Wisconsin Public Service Corporation
700 North Adams Street
P.O. Box 19001
Green Bay, WI 54307-9001

September 30, 2011

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

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

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

Wisconsin Public Service Corporation ("WPSC") respectfully requests that the U.S. Environmental Protection Agency ("EPA") grant reconsideration and immediately stay the compliance deadline and effective date of EPA's Final Rule signed July 6, 2011, titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States" ("Cross-State Rule") as it applies to Wisconsin.

INTRODUCTION

Without adequate notice and an opportunity to provide comments, EPA in its final Cross-State Rule cut Wisconsin's proposed state SO2 allowance budget by almost 20% in 2012 and 40% in 2014, and cut the proposed state's NOx budget by almost 30%. Given the unprecedented speed at which EPA is requiring sources to begin complying with the final rule, these major unexpected cuts leave the state - and WPSC - with virtually no compliance options other than a rapid shift in generation profile, which will lead to large rate increases for its customers. In fact, after accounting for the severe cuts in the final rule, EPA's Cross-State Rule is requiring Wisconsin to reduce it SO2 emissions by almost 40% in 2012 and 70% in 2014—cuts that are far in excess of Wisconsin's contribution to other states' nonattainment and maintenance problems.

The Cross-State Rule requires Wisconsin to over-reduce in order to offset the contributions of nearby states. After full implementation in 2014 (if not sooner), the limited contribution data in the docket appears to show that all of Wisconsin's "significant contributions" to other states' air quality problems will be eliminated, and in fact, Wisconsin will be required to reduce well below the threshold EPA has set to determine what constitutes a "significant contribution." Nevertheless, the contributions of the nearby states *to the same receptors* almost uniformly exceed the "significant contribution" threshold in 2014.

The sole statutory basis for EPA's Cross-State Rule is the "good neighbor" provision of the Clean Air Act, which provides that states must "prohibit[] . . . any source . . . within the State from emitting any air pollutant in an amount which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state." 42 U.S.C. § 7410(a)(2)(D)(i)(I). The underlying problem with EPA's final Cross-State Rule as applied to Wisconsin is that the rule is requiring Wisconsin to be much more than a "good neighbor." For EPA's final rule requires Wisconsin's sources and ratepayers to absorb the cost of not only eliminating Wisconsin's contribution—but also offsetting the contributions of neighboring states.

We believe such a result is unlawful and unjust. The Clean Air Act does not give EPA the authority to over-regulate Wisconsin sources so that it can under-regulate sources in neighboring states. EPA should accordingly stay its final rule as to Wisconsin, and initiate new notice-and-comment rulemaking to adjust Wisconsin's state budgets to ensure that Wisconsin is not being required to do more than its fair share.

As explained more fully below, WPSC also requests that EPA reconsider the rule on numerous additional grounds. Among these are:

- EPA used the Integrated Planning Model ("IPM") to set Wisconsin's state budgets based on the chosen 2012 and 2014 cost per ton thresholds, but the assumptions used in the model are unreasonable, factually incorrect and do not accurately account for Wisconsin's regulatory approval processes. For example, EPA's model appears to have incorrectly assumed that seven units in Wisconsin comprising approximately 2,377 total MWs will have environmental controls operating by January of 2012 (scrubbers/SCRs), when in fact none of them will have such controls by that time. If EPA simply corrected these obvious factual errors, Wisconsin's state budgets for SO2 and NOx would increase substantially.

- EPA used 2012 baseline modeling to determine which states to include in the annual SO2 and NOx programs, but the PM2.5 nonattainment compliance deadline is not until April 2015, which means EPA may have included states in the annual SO2 and NOx programs (like Wisconsin) whose "significant contributions" will be eliminated by the April 2015 compliance deadline;

- Based on EPA's limited data, it appears that all of Wisconsin's "significant contributions" are eliminated at the $500/ton threshold, which means, at a minimum, Wisconsin should have been placed into Group 2 for SO2, not Group 1; and

- EPA's baseline 2012 and 2014 emission estimates do not reflect reality in Wisconsin, and if adjusted, Wisconsin's significant contributions would likely be eliminated as early as 2012.

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

I. BACKGROUND

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

A. The *North Carolina* Decision

The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rejected CAIR on judicial review, ruling that CAIR suffered from several "fatal flaws." *North Carolina v. EPA*, 550 F.3d 896 (D.C. Cir. 2008). The Cross-State Rule is EPA's attempt to issue regulations that comply with the "good neighbor" provision, CAA § 110(a)(2)(D)(i)(I), while avoiding these "fatal flaws."

The *North Carolina* decision found that because states could freely trade allowances under CAIR, the rule did not ensure that each state would eliminate its significant contributions to other states' air quality problems, as all sources within a state could conceivably purchase allowances rather than install controls. *Id.* at 906-908. The Court held that the "good neighbor" provision requires EPA to "actually require elimination of emissions from sources that contribute significantly and interfere with maintenance in downwind nonattainment areas." *Id.* at 908. While EPA can consider cost when determining what level is "significant," the Court ruled that EPA cannot "just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply." *Id.* at 918. Moreover, as the Court explained, the "good neighbor" provision "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution." *Id.* at 921.

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

WPSC is a regulated electric and natural gas utility operating in northeast and central Wisconsin and an adjacent portion of Upper Michigan, covering an 11,000 square mile service area. It has 1,363 employees and serves approximately 439,000 electric customers, the vast majority of which are in Wisconsin. It owns and operates numerous coal and gas-fired electric generating units ("EGUs"), with a total electric generating capacity based on summer capacity ratings of 2,164 megawatts, including the utility's share of jointly owned facilities.

The final Cross-State Rule saddles WPSC's wholly and jointly owned EGUs and other Wisconsin EGUs with annual "state budgets" for SO_2 and NOx that are grossly disproportionate to state budgets for many other states, thereby unfairly and illegally penalizing Wisconsin utilities and ratepayers. WPSC estimates that the Cross-State Rule alone will require it to raise its rates by 3.3% just to cover the cost increases in 2012, and most of the impacts of the rate hike will fall on WPSC's industrial customers. If left in its current form, WPSC expects further significant rate increases related to the rule in the future, particularly since the Cross-State Rule ratchets down significantly in 2014 for SO2.

WPSC did not object to the proposed rule's budgets for Wisconsin during the rulemaking leading to the final Cross-State Rule. This is because the proposed budgets appeared to be more reasonable and did not obviously treat Wisconsin and its ratepayers inequitably when compared to other states' proposed budgets. Now that we have reviewed the final Cross-State Rule and the much lower and disproportionate SO_2 and NOx budgets for Wisconsin, however, we must take all appropriate steps to remedy this situation.

II. WPSC'S REQUEST FOR RECONSIDERATION AND STAY

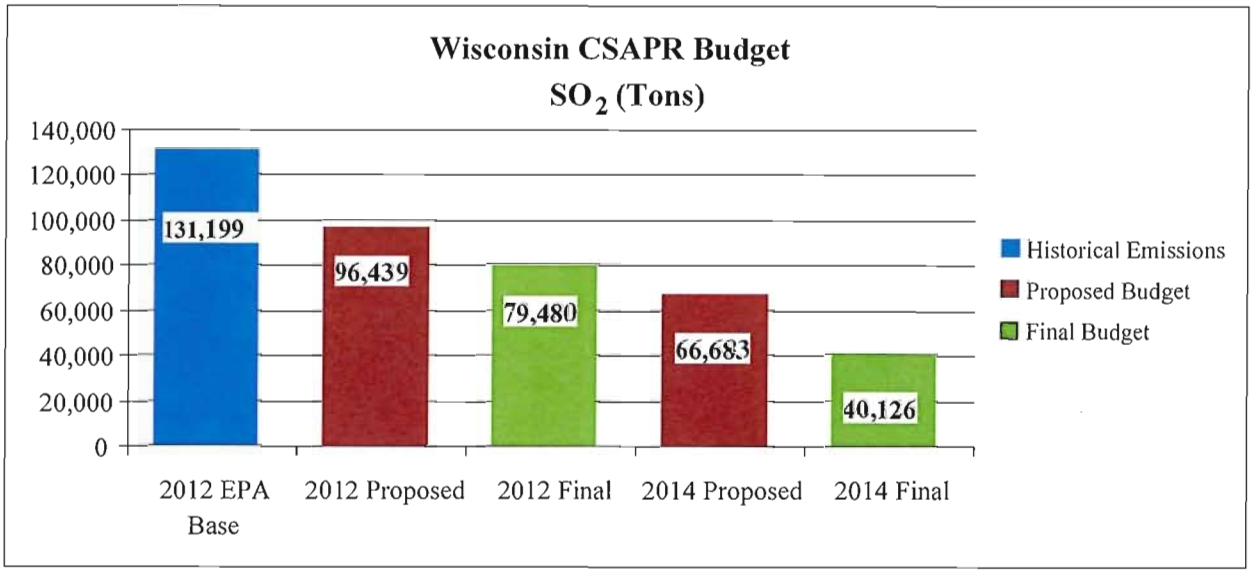
CAA § 307(d)(7)(B) provides that if it was "impracticable" to raise an objection to a final regulatory provision in comments on a proposed rule, or if the grounds for objection arose after the period for public comment, a party must file an administrative petition for reconsideration with EPA on that issue before proceeding to judicial review. If the issues raised are of "central relevance to the outcome," EPA is obligated to reconsider the portions of the rule at issue and afford the petitioner the right to comment that had been previously denied.

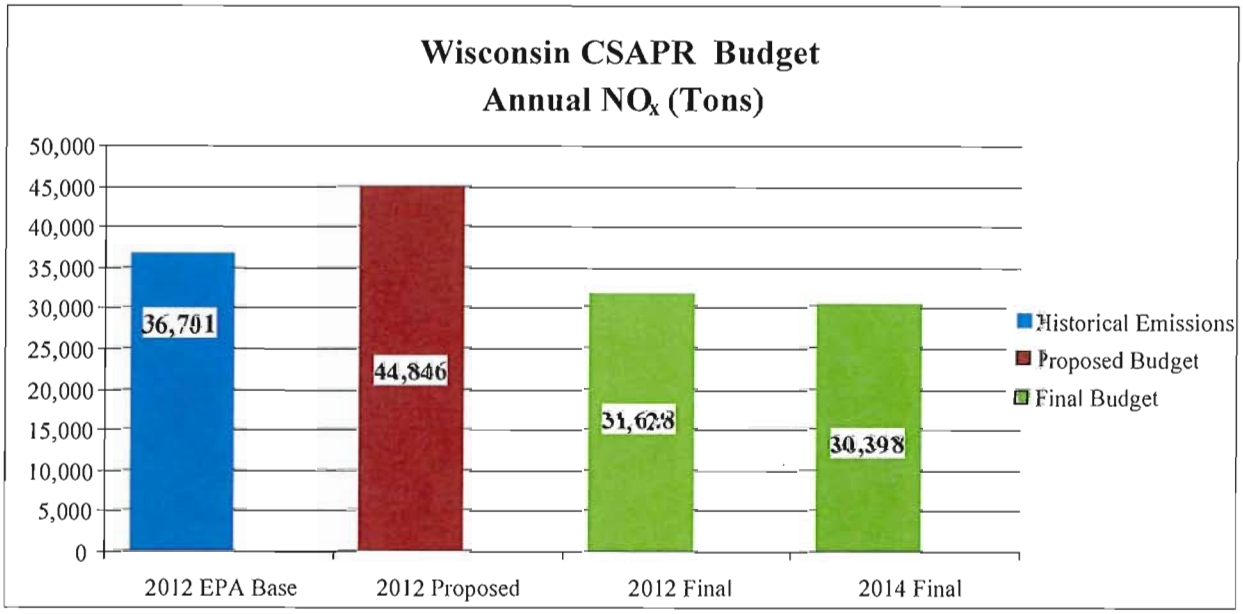
As we will show below, nothing in EPA's proposed rule – nor in any of EPA's subsequent "Notices of Data Availability" ("NODAs") – alerted WPSC or any other party that EPA was drastically reducing Wisconsin's proposed state budget numbers. Thus it was not only "impractical" for WPSC to have objected to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

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

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

WPSC was never made aware of the changes to the state budget between the proposed and final rule. No notice was included in the proposed rule that Wisconsin's budget might be changed by as much as 40%. Yet the charts below show the major cuts taken between EPA's proposed and final rules for SO2 and NOx.





The CAA requires that a "detailed explanation of [EPA's] reasoning" be included in the proposal, and that the proposal include: "(A) the factual data on which the proposed rule is

based; (B) the methodology used in obtaining the data and in analyzing the data; and (C) major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3); *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 519.

The CAA notice requirements are designed to ensure fairness to the affected parties and to give affected parties the opportunity to develop evidence in the record, and thereby enhance the quality of judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005). "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

1. EPA Admits That It Made "Significant" And "Numerous" Changes To Its State Budget Calculations In The Final Rule

EPA admits in its Response to Comments that it "modified the methods used to determine state emissions budgets" in the final rule. Transport Rule Primary Response to Comments at 470. More particularly:

> EPA made *numerous* updates and corrections to its significant contribution analysis for the final rule. Among other things, EPA updated the modeling used to identify nonattainment and maintenance receptors, EPA's source apportionment modeling, and EPA's development and use of CAMx and AQAT for identifying significant contribution to non-attainment and interference with maintenance.

Id. (emphasis added). EPA also states the following regarding the budget changes:

> [F]ollowing the proposal EPA has made *significant* updates to the IPM model for projecting EGU emissions. . . . EPA also received substantial public input following the proposal on the model's assumptions and representation of individual units, which allowed EPA to improve its 2012 and 2014 emission projections for states under the cost thresholds considered. . . .

76 Fed. Reg. at 48260. Nothing in EPA's proposed rule or the NODAs alerted WPSC that EPA was planning on making these "significant" and "numerous" changes. EPA has therefore violated the CAA's notice and comment procedures as to Wisconsin. If EPA does not reconsider and provide Wisconsin and its sources with a more adequate notice and comment period, WPSC will be compelled to pursue judicial review in the D. C. Circuit, which could very well vacate Wisconsin's state budgets and potentially the entire rule.

2. Had WPSC Been Given Notice Of The Drastic Cuts In Its State Budget, It Would Have Notified EPA Of Various Factual Errors And Faulty Assumptions In Its Calculations

WPSC is puzzled by EPA's final state budget calculations. As to SO2, EPA seems to believe that sources in Wisconsin can reduce their emissions from a 2012 base case level of 131,199 tons to 79,480 tons at the $500/ton level in 2012 without adding any controls in the state. Such assumptions are incorrect.

EPA has expressly acknowledged in its final rule that sources cannot install emissions controls to comply in the 2012 or 2013 compliance years. 76 Fed. Reg. at 48279-80. When it calculated state budgets in 2012 at the $500/ton level, EPA assumed that only the following compliance strategies could be implemented:

> (1) Operation of existing controls year-round in PM2.5 states; (2) operation of scrubbers that are currently scheduled to come online by 2012; (3) some sources switching to lower-sulfur coal . . . and (4) changes in dispatch and generation shifting from higher emitting units to lower emitting units. EPA modeling and selection of a $500/ton cost threshold includes all existing and planned controls operating year round (items 1 and 2). It also reflects an amount of coal switching and generation shifting that can be achieved for $500/ton.

Id. Given these restrictions in EPA's modeling at the $500/ton level, there is simply no way that Wisconsin's SO2 budget in 2012 should be 79,480 tons and that its NOx budget should be 31,628. Most sources in Wisconsin are already burning lower-sulfur coal, and the units with controls are already being dispatched at high levels. When it saw EPA's final state budgets, WPSC thought that EPA surely must have made a mistake. And it did.

Although EPA's assumptions in its modeling are far from clear, it appears that EPA made a number of highly significant factual errors. For example, the Integrated Planning Model EPA used to assess emission profiles and impacts appears to have incorrectly assumed that:

- WPSC's jointly owned Columbia Units 1 and 2[1] - which have a combined capacity of approximately 1,100 MW - have "dispatchable" wet scrubbers in 2012, when in fact, the current PSCW approved plans for those units call for installation of dry scrubbers that will not be operational until approximately May of 2014;

- Weston Unit 3 – which is approximately 330 MW – also has a "dispatchable" wet scrubber in 2012, when in fact it does not and the PSCW has not approved installation of such controls; and

[1] WPSC jointly owns these Columbia units with Madison Gas and Electric Company ("MG&E") and Wisconsin Power & Light Company ("WPL").

- Edgewater Unit 5 (which WPSC does not own) has an SCR already installed but the SCR will not be operational until approximately January of 2013. Edgewater Unit 5 is approximately 412 MW in size.

- WE Energies' Valley Units 2 & 3, totaling approximately 140 MWs, will have SCRs by 2012, even though to WPSC's knowledge no such controls are planned at those units.

- Dairyland Power Cooperative's John P. Madgett Unit 1 (approximately 395 MWs) will have an SCR in 2012, when in fact to WPSC's knowledge it will not have such controls in 2012.

If EPA simply corrected these obvious factual errors, Wisconsin's state budgets for SO2 and NOx would increase significantly. Had EPA allowed WPSC and other Wisconsin sources to comment on its revised final state budgets, EPA could have remedied these (and any other) errors prior to issuing the final rule. Instead, EPA has saddled Wisconsin and its sources with state budgets in 2012 that greatly exceed the $500/ton cost threshold.

EPA's SO2 budget in 2014 is also based on faulty assumptions. EPA based the 2014 budget on $2300/ton reductions, and assumed that Wisconsin sources could add environmental controls by that time. While other states may be able to permit and construct controls in the two and a half year time frame between when EPA finalized the rule and the 2014 compliance deadline, it is almost certainly impossible to do so in Wisconsin.

The Public Service Commission of Wisconsin - unlike any other state commission in the region - requires Wisconsin utilities to obtain a certificate of authority ("CA") *prior to making capital improvements at a plant* – including environmental controls – that would cost more than $8,248,000.[2] *See* Wis. Stat. § 196.49(3)(b); Wis. Admin. Code. §§ PSC 112.05(1). The two most recent PSCW approved CAs for environmental controls in Wisconsin (the Columbia Unit 1 and 2 dry FGDs and the Edgewater Unit 5 SCR) took two years and 1.5 years to obtain, respectively. For both of those projects, the owners in the CA applications estimated that the permitting and construction time frames would take two to three years *from final CA approval*, meaning it takes between 3.5 to 5 years to obtain regulatory approvals and construct FGDs and SCRs in Wisconsin, not 2.5 years as EPA assumed.

In light of all the above, we submit that EPA should reconsider Wisconsin's state budgets, allow all of the sources in Wisconsin to comment, and fix all of its modeling errors and spurious assumptions. While it does so, it should stay the rule as to Wisconsin.

B. The Wisconsin State Budgets for SO2 and NOx Are Inequitable And Unlawful Under The Clean Air Act and The D.C. Circuit's *North Carolina* Decision

[2] *See* Revised Estimated Gross Project Cost Thresholds for Construction Projects Requiring Commission Review and Approval per Wis. Admin. Code § PSC 112.05(3), PSC Docket No. 5-GF-154, Letter to Wisconsin Electric Utilities from Robert Norcross, Administrator Gas and Energy Division, dated April 7, 2010 (PSC Ref# 130686); *see also* Wis. Admin. Code § PSC 112.05(3)(a)3 & (b).

Putting aside the lack of notice and factual problems in EPA's final Cross-State Rule, the more fundamental problem with the rule is that it does not consider each state's emission contribution when setting the state budgets or assurance provision caps. Rather, it sets the budgets and assurance provision caps for Group 1 states exclusively on the chosen cost thresholds of $500/ton (NOx and SO2 in 2012) and $2,300/ton (SO2 in 2014), which are uniformly applied. Group 2 states were set the same way for NOx and SO2 in 2012 but were only required to meet the $500/ton level in 2014 for SO2.

In other words, EPA set the state budgets by determining "for specific cost per ton thresholds, the emission reductions that would be achieved in a state if all [covered units] . . . in that state used all emission controls and emission reduction measures available at that cost threshold." 76 Fed. Reg. at 48248. The result is that states that happen to have sources that are cheaper to control (based on EPA's model) end up with lower state budgets and lower assurance provision caps. While EPA did check to ensure that all (or at least most) air quality problems would be resolved at the chosen cost per ton figures, the actual contribution of each state was not considered in any way. In fact, EPA apparently never calculated the total SO2 and NOx contribution of each state to downwind receptors at the various cost thresholds. The result for Wisconsin is inequitable and unlawful.

1. Nearby States Contribute Significantly More Than Wisconsin To Downwind PM2.5 Nonattainment and Maintenance Problems, Yet Wisconsin Is Saddled With Greater Reductions

EPA included Wisconsin in the annual SO2 and NOx programs because of its modeled annual (and 24-hour[3]) PM2.5 contributions to various receptors in Ohio, Michigan, Illinois and Indiana. Annual SO2 and NOx emissions contribute to PM2.5 air quality levels. EPA's significant contribution threshold is 0.15 ug/m3 for annual PM2.5, meaning EPA assumes that states that have contributions below this amount are not "significantly contributing" to annual PM2.5 nonattainment or maintenance problems in other states and are not included in the annual SO2 and NOx programs. 76 Fed. Reg at 48236, 48240-41. States that are above the threshold for a receptor are considered "linked" with that receptor because, according to EPA, they "significantly contribute" to that receptor's air quality problems.

Table 1 shows the EPA base case (i.e., no controls) 2012 downwind annual PM2.5 contributions to each of Wisconsin's "linked" receptors (i.e., those receptors where Wisconsin's contribution is above 0.15 ug/m3) made by Wisconsin and four nearby states.

[3] This petition refers only to the annual PM2.5 data because that is the only data that is available in a usable form in the docket; however, WPSC would expect the 24-hour PM2.5 data to show similar results.

Table 1: Wisconsin's and Nearby States' Contributions (ug/m3) - 2012 Base Case

Receptor No#	State	County	WI	IL	IN	MI	OH
Nonattainment							
390618001	OH	Hamilton	0.16	0.50	1.27	0.35	NA
390350038	OH	Cuyahoga	0.18	0.38	0.65	0.64	NA
390610014	OH	Hamilton	0.16	0.50	1.28	0.35	NA
261630033	MI	Wayne	0.23	0.42	0.70	NA	0.99
390350060	OH	Cuyahoga	0.18	0.38	0.66	0.64	NA
171191007	IL	Madison	0.16	NA	0.71	0.26	0.42
390350045	OH	Cuyahoga	0.18	0.38	0.66	0.64	NA
Maintenance							
180970081	IN	Marion	0.20	0.65	NA	0.41	0.95
390617001	OH	Hamilton	0.16	0.50	1.28	0.35	NA
180970083	IN	Marion	0.20	0.65	NA	0.41	0.95
390350065	OH	Cuyahoga	0.18	0.38	0.66	0.64	NA

As the data in this table clearly illustrates, Wisconsin's contributions to every one of its "linked" receptors are significantly lower than the contributions of all of its neighboring states to those same receptors. Yet the Cross-State Rule still requires Wisconsin to eliminate almost 70% of its 2014 base case SO2 emissions, while only requiring Illinois to reduce approximately 10% of its emissions and Michigan to reduce 46% of its emissions compared to the 2014 base case.

2. In Setting Wisconsin's State Budgets, EPA Is Requiring Wisconsin To Offset Other States' Contributions, Which Is Unlawful

As the D.C. Circuit unmistakably articulated in its *North Carolina* decision, EPA cannot force one state to clean up more in order to allow another state to clean up less. *North Carolina*, 531 F.3d at 921. Yet that appears to be exactly what EPA is doing in its Cross-State Rule as to Wisconsin.

For its 2012 baseline calculations, EPA used the CAMx model to determine both the sulfate (SO2) and nitrate (NOx) contributions to PM2.5 assuming no Cross-State controls, and added those together to determine each state's total PM2.5 contribution at each receptor. At the various cost-thresholds, however, EPA apparently did not calculate the nitrate (or NOx) contributions, and instead just calculated the sulfate (or SO2) contributions, which are generally the largest portion of the total contribution. In other words, EPA never calculated each state's contribution when setting the state budgets—*which, if true, shows conclusively that EPA did not consider contribution at all when setting the budgets.*

Moreover, as shown in Table 2 below, Wisconsin's sulfate contributions are all well below the "significant contribution" threshold of 0.15 ug/m3 at the $500/ton level, which means that EPA is likely requiring Wisconsin to reduce its emissions below its "significant contribution" at the $500/ton level.

Table 2: Wisconsin's and Nearby States' Sulfate Contributions (ug/m3) - $500/ton

Receptor No#	State	County	WI	IL	IN	MI	OH
Nonattainment							
390618001	OH	Hamilton	0.08	0.20	0.57	0.25	NA
390350038	OH	Cuyahoga	0.09	0.15	0.31	0.38	NA
390610014	OH	Hamilton	0.08	0.20	0.57	0.26	NA
261630033	MI	Wayne	0.11	0.14	0.28	NA	0.40
390350060	OH	Cuyahoga	0.09	0.15	0.31	0.38	NA
171191007	IL	Madison	0.09	NA	0.34	0.19	0.21
390350045	OH	Cuyahoga	0.09	0.15	0.31	0.38	NA
Maintenance							
180970081	IN	Marion	0.10	0.25	NA	0.27	0.44
390617001	OH	Hamilton	0.08	0.20	0.57	0.26	NA
180970083	IN	Marion	0.10	0.25	NA	0.27	0.44
390350065	OH	Cuyahoga	0.09	0.15	0.31	0.38	NA

Wisconsin's highest sulfate contribution at the $500/ton level is 0.11 ug/m3 at the Wayne, Michigan receptor. Because EPA apparently did not calculate the NOx portion of the contribution, there is no record evidence available to determine exactly how low Wisconsin is

being required to go below the 0.15 ug/m3 threshold. However, the NOx contribution is generally much smaller than the sulfate contribution, which means that even at the $500/ton level for NOx and SO2, Wisconsin is likely being required to offset the contributions of its nearby states, all of whom are well in excess of the 0.15 ug/m3 threshold at $500/ton (except Illinois at Wayne, MI) without accounting for the NOx portion of the contribution.

Even given this inequity, EPA went further and included Wisconsin as a Group 1 state, meaning Wisconsin was required to ratchet down its SO2 emissions even more in 2014. Table 3 shows the sulfate contributions in 2014 assuming that the $500/ton NOx and $2300/ton SO2 reductions have occurred. As is obvious, Wisconsin's sulfate contributions are even lower, while none of the other nearby states have eliminated their own "significant contributions" (except Illinois at Wayne, Michigan).

Table 3: Wisconsin's and Nearby States' Sulfate Contributions (ug/m3) - $2300/ton

Receptor No#	State	County	WI	IL	IN	MI	OH
Nonattainment							
390618001	OH	Hamilton	0.07	0.19	0.49	0.21	NA
390350038	OH	Cuyahoga	0.09	0.15	0.27	0.32	NA
390610014	OH	Hamilton	0.07	0.20	0.49	0.21	NA
261630033	MI	Wayne	0.10	0.14	0.24	NA	0.31
390350060	OH	Cuyahoga	0.09	0.15	0.27	0.33	NA
171191007	IL	Madison	0.08	NA	0.29	0.16	0.16
390350045	OH	Cuyahoga	0.09	0.15	0.27	0.33	NA
Maintenance							
180970081	IN	Marion	0.09	0.25	NA	0.23	0.36
390617001	OH	Hamilton	0.08	0.20	0.49	0.21	NA
180970083	IN	Marion	0.09	0.25	NA	0.23	0.36
390350065	OH	Cuyahoga	0.09	0.15	0.27	0.33	NA

EPA apparently ignored the *North Carolina* decision because it did not even calculate each state's total contribution when setting the state budgets. Instead EPA set the budgets solely on a uniform cost threshold, which is unlawful.

EPA asserts that the Cross-State Rule complies with the *North Carolina* decision because it conducted modeling at the chosen cost thresholds and determined that virtually all downwind nonattainment and maintenance problems were remedied. 76 Fed. Reg. at 48270-71. EPA did not, however, ensure that one state was not being required to do more than its fair share, as Wisconsin is almost certainly being required to do. As the *North Carolina* Court explained, the "significant contribution" provision "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions." *North Carolina*, 531 F.3d at 921. This

data shows that EPA is doing just that: it is requiring Wisconsin to be more than just a "good neighbor," it is requiring Wisconsin to offset the contributions made by its nearby states.

Since Wisconsin's state budgets for NOx and SO2 are so fundamentally flawed, we submit that EPA should stay the rule as to Wisconsin and reconsider it.

C. Wisconsin Likely Should Not Have Even Been Included In The Annual SO2 or NOx Programs At All Based On EPA's Baseline Modeling

Examining EPA's baseline data, it is questionable whether Wisconsin should have even been included in the annual NOx and SO2 programs at all. The 2012 and 2014 baseline emission numbers that EPA used are purportedly "the emissions that would occur in each state if EPA did not promulgate the [Cross-State] Rule." 76 Fed. Reg at 48223. To arrive at these baseline emission estimates, EPA "developed emission data representing the year 2005 to support air quality modeling of a base year from which future air quality could be forecasted". 76 Fed. Reg. at 48225.

1. EPA Did Not Confirm Whether Wisconsin's Significant Contributions Would Be Eliminated As Of The PM2.5 Compliance Date

Again, EPA used the 2012 baseline year to determine which states were "significantly contributing" to nonattainment and maintenance problems in other states, and then included those states in the rule that were above the various thresholds in the 2012 baseline year (e.g., 0.15 ug/m3 for annual PM2.5). But for PM2.5 - as EPA has itself admitted - the nonattainment compliance deadline (with extensions) for these downwind receptors is April of 2015, not 2012[4]. 76 Fed. Reg. at 48277. Given this 2015 compliance date, EPA should have checked its baseline data to ensure that the states "significant contributions" are not eliminated by the April 2015 deadline—because if they are, there is no reason for those states to be included in the Cross-State Rule's annual NOx and SO2 programs at all.

As shown in EPA's 2014 baseline data in Table 4 below, Wisconsin's annual PM2.5 sulfate contributions are almost entirely eliminated in 2014, with only one receptor (Wayne, MI) modeled exactly at the 0.15 ug/m3 level.

[4] UARG and others have argued that the annual SO2 and NOx programs (which are based solely on the PM2.5 contributions) should not begin until 2014—which would give utilities more optionality in complying with the rule but would still "align" the Cross-State Rule's reduction requirements with the NAAQS attainment deadlines, as required by the *North Carolina* decision. WPSC also incorporates those comments herein.

Table 4: Wisconsin's and Nearby States' Sulfate Contributions (ug/m3) – 2014 Base Case

Receptor No#	State	County	WI	IL	IN	MI	OH
Nonattainment							
390618001	OH	Hamilton	0.11	0.20	1.01	0.29	NA
390350038	OH	Cuyahoga	0.13	0.15	0.51	0.43	NA
390610014	OH	Hamilton	0.11	0.20	1.01	0.29	NA
261630033	MI	Wayne	0.15	0.14	0.49	NA	0.71
390350060	OH	Cuyahoga	0.13	0.16	0.52	0.44	NA
171191007	IL	Madison	0.13	NA	0.59	0.21	0.38
390350045	OH	Cuyahoga	0.13	0.15	0.52	0.44	NA
Maintenance							
180970081	IN	Marion	0.13	0.26	NA	0.31	0.74
390617001	OH	Hamilton	0.11	0.20	1.01	0.29	NA
180970083	IN	Marion	0.13	0.26	NA	0.31	0.74
390350065	OH	Cuyahoga	0.13	0.15	0.52	0.44	NA

Given the slope of the reductions from 2012 to 2014 in EPA's baseline data, Wisconsin's total contribution to this one receptor may have been below the 0.15 ug/m3 cutoff by April of 2015. But EPA did not even calculate total SO2 and NOx contributions in any year except the 2012 baseline. This means all of Wisconsin's significant contributions may have been eliminated by the nonattainment compliance deadline *without accounting for any Cross-State Rule reductions* – but there is no way to determine this conclusively from the record. EPA should have conducted this modeling to ensure that Wisconsin in fact needed to be included in the annual SO2 and NOx programs. Instead, it relied solely on baseline data from 2012, which was unreasonable, inequitable, and likely unlawful under the *North Carolina* decision, which directed EPA to align the rule with the nonattainment compliance deadlines.

2. EPA's Baseline Data Does Not Reflect Reality, And Should Have Included The CAIR Reductions

Because EPA used 2005 as its base year, its emission projections did not include the CAIR reductions that were already occurring. EPA chose not to include these CAIR reductions because, according to EPA, "CAIR" will "cease to exist after the Cross-State Rule is promulgated." 76 Fed. Reg. at 48223-24. Numerous other parties commented that EPA should have included CAIR in its baseline data, and WPSC incorporates those arguments herein by reference. *See, e.g.*, Response to Comments at 422, 464, 488.

Perhaps more critically, EPA's 2012 and 2014 baseline SO2 emission estimates for Wisconsin do not reflect reality. EPA is obligated to consider real-world data to ensure that its predictions are reasonable and accurate. *See, e.g., NRDC v. Jackson*, 2011 WL 2410398, at *3

(7th Cir. June 16, 2011) ("[T]he way to test" predictive models is to "compare [the] projection against real outcomes . . . . An agency that clings to predictions rather than performing readily available tests may run into trouble."); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054 (D.C. Cir. 2001 (finding that EPA acted arbitrarily in failing to "address[] what appear[s] to be stark disparities between its projections and real world observations.").

Using 2005 as the base year, EPA calculated Wisconsin's baseline SO2 emissions in 2012 to be 131,199 tons and in 2014 to be 124,862 tons. But Wisconsin's emissions in 2010 were 109,430 tons – data which was readily available to EPA. Had EPA included the CAIR-related reductions in its baselines and checked its projections against reality, Wisconsin's contributions in 2012 may not have been above the thresholds for inclusion in the annual SO2 and NOx programs.

D. At A Minimum, Wisconsin Should Have Been Placed Into Group 2 for SO2

EPA also had no legal or factual basis for including Wisconsin in Group 1 for SO2. EPA chose the SO2 group designations by assessing the resulting downwind air quality at the various nonattainment and maintenance receptors after assuming the reductions modeled at the $500/ton threshold occurred in all states found to be linked to those downwind sites and the states hosting those downwind sites. Because all air quality problems at the downwind sites were not resolved at the $500/ton threshold, EPA then placed all states that were linked to the remaining nonattainment sites in Group 1.

The problem is that EPA determined whether or not a state was "linked" with the downwind receptor by relying on the 2012 baseline data—not the $500/ton data. Such an approach is inequitable and unlawful for states like Wisconsin that have relatively minor contributions but happen to be contributing to the same receptor as states with large contributions that were not resolved at the $500/ton threshold. Put another way, even though Wisconsin's significant contributions were likely eliminated at the $500/ton threshold (see Table 2 above) – EPA included Wisconsin in Group 1 anyway because it happened to be "linked" based on the 2012 baseline data to the same downwind receptor as the larger contributing states (like Illinois, Michigan, Indiana and Ohio). This is an illogical and unlawful approach.

E. EPA's "FIP First" Approach Fails to Comply With The CAA

The CAA is well recognized as being exceedingly complex. As Chief Justice Rehnquist famously said, provisions of the CAA "virtually swim before one's eyes." *U.S. Steel Corp. v. EPA,* 444 U.S. 1035, 1038 (1980). And the 1980 version of the CAA was simple compared to the current version. Just this year the D.C. Circuit once again mused that the CAA is a "complex regulatory regime." *Sierra Club v. Jackson*, 2011 U.S. App. LEXIS 13391 (D.C. Cir. 2011).

For all the CAA's amazing complexity, however, one fundamental point has always been abundantly and vibrantly clear: whenever EPA determines that SIPs need to be amended to meet new federally-mandated targets, the states get the "first cut" at the SIP process. As the U.S. Supreme Court stated this year: "The Act envisions extensive cooperation between federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain." *Am. Elec. Power Co. v. Connecticut*, 131

S. Ct. 2527, 2539 (U.S. 2011) (internal citations omitted).

EPA eliminated the first cut in the final Cross-State Rule, however. Just as the states learned of their new federally-mandated targets for the first time, EPA issued FIPs mandating site-specific allowance allocations to meet those targets. For this extraordinary and unprecedented curtailment of the states' "first cut" rights, EPA has cited two rationales: (1) the CAA's "plain language;" and (2) a concern expressed in the *North Carolina* decision that EPA not tarry too long to fix the problems with CAIR. 76 *Fed. Reg.* 48208 at 48219-20 (August 8, 2011).

Comments filed by UARG during the public comment period on the Cross-State Rule (reprinted in EPA's Response to Comments document) show through extensive analysis of statutory terms, legislative history, and case law how EPA's "FIP First" approach is violative of the CAA. We endorse those UARG comments, and need not repeat them here. Moreover, we have reviewed the "Request for Partial Reconsideration and Stay of EPA's Final Rule" filed on August 5, 2011 by Luminant Generation Company LLC and related companies (collectively denominated "Luminant"). We note that on pp. 22-26 of this August 5 filing, Luminant addresses the FIP First issue by endorsing the UARG comments and adding several salient points. We also endorse the FIP First points in the Luminant filing.

As to EPA's "plain language" rationale, we respectfully submit the plain language of the CAA most clearly supports the view that states should now have the "first cut" to develop SIPs. The language of CAA § 110(k)(5) could not be plainer (emphasis added):

> (5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184 or to otherwise comply with any requirement of this Act, *the Administrator shall require the State to revise the plan as necessary to correct such inadequacies.* The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

In its final preamble and final Response to Comments document, however, EPA relies on various provisions of CAA § 110 requiring EPA to issue a FIP within certain deadlines. EPA's explanation of its theory as related to the Wisconsin SIP is representative of its overall theory:

> On April 25, 2005 EPA made a finding of failure to submit a SIP to address the requirements of CAA section 110(a)(2)(D)(i) with respect to the 1997 $PM_{2.5}$ NAAQS (70 FR 21147) and has not, subsequent to that date received and approved a SIP revision to correct the deficiency. On June 19, 2007, Wisconsin submitted an abbreviated CAIR SIP to, among other things, modify the CAIR FIP for the 1997 $PM_{2.5}$ NAAQS for Wisconsin. As noted in the preamble to the

> Transport Rule, the abbreviated SIPs approved by EPA on October 16, 2007 (72 FR 58542), modified but did not replace the CAIR FIPs promulgated by EPA. Following approval of the abbreviated CAIR SIP, the CAIR FIP remained the legal vehicle for implementation of the CAIR ozone-season requirements in Wisconsin. The CAIR FIPs were found unlawful and remanded to EPA to be replaced by rules consistent with the D.C. Circuit decision in North Carolina. EPA's approval of an abbreviated CAIR SIP thus has no impact on EPA's authority and obligation to promulgate a FIP to correct the 110(a)(2)(D)(i)(I) deficiency identified in the April 25, 2005 finding of failure to submit. In addition, on June 9, 2010, EPA made a finding of failure to submit a SIP to address the requirements of CAA section 110(a)(2)(D)(i)(I) deficiency with respect to the 2006 $PM_{2.5}$ NAAQS (75 FR 32673) and has not, subsequent to that date received and approved a SIP that corrects the deficiency. Based on these facts, the provisions of section CAA 110(c)(1) establish that the Administrator shall promulgate FIPs for the state of Wisconsin addressing the requirements of 110(a)(2)(D)(i)(I) with respect to the 1997 $PM_{2.5}$ NAAQS and 2006 $PM_{2.5}$ NAAQS.

It is difficult to follow the twists and turns of EPA's logic but one thing should be clear: it is not based upon any plain language in the CAA. More importantly, a critical flaw undercuts all of this EPA reasoning. That is, *EPA is assuming a FIP clock must start running and continue running even when the states do not know what they are supposed to be doing.*

Whatever obligation states may have had to revise their SIPs to comply with CAIR, the *North Carolina* decision rejected CAIR. EPA has been working since that time to issue replacement rules, and everyone knows that. Thus, states would have been wasting their time developing SIPs designed to comply with a rule that had been rejected by the D.C. Circuit.

SIPs may have been deemed "deficient" over the past few years, but only because EPA's CAIR rule was held deficient. States could not even know how to develop an approvable SIP until EPA finally set state budgets in the final Transport Rule last month. EPA has finally established new federal requirements to be implemented through a SIP (the state budgets) and now, following the plain language of CAA § 110(k)(5) quoted above, "the Administrator shall require the State to revise the plan as necessary to correct such inadequacies."

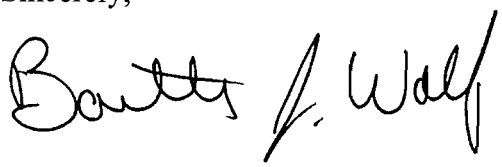
As to EPA's rationale based on the *North Carolina* decision, there is nothing in the initial opinion or the followup opinion that speaks to the issue of whether EPA can or should force FIPs on the states without allowing states to take the "first cut." Moreover, there is nothing in either opinion indicating that EPA should act with such extreme haste that it abrogates the traditional time period allowed for the states' first cut.

The Court in fact explicitly refused to impose any deadlines regarding EPA's followup rulemaking. 550 F.3d at 1176. The Court stated: "Our opinion revealed CAIR's fundamental flaws, which EPA must still remedy." *Id.* EPA simply cannot rely upon the Court's ruling to justify its new fundamental FIP First flaw.

CONCLUSION

EPA's final Cross-State Rule is factually and legally insupportable as applied to Wisconsin. Failure to correct these problems will force immediate and costly rate increases on WPSC and the state. Thus at a bare minimum, we submit that EPA should stay the rule as to Wisconsin while it conducts additional notice-and-comment rulemaking on Wisconsin's annual state budgets for SO2 and NOx.

Sincerely,



Barth J. Wolf
Secretary