modeling regions, these constraints are broadly constructed, assumed to be relatively constant during peak and off-peak periods, and were assumed to be the only meaningful transmission constraints that should be modeled for the determination of the appropriate baseline level of emissions for Louisiana EGUs. These assumptions are flatly incorrect and have no basis in reality.[43]

Compounding these modeling deficiencies is EPA's assumption that more efficient out-of-region power generation will be imported to Louisiana, without identifying how that power will flow from an undefined generator within and among Louisiana's regions and sub-regions. The identification and explanation of that transmission of power is critical to EPA's modeling, but completely lacking. Moreover, the assumptions that power from other regions can be dumped into these sub-regions and moved through a sub-region without transmission constraints is simply wrong and completely unsupportable by the facts.[44]

The LPSC and the industry can fully explain the nature and impact of relevant transmission constraints – and would have brought this to the attention of EPA during a proper notice and comment period had one been provided. Clearly, and indisputably, because the assumed availability of unrestrained transmission of power within the Louisiana regions and sub-regions as set forth in CSAPR is a false and inaccurate assumption, EPA must reconsider the rule, with due notice and comment period allowed, so that appropriate weight can be given to factually accurate and correct information pertaining to the actual transmission constraints within Louisiana.[45]

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[43] *Id.* at ¶¶ 16-18, 70.

[44] *Id.* at ¶¶ 18-24, 70.

[45] *Id*. at ¶ 71.

2. The EPA's modeling of Louisiana's power markets is deficient, in error, and does not recognize the unique nature of older Louisiana EGUs that are used to meet system reliability requirements.

Due to the significant transmission constraints within Louisiana as discussed in Section III.B.1 above and detailed in the affidavit of Dr. Dismukes, Louisiana utilities have traditionally been unable, during certain peak periods, to meet the electricity demand in some areas of the state with imported generation from out of state or even from other areas within Louisiana due to significant transmission constraints, particularly in portions of South Louisiana. Rather in these isolated areas, known as "load pockets,"[46] the utilities must utilize older, less efficient EGUs that are located within these transmission-constrained load pockets to meet the electricity demand of both industrial and residential Louisiana ratepayers during these peak periods.[47] These "reliability must run" units are typically older, higher incremental cost and higher emission units that the host area utilities operate during periods of peak demand to supply the reliability needs of the load pockets.[48] The reason is simple: due to transmission constraints unique to Louisiana's power market, there is no other current means of supplying power to the load pockets. Thus, to accommodate the reliability needs of these isolated areas in times of peak demand the utilities must run these older, less efficient EGUs.

The EPA modeling assumptions underlying CSAPR that the needs of Louisiana's citizenry can be met without use of these various "must run" EGUs in times of peak demand is incorrect and based on fundamentally flawed assumptions.

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[46] *Id.* at ¶ 21.

[47] Dismukes Affidavit, Ex. A, Attachment 4, p. 8; Attachment 5, pp. 7-8.

[48] *Id*.

Further complicating the unique power markets of Louisiana are the impacts of certain power generators in the state that, by federal mandate, have the right to sell power into the grid and the corresponding requirement on host utilities to purchase such power. The implications of these facts on Louisiana were completely ignored by EPA in its modeling that generated the CSAPR emissions budget for Louisiana. Louisiana is home to a significant quantity of this type of power generated by qualifying facilities ("QF") in areas of the state where the host utilities must purchase this power at their avoided cost. The host utilities must plan for such power to ensure that sufficient generation capacity is available for curtailment to accommodate this QF power when it is "put" to the transmission system by QF and to replace it when the QF does not have excess power to sell into the grid.[49] This "flexible capacity" is generally provided by the utilities through dispatch of vintage EGUs that have lower capital costs but relatively higher operating costs and emissions levels in order to capture the savings that occur due to the infrequent and varying use of these EGUs.[50]

The model used by the EPA to develop the baseline level of emissions from Louisiana EGUs did not take these critical reliability-related transmission and generation factors into account.[51] Based on this unjustified assumption, and without consideration of the specific and unique characteristics of the Louisiana power market, EPA drew the faulty conclusion that Louisiana could achieve the required amount of generation to meet peak electricity demand in

[49] Dismukes Affidavit, Ex. A, at ¶¶ 35-42.

[50] *Id.* at ¶¶ 39-41, 47, 49.

[51] *Id.* at §§ III and IV.

the state by importing power from other areas of the country, adding more efficient generation, or installing controls to existing generation.[52]

The EPA made no attempt to adjust the flawed IPM results to reflect the actual operation of Louisiana's transmission and generation assets; rather, it set Louisiana's allocation of allowances at a level that is unattainable by Louisiana utilities in the time mandated for compliance.[53] Indeed, because there is no factual support in either historical data or in the erroneous modeling used by the EPA for such drastic reduction in the level of allowances for Louisiana, the final rule is fatally defective and EPA must grant reconsideration of CSAPR as it applies to Louisiana under the CAA.

3. CSAPR is based upon flawed data that includes incorrect assumptions about the current and anticipated operational status of certain units, as well as their historic operating efficiencies.

By issuing the FIP in CSAPR, the EPA has ignored the state agency charged with regulating Louisiana's power markets and the generation resources necessary for Louisiana's citizens and the specific circumstances of Louisiana. In CSAPR, the EPA has effectively established a "one size fits all" model that incorrectly assumes that the Louisiana power market is the same as all other states affected by CSAPR. This assumption is, again, unjustified and factually incorrect and unsupportable.

For example, the EPA assumes the addition of several new natural gas-fired EGUs to Louisiana's total capacity mix over the next several years; however, it does so without explaining where those units will be built, who will build those units, and whether such units can

[52] *See* Section III.D.2., *infra.*

[53] Dismukes Affidavit, Ex. A, at ¶¶ 53-65, 70.

be designed, engineered, permitted and constructed within the estimated IPM timeline.[54] These assumptions, though fundamental to the CSAPR, are unsupported in the record and factually unrealistic. There is virtually no hard data in the underlying assumptions of CSAPR pertaining to the actual planned construction and operation of such units.[55]

Moreover, the EPA model assumes that the new combined cycle generation units will operate at a level drastically inconsistent with the past practices of Louisiana's utility-owned combined cycle units over the past 3 years. Historically, Louisiana's newer combined cycle units are sized about 22% larger than the EPA IPM assumption.[56] This is significant because the size of an EGU influences, ultimately, its NOx emissions.[57] Because the EPA model understates the size of the assumed new combined cycle units, the model understates the expected emissions from these units in quantifying Louisiana's emissions budget. Further, historically, Louisiana's combined cycle units operate at a capacity utilization rate some 27% lower than the IPM model, a heat rate 18% higher than the IPM model, and an emissions rate of 97% higher than the IPM model assumes.[58] In short, EPA's IPM new unit model assumptions suggest an operating performance for new combined cycle units entirely inconsistent with Louisiana's experience. Had the EPA used historically accurate factual assumptions in its modeling rather than

[54] *Id.* at ¶¶ 25-29, 70.

[55] *Id.* at ¶¶ 25-42, 70.

[56] *Id.* at ¶ 31.

[57] *Id*.

[58] *Id.* at ¶ 33.

assumptions having no rational or factual basis, Louisiana's emissions budget would be significantly different.[59]

Louisiana EGUs cannot be expected to reach standards whose underlying assumptions vary so greatly from reality. Reconsideration is imperative so EPA can regulate emissions from accurate information that leads to attainable standards in a reasonable time frame.[60]

C. CSAPR violates the CAA because the FIP does not defer to the states for implementation of emission reductions.

The CAA provides a clear definition of the role of states in regulating pollutants, namely that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments . . . ."[61] As the D.C. Circuit has recognized in multiple cases, Congress has clearly recognized that states are in a superior position compared to the EPA to make a determination regarding the exact method and process that the individual EGUs within its borders will follow to meet the applicable standards.[62] One obvious reason for this deference required by Congress is the state's familiarity with the problems and issues confronting the industry within the state and the status and cost of various emission controls that are required to meet the standards.

Section 7410 of the CAA sets the parameters for the state plans and the conditions under which a FIP may be substituted. According to the procedures set forth in the CAA, the states are required to submit to the EPA a plan for the "implementation, maintenance and enforcement" of

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[59] *Id.* at ¶¶ 33, 70.

[60] Dismukes Affidavit, Ex. A, at ¶ 71.

[61] 42 U.S.C. § 7401(a)(3).

[62] *See, e.g., Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86-87, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *Union Elec. Co. v. EPA*, 427 U.S. 246, 269, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976).

the standards for each air quality region with the state (State Implementation Plan or "SIP"), and the EPA is required to determine whether each SIP will adequately meet the standards.[63] Once this determination has been made, the EPA is permitted to promulgate a FIP only if (1) a state has failed to make a required submission or the Administrator finds that the plan or plan revision submitted by the state does not satisfy the minimum criteria prescribed by the Administrator or (2) the Administrator disapproves of a SIP in whole or in part.[64]

The EPA's prior findings and the lack of discussion of a Louisiana-specific SIP that complies with the mandates outlined in CSAPR clearly establish that the statutory prerequisites for the EPA issuing an FIP in place of a SIP have not been met. In fact, on April 18, 2011, the EPA found that the Louisiana SIP met the requirements of Section 110(a)(2)(D)(ii) with respect to the 1997 8-hour ozone and PM 2.5 NAAQS under the currently effective CAIR.[65] Louisiana has submitted no other SIP since that time. Thus, the EPA has not found that Louisiana has failed to make a submission, that a pending plan submitted by Louisiana was found lacking by the Administrator, or that Louisiana's SIP should individually be disapproved in whole or in part as required by statute.

Regardless of the fact that Louisiana has a compliant SIP, and without so much as an opportunity to comment on the application of the Louisiana-specific SIP to the new emissions rules announced in CATR, the EPA issued CSAPR, which sets out a FIP effective on January 1,

[63] 42 U.S.C. § 7410(a)(1).

[64] 42 U.S.C. § 7410(c)(1).

[65] Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Section 110(a)(2) Infrastructure Requirements for the 1997 8-hour Ozone and Fine Particulate Matter National Ambient Air Quality Standards, 76 Fed. Reg. 21,682 (Apr. 18, 2011).

2012 with no deference to the states to implement state-specific plans.[66] Rather, CSAPR allows a state to provide notice of its intent to develop a SIP but that SIP will only be effective, if approved by the EPA, beginning in 2013.[67] This provision of CSAPR directly contradicts the requirements and mandatory deference to states included in the CAA.

By issuing CSAPR and effectively ignoring its prior decision on Louisiana's SIP without an opportunity to correct any short-coming or develop a new SIP consistent with the CSAPR, the EPA has usurped the authority granted to the states in the CAA to implement an emission reduction plan at a federal level.

D. The timing of implementation of CSAPR is unrealistic.

1. The lack of an interstate trading market and the existence of significant transmission constraints leaves installation of mitigation equipment as the only arguably viable compliance option, but one which is impossible for compliance by 2012 and unreasonable from a cost perspective.

The unprecedented short time frame for compliance with CSAPR has left utilities and non-utility generators scrambling to determine the best means of compliance with this rule while avoiding violations of other state and federal regulations, and at the least cost to their shareholders and ratepayers. The LPSC will not know the full implications of CSAPR until the utilities have completed their own analyses and made planning decisions. Likewise, the electric reliability organizations such as SERC,[68] ERCOT[69] and SPP,[70] as well as other federal agencies

[66] CSAPR, 76 Fed. Reg. at 48,329.

[67] CSAPR, 76 Fed. Reg. at 48,329.

[68] SERC Reliability Corporation ("SERC") is the Electric Reliability Organization certified by the North American Electric Reliability Corporation ("NERC") under the Federal Power Act as one of the nine regional reliability councils whose responsibility is to propose and enforce reliability within the region. Most of Louisiana is in the SERC region.

like FERC,[71] have not and cannot adequately assess the impacts on the nation's electric grid until these decisions have been made by the EGUs regulated under CSPAR.[72] While the final planning decisions have not yet been made by LPSC-jurisdictional utilities, the investor-owned utilities in Louisiana have advised the LPSC that they cannot comply with the rule under the current time frame allowed.[73]

Further compounding Louisiana's plight is the EPA's new interstate trading restrictions[74] that will limit the scope of near-term market-based solutions for reducing Louisiana's NOx emissions due to the transmission constraints associated with importing power from sources with lower emissions.[75] These allowance trading restrictions are short-sighted, as they will force most EGUs to pursue long-term physical investment solutions to meet their compliance obligations rather than market-based ones with short-term compliance achieved, but at the cost of an adequate supply of reliable power. Such limitations on alternative CAA compliance are contrary to over twenty years worth of environmental policy initiatives dating back to the Clean Air Act Amendments ("CAAA") of 1990. Interstate allowance trading, starting with the trading of NOx allowances created by the CAAA, has been the hallmark of market-based solutions to air

[69] Electric Reliability Council of Texas ("ERCOT") is also one of the nine regional reliability councils certified under NERC to propose and enforce reliability within its region. ERCOT's region essentially covers the State of Texas.

[70] Southwest Power Pool ("SPP") is also one of the nine regional reliability councils certified under NERC to propose and enforce reliability within its region. SPP's region covers a portion of Louisiana.

[71] Federal Energy Regulatory Commission ("FERC").

[72] *See, e.g.*, Testimony of Chairman Jon Wellinghoff, Federal Energy Regulatory Commission, Before the House Subcommittee on Energy and Power of the Committee on Energy and Commerce, United States House of Representatives (Sept. 14, 2011), at p. 7.

[73] *See, e.g.*, Dismukes Affidavit, Ex. A, Attachment 3, at pp. 006, 020, 073.

[74] CSAPR, 76 Fed. Reg. at 48,332-48,343.

[75] *See, supra*, Section III.B.1.

emissions. The benefits of this approach over a mandatory "command-and-control" system of forced investments and financial penalties are well documented.[76]

CSAPR, however, forces the physical, command-and-control type approach over the tradable allowance concept included in CAIR. While the LPSC appreciates the constraints imposed upon EPA by the Court in *North Carolina* regarding interstate trading, the total disregard for such opportunities and the impact that the trading program has had on Louisiana's past compliance with EPA's NOx standards under CAIR, have not been adequately considered under CSAPR. For instance, throughout the 2010 CAIR compliance year, Louisiana met some 48% of its overall required NOx reductions through trading interstate allowances and the balance of the state's compliance was met through the efficiency improvements.[77] Thus, Louisiana was able to resort to a market-based blend of physical compliance (through heat input efficiency) and allowance purchases to meet its overall emission requirements under CAIR.

CSAPR rejects the historical allowance trading options under CAIR and leaves Louisiana EGUs with only two theoretical options: (a) dramatic and significant capital investments in mitigation technology on older and rarely used assets needed for reliability purposes, or (b) shutting down generators, resulting in deprivation of electricity to Louisiana's citizens. However, for the reasons set forth below and in Dr. Dismukes' affidavit, the first option is not an option in reality since it is impossible for the EGUs to design, permit and install such control equipment prior to the mandated compliance period.[78]

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[76] Dismukes Affidavit, Ex. A, at ¶¶ 56-58.

[77] *Id.* at ¶ 57.

[78] *Id.* at ¶¶ 14, 25-29, 63-65, 70.

While EPA suggests four methods for achieving necessary emission reductions, they are not viable options for Louisiana. According to the EPA's fact sheet on the CSAPR, the following are ways that power plants may achieve necessary emission reductions: 1) maintaining effective and frequent operation of already installed control equipment; 2) using low sulfur coal; 3) increasing generation from relatively cleaner units; and/or 4) installing existing, commercially proven technologies that are widely available and frequently used in this industry, including selective non catalytic reduction ("SNCR"), selective catalytic reduction ("SCR"), low NOx burners, scrubbers (flue gas desulfurization), or dry sorbent injection.[79] For the reasons set forth below, these options may be hypothetically available but are not in reality possible under the deadlines of the CSAPR FIP.

With regard to the first option above, the utilities have been and are required to operate installed control equipment effectively by the LDEQ pursuant to Louisiana state law.[80] Indeed, as part of the Louisiana SIP approved under CAIR, as well as the LDEQ mandated compliance guidelines, the actual 2010 emissions levels achieved by the EGUs already reflect this operational control of existing assets and therefore the EGUs cannot rely on this option to achieve additional decreased emissions.

With regard to the second option, low sulfur coal usage, the EPA is, or should be, well aware that the majority of Louisiana's EGUs burn natural gas rather than coal. Louisiana does not have among its EGUs significant numbers of coal-fired units, much less coal-fired units

[79] http://www.epa.gov/crossstaterule/pdfs/CSAPRFactsheet.pdf.

[80] La. Admin. Code, Tit. 33, Part III, § 905. ("To aid in controlling the overall levels of air contaminants into the atmosphere, air pollution control facilities should be installed whenever practically, economically, and technologically feasible. When facilities have been installed on a property, they shall be used and diligently maintained in proper working order whenever any emissions are being made which can be controlled by the facilities, even though the ambient air quality standards in affected areas are not exceeded.")

burning high sulfur coal as a fuel source. Importantly, however, even if such fuel switches were hypothetically possible, it cannot be ignored that the retrofitting of the existing units to accommodate a different fuel requires not only a significant capital investment, but a much longer lead time to implement than is allowed by CSAPR. Indeed, the hypothetical "option" of switching to a different fuel source also ignores completely the legal and contractual restraints on the EGU owners associated with long-term coal supply and coal transportation agreements.[81]

The third option suggested by the EPA, increasing generation from cleaner units, is, of course, being considered by utilities as an option for compliance, but as discussed above, many of the older, less efficient EGUs are required during the summer peak season to maintain the reliability of the transmission system, especially across parts of South Louisiana in the so-called "load pockets."[82] This option also assumes, incorrectly, that there is or will be excess generation and transmission capacity within the State of Louisiana from these EGUs. As was demonstrated by the severe load demands imposed on the power grid during the record-breaking heat in Louisiana during the summer of 2011, there is no assurance that such excess generation capacity is or will be available. Even assuming the availability of some increased generation from existing "cleaner" EGUs, there is still the very significant problem with the transmission constraints across the state that would render any such additional generational capacity totally irrelevant to reliable supply to the Louisiana citizenry.[83]

The fourth option, the installation of new technology mitigation equipment, is equally flawed. For instance, ExxonMobil, a large cogenerator, refiner and chemical producer in

[81] Dismukes Affidavit, Ex. A, at ¶¶ 61, 68.

[82] *See, supra*, Section III.B.3.

[83] *See, supra*, Section III.B.1.

Louisiana, employing thousands of workers at its Baton Rouge complex alone, has stated to the LPSC that "the nine month time frame does not allow an adequate time frame for completion of major projects needed for us to be in compliance. Projects of this scale typically take three years or more to design, fund, and implement."[84] The Exxon Mobil Baton Rouge Complex consists of the second largest refinery in the United States, which could, in just a matter of months, become a consumer rather than supplier of electricity to the grid.[85] Likewise, Lafayette Utilities System ("LUS"), the largest municipal power generator in Louisiana, noted that a consultant for the City of Lafayette estimated a time of up to 40 months (over 3 years) to permit, design, install and complete a controls investment project.[86] Further, as a public municipal utility, LUS would be required to add another six to eight month bonding process which is not included in the EPA modeling assumptions.[87] LUS anticipates that if everything went perfectly, it would be able to comply with the CSAPR emissions requirements by, perhaps, 2015 or 2016, but not 2012.[88]

Roughly 60 percent of Louisiana's active EGUs have installed some type of NOx mitigation equipment.[89] The remaining generators without NOx controls are primarily older, uncontrolled EGUs that are used infrequently by utilities to meet peak demand and/or for reliability purposes.[90] Because of the reliability needs of the Louisiana power grid, these vintage EGUs cannot be hastily replaced by the utilities; rather these peaking units will likely need NOx

[84] Dismukes Affidavit, Ex. A, Attachment 3 at p. 150, lines 1-4.

[85] Dismukes Affidavit, Ex. A, Attachment 3, at p. 149, lines 8-9, 11-12.

[86] *Id.* at p. 152, lines 2-4.

[87] *Id.* at p. 152, lines 4-5.

[88] *Id.* at p. 152, lines 6-7.

[89] Dismukes Affidavit, Ex. A, at ¶ 65.

[90] *Id.*

controls, which are necessarily subject to time constraints inherent in the design, engineering, permitting and installation of such equipment.[91]

Moreover, the assumptions by EPA that Louisiana EGUs' compliance efforts through mitigation equipment installation cannot be viewed in a vacuum. Unless stayed, CSAPR's dramatic near-term change in emission standards will result in a rush for mitigation equipment by EGUs throughout the eastern United States by affected EGU owners. The reason is obvious: most states are short on the number of allocated allowances and will be unable to achieve compliance by allowance trading and will therefore be forced to attempt to install control equipment to avoid curtailing supply of power. This demand will also create a demand on engineering, design and permitting services in the near term making it more difficult for the numerous affected EGUs to obtain the design services necessary to order and install the new control equipment. Thus, an estimated $2.28 billion capital investment forecast by Louisiana EGUs may likely be increased by some scarcity premiums, which could drive up the annual revenue requirement (or rate impact) for Louisiana electricity consumers by as much as $299 million per year over the next five years. This potential impact is entirely avoidable if EPA were to consider a more reasonable implementation time period.[92]

As importantly, the EPA, without any consideration of the factual availability of sufficient capital improvement equipment, merely assumed that the control equipment could also be timely installed to meet the 2012 compliance deadline. As in so many of the other aspects of CSAPR, the mere assumption of the availability of sufficient equipment does not satisfy the legal requirement that the EPA rules be based on factually accurate data and valid assumptions. The

[91] *See*, *e.g.*, Dismukes Affidavit, Ex. A, Attachment 3, at p. 150, lines 1-4.

[92] *Id.* at ¶ 66.

comments received by LPSC from Louisiana stakeholders casts grave doubt on the ability of Louisiana EGUs to design, permit, purchase and install new control equipment as assumed by EPA in CSAPR in order to meet the May 1, 2012 compliance deadline.[93]

2. CSAPR forces a significant regulatory burden on both utilities and the State of Louisiana in an unreasonable manner that will be impossible to meet given all available factual data.

Further complicating the cost and timing of the installation of new controls, the LPSC's constitutionally–mandated oversight of utilities for the benefit of its citizens requires that utilities get regulatory pre-approval for major capital outlays.[94] Utilities have cost recovery considerations when making capital improvements as only prudent expenses will be recoverable in a rate proceeding. Louisiana utilities are thus placed in the difficult situation of being forced to make changes in an impossibly short time frame that will have long-lasting implications for the utility's continued viability. The LPSC cannot divest itself of its responsibility to conduct a prudent review of all utility decisions, on behalf of the utility ratepayer. As a result, the utility is in a position of having to risk a denial of cost recovery or suffer the imposition of fines for violating an LPSC order in order to comply with CSAPR, without having adequate time to fully consider all options and make the best decision.[95]

[93] There are a whole class of inefficiency-related costs and stranded costs likely to arise from the proposed CSAPR that have also not been considered within EPA's IPM framework. The LPSC has not quantified these potential costs at the current time, but learned from its investigation that virtually all of its regulated utilities have these potential types of stranded costs that will likely arise due to EPA's proposed CSAPR.

[94] LPSC General Order dated May 7, 1982.

[95] Should a utility determine that it must purchase power from another source, it must do so pursuant to prior LPSC mandates. LPSC General Order dated September 20, 1983 (In re: In the Matter of the Expansion of Utility Power Plant; Proposed Certification of New Plant by the LPSC) (the "1983 General Order"), as amended by General Order in Docket No. R-30517 (In re: Possible modifications to the September 20, 1983 General Order to allow (1) for more expeditious certifications of limited-term resource procurements and (2) an exception for annual and seasonal liquidated damages block energy purchases) dated October 29, 2008, and corrected May 27, 2009.

Finally, CSAPR's complete disregard for the significant transmission constraints that exist both on a regional and local basis in Louisiana, as discussed further in Section III.B. above, also ignores the lengthy and complex transmission-related regulatory processes required to upgrade or modify the transmission system to allow additional imported power. As part of its due diligence and in accordance with regulations of the FERC and the Federal Power Act ("FPA"),[96] each interconnection and transmission service request goes through a series of studies, including feasibility, system impact and facility studies, before an interconnection or transmission service agreement can be signed. This process is independent of the acquisition process pursuant to the LPSC's market based mechanism ("MBM") rules.[97] That is, even if a power purchase agreement conforms to the MBM process, it may not be feasible due to constraints on the transmission system as identified by SPP. The reservation process for interconnection and transmission service, as well as the MBM process, are lengthy and detailed processes that can take years to complete. The assumption by EPA underlying CSAPR that Louisiana can meet its 2012 ozone season omissions budget by importing power is simply not an option given the facts and circumstances facing Louisiana and its citizenry.

The LPSC submits that these harms are clearly not what President Obama envisioned in Executive Order 13563, which was intended to modify, streamline, expand or repeal regulations more burdensome than necessary to achieve regulatory objectives, or in the Press Release of September 2, 2011, in which the President indicated a desire to "reduce regulatory burdens and

[96] 16 U.S.C. §§ 791a-828c.

[97] General Order, Docket No. R-26172, Subdocket A, In re: Development of Market Based Mechanisms to Evaluate Proposals to Construct or Acquire Generating Capacity to Meeting Native Load, Supplements the September 20, 1983 General Order, dated February 16, 2004 (as amended by General Order, Docket No. R-26172, Subdocket B dated November 3, 2006, and further amended by the April 26, 2007 General Order, and the amendments approved by the Commission at its October 15, 2008 Business & Executive Meeting and now in General Order, Docket No. R-26172, Subdocket C dated October 29, 2008).

regulatory uncertainty, particularly as our economy continues to recover."[98] The LPSC has shown that this regulation is unnecessary in light of the most up-to-date information, and is therefore contrary to the stated objectives of this Administration to reduce regulatory burdens that have a detrimental impact on an already ailing economy.

E. EPA's rule will likely compromise the reliability of Louisiana's transmission system, could lead to wide-scale power outages in Louisiana during the peak summer season, and compromise the health and safety of Louisiana citizens.

The failure to appreciate or account for the importance of the reliability of regional power systems is perhaps the single most important deficiency in CSAPR. The EPA focused exclusively on the results of the IPM, an integrated, multi-area regional dispatch model that optimizes generation on the economics of running EGUs, and not the combined optimization factors of safety, cost and reliability normally used by regulators and power systems planners. This faulty modeling, combined with the impossible May 2012 compliance deadline, leaves Louisiana utilities with no realistic compliance alternative other than the systematic reduction and shut-down of generators – "brownouts" and rolling black-outs – conditions which will exist at least during the 2012 and 2013 summer seasons.[99]

During that time, Louisiana's citizens will have to endure unreliable power to run air conditioners, water well pumps, and other health and safety systems. Additionally, Louisiana's energy infrastructure, which supplies oil and gas to the rest of the nation, will have interruptions affecting its ability to be the supplier the nation expects. Since these dramatic results were clearly not EPA's intent, the probability of endangerment to human health, safety, and welfare cries out for the Agency's reconsideration of the rule with a reasonable opportunity for the LPSC

[98] http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.

[99] Dismukes Affidavit, Ex. A, at ¶¶ 12, 13, 19, 24, 47, 50-52, 55, 70.

and its regulated entities to better explain to the EPA's satisfaction the real world factors which demand a different rule.

Power outages on the scale envisioned by Louisiana's utilities and major industries indicate that CSAPR could result in significant power outages, which, in turn, will significantly impact critical energy infrastructure on a level potentially equivalent to that experienced during the summer months of 2005 when Hurricane Katrina, then Hurricane Rita, slammed into the central Gulf Coast. One of the primary lessons the LPSC learned during this period was that electricity was one of the central resources essential to keep critical energy infrastructure moving. Interruption of power affects refineries and the processing and transmission of natural gas from Louisiana to other parts of the country.[100] Thus, CSAPR will have exceptionally dramatic and far-reaching impacts not only on Louisiana's industries and citizens, but also on the nation's expectation of an uninterrupted oil and gas supply.

The negative reserve requirements and transmission outages will cause wide spread power outages jeopardizing the health and safety of Louisiana citizens. During the summer in Louisiana, temperatures are typically in the high 90-degree mark, and often over 100 degrees. High humidity drives the heat index higher. For example, the normal high temperature for Baton Rouge, Louisiana – located in the southeast part of the state – during the summer months of July and August is approximately 92 degrees with an average of 23 days above 90 degrees.[101] In July 2011, Baton Rouge experienced 25 days over 90 degrees.[102]

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[100] *Id.* at ¶¶ 51-52.

[101] National Oceanic and Atmospheric Administration (United States Department of Commerce): Quality Controlled Local Climatological Data for Baton Rouge Regional Airport (13970) for May, 2011 to September, 2011.

[102] *Id*.

As difficult as the average summer in Louisiana can be, if the summers of 2012, 2013. and 2014 are in any way similar to the spring, summer, and fall of 2011, power outages will directly and dramatically threaten the health, safety, and welfare of Louisiana citizens. In 2011, Baton Rouge experienced above 90-degree temperatures for all 31 days in August with an average temperature of 96.7.[103] Additionally, the non-adjusted temperatures topped out over 100 degrees on 2 occasions. In the northwest corner of Louisiana, around Shreveport, just three hours east of Dallas, Texas, the temperatures exceeded 100 degrees for 57 days with 19 days above 104, with heat indexes hitting 121 degrees.[104] Even with full power to run air conditioners, water pumps, and all health and safety-related equipment, the area still experienced 6 heat-related deaths from May to August, 2011. This type of extreme heat during the same period that the EPA is requiring drastic measures to control emissions will likely combine to increase the number of heat-related injuries and deaths for Louisiana citizens.

CSAPR's lack of viable compliance alternatives in the face of an impossible May 2012 compliance deadline will create a "perfect storm" when Louisiana's energy grid will be the least reliable, necessarily threatening the health and safety of Louisiana citizens during these critical summer months. Reconsideration is imperative so these clearly unintended consequences can be avoided and a new rule implemented with full consideration given to the real world issues and inherent defects CSAPR presents.

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[103] *Id*.

[104] National Oceanic and Atmospheric Administration (United States Department of Commerce): Quality Controlled Local Climatological Data for Shreveport Downtown Airport (53905) for May, 2011 to September, 2011.

IV. GROUNDS FOR IMMEDIATE STAY OF CSAPR

The LPSC requests that the EPA issue a stay postponing the effectiveness of CSAPR pending the outcome of EPA's reconsideration of CSAPR. In addition to granting the EPA the power to reconsider rules such as CSAPR, federal law authorizes the EPA to stay the effectiveness of a final rule pending reconsideration.[105] The CAA provides specific authorization for such a stay in Section 7607(d)(7)(B), which permits the EPA to suspend the effectiveness of a rule for up to three months. As the EPA has recognized, Section 7607(d)(7)(B) provides the agency plenary authority to implement a three month stay without the requirement of providing notice and comment.[106]

The EPA has also been granted general authority under Section 7601(a)(1) of the CAA and Section 705 of the APA to implement stays beyond the aforementioned three month period and lasting as long as necessary to reconsider the rule being stayed.[107] In fact, the EPA noted this fact in a recent agency action and stated "the APA authorizes the EPA to find that justice requires postponing the effective date of a rule when litigation is pending."[108] In the same action, the EPA explained further, "the EPA has the discretion to decide whether it is appropriate to delay the effective date of a rule under either provision [Section 7607(d)(7)(B) of the CAA or Section 705 of the APA]."[109]

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[105] 42 U.S.C. § 7607(d)(7)(B); 42 U.S.C. § 7601(a)(1); 5 U.S.C. § 705.

[106] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation, 74 Fed. Reg. 22,693, 22,694 (May 14, 2009).

[107] 42 U.S.C. § 7601(a)(1); 5 U.S.C. § 705.

[108] Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. 28,662, 28,663 (May 18, 2011).

[109] *Id*.

Justice demands a delay of CSAPR's effective date based on many of the same considerations the EPA has taken into account in granting previous stay requests and further described herein. For example, the EPA has previously granted a stay on the basis that the requesting party was not given adequate notice to comment on the promulgation of a rule.[110] In the same ruling, the EPA granted a stay on the basis that it would prevent "undue hardship" and "possible harm" to the requesting party during reconsideration.[111] The EPA has also considered the "potential negative effects" on the industry, as a whole, being regulated.[112] Similarly, the EPA has considered adverse economic consequences to the individual requesting party, such as costs and business disruption resulting from the implementation of a rule.[113] Further, the EPA, in granting a stay pending reconsideration, has taken into account the need to investigate additional information presented by the requesting parties on the issue of potential environmental impacts and the burden on regulated facilities to make major compliance investments before the expiration of the applicable compliance deadlines.[114]

As detailed below, the factors used by the EPA to grant a stay in other proceedings, as well as other salient considerations necessitating a stay, are present in the matter now before the EPA. Accordingly, justice requires that the effectiveness of CSAPR be suspended pending the EPA's reconsideration of the rule.

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[110] *See* Standards of Performance for Petroleum Refineries, 73 Fed. Reg. 55,751, 55,752 (Sept. 26, 2008).

[111] *Id*.

[112] National Emission Standards for Hazardous Air Pollutants, 56 Fed. Reg. 10,523 (Mar. 13, 1991).

[113] *See* Protection of Stratospheric Ozone, 60 Fed. Reg. 24,676, 24,678 (May 9, 1995); National Emissions Standards for Hazardous Air Pollutants, 57 Fed. Reg. 56,877, 56,878 (Dec. 1, 1992).

[114] *See* Protection of Stratospheric Ozone, 60 Fed. Reg. at 24,678; *see also* Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, 76 Fed. Reg. at 28,663.

A. The EPA unlawfully announced its allocation methodology and the specific allowance limits on EGUs within the State of Louisiana for the first time in CSAPR.

The EPA released CATR as the revised interstate air transport rule on August 2, 2010, in response to the remand of CAIR by the D.C. Circuit. At that time, the EPA set a Louisiana total annual NOx allowance budget of some 21,220 tons: a significant but still arguably attainable reduction in NOx emissions for the 2012 time period.[115] While the LPSC filed two sets of comments requesting revision of the proposed rule to reflect Louisiana-specific information and concerns, the Commission's primary issue in those comments was the allocation of NOx allowances between Louisiana EGUs rather than the overall NOx budget included for Louisiana in CATR.[116]

In fact, the LSPC recommended in its comments on CATR that the EPA allocate the 21,220 tons budgeted for Louisiana on a percentage basis comparable to the SIP originally approved for Louisiana under CAIR.[117] The LPSC's last set of comments on this issue did not raise any issues related to the overall 21,200 ton allowance budget because, at the time, the Commission had no reason to believe that EPA would so dramatically change both the allocation of allowances between EGUs and the proposed total NOx budget for Louisiana. The LPSC could not have foreseen the dramatic change in methodology and results between the CATR and CSAPR.

The EPA, however, has made a dramatic change in both the distribution of allowances between EGUs and the total NOx allowance budget for Louisiana. Table 5 provides a Louisiana-

[115] CATR, 75 Fed. Reg. at 45,291, Table IV.E-2.

[116] *See generally* Dismukes Affidavit, Ex. A, Attachment 4, at pp. 7-14; Attachment 5, pp. 6-15.

[117] *Id.* at Attachment 4, p. 15; Attachment 5, p. 16.

specific comparison of how dramatically CSAPR changes both the total Louisiana NOx budget and the allocation of allowances between EGUs.

Table 5. CSAPR Allocation Summary and Comparison

	3-Year Average NOx	CATR[1] Allocation		CATR[1] Percent Difference		CATR[1] Deficit with CATR		CSAPR		CSAPR Deficit with CSAPR		Change in Deficit from CATR to CSAPR
		Option 1	Option 2	Option 1	Option 2	Option 1	Option 2	Allocation	Percent Difference	2012	2014	
CLECO	2,760.9	1,571.3	1,922.2	-43.1%	-30.4%	(1,189.7)	(838.8)	1,534.2	-44.4%	(1,226.7)	(1,226.7)	3.1%
ELL	6,516.0	3,561.8	4,162.4	-45.3%	-36.1%	(2,954.1)	(2,353.6)	2,609.0	-60.0%	(3,907.0)	(3,907.0)	32.3%
EGSL	2,925.3	1,873.1	2,291.4	-36.0%	-21.7%	(1,052.2)	(633.9)	1,583.0	-45.9%	(1,342.3)	(1,342.3)	27.6%
ENO	896.5	677.4	828.7	-24.4%	-7.6%	(219.1)	(67.8)	592.0	-34.0%	(304.5)	(304.5)	39.0%
SWEPCO	1,150.0	764.1	934.7	-33.6%	-18.7%	(386.0)	(215.3)	630.0	-45.2%	(520.0)	(520.0)	34.7%
Muni	1,637.5	948.6	1,124.8	-42.1%	-31.3%	(688.9)	(512.7)	806.8	-50.7%	(830.7)	(830.7)	20.6%
Big Cajun 2	5,001.7	3,337.4	4,082.7	-33.3%	-18.4%	(1,664.3)	(918.9)	2,842.0	-43.2%	(2,159.7)	(2,159.7)	29.8%
IPP	281.6	912.7	839.9	224.1%	198.3%	631.1	558.4	415.0	47.4%	133.4	133.4	-78.9%
Cogen	1,864.5	4,989.6	3,881.7	167.6%	108.2%	3,125.2	2,017.2	2,018.0	8.2%	153.5	153.5	-95.1%

Originally-Proposed CATR Louisiana OS Allowance Allocation:	**20,583**
Recently-Proposed CSAPR Louisiana OS Allowance Allocation:	**13,030**
Change in Louisiana OS Allocation:	**-36.7%**

Note: CATR Allocations in this summary table do not include certain facilities that are no longer included in CSAPR. These facilities are: Dow St. Charles; Formosa Plastics; Georgia Gulf Plaquemine; PPG Powerhouse; Shell Chemical; and Waterford 1&2 Unit 4.

As shown in Table 5, CSAPR adopted an extreme reduction of allowances for Louisiana EGUs of almost 40% for some utilities in Louisiana without notice and a comment period for the LPSC to inform the EPA that this level of emissions was unattainable for Louisiana. *A fortiori*, EPA must reconsider its rule because the assumptions of its model are fatally and fundamentally flawed and therefore generate results that may be hypothetically reasonable but have no basis in fact or reality whatsoever. As the United States Supreme Court has stated: "Hard questions cannot be avoided by a hypothetical reshuffling of the facts."[118] Thus, the EPA should grant stay of CSAPR while a reconsideration proceeding is initiated to consider this important information.

[118] *Trimble v. Gordon,* 430 U.S. 762, 774, 97 S.Ct. 1459, 1467, 52 L.Ed.2d 31 (1977).

B. The unreasonable compliance deadline in CSAPR eliminates the opportunity to Louisiana EGUs to develop a feasible compliance option and therefore must be stayed.

Louisiana's compliance responsibility with CSAPR falls squarely on the shoulders of Louisiana EGUs; however, the EPA must understand and recognize that the burden of compliance will ultimately be borne by the citizens of Louisiana. The EPA must accept the reality that the practical impossibility to achieve compliance with a mandated 42% reduction in NOx emissions by May 1, 2012 – only nine months after publication of CSAPR – will result in generation reductions that will dramatically threaten the health, safety, and welfare of Louisiana citizens.[119] Accordingly, the impossibility of timely compliance is an appropriate ground for stay.

EPA has already recognized that it is impossible for utilities to install new controls on EGUs before 2014 and concluded that emission reductions required in Phase I of the rule could be achieved using existing controls.[120] Even if that were true under earlier versions of the rule, the advent of CSAPR makes it clearly false now. CSAPR removed provisions such as an unlimited interstate trading mechanism and reduced Louisiana's state allowance budget to an unrealistic and unmanageable level. EPA's other suggested interim options for reducing emissions prove impractical or ineffective as each option's application and implementation timeline is explored.[121] Thus, the only means of compliance left is reducing the operation of EGUs that provide a needed reliability function for the Louisiana power grid. The devastating impact of taking these EGUs off-line on the people and businesses of Louisiana clearly

[119] *See*, *supra*, Section III.E.

[120] CATR, 75 Fed. Reg. at 45,281.

[121] *See, infra*, in Section III.D.

constitutes irreparable harm.[122] Even the various electric reliability councils, such as SPP and SERC, which are charged by federal mandate under the Federal Power Act to safeguard the reliability of the bulk power systems throughout the United States have raised serious doubts and concerns about CSAPR and the potential deleterious effect on the electric reliability of the United States.[123]

Further, the EPA has stayed implementation of other final rules when it realized the rule caused a facility to be out of compliance "with requirements for which they had no notice or time to come into compliance" and where "[g]ranting a stay…is, therefore, necessary to prevent any possible harm that may occur."[124] The possibility of harm in Louisiana is real and dire. Taking electric power off-line in summer months where the heat and humidity have significant health impacts will directly threaten human life. Thus, CSAPR places with Louisiana EGUs the choice of ignoring the EPA and accepting enormous penalties or ignoring the safety of Louisiana's citizens.

CSAPR's compliance deadline is unachievable except through reduction of the operation of certain necessary EGUs, a draconian alternative, which will necessarily cause direct and irreparable harm to the citizens of Louisiana who rely on reliable, reasonably priced power. A stay is necessary and appropriate pending reconsideration to allow the LPSC, the industry, and other affected agencies additional time to provide the EPA with information and data that the EPA can use to avoid the clearly unintended consequences CSAPR's unimpeded implementation portends.

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[122] *See*, *supra*, Section III.E.

[123] Dismukes Affidavit, Ex. A, Attachment 3 at pp. 046-059.

[124] Standards of Performance for Petroleum Refineries, 73 Fed. Reg. at 55,752.

C. CSAPR must be stayed because the EPA disregarded the financial investments by Louisiana EGUs to comply with CAIR and has not fully considered the cost of new emission investments required to meet the new allocation of allowances.

CSAPR will likely have considerable rate impacts for Louisiana citizens. Louisiana could be forced to incur at least $2.28 billion in capital investments within a matter of five months: an order of magnitude that has not been seen in Louisiana for any completed capital project in the power generation sector and a level that is simply implausible. The scarcity costs could expand that amount by as much as 20%.[125] The revenue requirement, or total annual rate impact for Louisiana ratepayers, could be as much as $299 million on an annual levelized basis,[126] an impact that is entirely avoidable if EPA were to consider a more reasonable implementation time period.

A more reasonable implementation time period will allow utilities, in conjunction with state and federal utility and environmental regulators, as well as the applicable reliability organizations, to determine the most efficient and least harmful means of complying with the mandates of the CAA as promulgated through CSAPR, rather than following an experimental, broad-based model that is fundamentally flawed. The inefficiency-related costs and stranded investments, which have not been considered in EPA's IPM framework, will cause irreparable harm on the citizens of Louisiana. An example of such costs are the stranded costs associated with longer term fuel contracts for units likely, and/or modeled to be, stranded under EPA's projected CSAPR base case generation. EGUs may have to either pay for these unused fuel requirements or pay a large exit fee for their cancellation, causing a windfall for the counterparties and a potential loss for utility ratepayers and industry employees.

[125] *See*, *supra*, Section IV.B.

[126] Dismukes Affidavit, Ex. A, at ¶ 66.

In addition, the increased inefficiencies that may arise by running older natural gas plants in lieu of coal generation for baseload purposes could drive up costs by as much as 20% according to some estimates,[127] if there is a sudden shift in the use of natural gas as a result of the cumulative impacts of all of EPA's proposed and pending rules. In summary, the lack of a reasonable implementation period for CSAPR will invariably start a chain of events that will cause irreparable harm to the citizens of Louisiana.

D. The EPA must stay CSAPR because the deadlines for compliance were not adequately explained and improvements to air quality due to Louisiana EGUs compliance with CAIR obviate any pressing need to force EGUs to comply with CSAPR.

As discussed in Section IV.B. above, the EPA proposed through CATR a dramatic change in the compliance deadlines set out in CAIR in CATR and then adopted these unreasonable deadlines without consideration of the impacts on utilities subject to the rules. However, without the knowledge of the serious and punitive reduction in allowances for Louisiana EGUs, the LPSC could not have known that the May 1, 2012 deadline for seasonal NOx compliance would impose such a hardship on the state and compromise the health and safety of its citizens. The EPA's explanation of the extremely shortened deadlines between CAIR and CSAPR was not adequate and lacked any factual basis for such an enormous change in the emissions deadlines. In fact, the EPA in CATR provided only a brief explanation stating, "these dates [were chosen] to coordinate with the NAAQS attainment deadlines and to assure that reductions are made as expeditiously as practicable."[128] However, the EPA has discretion to

[127] *Id.* at ¶ 69.

[128] CATR, 75 Fed. Reg. at 45,300.

extend the attainment deadlines to 2015.[129] Further, in CSAPR, the EPA noted that the final rule differed significantly from CAIR regarding compliance deadlines and, as applicable here, noted that "the second phase of CAIR reductions would have (if not replaced by the [CSAPR]) commenced . . . May 1, 2015 for ozone-season NOx requirements." CAIR was published on May 12, 2005 – a full ten years before the implementation of the seasonal NOx requirements. However, in CSAPR, the EPA is providing less than eight months for the states and utilities to comply with these regulations.

As further explained by Dr. Dismukes, there is no question that Louisiana utilities' compliance with CAIR, as well as other EPA and LPSC mandates to reduce emissions, has significantly reduced the amount of emissions produced by Louisiana EGUs. In fact, NOx emissions in Louisiana have dropped almost 42% since 2001, while fossil fuel generation has increased by 38%.[130] The Court in *North Carolina* also noted the value of leaving the emissions rules in place during the pendency of a new rulemaking proceeding.[131] The Court found that "the parties' persuasive demonstration, extending beyond short-term health benefits to impacts on planning by states and industry with respect to interference with the states' ability to meet deadlines for attaining national ambient air quality standards for PM2.5 and 8-hour ozone, shows that the rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule."[132]

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[129] CSAPR, 76 Fed. Reg. at 48,277.

[130] Dismukes Affidavit, Ex. A, at ¶ 43.

[131] *North Carolina*, 550 F.3d at 1178.

[132] *Id*. at 1178-79.

The same factors that convinced the Court to allow CAIR to remain in place while the EPA developed the replacement rule exist here. A stay should be granted for the maximum permitted time during the reconsideration proceeding because, as shown throughout this petition, Louisiana EGUs will not be able to comply by the May 1, 2012 deadline, and the process and allowances adopted by the EPA in CAIR will still provide "clear benefits to public health and the environment."[133]

V. CONCLUSION

For the foregoing reasons, the LPSC respectfully requests that EPA grant its Petition for Reconsideration of CSAPR and issue an immediate stay of CSAPR's effectiveness and compliance deadlines for Louisiana's utilities for the period of the EPA's reconsideration proceeding or any current or subsequent petitions for judicial review filed by the LPSC related to CSAPR, whichever is longer.

Respectfully submitted,

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[133] *Id.*