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FACSIMILE TRANSMISSION
July 22, 2011

To:	Lisa P. Jackson, Administrator U.S. Environmental Protection Agency	Fax:	202-501-1450
From:	Claudia O'Brien		
Re:	Petition for Administrative Stay of Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States (Docket No. EPA-HQ-OAR-2009-0491)		042117-0009

☒ Original(s) to follow Number of pages, including cover: 11

Attached please find a petition for administrative stay submitted on behalf of Edison Mission Energy. The original will follow via first class mail.

Thank you for your consideration.

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July 22, 2011

Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Petition for Administrative Stay of Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States (Docket No. EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson:

On behalf of Edison Mission Energy, we respectfully request an immediate stay of the effective date of EPA's recently promulgated Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States (Docket No. EPA-HQ-OAR-2009-0491) (the "Cross-State Air Pollution Rule"), pursuant to Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705. APA § 705 grants EPA authority to stay the effective date of a rule pending judicial review, when "justice so requires."[1]

Justice here requires a stay of the effective date of the Cross-State Air Pollution Rule. Indeed, although APA § 705 does not require irreparable injury to support a stay, here even the more stringent judicial standard for a stay is met. To determine whether to grant a stay, Courts consider four factors: (1) whether the stay applicant has shown that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) the possibility of substantial harm to other parties interested in the proceeding if the stay is granted; and (4) where the public interest lies. *See* D.C. Circ. Handbook of Practice and Internal Procedures (2011) at 33 (citing *Washington Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). All four factors are satisfied here.

A. Petitioners Are Likely To Succeed On The Merits

The Cross-State Air Pollution Rule will be challenged by States, whose cooperative federalism rights under CAA Title I have been abrogated by this rulemaking. It will also be

[1] Nothing in the CAA abrogates EPA's authority under APA § 705. *See, e.g.*, CAA § 7607(d)(1) (specifying sections of the APA that do not apply to CAA rulemaking, but not including APA § 705).

challenged by companies such as Edison Mission Energy, who relied in good faith on EPA and State rulemakings to stagger its hundreds of millions of dollars in emissions control technology investments, only to find itself forced to pay its competitors additional hundreds of millions of dollars – for no emissions reductions – because it failed to anticipate that EPA would change the requirements mid-stream, penalizing sources who guessed wrong and installed different emission controls first.

These petitioners are likely to succeed on the merits. In a rush to promulgate regulations that would take effect as soon as 2012, EPA has profoundly misinterpreted core provisions of Title I of the CAA–cooperative federalism is at the core of Title I. Congress specifically assigned different tasks to the states and to the EPA: EPA is tasked with promulgating uniform NAAQS;[2] States are specifically assigned the "primary responsibility" for weighing the appropriate manner to achieve these standards, consistent with local, economic and other state interests.[3] Although the EPA has the responsibility to review and approve or disapprove of state implementation plans (SIPs), the role of the states in formulating their SIPs is fundamental to the operation of the Act, and a key reason for its past success. Instead of simply inappropriately dictating the content of states' SIPs, as it did in *Virginia v. EPA*, EPA has now made the much graver error of circumventing the SIP process altogether by immediately imposing a FIP.[4] EPA proffered two rationales for a FIP first approach, neither of which will survive judicial review.

First, in relation to states' interstate transport obligations for 1997 Ozone and $PM_{2.5}$ NAAQS, EPA argues that the D.C. Circuit's remand of the CAIR rule—without vacatur—in *North Carolina v. EPA* somehow reversed EPA's prior approval of the states' SIP revisions addressing the transport obligations for the 1997 NAAQS. EPA reasons that it approved SIPs under CAIR before the court found "that CAIR was unlawful," which "meant that the CAIR SIPs were not adequate to satisfy [the statutory] mandate," and thus EPA's 2005 finding that states failed to submit SIPs addressing the transport obligations for the 1997 NAAQS remains in force.[5]

Nothing in the *North Carolina v. EPA* decision or the CAA provides a basis for such a claim. EPA made a finding of failure to submit for these states in 2005, which would have given

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2 42 U.S.C. § 7409.

3 § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."); § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which [NAAQS] will be achieved and maintained within each air quality control region in such state.").

4 *See Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997). EPA's final rule purports to create options for states to issue abbreviated or constrained SIPs instead of accepting the FIP. However, this does not cure the fundamental issue that is raised by EPA's "FIP first" approach because it only allows states to make "2013 allowance allocations through the use of a SIP revision that is **narrower in scope** than the other SIP revisions states can use to replace the FIPs and/or to make allocation decisions for **2014 and beyond.**" Final Rule at 24. Thus, EPA is still depriving states of the authority to implement the rule through SIPs.

5 *See* Final Rule at 53-54.

EPA power to impose a FIP under section 110(c)(1)(a). But, critically, EPA's later action in approving each state's SIP as meeting the requirements of section 110(a)(2)(D)(i)(I) *ended* EPA's authority to issue a FIP under section 110(c)(1)(a) because that authority exists "unless the State corrects the deficiency, and the administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan." The D.C. Circuit's decision in *North Carolina v. EPA* did nothing to restore this authority to EPA. While the D.C. Circuit remanded CAIR and the CAIR FIP,[6] EPA's individual SIP approvals were not before the court in that case and, therefore, remain in place. EPA's own actions support this conclusion. EPA approved six SIPs to meet the requirements of the statute *after* the D.C. Circuit's remand of the CAIR rule in December 2008, demonstrating the fallacy in EPA's analysis.[7] The conclusion that these SIPs remain in place is consistent with the D.C. Circuit's goal—in remanding, rather than vacating, CAIR—to "temporarily preserve environmental values covered by CAIR."[8] The plain language of the statute and EPA's subsequent actions thus confirm that the individual SIPs that EPA approved under CAIR remain valid.

Second, for states' interstate transport obligations under 2006 $PM_{2.5}$ NAAQS, EPA has disapproved many states' SIP revisions for failing to meet requirements that had not even been *identified* by EPA at the time the SIP revisions were submitted.[9] These SIP revisions were disapproved on June 28, 2011—days before the final rule was released.[10] In its proposals to disapprove the state SIP revisions responding to the 2006 $PM_{2.5}$ NAAQS (which revisions were submitted in 2009 for the most part) EPA alleged that none of those revisions have met the emission limitations EPA identified in its proposed CATR rule.[11] In other words, EPA denied the states the right to implement the requirements of EPA's 2010 proposal following a SIP Call by pretending that the states failed to do so earlier—in 2009 submissions—before EPA even made that proposal. *See Hatch v. FERC*, 654 F.2d 825, 835-37 (D.C. Cir. 1981) (finding that petitioner was not given sufficient notice of change in rule to "have a meaningful opportunity to meet it.").

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6 *See North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

7 These states are: Maryland, 10/30/2009; North Carolina, 11/30/2009; West Virginia, 8/4/2009; Pennsylvania, 12/10/2009; South Carolina, 10/16/2009; Ohio, 9/25/2009.

8 *See North Carolina*, 550 F.3d at 1178.

9 In the preamble to the proposed rule, EPA explained that it had separately issued a finding of failure to submit § 110(a)(2)(D)(i)(I) transport SIPs for the 2006 $PM_{2.5}$ NAAQS. *See* Proposed CATR, 75 Fed. Reg. at 45342. A number of states submitted SIP revisions to meet this requirement, but EPA finalized its disapproval of these SIPs on June 28, 2011—days before the final rule was released.

10 *See* EPA, Office of Air and Radiation, Status of CAA 110(a)(2)(D)(i)(I) SIPs Final Rule TSD (July 2011).

11 *See, e.g.*, Approval and Promulgation of Air Quality Implementation Plans; Georgia; Disapproval of Interstate Transport Submission for the 2006 24-Hour $PM_{2.5}$ Standard, 76 Fed. Reg. 4584, 4586 (proposed Jan. 26, 2011) (proposing to disapprove the state's SIP revision based on modeling EPA conducted for the Transport Rule); Approval of Air Quality Implementation Plans; Indiana and Ohio; Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-Hour PM2.5 NAAQS, 76 Fed. Reg. 6376, 6378 (proposed Feb. 4, 2011) (same); Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Disapproval of Interstate Transport Submission for the 2006 24-Hour PM2.5 Standard, 76 Fed. Reg. 4597, 4599 (proposed Jan. 26, 2011) (same).

Likewise, EPA has found that other states failed to submit SIP revisions to address the 2006 $PM_{2.5}$ NAAQS where EPA had not yet established state emission budgets and was more than a year late in even designating areas as attainment or nonattainment. While EPA argued in the preamble to the final rule that "nothing in the Act requires EPA to give the states another opportunity, following promulgation of the Transport Rule, to promulgate a SIP before EPA promulgates a FIP,"[12] this again is an effort to bypass the CAA's core requirement of cooperative federalism.[13] It is not credible for EPA to contend that states failed to develop SIPs to meet the requirements of section 110(a)(2)(D)(i)(I) until they know whether or not areas are in nonattainment or what the state emission budgets will be. *Cf. Hatch*, 654 F.2d at 835-37.

EPA's allocation methodology (discussed above) also is fundamentally flawed. EPA admitted in the NODA that "the initial allocation of allowances . . . [based upon] historic heat input would yield a distribution of allowances putting relatively greater burden on the higher-emission-rate units to reduce emissions or purchase additional allowances in order for the units to be in compliance with the proposed Transport Rule trading programs."[14] However, by EPA's own admission, short term reductions in emissions are available only on a marginal basis by making minor changes. As a result, the effect of the allocation during Phase I will be to put a "relatively greater burden" on the relatively higher-emission-rate units to purchase allowances from those units allocated excess allowances. EPA has presented no environmental justification for requiring some producers to pay others.

EPA attempted to justify the wealth transfer consequence of the unit-level allocation methodologies in EPA's NODA proposal by stating that "because higher-emission-rate units generally are responsible for a greater share of a state's total emissions and thus bear greater responsibility for a states' significant contribution and interference with maintenance, this distribution of burden is consistent with the goals of CAA section 110(a)(2)(D)(i)(I)."[15] This reasoning is clearly erroneous. The "distribution of burden" is not consistent with the goals of the CAA. The "burden" that EPA has imposed with its new unit-level allocation approach generates no emission reduction benefits; it is simply an invention of the rule's pointless wealth transfer and cannot be justified by any reference to the CAA or any other sensible public policy interest. This is particularly the case given that CAIR was expressly premised on a two-phased implementation, wherein less stringent reductions would take place in 2010, with more stringent reductions occurring five years later, and on the presumption that some sources would *not* install controls – particularly for the 2010-2014 phase of the rule. Under the Cross-State Air Pollution Rule approach, however, sources are penalized for choices that not only were legal, but indeed

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12 Final Rule at 55.

13 For example, EPA did not even *designate* areas as attainment or nonattainment until November 13, 2009, more than a year after its statutory deadline for doing so and two months after states were purportedly required to submit SIPs. *See* 42 U.S.C. § 7407(d)(1)(B)(i); U.S. EPA, *Air Quality Designations for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards*, 74 Fed. Reg. 58688 (Nov. 13, 2009).

14 NODA, 76 Fed. Reg. at 1,114.

15 *Id.*

were expressly contemplated by CAIR – and upon which EPA relied to ensure the cost-effectiveness of the CAIR rule. Nor do those sources have time to "correct" their compliance choices before the penalty occurs: as EPA acknowledges, sources cannot install new controls by 2012. This penalty is especially egregious as applied to sources such as Edison Mission Energy, which committed in 2006 to aggressive reductions of mercury, NO_x and SO_2, but agreed to phase in implementation of controls based on the priorities established by the state. In sum, the final rule's allocation approach is simply punitive, contrary to the statute, and a textbook example of arbitrary and capricious agency action.[16] As such, petitioners are likely to succeed on the merits.

B. Petitioners Will Be Irreparably Harmed Absent A Stay.

The Cross-State Air Pollution Rule will be challenged by States and by industry. Absent a stay of the effective date of the rule, both types of petitioners will be irreparably harmed. States are irreparably injured by EPA's abrogation of their cooperative federalism rights under Title I of the CAA. Industry also will be irreparably injured by the irrevocable commitment of resources required by the final rule. Specifically, companies like Edison Mission Energy will be required to pay their competitors hundreds of millions of dollars – for no emissions reductions – because they complied with existing federal law and did not anticipate that EPA would change emission reduction requirements mid-stream, without allowing sources sufficient time to install the requisite controls. As such, these companies have no alternative but to pay their competitors or shut down – they are penalized for guessing wrong and installing different emission controls first.[17] Yet even if ultimately successful before the Court, those companies will never be able to recoup the money paid to their competitors; there is no mechanism under the law to enable them to do so. In *Portland Cement Association, Inc. v. EPA*, No. 10-1359 (D.C. Cir. Jan. 19, 2011), the D.C. Circuit agreed that expedited briefing was warranted where petitioners argued that they faced irreparable injury from committing resources to install pollution controls based on a regulation that might be changed as a result of the litigation. The impact here is far more severe.

Retrofitting with SCRs and scrubbers is a complicated, expensive, and time-intensive process. There is widespread agreement among the industry and state commenters that EPA's estimates about what will be required in this massive undertaking grossly underestimate the burdens on industry, particularly in the short-term.[18] On a plant-by-plant basis, the time to

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16 *See Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

17 In Edison Mission Energy's case, the company followed Illinois's request and installed mercury controls first, NO_x controls second (implementation by 2012), with SO_2 controls last (and scheduled for installation by 2018). Similarly, EME's Homer City plant has had NO_x controls (SCRs) in place since 2003; in response to the CAIR rule, Homer City installed one scrubber, and scheduled to have the two remaining scrubbers installed by 2015.

18 *See, e.g.* Southern Company, Comments on Proposed Transport Rule, 13-21 (Oct. 1, 2010); Progress Energy, Comments on the Proposed CATR, 5 (Oct. 1, 2010).

design, contract, permit, and construct the pollution control equipment is significant and well-documented. The overwhelming amount of available data demonstrates that it takes between 40 and 60 months to complete scrubber installation and SCR retrofits average 39 to 40 months, but can take as long as 60 months.[19] Indeed, EPA has conceded that it is impossible for these retrofits to occur in time for Phase I of CATR in 2012[20] – and it is highly questionable if the required retrofits can practically be made by 2014.[21] Moreover, the rule is likely to drive a number of older coal plants to decommissioning. In areas that depend heavily on coal production, this is likely to have significant impacts on the price of electricity, as the costs of new plants are priced into the charges to consumers.[22] It may also negatively affect the struggling economies in those areas.[23]

These significant costs of retrofits will be exacerbated by the unjustified costs to many facilities of the wealth transfer that results from EPA's allowance allocation methodology – costs that will also be passed along to ratepayers. Specifically, the rule allocates emission allowances between existing units during Phase I in a way that amounts to a redistribution of wealth without

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19 UARG Comments at 42, 44; Southern Company, Comments on Proposed Transport Rule, 13-21 (Oct. 1, 2010) (stating that Southern Company's average installation time for scrubbers is 54 months with a range from 40 to 69); Progress Energy, Comments on the Proposed CATR, 5 (Oct. 1, 2010) (urging EPA to assume more realistic timeframes, estimating 44 months for scrubber installation and 38 months for SCRs). By contrast, EPA's estimates about how long it takes to install relevant equipment—multimillion dollar installations known colloquially as scrubbers or SCRs—are exceedingly optimistic and have no genuine support in the record. Relying on unrepresentative information concerning retrofits that two companies undertook a decade ago on two electrical generating facilities, *see* UARG Comments at 38-41, 44, EPA suggests (in the preamble) that owners of all such facilities should be able to install SCRs in 21 months. Proposed CATR, 75 Fed. Reg. 45,210, 45,281 (Aug. 2, 2010); Final Rule at 325.

20 Proposed CATR, 75 Fed. Reg. at 45,281 ("it is not possible to require the installation of post-combustion SO_2 controls (scrubbers) or post-combustion NO_x controls (SCRs) before 2014 (because it takes about 27 months to install a scrubber and 21 months to install an SCR).").

21 Beyond being objectively infeasible, compressing all of the construction into the short period leading up to 2014 will likely lead to significant reliability concerns—an issue raised by state commenters. For instance, the Ohio Public Utilities Commission concluded: "We believe that in terms of reliability, implementation of the Transport Rule, as proposed, will result in a level of uncertainty that is unacceptable and, further, irresponsible." *See* Ohio Public Utilities Commission, Comments on Proposed CATR (Oct. 1 2010).

22 *See id.* at 3-4.

23 *See, e.g.*, Letter from U.S. Representative Shuster of Pennsylvania to EPA Administrator Jackson (June 15, 2011) (explaining that if Homer City were forced to shut down or cut back operations because of EPA's rule, it would be very harmful to the local economy and Pennsylvania residents could see a $30 million per year increase in electricity costs). Moreover, the EPA's compressed time schedule will unnecessarily drive up the cost of compliance, an effect the EPA has failed to consider. History shows that, even when EPA appropriately complies with the CAA to implement NAAQS, it often underestimates actual costs. This is precisely what happened recently with respect to the NO_x SIP call. Compliance costs were dramatically higher for that rule than EPA predicted, largely due to increased costs for materials and services resulting from heightened demand that EPA failed to foresee in the proposed rule and its underestimation of the complexity of many retrofits. *See* J.E. Cichanowicz et al., Utility Industry Response to the IAQR Mandates: Estimates of Technology Retrofit and Schedule, EPA-HQ-OAR-2003-0053-1024 (Mar. 30, 2004); J.E. Cichanowicz et al., Analysis of CAIR Compliance Schedule: A Response to ICAC Estimates, Docket Entry EPA-HQ-OAR-2003-0053-1786 (July 26, 2004).

any environmental benefit. EPA has admitted that it is "not possible" to require retrofits of emission-control technology before 2014 because of required installation time,[24] but EPA's allocation methodology nonetheless would give some units significantly fewer emission allowances than they will require (without the ability to install additional controls before 2014) and provides other units with significantly more allowances than they will use. Facilities that are assigned fewer allowances than they will need to operate will not be able to install equipment to reduce their emissions, and will thus be forced to either purchase allowances on the open market,[25] or shut down.[26] A recent study indicates that the price of allowances under the rule's allocation approach is projected to be significantly higher than under the original Transport Rule proposal because of the incentives for withholding allowances from the market, but EPA did not even evaluate the market power effects of its final allowance approach.[27] According to the study:

> [The] NODA alternative allocation proposals concentrate a large number of SO_2 allowances in the hands of a few entities that do not need them to operate their generating units, giving them market power, which they can exercise by withholding allowances from the market.[28]

The net effect of EPA's rule will thus be to force the victims of the allocation system (those allocated fewer allowances than needed) to purchase allowances from the beneficiaries of the system (those allocated excess allowances) at inflated rates—money they should be spending on investing in the control technology needed to achieve emission reductions. This massive redistribution of wealth – amounting to ***$1.5 billion in 2012 and 2013*** – is depicted below[29]:

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24 Proposed CATR, 75 Fed. Reg. at 45,281 ("it is not possible to require the installation of post-combustion SO_2 controls (scrubbers) or post-combustion NO_x controls (SCRs) before 2014 (because it takes about 27 months to install a scrubber and 21 months to install an SCR).").

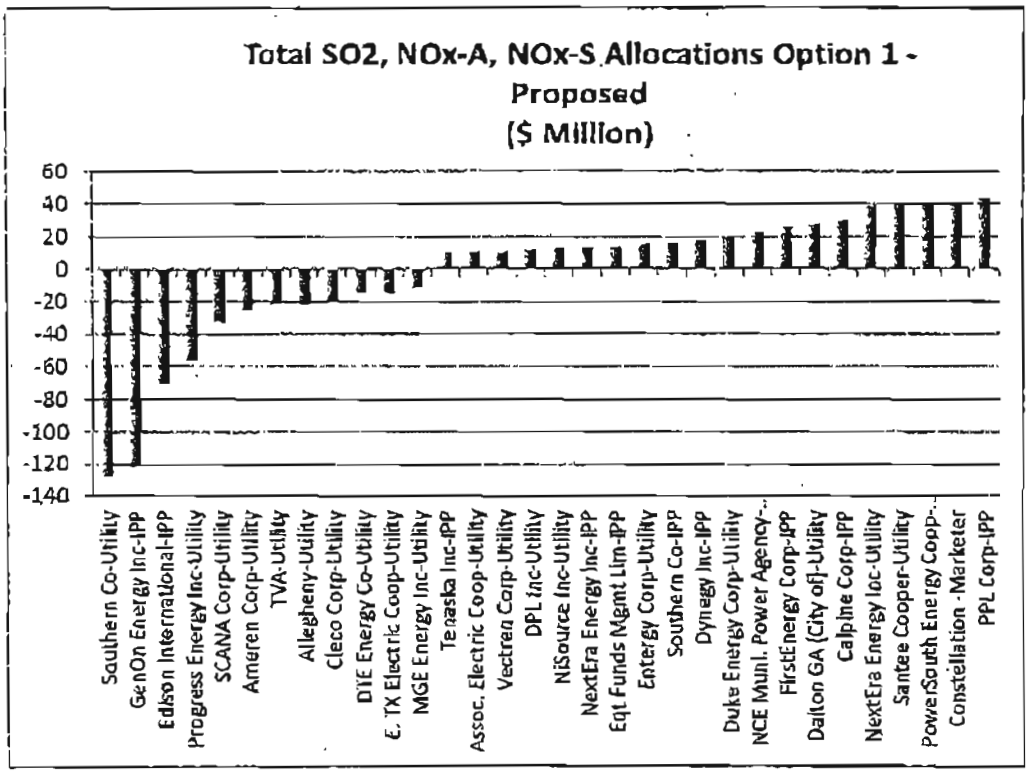
25 If indeed, such allowances are available. Due to the incentives to bank allowances for future years instead of selling, and the potentially monopolistic structure of the market EPA has designed, units that have been allocated allowances in excess of their emissions are likely to have considerable market power. *See* Edison Mission Energy *NODA Comments*, at 7-11 (Feb. 7 2011); *See also* Charles River Associates, Market Power Implications of EPA's Proposed Alternative Allowance Allocations Under CATR for 2012-13, 11-19 (May 9, 2011).

26 This very problem led to the suspension of the RECLAIM NO_x market during the California energy crisis. Moreover, shutting down plants harms more than the specific EGUs. Taking capacity off the market will decrease supply on the electricity market, increasing prices, and potentially causing volatility on the electricity spot markets.

27 *See* Charles River Associates, Market Power Implications of EPA's Proposed Alternative Allowance Allocations Under CATR for 2012-13, 3, 10 (May 9, 2011).

28 *Id.* at 3.

29 This chart was created based on NODA Option 1 and depicts the wealth transfer for one year for all distributions that exceed $10 million.



The wealth transfer effectively required under the rule will have negative effects on ratepayers and local economies. As the victim companies face increased costs in the form of allowances that must be purchased from the beneficiary companies, they must necessarily attempt to pass these costs along to the ratepayers. A recent study projects that the rule's allocation approach would result in an increase in consumer power prices by as much as $514 million per year in 2012 and 2013 with consumers in the Midwest bearing the greatest increase in power costs.[30] The windfall that this will generate at the beneficiary companies will almost certainly accrue to the shareholders, with little to no benefits passed on to the ratepayers.

On the local level, this will have significant impacts. Congressman Shuster recently summarized the potential impact of the EPA's allocation methodology on EME's Homer City plant in his district.[31] The rule would require Homer City to buy nearly 75 percent of the allowances it needs to operate – even though the full number of allowances it needs to operate was included in the State's baseline. This facility produces 1,884 MW of electricity—enough to power two million homes. The facility also employs many high earning workers and supports hundreds of local coal mining and trucking jobs. If this facility is forced to shut down or cut back operations because of the rule, it would be very harmful to the local economy.

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30 *See* Charles River Associates, Market Power Implications of EPA's Proposed Alternative Allowance Allocations Under CATR for 2012-13, 3-4 (May 9, 2011).

31 Letter from U.S. Representative Shuster of Pennsylvania to EPA Administrator Jackson (June 15, 2011).

Additionally, as Congressman Shuster noted, Pennsylvania residents could see a $30 million per year increase in electricity costs under the rule.

Moreover, the injury to companies (and ratepayers) from this needless wealth transfer will be irrevocable. Even if the rule is ultimately vacated (as we believe it will be), companies will be unable to recover the money they paid their competitors for allowances; we are aware of no mechanism under the law that would allow them to do so. Nor can companies afford to simply wait until the Court decides the validity of the rule before purchasing allowances. Plants such as Homer City, for example, were allocated only about a quarter of what they need to operate for 2012 and 2013– notwithstanding the fact that much more than a quarter of Homer City's emissions were incorporated into the Pennsylvania baseline; credit (in the form of allowances) for those emissions were simply given to other parties. As such, unless the D.C. Circuit vacates the rule before approximately February of 2012, Edison Mission Energy will be forced to purchase allowances from its competitors or shutter its plant. That clearly is irreparable injury.

C. A Stay Would Not Harm EPA And Is In The Public Interest

As noted above, EPA has acknowledged that "it is not possible to require the installation of post-combustion SO_2 controls (scrubbers) or post-combustion NO_x controls (SCRs) before 2014 (because it takes about 27 months to install a scrubber and 21 months to install an SCR) ...."[32] As a result, Phase I of the Cross-State Air Pollution Rule simply reflects the level of emissions that would otherwise occur in 2012 and 2013, with some minor tweaks based on assumed "optimization" of controls. Since the victims of EPA's allocation approach could not possibly install emission controls before 2012, as EPA acknowledges, the rule will not result in meaningful environmental benefits beyond what was mandated by CAIR – which will remain in effect if the rule is stayed. The net effect of Phase I, therefore, will be to transfer wealth from the ratepayers of the victim companies to the shareholders of the beneficiary companies, *with no environmental benefits to show for it.* Rather than providing environmental benefits, the rule's allocation approach merely manipulates the market. As such, and particularly with CAIR remaining in place as a backstop, EPA would not be harmed by a stay.

A stay clearly is in the public interest. There would be no environmental gain by entering a stay pending judicial review. And, at the same time, at a time of extremely weak economic growth and high unemployment, the costs to companies and ratepayers of EPA's proposal far outweigh any purported benefits. Although the shareholders of beneficiary companies would undoubtedly welcome the windfall profits, the increased electricity costs associated with the mandated wealth transfer – or resultant plant closures – could result in significant job losses at a particularly fragile time for the U.S. economy.

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[32] Proposed CATR, 75 Fed. Reg. at 45,281. By industry calculations, it may take even longer. *See Comments of Edison Mission Energy on EPA's Proposed Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone (The "Transport Rule")*, 22-25 (Oct. 1, 2010).

For the foregoing reasons, Edison Mission Energy respectfully requests an immediate stay of the effective date of the Cross-State Air Pollution Rule, pursuant to APA § 705. Should you have any questions or comments regarding the foregoing petition, please do not hesitate to contact me at 202-637-2181 or claudia.o'brien@lw.com.

Respectfully,

Claudia M. O'Brien
of LATHAM & WATKINS LLP