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July 11, 2005

- VIA HAND DELIVERY -

Stephen Johnson, Administrator
United States Environmental Protection Agency
Ariel Rios Building, Mail Code 1101A
1200 Pennsylvania Avenue, , N.W.
Washington, D.C. 20460

Re: Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule), 70 *Fed. Reg.* 25162 (May 12, 2005)("CAIR")

Dear Mr. Johnson:

I am enclosing FPL Group, Inc.'s Petition for Reconsideration of the above rule.

If there are any questions regarding this transmittal, please feel free to contact me at 305-577-2939.

Sincerely,

John T. Butler

Enclosure
cc: Jeffrey Holmstead, EPA (w/encl.)
Steve Page, EPA (w/encl.)
Brian McLean, EPA (w/encl.)
Kevin McLean, EPA (w/encl.)

MIA2001 407294v1

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Rule to Reduce Interstate Transport	)	**OAR-2003-0053**
of Fine Particulate Matter and Ozone	)	
(Clean Air Interstate Rule); Revisions	)	**FRL-7885-9**
to Acid Rain Program; Revisions to	)	
the NOx SIP Call	)	**RIN 2060-AL76**

FPL Group, Inc.'s Request For Reconsideration
Of EPA's Final Clean Air Interstate Rule (CAIR)

FPL Group, Inc. ("FPL Group") respectfully submits this Petition for Reconsideration of the Final Clean Air Interstate Rule ("CAIR" or the "Final Rule"). 70 *Fed. Reg.* 25162. FPL Group's principal subsidiary, Florida Power & Light Company ("FPL"), serves more than 4 million customers and owns or operates twelve fossil-fuel plants and two nuclear plants in Florida. In promulgating the CAIR, the United States Environmental Protection Agency ("EPA") has evaluated the State of Florida as a whole (without taking into account differences between the northern and southern portions) and made findings that Florida significantly contributes to ozone and PM2.5 non-attainment in downwind states. These findings make Florida subject to reduced emission levels for SO2 and NOx and require Florida to file revised State Implementation Plans ("SIPs") to meet these reduced emission levels. Under either the trading program or other electric generating unit ("EGU") emission control programs contemplated in CAIR, FPL Group (whose EGUs are predominantly in southern Florida) will be required to undertake EGU emission reductions that will prove costly to its customers even though most, if not all, of its EGUs in Florida do not contribute to downwind non-attainment.

FPL Group objects to and requests reconsideration of the following aspects of CAIR: (a) EPA's failure to recognize that emission sources in southern Florida do not significantly contribute to downwind ozone or PM2.5 non-attainment, and (b) EPA's determination that fuel

adjustment factors should be used to adjust the heat input data from which the state NOx budgets are derived. FPL Group's objections are of central relevance to the outcome of the CAIR rulemaking and either could not have been raised during the comment period or were impracticable to raise. Therefore, the Administrator should convene a proceeding for reconsideration of CAIR.

FPL Group is presently involved in modeling that will distinguish between the contributions to downwind ozone and PM2.5 non-attainment from sources in northern and southern Florida. That modeling is already well on its way to completion. The preliminary results of the modeling show clearly that southern Florida sources do not significantly contribute to downwind ozone and PM2.5 non-attainment and should not be subject to the CAIR. In fact, the preliminary results raise a serious question as to whether EPA can validly conclude that *any* parts of Florida are significant contributors to downwind ozone non-attainment. FPL Group has diligently pursued this modeling but has been unable to complete it within sixty days after the Final Rule was published. Therefore, EPA should also permit FPL Group to complete its air modeling and submit the results of that modeling and related comments within sixty days of this petition (*i.e.*, by no later than September 12, 2005).[1]

STANDARD FOR RECONSIDERATION

EPA "shall" convene a proceeding for reconsideration if an objection is of central relevance to the outcome of the rule and the grounds for the objection either arose after the

[1] FPL Group fully expects that it will be able to complete its modeling and provide comments within sixty days. As discussed below, however, one of the important steps in modeling the distinctions between northern and southern Florida is first to replicate EPA's own modeling outcomes. This has proven difficult. FPL Group intends to meet with EPA to address the discrepancies in the modeling results and is hopeful that they can be resolved quickly. In the event that resolution of the modeling discrepancies takes longer than anticipated, FPL Group might require more than sixty days to complete and submit its modeling results.

period for public comment (but within the time for judicial review) or the objection was impracticable to raise. Section 307(d)(7)(B) of the Clean Air Act (CAA), 42 U.S.C. § 7607(d)(7)(B). A petitioner cannot seek reconsideration until a final rule has been published. *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 418 (D.C. Cir. 1986). As the following discussion shows, FPL Group meets this standard for reconsideration.

EPA's determination that sources in southern Florida significantly contribute to ozone non-attainment arose after the comment period. In the Notice of Proposed Rulemaking ("NOPR"), the Supplemental Notice of Proposed Rulemaking ("SNPR") and the Notice of Data Availability ("NODA"), EPA concluded that the State of Florida did not significantly contribute to ozone non-attainment. It was only in the Final Rule that, for the first time, EPA concluded that the State of Florida significantly contributed to ozone non-attainment. During the comment period there were thus no EPA findings regarding sources in southern Florida or their contribution to ozone non-attainment. Therefore, there was no reason for FPL Group to take issue with this topic during the rulemaking.

As to EPA's implicit finding that southern Florida sources significantly contribute to PM2.5 non-attainment, it was impracticable for FPL Group to object to that finding and document its objection during the course of the rulemaking. FPL Group has acted as expeditiously as possible, but is just now securing -- after repeated attempts -- the data necessary to run detailed air modeling to determine source apportionment which will show that sources in southern Florida do not contribute to PM2.5 or ozone non-attainment. There was clearly insufficient time for FPL Group to secure such data, perform the necessary modeling, and submit

comments during any of the available comment periods.[2] FPL Group requested in its comments on the SNPR that EPA itself perform the fine grid modeling to determine source apportionment. Unfortunately this request was arbitrarily disregarded by EPA, even though EPA had reason to believe (from its SIP Call and the subsequent SIP Call judicial review) that such modeling would show that portions of states on the perimeter of an affected area do not contribute to downwind non-attainment -- and even though it would have been far easier for EPA simply to add more detailed source apportionment modeling runs to the existing EPA modeling effort than for FPL Group to reinvent the wheel as it has now had to do. *See Michigan v. EPA*, 213 F.3d 663, 684 (D.C. Cir. 2000).

As to fuel adjustment factors, FPL Group had no opportunity to comment upon their use by EPA in calculating state NOx budgets, because EPA did not employ fuel adjustment factors in calculating any of the state NOx emissions budgets prior to the Final Rule. The NOx emissions budget in the SNPR did not employ fuel adjustment factors, and EPA did not take comment on using fuel adjustment factors for calculating state emission budgets.

FPL Group is filing this Petition within the time for judicial review. The Final Rule was published in the Federal Register on May 12, 2005, at 70 Fed. Reg. 25,161-210. Pursuant to Section 307 of the Clean Air Act, 42 U.S.C. § 7607, and Rule 15 of the Federal Rules of

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[2] Currently FPL Group is participating in a modeling effort to evaluate appropriate boundaries for the significant contributions of PM2.5 and ozone. Initially, the intent was to complete this modeling effort during the sixty-day period between the publication of the final rule and the deadline for filing a rule-challenge petition. It has become apparent, however, that the modeling consultants could run only a few, preliminary sub-regional analyses to indicate that a north-south boundary line during this period, and that significant aspects of the modeling cannot be completed within that sixty-day time frame. Clearly it would have been impracticable to reproduce EPA's modeling effort in the short time frame allowed during a standard comment period.

Appellate Procedure, FPL Group may seek judicial review through July 11, 2005. This Petition is being filed within that time period.

ARGUMENT

I. The EPA Should Reconsider Its Decision To Include Sources In Southern Florida In CAIR.

a. FPL Group is Conducting Modeling That Will Demonstrate That Southern Florida Sources Have Been Improperly Included In The CAIR.

In *Michigan v. EPA*, the court suggested that EPA should be free "to select states as the unit of measurement," but, "[i]n turn, states (or the areas of states that believed themselves innocent of material contributions, or sources located therein), might respond by offering finer grained computations. Such a process seems more like a healthy search for the truth than the collapse into infinite regress that EPA claims to fear." 213 F.3d at 684. In apparently conscious disregard of this guidance, EPA has made only statewide determinations. These suffer from significant procedural flaws. More importantly, they are substantively arbitrary and capricious given EPA's consistent failure and refusal to consider whether southern Florida sources actually contribute to non-attainment.

FPL Group is actively engaged in modeling to determine whether all or a portion of Florida does not belong in CAIR for both ozone and PM2.5. FPL Group was not even aware that EPA had declined to conduct such modeling until the signed Final Rule was published in May 2005, and has been diligently conducting such modeling since that time. At the outset, this effort required EPA's assistance in providing the necessary (and voluminous) data files to run both the CMAQ model for PM2.5 and the CAMx model for ozone.

Regarding the CAMx modeling, FPL Group has obtained what EPA indicated were the precise data files used by EPA in its own modeling effort. To date, however, FPL Group has

been unable to replicate EPA's modeling results using this data. To the contrary, FPL Group's preliminary results suggest that Florida's impact on the one relevant downwind ozone non-attainment area (Fulton County, Georgia) is actually only about one-fourth of EPA's percentage-contribution threshold (.28% vs. 1%). Unless and until the cause of this difference is identified and shown to be a discrepancy in FPL's and not EPA's modeling, it raises a serious question about whether *any* portion of Florida is appropriately included in the CAIR-ozone program.[3] Moreover, FPL Group's modeling also shows preliminarily that -- even when adjusted for the differences in state-wide results -- southern Florida falls well short of EPA's one-percent contribution threshold for ozone.

FPL Group has been able to replicate more closely EPA's PM2.5 modeling results. Once again though, the preliminary modeling results suggest that southern Florida -- if not the entire state -- does not significantly contribute to downwind non-attainment.

In sum, FPL Group is confident that its modeling will demonstrate that sources in southern Florida do not significantly contribute to either ozone or PM2.5 non-attainment in other states, because of the geographic and meteorological factors that distinguish southern Florida from the rest of the state and from the Southeast. Moreover, this modeling may also demonstrate that there are substantial, fatal flaws in EPA's own statewide modeling.

EPA cannot logically support its failure to conduct the source apportionment modeling that FPL is now conducting. In its response to comments, EPA suggested that FPL Group should

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[3] FPL Group is involved with a group that is in the process of setting up a meeting with EPA to address the discrepancies in the model results. FPL Group expects that the discrepancies are caused by one or more of the following: (i) FPL Group does not have the precise data files used by EPA, or (ii) EPA and FPL Group used different assumptions in running the model. If FPL Group's modeling is correct, no part of Florida belongs in the CAIR-ozone program. If EPA's modeling is correct and FPL Group is able to replicate EPA's results, then we expect additional

have provided fine grid modeling. OAR-2003-0053-2165 at 230. This provides no basis to deny reconsideration. FPL Group had no reason to present modeling or other supporting information regarding ozone non-attainment because EPA consistently found, prior to adoption of the Final Rule, that Florida did not contribute to ozone non-attainment. Moreover, the time it has taken for FPL to secure the model and input data after the Final Rule and then to replicate EPA's modeling results demonstrates that securing and analyzing that data for PM2.5 modeling during the comment periods before the Final Rule was totally impracticable. Finally, it is worth noting that EPA's intransigence has forced FPL Group to undertake the massive effort of re-creating EPA's modeling from scratch before it could refine that modeling to evaluate the non-attainment contributions from southern Florida. In contrast, EPA could have performed refined modeling of southern Florida with little additional effort. EPA's shifting the burden of modeling to FPL Group is especially egregious in view of this drastic disparity in the size of the burden.

b. EPA Reached Its Decision To Include Southern Florida Sources In CAIR Via A Process That Was Procedurally And Substantively Flawed.

In the Final Rule, EPA made two findings that triggered Florida's inclusion in CAIR. EPA found for the first time, without notice or an opportunity for affected sources to address its finding, that the entire State of Florida "significantly contributed" to downwind ozone non-attainment in one county, Fulton County, Georgia.[4] EPA also found that the entire State of Florida "significantly contributed" to downwind PM2.5 non-attainment in seven counties, even

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modeling runs will show that a portion of Florida is not significantly contributing to Fulton County's non-attainment status.

[4] This contribution was at the very bottom of the range EPA established for determining a "significant contribution," a 1% contribution for a county in which 76% of the contribution is due to local sources. Moreover, EPA's own data show that Fulton County will achieve attainment by 2015 without CAIR.

though EPA had only a month before found that two of these seven counties[5] had achieved attainment.[6]

Because EPA had consistently concluded prior to the Final Rule that Florida *did not* significantly contribute to downwind ozone non-attainment,[7] potentially affected sources had no reason to seriously review and comment upon EPA's input assumptions and modeling regarding ozone. This lack of notice and opportunity for potentially affected sources to address the inclusion of southern Florida sources in CAIR is a fatal procedural defect that warrants reopening the proceeding and taking additional comments.

The fundamental foundation of any agency action is the provision of sufficient factual detail and rationale on a proposed rule to permit interested parties to comment meaningfully. *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). Clearly, this requirement was not met as to Florida's inclusion in the ozone non-attainment finding.

An agency commits serious procedural error, which must be corrected, when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. *American Medical Assoc. v. Reno*, 57 F.3d 11291132-33 (D.C. Cir. 1995); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). EPA failed to allow meaningful commentary on its finding that Florida sources

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[5] The seven counties were: Bibb County (Macon), Georgia; Clarke County (Athens), Georgia; Clayton County (Atlanta), Georgia; Cobb County (Atlanta), Georgia; Dekalb County (Atlanta), Georgia; Jefferson County (Birmingham), Alabama; and Russell County (Phenix City), Alabama.

[6] *See* 70 *Fed. Reg.* 19843 (April 14, 2005) where EPA, one month earlier, found that Clarke County, Georgia and Russell County, Alabama had achieved attainment.

[7] Prior to the Final Rule, modeling by EPA consistently showed that Florida does not contribute to nonattainment in downwind areas. That was the result of both the coarse grid and fine grid modeling performed by EPA in the SIP Call modeling. That was also the result of EPA's ozone modeling for the IAQR in this proceeding. That was also the result of EPA's ozone modeling for the SNPR in this proceeding.

significantly contribute to ozone non-attainment, for neither the technical basis purportedly supporting this conclusion nor this conclusion was revealed in the NOPR, SNPR or NODA.

The issue is whether the interested parties could reasonably have anticipated the final rule from the proposal. *American Waterworks Ass'n* at 1275; *Kooritzky v. Reich*, 17 F.3d 1509, 1513-14 (D.C. 1994). Sources in Florida had no reason to anticipate that southern Florida, or even all of Florida, would be part of CAIR with respect to ozone non-attainment.

An unexpressed intention cannot convert a final rule into a "logical outgrowth" that an interested party should have anticipated; interested parties cannot be expected to divine an agency's thoughts. *Shell Oil Co. v. Envt'l Protection Agency*, 950 F.2d 741, 751 (D.C. Cir. 1991). Inclusion of Florida in ozone non-attainment was, at best, an unexpressed intention, and FPL Group cannot be expected, much less held, to divine EPA's thoughts.

While the EPA did give notice of its intent to include Florida as a significant contributor to PM2.5 non-attainment, it committed serious procedural errors in its response to FPL Group's comments on that intent. FPL Group reviewed EPA's input assumptions and modeling regarding PM2.5 non-attainment and provided comments to EPA. These offered corrections regarding input assumptions[8] and addressed the need for EPA to model the significant portion of southern Florida that could not reasonably be found to contribute to downwind non-attainment[9] because of

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[8] In its August 27, 2004 comments on the CAIR NODA, FPL Group noted that the NEEDS data used in the updated modeling was inaccurate, dated and did not reflect the current inventory of generating resources. Corrected data was provided.

[9] FPL Group succinctly stated its concerns in its July 26, 2004 comments on the SNPR: "FPL Group believes that EPA has erred in the determination that all Florida electric generating units contribute to PM2.5 non-attainment status of downwind state counties and should meet the emission reductions of the CAIR. It is difficult to imagine, that on a peninsular state such as Florida, a plant in Brevard or Palm Beach County can be contributing to PM2.5 non-attainment areas in Georgia or Alabama. FPL Group believes that EPA's determination will burden affected states with the costs of emissions control equipment or allowances that are unnecessary and will not provide meaningful air quality improvements in non-attainment areas."

Florida's unique geography (*i.e.,* a peninsula extending 250 to 650 miles away from any non-attainment area)[10] and meteorology (*i.e.,* prevailing winds that blow away from rather than towards non-attainment areas). EPA declined to conduct the fine grid or more detailed modeling requested by FPL,[11] even though EPA had reason to believe from its own SIP Call rulemaking that such modeling would show that portions of states on the perimeter would not contribute to non-attainment.

EPA chose not to acknowledge the obvious geographic and meteorological conditions that make Florida unique and that warrant the use of more detailed and refined modeling to address southern Florida sources' potential contribution to non-attainment. To the contrary, EPA elected not to conduct such modeling and arbitrarily lumped FPL Group's comments with comments suggesting that Texas (which does not share Florida's unique physical and meteorological attributes) be split for assessing non-attainment. In its Corrected Response To Significant Public Comments On The proposed Clean Air Interstate Rule, OAR-2003-0053-2165, EPA asserted that it was "not legally mandated to assess significance of contribution on a statewide basis," citing *Michigan v. EPA*, 213 F.3d 663, 682 (D.C. Cir. 2000) (OAR-2003-0053-2165 at 229) and offered three rationales for its statewide determination of "significant contribution." OAR-2003-0053-2165 at 229,230. None of these *post hac* rationalizations justifies EPA's failure to employ fine grid modeling to evaluate specific source apportionment as

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[10] The part of Peninsular Florida, roughly Gainesville, Florida, that is closest to a non-attainment area, Bibb County, Georgia, is approximately 250 miles away, while the farthest part of Peninsular Florida, Key West, Florida, is approximately 650 miles away Bibb County, Georgia. The distance of Peninsular Florida from the nonattainment zone furthest away from Florida, Jefferson County, Alabama, ranges from approximately 450 to 850 miles.

[11] FPL Group made the following request in its July 26, 2004 comments on the SNPR: "FPL Group request[s] that EPA utilize a fine grid model to better determine which units are actually contributing to downwind PM2.5 non-attainment. Following this fine grid modeling EPA should

requested by FPL Group or correct its erroneous conclusion that southern Florida sources contribute to non-attainment.

EPA's first rationalization -- that state boundaries are natural demarcation points, that SIPs are statewide, and that CAA Section 110(a)(2)(d) "prohibits emissions from states" -- contains a surprising misinterpretation of the CAA and fails to heed the instruction of the court in *Michigan v. EPA*. Contrary to EPA's assertion, Section 110(a)(2)(d) does not prohibit "emissions from states," it prohibits "emissions from sources" in states. This misstatement of the CAA underscores the fallacy of EPA's position. FPL Group suggests that under the CAA, EPA should be focusing on *sources* rather than on states. EPA erroneously invokes the CAA to justify using a statewide approach. As the court observed in *Michigan v. EPA*:

> On its face the statute neither mandates nor prohibits an all-or-nothing statewide perspective. It directs the EPA to make sure that SIPS (which of course are state plans) adequately prohibit "any source or other type of emission activity within the State from emitting" in excess of the substantive limit. The critical issue is whether the targeted "source" or "emission activity" "contribute[s] significantly to non-attainment" in another state.

213 F.3d at 682. Thus, the critical issue is whether the targeted source or emission activity, in this case EGUs in southern Florida, contribute significantly to non-attainment in another state. EPA's modeling does not demonstrate that they do,[12] and EPA should grant reconsideration so

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re-determine which portion of the state or states should actually be included in the requirements to meet the CAIR reductions."

[12] EPA's coarse grid ozone modeling does not include Florida below the 26th latitude. Thus, even EPA's modeling does not justify including all of southern Florida in the ozone non-attainment finding. "EPA must establish that there is a measurable contribution" from an area, before it can conclude that there is a "significant" contribution. 213 F.3d at 683-84. FPL has no data that Florida sources below the 26th latitude make a measurable, much less significant contribution to Atlanta's ozone non-attainment. EPA's coarse grid PM2.5 modeling is also suspect for a variety of reasons: (a) inclusion of attainment zones as non-attainment zones, (b) erroneous input data, (c) the conclusion in the SIP Call that coarse grid areas should not have been included because modeling showed that only fine grid areas significantly contributed to

that FPL may introduce more detailed source apportionment modeling to demonstrate that they do not.

EPA's second rationalization for employing a statewide approach was that EPA does not know where to draw the line in order to survive arbitrariness attacks. The simple response is that EPA should rely upon appropriately granular modeling to draw the lines. FPL Group's supplemental modeling will provide a factual/rational support for a boundary line.

EPA's third rationalization -- the "potential in-state pollution haven" argument -- is wholly speculative, unsupported by the record and manifestly inconsistent with the operation of the electrical grid in Florida. In its response to comments, EPA characterizes the potential creation of an "in-state pollution haven" as a "possibility." In this "pollution haven" scenario, EPA postulates that utilities might build plants in southern Florida to avoid emission controls but move the electricity they generate north to meet load, instead of building plants in northern Florida where the electricity is needed. Significantly, EPA has not modeled Florida to determine whether this is even a realistic possibility. To the contrary, EPA is openly engaging in speculation that is at odds with the realities of the operation of peninsular Florida's power grid.

FPL's load center, to which it delivers most of its power, is in southern Florida. It employs its EGUs and transmission facilities to deliver electricity where it is needed to meet customer demand and energy consumption, not to avoid emission controls. FPL's load center continues to move south rather than north. EPA's suggestion that FPL may locate plants in the south and then move power north to avoid emission controls ignores the reality that FPL's primary need for power is in the south. Moreover, EPA's observation that if power is routed from southern Florida to northern Florida (a conclusion at odds with the physical operation of

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downwind non-attainment, and (d) FPL Group's request that EPA conduct similar fine grid

FPL's system) that "downwind receptors remain exposed to the same or similar level of PM2.5 and ozone emissions" (OAR-2003-0053-2165 at 230) is premised upon an erroneous assumption that all sources in Florida contribute equally to non-attainment. Even if sources indeed relocated from northern Florida to a "pollution haven" in the south, downwind receptors in non-attainment areas north of Florida would not be exposed to the same or similar levels of PM2.5 and ozone, because of the greater attenuation one can expect (and that FPL Group's modeling should confirm) in the transport of emissions from southern Florida to the non-attainment areas.

Furthermore, EPA's "pollution haven" rationalization ignores the Prevention of Significant Deterioration ("PSD") protection afforded by the Clean Air Act. The construction of new EGUs would require extensive PSD review to ensure that emissions from the new units do not exceed the available PSD increment for maximum allowable increases in concentrations of Criteria Pollutants. Thus, PSD precludes EGUs from congregating in so-called "pollution havens" to the extent that any National Ambient Air Quality Standards would be exceeded.

As the foregoing discussion demonstrates, EPA's findings that southern Florida sources contribute to ozone and PM2.5 non-attainment are based upon fatal procedural flaws and are counter-intuitive, arbitrary and capricious.[13] However, the process set forth by the D. C. Circuit Court of Appeals in *Michigan v. EPA*, if followed on reconsideration as urged by FPL Group, provides EPA a means of curing its procedural deficiencies and making findings that are neither arbitrary nor capricious.

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modeling in this proceeding.

[13] It was arbitrary and capricious for EPA to rely upon flawed modeling input and output. It was arbitrary and capricious for EPA not to conduct the fine grid modeling requested by FPL. It was arbitrary and capricious for EPA to use a statewide approach to assess the contribution of sources in Florida to downwind nonattainment. And it was counter-intuitive, as well as arbitrary and capricious, for EPA to ignore Florida's unique geography and meteorology and the likelihood that they would keep southern Florida sources from contributing to downwind nonattainment.

II. EPA's Decision To Employ Fuel Adjustment Factors To Adjust The Heat Input Data Used To Derive State NOx Allowance Budgets Is Procedurally Flawed and Is Arbitrary and Capricious.

For the first time in the Final Rule, EPA employs fuel adjustment factors in setting state NOx allowance budgets. It adjusts the heat input data for fuel types employing the following fuel adjustment factors: 1.0 for coal, 0.4 for gas, and 0.6 for oil. The effect is to remove fuel neutrality and reduce the emissions allowed for states and utilities with a substantial percentage of gas and oil units. EPA's adoption of fuel adjustment factors in setting state NOx allowance budgets is both procedurally and substantively infirm, and it warrants reconsideration by EPA.

a. Inadequate Notice of the Intent to Use Fuel Adjustment Factors.

The EPA did not provide legally sufficient public notice of its decision to adjust for fuel type the heat input data used to derive the state NOx budgets. EPA never proposed to adjust for fuel type. In its NOPR, EPA did not adjust heat input data for fuel type and did not suggest that it was considering such an adjustment. In its SNPR, EPA briefly observed that some commenters had suggested using factors to adjust heat input data.[14] However, the SNPR once again included state NOx budgets that were calculated without fuel adjustment factors, and EPA did not solicit comments on fuel adjustment factors. In the NODA, EPA announced a "Correction to State NOx Budgets," but that correction had nothing to do with the use of fuel

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[14] EPA's entire observation in its SNPR follows:

> Commenters have also suggested adjusting the heat input data for existing units used to determine State budgets by multiplying it by different factors, established regionwide based on fuel type. The factors would reflect the inherently higher emissions rate of coal-fired plants, and consequently the greater burden on coal plants to control emissions. In contrast to allocations based on historic emissions, the factors would also not penalize coal-fired plants that have already installed pollution controls. States shares would be determined by the amount the of State heat input, as adjusted, in proportion to the total regional heat input. The factors could be based on average historic emission rates (in lbs/mmBtu) by fuel type (coal, gas and oil) for the years 1999-2002. 69 *Fed. Reg.* 32689.

adjustment factors. Indeed, EPA explicitly stated in the NODA that it was "not revising the methodology it proposed to calculate NOx budgets...." That methodology and the resulting state NOx budgets set forth both in the NOPR and the SNPR did not employ fuel adjustment factors. In short, up to the time of the Final Rule, there was simply no reason for FPL Group to submit comments on fuel adjustment factors. Thus, EPA's statement in the Preamble to the Final Rule that "EPA took comment on an alternative methodology that determines State budgets by multiplying heat input data by adjustment factors for different fuels," is, with all due respect, disingenuous and misleading. The course of the rulemaking clearly and consistently pointed to the adoption of a fuel-neutral approach. No one reasonably could have anticipated that EPA would adopt the fuel adjustment factor approach and hence had no meaningful notice that it should comment on same.

Nor can EPA reasonably conclude that the fuel adjustment factors in the Final Rule are a "logical outgrowth" of the proposed rule. The issue is whether interested parties can reasonably anticipate a final rule from the proposal that led to it. *American Waterworks Ass'n* at 1275; *Kooritzky v. Reich*, 17 F.3d 1509, 1513-14 (D.C. 1994). As the foregoing discussion of the NOPR, SNPR and NODA shows, there was no basis for the parties to deduce that the Final Rule would employ fuel adjustment factors to adjust heat input data.

Moreover, an unexpressed intention cannot convert a final rule into a "logical outgrowth" that an interested party should have anticipated; interested parties cannot be expected to divine an agency's thoughts. *Shell Oil Co. v. Envt'l Protection Agency*, 950 F.2d 741, 751 (D.C. Cir. 1991). FPL Group should not be put in the position having to divine EPA's thoughts regarding fuel adjustment factors.

An agency must "describe the range of alternatives being considered with reasonable specificity" in order that interested parties will know what to comment on. *Horsehead Resource Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994). EPA's consistent development of NOx emission budgets without the use of fuel adjustment factors throughout the rulemaking prior to the Final Rule failed to alert FPL Group and others to the range of alternatives being considered by EPA and denied them the opportunity to comments on fuel adjustment factors.

b. Inadequate Notice of Particular Fuel Adjustment Factors.

EPA also failed to provide legally sufficient notice of its decision to adopt the *specific* fuel adjustments factors included in the Final Rule (*i.e.,* 1.0 for coal, 0.4 for gas, and 0.6 for fuel oil). Prior to the Final Rule, these particular factors were mentioned nowhere. EPA's failure to provide notice of the particular fuel adjustment factors it ultimately chose to employ is an inherently fatal procedural flaw. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. *American Medical Assoc. v. Reno*, 57 F.3d 11291132-33 (D.C. Cir. 1995); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

An agency must provide sufficient factual detail and rationale for a rule to permit interested parties to comment meaningfully. *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988). The SPNR briefly mentions commenters who suggested the use of fuel adjustment factors, but it says nothing about what the specific factors might be. FPL Group could not reasonably have known that EPA would adopt the particular fuel adjustments factors of 1.0 for coal, 0.4 for gas, and 0.6 for fuel oil and hence had no meaningful notice that it should comment on those specific factors.

c. EPA Has No Authority Under The CAA To Use The Fuel Adjustment Factors In Determining The States' Emission Budgets.

Section 110(a)(2)(D) of the CAA requires a determination -- for each upwind state -- of the amount of emission reduction necessary for the contribution of that state no longer to be "significant." Under *Michigan v. EPA*, this determination can include a consideration of cost.[15]

In adopting the Final Rule, EPA determined that a state's contribution to non-attainment would no longer be "significant" if it reduced NOx emissions by the amount achievable using "highly cost-effective" controls on EGUs. Those levels of "highly cost-effective" controls were developed by using heat input data (unadjusted for fuel adjustment factors) for each EGU within the region. As a result, the total regional level of NOx emissions which could be achieved by implementing "highly cost-effective" controls on EGUs was calculated without using fuel adjustment factors.

However, when those regional values were then allocated to states, EPA arbitrarily adjusted the heat input data by using fuel adjustment factors of 1.0 for coal, 0.6 for oil and 0.4 for gas. This resulted in states with a high proportion of oil and gas units being allocated fewer NOx emissions allowances than would have been the case using the fuel-neutral "highly cost-effective" reductions. Said another way, states with a high proportion of oil and gas units are being asked to achieve *more* NOx reductions than EPA's own cost-effectiveness calculations indicate would be warranted. This flies in the face of the cost-effectiveness criterion that is sanctioned by *Michigan v. EPA* and that underpins the entire emissions-allowance architecture of the CAIR.

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[15] *Michigan v. EPA* upheld EPA's interpretation of "significant" in Section 110(a)(2)(D) as that amount of contribution that would be eliminated if each upwind state's emissions were reduced by an amount achievable using "highly cost-effective" controls on EGUs.

In short, states with oil and gas units are being allocated emission budgets (caps) lower than the level EPA has determined to be achievable with "highly cost-effective" controls. This means that states with oil and gas units are no longer being allocated emission budgets that are based on what EPA said was the appropriate measure of costs. If EPA is going to use costs as a measure of what constitutes a "significant contribution," then it needs to use that measure of costs consistently throughout the rule, both in establishing the regional level of emissions and in allocating those emissions to states.

d. Failure to Model Revised State NOx Budgets is Arbitrary and Capricious.

EPA's decision to revise the state NOx budgets based on fuel adjustment factors without re-modeling the effects of the revised budgets on emission reductions was arbitrary and capricious. In the NOPR and SNPR, EPA used its Integrated Planning Model (IPM) to forecast the location and magnitude of emission reductions that would result from the operation of the model trading system using the proposed state budgets. EPA then used air quality models to forecast the effect these emission reductions would have on future PM2.5 and ozone concentrations. The predicted improvements in air quality are a cornerstone of the rule. In contrast, in the Final Rule, EPA revised the state budgets based on the fuel adjustment factors, dramatically transferring thousands of tons of emissions from Florida (a state that is far removed from the non-attainment problems) to states that are directly upwind from the non-attainment areas. Without re-running the IPM and air quality models under the revised budgets, EPA cannot know the effect of the revisions on the predicted air quality outcomes. In other words, EPA cannot tell whether or not CAIR still achieves its intended purpose. Therefore, EPA's revision of the state emission budgets to reflect fuel adjustment factors without modeling the effects of those revisions is arbitrary and capricious.

e. Given The Procedural And Substantive Problems, EPA Should Reconsider Its Use Of Fuel Adjustment Factors.

The use of fuel adjustment factors to establish NOx allowance budgets goes to the heart of CAIR. Given EPA's lack of notice of its intent to use any fuel adjustment factors or the specific fuel adjustment factors it selected after the comment periods, FPL Group did not have an opportunity to object to the use of fuel adjustment factors during the comment period. Given EPA's lack of notice, it was impracticable for FPL Group to address the potential use of fuel adjustment factors in establishing state NOx allowance budgets. EPA's use of fuel adjustment factors is inconsistent with the Clean Air Act and is arbitrary and capricious. EPA must reconsider and reverse its decision to employ fuel adjustment factors in establishing state NOx emission allowance budgets.

CONCLUSION

Based upon the foregoing, FPL Group respectfully requests that EPA grant this petition for reconsideration and convene a proceeding to accommodate such reconsideration. In that proceeding, FPL Group should be given sixty days, until September 12, 2005, to submit supplemental, source apportionment modeling results and comments addressing whether southern Florida sources contribute to either ozone or PM2.5 non-attainment and addressing whether fuel adjustment factors should be used to adjust heat input data in the computation of state NOx budgets. Other affected parties should also be given an opportunity to address these matters of core relevance to CAIR.

Respectfully submitted,

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