

# JONES DAY

77 WEST WACKER • CHICAGO, ILLINOIS 60601.1692  
TELEPHONE: +1.312.782.3939 • FACSIMILE: +1.312.782.8585

DIRECT NUMBER: (312) 269-4388  
CTWEHLAND@JONESDAY.COM

December 23, 2016

## VIA OVERNIGHT DELIVERY and ELECTRONIC MAIL:

The Honorable Regina A. McCarthy  
Office of the Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460  
mccarthy.gina@epa.gov

David Risley  
Office of Atmospheric Programs  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 6204M  
Washington, DC 20460  
risley.david@epa.gov

Re: Petition for Reconsideration, EPA–HQ–OAR–2015–0500

Administrator McCarthy:

Oklahoma Gas and Electric Company (OG&E) respectfully submits the enclosed Petition for Reconsideration of the final rule entitled *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 81 Fed. Reg. 74504 (Oct. 26, 2016). Please contact me with any questions.

Sincerely,

/s/ Charles T. Wehland  
Counsel for OG&E

NAI-1502341330v1

**BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**Oklahoma Gas and Electric Company,  
Petitioner**

**EPA Docket #:**

**EPA-HQ-OAR-2015-0500**

**PETITION FOR RECONSIDERATION**

Charles T. Wehland  
Alina Fortson  
JONES DAY  
77 West Wacker Drive  
Chicago, Illinois 60601  
Telephone: (312) 782-3939  
Facsimile: (312) 782-8585  
Email: ctwehland@jonesday.com;  
afortson@jonesday.com

Casey F. Bradford  
JONES DAY  
1420 Peachtree Street  
Atlanta, Georgia 30309  
Telephone: (404) 581-8119  
Facsimile: (404) 581-8330  
Email: cbradford@jonesday.com

Kimber Shoop  
Managing Director – Legal Department  
OGE ENERGY CORP.  
321 N. Harvey Avenue  
Oklahoma City, Oklahoma 73102  
Telephone: (405) 553-3023  
Email: shoopkl@oge.com

## PETITION FOR RECONSIDERATION

### **I. Introduction**

Pursuant to Clean Air Act Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), Oklahoma Gas and Electric Company (“OG&E”) respectfully submits this Petition for Reconsideration (“Petition”) to request that the United States Environmental Protection Agency (“EPA”) reconsider and correct certain deficiencies in the final rule entitled *Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS*, 81 Fed. Reg. 74504 (Oct. 26, 2016) (“Final Rule”) (EPA–HQ–OAR–2015–0500). This Petition is timely submitted within sixty days of the date of publication of the Final Rule in the Federal Register. 42 U.S.C. § 7607(d)(7)(B).

OG&E is the largest electric utility in Oklahoma, serving more than 820,000 customers across 30,000 square miles in Oklahoma and western Arkansas. OG&E’s service territory includes Oklahoma’s state capital and most populous city, Oklahoma City, as well as Ft. Smith, Arkansas, and some of the largest industrial consumers in the region. OG&E provides its service territory with the power needed to thrive and grow, while simultaneously balancing safety, electric system reliability, affordability and environmental responsibility. OG&E operates electric generating units (EGUs) that are affected by the Final Rule. OG&E submitted comments on the Proposed Rule and, in addition to this Petition, is filing a petition for review of the Final Rule in the United States Court of Appeals for the District of Columbia Circuit. OG&E also hereby supports, and incorporates by reference, Sections A–D of Western Farmers Electric Cooperative’s (“WFEC”) petition for reconsideration of the Final Rule.

### **II. The Final Rule is Not a Logical Outgrowth of the Proposed Rule**

EPA published the original Cross-State Air Pollution Rule (“CSAPR”) on August 8, 2011. Among other things, the original CSAPR addressed interstate transport of ozone pollution under

the 1997 ozone National Ambient Air Quality Standards (“NAAQS”). EPA proposed to update CSAPR to address interstate transport of ozone pollution with respect to the 2008 ozone NAAQS on December 3, 2015. *See* 80 Fed. Reg. 75706 (“Proposed Rule”). Under the notice-and-comment requirements of the Clean Air Act and the Administrative Procedure Act, “an agency’s proposed rule and its final rule may differ only insofar as the latter is a logical outgrowth of the former.” *See, e.g., Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Here, the Final Rule is not a logical outgrowth of the Proposed Rule.

The Final Rule establishes ozone-season budgets for emissions of nitrogen oxides (NO<sub>x</sub>) from EGUs in certain affected states. EPA significantly changed its budget calculation methodology in the Final Rule compared to the Proposed Rule. In both the Final and Proposed Rules, EPA’s approach involved “multiplying historical state-level heat input by state-level emission rates that reflect EGU NO<sub>x</sub> reduction potential.” 81 Fed. Reg. at 74547. However, in the Final Rule, EPA added several new steps to determining a state’s NO<sub>x</sub> reduction potential. Under the updated formula, EPA’s process involved the following:

- First, EPA used the state-level modeled EGU NO<sub>x</sub> emission rate from the 2017 budget-setting base case projection and subtracted the state-level modeled EGU NO<sub>x</sub> emission rate from the 2017 cost threshold projection (\$1,400 per ton).
- Second, EPA subtracted this modeled change in state-level NO<sub>x</sub> emission rate from the adjusted historical state-level EGU NO<sub>x</sub> emission rate.
- Third, EPA multiplied the resulting EGU NO<sub>x</sub> emission rate by 2015 historical heat input.
- Finally, EPA established emission budgets as the lower of the calculated emission budget or the 2015 historical (unadjusted) state-level emissions. *Id.* at 74548.

The first step (establishing the “delta” between the 2017 base case and the 2017 cost threshold), was not included in the calculation used in the Proposed Rule. In addition, in the Final Rule, EPA changed how it determined the adjusted NO<sub>x</sub> emission rate for purposes of step

two of the equation. Specifically, EPA adjusted the dataset “for three categories of known changes in the power sector occurring between 2015 and 2017: Announced new [Selective Catalytic Reduction] at existing EGUs; announced coal-to-gas conversions; and announced retirements.” *Id.* at 74547. Based on the Proposed Rule, OG&E could not have anticipated that EPA would add an entirely new step to its budget calculation, and did not know (and therefore could not comment on) what EPA’s new underlying assumptions would be for the adjusted historical emission rate.

### **III. Oklahoma’s Budget Changed Dramatically Under the Final Rule**

EPA’s changes to its state emissions budget calculation methodology in the Final Rule considerably impacted the budgets for many states, especially Oklahoma. In the Proposed Rule, Oklahoma’s 2017 EGU NOx ozone-season emissions budget was 16,215 tons. 80 Fed. Reg. at 75771. Under the Final Rule, it is 11,641 tons (a reduction of nearly 30 percent). 81 Fed. Reg. at 74631.

There are several potential reasons for this drastic change. Most notably, in the first step of its calculation, EPA over-predicted available emissions reductions. This is demonstrated by the fact that the 2017 budget-setting base case and the 2017 cost threshold projections for Oklahoma were both significantly higher than the 2015 emissions levels in Oklahoma.<sup>1</sup> EPA has no sound basis for its assumption that NOx emissions rates in Oklahoma would increase significantly over the period 2015–2017. To the contrary, this premise is undercut by the fact that, as explained above, in setting the adjusted historical emissions rate EPA anticipated that existing sources would begin installing new controls, using different fuel sources or, in some cases, retiring. EPA’s higher 2017 projections are inconsistent with these acknowledged trends,

---

<sup>1</sup> See Ozone Transport Policy Analysis Final Rule TSD, Appendix E.

which actually result in decreased NOx emissions over time. It was improper for EPA to rely on 2017 predictions which are plainly inconsistent with actual, historical data. *See, e.g., EME Homer City Generation, L.P v. EPA*, 795 F.3d 118, 135 (D.C. Cir. 2015) (explaining that an agency’s use of a model is arbitrary and capricious “when the model bears no rational relationship to the characteristics of the data to which it is applied”). Because the 2017 budget-setting base case was unrealistically high, the “delta” between that number and the 2017 cost threshold was also too high. This error was carried through the remainder of the revised equation, and resulted in an unreasonable estimation of the amount of emissions reductions achievable in Oklahoma, and ultimately caused EPA to set an unrealistically and arbitrarily low ozone-season emissions budget for the state.

#### **IV. Reconsideration is Proper**

Reconsideration is appropriate if an objection is of central relevance to the outcome of a rule, and it was either impracticable to raise an objection within the period for public comment, or the grounds for an objection arose after the period for public comment but within the time specified for judicial review. 42 U.S.C. § 7607(d)(7)(B). If these conditions are satisfied, EPA “*shall* convene a proceeding for reconsideration of the rule.” *Id.* (emphasis added).

It was impossible for OG&E to comment on EPA’s revised emissions budget calculation methodology, which was first presented, without notice, in the Final Rule. The revised calculations are key to the outcome, as they resulted in a significantly lower ozone-season emissions budget for Oklahoma in the Final Rule compared to the Proposed Rule. EPA must therefore reconsider and correct the methodology employed in the Final Rule.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in Sections A–D of WFEC’s petition for reconsideration of the Final Rule, EPA should grant this Petition for Reconsideration.

Dated: December 23, 2016

Respectfully submitted,

/s/ Charles T. Wehland  
Counsel for OG&E