IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| STATE OF NORTH CAROLINA, *et. al.*,<br><br>*Petitioner*,<br><br>v.<br><br>ENVIRONMENTAL PROTECTION AGENCY,<br><br>*Respondent.* | No. 05-1244<br>(and consolidated cases) |

**FLORIDA ASSOCIATION OF ELECTRIC UTILITIES' RESPONSE IN OPPOSITION TO RESPONDENT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC**

As ordered by the court on October 21, 2008, the Florida Association of Electric Utilities[1] (FAEU) files this response to the Respondent, U.S. Environmental Protection Agency's Petition for Rehearing or Rehearing En Banc of the court's decision in North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008). In sum, FAEU opposes rehearing, strongly supports the immediate vacatur of the

[1] FAEU's updated list of members include the City of Lake Worth, the City of Vero Beach, Florida Municipal Power Agency, Florida Power & Light Co., Gulf Power Company, Lakeland Electric, Orlando Utilities Commission, and Seminole Electric.

Clean Air Interstate Rule (CAIR), and adamantly opposes a stay of the mandate. Regulatory certainty is critically important, and granting rehearing or staying the mandate would require CAIR States to immediately implement, and affected sources to immediately comply with, a rule that the court has declared contains "more than several fatal flaws." North Carolina, 531 F.3d at 901.

**The Criteria for a Stay Has Not Been Met**

As this court has noted, there are "stringent standards" for granting the extraordinary remedy of a stay. Court Order Denying FAEU's Motion for Stay Pending Review, dated Jan. 20, 2006 (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958)). Staying the issuance of the mandate is subject to the same criteria. Natural Res. Def. Council v. EPA, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph J., concurring). Specifically, regarding staying the mandate to vacate CAIR, the court should consider (1) the likelihood that the court will reverse its decision on every fundamental component of CAIR, (2) whether the environmental benefits claimed by EPA, to the extent they may occur, can still be achieved by other existing and future federal and state regulatory programs, including EPA's re-promulgation of a new, valid CAIR, (3) the chaos and confusion created by states attempting to implement, and sources being forced to comply with, a fatally-flawed rule, while its replacement is being formulated, and (4) the value to the public and the regulatory inefficiency of temporarily

implementing a costly and fundamentally-flawed regulatory program.

Further, Rule 41 of the Circuit Rules of Appellate Procedure indicates that a stay of the mandate "ordinarily will not extend beyond 90 days from the date the mandate otherwise would have issued." A stay of the mandate to vacate CAIR, if granted, would need to extend until EPA finalized revisions to CAIR to correct all of the fatal (and other) flaws. Such re-promulgation could easily take several years – CAIR took 16 months from the proposed rule to the final rule, with untold months of effort prior to the proposal. Such extraordinary relief, for such an extraordinary amount of time, is simply not warranted. Further, staying the mandate would provide EPA no incentive to expeditiously promulgate a valid rule.

No party has moved for a stay of the mandate to vacate CAIR, and thus FAEU is unable at this time to further respond to specific arguments in support of such a stay.

**Vacatur is the Only Legal or Reasonable Remedy**

This court has already thoroughly considered whether remand or vacatur was the appropriate remedy in this circumstance, and properly concluded that CAIR is "one, integral action" that "must stand or fall together," and that "the threat of disruptive consequences cannot save a rule when its fundamental flaws 'foreclose EPA from promulgating the same standards on remand.'" North Carolina, 531 F.3d at 929 (quoting Natural Res. Def. Council, 489 F.3d at 1261-62.

Significantly, EPA does not address the court's conclusion that "CAIR is a single, regional program, as EPA has always maintained, and all its components must stand or fall together." North Carolina, 531 F.3d at 929. As the court recognizes, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." Id. (quoting Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997)). Wisely, EPA does not claim that the few upheld portions of the rule can be implemented independently – the court was clear that "very little" of CAIR survived. 531 F.3d at 929. Nor does EPA claim that the entire CAIR, in its present, fatally-flawed form, can be implemented. And, yet, that is exactly what would have to happen if the mandate is stayed – states would have to immediately implement, and sources would have to comply with, a rule that the court has held is "fundamentally flawed." Id. Rather, EPA boldly argues that CAIR must be implemented now because the court's holdings regarding the several fundamentals of CAIR are wrong, and once reversed, the program can continue to be implemented while remaining, minor errors in CAIR are revised. Staying the mandate, however, only makes sense if there are valid portions of the rule that can be severed and implemented, while EPA re-promulgates a new, substantially-revised CAIR. Since "EPA has been quite consistent that CAIR was one, integral

action," there are no appropriately severable portions. Id.

EPA did acknowledge the court's application of the two-part test in Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146 (D.C. Cir. 1993), regarding the appropriateness of remand or vacatur. Specifically, the court stated that "this answer depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change.'" North Carolina, 531 F.3d at 929 (quoting Davis County Solid Waste Mgmt., 108 F.3d at 1459 (applying Allied Signal)). In the first step, EPA's argument (as described above) is that the court's decision is wrong regarding the fundamental components of CAIR (i.e., revision of the Acid Rain program allowance system; establishing SO2 allowance budgets; establishing NOx allowance budgets, including the use of fuel factors; and creation of a regional SO2 and NOx trading program). Accordingly, under EPA's argument, when the court grants rehearing and reverses its decision on every one of these issues, the remaining errors in the rule (i.e., failure to address "interfere with maintenance"; the 2015 implementation date; and the inclusion of Minnesota) are not sufficiently serious to warrant vacatur.

EPA's argument fails on both fronts. First, EPA has not shown that the court's holdings on each of the issues listed above are in error. And, even assuming there is "doubt whether the agency chose correctly" on one or more of

these issues, the fundamental nature of every one of these issues means that they all must be reversed for the "seriousness of the deficiencies" to be even arguably rectified; all of CAIR's "components must stand or fall together." 531 F.3d at 929. Second, the remaining errors are also "serious," and implementation of CAIR with such flaws would create unacceptable results: shifting the number of states and sources in the program, shifting the targeted level of emission reductions needed and allowances allocated to each unit, as well as the timing of such reductions. Not knowing the level of reductions ultimately needed from each unit, affected sources could not effectively and prudently plan for the necessary emission controls, or therefore, the budget needed to install and operate such controls or purchase allowances; regulatory certainty would not exist, and yet is critical to providing electricity in a reliable and cost-effective manner.

Regarding the second step of the Allied Signal test, EPA argues that the court failed to consider the disruptive consequences of vacatur: the "environmental benefits of CAIR." EPA Brief, at p.10. But the court expressly stated that it was "sensitive to the risk of interfering with environmental protection," and concluded that "the threat of disruptive consequences cannot save a rule when its fundamental flaws 'foreclose EPA from promulgating the same standards on remand.'" North Carolina, 531 F.3d at 929. FAEU supports the general policy objective underlying CAIR: to reduce one state's impacts on another state's nonattainment areas via a

cost-effective trading program. Yet CAIR's "more than several fatal flaws" make its implementation in its present form impractical, confusing, specious, and contrary to law.

EPA's primary argument regarding "disruptive consequences" is a reduction in premature fatalities if the mandate is stayed. But EPA's basis for these claims relies on assumptions that EPA supports with little more than speculation. EPA's primary speculative assumption is that no emission reductions will occur if CAIR is vacated.[2] After recognizing that "[b]illions of dollars were spent by utilities

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[2] EPA's assumptions regarding the effects on public health have also been questioned. See Comments of the Utility Air Regulatory Group, 45-49 [OAR-2002-0056-2939] (March 30, 2004). EPA's Petition admits that the presumptive benefits are based on reduced PM emissions, but EPA does not mention that the chemical composition of the PM is an important factor regarding the toxicity of the particles. In its initial assessments of the potential benefits of an interstate air quality rule, EPA identified as "key" its assumption that "[a]ll fine particles, regardless of their chemical composition, are equally potent in causing premature mortality." EPA goes on to explain that "[t]his is an important assumption, because PM produced via transported precursors emitted from EGUs may differ significantly from direct PM released from automotive engines and other industrial sources." EPA, Benefits of Proposed Inter-State Air Quality Rule, 1-8 (Jan. 2004); 70 Fed. Reg. 25310 (May 12, 2005). And EPA recognized in developing the ambient PM standards, "[b]ecause PM from ambient air and other microenvironments may have different physical and chemical characteristics, PM from such different sources may also have different health effects." EPA, Air Quality Criteria for Particulate Matter, 5-2; 69 Fed. Reg. 63111 (Oct. 29, 2004). EPA also fails to acknowledge another of its "key" assumptions, that the uncertainty of its estimates "does not capture other sources of uncertainty regarding the model specification and other inputs to the model, including emissions, air quality, and aspects of the health science not captured in the studies, such as the likelihood that PM is causally related to premature mortality and other

installing controls in anticipation of the effective date of CAIR," EPA speculates that "it is unclear if those controls will be operated and whether utilities will be authorized, or able, to recover the capital and operating costs of those controls." EPA Petition, at 11. EPA's speculation is unfounded on both claims: cost recovery for these controls is sound because they were deemed prudent and necessary to comply with, and incurred in anticipation of, the flawed CAIR; and even absent the flawed CAIR, these controls will be operated, in many cases, to assist in complying with other federal and state regulatory obligations which EPA ignores, including requirements related to visibility and ambient ozone and PM2.5 levels, as well as a new CAIR. EPA's assumptions that costs will be stranded and that no emission reduction will occur if CAIR is vacated are erroneous.

As described above, staying the mandate will have the absurd result of requiring states to immediately implement, and companies to comply with, a rule that is fatally flawed. Not only is this unnecessarily costly and administratively wasteful, it defies logic. What valid portion of CAIR remains to be implemented? Would compliance with invalid portions be required? When and on what basis would EPA allocate allowances? Would allowances allocated based on a flawed allocation formula be tradeable? What is the status of CAIR allowances (or

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serious health effects." EPA, Regulatory Impact Analysis for the Final Clean Air Interstate Rule, 1-6 (March 2005) [OAR-2003-0079-1075].

allowance futures) that have already been traded? Would their value be preserved in any new program? How could an affected source or the agency or the public determine whether a source was in compliance, when the underlying requirement is invalid? Can an affected source be in violation of an invalid rule? Would enforcement be anticipated for such "noncompliance"? How long would it take EPA to finalize revisions that would "fix" the many fatal flaws?

For these reasons, the court really has only two choices: grant rehearing or issue the mandate to vacate CAIR. As explained above, the standards for staying the mandate, much less a protracted stay for the duration of a remand rulemaking, have not been met. EPA has petitioned for rehearing, and has not presented a case regarding a stay of the mandate. Rehearing is likewise not appropriate. As the court notes, "very few petitions for rehearing are granted," and "[p]etitions for rehearing en banc are rarely granted." D.C. Circuit Frequently Asked Questions 53-54 (2006). If rehearing is denied, the court has already identified the "more than several fatal flaws" in CAIR, any one of which is arguably sufficient to require vacatur, especially since CAIR is a single, integrated program. If the court should grant rehearing and reverse its decision such that the fatal flaws no longer exist, then the court's remedy may be appropriately revisited in accordance with the new decision. Accordingly, absent rehearing, further stay of the mandate should not occur.

Wherefore, FAEU respectfully requests that the court expeditiously deny rehearing and issue the mandate.

Respectfully submitted,

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Dated: November 5, 2008

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2008, I caused nineteen (19) copies of the foregoing response to be sent to the Clerk's Office of the Court of Appeals for the District of Columbia Circuit via Hand Delivery; transmitted copies by U.S. Mail to counsel of record; mailed a copy today by certified mail, return receipt requested, to:

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