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August 30, 2005

VIA FEDERAL EXPRESS

Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: Northern Indiana Public Service Company's Supplemental Petition for Reconsideration of the CAIR

Dear Administrator Johnson:

Enclosed herewith please find the Supplemental Petition for Reconsideration of the Clean Air Interstate Rule ("CAIR") submitted on behalf of Northern Indiana Public Service Company ("NIPSCO").

NIPSCO believes that the D.C. Circuit Court's decision in its review of the New Source Review ("NSR") rules, *State of New York v. USEPA*, Slip.Op. No. 02-1387 (D.C. Cir. June 24, 2005), affects the U.S. Environmental Protection Agency's ("USEPA") analyses that serve as the basis of the CAIR. More specifically, NIPSCO believes that the costs of NSR analyses and the additional time required for such analyses, as well as the possibility that the conclusions of such analyses could result in simultaneous construction of control equipment where it may have been staggered had such analyses not been required, require USEPA to reevaluate the highly cost effective criteria employed in the CAIR. Further, NIPSCO believes that the CAIR's compliance timeframes may no longer be viable as a result of the court's holding.

These issues arose after the effective date of the rule and is of central relevance to the rule, as required by Section 307(d)(6)(B) of the Clean Air Act. Therefore, reconsideration of the CAIR on this point is appropriate.

SCHIFF HARDIN LLP

If you have questions regarding this Supplemental Petition for Reconsideration, please do not hesitate to call.

Sincerely,

Sheldon A. Zabel

Enclosure

cc: Mr. Jeffrey Holmstead
Mr. Brian McLean
Mr. Steve Page
Ms. Sonja Petersen, via electronic mail

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BEFORE THE HONORABLE STEPHEN L. JOHNSON, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE SUPPLEMENTAL PETITION FOR RECONSIDERATION OF THE 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 70 Fed.Reg. 25161 (May 12, 2005)	)

NORTHERN INDIANA PUBLIC SERVICE COMPANY'S SUPPLEMENTAL PETITION FOR RECONSIDERATION

Petitioner, NORTHERN INDIANA PUBLIC SERVICE COMPANY ("NIPSCO") hereby petitions the U.S. Environmental Protection Agency ("EPA") to accept this Supplemental Petition for Reconsideration of the Clean Air Interstate Rule ("CAIR"), 70 Fed.Reg. 25161 (May 12, 2005), and to reconsider whether EPA's highly cost effective analyses continues to be valid given the court's holding in *State of New York v. USEPA*, Slip.Op. No. 02-1387 (D.C. Cir. June 24, 2005). In support of this Supplemental Petition for Reconsideration, NIPSCO states more specifically, as follows:

I. INTRODUCTION

On July 8, 2005, Petitioner NIPSCO submitted a Petition for Reconsideration of the CAIR, petitioning EPA to reconsider two provisions of the CAIR as finalized: (1) the decision to not allow the "banking into" the CAIR of vintage 2009 seasonal allowances of nitrogen oxides ("NOx") and (2) the retirement ratio applied to allowances for emissions of sulfur dioxide ("SO_2") considering both the statutory discontinuation of certain allowances issued pursuant to

Section 405 of the Clean Air Act, 42 U.S.C. § 7651d and additional contemporaneous reductions when CAIR is implemented. OAR-2003-0053-2194 (July 11, 2005).

On June 24, 2005, the Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") issued its opinion in the appeals of certain aspects of the rules promulgated on December 31, 2002, by EPA addressing New Source Review ("NSR"). Among other holdings, the D.C. Circuit found that inclusion of an exclusion from the definition of *modification* under NSR for environmentally beneficial pollution control projects ("PCPs") is beyond the scope of EPA's authority and vacated those portions of the NSR rules. *State of New York v. USEPA*, Slip.Op. No. 02-1387 (D.C. Cir. June 24, 2005) at 67. Subsequently, on August 8, 2005, EPA requested that the D.C. Circuit clarify that its holding regarding PCPs applies only prospectively. *State of New York v. USEPA*, No. 02-1387, EPA's Petition for Rehearing or Rehearing *En Banc* and Request for Clarification (August 8, 2005) at 15. Although the Utility Air Regulatory Group has requested rehearing on the issue of PCPs, *see State of New York v. USEPA*, No. 02-1387, Petition for Rehearing or for Rehearing *En Banc* of the Utility Air Regulatory Group ("UARG") (August 8, 2005), notably, EPA did not request rehearing on the D.C. Circuit's decision regarding PCPs, thereby accepting the decision.

EPA's acceptance of the D.C. Circuit's holding that PCPs are not exempt from NSR analysis raises serious questions regarding the sufficiency of EPA's analysis of the CAIR to determine what constitutes the highly cost effective criterion. More specifically, the pollution control equipment that will be installed on many electric generating units ("EGUs") in order for sources to comply with the CAIR would previously have qualified for the PCP exclusion from NSR set forth in the 2002 rule. Now, that exclusion is no longer available (unless the D.C. Circuit reverses itself in response to UARG's Petition for Rehearing), and sources will have to

perform expensive, time-consuming NSR analyses of their proposed pollution control equipment additions. EPA's highly cost effective analyses did not account for the additional cost and time necessary for sources to conduct NSR applicability analyses and comply with any applicable NSR requirements. EPA has taken the view of the "routine" exclusion in recent utility enforcement proceedings that a project must be routine for the individual unit, *see United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829 (S.D. Ohio 2003), these PCPs would not qualify as routine. The second criteria for NSR applicability, that the project must result in an emission increase, is in an even greater state of flux than the routine issue. Nonetheless, under the approaches EPA has taken in the enforcement actions for determining whether a project results in an emission increase sufficient to trigger NSR applicability, the PCPs undertaken for CAIR could be found to cause sufficient increase. Even if NSR did not ultimately apply to a PCP undertaken to comply with the CAIR, the analysis itself is costly and extremely time-consuming. If NSR did apply, the cost and time would be even greater. Therefore, either way, and certainly if NSR is applicable, EPA's cost analysis and its analysis of the timing of control measures, both due to permitting constraints and to the availability of boilermakers, is potentially inaccurate.

EPA's reconsideration of the CAIR to include the impact of NSR analysis in its evaluation of what is highly cost effective in the context of CAIR controls is appropriate for a number of reasons: (1) the CAIR is currently pending reconsideration by EPA; (2) the CAIR has been appealed to the D.C. Circuit; (3) the CAIR has not yet been implemented through state implementation plans ("SIPs"); (4) the question raised here, *i.e.*, whether EPA's highly cost effective analysis should have included the complexities imposed by NSR, is of central relevance to the outcome of the rule (42 U.S.C. § 7607(d)(7)(B)); and (5) it was not only impracticable, but also impossible, for NIPSCO to raise this issue during either the comment period for the

rulemaking or the 60-day appeal period following publication of the rule in the *Federal Register*, as no one could have known that this would be an issue (*id*).

II. DISCUSSION

EPA considered numerous factors in its highly cost effective analysis of the CAIR, including cost (70 Fed.Reg. at 25200), control measures whose costs fall within the chosen cost range (70 Fed.Reg. at 25201, 25209), and timing (70 Fed.Reg. at 25215). EPA's analysis of timing addressed the length of time necessary for the construction of control equipment, the "availability of adequate industrial resources, including boilermakers, for constructing the emission control retrofits required by CAIR," landfill permitting, financing, and grid reliability. 70 Fed.Reg. at 25215-16. EPA explicitly did not include NSR in its highly cost effectiveness analysis:

> The EPA did not propose any provisions in the CAIR related to new source review (NSR). . . .
>
> It should be noted that pollution control measures implemented by EGUs in compliance with the CAIR may be eligible for an exemption under the NSR pollution control project provision.[]. . [,] for controls such as selective catalytic reduction . . . and wet scrubbers. . . .

70 Fed.Reg. at 25305. Clearly, EPA anticipated that the PCP exemption would apply to the control technologies necessary for the CAIR and did not anticipate that NSR analysis needed to be considered as part of the highly cost effective criterion.

The applicability of NSR to CAIR control measures has several significant impacts. First, just having to conduct the threshold NSR analyses to determine if complete NSR analysis and permitting for the PCPs is required will significantly increase the cost and timing of permitting. Second, if the conclusion of the threshold NSR analysis is that NSR is applicable because there is a significant increase in collateral pollutants, then full NSR analysis and

permitting will be required and those pollutants will have to be controlled. This will greatly increase the cost and the time involved. Moreover, the NSR applicability could result in sources having to install both NOx and SO_2 control equipment simultaneously, where without the NSR applicability the equipment installations could be staggered. The necessity to install more pollution control equipment and simultaneously also could affect boilermaker availability in a manner that EPA had not anticipated. Further, the additional time necessary to prepare an NSR application and to process and issue an NSR permit could result in massive implementation delays, such that the 2009/2010 and 2015 compliance deadlines are no longer viable or appropriate.

A. NSR Analysis Is Costly and Time-Consuming.

If NSR is applicable to a construction project, then the source must evaluate the level of emissions of all the regulated pollutants, not just the pollutant of concern to the project, whether those additional pollutants will exceed the significance thresholds applicable to those pollutants, what the air quality impact will be, regardless of exceeding – or not – the significance threshold with respect to ambient standards and increment consumption. To do this could require a year just to collect ambient monitoring data. If the source finds that there are significant increases in collateral pollutants, it also must develop controls for that pollutant – BACT if it is an attainment area and pollutant or LAER if nonattainment. Also, if nonattainment, the source will have to obtain offsets.

Moreover, the permitting authority must review the potential NSR analysis and permit application, a need for more detailed effort than non-NSR pre-construction permitting. Public review is heightened for NSR permitting, as is federal oversight of the permitting process. It is not unusual for NSR analysis and permitting to require several years to complete.

Clearly, EPA had not anticipated the length of time necessary for NSR analysis and permitting when it evaluated the timeframes necessary for implementation of the CAIR. As EPA recognized, sources are not likely to initiate activities requiring a major commitment of funds prior to approval of the applicable SIP, some months after September 2006. 70 Fed.Reg. at 25217. Even recognizing that planning activities may have commenced prior to approval of the SIP, EPA anticipated approximately 24 months for actual construction following whatever state permitting activities that may be necessary. EPA recognized that there would be only 2¼ and 3¼ years between SIP approval and the compliance dates for NOx and SO_2, respectively. *Id.* EPA estimated 21 months for construction of selective catalytic reduction ("SCR") equipment and 27 months for construction of a scrubber. EPA did not anticipate the year or two for development of an NSR permit application plus another year or more for review of the NSR permit application and issuance of the construction permit. The additional time necessary for NSR permitting places the compliance dates of January 1, 2009 and 2010 in serious jeopardy.

B. <u>Controlling Collateral Pollutants Is Costly and Time-Consuming.</u>

As noted above, if the NSR analysis indicated significant increases in collateral pollutants, then those pollutants will have to be controlled at the same time that the CAIR control measures are installed. Obviously, controlling pollutants not anticipated under the CAIR will involve costs not evaluated under the CAIR. Moreover, controlling additional pollutants may require additional time to develop and install the necessary equipment. Controlling additional pollutants could also place a strain on the availability of boilermakers to the extent they are necessary for the installation of the additional equipment. As EPA had anticipated the applicability of the PCP exclusion, it would not have considered the additional time and cost to companies attendant upon collateral pollutant control.

C. NSR Applicability Could Result in Sources Having to Install Both NOx and SO_2 Control Measures Simultaneously.

Although EPA may have considered that some sources would install both NOx and SO_2 controls at the same time, it also must have recognized that some sources would stagger those projects because of the financial obligations involved or because of the impact on the source's ability to meet its generation obligations with units in outage in order for the equipment to be installed. NSR applicability may upset this scheme and place unanticipated strains on sources' financing and outage timing. Additionally, as discussed above, simultaneous installation of NOx and SO_2 control equipment would impinge upon boilermaker availability in a manner that EPA has not anticipated or analyzed.

D. The Compliance Deadlines of 2009 and 2010 May No Longer Be Viable.

NIPSCO recognizes the flexibilities inherent in emissions trading programs and generally supports the CAIR conceptually as a means of achieving the utility sector's share in reducing emissions to help to enable states to comply with the 8-hour ozone and PM2.5 ambient air quality standards. NIPSCO understands that where states are not able to rely upon reductions in background levels of ozone and particulate matter, they must obtain sufficient reductions locally, either in addition to or instead of regional reductions, in order to demonstrate compliance by the applicable attainment dates. NIPSCO also knows that the implementation deadlines for the CAIR are very close to being unhelpful to states' attainment demonstrations. It is in NIPSCO's interest for EPA not to have to extend the implementation dates for the CAIR.

Nevertheless, NIPSCO believes that it is possible that the CAIR implementation deadlines may not be able to be met because of the implications and ramifications of NSR applicability. On the one hand, NIPSCO does not believe that NSR should apply to sources' efforts to comply with CAIR. Sources should not be held responsible for their inability to meet

the deadlines, however, if NSR does, indeed, apply to them. On the other hand, NIPSCO is very concerned that NSR applicability will cause delays, as described, resulting in Indiana having to impose additional "beyond CAIR" control measures in order not only to demonstrate attainment but also to comply with other requirements of Section 182 of the Clean Air Act, 42 U.S.C. § 7511a, because it cannot rely upon timely implementation of the CAIR for those purposes.

EPA has not considered these factors in its highly cost effective analysis of the CAIR. NIPSCO believes that EPA must evaluate these factors very realistically and determine whether the CAIR remains, in its current form, highly cost effective and whether it will be possible to achieve the CAIR reduction on the contemplated schedule. NIPSCO is concerned that EPA's cost analysis and schedule are no longer valid, thereby exacerbating the arbitrary and capricious nature of the rule. *See* NIPSCO's initial Petition for Reconsideration.

WHEREFORE, for the reasons set forth above, NIPSCO hereby requests that EPA take into reconsideration the question of whether the CAIR continues to be highly cost effective, including both the costs to affected EGUs and in its timing, considering the necessity of NSR analyses, at the least, and the probable applicability of NSR permitting and control measures in at least some instances.

Respectfully submitted,

FOR NIPSCO

By: _____

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Dated: August 30, 2005