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SAN MIGUEL ELECTRIC COOPERATIVE, INC.

September 9, 2011

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Administrator Lisa P. Jackson
Attn. Docket No. EPA-HQ-OAR-2009-0491
U.S. Environmental Protection Agency
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(jackson.lisa@epa.gov)

Assistant Administrator Gina McCarthy
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U.S. Environmental Protection Agency
Office of Air and Radiation
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(mccarthy.gina@epa.gov)

Re: San Miguel Electric Cooperative, Inc.'s Request for Partial Reconsideration and Stay of the Cross-State Air Pollution Rule (76 Federal Register 48208) (August 8, 2011) (Docket No. EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson and Administrator McCarthy:

San Miguel Electric Cooperative, Inc. (San Miguel), which provides electricity to 26 member rural electric cooperatives across the State of Texas, submits the attached Petition for Partial Reconsideration and Stay of the Cross-State Air Pollution Rule (CSAPR). Given the concerns fully documented in the attached Petition, San Miguel requests that the U.S Environmental Protection Agency grant San Miguel's Petition and stay the effective date of the CSAPR until key procedural and substantive concerns about the rule are resolved. We respectfully request that the stay be issued immediately given the urgent need for San Miguel and other Texas power generators to give system operators and rate payers the piece of mind that electric reliability and affordability will not be put in jeopardy by CSAPR in 2012 and beyond.

If you have any questions or concerns, please contact me directly.

Respectfully,

Mike Kezar
General Manager, San Miguel Electric Cooperative, Inc.

CC: Attached Distribution List

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THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:	§	
	§	
Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, Final Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011)	§	EPA Docket No.
	§	
	§	EPA-HQ-OAR-2009-0491
	§	
	§	

Petition of San Miguel Electric Cooperative, Inc. for Partial Reconsideration and Stay of Final Rule

I. Introduction & Clean Air Act Authority for Reconsideration

San Miguel Electric Cooperative, Inc. (San Miguel) is a 400 MW, mine-mouth, lignite-fired electric generating unit (EGU) located in Atascosa County, Texas roughly 45 miles south of San Antonio. The power plant is located over 300 miles from the nearest state border. One hundred percent of the output of the plant is sold to San Miguel's member rural electric cooperatives.

San Miguel requests that EPA commence a proceeding, as required by Clean Air Act (CAA) § 307(d)(7)(B), to reconsider: (1) its determination that Texas "significantly contributes" to $PM_{2.5}$ nonattainment in downwind states and the resulting inclusion of Texas in the annual SO_2 and NOx programs in the final Cross-State Air Pollution Rule (CSAPR); (2) its decision to set annual emissions budgets and associated allowance allocations for Texas EGUs, for both SO_2 and NOx.; and (3) any data and analysis that EPA relied upon in the CSAPR rulemaking to support these findings.[1]

The Clean Air Act requires that EPA commence a reconsideration proceeding to address San Miguel's legitimate and significant concerns regarding this rulemaking. Clean Air Act Section 307(d)(7)(B) states that "the Administrator shall convene a proceeding for reconsideration of the rule:" (1) if the objecting party "can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment," and (2) "if such objection is of central relevance to the outcome of the rule." As described in detail below, the flaws in the rulemaking process to which San Miguel objects are of "central relevance to the outcome of the rule", and San Miguel could not practicably have raised its objections during the public comment period.

San Miguel requests that EPA exercise its authority under the Clean Air Act to stay the effective date of this rule as it applies to Texas. San Miguel and the State of Texas were not on notice of this rule. While the compliance date may be difficult for many other states and facilities to meet, Texas and its EGUs are particularly harmed by the five-month compliance window because they were not included in the annual SO_2 or NOx programs at the proposal phase.

[1] San Miguel's request for partial reconsideration of CSAPR with regard to Texas' inclusion in the annual SO_2 and NOx programs is in no way meant to prejudice the claims that other states or electric generating companies may have regarding CSAPR.

II. Description of San Miguel Electric Cooperative, Inc. and its Member Cooperatives

San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating a 400-MW mine-mouth, lignite-fired generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. (BEPC) and South Texas Electric Cooperative, Inc. (STEC).

Commercial operation of the plant began on January 7, 1982. BEPC and STEC, which are generation and transmission cooperatives (G&Ts), have entered into wholesale power contracts with San Miguel that cannot be terminated before the year 2037. Under these agreements BEPC and STEC have purchased and agreed to purchase, and San Miguel has sold and agreed to sell, the entire output of the plant. The contracts provide that BEPC and STEC are collectively responsible for San Miguel's total cost of owning and operating the plant, including San Miguel's debt service obligations, and such responsibility is allocated between BEPC and STEC by reference to their respective power purchase obligations for any given year. The impacts of CSAPR, therefore, are directly borne by these G&Ts and the customers they serve. Those customers, who are all rural electric cooperative members of San Miguel, range in size and geographic service area across the State of Texas. They are listed below in Table 1: San Miguel Electric Cooperative, Inc. Member Cooperatives & Headquarters Towns.

Table 1: San Miguel Electric Cooperative, Inc. Member Cooperatives & Headquarters Towns

Member Cooperative	HQ	Member Cooperative	HQ
Bartlett EC	Bartlett	Medina EC	Hondo
Brazos EC	Waco	Mid-South Synergy	Navasota
Comanche EC	Comanche	Navarro County EC	Corsicana
Cooke County ECA	Muenster	Navasota Valley EC	Franklin
CoServ Electric	Corinth	Nueces EC	Robstown
Fort Belknap EC	Olney	San Patricio EC	Sinton
Hamilton County ECA	Hamilton	South Plains EC	Lubbock
Heart of Texas EC	McGregor	South Texas EC	Nursery
HILCO EC	Itasca	Tri-County EC	Azle
J-A-C EC	Bluegrove	United Cooperative Services	Cleburne
Jackson EC	Edna	Victoria EC	Victoria
Karnes EC	Karnes City	Wharton County EC	El Campo
Magic Valley EC	Mercedes	Wise EC	Decatur

These cooperatives will bear the financial burden that CSAPR places on the San Miguel unit. If CSAPR forces a shut-down or derating of San Miguel, these cooperatives will be exposed to the risk of buying replacement power in what promises to be a highly volatile electric market if historic peaks continue to be experienced and CSAPR impacts reliability as projected next year.

III. Summary of Basis for Reconsideration

EPA's CSAPR rulemaking process, and assumptions/decisions made within the process, requires that a reconsideration is commenced as to the rule's applicability to Texas.

Unlike every other state and facility affected by this rule, San Miguel, and Texas power plants generally, did not have proper notice and opportunity to comment on Texas' inclusion in the annual SO_2 and NOx programs. Because Texas was not in the rule proposal for the annual SO_2 and NOx programs, the proposal was completely devoid of information that could be construed as fair notice that Texas would ultimately be included in those programs. It was impossible to comment on Texas' alleged contribution to downwind states and to submit information relating to the attainment status regarding the alleged downwind link for $PM_{2.5}$ exceedances, Madison County, Illinois.[2] EPA has gone as far as to say that the one information request made by EPA in the proposal, regarding Texas' inclusion in the annual SO_2 program, was no longer relevant in the final rule.

EPA has also failed to comply with multiple portions of the Clean Air Act. Texas' emissions budgets require reductions far beyond Texas' significant contribution amount, and in effect, require Texas to shoulder a substantial portion of the emission reduction loads of other states. The incredibly compressed timeframe for compliance has also violated the Clean Air Act by eliminating any compliance plan that takes longer than five months to implement. EPA has also bypassed the Clean Air Act's required deference to the state by implementing a Federal Implementation Plan (FIP) before states have been allowed to submit State Implementation Plans (SIPs).

A pivotal issue which San Miguel could have commented on, if properly included in the proposal, was EPA's predictions about San Miguel operating times. EPA predicts that San Miguel will be operating roughly 28.5% of historical operating hours. EPA apparently does not have San Miguel categorized as a baseload unit or predicts a drastic reduction in future operation. This type of reduction not only completely contradicts the operating history of the plant and future operating plans for the unit, it seriously undermines the ability of San Miguel's customer cooperatives to continue to buy (and supply to rural consumers) affordable power if they are forced to buy the power on the Texas market.

Under the authority granted to EPA under the Administrative Procedures Act (APA), a stay of the effective date of this rule should be granted with regard to the application of this rule to Texas until the completion of a reconsideration period, and substantive issues as they relate to Texas are resolved. Failure to stay the rule will result in significant impacts to San Miguel and other power generating companies, who will have to make immediate and costly expenditures

[2] EPA has promulgated a Federal Implementation Plan for Texas based on impact to annual $PM_{2.5}$. Given this determination, the majority of this Petition addresses that finding. However, San Miguel also opposes, for many of the same reasons, EPA's assertion that Texas emissions contribute to nonattainment of the 24-hour $PM_{2.5}$ NAAQS for Madison, IL, and this flawed finding should not serve as a basis for inclusion in the rule. Further, San Miguel contests EPA's alleged downwind maintenance impacts for ozone from Texas to Allegan, Michigan.

that may not ultimately be required post-reconsideration. More importantly, for the citizens of the state, failing to stay the rule could result in significant reliability impacts.

As discussed further below, the Electric Reliability Council of Texas (ERCOT) has compiled significant information from market participants, and in a report dated September 1, 2011, concluded that CSAPR alone will result in a 1,200 to 1,400 MW reduction in generation capacity at peak times, and between 3,000 MW to 6,000 MW in non-peak times.[3] This is in addition to 11,000 MW of additional retirements by 2016, which ERCOT anticipates will result from EPA's other major proposed regulations affecting EGUs. This report, by one of the largest system operators in the United States, is reason enough for EPA to stay the CSAPR and initiate a reconsideration period to more fully evaluate the electric reliability impacts on Texas and other states.

IV. Inadequate Notice and Opportunity to Comment

EPA's inclusion of Texas in the final CSAPR for annual SO_2 and NOx programs, based on factors not addressed in the proposed rule in which EPA concluded that Texas emissions did not have a significant downwind effect on other states,deprives Texas and its EGUs of the protections of the Clean Air Act. EPA has failed to provide proper notice and has included Texas based on rationale and methodology that were not subject to comment in the rulemaking process. Texas never had the opportunity to comment on annual emissions budgets, in contrast to every other state included in CSAPR. In order to allow the opportunity to cure the deficiencies in this rulemaking, a reconsideration proceeding as the rule relates to Texas, and an immediate stay of the effective date of the rule, are necessary.

A. EPA has failed to comply with Clean Air Act notice and comment requirements

The notice and comment requirements for this rule proposal are found at CAA § 307(d). More stringent than the notice and comment requirements of the Administrative Procedure Act,[4] the CAA requires that any proposed rulemaking include:

> (A) the factual data on which the proposed rule is based;
> (B) the methodology used in obtaining and analyzing the data; and
> (C) the major legal interpretations and policy considerations underlying the proposed rule.[5]

In addition, EPA is required under § 307(d)(4)(B)(i) of the CAA to update the rulemaking docket as new information becomes available. EPA's process of including Texas in the annual SO_2 and NOx programs significantly deviated from the rule proposal, resulting in a failure to comply with the notice and comment requirements of CAA § 307(d).

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[3] Electric Reliability Council of Texas, Impacts of the Cross-State Air Pollution Rule on the ERCOT System (Sept. 1, 2011).

[4] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 518-519 (D.C. Cir. 1983).

[5] CAA § 307(d); 42 U.S.C. § 7607(d).

While some modifications are allowed between rule proposal and rule finalization, neither the CAA nor case law contemplates the kinds of changes made here. As stated by the D.C. Circuit, EPA may not finalize a rule based on "unexpressed intentions."[6] It is incumbent upon EPA to anticipate and fully address any significant potential changes between rule proposal and rule finalization that would constitute a "marked shift in emphasis."[7] EPA has failed to anticipate and invite comment on changes in rationale and methodology at the appropriate stage in this rulemaking, and a reconsideration is therefore required.

B. EPA's request for comment was on an "irrelevant" matter foreclosing any meaningful comment on "significant contribution" analysis or any measure that would justify Texas' inclusion in the annual SO_2 and NOx programs.

At the proposal phase, EPA found that Texas EGUs did not meet the contribution thresholds for annual or 24-hour $PM_{2.5}$ standards in downwind states. EPA sought comment on only one specific matter with relation to Texas. This was whether emissions in Texas, along with other states, might increase after the finalization of CSAPR, based on EPA's speculation that potential changes in coal prices may result in increases in SO_2 emissions.[8] The request for comments was based on "this reason" alone.[9] At no time did EPA request comment on, or indicate the possibility of, Texas' inclusion in an annual NOx program.

EPA received extensive comment on this one request, which clearly demonstrated that this was not a concern. Abandoning this reasoning in the final rule, EPA stated in its response to comments that:

> EPA notes that Texas is included in the final rule as a result of the state's contributions to downwind receptors in the updated base case modeling, thus, the comments on whether SO_2 emissions in Texas might increase if the state were not covered (as was projected in the modeling for the proposal) **are no longer relevant.**[10] (emphasis added)

By finding that the request for comments and the comments submitted were not relevant, EPA has acknowledged that it failed to solicit comments that would have been relevant to the final rule.

Further complicating the ability to comment was EPA's change in analysis method. Under the original methodology, EPA found that Texas would not contribute to out of state nonattainment for $PM_{2.5}$, and therefore, inclusion in the annual SO_2 and NOx programs was unwarranted. In the final rule however, EPA substantially revised its modeling to make its findings that Texas

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[6] *Shell Oil v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

[7] *Id.*

[8] Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, Proposed Rule 76 Fed. Reg. 45,210, 45,284 (Aug. 2, 2010).

[9] *Id.*

[10] U.S. Environmental Protection Agency, *Transport Rule Primary Response to Comments* 563 (June 2011).

contributes to the nonattainment of the one Madison County monitor.[11] It was impossible, therefore, for San Miguel to provide meaningful comment on methodology, as the methodology changed from proposal to finalization stage.

By taking comment solely on a now "irrelevant" rationale, substantially changing its analysis methodology, and reversing its conclusions regarding the inclusion of Texas in the annual SO_2 and NOx programs, all while failing to update the rulemaking docket accordingly, EPA has violated the requirements of the Clean Air Act, particularly § 307(d)(4)(B)(i).

C. San Miguel and other Texas EGUs were never given the opportunity to comment on the proposed annual emissions budgets for Texas, in contrast to every other state with an annual budget included in the final rule.

Emissions budgets, and subsequent individual unit allocations, are at the heart of this rule. All substantive requirements derive from these budgets and allocations. Therefore, it is of critical importance that, prior to issuing its final rule, EPA never proposed or discussed potential annual emission budgets for Texas and never provided an opportunity to comment on these budgets. This is in contrast to every other state included in this rule.

It is without precedent, or reasonable prediction, that EPA would include Texas in the annual SO_2 and NOx programs and establish emissions budgets for Texas without any opportunity for Texans to comment. This has always been the case for transport rules. The EPA for the final NOx SIP call in 1997-1998 creating an emissions allowance cap-and-trade program only finalized emissions budgets that were in the proposed rule.[12] Similarly, the CAIR SO_2 and NOx cap-and-trade programs annual budgets were provided in the rule proposal phase, allowing for public comment.[13] There was no evidence or statement in the rule proposal to give notice to Texans that this precedent would change in this rule.

Every other state included in this rule had, or will have, an opportunity to comment on their respective emissions budgets. EPA has proposed a supplemental notice of proposed rulemaking (SNPR) for six other states on whether these states should be included in the ozone program.[14] In fact, apparently Texas was meant to be included as a state with an SNPR. In a draft version of the preamble, EPA stated:

> EPA therefore believes its determination that Texas must be included in the rule for annual $PM_{2.5}$ is a logical outgrowth of its proposal. **EPA is also requesting comment, in a supplemental notice of proposed rulemaking, on its conclusion that Texas also significantly contributes to nonattainment or interferes with maintenance of the 24-hour $PM_{2.5}$ NAAQS in another**

[11] 76 Fed. Reg. 48,254.

[12] *Compare* 62 Fed. Reg. 60,318, 60,361 (Nov. 7, 1997) with 63 Fed. Reg.57,356, 57,439 (Oct. 27, 1998).

[13] Compare 69 Fed. Reg. 4,566, 4,619-4,621 (Jan. 30, 2004) with 70 Fed. Reg. 25,162, 25,230-25,231 (May 12, 2005).

[14] Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone, 76 Fed. Reg. 40,662 (July 11, 2011).

> **state.**[15] (Emphasis added. Bolded language was in the original draft language but not in the final language.)

EPA has provided no justification why Texas should be treated differently than every other state, and why, at a minimum, Texas was not given the opportunity to comment during an SNPR.

Ultimately, even if Texas had been provided with some notice or some indication that comment would be expected on emissions budgets, there was nothing for San Miguel and Texas facilities to comment on. EPA provided no information and underlying data relevant to establishing emissions budgets, including variability analyses, individual unit allocations, new unit set asides, or modeling results, inputs, and assumptions. EPA's inclusion of Texas in the final rule, and the assigned budgets, were not logical outgrowths of anything included in the proposed rule.

Whatever EPA might now rationalize, after-the-fact, that Texas "should have known", the APA and the CAA cannot be turned upside down and interpreted to put the burden on members of the public and regulated community regarding constructive notice of every possible outgrowth of a proposed rule. Like every other state included in this rule and previous transport style rules, San Miguel and other Texas facilities should be given the same opportunity to comment on the proposed emissions budgets and other aspects of EPA's decision to include Texas in the annual SO_2 and NOx programs before those programs become effective.

V. EPA Has Exceeded its Clean Air Act Authority in its Establishing of Annual Emissions Budgets for Texas.

EPA's decisions to include Texas in the annual SO_2 and NOx programs, and to require emission reductions that far exceed anything that might be necessary to address Texas' alleged potential to contribute to nonattainment of downwind states, are beyond EPA's statutory authority.

A. Actual emissions data directly contradicts EPA's claim that Texas is contributing, or will contribute, to nonattainment of 1997 annual $PM_{2.5}$ NAAQS at the Granite City monitor in Madison County, Illinois.

EPA bases its inclusion of Texas in annual SO_2 and NOx programs, and subsequent emissions budgets, on modeling which predicts Texas would contribute to the nonattainment of the Granite City monitor located in Madison County, Illinois. EPA predicts this contribution to be minuscule at just 0.03 µg/m3 over EPA's determined significance level.[16] However, this determination is undermined by the fact that the receptor is actually in compliance with the 1997 annual $PM_{2.5}$ NAAQS.[17]

On May 23, 2011, EPA published its "final action determining that the Saint Louis fine particle ($PM_{2.5}$) nonattainment area," which includes this monitor, had attained the 1997 annual $PM_{2.5}$

[15] *See* CSAPR Final Rule, 76 Fed. Reg. at 48,214; *see also, and compare to,* U.S. Environmental Protection Agency, *E.O. 12866 Review – Draft*, 36 (Docket ID No. EPA-HQ-OAR-2009-0491-4552).

[16] CSAPR Final Rule, 76 Fed. Reg. at 48,240.

[17] Approval and Promulgation of Air Quality Implementation Plans; Illinois; Missouri; Saint Louis Nonattainment Area; Determination of Attainment of the 1997 Annual Fine Particle Standard, 76 Fed. Reg. 29,652 (May 23, 2011).

NAAQS. This is based on actual, real world monitoring, while EPA's reason for including Texas in this rule is based on modeling. Besides the very weak foundation of including Texas in this program based on the modeled readings of one receptor, it simply makes no logical sense for EPA to include Texas in the program while actual monitoring has shown that the single receptor is in compliance. EPA has not provided any justification for basing this rulemaking on the modeled exceedances at this one monitor, rather than depending on actual monitoring data. Because of these findings, and the attainment of this monitor, further reductions by Texas are not necessary under the good neighbor provision of the CAA, and therefore, there is no demonstrated reason for Texas to be included in this rule. EPA has further failed to provide any arguments or evidence for why this monitor would go into nonattainment due to Texas emissions by the time this rule goes into effect on January 1, 2012.

While EPA finds that emissions from EGUs in Texas and the other nine upwind states are contributing to nonattainment at the Granite City monitor, the primary cause for the exceedances detected at the Granite City monitor, and a likely explanation why Texas emissions would not be causing exceedances of other nearby monitors, is the proximately located U.S. Steel mill. As summarized in a report describing the impact of this steel mill on the monitor:

> A somewhat more refined approach to wind direction analysis at the Granite City monitoring site evaluated separate local and regional components of total $PM_{2.5}$ mass. $PM_{2.5}$ measurements from the Granite City site were compared to measurements at a second site in downtown St. Louis to identify time periods when the Granite City site showed "excess" $PM_{2.5}$ concentrations above levels that would be attributable to regional transport and urban sources (e.g., motor vehicles). Measurements from these time periods were combined with surface meteorological data to identify source regions contributing to the excess $PM_{2.5}$. This analysis showed that excess $PM_{2.5}$ was observed at the Granite City site when winds were from the south and southwest, indicating impacts from a large steel mill in the vicinity.[18]

It therefore appears that the more likely nonattainment responsibility, when nonattainment did exist at this monitor, was on the steel mill and not Texas, and San Miguel, hundreds of miles away. This apparent substantive flaw in the rule could have been addressed if this section had been subject to comment, and it requires additional comment now.

B. Finalized emissions budgets require emissions reductions that far exceed Texas' alleged "significant contribution" to downwind states.

EPA makes no effort to set emissions budgets based on the amount of actual downwind contribution, but rather, EPA has set the emissions budgets based purely on the ability of states

[18] Sonoma Technology, Inc., Assessment of Local-Scale Emissions Inventory Development by State and Local Agencies, Draft Final Report Prepared for U.S. Environmental Protection Agency Research Triangle Park, NC, 3-6-3-7 (Oct. 2010).

to make all feasible reductions at a cost of $500/ton for SO_2 and $500/ton for NOx.[19] The preamble clearly indicates that Texas is shouldering a disproportionate load of the reductions for the Granite City monitor in Madison County, IL, particularly given the amount of reductions asked of Texas. For SO_2 alone, EPA is requiring a 47% reduction.

There are a total of nine upwind states that EPA alleges impact to Madison County, IL nonattainment. In addition to Texas, these include Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Tennessee, and Wisconsin. Depending on whether these states are in Group 1 or Group 2, they are required to make reductions down to either $500 or $2,300 for SO_2 and $500 for NOx. However, EPA does not require these states to eliminate their emissions down to their "significant contribution" levels. Rather, these emissions are based on this arbitrary $500/ton threshold.

This emissions budget setting process, which requires Texas to make reductions far beyond its contribution level, clearly violates CAA § 110(a)(2)(D)(i)(I), which states that EPA is to eliminate "air pollutant[s] in amounts which will...**contribute significantly to nonattainment**." (emphasis added). Regardless of EPA claims that there is some relationship between contribution levels and required reductions, it appears that Texas will be required to make reductions to reach points that are far below their contribution levels, while other states may continue to exceed their contribution levels to that monitor. In effect, EPA is relying on a uniform control measure that has no relation to what is actually contributed. This is in direct violation of CAA § 110(a)(2)(D)(i)(I).

It is clear that EPA has gone to great lengths to attempt to cure the legal error ruled upon by the court in the *North Carolina* decision.[20] However, attempting to comply with that court's decision does not mean that the substantive requirements of the Clean Air Act can be ignored. Texas is not only being asked to reduce an alleged significant contribution, but through EPA's reliance on the arbitrary $500/ton, is being asked to reduce its contribution far beyond a significant contribution level and to bring other states down to their significant contribution levels by making their reductions for them. Given this direct contradiction of the Clean Air Act and the fact that the monitor is now found to be in attainment, EPA must reassess this methodology entirely in its reconsideration.

C. Texas' allotted annual budgets and compliance timeline provide no choice in compliance strategies.

In addition to Texas' annual budgets requiring reductions that far exceed any alleged "significant contribution" to downwind states, the budgets are so low that EPA has in effect dictated the type of control technologies that will have to be used on EGUs. The D.C. Circuit has clearly stated that § 110 of the CAA does "not permit the agency to require the state to pass legislation or issue regulations containing control measures of EPA's choosing,"[21] and that even under trading

[19] CSAPR Final Rule, 76 Fed. Reg. at 48252.

[20] *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008).

[21] *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997).

strategies, the state must be given "real choice" in how to comply.[22] Real choices can include allowing states to look at mobile sources, stationary sources, or a myriad of other options.[23]

The EPA designed this rule to apply specifically to EGUs,[24] and due to the level of emission reductions that must be achieved, in combination with the extremely short compliance timeline, San Miguel is left with very few options to comply with this rule's requirements. San Miguel is a mine-mouth lignite facility. There is no immediate possibility of switching to other types of coal. Although San Miguel does have a rail spur entering the plant site, San Miguel does not have the necessary facilities required to unload coal. Additional land would need to be acquired in order to install the rail track and unloading facilities. Further, San Miguel is already a scrubbed unit, making it difficult to add on control technologies to reduce emissions even if the extremely short time constraints were not already in place. Regarding NOx limitations, even if alternative coals were available and forced fuel switching was authorized by the Clean Air Act - which it is not - a switch of coals would likely have little effect on NOx emissions.

With a limited time period to install controls, and an extremely abbreviated length of time between notice and compliance, EPA has forced San Miguel into a hypothetical emissions trading market. There are two fundamental flaws with EPA's reliance on this market. First, EPA has provided no evidence that an effective emissions trading market can be established within five months, particularly for Texas units that are only now becoming aware that allowances would need to be purchased to comply with the annual SO_2 and NOx limits. In previous cap-and-trade style rulemakings, regulated entities had a much longer lead-up period before the effective date of the rule, which actually allowed a market to be developed.

The second significant flaw in EPA's reliance on an allowance trading market comes from EPA's prediction that the market will be entirely liquid. There is no evidence of this for any market, particularly one that is supposed to be in place in five months. Electric generating companies' primary purpose is not to market and sell allowances. If anything, experience has shown that electric generating companies are risk averse, and will store excess allowances to address potential future changes in operations or some unexpected future occurrence. Further, for those allowances that are available, it is likely that the price will far exceed EPA's $500/ton measure used in setting emissions budgets, especially at the beginning of the market when a rush for allowances will cause a spike in demand. Simple economics dictates that a spike in demand, with a set supply, will lead to higher costs.

In the rule preamble, EPA states that "conducted sensitivity analysis...shows [that] Texas can also achieve the required cost-effective emissions reductions even while maintaining current levels of lignite consumption at affected EGUs."[25] While this generally seems unlikely given the low emissions allocations, San Miguel is particularly concerned with EPA's perception of the duration of time that the facility is in operation. As discussed above, EPA predicts that San Miguel will only operate part of the time, roughly 28.5% of its historical operating hours, under

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[22] *See Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000).
[23] *Id.*
[24] *See* Final CSAPR, 76 Fed. Reg. at 48,208, 48,320.
[25] *Id.* At 48284.

the CSAPR rules. This assumption does not reflect the operational history of San Miguel and does not reflect "current levels of lignite consumption." In fact, San Miguel is a baseload unit that operates year-round. The G&Ts that San Miguel services depend on this base load power source.

Highlighting this error is EPA's predicted lignite consumption. In EPA's base case, EPA predicts a total fuel use of 11.737 TBtu. In the remedy case, EPA predicts a total fuel use of 9.923 TBtu. In actuality, San Miguel had a total fuel use of 32.232 TBtu in 2010. This is almost three times as much as predicted by EPA in the base case. From January to August of 2011, San Miguel had a total fuel use of 21.787 TBtu.

VI. EPA Has Exceeded the Authority Granted in CAA §110 by Progressing to a Federal Implementation Plan Without Providing the States Adequate Opportunity to Address Nonattainment Issues Within Their Borders.

The Clean Air Act places the primary responsibility for the regulation of air pollution with the states.[26] Only in limited circumstances may EPA usurp state authority. These circumstances are outlined in CAA § 110(c)(1), which states:

> (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years **after** the Administrator—
>
> > (A) finds that a State has failed to make a **required** submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
> >
> > (B) **disapproves a State implementation plan submission** in whole or in part,
>
> **unless the State corrects the deficiency**, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan. (emphasis added).

The EPA has not met either of these § 110(c)(1) requirements and has jumped the gun by issuing a FIP before making a SIP call, as required by the CAA.[27] The EPA has set statewide limits on SO_2 and NOx and simultaneously proposed to institute a federal implementation plan for each of those states. Only later could states resume authority over those programs. States have had no meaningful opportunity to submit a SIP. This directly contradicts the language of § 110(c)(1) and violates EPA precedent in transport rules. The EPA first made attempts to address interstate transport in the 1998 NOx SIP call, discussed above, where EPA called on "the State to determine the appropriate mix of controls to achieve...reductions."[28] Similarly, EPA undertook

[26] *See* CAA §§ 301(a)(3), 307(a).

[27] *See* CAA § 310(k)(5).

[28] *See* 63 Fed. Reg. at 57,356.

the same steps in the CAIR rulemaking, where it stated that it would "only issue a final FIP for those jurisdictions that fail[ed] to respond adequately to CAIR."[29]

VII. EPA Must Stay the Effective Date of CSAPR's $PM_{2.5}$ FIP and Associated Annual SO_2 and NOx Emissions Limits as They Apply to Texas

The CAA and the APA specifically allow for a stay of the rule for this very type of scenario. Section 307(d)(7)(b) of the CAA states that "[t]he effectiveness of the rule may be stayed during ... reconsideration...by the Administrator...for a period not to exceed three months." The APA provides additional and broader authority to EPA which adds that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[30] Justice requires a stay of this rule.

Given the unprecedented short compliance window, the only just and reasonable action EPA must take is to stay the effectiveness of the rule until this reconsideration period, including analysis of all comments, is complete. EPA should further stay the rule until all legal challenges are resolved. To do otherwise would risk arriving in a very similar situation as in CAIR, where the finalized rule succumbed to legal challenge resulting in this costly and unsettling rulemaking. A stay was already granted in the similarly implemented Industrial Boiler MACT Rule, which specifically called for additional opportunity for public comment.[31] Further, granting a stay will not contradict the ruling and timeline proposed in the *North Carolina* decision. As summarized by EPA in the CSAPR rule, the court instructed EPA to "decide what date, whether 2015 or earlier, is as expeditious as practicable for states to eliminate their significant contributions to downwind nonattainment."[32] Therefore, while EPA would certainly be within its powers to request that the court extend the rulemaking timeline, at this point it is unnecessary given the court's 2015 target date.

The inclusion of Texas in the annual SO_2 and NOx programs in the final rule is a significant and unprecedented change between proposal and finalization stage. Unlike every other affected state and facility, San Miguel and other Texas entities were never given the necessary notice to comment on this inclusion. It is only fair and just to allow Texas a similar opportunity to comment. Going beyond the state's inclusion, budget allocations were never proposed for the state and San Miguel never had any voice in the crafting of those allocations. Given the extremely short period of time before the effective date of this rule, without a stay of the rule, San Miguel, its client Cooperatives, and their customers, would have to bear potentially significant harm due to EPA's last minute inclusion of Texas.

If the compliance date is not postponed, San Miguel will likely have to make significant capital expenditures. Given that the rule has already received legal challenges and a high possibility exists that the rule may be significantly modified, at least with regard to Texas, it is unfair to

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[29] 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, Final Rule 76 Fed. Reg. 25,162, 25,269 (May 12, 2005).

[30] Federal Administrative Procedures Act § 705.

[31] Industrial, Commercial, and Institutional Boilers and Process Heaters and Commercial and Industrial Solid Waste Incineration Units, Final Rules; Delay of Effective Dates, 76 Fed. Reg. 28,662 (May 18, 2011).

[32] CSAPR Final Rule at 48,277, citing *North Carolina*, 531 F.3d at 930.

saddle San Miguel, and other Texas facilities, with these costly investments when ultimately they may be shown to be unnecessary.

EPA has stated that reliability, even regional reliability, will not be a concern under this rule. However, at least with regard to Texas, this directly contradicts statements made by the Electric Reliability Council of Texas.[33] Following the finalization of CSAPR, ERCOT responded with the following statement:

> "We are a non-profit organization; we don't own generation or transmission; nor do we advocate for or against policy positions – except in cases where electric grid reliability may be affected. This is one of those cases where we believe it is our role to voice our concern that **Texas could face a shortage of generation necessary to keep the lights on in Texas within a few years, if the EPA's Cross-State Rule is implemented as written**...Our concern is that the timing of the new requirements – effective Jan. 1, 2012 – is unreasonable because it does not allow enough time to implement operational responses to ensure reliability. We fear that many of the coal plants in ERCOT will be forced to limit or shut down operations in order to maintain compliance with the new rule, possibly leading to inadequate operating reserve margins with insufficient time to reliably retrofit existing generation or build new, replacement generation...At this time, it is not clear that ERCOT operations has adequate tools to maintain long-term reliability in the face of the possible loss of a large amount of existing baseload generation in such a short period of time."[34] (emphasis added).

A key difference between ERCOT's assessment of the impact of this rule and EPA's appears to center on perceptions of generation sources. ERCOT calculates total resources to be 75,967 MW in 2014, with 19,959 of those MWs coming from coal sources.[35] In contrast, EPA predicts that by 2014 the ERCOT region will have 90,405 MW of available capacity, of which 18,456 MW will come from coal.[36] This discrepancy likely results from EPA's overestimation of installed capacity, wind generation potential, co-generation capacity, and new capacity coming online by 2014.

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[33] According to ERCOT's website: "[ERCOT] manages the flow of electric power to 23 million Texas customers - representing 85 percent of the state's electric load and 75 percent of the Texas land area. As the independent system operator for the region, ERCOT schedules power on an electric grid that connects 40,500 miles of transmission lines and more than 550 generation units. ERCOT also manages financial settlement for the competitive wholesale bulk-power market and administers customer switching for 6.6 million Texans in competitive choice areas."

[34] H.B. "Trip" Doggett, CEO of ERCOT, CEO Statement Regarding EPA Cross-State Rule (July 19, 2011).

[35] ERCOT, Report on the Capacity, Demand, and Reserves in the ERCOT Region, 7, 45, May 2011 (June 9, 2011 Revision 2).

[36] *See* Resource Adequacy and Reliability in the IPM Projections for the Transport Rule, 5 EPA-HQ-OAR-2009-0491-4399 and U.S. Environmental Protection Agency, Resource Adequacy and Reliability in the IPM Projections for the Transport Rule TSD 6, June 2011, EPA-HQ-OAR-2009-0491-4455.

It appears that EPA has assumed a wind generation capacity factor of 100%. This assumption is fundamentally flawed and directly contradicts the well-researched factors utilized by system operators such as ERCOT. Based on its familiarity with wind generation, and given the fact that the ERCOT market contains, by far, the most wind generation in the country, ERCOT has established an effective load-carrying capability for wind generation of only 8.7% of nameplate capacity.[37] There is no valid basis for EPA to assume any higher capacity factor, especially when evaluating reliability risks that are likely to be the greatest during hot summer afternoon peak periods when wind generation is traditionally at its lowest production.

An additional flaw in EPA's reliability analysis arises from the fact that it has assumed that numerous mothballed units that are no longer operational would come online to replace lost coal capacity.[38] For instance, two Luminant units that EPA expects to come online are non-operational. One has had the control room stripped down and no longer has an air permit and the other has been demolished.

This type of discrepancy seriously undermines any proper analysis of this rule's potential effect on reliability. Given ERCOT's familiarity with its grid and its system, EPA must grant reconsideration so the flaws in its analysis can be eliminated and a full study can be conducted in light of documented reliability concerns from ERCOT and other system operators that they directly attribute to EPA's rushed implementation of CSAPR.

On September 1, 2011, ERCOT published a report on the impacts of CSAPR. ERCOT provided three potential impact scenarios. To quote the report:

> The first scenario, derived directly from the compliance plans of individual resource owners, indicates that ERCOT will experience a generation capacity reduction of approximately 3,000 MW during the off-peak months of March, April, October and November, and 1,200 – 1,400 MW during the other months of the year, including the peak load months of June, July and August. Scenario 2, which incorporates the potential for increased unit maintenance outages due to repeated daily dispatch of traditionally base-load coal units, results in a generation capacity reduction of approximately 3,000 MW during the off-peak months of March and April; 1,200 – 1,400 MW during the remainder of the first nine months of the year; and approximately 5,000 MW during the fall months of October, November and possibly into December. Scenario 3 includes the impacts noted for Scenario 2, along with potential impacts from limited availability of imported low-sulfur coal. This scenario results in a generation capacity reduction of approximately 3,000 MW during the off-peak months of March

[37] ERCOT Capacity and Demand Report at 4.

[38] An additional concern is the effect to overall NOx emissions in the state from dispatching more gas plants in the state, particularly those near ozone nonattainment areas.

> and April; 1,200 – 1,400 MW during the remainder of the first nine months of the year; and approximately 6,000 MW during the fall months of October, November and possibly into December.[39]

"Even in the best-case scenario," had the 1,200-1,400 MW "reduction been in place in 2011, ERCOT would have experienced rotating outages during days in August."[40] In addition, the report notes that "[o]ff-peak capacity reductions in the three scenarios evaluated as part of this study, when coupled with the annual maintenance outages that must be taken on other generating units and typical weather variability during these periods, also place ERCOT at increasing risk of emergency events, including rotating outages of customer load."[41] ERCOT is particularly concerned with the imminent January 1, 2012 compliance date, stating:

> the CSAPR implementation date does not provide ERCOT and its resource owners a meaningful window for taking steps to avoid the loss of thousands of megawatts of capacity, and the attendant risks of outages for Texas power users.[42]

Prior to the finalization of CSAPR, ERCOT also conducted an analysis of the effects that the 316(b) rule,[43] Utility MACT rule,[44] coal combustion residuals rule,[45] and *proposed* clean air transport rule (CATR) would have on Texas' electric reliability. Given that Texas was not included in the annual SO_2 and NOx programs in the CATR proposal, ERCOT predicted a limited effect on Texas' facilities. Therefore, based primarily on the other three rules, ERCOT in its base scenario predicted that EPA regulations would cause 11,000 MW (9,800 MW of gas and 1,200 MW of coal) of retirements by 2016, resulting in a reserve margin of **negative** 2.3%.[46] This reserve margin would be lowered even further given EPA's predicted CSAPR effects.

Beyond statewide impacts, the impacts to San Miguel, the cooperatives it supports and their customers would be significant if San Miguel was forced to derate or idle its operations in order to comply with CSAPR. Texas' power market is a deregulated market. Therefore, for every megawatt that is not supplied by San Miguel, the cooperatives must purchase replacement power off the market. At peak times, these costs are prohibitively expensive for rural electric cooperative members who depend on affordable electricity to maintain their ways of life.

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[39] ERCOT CSAPR Impacts Report at 1.

[40] *Id.* at 5.

[41] *Id.*

[42] *Id.* at 7.

[43] National Pollutant Discharge Elimination System--Cooling Water Intake Structures at Existing Facilities and Phase I Facilities; Proposed Rule, 76 Fed. Reg. 22174 (Apr. 20, 2011).

[44] National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial- Commercial-Institutional Steam Generating Units, 76 Fed. Reg. 24976 (May 3, 2011).

[45] Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, 75 Fed. Reg. 35127 (June 21, 2010).

[46] ERCOT, Review of the Potential Impacts of Proposed Environmental Regulations on the ERCOT System, Revisions 1, 12 (June 21, 2011).

VIII. Conclusion

The CSAPR rulemaking process violated proper notice and comment requirements and contains numerous flaws, particularly with regard to EPA's substantial contribution analysis and inclusion of Texas in the annual SO_2 and NOx programs with associated emissions budgets. EPA also severely underestimates the potential impact to reliability that this rule will have on Texas power consumers and the cooperatives that San Miguel serves. In order to begin the process of resolving these problems, and to ensure that a fair, legal, and scientifically sound rule is developed prior to implementation, EPA should conduct a partial reconsideration proceeding as it applies to Texas and grant a stay of the rule until the reconsideration proceeding is completed and all substantive concerns in the rulemaking are addressed.