BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Environmental Cost Recovery Clause	))	DOCKET NO. 090007-EI FILED: January 6, 2009

FLORIDA POWER & LIGHT COMPANY'S NOTICE OF D.C. CIRCUIT OPINION ON REHEARING OF OPINION VACATING CAIR

Florida Power & Light Company ("FPL") hereby gives notice that, on December 23, 2008, the United States Circuit Court of Appeals for the District of Columbia Circuit issued an opinion on rehearing of the Court's July 11, 2008 opinion vacating the United States Environmental Protection Agency's ("EPA's") Clean Air Interstate Rule ("CAIR"). A copy of the Court's opinion on rehearing is attached hereto.

The opinion on rehearing remands CAIR to the EPA without vacatur, so that EPA may remedy CAIR's flaws in accordance with the Court's July 11 opinion. This results in CAIR remaining in effect in its current form until it is revised with the July 11 opinion. No timetable is set for the EPA to revise CAIR, but the Court reminded EPA that it did not intend to grant an indefinite stay of the effectiveness of the July 11 opinion. Because the Court did not vacate CAIR, FPL and other utilities must continue to comply with its current requirements until they are revised.

Parties to the CAIR rule challenge will have the right to petition the Supreme Court of the United States for a writ of certiorari within 90 days of the opinion on rehearing. FPL is not aware at this time whether any party intends to seek certiorari review.

Respectfully submitted,

R. Wade Litchfield, Esq.
Vice President and Chief Regulatory Counsel
John T. Butler, Esq.
Managing Attorney
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
Telephone: (561) 304-5639
Facsimile: (561) 691-7135

By: *s/ John T. Butler*
John T. Butler
Fla. Bar No. 283479

CERTIFICATE OF SERVICE
Docket No. 090007-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on January 6, 2009 to the following:

Martha Brown, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

J. R Kelly, Esq
Steve Burgess, Esq
Office of Public Counsel
C/o The Florida Legislature
111 W Madison St. Room 812
Tallahassee, FL 32399-1400

Lee L. Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
Attorneys for Tampa Electric
P.O. Box 391
Tallahassee, Florida 32302

John T. Burnett, Esq.
Progress Energy Service Company, LLC
P.O. Box 14042
St. Petersburg, Florida 33733-4042

John W. McWhirter, Jr., Esq.
c/o McWhirter Law Firm
P.O. Box 3350
Tampa, Florida 33601-3350
Attorneys for FIPUG

Gary V. Perko, Esq.
Hopping Green & Sams
P.O Box 6526
Tallahassee, FL 32314
Attorneys for Progress Energy Florida

Jeffrey A. Stone, Esq.
Russell A. Badders, Esq.
Beggs & Lane
Attorneys for Gulf Power
P.O. Box 12950
Pensacola, Florida 32576-2950

Capt Sayla L. McNeill, Esq.
Karen S. White, Esq.
Federal Executive Agencies
c/o AFCESA/JACL-ULT
139 Barnes Drive, Suite 1
Tyndall AFB, FL 32403-5319

By: *s/ John T. Butler*
John T. Butler
Fla. Bar No. 283479

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided December 23, 2008

No. 05-1244

STATE OF NORTH CAROLINA,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

UTILITY AIR REGULATORY GROUP, ET AL.,
INTERVENORS

Consolidated with
05-1246, 05-1249, 05-1250, 05-1251, 05-1252, 05-1253, 05-1254, 05-1256, 05-1259, 05-1260, 05-1262, 06-1217, 06-1222, 06-1224, 06-1226, 06-1227, 06-1228, 06-1229, 06-1230, 06-1232, 06-1233, 06-1235, 06-1236, 06-1237, 06-1238, 06-1240, 06-1241, 06-1242, 06-1243, 06-1245, 07-1115

On Petitions for Rehearing

Before: SENTELLE, *Chief Judge*, and ROGERS and BROWN,

Circuit Judges.

Opinion for the Court filed PER CURIAM.

Opinion concurring in part filed by *Circuit Judge* ROGERS.

PER CURIAM: In these consolidated cases, we considered petitions for review challenging various aspects of the Clean Air Interstate Rule ("CAIR"). On July 11, 2008, we issued an opinion, in which we found "more than several fatal flaws in the rule." *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008) (per curiam). In light of the fact that the Environmental Protection Agency ("EPA") adopted CAIR as an integral action, we vacated the rule in its entirety and remanded to EPA to promulgate a rule consistent with our opinion. *Id.* at 929-30.

On September 24, 2008, Respondent EPA filed a petition for rehearing or, in the alternative, for a remand of the case without vacatur. On October 21, 2008, we issued an order on our own motion directing the parties to file a response to EPA's petition. (Order at 1, Oct. 21, 2008.) We also required the parties to "address (1) whether any party is seeking vacatur of the Clean Air Interstate Rule, and (2) whether the court should stay its mandate until Respondent [EPA] promulgates a revised rule." *Id.* Respondent EPA was given leave to "reply to the question whether a stay of the court's mandate in lieu of immediate vacatur would suffice." *Id.*

Having considered the parties' respective positions with respect to the remedy in this case, the court hereby grants EPA's petition only to the extent that we will remand the case without vacatur for EPA to conduct further proceedings consistent with our prior opinion. This method of disposition is consistent with this court's precedent. *See Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (noting this court's prior

practice of remanding without vacatur). This court has further noted that it is appropriate to remand without vacatur in particular occasions where vacatur "would at least temporarily defeat . . . the enhanced protection of the environmental values covered by [the EPA rule at issue]." *Envtl. Def. Fund, Inc. v. Adm'r of the United States EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990). Here, we are convinced that, notwithstanding the relative flaws of CAIR, allowing CAIR to remain in effect until it is replaced by a rule consistent with our opinion would at least temporarily preserve the environmental values covered by CAIR. Accordingly, a remand without vacatur is appropriate in this case.

In addition, some of the Petitioners have suggested that this court impose a definitive deadline by which EPA must correct CAIR's flaws. Notwithstanding these requests, the court will refrain from doing so. Though we do not impose a particular schedule by which EPA must alter CAIR, we remind EPA that we do not intend to grant an indefinite stay of the effectiveness of this court's decision. Our opinion revealed CAIR's fundamental flaws, which EPA must still remedy. Further, we remind the Petitioners that they may bring a mandamus petition to this court in the event that EPA fails to modify CAIR in a manner consistent with our July 11, 2008 opinion. *See Natural Res. Def. Council*, 489 F.3d at 1264 (Randolph, J., concurring).

We therefore remand these cases to EPA without vacatur of CAIR so that EPA may remedy CAIR's flaws in accordance with our July 11, 2008 opinion in this case.

ROGERS, *Circuit Judge*, concurring in granting rehearing in part: In deciding on rehearing to remand without vacating the final rule, the court has adhered to its traditional position where vacating would have serious adverse implications for public health and the environment. *NRDC v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Rogers, J., concurring in part and dissenting in part); *see, e.g., Envtl. Def. Fund, Inc. v. Adm'r of the United States EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990). When the court has ordered vacatur despite potential adverse implications for public health and the environment, it has usually provided an explanation, *see NRDC*, 489 F.3d at 1265, and we did so here, *North Carolina v. EPA*, 531 F.3d 896, 929-30 (D.C. Cir. 2008). We explained that vacatur was appropriate because of the depth of CAIR's flaws, the integral nature of the rule, and because other statutory and regulatory measures would mitigate the disruption caused by vacating the rule. *Id.* However, on rehearing, EPA, petitioners, and amici states point to serious implications that our previous remedy analysis, including our consideration of mitigation measures, did not adequately take into account. The parties' persuasive demonstration, extending beyond short-term health benefits to impacts on planning by states and industry with respect to interference with the states' ability to meet deadlines for attaining national ambient air quality standards for PM2.5 and 8-hour ozone, shows that the rule has become so intertwined with the regulatory scheme that its vacatur would sacrifice clear benefits to public health and the environment while EPA fixes the rule.