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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

In re:)
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Nelson Industrial Steam Company)
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Appeal No. CAA 07-02

ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

The Board should affirm the Administrator's action in this case because the Administrator has demonstrated a rational basis for his decision that two units at a power production facility owned by Nelson Industrial Steam Company (NISCO) are not exempt from the requirements of the EPA-administered trading programs under the Clean Air Interstate Rule (CAIR) and the CAIR Federal Implementation Plans (FIPs) under 40 CFR Parts 96 and 97 and the Petitioner has failed to demonstrate that any conclusion of law underlying this decision is clearly erroneous or that any exercise of discretion underlying the decision is arbitrary and capricious or an abuse of discretion. First, the Administrator's determination that these units (the NISCO units) are not exempt from the CAIR FIP and CAIR trading programs is consistent with the CAIR FIP and CAIR regulations which do not create an exemption for non-cogeneration units having "small amounts" of, or de minimis sales of electricity. See 40 CFR §§97.104(a)(1), 97.204(a)(1), and 97.304(a)(1) (CAIR FIP rules) and 40 CFR §§96.104(a)(1), 96.204(a)(1), and 96.304(a)(1) (CAIR model trading rules); see also 40 CFR §§51.123(cc) and 51.124(q) (definitions of "electric generating unit" or "EGU"). In fact,

in the CAIR rulemaking, EPA expressly considered and decided not to establish a general exemption for all units based on minimal sales of electricity. Instead, EPA expressly created a limited exemption -- i.e., an exemption only for cogeneration units that otherwise meet the general applicability criteria for all units -- based on the amount of electricity sales. See 40 CFR §§97.104(b)(1), 97.204(b)(1), and 97.304(b)(1) (CAIR FIP rules) and 40 CFR §§96.104(b)(1), 96.204(b)(1), and 96.304(b)(1) (CAIR model trading rules); see also 40 CFR §§51.123(cc) and 51.124(q) (definitions of “electric generating unit” or “EGU”). Petitioner does not argue here that the NISCO units qualify as cogeneration units under the CAIR FIPs and CAIR; thus any exemption for such units cannot apply. Second, the Administrator reasonably concluded that he cannot create a new, de minimis exemption covering the NISCO units without revising the regulations in a notice-and-comment rulemaking, consistent with statutory rulemaking requirements. Thus, in the applicability determination, he must apply the existing regulations, which do not allow for such an exemption.

Background

This case involves an appeal of the applicability determination, issued by the Administrator on October 22, 2007 under 40 CFR §§97.104(c), 97.204(c), and 97.304(c), for two units at NISCO’s Roy S. Nelson Station at Westlake, Louisiana.¹ The two units are circulating fluidized bed boilers burning petroleum coke, supplemented by natural

¹ EPA promulgated the CAIR FIPs as a backstop to implement CAIR and to ensure that there were rules in place to implement the requirements of Section 110(a)(2)(D)(i) of the Clean Air Act (CAA) prohibiting emissions that contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to national ambient air quality standards (NAAQS) for fine particulates and ozone. See 70 Fed. Reg. 25162, 25166-67 (May, 12, 2005). EPA gave States the option under CAIR of meeting these requirements in their SIPs by adopting EPA-administered trading programs for SO₂, NO_x annual, and NO_x ozone season emissions. *Id.* at 25273. The CAIR FIPs adopted essentially the same EPA-administered trading programs and will be withdrawn for States that adopt SIPs meeting the CAA Section 110(a)(2)(D)(i) requirements. 71 Fed. Reg. 25328, 25343 (Apr. 28, 2006).

gas, and serving two 130 MWe generators. The generators produce electricity, and some of the waste heat is used to produce steam. Most of the electricity and all of the steam are used by the owners of the facility, and a relatively small portion of the electricity is sold to a utility for delivery to the utility's customers.

In its original request for an applicability determination dated March 13, 2006, NISCO contended that the NISCO units were cogeneration units exempt from the CAIR FIP and CAIR trading programs.² See Petitioner's Exhibit 2. In its applicability determination, the Administrator rejected that contention because these two units do not meet the efficiency standard that is required for a unit to qualify as a cogeneration unit and thus is a prerequisite for qualifying for the cogeneration unit exemption. See Petitioner's Exhibit 1 at 6. Petitioner does not here contest that finding. Instead, Petitioner relies on a second, additional argument, made in its supplement to the request, dated November 15, 2006, that these two units do not meet the definition of electric generating unit (EGU) under CAIR (40 CFR §§51.123(cc) and 51.124(q)) and the general applicability criteria for CAIR units under the CAIR FIPs (40 CFR §§97.104(a)(1), 97.204(a)(1), and 97.304(a)(1)) and under CAIR (40 CFR §§96.104(a)(1), 96.204(a)(1), and 96.304(a)(1))³ because the units have "small amounts", or de minimis, sales of

² When NISCO submitted its applicability determination request and a supplement to that request, the CAIR FIPs for SO₂ NO_x annual, and NO_x ozone season emissions were in place in Louisiana. Between the submission of NISCO's request and supplement and the issuance of the Administrator's applicability determination, the Agency approved Louisiana's SIP revision providing for participation in the EPA-administered CAIR SO₂ trading program and incorporating by reference most of the CAIR SO₂ model trading rule and proposed approving the State's SIP revisions providing for participation in the EPA-administered CAIR NO_x trading programs. NISCO and the State continued to express an interest in the Administrator's responding to the request, particularly since the relevant provisions of CAIR FIPs and SIPs for SO₂ and NO_x are all essentially identical. The Administrator therefore issued the applicability determination and referenced the relevant provisions in both the CAIR FIPs and the CAIR model trading rules. Petitioner's Exhibit 1 at n.1.

³ Although NISCO referenced only 40 CFR 51.123(cc) and the CAIR FIP applicability provisions, NISCO objected to inclusion of its units in the EPA-administered SO₂ and NO_x trading programs under CAIR, as

electricity (Petitioner's Exhibit 3). After carefully considering NISCO's supplemental request, the Administrator determined that the NISCO units are CAIR units even though they have produced only relatively small amounts of electricity for sale. The Administrator found that the general applicability criteria of the EPA-administered CAIR FIP and CAIR trading programs do not include an exemption for all units with "small amounts" of sales of electricity.⁴ The Administrator also found that a new exemption for all units with de minimis sales of electricity can only be created through notice-and-comment rulemaking to revise the CAIR FIPs and CAIR and that therefore he must apply in the applicability determination the existing regulations, which do not allow for such an exemption. See Petitioner's Exhibit 1 at 4-5 and 6-7.

Standard of Review

As provided in 40 CFR §§97.108, 97.208, and 97.308, the appeal procedures for CAIR FIP applicability determinations are set forth in 40 CFR Part 78. The scope of review is established in 40 CFR §78.1. This section explicitly provides that Part 78 governs appeals of any final decision of the Administrator under the EPA-administered trading programs under the CAIR FIPs and CAIR. 40 CFR 78.1(a)(1) (stating that "[t]his part governs appeals of any final decision of the Administrator under the EPA-

well as both the CAIR FIP SO₂ and NO_x trading programs. The EGU definition in CAIR with regard to SO₂ emissions is in 40 CFR §51.124(q). Moreover, the Administrator explained that the applicability of the EPA-administered trading programs under the CAIR FIPs and CAIR to the NISCO units is governed by the provisions in 40 CFR §§97.104, 97.204, and 97.304 and 40 CFR §§96.104, 96.204, and 96.304, rather than the EGU definitions in 40 CFR §§51.123(cc) and 51.124(q). In fact, the term "EGU" is not used in the CAIR FIP and CAIR trading rules and is used in 40 CFR §§51.123 and 51.124 in provisions addressing the establishment of and demonstration of compliance with State budgets, the requirements for emissions monitoring and reporting, and the requirements for participation in the EPA-administered trading programs. See 40 CFR §§51.123(e)-(g), (i), (o), (q)-(s), (u), and (aa); and 51.124(e)-(g), (i), and (o). In any event, the applicability provisions and the EGU definitions are identical for all purposes relevant in this case. Petitioner's Exhibit 1 at n.4.

⁴ See n.3.

administered trading programs under . . . subparts AA through II of part 96 of this chapter, subparts AAA through III of part 96 of this chapter, and subparts AAAA through IIII of part 96 of this chapter, or part 97 of this chapter”) See also 40 CFR §78.1(b)(7)-(12) (providing a non-exclusive list of the types of final decisions of the Administrator under the CAIR FIPs and CAIR that are appealable under 40 CFR §78.1(a)(1)). Because this is an appeal of a final applicability determination by the Administrator under the CAIR FIPs, the Board has jurisdiction to hear this appeal.

Under Part 78, while the Administrator has the burden of going forward to show the rational basis for the October 22, 2007 applicability determination because there was no opportunity for public comment before issuance of the decision, Petitioner bears the burden of convincing the Board that the determination should be reversed, modified, or remanded. 40 CFR §78.12(b). Under the Board’s procedural rules, the applicability determination may be reversed, modified, or remanded under only two circumstances. First, the Board may reverse, modify, or remand the determination to the extent the Board concludes that “a finding of fact or conclusion of law underlying the decision is clearly erroneous.” Id. Second, the Board may reverse, modify, or remand the determination to the extent the Board finds that “an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants” such action by the Board. Id.⁵

⁵ The standard of review under Part 78 governing appeals of CAIR FIP and CAIR SO₂ and NO_x trading program actions to the Board is similar to that governing other EPA actions under 40 CFR §124.19. The principles directing the Board to apply a deferential standard of review are the same. “As the preamble to the Part 124 regulations states: ‘[the] power of review should be only sparingly exercised’[.]” In Re SEI Birchwood, Inc., 5 E.A.D. 25, 27 (EAB 1994) (quoting 45 Fed. Reg. 33412 (May 19, 1980)).

As EPA stated in its proposed Acid Rain Program rules where the Part 78 appeal procedures were first proposed, “[t]hese standards are consistent with the traditional standards for reviewing actions of agencies under applicable provisions of the Administrative Procedure[] Act.” 56 Fed. Reg. 63002, 63033 (Dec. 3, 1991); see also 5 U.S.C. 706(2). This narrow, deferential scope of review prohibits a court from “substitut[ing] its judgment for that of the agency.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Courts must consider whether an agency’s decision “was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974) (citation omitted). The agency’s determinations must be upheld if they “conform to ‘certain minimal standards of rationality.’” Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983) (citation omitted). In construing administrative regulations, courts give “controlling weight” to the agency’s interpretation “unless it is plainly erroneous or inconsistent with the regulation.” United States v. Larionoff, 431 U.S. 864, 872 (1977) (citation omitted); see also Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

ARGUMENT

In its request for an applicability determination, Petitioner argued that the Administrator should have used one of three “mechanisms” to determine that the NISCO units are not subject to the EPA-administered trading programs under the CAIR FIPs and CAIR. Petitioner’s Exhibit 3 at 4; see also Petition at 4. Specifically, Petitioner argued that the Administrator should have: (i) interpreted the applicable regulations to exclude the units because their electricity sales were “incidental production” amounting to less

than 1% of their annual electric output and, for limited periods, small amounts “during or in response to natural disasters”; (ii) amended the CAIR FIPs to create exemptions for units with de minimis electricity sales; or (iii) allowed Louisiana to include such a de minimis exemption in its CAIR SIP. Petitioner’s Exhibit 3 at 4; see also Petition at 4. Before the Board, Petitioner focuses its attention on the Administrator’s alleged “inherent authority to make de minimis exceptions to its rules” (Petition at 4; see also id. at 5-8), but apparently continues to assert that the Administrator should have used one of the above-described “mechanisms” to provide an exemption for the NISCO units. As discussed below, the applicable regulations and the accompanying preambles and response to comments do not support the interpretation sought by Petitioner. Further, the Administrator cannot create a new de minimis exemption (whether a categorical or case-by-case exemption) covering the NISCO units without revising the CAIR FIPs and CAIR in a notice-and-comment rulemaking, consistent with statutory rulemaking requirements, and so must apply in the applicability determination the existing regulations, which plainly do not allow for such an exemption.

I. The Rules Governing the EPA-administered Trading Programs Under CAIR FIPs and CAIR Clearly Provide That the NISCO Units are Subject to These Programs, and Neither the Rule Text nor the Accompanying Preambles Support the Interpretation Sought by Petitioner.

The Administrator concluded, in the October 22, 2007 applicability determination that both of the NISCO units meet the general applicability criteria for units subject to the EPA-administered trading programs under the CAIR FIPs and CAIR, i.e., the criteria in 40 CFR §§97.104(a)(1), 97.204(a)(1), and 97.304(a)(1) and the identical provisions in 40 CFR Part 96, and are thus CAIR units. As explained above, NISCO originally contended

that its units qualified for the exemption from the general applicability criteria that is limited to certain cogeneration units, as set forth in 40 CFR §§97.104(b)(1)(i), 97.204(b)(1)(i), and 97.304(b)(1)(i), but in this action does not contest EPA's finding that the cogeneration unit exemption does not apply to the NISCO units. Therefore, the issue before the Board is whether EPA should have interpreted the general applicability criteria for the EPA-administered trading programs (and the identical language in the EGU definition) to exclude the NISCO units from the trading programs because of the relatively small amounts of electricity that the units sell. Petitioner's Petition at 3.

As explained in the applicability determination, the general applicability criteria in 40 CFR §§97.104(a)(1), 97.204(a)(1), and 97.304(a)(1) (and in 40 CFR §§96.104(a)(1), 96.204(a)(1), and 96.304(a)(1)) expressly cover each unit serving a generator of the requisite size producing any amount of electricity for sale, i.e., "any stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more the 25 MWe, producing electricity for sale." See also 40 CFR §§51.123(cc) and 51.124(q) ("EGU" definitions) (containing this same language). Nowhere in this rule text or the related preamble language is there any indication that units serving a generator producing a small amount of electricity for sale are to be treated any differently than any other units serving a generator producing electricity for sale. The rules on their face simply do not create an exemption for all units with "small amounts" of, or de minimis, electricity sales.

In contrast, the rules do explicitly create an exemption covering only units that both qualify as cogeneration units and sell only a limited amount of electricity. EPA

expressly limited this exemption based on the amount of electricity sold to cogeneration units with annual sales not exceeding the greater of one-third of potential electrical output capacity or 219,000 MWh. 40 CFR §§97.104(b)(1), 97.204(b)(1), 97.304(b)(1). See also 40 CFR §§96.104(b)(1), 96.204(b)(1), and 96.304(b)(1); and 40 CFR 51.123(cc) and 51.124(q) (“EGU” definitions). As exhibited by the manner in which this limited exemption is written, EPA clearly knew how to draw the distinction among varying amounts of sales of electricity and chose not to apply such a distinction in the general applicability criteria. Petitioner does not, and cannot, point to any rule text that would support an interpretation that the general applicability criteria -- which apply to both non-cogeneration units and cogeneration units -- exclude units with any (non-zero) amount of electricity sales, however small.

Moreover, EPA specifically rejected comments submitted in the CAIR rulemaking asking EPA to use a definition for EGUs covered by the EPA-administered CAIR trading programs that would have included an exemption for all units supplying less than one-third of their potential electrical output to the grid. The commenter had incorrectly implied that the Acid Rain Program contained such an exemption. In rejecting this request, EPA explained:

[T]he commenter misstated the Acid Rain definition and confused the Acid Rain applicability provisions concerning utility units in general with those provisions concerning cogeneration units in particular. The language referenced by the commenter concerning potential electrical output applies, in the Acid Rain Program, only to cogeneration units, not all fossil fuel-fired units. For non-cogeneration units,

there is no exemption from Acid Rain Program requirements based on the units selling a “small” amount of electricity for sale. 70 Fed. Reg. at 25276.

EPA decided to adopt in the CAIR model trading rules “different applicability provisions for non-cogeneration units and cogeneration units.” (*id.*) and subsequently adopted for the CAIR FIPs essentially the same trading program rules (including the applicability provisions that lack an exemption for non-cogeneration units based on the amount of electricity sales) as in the CAIR trading programs (71 FR at 25343). See also Corrected Response to Significant Public Comments on the Proposed Clean Air Interstate Rule at 876 (April, 2005) (stating that “[f]or non-cogeneration units, “producing electricity for sale” means any amount of electricity for sale.”) (Respondent’s Exhibit 1).

Because the rule text, on its face, does not create an exemption for non-cogeneration units based on the amount of electricity sales and neither the rule text nor the accompanying preambles and response to comments support Petitioner’s interpretation creating such an exemption, the Administrator reasonably rejected Petitioner’s claim that he should interpret (or allow Louisiana to interpret) the general applicability criteria to create that exemption. See Petitioner’s Exhibit 1 at 5 and 7.

II. The Administrator Cannot Create a new de Minimis Exemption Covering the NISCO Units Without Revising the CAIR FIPs and CAIR in a Notice-and-Comment Rulemaking.

Although Petitioner fails to show that the rule text and preambles for the CAIR FIPs and CAIR support its interpretation creating a “small sales” exemption for all units (including non-cogeneration units), Petitioner argues nevertheless that the Administrator’s failure to create a de minimis exemption (either a categorical exemption or a case-by-case exemption) covering the NISCO units is arbitrary and capricious and an

abuse of discretion. However, the Administrator reasonably declined to revise, in the applicability determination, the CAIR FIPs and CAIR to create such a new exemption and properly applied the existing rules, which do not allow for such an exemption.

a. The Administrator cannot create, in the applicability determination, a categorical de minimis exemption covering the NISCO units because the CAIR FIPs and CAIR do not include such an exemption.

Petitioner goes to great length in its brief to convince the Board that the Administrator has inherent authority to grant de minimis exemptions under Alabama Power v. Costle, 636 F. 2d 323 (D.C. Cir. 1979) and its progeny, which address agency authority to create categorical de minimis exemptions. However, because the rule text and preambles do not support the interpretation creating a “small sales” exemption for all units, Petitioner’s position amounts to a claim that the Administrator should revise the regulations to create a new exemption in an applicability determination, instead of in a notice-and-comment rulemaking consistent with statutory rulemaking requirements. In fact, two of the three “mechanisms” urged by Petitioner for determining that the NISCO units are not subject to the EPA-administered trading programs under the CAIR FIPs and CAIR are: “to amend the FIP to create such de minimis exemptions from the definition of EGU” (Petition at 4); and “to allow the State of Louisiana to include such a de minimis exemption in its SIP” (id.) for the EPA-administered trading program even though the creation of such an exemption by a State is barred under 40 CFR §§51.123(o)(2) and (aa)(2) and 51.124(o)(2) (see Petitioner’s Exhibit 1 at 7 and n.9).

Respondent does not dispute that, beginning on November 15, 1990 and thereafter, the NISCO units have produced only relatively small amounts of electricity for sale during certain years, sometimes in response to natural disasters. However, the CAIR

FIPs and CAIR were each promulgated after providing public notice, a public hearing, and the opportunity for the public to comment. As discussed above, EPA in fact received and rejected, in the CAIR rulemaking, a comment supporting an exemption for all units based on “small amounts” of electricity sales. The Administrator cannot now revise these existing rules to create this new, previously rejected exemption without meeting statutory notice-and-comment requirements for rulemaking simply because a source is dissatisfied with the application of the existing rules. Under CAA Section 307(d), which applies to both the CAIR FIPs and CAIR,⁶ the Administrator must, among other things, provide public notice of proposed rules, and opportunity for hearing and public comment on proposed rules, before issuing final rules. See 42 U.S.C. 7607(d)(3)-(5). See Appalachian Power Co. v. EPA, 208 F.2d 1015, 1024 (D.C.Cir. 2000) (stating that “[i]t is well established that an agency may not escape notice and comment requirements (here, of 42 U.S.C. §7607(d)) by labeling a major substantive legal addition to a rule a mere interpretation”). In short, the Administrator cannot -- in the applicability determination -- add to the CAIR FIPs and CAIR trading rules Petitioner’s new, “small sales” exemption for all units. As explained in the October 22, 2007 applicability determination, the Administrator, in the context of the applicability determination, must apply the existing rules, not amend the rules to “create new exemptions.” Petitioner’s Exhibit 1 at 6; see also id. at n.9.

Petitioner’s reliance on Alabama Power and subsequent authorities based thereon is unfounded because the courts in these cases were considering whether EPA can create -- through a rulemaking -- categorical de minimis exemptions to a statute, not whether

⁶ See 69 Fed. Reg. 32684, 32686 (Je. 10, 2004) (stating that CAIR is subject to CAA Section 307(d)) and 42 U.S.C. 7607 (d) (1)(B) (stating that the promulgation of a FIP is subject to CAA Section 307(d)).

EPA could create -- through a non-rulemaking proceeding -- categorical de minimis exemptions to an existing rule. Specifically, the court in Alabama Power examined whether EPA can grant, in a rulemaking, a categorical de minimis exemption -- that is, a blanket regulatory exemption for a category of entities -- where the statute, if literally applied, would result in "burdens of regulation [that] yield a gain of trivial or no value." Alabama Power, 636 F.2d at 360-61. Cases that follow Alabama Power and uphold EPA's power to create regulatory exemptions similarly deal with blanket de minimis exemptions of particular categories of entities that would otherwise be regulated under a statute. See, e.g., Environmental Defense Fund, Inc. v. EPA, 82 F.3d 451, 465-67 (D.C. Cir. 1996) (upholding a rule establishing a categorical de minimis exception for federal actions from conformity requirements); and Ober v. Whitman, 243 F.3d 1190, 1193-96 (9th Cir. 2001) (upholding a FIP rule establishing a categorical de minimis exception for emission sources). In fact, the Alabama Power court specifically stated that it is "not concerned here with the 'equitable' discretion of agencies to afford case-by-case treatment taking into account circumstances peculiar to individual parties in the application of a general rule to particular cases, or even in appropriate cases to grant dispensation from the rule's operation." Id. at 357.⁷ In contrast with the circumstances before the court in Alabama Power, Petitioner seeks a categorical de minimis exemption from EPA's CAIR FIP and CAIR regulations, not from a statute, and wants the

⁷ In referring to "appropriate cases to grant dispensation" from a rule, the Alabama Power court cited U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972), where the agency whose rules were addressed by the court had adopted both rules establishing general requirements and another rule allowing for case-by-case applications for exceptions to the general requirements in order to "allow for special circumstances." As discussed below, the Administrator's applicability determination on review by the Board cannot be an "appropriate case[] to grant dispensation" (Alabama Power, 636 F.3d at 357) because EPA has no rule that allows for case-by-case exceptions to the applicability provisions of the CAIR FIP and CAIR trading rules and, absent such a rule, case-by-case exceptions cannot be made without first adopting such a rule through notice-and-comment rulemaking.

Administrator to create the new exemption without meeting statutory rulemaking requirements for revising the regulations. Petitioner's reliance upon Alabama Power as authority to grant a categorical de minimis exemption from the general applicability criteria of the CAIR FIPs and CAIR is thus misplaced, and consequently this line of cases does not support Petitioner's position.

b. The Administrator cannot create, in the applicability determination, a case-by-case de minimis exemption covering the NISCO units because the CAIR FIPs and CAIR do not allow for case-by-case exemptions to the applicability criteria.

While Petitioner argued, in its request for an applicability determination, that the Administrator has the authority, under Alabama Power, to create a categorical de minimis exemption for all units from the general applicability criteria in the CAIR FIP and CAIR trading programs, Petitioner now presents -- for the first time before the Board -- a variation on that argument. Petitioner now claims that under several cases, some of which preceded Alabama Power, the Administrator has the authority to grant a de minimis exemption for the NISCO units on a case-by-case basis. However, just as the Administrator cannot create a categorical de minimis exemption for all units in the applicability determination, the Administrator similarly cannot grant the NISCO units a case-by-case de minimis exemption in that context.

Specifically, Petitioner cites several cases, claiming that the courts either held that EPA's rules establishing general requirements "must" include case-by-case variances (E.I. du Pont de Nemours v. Train, 430 U.S. 112, 128 (1977)) or upheld agency authority to adopt rules providing for case-by-case exemptions from general regulatory requirements (U.S. v. Storer Broadcasting Co., 351 U.S. 192 (1956); Portland Cement Ass's v.

Ruckleshaus, 486 F. 2d 375, 398-99 (D.C. Cir. 1973), cert. den., 417 U.S. 921 (1974); and Chemical Manufacturers Assn. v. Natural Resources Defense Council, 470 U.S. 116 (1985)). However, Petitioner does not, and could not, assert that the CAIR FIPs and CAIR include provisions allowing for case-by-case exemptions from the general applicability criteria. These regulations do not include such provisions concerning the applicability criteria,⁸ and none of these cases are on point as explained below..

In E.I. du Pont, the court's statement that EPA must provide, in its regulations, for variances from certain effluent limitations (i.e., limitations taking effect in 1977 for existing sources) was based on the particular statutory provisions before the court (which included an express requirement that variances be available for more stringent effluent limitations taking effect in 1983 for existing sources). E.I. du Pont, 430 U.S. at 121 and 127-28. Indeed, the court also held that different provisions of the same statute barred EPA from granting variances from effluent limitations for new sources. Id. at 138. In any event, the issue of whether EPA had to include, in the CAIR FIPs and CAIR, rules allowing for case-by-case exemptions from the general applicability criteria is not, and could not be, raised by Petitioner before the Board. Under CAA Section 307(b), such a

⁸ Where EPA wanted to allow case-by-case exemptions from requirements in the CAIR FIPs and CAIR, the regulations expressly provide for such exemptions. For example, the CAIR FIP and CAIR trading rules establish procedures for requesting an alternative to generally applicable monitoring, reporting, and recordkeeping requirements. See 40 CFR §§ 97.175, 97.275, and 97.375 and 40 CFR §§96.175, 96.275, and 96.375. Similarly, CAIR expressly allows a State to adopt, in its SIP, CAIR trading rules that differ, but in only very limited ways, from the CAIR model trading rules. See 40 CFR §§51.123(o)(2) and (aa)(2) and 40 CFR §51.124(o)(2). As explained by the Administrator (Petitioner's Exhibit 1 at 7), the creation of any new de minimis exemption (whether categorical or case-by-case) from the applicability provisions was not one of the allowed changes.

challenge of the CAIR FIPs and CAIR can only be raised before the U.S. Court of Appeals for the D.C. Circuit, not before the Board.⁹

In Storer Broadcasting, Chemical Manufacturers, and Portland Cement, the agency had either already adopted a rule allowing for case-by-case applications for waiver of, or exception to, general requirements in another rule (Storer Broadcasting, 351 U.S. at 201; and Chemical Manufacturers, 470 U.S. at 119-24 and n.8) or proposed a rule providing for requests for case-by-case flexibility in the application of general requirements (Portland Cement, 486 FR.2d at 398-99). As discussed above, EPA has not adopted any rule providing for case-by-case exemptions from the general applicability criteria of the CAIR FIP and CAIR trading programs. Consequently, the Administrator cannot grant a case-by-case exemption for the NISCO units without first revising, in a rulemaking, the CAIR FIPs and CAIR to adopt a new rule allowing for case-by-case exemptions, and, in the absence of such a new rule, the Administrator must apply in the applicability determination the existing regulations, which do not allow for such a case-by-case exemption.

c. The factual assertions and supporting information presented by Petitioner to justify a categorical or cases-by-case de minimis exemption covering the NISCO units are irrelevant to the issues properly before the Board.

Because, as discussed above, the Administrator cannot grant, in the applicability determination, either the categorical or case-by-case de minimis exemption requested by Petitioner, the factual assertions and supporting information presented in the Petition to justify such an exemption are irrelevant to the issues properly before the Board. For example, asserting that application of the CAIR FIP and CAIR trading programs to the

⁹ See 70 Fed. Reg. at 25317 and 71 Fed. Reg. at 25329 (explaining that any appeal of CAIR and the CAIR FIPs must be made before the U.S. Court of Appeals for the D.C. Circuit); see also 42 U.S.C. 7607(b).

NISCO units is “an absurd result” (Petition at 8), Petitioner presents information to support this assertion (*id.* at 2-4 and 8-9). Petitioner’s assertions and information to justify an exemption covering the NISCO units are not relevant to the issues properly before the Board in this proceeding because, even assuming, *arguendo*, that all the assertions and information were accurate and supported in the record¹⁰ and that they were sufficient to justify an exemption,¹¹ the Administrator must -- for the reasons discussed above -- apply the existing regulations, which do not allow for such an exemption. Moreover, in justifying the requested exemption, Petitioner makes certain assertions disputing the air quality modeling on which the CAIR FIPs and CAIR, and Louisiana’s inclusion in these rules, are based, and these assertions amount to a challenge on the merits of these rules.¹² As discussed above, under CAA Section 307(b), such a challenge can only be raised before the U.S. Court of Appeals for the D.C. Circuit, not before the Board.

¹⁰ While these assertions and information are not relevant here, the Administrator notes that many of the assertions and much of the information are not accurate or supported in the record. For example, contrary to NISCO’s claim that its circulating fluidized bed units cannot make cost-effective emissions reductions (*id.* at 2-3 and 8), EPA considered, and specifically rejected, in the response to comments in the CAIR rulemaking, comments that, because of relatively low emissions, circulating fluidized bed boilers should not be covered by the EPA-administered trading programs. See Corrected Response to Significant Public Comments on the Proposed Clean Air Interstate Rule at 274-75 and 878-90 (Respondent’s Exhibit 1). Further, contrary to Petitioner’s claim of having the only CAIR units not allocated SO₂ allowances (Petition at 3), other companies claim to have CAIR units lacking such allocations and are currently litigating this claim in *State of North Carolina v. U.S. EPA*, Docket Nos. 05-1244, et al. See Respondent’s Exhibit 2 (statements of issues concerning CAIR units lacking SO₂ allowance allocations).

¹¹ While, as discussed above, these assertions and information are not relevant here, the Administrator notes that they are not necessarily sufficient to justify the exemption sought by Petitioner. For example, Petitioner claims that its modeling shows that “modeled maximum SO₂ emissions were less than 15% of the short term and long term ambient standards” and so “the NISCO contributions of SO₂ were not likely to affect ambient air quality in Alabama.” Petition at n.3. However, as explained by the court in *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1049 (D.C. Cir. 2001), Congress’ approach in CAA Section 110(a)(2)(D)(i) “plainly reflected a decision to act against sources whose emissions, while harmless individually, could become harmful when combined with others.”

¹² See Petition at 8 and n.2.

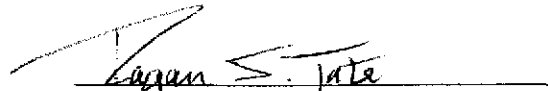
CONCLUSION

The only issues properly before the Board in this appeal are whether the Administrator's determinations that NISCO's units are not exempt from the general applicability criteria of the CAIR FIP and CAIR trading programs and that he cannot adopt, a new, de minimis exemption (whether categorical or case-by-case) to these criteria in an applicability determination are based on a clearly erroneous conclusion of law or comprise an exercise of discretion that is arbitrary and capricious and an abuse of discretion. However, the Administrator reasonably determined, consistent with the rule text and accompanying preambles and response to comments, that the CAIR FIPs and CAIR contain no exemption from the general applicability criteria for all units based on the amount of electricity sales. Further, the Administrator was well within the scope of his administrative discretion to decline creating, in the applicability determination and in the absence of a notice-and-comment rulemaking revising the CAIR FIPs and CAIR, , a new, categorical or case-by-case de minimis exemption covering the NISCO units and to apply the existing regulations, which do not allow for such an exemption. The Board should affirm the Administrator's October 22, 2007 applicability determination and deny

the Petition for Review.

Date: 2/18/08

Respectfully submitted,



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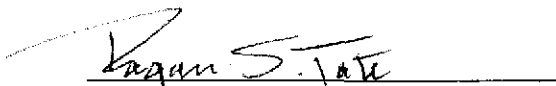
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CERTIFICATE OF SERVICE

I hereby certify that copies of this Administrator's Response to Petition for Review were served on the following persons by Facsimile and First Class U.S. Mail:

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Date: February 28, 2008


Ragan S. Tate

**RESPONDENT
EXHIBIT 1**

equipped with SCR shows the stack NOx rate varying from 0.03 to 0.26 lb/MMBtu.⁶⁸ In addition, EPA notes that not all affected coal-fired units will install SCR. Therefore, EPA has considered these differences between boilers and used an average NOx rate of 0.11 lb/MMBtu to establish the CAIR NOx caps.

Comment:

One commenter argues that the capital and operating costs associated with SCR controls would be prohibitively expensive for the municipal solid waste (MSW) facilities.

Response:

The EPA notes that CAIR does not require controls on MSW plants. In addition, EPA does not require states to include MSW plants for CAIR. However, if any state elects to include an MSW plant as part of its SIP, EPA notes that SCR has been applied to a large number of worldwide MSW facilities.⁶⁹ In addition, such facilities have an option to consider other technologies, such as SNCR and reburn, which are considered viable for such applications.

Comment:

One commenter has argued that the waste-coal circulating fluidized-bed (CFB) boilers should be required to comply with only the NOx control requirements under CAIR, exempting them from compliance with the NOx control requirements of this rule. This commenter points out that, since these two pollutants (NOx and SO2) are controlled through operational practices in CFB boilers, their emissions are interrelated to the extent that increased control of one may cause increased emissions of the other. Therefore, the commenter believes that compliance with the requirements for both pollutants would not be possible for the CFB boiler plants firing waste coal.

Response:

The Agency agrees with the commenter that there may be an interdependency between the control of NOx and SO2 in a CFB boiler, if only operational practices are considered for this purpose. However, the Agency does not agree that operational practices are the only methods available to CFB boilers firing waste coals for controlling emissions of NOx and SO2. A large number of CFB boilers are equipped with selective non-catalytic reduction (SNCR) systems to control NOx.⁷⁰ Use of a polishing spray dryer absorber (SDA) to provide control of SO2 emissions, in addition to limestone injection in the furnace, has also been amply demonstrated on a CFB boiler installation.⁷¹ Both of these technologies are used downstream of the boiler combustion zone and they operate independent of each other.

⁶⁸"EPA's Website - Acid Rain/OTC Programs Hourly Emissions Data,"
www.epa.gov/airmarkets/emissions/raw/index.html

⁶⁹Email from J. Staudt to S. Khan, Update to IAQR comments - MSW, August 26, 2004 (docket no. OAR-2003-0053-1948)

⁷⁰"Fuel Tech NOx Out Process Experience List," Comment Received on CAIR from ICAC, (VII.B-0772)

⁷¹W. Goodrich, et. al, "Summary of Air Emissions from the First Year Operation of JEA's Northside Generating Station," ICAC Forum '03, Nashville, Tennessee

As mentioned by the commenter, further control of SO_2 emissions in an existing CFB boiler can be provided by increasing the limestone injection rate. If this is used in conjunction with an SNCR system, further reductions in SO_2 emissions can also be provided. As an alternative, SNCR can be used along with a polishing SDA to reduce both NO_x and SO_2 emissions. Since the CFB boilers mentioned in the comment have these options available to them for reducing NO_x and SO_2 emissions over and above the levels that can be achieved with operational practices, the Agency cannot agree with the commenter that simultaneous control of these two pollutants is not possible for these boilers.

Comment:

EPA has not done an economic analysis to demonstrate that additional NO_x reductions are cost-effective in reducing $\text{PM}_{2.5}$ and ozone exceedances:

EPA should separately model the $\text{PM}_{2.5}$ and ozone benefits derived solely from the proposed reduction in year-round NO_x emissions. Reducing NO_x emissions in the winter provides no benefits in reducing warm season $\text{PM}_{2.5}$ exceedances. It is not a cost-effective approach. EPA should either provide a straightforward cost-effective justification of year-round NO_x controls, or drop this requirement from the IAQR. [[p. 4]]

Response:

See III in the CAIR NFR preamble.

Comment:

Duke Energy has serious concerns about the technical and legal basis for the additional electric generating unit (EGU) NO_x reductions that EPA has proposed, especially in those states already affected by the NO_x SIP Call rule. The minimal downwind air quality impacts to both 8-hour ozone and fine particles that EPA's modeling indicates might result from the additional reductions are not compelling and do not support EPA's proposal for additional NO_x reductions from EGUs to address transport. In fact, EPA's modeling indicates that 8-hour ozone levels may actually increase in Mecklenburg County, N.C. if the proposed NO_x reductions are implemented (EPA modeling indicates that the 2010 8-hour ozone design value increases for Mecklenburg County). See OAR-2003-0053-0162, Tables X-7 and X-9. At the most, rather than require installation of further NO_x controls on EGUs, Duke recommends that EPA simply adjust the NO_x SIP Call to an annual program requiring year-round operation of the controls that are already being installed to meet the SIP call. [[(0965, pp.3-4)]] [[(See Section IV, pp.3-5, of Docket Number 0966 for detailed discussion of this issue)]]

Response:

The emission reductions required by CAIR are intended to reduce significant contribution from upwind States, which will help downwind States to achieve attainment of the $\text{PM}_{2.5}$ and 8-hour ozone standards. However, CAIR is not intended to bring every nonattainment county into attainment.

As described in the CAIR NFR preamble, CAIR is an early step in the process of addressing $\text{PM}_{2.5}$ nonattainment and maintenance requirements. The Clean Air Act requires states to submit 110(a)(2)(D) plans to address interstate transport, and overall attainment plans to ensure the NAAQS are met in local areas. By taking the early step of finalizing CAIR, we are requiring

Although commenter does not support regulating cogeneration units under the IAQR, if EPA proceeds this way, it must define 'cogeneration units' consistent with policies and regulations in the Acid Rain program.

If cogeneration units are regulated under the IAQR, then EPA must adopt a definition of 'cogeneration unit' that is consistent with existing CAA regulations and policy. *Id.* At 4610. Under the acid rain program, the calculation of whether more than 'one-third' of the unit's energy is supplied to the transmission grid is determined by subtracting the power the 'host' company buys back for process steam and other industrial uses from the gross MW generated by the unit and sold to the transmission grid. (Generally such arrangements contemplate lower costs for the host, further incentivizing investment in more energy-efficient independent power production, consistent with national energy policies.) Thus, commenter recommends that EPA's definition of 'cogeneration unit' should specifically spell out this determination of 'net' output in determining whether 1/3 of the unit's power is being sold to the electricity transmission grid.

Response:

Contrary to the commenter's statement, the notice of proposed rulemaking does not treat "cogeneration units" the same as other "electric generating units." EPA proposed and is finalizing an exemption for cogeneration units. See preamble section VIII for further discussion and for a response to the remainder of this comment.

Comment:

The phrase, 'producing electricity for sale' could be interpreted to mean any amount of electricity for sale. EPA's proposed definition of cogeneration applies some additional threshold criteria. But those thresholds are not apparent for non-cogeneration units that might solely be producing electrical power with some small amount sold to a utility grid.

Response:

For non-cogeneration units, "producing electricity for sale" means any amount of electricity for sale. See preamble for further discussion.

Comment:

In the proposal, the CAIR would apply to units that burn any amount of fossil fuel, consistent with the applicability of the Acid Rain Program. Though this is a departure from the definition of 'fossil fuel-fired' for EGUs under the NOx SIP Call (i.e., >50 percent heat input from fossil fuels), we nevertheless understand EPA's intent to tie the CAIR program as closely as possible to the Acid Rain Program. That is why we so strongly believe that it would be a mistake to fail to include the exemptions from the Acid Rain Program that were mandated by Congress. However, if EPA chooses to depart from Congressional intent for that program in the development of the CAIR, then we believe that EPA should also reconsider the overly broad definition of 'fossil-fuel-fired,' in light of the fact that a number of EGUs burn only minor amounts of fossil fuel.

States. EPA should delete CHP units from the definition of EGU and from the scope of the CAIR program.

Response:

See preamble. See also responses to previous comments in this section and the response to commenters arguing for a general exemption for all CHP units given earlier in this section.

Comment:

West Virginia is a small State with only a small group of non-EGUs with a modest amount of emissions, but with several large EGUs affected by the current NOx SIP Call rules. If the non-EGU trading program is isolated and stranded by disallowing access to emission allowances under a substituted plan for large EGUs under the IAQR, then the pool of options to achieve 'cost-effective' reductions would be seriously diminished, and it would especially unfairly impact opt-in units under the NOx SIP Call, such as one of our members who chose to opt-in due to such market opportunities. Options for meeting NOx allowances would also essentially be reduced for non-EGUs to just one: unit-specific controls. Accordingly, we strongly urge EPA to fashion an allocation and trading program that will fully preserve non-EGU access to the full emissions markets.

Response:

EPA has modified its proposal to allow non-EGUs under the NOx SIP Call to participate in the CAIR ozone season trading program. See preamble.

Comment:

Commenter's facilities emit SO₂ at rates substantially lower than most conventional coal-fired utility units, and therefore should not be required to further reduce SO₂ emissions under the CAIR. Virtually all of the commenter's facilities have been constructed under permits imposing stringent SO₂ emission limitations, consistent with current Best Available Control Technology ('BACT') standards. Commenter's facilities have achieved low SO₂ emissions by utilizing limestone injection within the fluidized bed combustion zone. The limestone injection technology typically achieves greater than a 90 percent reduction in SO₂ emissions from these sources. As a result, SO₂ emissions from commenter's plants are significantly lower than the emissions from conventional coal-fired units. Based upon a recent analysis conducted in support of its proposed renewable portfolio standard, the Pennsylvania Department of Environmental Protection has concluded that pulverized coal boilers (without scrubbers) typically emit SO₂ in the range of 2-3 lbs/MMBtu, while anthracite waste coal facilities have achieved SO₂ emission rates of 0.20-0.25 lbs/MMBtu.

The Agency's analysis of SO₂ control technology in developing the CAIR related solely to large, conventional coal-fired utility units, many of which have not been subjected to BACT determinations. Specifically, the Agency based its SO₂ control analysis solely on the application to large EGUs of Flue Gas Desulfurization ('FGD') systems. The Agency apparently did not consider the appropriateness or feasibility of such technology for facilities firing waste coal or

those utilizing CFB technology. CFB technology generally is incompatible with the use of back-end controls, for reasons of technical and/or economic feasibility. Both NO_x and SO₂ emission controls are effectively accomplished for CFB boilers in the combustion zone, through operational controls, rather than through 'back-end' control equipment. The commenter's facilities have optimized these operational controls to satisfy the stringent NO_x and SO₂ standards currently applicable to these sources.

Further, given the relatively small size of the individual commenter's facilities and their low baseline SO₂ emissions, application of add-on control technologies would be cost prohibitive. The use of limestone injection within the fluidized combustion zone has reduced SO₂ emissions from ARIPPA facilities to such an extent that there is limited practical potential for further significant SO₂ reductions. Therefore, on a cost per ton basis, the (theoretical) application of FGD to a CFB unit would exceed -- by orders of magnitude the marginal cost per ton estimates assumed by the Agency in developing the CAIR.

In light of the commenter's facilities' success in maximizing control of SO₂ emissions from CFB units, and the infeasibility of further control, these facilities should not be subjected to the CAIR SO₂ control requirements. Commenter's facilities would be economically disadvantaged by being required to reduce SO₂ emissions to the same extent as conventional units. Such requirements essentially would penalize commenter's facilities for maximizing SO₂ control efforts earlier than their utility counterparts.

Response:

EPA applauds the owners of CFB units that have achieved reductions as described in this comment. Despite the fact that these units may emit very low amounts of SO₂, such units still have the potential to emit SO₂ which this rule is designed to reduce, particularly if SO₂ controls are not in operation. Such units are also a source of SO₂, which this rule is designed to reduce. EPA realizes that some of commenter's facilities may be Independent Power Producers. For a discussion of why the exemption for Independent Power Producers under the Acid Rain Program is not continued under the CAIR, see preamble. Finally, EPA notes that units emitting at low levels will not necessarily have to reduce emissions. Units have the option of reducing emissions or purchasing allowances. Low-emitting units should not have to purchase large amounts of allowances and thus the negative impact of being affected by the CAIR is somewhat mitigated. The EPA does not agree with the commenter that the SO₂ reduction capability of a CFB boiler already equipped with limestone injection cannot be improved further. The CFB boilers mentioned in the comment are designed for 90 percent SO₂ removal. The EPA notes that SO₂ removal rates greater than 90 percent have been achieved at certain CFB installations.^{113,114} Therefore, the Agency believes that it is possible to use techniques, such as increased limestone

¹¹³A. Basak, et. al., "Emission Performance Summary from Nucla Circulating Fluidized Bed Boiler Demonstration Project," 1991 International Conference on Fluidized Bed Combustion, Montreal, Canada, April 21-24, 1991

¹¹⁴D. Beacon, et. al., "Advanced Emission Controls at Mt. Poso Pyroflow Circulating Fluidized Bed Boiler," 1991 International Conference on Fluidized Bed Combustion, Montreal, Canada, April 21-24, 1991

injection rate, to enhance the SO₂ control performance of an existing CFB boiler. Additionally, a CFB plant can also be retrofitted with a backend polishing spray dryer absorber (SDA) to reduce SO₂ emissions. A CFB installation equipped with a polishing SDA has been operating for several years.¹¹⁵

Comment:

Unit size and emissions are the most important factors to consider in defining applicability - more important than whether a unit is primarily used to generate electricity (FR Vol. 69 No. 20 pg. 4610). EPA considers emissions from the electric power industry to be 'a relatively large amount,' and requests comment on how to determine what constitutes 'a relatively large amount' of the relevant emissions from other sectors. Clearly, EGU units are a significant source of these pollutants, and most significantly responsible for the transport of pollutants into the OTR. However, beyond that, EPA should not try to redefine applicability or whether a source constitutes a 'relatively large amount' of emissions. There is no need to do so, and it is a term with no legal basis or precedent of use. As a qualitative description, it's fine; as a regulatory threshold or applicability standard, it is not.

Response:

The comment is unclear. See preamble section VIII for a discussion of applicability criteria.

Comment:

Commenter supports the de minimis treatment for utility units of < 25 MW nameplate capacity. Commenter is very concerned about the timing implementation for the two phases in this rulemaking. The public power community's smaller generating stations (<250 MW potential facility-wide name plate capacity) will face pressure to shutdown if the IAQR is implemented as EPA proposes in this rule because of anticipated operating expenses associated with new compliance assurance method or CEMs. Losing these small generators will disrupt the national distribution of electricity and reduce the security and reliability of our nation's electricity supply. Commenter also supports the EPA's commitment to a cap and trade system to achieve NOx and SO₂ reductions and we offer a number of suggestions to maximize flexibility within that system. One suggestion is to implement this rule in phases starting with the largest generating stations where emission controls are most cost effective and return the largest reductions in emissions with downwind impacts. Using this approach, the utilities least likely to shutdown due to the costs of control would bear the burden during the initial phases. Small generating stations for which these control costs seriously threaten viability would be regulated in later phases if the downwind impact on nonattainment remains a concern. Commenter offers this approach to minimize the number of smaller generators that might be forced to shutdown and to reduce the negative effects of large scale consolidation in the utility sector. While trading may increase the opportunity for marginal units to purchase allowances rather than retrofit, there are significant lower case cost associated with installation of monitoring, etc. Commenter believes the final rule should allow States to make these determinations where the viability of a smaller utility is threatened.

¹¹⁵W. Goodrich, et. al, "Summary of Air Emissions from the First Year Operation of JEA's Northside Generating Station," ICAC Forum '03, Nashville, Tennessee

**RESPONDENT
EXHIBIT 2**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH CAROLINA,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Case No. 05-1244

and Consolidated Cases
05-1246, 05-1249, 05-1250,
05-1251, 05-1252, 05-1253,
05-1254, 05-1256, 05-1257,
05-1259, 05-1260, 05-1261
and 05-1262

PRELIMINARY AND NON-BINDING
STATEMENT OF ISSUES

Pursuant to an order from this Court dated July 19, 2005, The AES Corporation and its United States Subsidiaries, and AES Beaver Valley, LLC, and AES Warrior Run, LLC, and Constellation Energy Group, Inc., petitioners in No. 05-1259, which has been consolidated with No. 05-1244, by and through their counsel, file the accompanying Docketing Statement and this preliminary and non-binding statement of issues to be raised on review:

1. Whether the U.S. Environmental Protection Agency in issuing the final action entitled "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," at 70 Fed. Reg. 25,162, *et seq.* (May 12, 2005) (hereinafter the "CAIR Rulemaking") exceeded its statutory authority under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

2. Whether the U.S. Environmental Protection Agency exceeded its statutory authority under the Clean Air Act by creating a sulfur dioxide cap and trade emissions program under the CAIR Rulemaking that applies to sources of sulfur dioxide that are statutorily exempt

at 42 U.S.C. §7651d(g)(6) from a sulfur dioxide cap and trade emissions program created by Congress in the Clean Air Act.

3. Whether the U.S. Environmental Protection Agency acted arbitrary or capriciously or otherwise violated the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, and Clean Air Act in failing to abide by the Congressionally mandated exemptions for air pollutant sources from the Clean Air Act's sulfur dioxide cap and trade program, 42 U.S.C. Subchapter IV, by subjecting those sources to a sulfur dioxide cap and trade program under the CAIR Rulemaking.

4. Whether the U.S. Environmental Protection Agency acted arbitrary or capriciously or otherwise violated the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, and the Clean Air Act by failing to consider the disparate economic impacts that would be imposed on Petitioners and similarly situated cogenerators and independent power producers by subjecting them to a sulfur dioxide cap and trade program or, in the alternative, by not providing them with any sulfur dioxide allowances.



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Dated: August 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARIPPA,

Petitioner,

v.

ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

DOCKET NO. 05-1249,
Consolidated with 05-1244
and other cases

ARIPPA'S NON-BINDING STATEMENT OF ISSUES

Petitioner ARIPPA, by and through its counsel, hereby submits the following non-binding statement of issues in support of its petition for review of the final rule promulgated by the Environmental Protection Agency ("EPA"), entitled "Rule to Reduce Interstate Transport of Ozone (Clean Air Interstate Rule); Revisions to the Acid Rain Program; Revisions to the NOx SIP Call" (commonly known as the "Clean Air Interstate Rule" or "CAIR") published at 70 Fed.Reg. 25,162 (May 12, 2005).

1. Whether EPA's failure under CAIR to provide for an allocation of sulfur dioxide ("SO₂") allowances to electric generating units not subject to and/or not receiving an SO₂ allocation under the Acid Rain Program ("non-Acid Rain sources") was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

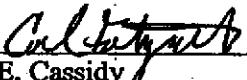
2. Whether EPA's failure to account for emissions from non-Acid Rain sources in establishing CAIR SO₂ budgets was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

3. Whether EPA's determination that Independent Power Producers should be included within the category of electric generating units subject to CAIR, notwithstanding their exemption from the Acid Rain Program, was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

4. Whether EPA's determination that all electric generating units subject to CAIR, including Independent Power Producers who already conduct continuous monitoring of SO₂ pursuant to separate regulatory requirements, must comply with the SO₂ continuous monitoring requirements established under 40 CFR Part 75, was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Respectfully submitted,

Dated: August 17, 2005


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