

**BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC**

**PETITION FOR RECONSIDERATION OF FINAL AGENCY  
ACTION AND REQUEST FOR A STAY OF:**

***FEDERAL IMPLEMENTATION PLANS: INTERSTATE TRANSPORT  
OF FINE PARTICULATE MATTER AND OZONE AND CORRECTION  
OF SIP APPROVALS***

**76 Fed. Reg. 48,208 (Aug. 8, 2011)**

**Petitioner  
GENON ENERGY, INC.**

September 13, 2011

## INTRODUCTION

Pursuant to § 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), 5 U.S.C. §§ 551 *et seq.* of the Administrative Procedure Act and for the reasons set forth below, GENON ENERGY, INC. (GenOn) petitions the Administrator of the United States Environmental Protection Agency (EPA) to reconsider specific provisions of its final rule concerning the interstate transport of fine particulate matter and ozone. GenOn also requests that EPA stay the rule during the reconsideration process.

On August 2 2010, EPA proposed the rule *Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of Sip Approvals*, 75 Fed. Reg. 45,210, 45,281 (Aug. 2, 2010) (Proposed Transport Rule). On August 8, 2011, EPA published the final Transport Rule (76 Fed. Reg. 48,208) (Transport Rule).

Reconsideration of the Transport Rule is warranted because the objections identified below, which are "of central relevance to the outcome of the rule," arose after the public comment period or could not be raised due to impracticability. 42 U.S.C. § 7607(d)(7)(B). The Clean Air Act (CAA) requires that EPA "shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed." *Id.*

A stay of the Transport Rule is also warranted. During the reconsideration of a rule, EPA may stay the effectiveness of the rule pursuant to the CAA. *Id.* EPA may also "postpone the effective date of [an] action taken by it pending judicial review" if the Agency "find[s] that justice requires postponing the action, that the action has not gone into effect and that litigation is pending." *Indus., Commer. And Institutional Boilers and Process Heaters and Comm. and Indus. Solid Waste Incineration Units*, 76 Fed. Reg. 28,662, 28,663 (May 18, 2011) (*quoting* the Administrative Procedure Act (APA), 5 U.S.C. § 705).

## SUMMARY OF PETITION

GenOn is one of the largest independent power producers in the United States. Because it is not a regulated utility, it must compete with other power producers in wholesale electricity markets. GenOn owns and operates generating plants with a total capacity of approximately 24,200 megawatts (mw) – enough electricity to serve about 25 million U.S. homes.

The vast majority of this electric power is produced in plants that burn coal, natural gas and, to a lesser extent, oil. GenOn's facilities are located in 12 states, including the following states covered by the Transport Rule: Maryland, Virginia, New York, Pennsylvania, Ohio, Illinois, New Jersey, Florida, Mississippi, and Texas.

The Transport Rule will have a substantial impact on GenOn's fleet of coal-fired power plants, which provide baseload power to several major urban areas. Through its subsidiaries, GenOn owns 7,542 mw of coal-fired capacity in states covered by the Transport Rule. Except for one 482 mw plant in Virginia, all these plants (more than 7,000 mw) are located in Pennsylvania, Ohio, and Maryland.

The Transport Rule creates SO<sub>2</sub> and NO<sub>x</sub> emission budgets for covered states and allocates emission allowances to power plants in those states. The allowances for all the power plants in a given state are roughly equal to the budget for the state in which the plants are located. For many covered states, including Pennsylvania, Ohio, and Maryland, the final Transport Rule established emission budgets that are much lower than those included in the Proposed Transport Rule. As a result, the allowances given to power plants in those states are also substantially reduced. The changes to state budgets are based on new assumptions and updated modeling that were never subject to public notice and comment. GenOn, among others, was therefore denied an adequate opportunity to comment on these new assumptions and updated modeling. The updated models should be submitted to notice and comment and, to prevent irreparable harm to power producers like GenOn, the Transport Rule should be stayed pending reconsideration.

### **SPECIFIC ISSUE FOR RECONSIDERATION**

The specific issue for reconsideration is that the state budgets in the final Transport Rule are substantially different than those in the Proposed Transport Rule, and yet those changes – and the analysis that EPA apparently used to support them – were not submitted to notice and comment rulemaking. The APA's notice and comment procedures, 5 U.S.C. §§ 551(5), 533(c), "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of*

*Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2002). A final rule may differ from a proposed rule only if it is a "logical outgrowth" of the former, which is not the case where interested parties were expected to "divine [EPA's] unspoken thoughts" resulting in a final rule "surprisingly distant" from the Agency's proposal. *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000); *see also Int'l Union*, 407 F.3d at 1260.

In this case, the state SO<sub>2</sub> and NO<sub>x</sub> budgets in the final Transport Rule were drastically different from those in the Proposed Transport Rule. According to the preamble to the final Rule, this result was the result of updated modeling and cost curves. EPA did not provide any notice or meaningful opportunity to comment on the modeling changes that apparently caused such substantial changes to the state budgets in the final Rule.

As noted above, virtually all GenOn's coal-fired capacity is located in Pennsylvania, Maryland, and Ohio. The following charts show the changes in the SO<sub>2</sub> budgets for these States between the proposed and final rules:

**Annual SO<sub>2</sub> Allowances/Budgets for 2012 - 2013**

	Proposed Rule	Final Rule	Change from Proposed to Final
Pennsylvania	388,612	278,651	-28%
Ohio	464,964	310,230	-33%
Maryland	39,665	30,120	-24%

**Annual SO<sub>2</sub> Allowances for 2014 and thereafter**

	Proposed Rule	Final Rule	Change from Proposed to Final
Pennsylvania	141,693	112,021	-21%
Maryland	39,665	28,203	-29%
Ohio	178,307	137,007	-23%

Thus, GenOn learned for the first time on July 6, 2011, that it would be responsible for substantial reductions in SO<sub>2</sub> emissions – well beyond those proposed in the proposed rule – in less than 6 months.

In addition, the unexplained "modifications" substantially altered GenOn's specific allowances for both SO<sub>2</sub> and NO<sub>x</sub>. For example, the allocations for GenOn's plants in Ohio were reduced by 77% (SO<sub>2</sub>), 76% (Annual NO<sub>x</sub>), and 74% (Ozone Season NO<sub>x</sub>). Similarly, the allocations for GenOn's plants in Pennsylvania were reduced by 67% (SO<sub>2</sub>), 33% (Annual NO<sub>x</sub>), and 27% (Ozone Season NO<sub>x</sub>). Unless EPA grants reconsideration of the Transport Rule, GenOn will have no opportunity to present to EPA meaningful comment on the methodology change that led to the lower allocation levels. It is hard to see how such fundamental changes in substantive requirements could be viewed as mere "refinements" of the modeling in the Proposed Transport Rule. Accordingly, GenOn requests reconsideration of the Transport Rule and submission of the Rule to notice and comment.

### **REQUEST FOR STAY OF RULE**

GenOn requests a stay of the Transport Rule pending EPA's review pursuant to 42 U.S.C. § 7607(d)(7)(B), which permits the EPA to stay a rule during reconsideration, and 5 U.S.C. § 705, which permits a stay when the Agency "find[s] that justice requires postponing the action, that the action has not gone into effect and that litigation is pending." 76 Fed. Reg. at 28,663 (quoting 5 U.S.C. § 705)." The Transport Rule is not yet in effect, petitions for judicial review of the Rule have already been filed, and the following demonstrates that justice requires a stay.

The Transport Rule will cause irreparable harm. The final Rule gives GenOn's facilities approximately 22% of the SO<sub>2</sub> allowances they need to operate at historic levels in Ohio and approximately 31% of the SO<sub>2</sub> allowances they need to operate at such levels in Pennsylvania. In order to achieve the emission levels that correspond with the allowances given to these plants, GenOn would need to install major control technology equipment on facilities that represent most of the Company's generating capacity in these states. It is simply impossible, however, to install the state-of-the-art controls called for by the Transport Rule in 5 months. EPA's recognizes this in the preamble to Transport Rule, stating that "it is not possible to require the installation of post-combustion SO<sub>2</sub> controls (scrubbers) or post-combustion NO<sub>x</sub> controls (SCRs) before 2014 (because

it takes about 27 months to install a scrubber and 21 months to install an SCR) . . . ." Proposed Transport Rule at 45,281. Yet the Transport Rule requires compliance starting January 1, 2012. GenOn's only options will be to purchase allowances and/or curtail operations, thus incurring substantial, unrecoverable costs.

The Transport Rule will cause other irreparable harm to GenOn if it is not stayed. For example, GenOn has committed its capacity through May 2015 pursuant to market rules and could suffer severe penalties if it cannot meet those commitments. Otherwise, those obligations will minimize GenOn's ability to comply with the Transport Rule by de-rating and possible shut-down of facilities. In addition, the Transport Rule appears to be based on an assumption that the substantial reductions will largely be achieved by "increased dispatch of lower-emitting generation which can be achieved by 2012." 76 Fed. Reg. at 48,252. This apparently means that gas-fired power plants that have been designed and operated as peaking units will be expected to provide more baseload power. Yet EPA also seems to assume that baseload coal-fired plants will be available to be operated as peaking units, which would cause maintenance costs to go up and availability to go down on a number GenOn's units, which were designed as baseload units that run essentially all the time.

Although EPA suggests that units may comply with the emission reductions by purchasing allowances, this is not realistic for GenOn because of the way EPA has structured the "assurance provisions" and penalties in its final rule. The "assurance provisions" in the Transport Rule impose substantial financial penalties on a company if its emissions in any state are more than 18-21 percent higher than the number of allowances it has received for that state. It is true that this penalty only applies if total power plant emissions in a state are more than 18-21 percent higher than the State's corresponding budget, but it is impossible for any company to predict with confidence what total emissions in a state will be – especially in the first two years of the program. Thus, at least in 2012 and 2013, relying on allowance purchases alone is not likely to be a feasible compliance option.

The public interest also favors a stay. The Transport Rule threatens significant harm to GenOn, the rest of the utility industry, and the U.S. economy at a time when companies are attempting to recover from the steepest economic downturn since the 1930s. The Transport Rule will likely force a number of plants to shut down, as already announced by at least one major company. Jobs will be eliminated due to faster than planned

retirements. Such shut-downs will injure a number of communities. Furthermore, the public has a great interest in the continued operation of the utility industry. Any interruption or a significant increase in the cost of electricity will have an adverse impact on our struggling economy. In the converse, a stay will not cause appreciable because existing regulatory requirements, including the Clean Air Interstate Rule, will remain in place during the pendency of a stay. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

## **CONCLUSION**

For all of the foregoing reasons, GenOn respectfully requests that EPA grant the Petition for Reconsideration and stay the Final Transport Rule during the pendency of the reconsideration process.