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

EME HOMER CITY GENERATION, L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 11-1302 (and
	)	consolidated cases)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
	)	
Respondents.	)	
	)	

EPA'S CONSOLIDATED OPPOSITION TO REMAINING MOTIONS FOR STAY PENDING JUDICIAL REVIEW OF EPA'S TRANSPORT RULE

IGNACIA S. MORENO
Assistant Attorney General
DAVID S. GUALTIERI
JON M. LIPSHULTZ
JESSICA O'DONNELL
NORMAN L. RAVE
Environmental Defense Section
Environment and Natural Resources Div.
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986
(202) 514-4767

OF COUNSEL
SONJA RODMAN
BYRON BROWN
STEPHANIE HOGAN
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

*Authorities upon which we chiefly rely.

STATUTES:

FEDERAL REGISTERS:

LEGISLATIVE MATERIALS:

Pursuant to the Court's Orders of November 14 and 28, 2011, Respondent United States Environmental Protection Agency ("EPA") hereby opposes the ten motions for a stay pending judicial review filed in Nos. 11-1360, 11-1363, 11-1372, 11-1373, 11-1374, 11-1378, 11-1379, 11-1392, 11-1393, and 11-1394,[1] and responds to the seven responses in support of motions for a stay pending judicial review filed in Nos. 11-1329 and 11-1364.[2] For the reasons discussed herein, as well as in EPA's prior responses, all the stay motions should be denied.

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[1] The referenced stay motions are: (1) No. 11-1373, Environmental Committee of the Florida Electric Power Coordinating Group (document 1335573) (filed Oct. 14, 2011) ("FL Utils. Mot."); (2) No. 11-1379, Municipal Electric Authority of Georgia (document 1335586) (filed Oct. 14, 2011) ("GA Utils. Mot."); (3) No. 11-1374, Kansas City Board of Public Utilities (document 1337158) (filed Oct. 21, 2011) ("KS Utils. Mot."); (4) No. 11-1378, Ames, Iowa (document 1337266) (filed Oct. 24, 2011) ("Ames Mot."); (5) No. 11-1393, Wisconsin (document 1337415) (filed Oct. 24, 2011) ("WI Mot."); (6) No. 11-1394, Dairyland Power Coop. (document 1337439) (filed Oct. 24, 2011) ("Dairyland Mot."); (7) No. 11-1360, Entergy Corp. (document 1338085) (filed Oct. 26, 2011) ("Entergy Mot."); (8) No. 11-1363, Wisconsin Elec. Power Corp. (document 1339374) (filed Nov. 1, 2011) ("We Energies Mot."), (9) No. 11-1392, Ohio (document 1342027) (as re-filed Nov. 15, 2011) ("OH Mot."); (10) No. 11-1372, Indiana (document 1341729 (filed Nov. 14, 2011) ("IN Mot.").

[2] The referenced responses are: (1) Michigan (document 1337338) (filed Oct. 24, 2011) ("MI Resp."); (2) Georgia (document 1339038) (filed Oct. 31, 2011) ("GA Resp."); (3) Southern Company, et al. (document 1339073) (filed Oct. 31, 2011) ("Southern Co. Resp."); (4) Alabama, Mississippi, et al. (document 1339054) (filed Oct. 31, 2011) ("AL/MS Resp."); (5) the Utility Air Regulatory Group (document 1338754) (filed Oct. 31, 2011) ("UARG Resp."); (6) Putnam County Georgia (Amicus) (document 1339074) (filed Oct. 31, 2011) ("Putnam Amicus Resp."); and (7) American Electric Power (document 1340481) (filed Nov. 7, 2011) ("AEP Resp.").

INTRODUCTION

These consolidated petitions for review challenge EPA's Cross-State Air Pollution Rule, informally referred to herein as the "Transport Rule."[3] The Transport Rule builds on the success of prior actions EPA has taken since the 1990s to address the interstate transport of air pollutants, a very serious -- and previously somewhat intractable -- public health and welfare issue. The rule focuses on control of emissions of nitrogen oxides ("NOx") and sulfur dioxide ("SO_2") to address interstate contributions to nonattainment of (and difficulties maintaining) the national ambient air quality standards ("NAAQS") for ozone and fine particulate matter ("$PM_{2.5}$"[4]), two widespread air pollution problems that cause a variety of serious health effects (such as bronchitis, asthma, heart attacks, and death). The Transport Rule will achieve dramatic health benefits for over 240 million people living in the eastern half of the United States.[5]

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[3] The final rule was publicly released in July 2011 and published in August 2011. See 76 Fed. Reg. 48,208 (Aug. 8, 2011); see generally http://www.epa.gov/airtransport/actions.html.

[4] The "$_{2.5}$" in this acronym refers to the size of fine particulate matter, i.e., 2.5 microns or less. Other EPA regulations, not at issue here, address relatively more coarse particulate matter up to 10 microns ("PM_{10}").

[5] See 76 Fed. Reg. at 48,308-10 (1 in 20 deaths in the U.S. is attributable to $PM_{2.5}$ and ozone exposure). The $PM_{2.5}$ aspects of the Transport Rule will, based on 2014 modeling, annually reduce between 13,000 and 34,000 deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma; ozone aspects of the Transport Rule will reduce, during the summer ozone season, 27-120 premature

States and utilities whose "upwind" emissions of NOx and SO_2 have been documented by EPA to contribute to "downwind" ozone and $PM_{2.5}$ pollution problems in other States have now filed nineteen motions[6] to stay the Transport Rule pending judicial review on the merits, claiming, among other things, that if not stayed, the rule will cause them imminent and irreparable harm that they could not possibly have anticipated or planned for.[7] As EPA has explained in the nine responses it has filed to date, and as will be further explained herein, these allegations are meritless and, as a whole, represent little more than an unjustified attempt by these States and utilities to evade their long-overdue obligations under the Clean Air Act ("CAA" or "Act").

BACKGROUND

One of the most important components of the Act is the establishment of NAAQS by EPA. These are science-based standards that set limits on certain

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deaths, 240 hospital admissions for respiratory problems, 86 emergency room admissions for asthma, 160,000 days of restricted activity for individuals, and 51,000 days of school absences for children).

[6] We generally refer herein to the nine stay motions to which EPA previously responded simply as the "[Name of Party] Motion."

[7] Of course, the terms "upwind" and "downwind" are somewhat imprecise, since most "upwind" contributors to pollution problems in downwind States are themselves affected by emissions transported from other States, and many have nonattainment or maintenance problems of their own. In fact, as explained herein, the overlapping and criss-crossing nature of pollution contribution linkages is part of the reason why the determination of each State's "significant contribution" is best made using a mixed air quality and cost approach.

pollutants in the ambient air that EPA determines are requisite to protect public health and welfare. See 42 U.S.C. §§ 7408, 7409. States then have the responsibility to adopt state implementation plans -- "SIPs" -- to maintain good air quality in "attainment" areas and to bring "nonattainment" areas into compliance with the NAAQS. Id. § 7410(a). If States do not, EPA must adopt a federal implementation plan -- or "FIP" -- to address these deficiencies. Id. § 7410(c)(1).

A significant confounding factor in this regulatory process is that NAAQS nonattainment and maintenance problems in many States are in part caused by emissions transported from other States, often over vast distances. This is particularly true for ozone and $PM_{2.5}$, which are the two NAAQS pollutants central to the Transport Rule. When a State's pollution problems are caused in part by unchecked emissions from neighboring States, it means that the "downwind" State must regulate its own emissions sources much more stringently to compensate, and in some cases, there is *no* feasible action the downwind State can take on its own to attain and maintain the NAAQS. Absent effective federal control, individual States often have little economic or political incentive to impose regulatory controls (and attendant costs) on pollution sources within their States solely to address air quality problems in downwind States.

Congress recognized and expressly addressed these issues from the outset. In the 1970 version of the Act, Congress required all SIPs to have provisions for

"intergovernmental cooperation" to assure their emissions would not interfere with attainment or maintenance of the NAAQS in other States. 42 U.S.C. § 1857c-5(a)(2)(E) (1970). When this "cooperation" approach proved ineffective, Congress amended the statute in 1977 to require, more directly, that all SIPs contain provisions prohibiting emissions from particular stationary sources that "will prevent" attainment or maintenance of the NAAQS in downwind States. 42 U.S.C. § 7410(a)(2)(E) (1977). In adding these (and related) new provisions in 1977, Congress recognized the scant incentive that upwind States had to control their interstate pollution contributions and made clear its intent that the burdens of air pollution control be shared more equitably among the States.[8]

By 1990, there was an even greater awareness that certain air pollution problems, particularly in the eastern United States, were unlikely to be successfully

[8] For example, the House Committee viewed existing law as "an inadequate answer to the problem of interstate air pollution." H.R. Rep. No. 95-294, at 330 (1977), reprinted in 4 A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legis. Hist."), at 2797 (Comm. Print 1978). The House Report stressed that one of the problems under the existing law was that its effectiveness depended largely on "prevention or abatement" by upwind States that in reality had little "incentive and need to act." Id. Similarly, the Senate Committee Report criticized the lack of effective "interstate abatement procedures" and "interstate enforcement actions" under existing law, which the Committee viewed as "resulting in serious inequities among several States, where one State may have more stringent implementation plan requirements than another State." S. Rep. No. 95-127, at 41, reprinted in 3 1977 Legis. Hist. 1415. Accordingly, the new provisions were "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." Id. at 1416.

addressed without enhanced control of interstate pollution transport.[9] Further, the statutory criterion established in 1977 proved difficult to meet. In a number of decisions EPA had found that it could not be demonstrated that upwind pollution contributions by particular sources were "prevent[ing]" NAAQS attainment downwind. See Michigan v. EPA, 213 F.3d 663, 674 (D.C. Cir. 2000) (discussing this history). For these reasons, in the 1990 CAA amendments, Congress added and strengthened a number of provisions relating to interstate pollution transport, including (as pertinent here) a significant change to section 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D), which extended the reach of that provision beyond a single stationary source to cover multiple sources and other emissions activities that "contribute significantly" to downwind nonattainment or maintenance problems (as opposed to the former standard of "will prevent" attainment).[10]

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[9] See S. Comm. on Env't & Public Works, Clean Air Act Amendments of 1989, S. Rep. No. 101-228, at 48 (1989), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1990, at 8388 ("1990 Legis. Hist."). See also Lautenberg, S. Debate on H.R. Conf. Rep. No. 101-952 (1990), reprinted in 1 1990 Legis. Hist. at 1106 ("In New Jersey, the Department of Environmental Protection says that on some days even if we shut down the entire State, we would be in violation of some health standards because of pollution coming over from other states."); S. Rep. No.101-228, at 49 (1989), reprinted in 5 1990 Legis. Hist. at 8389 (similar statement regarding New York City).

[10] Compare 42 U.S.C. § 7410(a)(2)(E) (1977) ("prohibiting [emissions from] any *stationary source* within the State . . . which will . . . *prevent* attainment or maintenance by any other State") (emphasis added), with 42 U.S.C. § 7410(a)(2)(D)(i)(I)(1990) ("prohibiting, consistent with the provisions of this title, any source *or other type of emissions activity* within the State . . . which will . . .

Following enactment of the 1990 CAA amendments, States and EPA began an effort to address interstate contributions to ozone nonattainment in a cooperative and comprehensive fashion.[11] Although this process ultimately did not yield a consensus among EPA and all the States involved, the air quality modeling and other technical work of the group provided much of the foundation for EPA's 1998 "NOx SIP Call." That rule required 22 States and the District of Columbia to adopt additional restrictions on the emissions of nitrogen oxides ("NOx") to address their interstate contributions to ozone nonattainment and established a mechanism to address such contributions -- the NOx Budget Trading Program. See 63 Fed. Reg. 57,356 (Oct. 27, 1998). This Court upheld the NOx SIP Call in most significant respects in Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). The Court found that EPA acted permissibly in utilizing "a very low threshold of contribution," based on emissions data and air quality modeling, to determine which upwind/downwind linkages were sufficient to warrant inclusion of particular

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contribute significantly to nonattainment in, or interfere with maintenance by, any other State") (emphasis added).

[11] In 1995, 37 States east of the Rockies, along with representatives from EPA, industry and environmental groups, formed the Ozone Transport Assessment Group ("OTAG") to study interstate ozone pollution and develop solutions to the problem. 63 Fed. Reg. 57,356, 57,361 (Oct. 27, 1998). OTAG conducted comprehensive studies of interstate ozone formation and transport, and considered means to mitigate the problem. OTAG concluded that reductions in emissions of oxides of nitrogen were necessary to address interstate ozone transport, but its members could not reach consensus on specific control recommendations. 62 Fed. Reg. 60,318, 60,320 (Nov. 7, 1997).

States in the SIP Call. 213 F.3d at 675. Once the universe of such "contributing" States was determined, the Court also upheld EPA's decision to base each State's NOx emissions "budget" primarily on an analysis of the amount of emissions that could be controlled in a highly cost-effective manner, which was intended, among other things, to ensure that States would have to make the same minimum degree of investment in addressing pollution problems to which they collectively contribute. Id. at 675-79.

In 2005, EPA largely replaced the NOx SIP Call with the Clean Air Interstate Rule, or "CAIR." See 70 Fed. Reg. 25,162 (May 12, 2005).[12] While similar in many respects to the NOx SIP Call, CAIR also addressed interstate contributions to $PM_{2.5}$ pollution problems through annual NOx and SO_2 emission limitations. The Court invalidated CAIR in North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008).[13] North Carolina re-affirmed Michigan's general acceptance of a cost-effectiveness analysis, but it held that, due to CAIR's relatively broad trading provisions and other features, the rule did not adequately assure that each upwind State would, in fact, eliminate those emissions that contribute significantly to downwind nonattainment in other States. Id. at 907-08. The Court also held that

[12] While the NOx SIP Call requirements remained in place, the NOx Budget Trading Program established in the NOx SIP Call was sunsetted and replaced with the CAIR NOx ozone season trading program.

[13] The Court initially vacated CAIR, id. at 930, but on rehearing remanded the rule without vacatur. North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008).

EPA did not adequately coordinate CAIR's regulatory deadlines with the NAAQS attainment deadlines facing the "downwind" States whose NAAQS attainment and maintenance problems the rule was designed to address. Id. at 911-12. Finally, although the Court ultimately agreed to leave CAIR in place as an interim measure to avoid undue regulatory disruption and adverse environmental effects, it also stressed, in unequivocal terms, that the Court's forbearance would not be "indefinite" and that EPA must act expeditiously to remedy the "fundamental flaws" the Court had identified in CAIR. 550 F.3d at 1178.

The Transport Rule represents EPA's response to the remand of CAIR. See 76 Fed. Reg. 48,208 (Aug. 8, 2011). In brief, the Transport Rule identifies those States with emissions that significantly contribute to nonattainment or interfere with maintenance of the ozone or $PM_{2.5}$ standards in other States, establishes emissions budgets for covered electric generating units ("EGUs") in each such State,[14] and promulgates FIPs to achieve the necessary reductions in each State. See 76 Fed. Reg. at 48,209-16. Phase I of the rule addresses emissions beginning in 2012. Phase II applies more stringent SO_2 standards in some States for 2014 and beyond. Id. at 48,211. EPA also substantially revised the trading program so that,

[14] To address significant contribution to downwind ozone problems, the Transport Rule establishes a budget for NOx, an ozone precursor, during the ozone season. To address significant contribution to downwind $PM_{2.5}$ problems, the Transport Rule establishes annual budgets for NOx and SO_2, which are $PM_{2.5}$ precursors.

while it is still flexible enough to allow sources to adjust to variability in the electricity sector, it also contains certain state-specific limits (referred to as "assurance provisions") "to ensure that the necessary emission reductions occur within each covered state." Id. at 48,271.

STANDARD OF REVIEW

"On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985). A movant must demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury if relief is withheld; (3) lack of harm to other parties from a stay; and (4) that a stay would serve the public interest. Nken v. Holder, 129 S. Ct. 1749, 1761 (2009); see also D.C. Cir. R. 18(a)(1).

On the first factor, Petitioners must show that EPA's action is likely to be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This deferential standard prohibits a court from substituting its judgment for the agency's and presumes the validity of agency actions. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983). Courts defer to agency constructions of statutes they administer, Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-45 (1984), and of their own regulations. Auer v. Robbins, 519 U.S. 452, 457 (1997). "In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were

so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8).

To establish irreparable harm, Petitioners must demonstrate an injury that is "both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). A mere possibility of such harm is insufficient. Winter v. NRDC, 555 U.S. 7, 20-24 (2008). Alleged economic losses do not constitute irreparable injury except in the most extreme circumstances, i.e., where the "very existence" of a company is threatened. Wisconsin Gas, 758 F.2d at 674. Further, regulatory compliance costs generally do not constitute irreparable injury. See, e.g., American Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980); A.O. Smith Corp. v. FTC, 530 F.2d 515, 527–28 (3d Cir. 1976).

SUMMARY OF ARGUMENT

"A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" Nken, 129 S. Ct. at 1757 (citations omitted). Stated another way, a stay is "extraordinary" relief, Cuomo, 772 F.2d at 978, which should only be sought in similarly extraordinary situations. Here, however, out of the forty-five petitions for review that have been filed, nineteen

have been accompanied by a stay motion, and numerous other Petitioners have filed "responses" in support of stay motions that effectively seek the same relief.

While the number of stay motions and responses are certainly not determinative of the substance of Petitioners' claims, the sheer number of issues presented at this stage does reinforce the conclusion that Petitioners have, collectively, made little or no effort to present to the Court only those claims they truly believe are "extraordinary." Instead, they seem to have bundled into their stay motions just about every conceivable merits challenge and every possible "injury" they can think of, hoping that something in this mountain of paper may resonate with the Court. This approach is wholly inconsistent with the stringent standards for a stay pending judicial review, and it is especially inappropriate in light of the sweeping relief sought by Petitioners here.

As discussed above, the Transport Rule represents the culmination of decades of Congressional, administrative, and judicial efforts to fashion a workable, comprehensive regulatory approach to interstate air pollution issues that have huge public health implications. The legislative history of the Act clearly reflects a Congressional frustration with the historical failure of upwind States to take effective action on their own to curtail their contributions to pollution problems in downwind States. The Transport Rule addresses and effectuates this Congressional intent, and many, if not most, of the specific features of the rule

challenged by Petitioners (e.g., restrictions on interstate trading; the timing of the rule to address CAA compliance deadlines; the mix of air quality and cost considerations used to define "significant contribution") are, in fact, direct responses to guidance from this Court in North Carolina and Michigan. In sum, the stay motions are little more than unjustified attempts by certain upwind States and utilities to block an exceptionally well-documented, lawful, and important rule solely to serve their own parochial and economic interests.

1. Petitioners have no likelihood of success on the merits.

One of the Petitioners' most prominent merits contentions is that EPA should not have issued federal implementation plans, but instead should have delayed the relevant compliance dates to give States additional time to submit their own implementation plans. However, as discussed above, the Act has obligated States to adopt SIP provisions to address interstate air pollution since the 1970s, and it has been clear since this Court's 2008 decision in North Carolina that neither the provisions of the CAIR FIPs, which remain in place in several States, nor SIP provisions that merely implemented the requirements of CAIR, were sufficient to satisfy this obligation. Further, the Court in North Carolina stressed EPA's obligation to help States meet their CAA compliance deadlines. North Carolina, 531 F.3d at 911-12.

Where implementation plan deficiencies continue to exist, the statute obligates EPA to step in with a FIP. Further, States that truly were interested in adopting their own interstate transport SIP provisions have had years to do so – interstate transport SIPs for the 1997 NAAQS were due in 2000 and those for the 2006 NAAQS were due in 2009. However, the States raising these claims either did not develop any such SIP revisions at all following North Carolina, decided to remain subject to the CAIR FIPs, and/or submitted proposed revisions to EPA that were clearly inadequate. Against this background, EPA not only had the authority under the Act to promulgate FIPs for the covered States but, indeed, had an obligation to do so. Such EPA action is precisely what the Act mandates and is not an improper intrusion on state sovereignty. Consistent with the state/federal partnership created by the Act, however, the Transport Rule provides that any State that truly wishes to take over its transport obligations under a SIP may do so, as long as its plan achieves at least the same emission reductions as EPA's.

Petitioners also make a hodgepodge of arguments contending, in one way or another, that EPA incorrectly gauged the "significant contribution" of particular States. Many Petitioners argue, more specifically, that significant contribution should be defined solely with respect to air quality analyses, apparently because they believe such an approach would result in less stringent controls in their particular State. EPA's task here, however, was to develop a regulatory approach

that addressed the *entirety* of this complex, multi-State pollution issue, where contributions from numerous upwind States typically are linked to particular downwind nonattainment problems. From a technical perspective, EPA explained why an air quality-only approach would not be an effective or efficient *overall* response to the complex collective-contribution problem presented here, and this analysis stands essentially undisputed. And from a legal perspective, the mixed air-quality and cost-effectiveness approach the Agency instead adopted was previously upheld in both Michigan and North Carolina.

A number of Petitioners also claim they did not have sufficient opportunity to comment on aspects of the rule of concern to them. However, the proposed rule, combined with three separate supplemental notices, provided Petitioners (and all members of the public) with more than ample notice and opportunity to comment on EPA's methodology, data, and general approach, and nothing in the Clean Air Act or the Administrative Procedure Act required more. Petitioners thus cannot show any legal defect in the notice or opportunity to comment provided by EPA, and they certainly cannot satisfy the stringent standard for alleged procedural errors established by CAA Section 307(d)(8), 42 U.S.C. § 7607(d)(8).

2. Petitioners have not demonstrated irreparable injury.

Petitioners fare no better in their attempts to show that they will suffer irreparable injury before their claims can be heard on the merits. While covered

sources must hold allowances sufficient to cover emissions that occur during 2012, the State budgets set forth in the initial stage of the Transport Rule (i.e., for 2012 and 2013) are based primarily on the capabilities of existing and previously-planned emission controls. When reductions that are expected or required to be in place by 2012 are taken into account, it becomes clear that Petitioners' claims that drastic reductions will be required by 2012 are (to varying degrees) grossly exaggerated. The flexibility of the rule gives individual sources multiple compliance options. The rule does not set emission limits for individual sources, and sources with emissions above their initial allowance allocations will have more than ample opportunity to purchase enough allowances to cover any shortfall (in fact, there already is solid evidence of the development of a robust market for such allowances). Furthermore, parties are not required to demonstrate their compliance with the allowance holding requirements rule until the end of 2012 (for ozone season NOx budgets) or the Spring of 2013 (for annual SO_2 and NOx budgets), so the merits of this case could be heard in the normal course before either of these certifications have to be made.

It is true that the Transport Rule, like any significant regulation, will impose some compliance costs on regulated entities. However, such compliance costs do not constitute irreparable injury; if this were not the case, then this Court would be asked to stay nearly *every* regulation for which judicial review was sought by a

regulated entity. Simply put, a stay is extraordinary relief, only granted in extraordinary circumstances, and none of the cost allegations posited by Petitioners (e.g., temporarily reduced profits) rises anywhere close to this level.

Nor is there merit to Petitioners' reckless and unjustified claims that the Transport Rule will threaten electric reliability. Although the specifics of Petitioners' allegations vary somewhat from State to State, they all are generally based on a host of demonstrably incorrect and extreme assumptions about the lack of compliance options and the unavailability of allowances. In reality, however, the rule provides all utilities with a host of compliance options that will easily allow them to meet all established reliability protocols. In order to ensure the rule was compatible with reliable grid operation, EPA's modeling took into account regional constraints informed by the planning studies conducted by the North American Electric Reliability Corporation ("NERC"). Declaration of Sam Napolitano ¶ 53, Attachment 1. In addition, EPA's own analysis confirmed that all regions covered by the rule would have sufficient capacity to meet foreseeable peak electricity demand with an adequate reserve margin. Id. ¶¶ 55-57.

Indeed, a November 2011 report by NERC, looking at the potential impact of four separate EPA rules (the other three of which are not yet final), confirms that the Transport Rule will not threaten electric reliability, and especially not the requirements of the rule's relatively less stringent first phase that will be in place

while the merits of this case are likely to be briefed and argued.[15] Generally speaking, NERC's assessment is a stress test (applying many worst case assumptions) that projects no significant change in resource adequacy and ample reserve margins in all scenarios for the year 2013. See Napolitano Decl. ¶ 57.[16]

3. The balance of harms favors denying a stay.

The harm to the public of the stay sought by Petitioners vastly outweighs any conceivable economic benefit Petitioners might gain by being relieved of some compliance costs during 2012. EPA's analysis -- which is not seriously disputed here -- documents the tremendous public health benefits (e.g., far fewer deaths, hospitalizations, and missed work and school days resulting from respiratory and cardiovascular problems) that will result from Transport Rule.

It is no answer to say, as some Petitioners do, that the Court could simply stay the Transport Rule as it applies to some or all States, with CAIR resurrected in

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[15] See 2011 Long-Term Reliability Assessment, NERC (November 2011) (available at http://www.nerc.com/files/2011LTRA_Final.pdf) ("NERC 2011 LTRA").

[16] Compare NERC 2011 LTRA at 152,Table 37: 2013 Reference Case (showing reserve margins in the absence of any EPA rules) with id. at 153,Table 38: 2013 Moderate Case Results (showing reserve margins in 2013 with EPA rules). The 2013 scenario presented is the most relevant because the NERC study analyzes at the potential impact of four separate EPA rules (three of which have not yet been finalized). The Transport Rule is the only one of the four where compliance in 2013 is required, and thus the 2013 results largely isolate the impact of the Transport Rule, demonstrating that this rule alone has little, if any, impact on anticipated or potential reserve margins.

whole or in part in the interim. As explained in EPA's prior responses, and as is also discussed herein, even a stay "limited" to particular States would greatly undermine effective emissions control because the CAIR requirements would cease to constrain emissions due to disruptions to the normal trading of allowances, and would also result in substantial confusion in the regulated community. Moreover, it is difficult to see how such a course could possibly be said to serve the public interest, since this Court in North Carolina found CAIR to be legally deficient in a number of critical respects, and the primary purpose of the Transport Rule is to replace CAIR in a manner that addressed the Court's concerns.

ARGUMENT

I. PETITIONERS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

A. EPA Has Statutory Authority to Promulgate the Transport Rule FIPs.

Most of the Petitioners assert that EPA lacked authority to implement the Transport Rule by promulgation of FIPs. Although they base their arguments on such concepts as "cooperative federalism," "state sovereignty," or the supposed structure of the Act, they assiduously avoid addressing the actual language of the statute. As described in detail in our previous responses (see, e.g., EPA Opp. to EME Homer Mot., document 1328647, at 6-12; EPA Opp to NE Mot., document 1335231, at 9-12), CAA section 110(c)(1) states that "The Administrator *shall*

promulgate a Federal implementation plan at any time within 2 years" after EPA either finds that a State has failed to make a required SIP submission or disapproves a submitted SIP in whole or in part. 42 U.S.C. § 7410(c)(1) (emphasis added). For every State subject to the Transport Rule, EPA has made a determination of either failure to submit a SIP or has disapproved a SIP with regard to the 1997 ozone NAAQS, the 1997 $PM_{2.5}$ NAAQS, and/or the 2006 $PM_{2.5}$ NAAQS. U.S. EPA, Status of CAA 110(a)(2)(D)(i)(I) SIPs Final Rule TSD (July 2011) (Attachment 2). Thus, the States have had their opportunities to address their significant contribution to nonattainment or interference with maintenance in other States and have failed to do so. In such circumstances, the CAA not only authorizes, but requires, EPA to promulgate one or more FIPs for each State to address its significant contribution.

To the extent Petitioners do address the statute, they erroneously focus on section 110(k)(5), 42 U.S.C. § 7410(k)(5). See, e.g., WI Mot. at 6; FL Utils. Mot. at 2; GA Resp. at 2. Section 110(k)(5) authorizes EPA to issue a "SIP Call" when it determines that a State's existing SIP does not meet CAA requirements. It is not applicable to a situation, such as exists here, where the States have failed to comply with their obligations under the Act, and EPA has made a finding of failure to submit or has disapproved a State's SIP. The NOx SIP Call (upheld in Michigan) and CAIR (reviewed in North Carolina) illustrate the difference.

The NOx SIP Call was a SIP Call issued in the absence of any findings of failure to submit or SIP disapprovals. It required certain States to modify their SIPs to eliminate their significant contributions to nonattainment or interference with maintenance in other States. While the NOx SIP Call established NOx budgets for each covered State and required sources to participate in the allowance programs established, it did not allocate allowances to individual sources. CAIR, however, was not a SIP Call and EPA did not issue a SIP Call before promulgating CAIR. For all of the States covered by CAIR, EPA had made a finding of failure to submit, see 70 Fed. Reg. 21,147 (Apr. 25, 2005), and EPA promulgated a CAIR FIP for each covered State, 71 Fed. Reg. 25,328 (Apr. 28, 2006), which required covered sources to participate in the CAIR allowance programs and allocated allowances to individual units.

There is nothing in section 110(c)(1), which is the basis for EPA's promulgation of both the Transport Rule and CAIR FIPs, that requires EPA to issue a SIP Call before promulgating a FIP. 42 U.S.C. § 7410(c)(1). When EPA promulgates a new NAAQS or revises an existing NAAQS, as it did with the 1997 ozone and $PM_{2.5}$ NAAQS and the 2006 $PM_{2.5}$ NAAQS, States are obligated to submit SIP revisions to address the new or revised NAAQS. 42 U.S.C. § 7410(a)(1), (k)(2),(3). This includes the obligation to address their significant contribution to nonattainment or maintenance problems in other States. Nothing in

this provision makes the State's obligation contingent on a determination by EPA as to what constitutes significant contribution. Rather the Act imposes an affirmative obligation on the States to address emissions from the State that significantly contribute to nonattainment or interfere with maintenance in other States. The States have not met that obligation with respect to the pollutants covered by the Transport Rule. Thus, for each of the States subject to the Transport Rule, EPA either found that the State had failed to make one of these required submissions or disapproved a submission. Under those circumstances, section 110(c)(1) explicitly requires EPA to promulgate a FIP for each such State, whether or not it has issued a SIP Call.

Virginia v. EPA, 108 F.3d 1397 (D.C. Cir.), modified on other grounds, 116 F.3d 499 (D.C. Cir. 1997), is inapplicable here for the same reason. In Virginia, EPA had issued a SIP Call and the Court held that EPA had improperly required the States to adopt California's motor vehicle regulations as a condition of SIP approval. Id. at 1403-04. The Transport Rule is not a SIP Call and does not require the States to do anything. Rather, it is a federal regulation that directly regulates individual sources. Thus, Virginia is inapposite.[17] The CAA

[17] Moreover, even in the context of a SIP Call, the Court has held that EPA's specification of State budgets based in part on cost-effectiveness was not inconsistent with Virginia because States could choose how to achieve those budgets, just as EPA does in the FIP context. Michigan, 213 F.3d at 685-88.

contemplates, and, in fact, requires that EPA act when the States have failed to do so. The States subject to the Transport Rule have failed to address their significant contributions to ozone and $PM_{2.5}$ pollution problems in other States, and thus EPA has done so. 76 Fed. Reg. at 48,219-20.

Finally, Ohio's claim that EPA improperly disapproved its proposed SIP to address the 2006 $PM_{2.5}$ NAAQS, OH Mot. at 15-17, is inapposite. First, EPA's disapproval of that submission is a separate EPA action not under review here. In fact, Ohio has filed a separate petition in the Sixth Circuit seeking review of that decision. Ohio v. EPA, No. 11-3988 (6th Cir. filed Sept. 19, 2011). Thus, that issue is not before this Court. Second, Ohio is subject to the annual NOx and SO_2 programs of the Transport Rule regardless of the validity of EPA's disapproval of Ohio's SIP regarding the 2006 standard because EPA found that Ohio had failed to submit a SIP addressing interstate transport requirements for the 1997 $PM_{2.5}$ NAAQS; Ohio did not challenge this finding. Attachment 2 at 9; see EPA Opp. to EME Homer Mot., document 1328647, at 8-10 (demonstrating that EPA's approval of CAIR SIPs does not eliminate EPA's authority to promulgate a FIP because this Court's decision in North Carolina demonstrates that those SIPs do not correct the deficiency.) Finally, the guidance cited by Ohio (at 16) was applicable only to SIPs addressing the 1997 NAAQS revisions and said that States could rely on CAIR for addressing those revisions. Because CAIR did not address

the 2006 NAAQS revisions, the guidance was completely inapplicable to SIP requirements arising out of those revisions.

B. EPA Used an Appropriate Approach For Defining the Amount of Each State's Significant Contribution.

A number of Petitioners challenge the manner in which EPA calculated each State's "significant contribution," which, as discussed above, was based on a mixed air quality and cost approach.[18] Most of these Petitioners argue that significant contribution should instead be defined exclusively by air quality considerations. None of these arguments has merit.

By way of background, as discussed above, EPA used air quality modeling initially to determine which upwind States made emissions contributions that were significant enough to link them with particular downwind nonattainment or maintenance problems. See generally 76 Fed. Reg. at 48,238-46.[19] Typically, the modeling showed that for each such downwind receptor with an ozone or $PM_{2.5}$

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[18] See WI Mot. at 8-9; Dairyland Mot. at 12-13; FL Utils. Mot. at 14; GA Utils. Mot. at 11-14; AL/MS Resp. at 3-9.

[19] Specifically, at this stage of its analysis, EPA used "CAMx" (Comprehensive Air Quality Model with Extensions) source apportionment modeling to "quantify the contribution of emissions from various sources . . . to quantify the downwind contributions of ozone and $PM_{2.5}$ from upwind states." 76 Fed. Reg. at 48,229. An emissions and economic model -- the Integrated Planning Model, or "IPM" – was used to develop the EGU emission inventories which are one of many inputs into the CAMx model. In addition, in later stages of its analysis, EPA used IPM modeling to help determine appropriate emission budgets for each State by predicting NOx and SO_2 emissions from EGUs in each State after implementing controls at defined cost thresholds. 76 Fed. Reg. at 48,259-61.

nonattainment problem, there are numerous (sometimes as many as two dozen or more) upwind States whose emissions make some contribution greater than zero to the problem.[20] EPA then used numerical thresholds (generally based on one percent of the applicable NAAQS) to determine, out of these groups, which upwind State contributions to downwind problems are so small as to warrant exclusion, while a combination of air quality and cost-effectiveness analyses were conducted to determine whether, and if so how much, States above the threshold are "significantly contributing" to downwind nonattainment problems. The upwind States identified in this analysis became the universe of States subject to the Transport Rule. See 76 Fed. Reg. at 48,222-46.

EPA then calculated the emission "budgets" for each State based on average yearly electric generating unit ("EGU") emissions after all significant contribution has been eliminated. For $PM_{2.5}$, EPA set annual budgets for NOx and SO_2, both of which are $PM_{2.5}$ precursors. For the SO_2 budgets, EPA separated upwind States into two groups. Id. at 48,264. In "Group 1" States, which are required to make more stringent reductions, the final SO_2 budgets are based on the amount of SO_2

[20] See generally Air Quality Monitoring Final Rule Technical Support Document, Appendix D (June 2011) (available at: http://www.epa.gov/airtransport/pdfs/AQModeling.pdf) (showing contributions from each upwind State to each downwind receptor).

that will be emitted if controls costing up to $2,300 per ton are implemented.[21] In "Group 2" States, all SO_2 budgets are based on less stringent controls costing up to $500 per ton. Overall, EPA's analysis indicated that these reductions would fully and cost-effectively address significant interstate contributions to $PM_{2.5}$ nonattainment and maintenance problems. 76 Fed. Reg. at 48,209-12, 48,252-55.

Although Petitioners' motions are not entirely clear (or uniform) on this point, their main argument appears to be that EPA must identify the specific level at which a State's emissions would meet but not exceed the one percent threshold used in the air quality portion of EPA's analysis, and that EPA may not define particular States' "significant contribution" to be any more than that amount. See, e.g., Dairyland Mot. at 12-13; WI Mot. at 8-9; AL/MS Resp. at 5. Some of these Petitioners make the related suggestion that the percentage of emission reductions required from each upwind contributor to a particular downwind pollution problem must be proportional to each of the upwind States' relative degree of modeled air quality contributions. See, e.g., WI Mot. at 10; FL Utils. Mot. at 14.

[21] The 2012-13 budgets for "Group 1" States are based on the amount of SO_2 that will be emitted if controls up to $500 ton are implemented, and the budgets for 2014 and beyond are based on the amount of SO_2 that will be emitted if controls costing up to $2,300 per ton are implemented.

While the more specific of these claims are grossly exaggerated and meritless on their own terms,[22] the fundamental problem is that all of these arguments are focused entirely on the narrow desired result of minimizing the emissions reductions of a single upwind State, as measured by its contributions to a single downwind receptor. But EPA's task in the Transport Rule was to address the much broader and more complex web of interstate transport issues affecting more than half the States in the country. In reality, most upwind States contribute to nonattainment in multiple downwind States, and all downwind nonattainment problems are caused by the combined contributions of local emissions and transported emissions from multiple upwind States. Thus, as EPA explained at the time of proposal, air quality-only approaches to this "collective contribution" problem generally require each upwind State to reduce its emissions to address the maximum contribution that the State makes to any downwind nonattainment problem, resulting in much larger required emission reductions in upwind States than would be necessary, collectively, to address the identified downwind nonattainment issues.[23] The mere fact that certain Petitioners believe their narrow

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[22] See Part I.D, infra; see also Declaration of Brian S. Timin ¶¶ 5-16 (Attachment 3).

[23] U.S. EPA, Alternative Significant Contribution Approaches Evaluated TSD (July 2010), at 3-7 (available at http://www.epa.gov/airtransport/pdfs/TSD_alternative_significant_contribution_approaches.pdf).

interests would have been better served in this particular case by an air-quality only approach does not rebut EPA's well-reasoned choice of a different approach for the rule that better serves the goals of the statute and this Court's guidance.

Michigan and North Carolina support EPA's approach of using both air quality and cost considerations to inform its analysis of whether, and how much, particular States "contribute significantly to nonattainment," as that term is used in CAA section 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I). As discussed above, in Michigan this Court held that the term "significant" as used in this phrase is *not* limited exclusively to air quality and health issues, but instead is properly read to include economic considerations. Michigan, 213 F.3d at 674-79. The Court re-affirmed this aspect of Michigan in North Carolina. North Carolina, 531 F.3d at 917. It is true that in North Carolina, the Court found that CAIR utilized a flexible emission-trading system and other features that undermined EPA's obligation to assure that state-specific nonattainment problems would be addressed. Nothing in North Carolina, however, precludes use of a more state-specific and refined analysis, as EPA did here, which assures that the rule will be cost-effective and meet the State-specific air quality requirements of the statute.[24]

[24] The Transport Rule adopted a number of important revisions from the approach taken in CAIR to address the Court's concerns on these issues, including a much more restricted emissions trading program, "variability" limits on the amount by which each contributing State can exceed its yearly emissions budgets, an air-quality-based approach to identifying cost thresholds, and a two-part

Nor is there any basis for the suggestion that Michigan only allowed the use of costs to *reduce* the stringency of required emission reductions that would otherwise be required by air quality modeling. See AL/MS Resp. at 8-9. In fact, Michigan *rejected* an almost identical set of arguments. In that case, one of the Petitioners' critiques of the NOx SIP Call was that it used a relatively "uniform" analysis to determine each State's required emission reductions. Michigan, 213 F.3d at 679. Petitioners argued, much like Petitioners here, that EPA instead should have made "reductions from sources near the nonattainment areas (or otherwise more damaging, molecule for molecule) more valuable than ones from distant sources . . . ." Id. Petitioners also criticized EPA's approach on the basis that "where two states differ considerably in the amount of their respective NOx contributions to downwind nonattainment, under the EPA rule even the small contributors must make reductions equivalent to those achievable by highly cost-effective measures." Id. In response, the Court simply explained that EPA had articulated a reasonable basis in the record for its decision to use a cost-effectiveness approach to "significant contribution," that the effects objected to by Petitioners naturally flowed from EPA's decision, and that "[o]ur upholding of that

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approach to SO_2 contributions which, as discussed in the text, applies relatively less stringent cost-effectiveness criteria to some States. See generally 76 Fed. Reg. at 48,209-16. In the final step of its analysis, EPA conducted modeling to assure that the program would achieve appropriate state-specific air quality results, 76 Fed. Reg. 48,253-55, and Petitioners do not directly contest that modeling here.

decision logically entails upholding this consequence." Id.; see also North Carolina, 531 F.3d at 908, 917 (re-affirming this aspect of Michigan).[25]

It bears emphasis that under the Transport Rule, a State's "significant contribution" to downwind NAAQS nonattainment is *not* equivalent to the above-described thresholds that EPA used to help identify States whose contributions were large enough to warrant further consideration, as some Petitioners claim. See, e.g., Dairyland Mot. at 12. Instead, as EPA clearly explained, the cited thresholds were merely an analytical tool used by EPA in the first step of a multi-factor analysis to help determine which States should be included in the rule.[26] Once those States were identified, their "significant contribution" was defined not in relation to the thresholds, but instead with respect to the amount of emissions within the State that could be reduced at a specific cost threshold identified for

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[25] Some Petitioners also suggest that in North Carolina, the Court prohibited EPA from requiring States to reduce more than their amount of modeled air quality contributions to downwind nonattainment and maintenance problems. See, e.g., WI Mot. at 9 (citing North Carolina, 531 F.3d at 917-21). This is incorrect. In fact, as noted in the text, the cited portion of North Carolina re-affirmed Michigan's general acceptance of a cost-effectiveness approach to "significant contribution," but determined that two specific features of CAIR -- the rule's use of acid rain allowances in the trading program and of "fuel factors" as part of the budget-setting process -- were inadequately justified and explained. As noted above, however, EPA made a number of changes in response to North Carolina, and neither of these features of CAIR was utilized in the Transport Rule.

[26] 76 Fed. Reg. at 48,246-48; see also North Carolina, 531 F.3d at 916-17 (recognizing that similar thresholds used in CAIR were used only to help determine the inclusion or exclusion of particular States in the rule, not the amount of each State's "significant contribution").

each State by utilizing the combined cost-effectiveness and air quality analysis described above. 76 Fed. Reg. at 48,248-65. Thus, the Petitioners' suggestion that the rule creates a mismatch between the amount of a State's "significant contribution" and the amount of its required emission reductions is, in this respect, little more than a mischaracterization of the record.[27]

Finally, there also is no merit to Georgia Utilities' argument that EPA's significant contribution analysis was flawed, with respect to Georgia, because it supposedly will require specific sources in Georgia to make SO_2 emission reductions costing more than $500 per ton. GA Utils. Mot. at 12-14. This argument reflects a misunderstanding of the rule and is premised on an exaggerated estimate of compliance costs. See Napolitano Decl. ¶¶ 77-79. The $500 per ton SO_2 threshold is neither a binding cap on the cost of potential compliance costs, nor is it used to define unit or utility-specific compliance requirements. Id. Instead, it was used to estimate the point at which air quality impacts in downwind States noticeably changed; when reductions available at $500/ton were implemented the relevant downwind receptors came into attainment and resolved maintenance problems. See 76 Fed. Reg. at 48,257. Notwithstanding this analytical approach, the Transport Rule provides flexibility in compliance

[27] See also, e.g., EPA's Opp. to Wisconsin Public Service Corp.'s Mot., document no. 1337434, at 7-13 (filed Oct. 24, 2011) (discussing issues in detail).

options, and covered EGUs may choose to comply using a method that costs less or more than $500 per ton. In short, the cost threshold was an analytical tool used by EPA, not a compliance requirement.

For all the foregoing reasons, EPA's approach to "significant contribution" issues was reasonable, is consistent with the statute, and likely will be upheld.

C. EPA Gave Adequate Notice of the Final Budgets.

Many of the stay motions assert that EPA failed to give adequate notice of the emission budgets in the final rule because those budgets changed from the proposal. As we have explained in our responses to other stay motions, EPA provided adequate notice because it identified in the proposal the methodology it would use to establish the budgets and provided opportunities to comment on the changes to the model and data being used. See, e.g., EPA Opp. to NE Mot., document 1335231, at 7-9. The changes in budgets from the proposal to the final rule are in large part the result of information provided in comments, and thus the final rule is a logical outgrowth of the proposal. As this Court has held, a final rule may permissibly differ from the proposal if it is a "logical outgrowth" of the proposal "where the agency gave adequate notice of the procedures it intended to use, the criteria by which it intended to select data, and the range of alternative sources of data it was considering." Am. Coke & Coal Chems.Inst. v. EPA, 452 F.3d 930, 939 (D.C. Cir. 2006).

The budgets under the rule represent each State's emissions in an average year after implementation of reductions needed to eliminate emissions that significantly contribute to nonattainment or interfere with maintenance in other States. 76 Fed. Reg. at 48,260. To identify the necessary reductions, EPA used an air-quality-based analysis to identify appropriate cost thresholds and the Integrated Planning Model ("IPM")[28] to predict NOx and SO_2 emissions from electric generating units in each State after implementing controls at those cost thresholds. 76 Fed. Reg. at 48,255-61. The change in the budgets between the proposed and final rules is due primarily to modifications EPA made to the IPM to make it more accurate, including addressing public input suggesting that certain IPM updates were needed. Id. at 48,260.

EPA provided an opportunity to comment on the revisions to the model through a Notice of Data Availability ("NODA") that stated that EPA had made changes in the IPM, that detailed documentation of the changes was available in the docket (and on-line), and that requested comment on the changes. 75 Fed. Reg. 53,613, 53,614 (Sept. 1, 2010).[29] The NODA also stated that updated information

[28] IPM is an economic model, used to determine the least-cost method of generating electricity. In other words, it forecasts how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and environmental requirements

[29] This was one of three NODAs published by EPA to provide an opportunity for comment on revised data used in its analyses for the Transport Rule. The

concerning the generating units included in the IPM was available for comment in the docket, and that, in running the IPM, EPA would use data from 2009, rather than the 2007 data used in the proposal, and EPA identified the data that would be used. Id. at 53,614-15. EPA explained that these changes would "more accurately portray the unit level control installations that have occurred at power plants during the past several years." Id. The NODA also explained that these changes to the IPM could impact the final rule by "[c]hanging cost and emission projections used in the multi-factor test to determine the amount of emissions that represent significant contribution," id. at 53,614, which determines the State budgets.[30]

Thus, through the NODAs, EPA gave notice that the final rule budgets would differ from those in the proposal and provided an opportunity to comment on the methodology and data used in developing the final budgets. Furthermore, based on publicly available data, Petitioners should have known that the final budgets would be significantly lower than those in proposal because actual emissions had become lower. For example, SO_2 emissions in Wisconsin (where movant Dairlyand is located) decreased from 129,695 tons in 2008 to 109,476 tons

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others are at 75 Fed. Reg. 66,055 (Oct. 27, 2010) and 76 Fed. Reg. 1109 (Jan. 7, 2011).

[30] In the January 2011 NODA, EPA also emphasized that: "It is important to note that final State budgets may differ from the proposed budgets because EPA is still in the process of updating its emissions inventories and modeling in response to public comments, including comments on the . . . IPM." 76 Fed. Reg. at 1111.

in 2010, while NOx emissions decreased from 47,805 to 33,466 tons in the same period. See www.camddataandmaps.epa.gov/gdm. Thus, Dairyland and other Petitioners should have been aware that the data EPA intended to use in promulgating the final rule reflected lower emission levels than the data used to develop the proposed budgets, and should not have been surprised that the final budgets were lower. The final rule is a logical outgrowth of the proposal and Petitioners had adequate opportunity to comment. Am. Coke, 452 F.3d at 938-39 ("If interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period, then the rule is deemed to constitute a logical outgrowth of the proposed rule.").

Petitioners' reliance on Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983), is misplaced because the primary factor on which the Court relied in Small Refiner, i.e., a "promise" that EPA had made in the proposal that small refiners "could safely delay capital investments pending EPA's issuance of the final rule," id. at 542, is not present here. In Small Refiner the Court held that EPA had not complied with notice requirements because EPA had made a specific commitment in the proposal and then abandoned that commitment in the final rule. Id. at 543 (issue was not whether proposal gave adequate notice of the final standard, but whether it gave adequate notice of the interim standard in

light of EPA's commitment). It did not hold that EPA had failed to give adequate notice simply because the final rule was more stringent than the proposal.

EPA made no analogous commitment in the Transport Rule proposal. Rather, the proposal and the NODAs made clear that EPA was seeking updated data to make the budgets more accurately reflect actual conditions. This Court has recognized that one of the purposes of notice and comment is to allow an agency to refine its proposal in light of the information provided in comments and that requiring the agency to go through a new round of comments each time it made such a refinement would lead to endless cycles of notice and comment. Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 951 (D.C. Cir. 2004). In this case, EPA made clear that it intended to update the budgets in light of new information and gave interested parties the opportunity to comment on the data and the model. Such action is entirely consistent with notice and comment requirements. As this Court has stated, "Agencies are free – indeed they are encouraged – to modify proposed rules as a result of the comments they receive." Id.

The arguments raised by individual Petitioners are similarly without merit. For example, Florida Utilities' claim that EPA failed to provide an opportunity to comment on the use of IPM in developing State budgets, FL Utils. Mot. at 9, is simply wrong. While the proposal preamble states that EPA would utilize a variety of sources of information in developing budgets, it does not state that EPA

would not use IPM modeling. In fact, the proposal used IPM to develop 2012 and 2014 budgets. Napolitano Decl. ¶ 73. Moreover, EPA received numerous comments directly addressing, and largely supporting, the use of IPM modeling in developing the budgets. Id. ¶ 47. Thus, the regulated community had ample notice that EPA intended to utilize the IPM in developing the budgets.

Entergy's claim that EPA changed its methodology for determining the level of emission reductions as applied to Louisiana, Mississippi, and Arkansas between the proposed and final rules, Entergy Mot. at 10-12, is also factually incorrect. EPA applied the same methodology to these States as it did to the rest, i.e., it determined what emission reductions were available within each State at specific cost thresholds. For these States, after IPM modeling showed that emissions after implementing emission reductions available at the $500 per ton level would equal the base case emissions, EPA conducted a further analysis to determine, based on an examination of what would happen in these States if they were excluded from the program, whether emission reductions were available in these States at $500 per ton and it determined that there were. 76 Fed. Reg. at 48,263. EPA's analysis focused on identifying reductions available within these States and determining "whether emission limits are necessary to prohibit *these states* from significantly contributing to downwind nonattainment or interfering with maintenance." Id. (emphasis added). As such, Entergy's claim that EPA decided to include these

States "so that *other states* will achieve their projected emission reductions" (Entergy Mot. at 12 (emphasis added)) is false. EPA did not apply a different methodology to these States, and Entergy had ample notice of the method that EPA would use to determine the necessary emission reductions.

The City of Ames' argument that EPA failed to provide notice of changes to the allocations to units owned by Ames is similarly without merit because EPA explicitly provided an opportunity to comment on the revised methodology to be used for unit-level allocations in the January 2011 NODA. Further, the City's argument that EPA failed to provide notice of the ozone-season budget for the State of Iowa is inapposite because Iowa is not included in the final rule for ozone and therefore does not have an ozone-season budget. 76 Fed. Reg. at 48,213, Table III-1. (EPA has proposed, but not yet taken final action, to include Iowa in the ozone season program, 76 Fed. Reg. 40,662 (July 11, 2011)).

D. EPA Properly Based Its Identification of Downwind Nonattainment and Maintenance Areas on Air Quality Modeling.

A number of Petitioners challenge EPA's use of air quality modeling -- as opposed to current air quality monitoring data -- to identify which downwind areas will experience $PM_{2.5}$ and ozone NAAQS nonattainment and maintenance problems in the absence of upwind controls.[31] By way of background, it was

[31] See WI Mot. at 12; Dairyland Mot. at 14; Indiana Mot. at 8-9; FL Utils. Mot. at 10-12; Southern Co. Resp. at 3, 5-11; GA Utils. Mot. at 18-19.

necessary for EPA to use air quality modeling, as opposed to current air quality monitoring data, because in North Carolina this Court unequivocally directed EPA to *replace* CAIR, not merely to supplement it. See 76 Fed. Reg. at 48,223; see also North Carolina, 531 F.3d at 929-30 (describing EPA's approach in CAIR as "fundamentally flawed," directing EPA to "redo its analysis from the ground up," and stating that "[n]o amount of tinkering with the rule or revising of the explanations will transform CAIR, as written, into an acceptable rule.").[32] Thus, to appropriately analyze "from the ground up" what controls are needed for the Transport Rule, it was essential for EPA to begin by modeling what air quality would be like in downwind areas *without* the CAIR regulatory regime in place. Only with that "base case" established could EPA then analyze what downwind air quality problems would exist without CAIR due to upwind contributions and, accordingly, what upwind controls were needed in the Transport Rule to address significant contributions to NAAQS nonattainment and maintenance problems. See 76 Fed. Reg. at 48,223-24.[33]

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[32] It is also worth noting that in North Carolina and Michigan, this Court upheld EPA's use of modeling data to help determine which upwind States should be included in CAIR and the NOx SIP Call. See North Carolina, 531 F.3d at 913-14; Michigan, 213 F.3d at 673-74.

[33] However, any suggestion that EPA's "base case" or modeling does not accurately reflect the real-world operating conditions and projected future emissions is incorrect. For example, EPA's modeling projections include information about announced unit retirements and controls that are planned to

Generally speaking, Petitioners argue that EPA's modeling analysis (and, by extension, much of the Transport Rule) was unnecessary, since they believe, based on recent monitoring data, that a number of downwind areas that are the focus of the rule presently are attaining the relevant NAAQS or are at least on a path to do so. However, all of these arguments ignore the fact that the cited air quality monitoring data necessarily reflect, inter alia, the air quality improvements resulting from CAIR. See 76 Fed. Reg. 48,260-61. Therefore, these data, which necessarily reflect the control requirements of CAIR, simply are irrelevant to the question of what controls are needed as a *replacement* for CAIR.

Similarly meritless is the related suggestion by some Petitioners that the Transport Rule is also unnecessary (at least in part) because some downwind areas might reach attainment by 2014, even if they can't do so by 2012. See, e.g., WI Mot. at 14; FL Utils. Mot. at 11. Pursuant to North Carolina, 531 F.2d at 911-12, 930, part of EPA's charge here was to ensure that reductions occurred in a timeframe that is as "expeditious as practicable," providing the statutorily-mandated assistance to downwind States in advance of their deadlines for attaining the NAAQS. Therefore, EPA properly focused its identification of downwind

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come online and will be required to run, either due to plant design, consent decrees, agreements, or state regulations that would affect future emissions upwards or downwards. See Napolitano Decl. ¶ 45.

receptor States on the 2012 "base case" scenario. See 76 Fed. Reg. at 48,214, 48,227-38, 48,277-79; see also infra Part I.G.

In short, two of the clear directives of North Carolina were that EPA needed to re-do its interstate transport analysis "from the ground up" and that EPA needed to come up with a new regulatory approach that would, among other things, allow downwind areas to achieve their statutory NAAQS attainment and maintenance obligations as "expeditiously as possible." The Transport Rule indisputably addresses the Court's guidance on these points and, at the very least, reflects a reasonable policy choice by EPA. The mere fact that certain Petitioners believe that similar (albeit slower) air quality benefits could have been secured at a lower cost to themselves by a different policy choice -- i.e., a decision to leave CAIR in place with only the sort of "tinkering" EPA was expressly admonished to avoid in North Carolina -- simply is irrelevant.

Finally, Petitioners' arguments concerning alleged modeling errors on these points are, in any event, wrong on their merits. For example, Florida Utilities' suggestion that Florida's linkage to Harris County, Texas, must be unreasonable because changes in EGU emissions were not linearly related to changes in maximum modeled impacts at downwind receptors (FL Utils. Mot. at 5-6) is simplistic and demonstrably incorrect. As explained in the attached EPA declarations, Petitioners' arguments on these points misunderstand or ignore the

complexity of the air quality models developed to take into consideration myriad complex factors that influence pollution transport. See Timin Decl. ¶ 5-16; see also Napolitano Decl. ¶¶ 44-52. Properly understood, this modeling demonstrates that Florida's ozone contributions to receptors in Harris County, Texas, substantially exceeds the threshold used in the significant contribution analysis for the final Transport Rule. Timin Decl. ¶ 16. For all the foregoing reasons, Petitioners' arguments concerning modeling vs. monitoring data are meritless.

E. EPA Adequately Considered Transmission Constraints and Localized Grid Reliability Issues.

Entergy, We Energies, and the Kansas Utilities raise various arguments that EPA's modeling failed to consider transmission constraints and did not adequately analyze localized grid reliability issues. None of the Petitioners' arguments shows any likelihood of success on the merits.

Entergy argues that the IPM[34] that EPA used to establish State emissions budgets is flawed and should not be used to establish budgets because it does not take into account transmission constraints. Entergy Mot. 8-9. This is a particularly odd argument for Entergy to make, as Entergy affirmatively supported EPA's use of IPM to establish State emissions budgets in its comments to the agency.

[34] IPM is an economic model, used to determine the least-cost method of generating electricity. In other words, it forecasts how the power sector produces electricity at least cost while meeting energy demand, reliability constraints, and environmental requirements.

Comment by Entergy Servs., Inc., EPA-HQ-OAR-2009-0491-2847, at 2 ("Entergy Cmt.") (Attachment 4). Although some aspects of IPM were updated as identified in a NODA (75 Fed. Reg. 53,613), aspects of IPM that Entergy now claims are flawed, including the manner in which the model considers transmission constraints, voltage support requirements, load pockets and other reliability rules imposed on the transmission system (Entergy Mot. at 8),[35] are aspects of the model that Entergy was well aware of and were not altered in any way between the version of IPM used for the proposal modeling and the version used for the final rule modeling. Napolitano Decl. ¶ 48. Notwithstanding, Entergy commented that "with the right assumptions, *IPM adequately depicts future demand needs at regional and state levels*." Id. (emphasis added).[36] Thus, Entergy's argument that EPA relies on a flawed application of IPM was not presented to EPA -- indeed, directly contradicts its comments to EPA -- and fails to show that EPA's reliance

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[35] The terms "transmission constraints" and "bottle necks" generally refer to limits on the ability of the transmission grid to move power from where it is generated to where it is consumed. The extent to which these limits are constraining may depend on numerous factors, including demand (they are most likely to be constraining when demand is high). "Voltage requirements" are requirements to maintain grid voltage at prescribed levels. "Load pocket" generally refers to an area with units that must run during periods of peak demand, generally because there are limits on importing power to meet peak load.

[36] The only changes Entergy suggested with regard to IPM's assumptions pertained to certain natural gas assumptions, id., which were addressed by changes EPA made in the final rule, see Transport Rule Primary Response to Comments (June 2011), EPA-HQ-OAR-2009-0491-4513, at 2141-42 (Attachment 6).

on IPM for establishing State budgets was arbitrary. Moreover, this Court has previously upheld the use of IPM for these purposes. Appalachian Power Co. v. EPA, 249 F.3d 1032, 1053-54 (D.C. Cir. 2001).

Furthermore, contrary to the assertions of Entergy and other Petitioners (We Energies Mot. at 15, KS Utils. Mot. at 19), EPA did take into account transmission constraints both in establishing State emissions budgets using IPM and in allocating emissions allowances to individual units. EPA's IPM projections for the Transport Rule explicitly take into account regional constraints on electricity transmission, informed by planning studies conducted by the North American Electric Reliability Corporation ("NERC"), an entity that is federally mandated to ensure electric system reliability. Napolitano Decl. ¶¶ 52-53. IPM's thirty-two modeling regions are constructed to capture, directly within the model, significant limitations of the existing grid to deliver least-cost electricity under various scenarios. Id. ¶ 54.

Additionally, EPA modified its method of allocating emissions allowances to individual units between the proposed and final rule, in part, to respond to comments regarding localized transmission constraints. Entergy and others raised concerns that IPM did not take into account localized transmission constraints and therefore it was a poor tool on which to base unit-specific emissions allocations. E.g., Entergy Cmt. at 2-3; We Energies Cmt., EPA-HQ-OAR-2009-0491-2629, at

6-7; New Orleans City Council Cmt., EPA-HQ-OAR-2009-0491-2719, at 2; Louisiana Energy and Power Auth. Cmt., EPA-HQ-OAR-2009-0491-3738, at 7-10. Entergy commented that the limitations in the way IPM addresses transmission constraints and other related issues would have "limited impact for state-level modeling results," but might become problematic at the individual unit level. Entergy Cmt. at 3. Entergy's comments suggested that these transmission issues could be addressed by changing the basis for unit-specific emissions allocations to historic heat input, which is exactly what EPA did in the final rule. Id.

In the final rule, EPA based unit-level allowance allocations *not* on IPM projections, but instead on a combination of historic heat input and historic emissions data. 76 Fed. Reg. at 48,288; Napolitano Decl. ¶ 55. These historic data necessarily reflect specific unit-level behavior that may be driven by local transmission constraints and other operational needs of the grid, meaning that unit-level allowance allocations under the final Transport Rule acknowledge and account for the historic response of these units to maintain electric reliability. Id. In short, the contention (Entergy Mot. at 8; We Energies Mot. at 15) that EPA ignored an important aspect of the problem or failed to consider real-world data is simply wrong.

That EPA's Revisions Proposal, 76 Fed. Reg. 63,860 (Oct. 14, 2011), proposes to adjust a handful of State budgets (Louisiana, Mississippi, Texas, New

Jersey, and New York) to address localized issues such as transmission constraints affecting unit dispatch based on unit-specific information provided to EPA *after* the Transport Rule was final does not show that the model was flawed or that the emissions budgets are arbitrary, as Entergy and others suggests. See Entergy Mot. at 8. Rather, the Revisions Proposal demonstrates that unit-specific assumptions in IPM can be adjusted to address more localized transmission constraints when EPA is provided sufficient information to make the adjustments. However, such localized, unit-specific transmission constraints are rarely publicly available, Napolitano Decl. ¶ 54; thus, EPA could not have considered them as part of the rule unless utilities provided this information. The generalized comments by We Energies and the Kansas Utilities as to localized constraints did not provide EPA with sufficient information to incorporate them into the model. Likewise, despite Entergy's clear understanding of IPM and its treatment of transmission constraints, Entergy provided EPA with the information it needed only *after* the rule was finalized. Napolitano Decl. ¶ 131; see, e.g., Entergy Mot. Ex. 3.

Moreover, the unit-level adjustments that EPA proposes affect only 3% of the 3,632 units covered by the final rule. Napolitano Decl. ¶ 135. While Entergy claims the model made incorrect predictions with regard to 26 units in Louisiana, Mississippi, and Arkansas, EPA is proposing to adjust the assumptions for only 17 units in Louisiana and Mississippi. Id. ¶ 136. Overall, the proposed revisions

would increase total seasonal NOx budgets by only 2%, which contradicts Entergy's suggestion of some sort of "fundamental" flaw in the model. Id. ¶ 136.

Finally, Petitioners' claim that EPA's assumptions and modeling will lead to reliability problems (Entergy Mot. at 10, 13-18; KS Utils. Mot. at 19; We Energies Mot. at 15) fails because it ignores the inherent flexibility in an emissions trading program and relies on the erroneous assumption that units that were allocated zero or a small number of allowances will be unavailable to meet electricity demands in constrained areas. The Transport Rule does not set emissions limits for individual units, but rather allows EGUs flexibility to choose among a combination of compliance options, including trading allowances, to stay within established State budgets. See Napolitano Decl. ¶¶ 11, 18. Thus, EPA reasonably found that the rule provides enough flexibility for coordination among regional transmission entities and utilities to address local grid issues. Napolitano Decl. ¶ 57.

F. The Budgets for the State of Wisconsin Are Not in Error.

The Dairyland and Wisconsin Motions contend that EPA made erroneous assumptions as to whether seven coal-fired EGUs in Wisconsin currently have or will have environmental controls (flue gas desulfurization or "scrubbers" for SO_2 and selective catalytic reduction, "SCR," for NOx). Dairyland Mot. at 10-12; WI Mot. at 7. Both motions, like WPSC's before them, argue that these alleged technical errors lowered the final 2012 NOx and SO_2 budgets for the State of

Wisconsin by "tens of thousands of tons." Dairyland Mot. at 12. As EPA already explained in its response to the WPSC Motion, document 1337434, at 13-14, these claims are substantially false and are greatly exaggerated. In fact, EPA made only one incorrect assumption about controls that would be in place in 2012, as to just one of the seven units in question. Id. As to this lone error affecting Wisconsin's 2012 budgets, EPA has proposed to increase Wisconsin's annual NOx budget by 2,437 tons (less than 8%), hardly the "tens of thousands" of tons that the movants posit. The factual errors that the movants allege simply did not occur (save the exception noted above), Wisconsin's 2012 budgets are not materially lower as a result, and, obviously, no irreparable harm can result from non-existent errors.

G. The Transport Rule Reasonably Applies to Emissions in 2012.

A recurring assertion in these motions is that the Transport Rule's compliance time frame is unreasonably short because the rule sets emissions budgets that will require emissions reductions in 2012. The Petitioners assert that EPA's decision to establish requirements for 2012 was arbitrary and capricious (see, e.g., OH Mot. at 11-14) or that the compliance time frame will lead to irreparable harm (see, e.g., We Energies Mot. at 15-16; UARG Resp. at 11). Regardless of how framed, these complaints about the compliance schedule disregard the applicable law and essential facts about the Transport Rule. While the Petitioners may desire longer compliance deadlines, EPA reasonably reads this

Court's holding in North Carolina as foreclosing a later compliance deadline, as the Court rejected the CAIR Phase II compliance date of 2015 and directed EPA to harmonize the requirements of any rule governing interstate transport with the deadlines for attainment of the NAAQS in downwind States. 531 F.3d at 911-12. As a result, the Transport Rule deadlines are coordinated, as they must be, with the attainment dates for the relevant NAAQS. 76 Fed. Reg. at 48,214, 48,277-79. Moreover, this Court admonished EPA to replace CAIR expeditiously. North Carolina, 550 F.3d at 1178. Thus, CAIR itself and this Court's decisions addressing CAIR put States and sources fully on notice that requirements to reduce NOx and SO_2 were right around the corner.

The Petitioners' expressions of surprise and consternation about the rule's 2012 compliance deadline thus ring hollow three years after this Court remanded CAIR. The Petitioners are equally aware of the Act's express requirement that SIPs "contain adequate provisions prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [a National Ambient Air Quality Standard ("NAAQS")]." 42 U.S.C. § 7410(a)(2)(D)(i)(I). This provision imposes an affirmative, self-executing obligation on the States to address emissions from the State significantly contributing to nonattainment or interfering with

maintenance in other States, irrespective of EPA action and irrespective of whether a State was originally included in CAIR. Thus when EPA promulgated the NAAQS addressed by the Transport Rule – in 1997 and 2006 – States were required to submit to EPA revisions to their SIPs to address implementation of the revised NAAQS, including the requirement of section 110(a)(2)(D)(i)(I). 42 U.S.C. § 7410(a)(1). Thus, States claiming now to be faced with an untenable deadline have already had either six or fourteen years to address significant contribution in a SIP, not months. And even those States that believed they had addressed their downwind issues through SIP revisions pursuant to the NOx SIP Call or CAIR have been on notice of the need to do more since North Carolina issued.

Additionally, EPA's approach to the 2012 emissions budgets makes a long transition period unnecessary. The rule includes an initial phase of emission reductions starting in 2012 that, as directed by this Court, addresses downwind problems as expeditiously as practicable and helps States to meet 2013 NAAQS attainment deadlines. 76 Fed. Reg. at 48,278. These reductions are not as stringent as those in the Transport Rule's second phase (starting in 2014) because, given the shorter lead time, EPA recognized that the installation of post-combustion controls (which requires a longer lead time) would not be a feasible compliance option. Rather, EPA explained that the first phase reductions could be achieved through an array of strategies such as optimizing or increasing the use of

existing controls, fuel-switching, dispatching lower emitting units more often, or installing simpler control technologies. Id. at 48,279. Individual sources could also choose to comply by purchasing additional allowances through the Transport Rule's trading program that is already operating. Id. at 48,280; Napolitano Decl. ¶¶ 13-16. EPA carefully analyzed the practical implications of achieving these reductions in 2012 and 2013 and reasonably concluded that States and sources could comply with the 2012 assurance levels by employing a combination of the available compliance options. 76 Fed. Reg. at 48,279-81; EPA-HQ-OAR-2009-0491-4529, Transport Rule Engineering Feasibility Response to Comments.

Finally, it is inaccurate and overblown to suggest, like some Petitioners, that *drastic* emissions reductions must be achieved by January 2012. In the first instance, as is demonstrated throughout this brief and in our other filings, the degree of emissions reductions actually required to meet the 2012 assurance levels have largely been exaggerated and are far more manageable than the motions portray. Napolitano Decl. ¶¶ 17-43, 91-92, 108, 111-12. Nor is time as short as the Petitioners claim, as the rule's first compliance deadlines (depending on the part of the rule to which a State is subject) are December 2012 and March 2013, by which date sources must demonstrate that they hold sufficient allowances to cover their 2012 emissions of NOx and SO_2. 76 Fed. Reg. at 48,277 & n.57. The merits of this case could be heard within this time frame. Moreover, controls or other

means to reduce emissions do not have to be implemented by January 1. Rather, sources can implement measures during the course of 2012 that will contribute to their ability to demonstrate by December 2012 or March 2013 that they have sufficient allowances to comply with the 2012 emission requirements.

In sum, the Petitioners are not likely to prevail on any of these merits issues.

II. THE PETITIONERS WILL NOT BE IRREPARABLY HARMED ABSENT A STAY OF THE RULE

Although the details vary, the Petitioners consistently allege two forms of irreparable injury. First, they contend that to comply with the rule's 2012 emissions requirements, utilities will have no option other than reducing generation in a fashion that will undermine system reliability and lead to blackouts. As we set forth in detail below, these claims all fail because they ignore the rule's flexible compliance options (such as the purchase of allowances), grossly exaggerate the degree of reductions that will be required in 2012, rely on faulty or pre-cooked assumptions and analyses, or otherwise bypass reasonable, real-world approaches to complying with the rule in order to portray doomsday scenarios. The simple fact is that EPA's analysis in support of the rule shows that there is no reason to believe that reliability will be threatened or that lights will go out as a result of the rule. Significantly, as discussed above (at 17-18) and below, EPA's conclusion is confirmed by NERC's 2011 Long-Term Reliability Assessment, which found that even with the Transport Rule and three other proposed EPA regulations in effect,

there will be no significant change in resource adequacy and ample reserve margins in all scenarios for the year 2013. NERC 2011 LTRA (available at http://www.nerc.com/files/2011LTRA_Final.pdf); Napolitano Decl. ¶ 57.

Second, the Petitioners claim that complying with the Transport Rule's 2012 requirements will be prohibitively expensive. Beyond the fact that these claims are highly speculative and the amounts plainly inflated, see Napolitano Decl. ¶¶ 17-43, 91-97, 102, they also constitute precisely the type of temporary and recoverable economic loss that this Court has found *does not* constitute irreparable injury. Even if taken at face value, the Petitioners' claims do not even approach the type of extraordinary, bet-the-company-type of economic loss that could support the extraordinary relief of a stay. Simply put, the Petitioners' claims that they will suffer irreparable injury without a stay are at variance with the facts, the law, and common sense.

A. No Petitioner Has Shown a Realistic, Let Alone Imminent, Threat to Reliable Electricity Generation.

Given the State- and utility-specific nature of the allegations concerning reliability problems that supposedly will result from the Transport Rule, the below discussion is organized according to the motion or response raising the issue. As we show, none of the reliability claims has merit.[37]

[37] The Florida Utilities Motion (at 17-18) makes a cursory, speculative, and unsupported assertion that, during summer hurricane season, "*if* some units go

We Energies Motion and Michigan Response. The We Energies Motion and Michigan Response both portend a "threat" to electric power grid reliability in Michigan if a stay is not granted. We Energies Mot. at 10; MI Resp. at 3. Both filings greatly exaggerate the supposed threat and are premised on demonstrably false assumptions. We Energies's Motion is limited to anticipated 2012 compliance problems at its Presque Isle facility in Michigan's Upper Peninsula and power grid reliability issues that We Energies alleges as a result. To begin, like so many other Petitioners, We Energies claims that it has been allocated insufficient allowances to cover anticipated 2012 NOx emissions and will be forced to curtail operations at this facility as the "only way to comply" with the Transport Rule, compromising reliability of the power grid in Michigan's Upper Peninsula as a result. We Energies Mot. at 17. We Energies further asserts that it is "very likely" that Michigan "will significantly exceed EPA's annual NOx assurance levels for 2012," and that We Energies will incur assurance penalties as a result. Id. at 12, 19.

This is rank speculation that contrasts sharply with the data and ignores We Energies's other compliance options. All of these allegations fail because they are premised on the mistaken assumption that Michigan will exceed its NOx assurance

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offline because they cannot meet reductions required by [the Transport Rule], the availability of reliable electricity *may become a concern*." (emphasis added). Seeing as the Petitioners have not even alleged, let alone shown, a likely and imminent injury as to grid reliability, a detailed response here is not warranted.

levels in 2012. However, the most recent four quarters of available data show that Michigan's actual NOx emissions were 75,462 tons, continuing a consistent downward trend. Napolitano Decl. ¶ 38. This is only approximately 4,000 tons (6%) more than Michigan's 2012 NOx assurance level.[38] Additionally, EPA has already proposed to increase Michigan's 2012 NOx budget by 5,228 tons, 76 Fed Reg. at 63,863; therefore, if the Revisions Proposal is finalized, it is very unlikely that emissions from Michigan sources will exceed Michigan's NOx assurance level. Indeed, We Energies concedes that its complaints will be addressed by the proposed revisions, stating that its motion is merely a "protective measure" in case EPA does not finalize the Revisions Proposal. We Energies Mot. at 4.

We Energies ignores, among other things, that the Transport Rule includes a flexible trading program under which it (and other utilities) can purchase allowances.[39] EPA has already shown that the market for such allowances is up and running and that allowance purchases will be a viable compliance option for sources in 2012. See supra at 51. In short, We Energies has failed to show that the

[38] We Energies further overstates its supposed dilemma by inexplicably doing its own (predictably lower) calculation of Michigan's 2012 NOx assurance level (the compliance benchmark) as 69,606 tons per year, We Energies Mot. at 9, even though the rule specifies that Michigan's actual 2012 NOx assurance level is 71,028 tons per year. 76 Fed. Reg. at 48,269.

[39] While We Energies fails even to acknowledge that it could buy allowances to comply with its 2012 NOx allocation, it concedes that a market exists when it asserts that it will be able to "trade for new allowances to replace the ones surrendered" if it is subjected to assurance penalties. We Energies Mot. at 19.

state-wide allowance shortfall it foresees is likely and, further, that We Energies will be unable to purchase allowances needed to comply with the rule.

The identical claims in the Michigan Response (at 3) fail for the same reasons. And the State of Michigan fares no better with its allegation (in a single paragraph at 4) about unit shutdowns leading to reliability problems in 2012 in Michigan's Lower Peninsula. Michigan offers no basis whatsoever for this assumption, and EPA has already addressed why Michigan is unlikely to have difficulties meeting its NOx assurance levels for 2012. Michigan's SO_2 situation is even more favorable, as Michigan's assurance level for 2012 (270,578 tons) *far exceeds* both its 2010 SO_2 emissions (243,417 tons) and its emissions in the last four quarters (233,132 tons). Napolitano Decl. ¶ 38. Michigan does not even attempt to address its compliance options, beyond retiring facilities, if SO_2 emissions reductions beyond current levels are needed. In short, there is no plausible basis, let alone a likely and imminent one, for Michigan and We Energies's dire reliability predictions.

Kansas Utilities Motion. Although wrapped in slightly different packaging, the reliability and other irreparable harm arguments in the Kansas Utilities Motion are the same as those that EPA rebutted in its opposition to the Kansas Motion (document 1339022 at 14-16), and they fail for the same reasons. The Kansas Utilities pile one speculative assumption atop another to conjure a situation of

reduced generation leading to strained grid reliability in the Southwest Power Pool ("SPP") and, eventually, rolling blackouts. These reliability claims strain credulity in their own right, but are nevertheless completely undone by the recent NERC assessment which estimates that the SPP region, of which Kansas is a part, will have very healthy electricity generation reserve margins in 2013. NERC found that the SPP will have an "anticipated reserve margin of 23.6-25.5% in 2013," well above their required reference reserve margin of 13.6%. NERC 2011 LTRA at 153, Table 38-39; see also Napolitano Decl. ¶ 66. NERC also found that the SPP reserve margin is not threatened by the combined impact of the Transport Rule (and three other proposed EPA regulations included in the analysis) in any of the years it studied. NERC 2011 LTRA at 152-60.

EPA is acutely aware of the importance of grid reliability, and EPA's analysis supports its conclusion that the Transport Rule can be implemented both nationally and in the SPP region without causing reliability problems. Napolitano Decl. ¶ 57; EPA-HQ-OAR-2009-0491-4455, Resource Adequacy and Reliability in the IPM Projections for the Transport Rule TSD (June 2011), Attachment 5. The Kansas Utilities' reliability arguments are further undermined by the fact that the SPP analysis they rely on to claim that service shutdowns are "highly probable," KS Utils. Mot. at 9, is fraught with technical errors and unjustified assumptions. Napolitano Decl. ¶¶ 58-61, 66.

Additionally, and as we have shown elsewhere, the notion that Kansas Utilities "have no option but to reduce generation to meet the 2012 emissions limits," KS Utils. Mot. at 8, flies in the face of the reality of Kansas's likely state-wide emissions in 2012 and the rule's available compliance options. After making adjustments for emissions reductions that will occur before 2012, EPA expects that, state-wide, Kansas sources will emit below Kansas's annual NOx assurance level and that Kansas sources will need to make NOx emissions reductions of only approximately 5,000 tons to meet the 2012 annual NOx budget, a manageable gap that could be closed by purchasing allowances costing around $4.5 million. Napolitano Decl. ¶ 96. There is already evidence that a robust allowance market is developing, and the Kansas Utilities offer no credible reason why they will be unable to purchase sufficient allowances. Id. ¶¶ 13-16.[40] The Kansas Utilities also rule out purchasing power as too expensive (at 7-8), but not infeasible. However, in the unlikely event of needing to reduce generation overall, the recoverable cost of purchasing power does not constitute irreparable harm, to say nothing of the fact that such costs are reasonable and to be expected as a result of an *emission reduction program* such as this.

[40] The state-wide situation for SO_2 is even more favorable, as Kansas's emissions in the last four quarters (41,671 tons) are a mere 150 tons greater than its 2012 budget (41,528 tons) and are *well below* its SO_2 assurance level (49,003 tons). Napolitano Decl. ¶ 21.

The motion's utility-specific arguments (at 11-14) also lack merit. For instance, the Kansas City Board of Public Utilities's allegations are predicated on the false assumption that there will be no market for SO_2 allowances. Sunflower's claims of having to reduce operations at one of its facilities are undone by its own declaration, which concedes that Sunflower has expedited the installation of low-NOx burners at the facility in question so that it will occur in January 2012. KS Utils. Mot., Ex. D ¶ 29. Moreover, Sunflower's own permit application for this project estimates that it will reduce NOx emissions by 2,000 tons in 2012, leaving Sunflower very close to operating within its 2012 NOx allocation. Napolitano Decl. ¶ 100. As for Westar, its purported "modeling" that forecasts rolling blackouts offers nothing more than pre-cooked conclusions, as Westar's "modeling" *began* with the assumption that it could not purchase allowances or power from other utilities. By ruling out significant compliance options in advance, it is no surprise that the model "predicted" blackouts and reliability problems. KS Utils. Mot., Ex. E at 8. Westar otherwise makes no effort to show to what degree its allowance allocation is insufficient, let alone explain *why* it assumes it cannot purchase such allowances. In sum, the Kansas Utilities' claims of reliability problems and summer blackouts are simply not credible and do not support a stay.

Entergy Motion. Entergy's contention that, absent a stay, it has no "realistic" options for complying with the Transport Rule other than to curtail power at "must run" units is similarly flawed and recycles the arguments raised in the Louisiana Motion. Like Louisiana's, Entergy's claims exaggerate the facts, are unsupported, and fail to take into account the flexibility under the rule to adopt a multi-pronged compliance strategy. See EPA Opp. to LA Mot., document 1340488, at 11-16, 17-18.

Entergy's assertion that no *single* compliance strategy will allow it to meet its predicted generation demand and meet the rule's 2012 compliance deadlines (see Entergy Mot. at 12) completely sidesteps the central question of whether Entergy can comply through a *combination* of compliance strategies. In promulgating the rule, EPA found that several compliance options, short of installing post-combustion controls or reducing generation, are available to reduce emissions in the short-term. See, e.g., 76 Fed. Reg. at 48,279. Entergy offers only unsupported assertions (see Glover Decl.¶ 17-18) and fails to offer any specifics about the measures it considered beyond reduced generation to comply with the rule and, more importantly, *why* it could not undertake those measures or a combination of them.

Entergy's motion is unclear as to why it assumes that it cannot make changes to its generating fleet to redispatch power and thus must rely solely on

purchasing allowances. Entergy claims to have done modeling that indicates that system redispatch will be insufficient to address the predicted shortfall in allowances, Entergy Mot. at 16, however, the referenced declaration indicates that the "modeling" *pre-determined* a compliance strategy of only system dispatch and did not analyze complementary measures such as purchasing allowances. Glover Decl. ¶ 22. EPA has already shown that Entergy's assumption that allowance markets will not develop is erroneous. See supra at 51; Napolitano Decl. ¶¶ 13-16.

Further, Entergy's assumptions regarding adverse consequences to grid reliability are, like those of the Kansas Utilities and the State of Kansas, premised on faulty analysis by the Southwest Power Pool. See supra at 57; Napolitano Decl. ¶¶ 58-61. As noted, SPP flawed analysis is soundly rebutted by the recent NERC assessment and EPA's reliability analysis in support of the Transport Rule. See supra at 17-18; Napolitano Decl. ¶¶ 57, 66.

At bottom, Entergy's argument is that the Transport Rule does not allow it to continue doing what it has been doing – i.e., operating its units at historic levels and postponing reducing its emissions through the purchase of unlimited allowances to pollute. This argument fundamentally ignores the requirements of section 110(a) of the Clean Air Act and the point of the Transport Rule -- reducing emissions that cause downwind attainment problems. Moreover, Entergy overstates its supposed compliance dilemma by exaggerating the reductions

required in Arkansas, Louisiana, and Mississippi by comparing the 2012 emissions budgets with actual 2010 emissions. In fact, 2011 ozone-season emissions were lower than 2010 ozone-season emissions in all three States, bringing actual emissions closer to the 2012 emissions budgets. Napolitano Decl. ¶ 29.

Moreover, that Louisiana must reduce its emissions more than some Transport Rule States, which translates into a smaller number of allowances allocated to Entergy units there, is a harm that can be traced directly to Entergy's own actions. Utilities in Louisiana, including Entergy, opted to meet their compliance obligations under CAIR primarily by purchasing allowances, as opposed to installing technological controls. EPA Opp. to LA Mot, document 1340488, at 18; Napolitano Decl. ¶ 90. In the past two years, Entergy has purchased almost half of the total number of allowances that it used to comply with CAIR in the three States in which it operates. Napolitano Decl. ¶ 90. Indeed, since the CAIR ozone-season NOx trading program began in 2009, total ozone-season NOx emissions from covered facilities owned by Entergy in these States actually have *increased* slightly. Id.

In view of the Court's holding in North Carolina that unrestricted interstate trading does not comply with CAA 110(a)(2)(D)(i)(I), 531 F.3d at 906-08, 921-22, Entergy acted at its own peril when it chose to defer installing controls to reduce

emissions. Having done so, it cannot now argue that it is irreparably harmed by the Transport Rule's emissions reduction requirements.

City of Ames Motion.[41] Like the others, Ames makes the unsupported allegation that it has "no choice" but to reduce generation to comply with the Rule and predicts dire reliability scenarios. Ames also follows suit by exaggerating the potential impact of the rule and relying on incorrect and unsupported assumptions. Ames contends that it will be "impossible" to install controls to meet the 2012 compliance deadlines and also asserts that the market for allowances will be insufficient. Ames Mot. at 9. Ames's alleged predicament appears to be based on its own choice not to go forward with construction of previously-planned controls – a business decision based on its apparent miscalculation that the Transport Rule would be less stringent than CAIR. Ames Mot. at 7-8, 16. Such self-inflicted harm is insufficient to support a stay of the rule. Cuomo, 772 F.2d at 977.

Even if Ames could not install emissions-reducing controls, Ames fails to show that it could not comply with the rule and still generate sufficient electricity. As an initial matter, Ames exaggerates the emissions reductions it would have to achieve to operate within its emissions allocation. Actual emissions for the last

[41] Ames seeks a stay of both the annual and ozone-season NOx requirements as they apply to Ames. However, Iowa is not in the Transport Rule for the ozone-season program, 76 Fed. Reg. at 48,212, Table III-1, although EPA has proposed (but not finalized) adding Iowa to the ozone-season program. Id. at 40,662.

four quarters at Ames's units are only 184 tons (or 24%) more than Ames's allocation, Napolitano Decl. ¶¶ 33-34, much less than the 46% difference Ames alleges. Ames Mot. at 14. In addition, Ames's contention that it can import very little power is greatly exaggerated. The Trower declaration suggests that the city can import between 54% and 72% of the combined megawatt capacity of Ames's two-boiler EGU plant, which Ames says is 98 mega watts. See Trower Decl. ¶ 9. Thus, while Ames claims that the summer demand peaks as high as 128 MW, id. ¶ 11, it fails to explain why it cannot comply with the rule and meet this demand by a combination of importing power and purchasing allowances. Ames also fails to consider that it operates two additional plants with capacities of 18 and 27 megawatts, respectively. Napolitano Decl. ¶ 64. In short, Ames's allegations simply do not withstand scrutiny.

Ohio Motion. Ohio takes only a slightly different approach to the general reliability claims offered by other Petitioners and argues that the Transport Rule will lead to "early retirement" of coal-fired EGUs and that these unexpected retirements will create "uncertain power service reliability" in the PJM regional transmission organization region of which Ohio is a part. OH Mot. at 18-19.[42]

[42] The PJM region covers all or most of Delaware, the District of Columbia, Maryland, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia, and parts of Indiana, Illinois, Kentucky, Michigan, North Carolina and Tennessee. See http://www.ferc.gov/market-oversight/mkt-electric/pjm.asp#geo.

Ohio's claims are not only unsupported, but are contradicted by the NERC assessment, which concluded that the PJM region will continue to have significant excess capacity in 2013 even assuming that the Transport Rule and three other proposed EPA regulations would be in effect. NERC 2011 LTRA at 153, Tables 38-39 (2013 projections), 156, Tables 41-42 (2015 projections). In the light of this comprehensive reliability study, combined with EPA's own well-supported conclusions as to the minimal reliability and capacity effects of the rule, Ohio's claim of likely and imminent reliability problems is far-fetched.

Moreover, Ohio's reliability allegations are based on speculation that some 150 units in the PJM region are at risk of decommissioning by *2015*. OH Mot. at 18. Ohio makes no showing that any of these decommissionings (if they were to occur at all) are imminent or would be related to the Transport Rule. See Wisconsin Gas, 758 F.2d at 674 (movant must "show that the alleged harm will directly result *from the action with the movant seeks to enjoin*") (emphasis added).[43] In sharp contrast to EPA's and NERC's detailed analyses, Ohio fails to support its dire predictions of decommissionings and reliability problems with a declaration or other evidence and thus fails to meet its heavy burden to prove

[43] That some older, less efficient, and dirtier plants may be shut down to comply with the Transport Rule does not, by itself, establish a threat to reliability, especially since Ohio does not even address whether excess capacity already exists within the State or whether new, more efficient plants could take the place of those that are shut down.

irreparable harm justifying a stay. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." Wisconsin Gas, 758 F.2d at 674. Like the other allegations that the Transport Rule will cause retirements and reduced generation that undermines grid reliability and the supply of electricity, Ohio's claims should be rejected.

B. Incurring Additional Economic Costs to Comply With the Rule Does Not Constitute Irreparable Injury.

Several Petitioners claim that they will be irreparably harmed as a result of alleged substantial compliance costs associated with adopting emissions reductions strategies or purchasing allowances and by the alleged resulting increases in electric rates. However, alleged economic losses do not constitute irreparable injury except in the most extreme circumstances, i.e., where the "very existence" of a company is threatened. Wis. Gas, 758 F.2d at 674. Further, regulatory compliance costs generally do not constitute irreparable injury. See, e.g., Am. Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980); A.O. Smith Corp. v. FTC, 530 F.2d 515, 527–28 (3d Cir. 1976). Although some Petitioners suggest (but do not demonstrate) that these costs are unrecoverable, most acknowledge that these costs may be passed on to their rate paying customers. See, e.g., FL Utils. Mot. at 16 (compliance options "will force . . . ultimately the Floridians who use electricity[] to incur substantial costs"). As such, any compliance costs the utilities

might incur appear to be recoverable and do not come close to the extreme circumstances that would warrant a stay. Wis. Gas, 758 F.2d at 674.[44]

Likewise, those States alleging economic harm as a result of having to pay increased rates that allegedly will result from the Transport Rule (see, e.g., WI Mot. at 14), fail to make a sufficient showing to justify a stay. The States make no attempt to demonstrate such costs are unrecoverable. Regardless, Petitioners bear a heavy burden to show that the alleged costs are "both certain and great" and "of

[44] Amicus Putnam County, Georgia improperly attempts to add to the more than ample briefing on these stay motions by filing a response to Georgia's response in support of Kansas's stay motion that alleges economic harm from the Rule. As this Court has found, "[n]either the Federal nor the D.C. Circuit Rules provide for amici to file or respond to motions." Texas v. EPA, No. 10-1425 (D.C. Cir. Jan. 12, 2011) (Order) (document 1287586) (citing United States v. Michigan, 940 F.2d 143, 164-66 (6th Cir. 1991) (amici "consistently precluded from . . . filing pleadings, or otherwise participating . . . in a totally adversarial fashion"). If the Court considers the filing, it lacks merit. First, the alleged harm is remarkably speculative, as it is based on unsubstantiated predictions that the county *may* lose speculative amounts of tax revenue *if* the Georgia Power facility in the county cuts back generation as a result of the Transport Rule. Second, even if such alleged economic losses came to pass, Amicus has not shown them to be unrecoverable such that they could support a stay as a matter of law. Finally, the claim that EPA conducted "no analysis of the effect of the final rule on local governments" (at 3) is simply in error, and Amicus identifies no applicable legal requirement with which EPA failed to comply. EPA thoroughly and carefully considered the Transport Rule's impacts on affected municipalities and local governments, evaluated such impacts on local governments consistent with the Unfunded Mandates Reform Act of 1995 (notwithstanding EPA's determination that the Act does not apply to the Transport Rule), and specifically determined (in a passage cited by Amicus) that transfer payments, such as the potential loss of tax revenue that Amicus posits, are not among the "social costs" that are appropriate to consider in cost/benefit analysis. See 76 Fed. Reg. at 48,313, 48,345.

such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Wis. Gas, 758 F.2d at 674 (citations and internal quotation marks omitted). The States' bare allegations that their electric rates likely will increase do not satisfy this burden. Moreover, the States' argument is undercut by EPA's thorough analysis of compliance costs, which predicted only a small increase in average retail electricity prices in the contiguous U.S. (1.7 percent in 2012 and 0.8 percent in 2014). 76 Fed. Reg. 48,346-47.

To the extent the States argue that the rule will result in higher electric rates for their citizens, the States lack standing to raise such injuries. In claims against the United States premised on federal law, a State must base its standing on alleged injuries to itself as a State, not as *parens patriae* for the interests of its citizens or businesses. See Ctr. for Biological Diversity v. DOI, 563 F.3d 466, 476-77 (D.C. Cir. 2009).[45] In sum, none of the Petitioners has shown the type of economic injury that rises to the level of irreparable harm.

[45] Another injury alleged by the States of Wisconsin, Ohio, and Indiana (and others) is that EPA's decision to promulgate FIPs somehow usurps State sovereignty. This purported injury argument is merely a re-packaging of the Petitioners' merits argument, to which we responded supra at 19-24 by demonstrating the legality of EPA's approach in the rule. The Petitioners can hardly be irreparably injured by EPA's correct and lawful implementation of the Clean Air Act. If the Court nonetheless reaches this issue, EPA incorporates its response in opposition to the Kansas Motion. Document 1339022 at 17.

III. A STAY WOULD HARM THIRD PARTIES AND IS CONTRARY TO THE PUBLIC INTEREST

The Petitioners are no more rigorous or persuasive in their attempts to balance, on the one hand, their alleged irreparable harm if a stay is denied and, on the other, the harm to the public if the Transport Rule is stayed pending judicial review. In claiming that the public will not be negatively affected if the rule is stayed, the Petitioners present variations on the same two flawed arguments that we have rebutted in prior filings, namely that maintaining CAIR (in whole or in part) during a stay is functionally the same as implementing the Transport Rule and that, by proposing in the Revisions Proposal to delay the effective date of the assurance provisions until 2014, EPA has somehow conceded that a stay is in the public interest. Neither of these arguments has merit.

Before addressing these specific arguments, it bears emphasis that the Petitioners have advanced two completely contradictory propositions. First, they ask this Court to find that the Transport Rule will be so onerous that it imminently threatens forced unit retirements, grid reliability, system blackouts, and the Petitioners' financial viability. Yet in the very next breath, they claim that the Court needn't worry about the effects of a stay because the Transport Rule is really no different than maintaining the status quo (i.e., operating under the requirements of CAIR, State laws, and consent decrees) and that the Transport Rule could be stayed without affecting air quality, harming the public health, or otherwise

affecting the public interest. The Petitioners simply cannot have it both ways. In any case, we have already shown that they have not established irreparable injury and below we show that the balance of harms favors denying their stay requests.

A. Staying the Rule and Leaving CAIR in Place Pending Judicial Review Would Deprive the Public of Substantial Air Quality and Health Benefits.

The Petitioners do not seriously dispute the enormous air quality and health benefits that will result from the Transport Rule. The lost benefits to the public overwhelmingly outweigh the rule's costs, including the specious harms that the Petitioners assert. Each year, the rule will prevent between 13,000 and 34,000 premature deaths; 15,000 non-fatal heart attacks; 19,000 hospital visits; 19,000 cases of acute bronchitis; 400,000 incidences of aggravated asthma; and 1.8 million missed school or work days. 76 Fed. Reg. at 48,310. The monetized value of these health and welfare benefits is immense, between $120 billion and $280 billion annually, id. at 48,313, amounts that dwarf the $1.4 billion the Florida Utilities Motion (at 19) claims the rule will cost to implement in 2012.

While the Southern Company Response purports to analyze how emissions reductions required by the Transport Rule would compare to reductions in 2012 if CAIR were to remain in effect, its analysis fails because it uses the wrong metrics, faulty methods, and invalid assumptions. Napolitano Decl. ¶¶ 82-85. To take just one example, when Southern Company purports to show how "CAIR and CSAPR

[the Transport Rule] achieve similar total EGU emission reductions" in 2012 (at 11), it doesn't compare projected *emissions* at all. Rather, Southern Company compares emissions *budgets* under the two regimes, meaning that the analysis fails to account for the enormous quantity of banked (i.e., already allocated) SO_2 and NOx allowances that, if CAIR were to remain in effect for 2012, would allow States to emit well in excess of their CAIR budgets. Due to these abundant allowances that Southern Company ignores, CAIR, unlike the Transport Rule, would not effectively constrain source emissions in 2012. Napolitano Decl. ¶ 83. Worse still, Southern Company's analysis used an outdated EPA analytical tool from the proposed, not the final, Transport Rule, Southern Co. Resp. at 12, even though EPA greatly improved the accuracy of this tool between the proposed and final rules. Napolitano Decl. ¶ 84.

The emissions projections tell a much simpler and more compelling story. Emissions will be reduced far more in 2012 under the Transport Rule than if CAIR remains in effect. By 2012, power plants in States common to both the Transport Rule and CAIR will reduce their annual SO_2 and NOx emissions by approximately 1.5 million and 116,000 tons more, respectively, than they would have under CAIR. Id. ¶ 121. In 2014, SO_2 and NOx emissions under the Transport Rule will continue to be reduced to a greater degree than if CAIR were to remain in effect (by 1.8 million and 76,000 tons, respectively). Id. Thus, delaying the

implementation of the Transport Rule and reducing the emissions of these pollutants *above and beyond CAIR* will also delay the accompanying reduction in health impacts, including asthma and other pulmonary and cardiac diseases. Id. The claims that the first two years of the Transport Rule "will not result in meaningful environmental benefits beyond those mandated by CAIR" (Dairyland Mot. at 20) or that the marginal benefits are "negligible" (IN Mot. at 10) simply do not withstand scrutiny.

A stay would also negatively affect the regulated community and the States in their regulatory capacity. As we discussed above, the emissions market has already transitioned from CAIR to the Transport Rule, and a market for Transport Rule allowances is already established and trading. A sudden shift back to CAIR as a result of a stay would disrupt those markets. Companies have also already begun to develop compliance plans for 2012 that anticipate the Transport Rule being in effect. States, too, will be negatively affected because shifting back to CAIR would engender uncertainty in their development of NAAQS attainment plans. This confusion would be compounded by the fact that there is not a complete overlap of States covered by CAIR and the Transport Rule. Napolitano Decl. ¶ 128.

The argument that a partial stay, i.e., only as to one or a few States, would be benign is equally fallacious. See KS Utils. Mot. at 19-20; We Energies Mot. at 2;

GA Utils. Mot. at 20. Having just one or a handful of States be covered by CAIR pending judicial review would distort CAIR trading rules and essentially give those States a free pass to pollute because they would have unfettered access to artificially cheap NOx and SO_2 allowances. Napolitano Decl. ¶¶ 122-27. The data show that when allowances are available at very low cost, sources tend to increase their emissions, id., meaning that populations in States downwind of the State(s) operating under CAIR instead of the Transport Rule would be affected by disproportionately larger emissions from such States. Moreover, a partial stay for a State like Kansas that is not subject to CAIR would result in Kansas not being subject to *either rule* and being able to emit more NOx and SO_2 than if it were subject to the Transport Rule. These greater emissions will have the same predictable deleterious health impacts on residents of Kansas and the seven States downwind of Kansas. See EPA Opp. to KS Mot., document 1339022, at 18. Such a result would also clearly conflict with this Court's reasoning invalidating CAIR's trading program in North Carolina. See 531 F.3d at 907 (criticizing theoretical possibility under CAIR that sources contributing to downwind problems "would not need to reduce their emissions at all" if they "could purchase enough . . . allowances to cover all their current emissions").

B. EPA's Revisions Proposal Has No Bearing on Whether a Stay Is in the Public Interest.

The Court should reject Petitioners' attempt to use EPA's Revisions Proposal to bootstrap a basis for a stay pending judicial review. Contrary to their arguments (see, e.g., OH Mot. at 20; UARG Resp. at 11, FL Utils. Mot. at 13-14), EPA's Revisions Proposal does not concede major errors. Rather, the Revisions Proposal reflects relatively minor adjustments to a handful of State emissions budgets and assurance provisions, based on information brought to EPA's attention *after* issuance of the final rule. See, e.g., supra at 45-47; Napolitano Decl. ¶¶ 130-31. If anything, the possibility that EPA may adopt revisions that increase some State budgets and assurance levels and defer the rule's assurance provisions until 2014 makes any harm allegations that much more speculative. Indeed, at least one Petitioner (We Energies Mot. at 4) argues that the irreparable harm it alleges would occur only *if* EPA does not adopt the Revisions Proposal, and no Petitioner covered by the Revisions Proposal goes so far as to say that it would be insufficient to remedy the harm they allege. See, e.g., Entergy Mot. at 10.

Nor does EPA's Revisions Proposal suggest that EPA believes a stay of the rule pending judicial review is appropriate. See GA Resp. at 5; AL/MS Resp. at 10. It is misleading to suggest that EPA's proposal to suspend the assurance provisions of the Transport Rule temporarily is tantamount to staying the rule pending judicial review. If adopted, EPA's proposal to suspend the assurance

provisions until 2014 merely suspends the requirement that the total emissions from within a State not exceed the State's assurance level. 76 Fed. Reg. 63,861. In other words, suspending the assurance provisions means that EPA would not enforce the assurance levels prior to 2014. Nevertheless, other provisions of the rule would still apply and the rule's enormous benefits would begin to accrue. For instance, even if EPA finalizes the Revisions Proposal, the rule would still achieve region-wide reductions in emissions starting in 2012. See 76 Fed. Reg. at 63,871. Additionally, States and utilities would be responsible for taking steps now to ensure that they could demonstrate compliance in 2014.

In contrast, if a stay is granted, the status quo would be maintained and these parties would be relieved of complying with *any* Transport Rule requirements pending judicial review, including making preparations to comply with requirements that do not take effect until 2014. In such circumstances, the enormous benefits of the rule needlessly would be deferred until long after the Court rules on the merits.

CONCLUSION

For all the foregoing reasons, the pending stay motions should be denied.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

/s/David S. Gualtieri
DAVID S. GUALTIERI
JON M. LIPSHULTZ
JESSICA O'DONNELL
NORMAN L. RAVE
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-4767

OF COUNSEL

SONJA RODMAN
BYRON BROWN
KAYTRUE TING
United States Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing consolidated opposition to motions for stay pending judicial review were served, this 1st day of December, 2011, on all registered counsel, through the Court's CM/ECF system.

/s/David S. Gualtieri
David S. Gualtieri
United States Department of Justice/ENRD
Counsel for Respondent EPA