

Mississippi Public Service Commission



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October 5, 2011

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Hon. Lisa P. Jackson, Administrator
U. S. Environmental Protection Agency
Room 3000, Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460
jackson.lisap@epa.gov

RE: Petition for Reconsideration and 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); Docket No. EPA-HQ-OAR-2009-0491

Dear Administrator Jackson:

Enclosed for filing please find the Mississippi Public Service Commission's Petition for Reconsideration and Stay of the above-styled Final Rule as it relates to the State of Mississippi. Upon receipt, please file the Petition for Reconsideration and Stay in Docket No. EPA-HQ-OAR-2009-0491.

I have enclosed an extra cover page of the Petition for Reconsideration and Stay, along with a self-addressed, stamped envelope. Please have this cover page date-stamped and returned to me for the Commission's records.

I thank you and your staff for assistance with this matter. If there are any questions regarding this filing, please do not hesitate to contact me at 601-961-5497.

Sincerely,

A handwritten signature in black ink, appearing to read "Shawn Shurden", is written over a horizontal line.

Shawn Shurden, Senior Attorney
Mississippi Public Service Commission

cc: Assistant Administrator Gina McCarthy
Ms. Sonja Rodman

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:

EPA Docket No.:

Federal Implementation Plans: Interstate
Transport of Fine Particulate Matter and
Ozone and Correction of SIP Approvals,
76 Fed. Reg. 48,208 (Aug. 8, 2011)

EPA-HQ-OAR-2009-0491

PETITION FOR RECONSIDERATION AND STAY

Pursuant to 5 U.S.C. § 705 and 42 U.S.C. § 7607(d)(7)(B), the Mississippi Public Service Commission (“MPSC”) requests reconsideration and an immediate stay of the above referenced rule (the “Final Rule”) as it applies to Mississippi.

INTRODUCTION

In August 2003, North America experienced an historic blackout that affected 50 million people in 8 Northeast states and Ontario, Canada. The blackout lasted two days, with a load shed of around 61,800 MW (megawatts). At least eleven people died, and the region suffered financial losses of \$4-\$10 billion. *See* Electricity Consumers Resource Council, *The Economic Impacts of the August 2003 Blackout*, (February 9, 2004).¹ Financial losses stemmed primarily from lost production as hundreds of thousands of workers were idled, disrupted deliveries, overtime wages for government disaster relief workers and commodity spoilage. The potential for a broader financial disaster loomed as eight oil refineries were forced to perform emergency shutdowns, threatening a gasoline shortage. *Id.*

The blackout also had serious environmental impacts. A leak of hydrocarbons and steam following a faulty emergency shutdown procedure at a Marathon Oil Corporation facility forced the evacuation of residents within a one mile radius. Also tied to the blackout were several chemical plant fires, with pluming black smoke, as well as a massive orange-gray cloud emanating from one burning steel plant. *Id.*

Negative health effects abounded. Instances of heat related illness skyrocketed, compounded by electric equipment failure at several hospitals. The loss of refrigeration at hospitals led to widespread vaccine and banked blood spoilage. Loss of home refrigeration resulted in spoilage of perishable foods, leading to increased instances of gastrointestinal disease and an increased rodent population. *See* Mark E. Beatty et al., *Blackout of 2003: Public Health Effects and Emergency Response*, 121 Public Health Rep. 36 – 44 (Jan. – Feb. 2006).

In response to the blackout, the U.S. - Canada Power System Outage Task Force was commissioned, issuing its report in February of 2004. The Task Force’s paramount recommendation sought to make industry reliability standards mandatory and

¹ <http://www.elcon.org/Documents/EconomicImpactsOfAugust2003Blackout.pdf>.

enforceable. U.S. – Canada Power System Outage Task Force, *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations* 140 (April 2004). Soon after, Congress responded with the Energy Policy Act of 2005. A key provision of EPAct was the expanded role for the Federal Energy Regulatory Commission (“FERC”) in the approval and enforcement of mandatory reliability planning standards for utilities or other entities that use the bulk power system. EPAct called on FERC to designate a self-regulated Electric Reliability Organization (“ERO”), which it did with the North American Electric Reliability Corporation (“NERC”). NERC reliability standards, which had been voluntary since 1965, were made mandatory on June 18, 2007. Penalties for standards violations can include restrictions on activities within the bulk power system, remedial actions to diffuse threats to system reliability, disgorgement of unjust profits, or fines of up to \$1 million per day. 123 FERC ¶ 61,156 (2008).

Despite the priority of resource adequacy and reliability, the EPA has failed to conduct any significant study of the effects of the Final Rule on system reliability. A fully implemented Final Rule likely will place Mississippi utilities in the untenable position of choosing between compliance with FERC reliability standards or EPA environmental standards. With the 2003 Blackout dramatically demonstrating the need for and importance of a reliable electric system, EPA’s dismissal of the matter is troubling.

Forcing an unnecessary choice between FERC compliance and EPA compliance is irresponsible. NERC standards have worked well and represent progress toward a more reliable electric system. For example, 2011 saw record setting heat in the South. According to the National Oceanic and Atmospheric Administration, Mississippi experienced the 12th hottest July on record and the 18th hottest August since records were kept. Across the South, July was the warmest single calendar month ever recorded for the region. *See NOAA, State of the Climate National Overview, (2011).*² One Mississippi utility set a peak load record on August 3, 2011; while another system operated at 97% of budgeted load, bringing 80% of its generating capacity on-line to meet load requirements.

Resource adequacy built into the system sufficed to avoid any load shedding events. The Final Rule would require Mississippi to curtail roughly 46% of its capacity. If that were the result, a summer like the past would lead to load shed in Mississippi. The MPSC’s interest in asking for reconsideration and an immediate stay lies in its charge to assure that Mississippians have *reliable* power at the lowest reasonable cost. The Final Rule risks undoing the progress made by FERC, making the nations electric system more vulnerable to load shed and exposing ratepayers to sharply rising costs for energy.

STANDARDS FOR RECONSIDERATION AND STAY

The Clean Air Act (“CAA”) requires the Administrator to reconsider the Final Rule if Mississippi can show two things: 1) that it is was either impracticable to raise the

² <http://www.ncdc.noaa.gov/sotc/national/2011>.

objection during the comment period or that the grounds for the objection arose after the close of the period for public comment; and 2) that the objection is of central relevance to the outcome of the Final Rule. 42 U.S.C. § 7607(d)(7)(B).

The MPSC satisfies the first showing because the Final Rule differed so significantly from the Proposed Rule both in regards to the state budget and the time for implementation that the MPSC could not have raised its concerns for the reliability of the electric system within the appropriate time period. The MPSC satisfies the second showing because its objections to the Final Rule relate directly to the calculation of the State's budget and the truncated implementation schedule. Further, the MPSC has identified several legal flaws that place in jeopardy the legal validity of the Rule; thus, Mississippi's objections are of central relevance to the outcome of the Final Rule.

Given the various factual and legal flaws with the Final Rule, the Administrator should stay the effective date and implementation of the Rule. Upon a finding "that justice so requires," the EPA can stay implementation of the Final Rule pending judicial review.³ 5 U.S.C. § 705. Setting aside the very real threat of blackouts, should the Final Rule become effective, absent a stay, Mississippi utilities will undertake immediate and costly steps to comply with the Final Rule. The utilities will pass these costs on to Mississippi ratepayers, who will pay the price whether the Rule changes or remains the same. Unlike taxes, everyone pays electricity bills; thus, without a stay, the costs of complying with the Final Rule, even before the completion of judicial review, will be passed on to every citizen. Because everyone pays rates, the costs imposed by the EPA will be born disproportionately by those least able to afford it.

DISCUSSION

The MPSC respectfully requests that the EPA reconsider the Final Rule and stay its implementation pending judicial review as it relates to Mississippi's inclusion in the seasonal ozone program. The unrealistic and deeply flawed state budget for summer NO_x emissions, in conjunction with the impossible compliance date, will require Mississippi utilities to shutter or de-rate approximately 46% of the State's electric generating capacity. The sudden and dramatic unavailability of local capacity will degrade the reliability of the system. In the absence of local generation, transmission will become congested and imbalanced, leading to load shedding events. In simple terms, people will not have electricity because the transmission system will not be able to deliver power.

Apart from reliability, Mississippians will be harmed by the Final Rule, especially if compliance is required by May 2012. Mississippi, like many states, grants its electricity utilities monopoly status. In exchange for exclusive rights to serve a defined area, a utility promises to provide reliable power at the lowest, reasonable cost to ratepayers. Under this regulatory model, all prudently incurred costs are passed to the ratepayers. If the Final Rule is not stayed, ratepayers will bear the cost of compliance, whether the Final Rule changes or remains the same. To avoid unnecessarily taxing

³ Additionally, the Administrator can grant a three-month stay pending reconsideration under 42 U.S.C. § 7607(d)(7)(B).

those that can least afford it, the EPA should stay implementation of the Final Rule pending judicial review or agency reconsideration, whichever is longer.

I. The Final Rule is not a logical outgrowth of the Proposed Rule.

Given the unrealistic state budget numbers and the unattainable May 2012 implementation date, the Final Rule will cause an unprecedented shift in generation dispatch, leading to an unreliable electric system. Just as the Final Rule does not reflect reality, the Proposed Rule was not a fair precursor of the Final Rule. “Given the strictures of notice-and-comment rulemaking, an agency’s proposed rule and its final rule may differ only insofar as the latter is a ‘logical outgrowth’ of the former.” *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). A “final rule is a ‘logical outgrowth’ of a proposed rule only 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.” *Id.* at 998. The EPA cannot “use the rulemaking process to pull a surprise switcheroo on regulated entities.” *Id.*

Apart from strict notice-and-comment requirements, a court will find the EPA’s determinations 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.

North Carolina v. EPA, 531 F.3d 896, 906 (D.C. Cir. 2008) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Applying this standard to the EPA’s use of modeling, the D.C. Circuit explained that “it is only when the model bears no rational relationship to the characteristics of the data to which it is applied that we will hold that the use of the model was arbitrary and capricious.” *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1052 (D.C. Cir. 2001) (quoting *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir. 1998)).

The EPA has power to use predictive modeling “so long as it ‘explain[s] the assumptions and methodology used in preparing the model’ and ‘provide[s] a complete analytic defense’ should the model be challenged.” *Appalachian Power*, 249 F.3d at 1052 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)). Modeling, however, must yield to reality. “While courts routinely defer to agency modeling of complex phenomena, model assumptions must have a ‘rational relationship’ to the real world.” *Appalachian Power*, 249 F.3d at 1053; see *NRDC v. Jackson*, 650 F.3d 662, 2011 WL 2410398, at *3 (7th Cir. 2011) (“The way to test a model is to compare its projection against real outcomes. . . . An agency that clings to predictions rather than performing readily available tests may run into trouble.”).

In *Appalachian Power*, the D.C. Circuit reviewed the EPA's final rule to control NO_x emissions from stationary sources under § 126 of the CAA. 249 F.3d at 1036. In creating state-specific emissions budgets, the EPA used the Integrated Planning Model ("IPM") to project EGU utilization for 2007 by taking the actual EGU utilization for 1996 or 1997 and applying a "growth factor." *Id.* at 1053. Strikingly, the IPM predicted facility utilization for 2007 that was *lower* than the actual facility utilization in 1998. *Id.* The Court observed that

[i]n Michigan and West Virginia, for example, actual utilization in 1998 already exceeded the EPA's projected levels for 2007. This, on its face, raises questions about the reliability of the EPA's projections. While courts routinely defer to agency modeling of complex phenomena, model assumptions must have a "rational relationship" to the real world.

Id. In remanding the issue to the EPA "so that the agency may fulfill its obligation to engage in *reasoned* decisionmaking," the Court found that "the EPA has not fully explained the bases upon which it chose to use one set of growth-rate projections for costs and another for budgets, nor has it addressed what appear to be stark disparities between its projections and real world observations." *Id.* at 1054 (emphasis in original).

Here, the MPSC did not have adequate notice and a real or practical opportunity to comment or raise objections because the proposed state budgets and the uncapped trading program (which differed so drastically in the Final Rule) would not have alarmed state utility regulators. Mississippi's NO_x emissions budget in the Proposed Rule for the seasonal ozone program was 16,530 tons, a more realistic reflection of Mississippi's actual 2010 emissions of approximately 16,089 tons. While cost to ratepayers is always a concern, the emissions budget in conjunction with an unrestricted trading program would not have piqued the MPSC's fears of unreliability, the reasons for which are so obvious in the Final Rule.

Like the MPSC, the Office of Management and Budget ("OMB") was taken aback by the changes wrought in the Final Rule:

It is unclear if states and affected facilities will be prepared for a January 1, 2012 start date, especially given other changes that EPA is making in the draft final rule. For instance, **modeling results used in the final rule are substantially different than those in the original August 2, 2010 Proposed Rule and subsequent notices.** Six (6) States are being dropped from the proposed rule; Texas is being added; 3 States have their SO₂ Group status change; and the sheer magnitude of change to the budgets of all of the states results in a significantly different rule than originally proposed.

(OMB, *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review*, ¶ E, p. 11.)

As observed by OMB, neither the Proposed Rule nor subsequent Notices of Data Availability alerted interested parties of the drastic re-working of state budgets. Consequently, it was not only impractical for the MPSC to object, but it was actually impossible. Moreover, because the “substantially different” state budgets were finalized and presented after the close of the public comment period, the grounds for MPSC’s objections necessarily arose after such time.

A closer look at some representative results exemplifies the magnitude of the changed Rule and its disassociation from reality. Mississippi’s seasonal NO_x budget crafted for the Final Rule and effective May 2012 is 10,160 tons, a reduction of nearly 37% from actual 2010 levels of 16,089 tons. Additionally, the IPM base case run for the Final Rule removed 94 TBtu heat input from Mississippi’s actual 2010 heat input of 205 TBtu.⁴ Stated differently, while Mississippi converted fuel to energy at 205 TBtu in 2010, the IPM base case projected Mississippi’s heat input for 2012 at approximately 111 TBtu. (Ex. A, attached hereto). **This 46% reduction in heat input effectively translates to a 46% reduction in local generation.**

Below, Table 1 shows those Mississippi EGUs that were essentially “zeroed out,” or taken out of service, in the base case compared to their actual heat inputs for 2010.

TABLE 1

Out of Service Facilities in IPM 2012 Base Case

Plant Name	Plant Type	Unit ID	Capacity (MW)	2010 Ozone Season Heat Input (mmBtu)
Baxter Wilson	O/G Steam	1	475	11,233,893
Baxter Wilson	O/G Steam	2	771	6,651,216
Crossroads Energy Center	Combustion Turbine	CT01	77	78,982
Crossroads Energy Center	Combustion Turbine	CT02	77	74,870
Crossroads Energy Center	Combustion Turbine	CT03	77	68,478
Crossroads Energy Center	Combustion Turbine	CT04	77	66,758
Delta	O/G Steam	1	104	21,210
Delta	O/G Steam	2	103	74,222
Gerald Andrus	O/G Steam	1	670	13,424,790
Jack Watson	O/G Steam	1	76	109
Jack Watson	O/G Steam	2	76	9,342
Jack Watson	O/G Steam	3	107	0
Moselle	O/G Steam	1	59	545,684
Moselle	O/G Steam	2	59	400,284
Moselle	O/G Steam	3	59	494,797
Natchez	O/G Steam	1	73	0

⁴ The “TBtu” acronym represents “trillion British thermal units” and “mmBtu,” as presented in Table 1, represents “million metric British thermal units.”

Rex Brown	O/G Steam	1A	36	0
Rex Brown	O/G Steam	3	68	0
Rex Brown	O/G Steam	4	200	2,033,018
Sweatt	O/G Steam	1	46	22,500
Sweatt	O/G Steam	2	46	21,834
Sylvarena	Combustion Turbine	1	43	176,934
Sylvarena	Combustion Turbine	2	43	253,604
Sylvarena	Combustion Turbine	3	43	241,804
Totals			3465	35,894,329

Again, Table 1 shows *only* those units that were taken out of service by the final base case; a plant by plant comparison is attached as Exhibit A to this Petition. Of the 24 units that were retired under the base case, all but 4 actually ran during the 2010 ozone season. Alarming, the units at Baxter Wilson, Gerald Andrus, Moselle and Rex Brown are critical to grid stability within their respective systems, serving consistent native load and absolutely necessary to balance the systems and maintain reliability.

The EPA has repeated the errors it made in *Appalachian Power* because the Final Rule and underlying base case are divorced from reality. The base case, which is intended to reflect real-world economic decisions, fails in this instance. But for this Rule, Mississippi utilities would have no intention to shutter nearly half of their fleet by May 2012. Like the inexplicable IPM growth rate predictions in *Appalachian Power*, the base case emissions projections and heat input reductions are erroneous on their face. The EPA has not and cannot explain why or how Mississippi utilities would reduce their NO_x emissions by 37% and their local generation by an even more astounding 46% from 2010 to 2012.

After the fact, EPA appears to attribute the dramatic changes in state NO_x budgets to an unexplained “combination of modeling updates, including lower natural gas prices, reduced electricity demand, newly modeled consent decrees and state rules, and updated NO_x rate to reflect 2009 emissions data.” 76 Fed. Reg. 152, 48251. As to Mississippi, there are no applicable consent decrees or state rules; no modeling performed by utilities in proceedings before the MPSC have indicated lower natural gas prices than presently enjoyed; most assuredly, no projections show reduced electricity demand⁵; and as shown above, the emissions rates and heat input (a fair proxy for demand) for 2010 are far in excess of the projected emissions and heat input for 2012. EPA’s limited explanation, offered *after* the Final Rule, is not adequate to defend the drastic reduction of Mississippi’s proposed state budget and cannot satisfy the required notice-and-comment mandated by federal law.

EPA’s cavalier dismissal of the IPM’s clear divergence from reality falls short of offering a real explanation of the model’s assumptions and methodology or “a complete

⁵ See generally MPSC Docket Nos. 2008-AD-158 (Generation Needs Docket), 2009-UA-14 (Kemper County IGCC Project Certificate Docket), 2009-UA-260 (Grand Gulf Nuclear Facility Uprate Certificate Docket).

analytic defense” of the model and its results. *Appalachian Power*, 249 F.3d at 1052 (quoting *Small Refiner*, 705 F.2d at 535). Having no meaningful basis in reality, Mississippi’s state budget under the Final Rule is not a logical outgrowth of the Proposed Rule and has no rational relationship to the real world.

II. CSAPR forces utilities to reduce emissions by curtailing generation.

Mississippi utilities cannot comply with the Final Rule by May 2012 through the construction of additional emission controls and/or the purchase of allowance credits in a NO_x emission trading market. The addition of NO_x emission controls on the affected Mississippi EGUs sufficient for compliance cannot be permitted and constructed by May 2012. Additionally, a viable trading market will not exist due to deficient emission budgets and accelerating implementation of the assurance provision from 2014, as originally proposed, to 2012. Under rationally-predicted market and weather conditions, and based on historic conditions of load demand, Mississippi utilities will have no choice but to curtail generation during the summer of 2012.

Offering no real options, the EPA’s directive to curtail generation runs afoul of the D.C. Circuit Court’s repeated admonishment that the CAA “does not permit the agency to require the state to pass legislation or issue regulations containing control measures of the EPA’s choosing.” *Virginia v. EPA*, 108 F.3d 1397, 1408 (D.C. Cir. 1997). Even where the EPA sets out state budgets and trading programs, the State must have “real choice” among compliance options. *Michigan*, 213 F.3d at 687. As explained by the *Michigan* Court:

Given the *Train* and *Virginia* precedent, the validity of the NO_x budget program underlying the SIP call depends in part on whether the program in effect constitutes an EPA-imposed control measure or emission limitation triggering the *Train-Virginia* federalism bar: in other words, on whether the program constitutes an impermissible source-specific means rather than a permissible end goal. However, the program’s validity also depends on whether EPA’s budgets allow the covered states real choice with regard to the control measure options available to them to meet the budget requirements.

Id. The Final Rule offers no choice short of curtailing local generation.

A. Mississippi utilities cannot permit and construct NO_x emission controls in 8 months.

The Final Rule assumes Mississippi utilities will be able to install NO_x emission controls by May 2012. The EPA concluded that certain controls such as low-NO_x burners, overfire air and SNCRs could be installed prior to the beginning of the compliance period. 76 Fed. Reg. 48,280. However, the EPA NO_x emission control installation analysis is flawed.

The EPA based its analysis on installation of NO_x emission controls on coal units. 76 Fed. Reg. 48,279-81. However, many of the EGU's removed from the base case are **gas fired** units. Emission controls such as low-NO_x burners and SNCR's are not as common on gas units. Therefore, utilities must comprehensively evaluate whether these controls will be economic and effective. For example, Entergy Mississippi, Inc. ("EMI") is assessing whether to install low NO_x burners on the Gerald Andrus units. Low NO_x burners, however, are not implemented often for gas units. Thus, EMI must evaluate within eight months how low NO_x burners will affect the performance of the units. EMI is also evaluating the possibility of installing a SNCR on the Gerald Andrus units. Unlike coal units, though, limited historical analysis exists for installing SNCRs on gas units, and the effect on the performance of the unit is uncertain. For the Baxter Wilson units, EMI is evaluating whether to install Burners-Out-Of-Service ("BOOS"). The BOOS will affect the ramp rates of the Baxter Wilson units, which poses yet another hurdle. The ability to ramp up or down quickly is the primary benefit the Baxter Wilson units provide to the EMI generating fleet.

The EPA failed to consider the cumulative impact of multiple units on a system requiring emission controls within an eight month time frame. During significant portions of the installation of emission controls units must be shut down; thus, a utility will have to schedule an outage of that unit for installation. One Mississippi utility anticipates that NO_x emission controls must be installed on 9 to 13 units during the 8 month time frame. These outages must be scheduled cautiously in order for the system to effectively serve its native load and ensure reliability of the transmission system. It is unlikely that Mississippi utilities can manage the necessary installation on the schedule set forth by the Final Rule.

The EPA also failed to consider that decisions regarding the addition of emission controls cannot be made in a vacuum. Utilities must determine how to comply with CSAPR while also achieving and maintaining compliance with all of EPA's rules. For example, South Mississippi Electric Power Association ("SMEPA") is evaluating the installation of SNCRs and/or low NO_x burners in addition to other options to ensure the availability and reliability of the Plant Morrow capacity, yet meet the restrictions to plant operation as a result of CSAPR. The HAPS MACT final rule which is set to be issued in November 2011 will play a part in the economic evaluation related to installing controls on Plant Morrow. SMEPA's prudence in trying to comply with all of EPA's upcoming rules should not be thwarted.

Further, the Proposed Rule provided no notice that Mississippi utilities would need to evaluate the ability to have additional NO_x emission controls installed by May 2012. The EPA stated that implementation of controls would be possible especially for those "early movers" who have initiated projects based on the Proposed Rule. 76 Fed. Reg. 48,281. Mississippi utilities had no reason to be an early mover. The state budget of 16,530 tons in the proposed rule was realistic compared to Mississippi's actual emission of approximately 16,089 tons in 2010. Moreover, Mississippi was under the assumption that unlimited interstate trading would exist until implementation of the assurance provision in May 2014.

Finally, EPA appears to assume that controls will not require a permit from state regulatory authorities prior to construction. State law requires that a public utility receive a Certificate of Public Convenience and Necessity from the Commission before the utility may begin construction of an addition to a generating facility. The most recent petition for a CCN for environmental controls was Mississippi Power Company's petition to construct a scrubber for Plant Daniel Units 1 and 2. MPSC anticipates that it will issue a final order no earlier than December 2011. If that is the case, it will have been 1.5 years since the petition was initially filed, with actual construction anticipated to take 18 months. The MPSC has the statutory duty to ensure that the public convenience and necessity requires the addition of environmental controls to generating units under its jurisdiction. Certain pollution control projects also may require environmental permits, which can take several months to obtain (or longer if contested).

Even in a perfect world the construction process alone for most of the control measures identified would take between 10-18 months; yet, the Final Rule does not create a perfect world. Rather, the Final Rule creates immediate increased demand for the resources and labor needed to comply in an artificially constrained period. Decreased supply could extend and delay construction and will certainly increase costs.

B. A NO_x allowance trading program does not exist nor will a robust trading market come to fruition.

According to the EPA, individual sources may comply through other measures such as purchasing additional allowances if installation takes longer than expected for a given combustion control. 76 Fed. Reg. 152, 48,280. Unfortunately, Mississippi utilities will not be able to comply through the interstate trading program. The accelerated implementation of the state assurance provision to May 2012 combined with the reduced allocations in the Final Rule eviscerates the interstate trading program.

The assurance provision ensures that the necessary emission reductions occur within each covered state. The assurance provision restricts the emissions within each state to the state's budget plus the variability limit; thus, Mississippi's emissions (total sum of EGU emissions) must not exceed the state budget plus variability limit. For Mississippi, it must not exceed 12,294 tons. If a state exceeds the state assurance level, the EPA will then identify which utility exceeded its individual assurance level. The public utility that has emissions greater than its assurance level will be required to surrender one allowance as an offset and one allowance as an excess emissions penalty for each ton of emissions in excess of the amount of allowances held. The utility would also be subject to a discretionary civil penalty as well.

Mississippi's state emission assurance level was cut by 25% compared to Mississippi's actual 2010 NO_x emissions. The state assurance level is 12,294 tons while Mississippi's 2010 ozone season NO_x emissions were 16,089 tons. Unquestionably, a trading market will not exist inside Mississippi. It is inconceivable to expect that allowances will be available for trading among Mississippi due to EPA's severe reduction in allowances afforded to the State by the Final Rule. Furthermore, Mississippi utilities will be hesitant to purchase allowances available from utilities in other states due to the

risk of exceeding the variability limit and triggering the assurance provisions.⁶ Astonishingly, the EPA readily admits the “catch-22” placed upon the utilities:

In making compliance decisions and determining to what extent to rely on purchased or banked allowances, owners and operators will have to take into account the risk of triggering the assurance provisions in the state involved and of incurring significant assurance provision penalties.

76 Fed. Reg. at 48,295.

Even if the chilling effect of the assurance provision ceased to exist until 2014 instead of 2012, the substantial cuts in NO_x emission allocations to the states in the seasonal NO_x program would keep a viable interstate trading market from becoming a reality. For seasonal NO_x emissions, 14 states face budget reductions ranging from 0.70% to 51% with an average of 18% for the affected states. When the state budgets are compared to actual 2010 season NO_x emissions, the severity of the cuts crystallizes. Total 2010 seasonal NO_x emissions for states under the Rule were 585,566 while the 2012 total budget is 495,314. Regardless of when the assurance provision begins, there are not enough allowances for a viable market to exist in May 2012.

The OMB accurately summarized the problem:

While each of the components (the variability limits, the allocation rule, and the assurance mechanism) may appear reasonable in isolation, in combination they appear very likely to stifle the development of an emissions market and undermine the scheme’s cost-effectiveness.

(OMB, *supra*, at ¶ E, p. 7.)

The reduced allocation budgets in the final rule combined with acceleration of the implementation of the assurance provision program to 2012 leaves no option for Mississippi utilities to comply with the Final Rule by May 2012. Mississippi utilities will be forced to curtail generation by a draconian 46% during the summer of 2012.

The EPA’s decision to foreclose state options and to impose the Final Rule through a Federal Implementation Plan (“FIP”) engenders a serious legal challenge.⁷ The CAA provides that states bear the primary responsibility for assuring air quality within each state. 42 U.S.C. §§ 7401(a)(3) and 7407(a). Once the EPA promulgates air quality standards, each state subject to the rule must submit a State Implementation Plan (“SIP”) setting out the means to achieve the required outcome. 42 U.S.C. § 7410(a)(1). If the EPA determines that a SIP is deficient, within two years of such determination, the EPA

⁶ The OMB echoes the logic that the assurance mechanism will severely limit trading. “It is hard to imagine, for example, that a regulated utility would choose to comply by leaving its emissions uncontrolled and covering those emissions with purchased allowances, because that would leave it exposed to the risk of higher-than-expected emissions and a steep penalty.” OMB, *supra*, at ¶ E, p. 6.

⁷ The MPSC incorporates and adopts by reference the FIP First arguments regarding the Final Rule as presented by Luminant Generation Company, “Request for Partial Reconsideration and Stay of EPA’s Final Rule” filed August 5, 2011; and Wisconsin Public Service Corporation, “Petition for Reconsideration and Request to Stay the Final Rule” filed September 23, 2011.

may issue a FIP, provided that the state has not corrected the noted deficiency. 42 U.S.C. § 7410(c)(1)(A), (B). Prior to imposing a FIP, however, the EPA must give the state a chance to revise its plan to correct any inadequacies through what is referred to as a “SIP Call.” 42 U.S.C. § 7410(k)(5); *see Michigan*, 213 F.3d at 671 (describing SIP call).

The interplay, or “cooperative federalism,” between the states and the EPA has been explained by the D.C. Circuit Court, as follows:

[T]he Clean Air Act creates a partnership between the states and the federal government. The state proposes, the EPA disposes. The federal government through the EPA determines the ends-the standards of air quality-but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables of compliance.... The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, ... especially when, as in this case, the agency is overriding state policy.

Virginia, 108 F.3d at 1408 (quoting *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1037-38 (7th Cir. 1984)).

In the present context, under the “good neighbor” provision of the CAA, the EPA must first quantify the emissions within a state that significantly contribute or interfere with maintenance of air quality standards in another state. The EPA purported to determine significant contributions or interference with maintenance in the Final Rule; therefore, a state could not submit a SIP that would address the EPA’s determination until after the Final Rule was promulgated.

Here, the EPA went straight to a FIP. Beyond the clear departure from the CAA, the MPSC notes that the *North Carolina* Court deemed CAIR deficient⁸, prompting the EPA to abandon CAIR and promulgate CSAPR as a replacement; thus, there was no basis for a SIP prior to the Final Rule. The Final Rule offers Mississippi its first chance to craft a responsive SIP.

Neither Mississippi, nor any other state, has had the full opportunity to submit a SIP relevant to the Final Rule. *See* 42 U.S.C. § 7410(a)(1) (“Each State *shall* . . . adopt and submit to the Administrator . . . a plan[.]” (emphasis added)). Because Mississippi has not had the chance to submit a SIP, the EPA cannot make the requisite findings (failure to file a plan/revision, filing a deficient plan/revision or disapproval of a plan) that would trigger the EPA’s secondary authority to issue a FIP. *See* 42 U.S.C. § 7410(c)(1)(A), (B) (“The Administrator shall promulgate a [FIP] . . . *after* the Administrator--finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria . . . or disapproves a State implementation plan submission in whole or in part[.]” (emphasis

⁸ “CAIR’s flaws are deep. No amount of tinkering with the rule or revising of the explanations will transform CAIR, as written, into an acceptable rule.” *North Carolina*, 531 F.3d at 930.

added)). As a result, the EPA has violated the plain language of the CAA and has run afoul of the D.C. Circuit Court's admonishment to allow states "real choice" among compliance options. *Michigan*, 213 F.3d at 687.

III. CSAPR renders Mississippi's electric system unreliable.

If Mississippi generation is curtailed by 46%, as presented in the Final Rule, transmission will become congested and imbalanced, leading to load shedding events. In simple terms, people will not have electricity because the transmission system will not be able to deliver it. Setting aside the irrational and unrealistic curtailment of emissions and heat input projected by the base case, the MPSC does not think that Mississippi's utilities will be able to reliably serve their ratepayers if the Final Rule goes into effect.

The IPM base case seeks to predict EGU emissions based on speculative market-driven decisions. While the IPM pays lip-service to the concept of reliability, the model treats reliability in a cursory, and largely economic, fashion. For example, the IPM explains in its modeling framework for Transmission Decision Variables and Transmission Constraints, as follows:

IPM includes decision variables representing the electricity transmission along each transmission link between model *regions* in each run year. In the objective function, these variables are multiplied by variable transmission cost rates to obtain in the total cost of transmission across each link.

* * *

IPM can simultaneously model any number of *regions* linked by transmission lines. The constraints define either a maximum capacity on each link, or a maximum level of transmission on two or more links (joint limits) to different *regions*.

(Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model, §§ 2.2.2, 2.2.3, pp. 2-4, 2-3, Aug. 2010) (emphasis added.)

The IPM focuses on the economics associated with moving power between regions. In fact, the IPM assumes a perfect transmission world once power passes through known regional "bottlenecks." Even assuming that the IPM's assumptions regarding regional transmission capacity are correct (which they are not)⁹, intra-regional and more local constraints play an even greater role in relation to reliability and deliverability.

⁹ The Eastern Interconnection Planning Collaborative ("EIPC") is conducting an ongoing study of the reliability of the Eastern Interconnection electric grid. The EIPC study results indicate that the energy transfer capability between regions external to the defined Entergy Region are significantly lower than those assumed in the IPM. Even the EIPC results may be exaggerated because they take into account future, but not yet constructed, transmission projects extending to the 2020 horizon.

The IPM ignores local transmission constraints and “must run” generation. The utility industry has a saying: “Transmission is built with generation in mind.” Generally speaking, generation is built as close as practicable to the load it will serve. Transmission then runs from the generation to the load. The farther away load is from generation the more costly and difficult it becomes to reliably deliver electricity to load. The farther electricity must travel from its generation the greater the need for higher voltage transmission. At certain distances, “line losses” become unacceptable, and electricity cannot be reliably delivered. Well-placed generation improves the overall operational efficiency and reliability of the transmission system.

For example, assume you have a single, 100’ string of Christmas lights. If you plug that string into a single outlet, the bulb nearest the outlet will burn brighter than the bulb at the opposite end of the long string. If you have five, 20’ strings of lights and you plug each string into its own outlet (voltage source), then the five bulbs at the remote ends of the strings will burn brighter than the single bulb at the end of the 100’ string. So it is with generation, transmission and the reliable delivery of power. The location of generation (system voltage support) matters because it supplies needed voltage support at specific locations on the transmission system allowing delivery of electricity to load in a more efficient and reliable manner.

SMEPA provides a working example. SMEPA is a non-profit electric cooperative that provides generation and transmission service to its eleven Member distribution cooperatives located throughout rural Mississippi. SMEPA operates a generation and transmission system (“G&T area”) that serves as a NERC Balancing Authority and is interconnected with four neighboring utilities through six transmission interconnections.

The Final Rule will effectively require SMEPA-owned generation to reduce NO_x emissions by approximately 70% from the actual 2010 ozone season emissions, correlating to a 32% curtailment of generation within SMEPA’s G&T area. The impact of the Final Rule on two SMEPA-owned facilities, Plants Morrow and Moselle, is of particular concern. The Final Rule’s impact on these two facilities is significant due to the limited generation located within the G&T area and the limited transfer capability into the G&T area from neighboring utilities. The loss or reduction of generation from either or both plants is detrimental to SMEPA and its customers from both a system reliability and economics standpoint due to the plants’ contributions to the reliable operation of the SMEPA Balancing Authority.

Plant Moselle is located in the geographic center of SMEPA’s transmission system and provides necessary voltage support to the 69kV portion of the transmission system and regulation for the SMEPA Balancing Authority. The design of the transmission system includes properly placing generation resources capable of providing necessary reactive (voltage) support to the system. Without the voltage support provided by generation at Plant Moselle during the summer peak season, low voltage conditions will occur at remote ends of the transmission system during normal operating and

contingency outage conditions (the Christmas lights example above). Due to its geographic location and the transmission configuration, generation at Plant Moselle is considered “must run” during peak system loading conditions.

Plant Morrow is the largest and most efficient generation resource within SMEPA’s G&T area and provides necessary voltage support and regulation for the 161kV transmission system and the SMEPA Balancing Authority. Without the voltage support from Plant Morrow during summer peak conditions, low voltage can result on SMEPA’s 161kV transmission system during both normal and contingency outage conditions. Plant Morrow and Plant Moselle provide more than 82% of the dynamic reactive reserves required for the G&T system.

In addition to providing voltage support and regulation to the SMEPA system, units at Plant Morrow and Plant Moselle combined to provide 64% of the generation capacity within the G&T area. The loss or reduction in capability of either facility will cause SMEPA to be capacity deficient in resources required to reliably serve load in its Member systems.

In the Final Rule’s base case, Plant Moselle was effectively “retired,” and Plant Morrow’s emissions were reduced by 66%, even though both plants ran as required in 2010, continue to run as needed, and are projected to operate at capacity factors important to system operations and reliability in 2012.

The Final Rule and its base case detrimentally affect the reliability of small and large systems alike. Entergy Mississippi Incorporated (“EMI”) is a large, diversified utility within the even larger Entergy Corporation system of operating companies. Given the historical development and geographical features within the Entergy Electric System, certain sub-regions or “load pockets” were identified for planning and operational purposes. Load pockets are areas of the system that must be served in part by the transmission system but are dependent on local generation to serve the entire load within the load pocket, similar to the SMEPA G&T area example above. Given these constraints, the Entergy Transmission System evolved to comprise local generation and transmission serving sub-regions linked together by an extra high voltage grid (500kV). Reliable operation of the Entergy Electric System relies on close coordination of the power generated by the local generation facilities and the available internal transmission capability to move energy reliably between sub-regions.

One such sub-region exists around the Jackson, Mississippi, metropolitan area. At certain load levels and in the absence of local generation, the loss of 500kV autotransformers will cause other autotransformers to exceed their thermal ratings, causing possible multiple failures. Consequently, Rex Brown Unit 4 is designated as a “must run” unit for reliability.

Two plants, Gerald Andrus and Baxter Wilson, are not only critical to serving native load within EMI, but also in producing counterflow that allows efficient combined cycle units to generate in northern Louisiana and central Mississippi. Loss of EMI

generating units as modeled by the IPM could reduce the dispatch of CCGT units in other states, thus reducing flexibility to respond to load demand. The negative impact will likely be felt across the Entergy Transmission System, as well as TVA and Southern Company systems.

In the Final Rule's base case, Rex Brown, Gerald Andrus and Baxter Wilson were all effectively "retired," even though each plant ran as required in 2010, continues to run as needed, and is projected to operate at capacity factors important to system operations and reliability in 2012.

The assumed ability to purchase and deliver power from outside a system to any point within a system ignores reality. Even assuming such a perfect world exists (as does the IPM), purchased power cannot adequately replace local generation for purposes of reliability. Such assumptions ignore the need to maintain voltage support and balance a system. Even if planning reserves and reserve margins could be met through purchased power and firm transmission agreements, this mode of operation would expose a system to regional, intra-regional and local transmission constraints while placing one system's duty to reliably deliver power in the hands of a stranger. Further, the ability of a system to plan its operating reserves on a day-ahead or real-time basis would greatly diminish. A system's ability to turn generation up or down as the situation dictated would be degraded.

Overreliance on transmission to the detriment of local generation exposes a system to greater reliability risks related to "normal" emergencies, such as inclement weather. For example, one public utility had to take 46 transmission lines out of service for varying lengths of time in April 2011. These losses were not due to hurricanes, ice storms or tornados but rather, attributable only to normal "severe spring weather events" that the South and other parts of the country routinely experience. Without adequate local generation, transmission cannot reliably deliver power as needed.

Interested parties are not exaggerating their concerns related to the reliability of the nation's electric grid. Southwest Power Pool, Inc. ("SPP"), a Regional Transmission Organization ("RTO") has warned the EPA that compliance with CSAPR would place it in violation of FERC/NERC reliability standards and could lead to cascading outages like those experienced in 2003 or more localized rolling blackouts or load-shedding events. (SPP letter to Administrator dated Sept. 20, 2011, attached hereto as Ex. B.) Electric Reliability Council of Texas, Inc. ("ERCOT"), another RTO, has expressed similar concerns. (State of Texas, Pet. for Recon. and Stay, Sept. 8, 2011, Ex. A.)

In a letter to FERC Chairman Jon Wellinghoff, Senator Lisa Murkowski, Ranking Member of the Committee on Energy and Natural Resources, explained, as follows:

Today's transmission systems do not allow for seamless transfer of power from any point in the country to another. Instead, as the Commission has pointed out time and again, our electric systems are in regions and sub-regions with singular characteristics. Often reliability in a particular sub-region or local control area

comes down to a specific plant or plants or one or more transmission lines. A failure at that level can result in a local outage, even though ample generating capacity may be available across the region or across the nation as a whole. The risks are more acute in areas of the country where generating capacity is located far from load centers. These overall risks, if not properly addressed, can result in local outages becoming ones with even more widespread effects.

(U.S. Senator Lisa Murkowski, letter to Jon Wellinghoff, FERC chairman dated September 19, 2011, attached hereto as Ex. C.) The MPSC joins the chorus of well-meaning and interested parties asking the EPA to reconsider the Final Rule and its impact on the reliability of the electric grid.

IV. Mississippi should not be subject to CSAPR.

Applying the EPA's standards, Mississippi's NO_x emissions do not contribute significantly to non-attainment in or interfere with the maintenance of NAAQS in a downwind state. The "good neighbor" provision of the CAA requires that implementation plans must

contain adequate provisions-- (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will-- (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard

42 U.S.C. § 7410(a)(2)(D)(i)(I).

In *Michigan*, the D.C. Circuit approved EPA's determination that a "significant contribution" of emissions to non-attainment were those emissions that could be eliminated with "highly cost-effective controls." *Michigan v. EPA*, 213 F.3d 663, 675, 679 (D.C. Cir. 2000). As reiterated by the D.C. Circuit, "we held EPA may 'after [a state's] reduction of all [it] could . . . cost effectively eliminate[],' consider 'any remaining 'contribution'' insignificant." *North Carolina*, 531 F.3d at 917 (quoting *Michigan*, 213 F.3d at 677, 679)). Even so, EPA cannot force a state to reduce its emissions beyond its significant contribution. *North Carolina* at 921 ("Each state must eliminate its own significant contribution to downwind pollution. While CAIR should achieve something measurable towards that goal, it may not require some states to exceed the mark.").

In *North Carolina*, the D.C. Circuit entertained several challenges to the EPA's Clean Air Interstate Rule ("CAIR"), but as the Court explained, "[a]t issue in much of this litigation is the definition of the term 'contribute significantly.' In other words, in order to promulgate CAIR, EPA had to determine what amount of emissions constitutes a 'significant contribution' to another state's non-attainment problem." *Id.* at 903. CAIR focused on reducing the significant contributions of a region in the interests of equity and efficiency, as opposed to identifying and eliminating each state's significant

contribution. *Id.* at 906-07. In light of the CAA’s plain language, EPA’s equitable regional focus, rather than a state-by-state approach, led the Court to vacate CAIR in its initial decision. *Id.* at 929-30.

EPA appears to have committed some of the same fundamental errors with CSAPR that it did with CAIR. In the Final Rule, the EPA explains that it used a “cost- and air quality-based approach to quantify the amount of emissions that represent significant contribution to nonattainment and interference with maintenance for each state.” 76 Fed. Reg. 48,246. After EPA’s air quality analysis “links” an upwind state with nonattainment or maintenance issues in a downwind state, then the EPA “quantifies the portion of each state’s contribution that constitutes its ‘significant contribution’ or ‘interference with maintenance.’” *Id.* at 48,248.

In attempting to quantify each state’s contribution, EPA claims to “expand upon the methodology in the NO_x SIP Call and CAIR but modifies it in important respects.” *Id.* These modifications resulted in a four part methodology: “(1) Identification of each state’s emission reductions available at ascending costs per ton as appropriate; (2) assessment of those upwind emission reductions’ downwind air quality impacts; (3) identification of upwind “cost thresholds” delivering effective emission reductions and downwind air quality improvement; and (4) enshrinement of the upwind emission reductions available at those cost thresholds in state budgets.” *Id.* According to the EPA, the result of the application of this methodology

defines each state’s significant contribution to nonattainment *and* interference with maintenance as the emission reductions *available* at a particular *cost* threshold in a *specific upwind state* which effectively address nonattainment and maintenance of relevant NAAQS in the linked downwind state of concern.

Id. (emphasis added). The MPSC will address each step of the methodology as it applies to Mississippi in light of the definition of “significant contribution” established by the EPA.

For Mississippi’s 2012 base case, the IPM predicted that Mississippi would emit 10,161 tons of ozone season NO_x. *Id.* at 48,307; (*see* Technical Support Document (“TSD”) for the Final Rule, *Significant Contribution and State Emissions Budgets*, p. 10, July 2011.) In step one, at the \$500/ton and \$1,000/ton cost, Mississippi sees no reduction from the base case; emission levels slightly increase until the \$5,000/ton cost measures are applied. 76 Fed. Reg. at 48,251; TSD, *supra*, at 10. According to the EPA, Mississippi shows no reduction in emissions when control measures available at the settled-upon \$500/ton cost are applied to all relevant EGUs within the state.

Progressing with the methodology, “[i]n step two, EPA uses an air quality assessment tool to estimate the impact that the *combined reductions* from upwind contributing *states* and the downwind receptor state at different cost-per-ton levels would have on air quality at downwind monitoring sites projected to have nonattainment and/or maintenance problems.” 76 Fed. Reg. at 48,249. At this step, the Final Rule appears to

run afoul of *North Carolina* by aggregating the emissions reductions of upwind states and projecting their collective impact on a single linked state. See *North Carolina*, 531 F.3d at 918 (“EPA can’t just pick a cost for a region, and deem ‘significant’ any emissions that sources can eliminate more cheaply. Such an approach would not necessarily achieve something measurable toward the goal of prohibiting sources ‘within the State’ from contributing significantly to downwind nonattainment.”). Regardless of this apparent deficiency, because Mississippi’s emissions remain essentially unchanged as control measures are applied at varying cost levels, Mississippi has no reductions and therefore, no individual impact, under the parameters of step 2, on any downwind state.

“In step three, EPA examines cost and air quality information to identify ‘significant cost thresholds.’” 76 Fed. Reg. 48,249. From this statement, the MPSC cannot discern whether this step is an inappropriate aggregation of state sources, although the use of “air quality information” suggests that it would be given the manner by which such information is gathered as set out in “step two.” The EPA further explains that it “considered a significant cost threshold to be a point along the costs curves where a noticeable change occurred in the downwind air quality, such as a point where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective.” *Id.* Again, because Mississippi experiences no reductions in its emissions at relevant cost-per-ton levels, Mississippi does not appear to contribute to downwind air quality under the identified methodology.

In the fourth and final step, EPA uses emission reductions available at a certain cost threshold to form a state budget, which according to EPA, represents “the remaining emissions from covered sources . . . once significant contribution and interference with maintenance have been eliminated[.]” *Id.* Mississippi enjoyed no emissions reductions (actually experiencing increased emissions) at the favored \$500/ton cost threshold; therefore, Mississippi had no remaining emissions “once significant contribution and interference with maintenance [had] been eliminated.” Nevertheless, EPA arbitrarily imposed Mississippi’s base case level of 10,161 tons for ozone season NO_x as the State’s budget.

According to the EPA, application of the above methodology defined each state’s significant contribution to nonattainment *and* interference with maintenance as the emission reductions *available* at \$500/ton for ozone season NO_x in each relevant *state*, which effectively addresses nonattainment and maintenance of relevant NAAQS in the linked downwind state of concern. *Id.* at 48,248; 48,255-256. As shown in the step-by-step walkthrough above, Mississippi does not significantly contribute to nonattainment or maintenance issues as defined above, i.e. Mississippi does not enjoy any reduction at the “significant contribution” cost threshold of \$500/ton.

The EPA recognizes Mississippi’s situation (along with four other similarly situated states) but justifies the State’s inclusion in the ozone season program because “if emission limits were not established for these five states, ozone-season NO_x emissions in each of the states would increase (beyond the 2012 base case emission projections) due to

interstate shifts in electricity generation that cause ‘emissions leakage’ in uncovered states.” *Id.* at 48,263. The EPA’s rationale is unsupported and sounds contrived.

The EPA set out a methodology for *defining* a state’s significant contribution. But when application of that methodology revealed that Mississippi was not significantly contributing to nonattainment, the EPA abandoned the methodology and baldly concluded that because Mississippi might minimally increase emissions due to some ill-defined “interstate shifts in electricity generation” Mississippi’s base case must be its budget. The EPA’s makeshift explanation is arbitrary and capricious because it does not comply with the CAA’s mandate to eliminate significant contributions from within the State, as expressed in *North Carolina*. Simply capping all seasonal NO_x emissions beyond the base case modeled for Mississippi is arbitrary because it does not make any real or individualized determination of what constitutes a significant contribution. EPA’s conclusion as to Mississippi is contrary to its developed methodology.

The MPSC reiterates that the most startling error in the Final Rule is the miscalculation of Mississippi’s budget. The Final Rule recognizes the magnitude of the changes in state budgets, as follows:

It is worth emphasizing that the lower emission reductions observed at the \$500/ton in this final rulemaking are due to a lower starting point in the updated base case EGU NO_x emission levels (and thus do not reflect higher NO_x emissions remaining after the reductions made at the \$500/ton threshold).

76 Fed. Reg. 48,251. The EPA’s methodology as applied to the base case showed that Mississippi did not significantly contribute to nonattainment.

The base case retired 46% of Mississippi’s capacity; units that, in the real world, continue to generate power. In the real world, Mississippi runs units that the base case says should not exist, and the owners will rush to construct control measures on these units for which a model concludes there will be no reduction of emissions that significantly contribute to nonattainment.

V. EPA should stay the Final Rule to avoid injustice to ratepayers.

Under the Administrative Procedures Act, the EPA may postpone the effective date of implementation of the Final Rule pending judicial review if it finds that “justice so requires”. 5 U.S.C. § 705. Further, § 705 provides that a reviewing court may grant a stay “to the extent necessary to prevent irreparable harm.” Mississippi satisfies each of these standards.

The subjective, “as justice so requires”, standard gives the EPA broad discretion when determining whether to grant a stay. However, as noted in the Petition for Reconsideration and Stay filed by the State of Texas, the EPA has not employed any specific criteria to determine whether the standard is met. As a guidepost, 5 U.S.C. § 705 provides that a court reviewing the action of an agency may grant a stay “to the extent

necessary to prevent irreparable harm”. A court, in considering whether to grant such a stay, will consider four factors: (1) whether the petitioner has shown he is likely to prevail on the merits; (2) whether the petitioner will incur irreparable harm in the absence of a stay; (3) whether the issuance of a stay would substantially injure other interested parties; and (4) where the public interest lies. *Va. Petrol. Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). While the EPA has not adopted this test as applied to determining whether the “as justice so requires” standard is met, prongs (2) and (4) of the test are vital considerations in determining whether the standard is met with respect to Mississippi.

Justice and the public interest require that the EPA grant a stay pending judicial review of the Final Rule as applicable to Mississippi. The Final Rule unnecessarily tests the outer limits of the reliability of the nation’s electric grid, placing in jeopardy lives, jobs and security. The threat of blackouts is real. Courts have found that rolling blackouts place citizens’ health and safety at risk and that the mere threat of blackout constitutes irreparable harm. *See, e.g., California Independent System Operator Corp. v. Reliant Energy Services, Inc.*, 181 F. Supp. 2d 1111, 1121 (E.D. Cal. 2001); *Cleveland v. Cleveland Elec. Illum. Co.*, 684 N.E.2d 343, 350 (Ohio Ct. App. 1996).

As explained in the previous sections, the Final Rule forces Mississippi to curtail its local generation by approximately 46%, leading to a strain on the transmission system, deficient voltage support and ultimately, load shed. As noted in the letter to the Administrator from SPP, the impacts to reliability of the transmission system as a result of the changes in generation dispatch that will be required by CSAPR are simply unknown at this time. Due to the complexity and the significance of this rule, the industry needs time to fully evaluate the impacts, to determine a necessary plan of system improvements, and sufficient time to implement system improvements required to ensure reliability of the system. Implementation of the Final Rule as currently scheduled is simply reckless from a system reliability perspective.

Blackouts during a Mississippi summer will kill people. As highlighted in the Petition for Reconsideration and Stay filed by the Texas Attorney General, “Heat is the number one weather-related killer in the United States, resulting in hundreds of fatalities each year. On average, excessive heat claims more lives each year than floods, lightning, tornadoes, and hurricanes combined.” In 2010 twenty-three Mississippians died from exposure to excessive natural heat. Mississippi Department of Health, *Vital Statistics Bulletin*, p. 110 (2010).¹⁰ One of the primary ways the Centers for Disease Control and Prevention (“CDC”) recommends to protect oneself is to seek an air-conditioned environment. *See CDC, Heat Stress in the Elderly*. (2009).¹¹ Even the EPA has stated that “[a]ir conditioning is the best defense” to prevent heat-related problems, and recommends that local government “coordinate with local utilities to ensure that no customer’s electricity is turned off during a heat wave.” EPA, “*It’s Too Darn Hot*” – *Planning for Excessive Heat Events*, (October 2007).¹²

¹⁰ <http://www.msdh.state.ms.us/phs/2010/Bulletin/vr2010.pdf>.

¹¹ <http://www.bt.cdc.gov/disasters/extremeheat/elderlyheat.asp>.

¹² http://www.epa.gov/agingepa/resources/factsheets/itdhpfehe/itdhpfehe_english_2007_10.pdf.

The elderly, in particular, are more prone to heat stress because they do not adjust well to sudden changes in temperature, are more likely to have a chronic medical condition that changes normal body responses to heat, and are more likely to take prescription medicines that impair the body's ability to regulate its temperature or that inhibit perspiration. *Heat Stress, supra*, n. 11. The average daily high temperature from June through August in Hinds County, the largest county in Mississippi and home to 26,551 elderly individuals,¹³ exceeds 90 degrees. See The Weather Channel, *Monthly Averages for Mississippi State, MS*.¹⁴ Hinds County also contains the city of Jackson, an EMI designated load pocket. To now threaten capacity in the regions hardest hit by recent heat waves seems to run counter to the EPA's stated mission of ensuring that "all Americans are protected from significant risks to human health." EPA, *Our Mission and What We Do*.¹⁵

The Final Rule's massive curtailment of local generation will also cost jobs. Some of the plants that may have to shut down or de-rate operate in the highest unemployment areas of the country. Closing plants will create a ripple effect in the local economies. The Final Rule impacts one plant that operates in Washington County where the current unemployment rate is 16.2%. Tax revenue from the plant in fiscal year 2010 added \$4,318,845 to the county tax roll. The taxes accounted for approximately 14% of that county's total budget for fiscal year 2010. The education system and infrastructure of many rural areas supported, in part, by power plants will not be sustainable without sufficient revenue. Further, Mississippi's tax rolls could also be affected as counties attempt to address additional revenue shortfalls.

As the cost of generating power necessarily increases, these costs will be passed to ratepayers. Unlike taxes, everyone pays for electricity; therefore, increased electricity costs disproportionately impact those that can least afford it. Costs and expenses are sure to rise.

The Final Rule leaves Mississippi utilities with few, if any, viable options for compliance within the extremely short time period for implementation. Any such measures will certainly require utilities to incur enormous expense, costing ratepayers tens-of-millions of dollars on top of the *hundreds-of-millions* of dollars required to comply with other EPA rules. For example, installation of "scrubbers" at Mississippi Power Company's Plant Daniel is estimated to cost upwards of \$600,000,000.00. While other less expensive measures, by comparison, are available to control NO_x emissions to some but not all units, the expense will ultimately be borne by the ratepayer.

Even so, because the short implementation period leaves utilities little time to build control measures, construction will not alleviate the risk of non-compliance. Utilities will have little choice but to import electricity from out-of-state sources in order to meet demands that cannot be met due to curtailed local generation. While availability

¹³ <http://quickfacts.census.gov/qfd/states/28/28049.html>.

¹⁴ <http://www.weather.com/weather/wxclimatology/monthly/graph/39762>.

¹⁵ <http://www.epa.gov/aboutepa/whatwedo.html>.

of such electricity for purchase is questionable, the more serious concern is whether existing transmission systems are capable of handling the resulting increased flow of energy. Although the exact cost of necessary transmission system upgrades is unknown, it is certain to be substantial. Alarming, the EPA apparently failed to consider this real and serious consequence of the Final Rule.

While the Final Rule proposes that utilities purchase necessary allowances, this option is not viable. Because of uncertainty, especially during the early stages of implementation, the market to purchase allowances is likely to be severely restricted. Due to the severe penalties for noncompliance in addition to the necessity to procure allowances at a 3:1 ratio in order to maintain assurance levels, it can easily be anticipated that affected utilities would be reluctant to sell allocations, especially during the first few years of the Final Rule. Any sellers would extract a high price.

The likely approach is that utilities will rush to begin building control measures, whether or not they can be completed by May 2012, while simultaneously entering into expensive purchased power agreements. What credits that can be purchased will be acquired at a premium. As an additional “hidden” cost of the Final Rule, systems likely will need to build new, as-yet-unplanned transmission to ensure reliability and to meet federal standards.

Compliance measures will be financed by ratepayers unable to bear the increased expense in these difficult times. Failure to grant a stay of the Final Rule will result in irreparable harm to Mississippi ratepayers. Mississippi is one of the poorest states in the nation. According to the U.S. Census Bureau, Mississippi has the lowest median income in the nation, and in 2010, 22.4% of Mississippians were living below the poverty level. U.S. Census Bureau, 2010 *American Community Survey* (2011).¹⁶ Further, in August 2011, 10.3% of the workforce in Mississippi was unemployed. U.S. Dep’t of Labor, *Local Areal Unemployment Statistics* (August 2011).¹⁷

The substantial reductions in allocations afforded Mississippi generating facilities will almost certainly result in an increased cost to ratepayers as utilities struggle to comply with NO_x emissions requirements. Furthermore, if Mississippi utilities are unable to comply with the Final Rule and incur fines and penalties as a result, those costs might also be passed along to ratepayers.

Staying implementation of the Final Rule as applied to Mississippi is in the public interest and the interest of justice. Beyond the dire consequences of skyrocketing electric bills to already impoverished Mississippi families, citizens and businesses will also be faced with unreliable electricity service and even higher unemployment rates due to shut-down or de-rating of generating facilities. Respectfully, the MPSC petitions the Administrator to reconsider the Final Rule as to Mississippi and issue a stay because justice so requires.

¹⁶ <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

¹⁷ <http://www.bls.gov/web/laus/laumstrk.htm>.

CONCLUSION

The MPSC respectfully requests that the EPA reconsider the Final Rule and stay its implementation pending judicial review or agency reconsideration, whichever is longer, as it relates to Mississippi's inclusion in the seasonal ozone program as discussed above. The unrealistic and deeply flawed state budget for summer NO_x emissions in conjunction with the impossible compliance date will require Mississippi utilities lose approximately 46% of the State's electric generating capacity. The sudden and dramatic unavailability of local capacity will degrade the reliability of the system. The MPSC had no way of anticipating the Final Rule's drastic departure from the Proposed Rule and the impact these changes would have on Mississippi. The Final Rule, particularly its modeling and methodology, is replete with factual and legal errors that go to the heart of the Rule. These errors translate into irreparable harm for Mississippi and the nation such that justice and the public interest require the Administrator to stay the case.

Respectfully submitted,



Shawn Shurden, Senior Attorney
Mississippi Public Service Commission

Katherine Collier, Senior Attorney
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EXHIBIT A

Comparison of 2010 actual emissions and 2012 Base Case

Facility Name	Data	Total
Atala Generating LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	9.50 4.72
Batesville Generation Facility	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	10.91 3.07
Baxter Wilson	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	7.89 0.00
BTEC New Albany LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.00 0.15
BTEC Southaven LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.00 0.10
Caledonia	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	12.61 7.59
Chevron OH	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	3.93 0.63
Choctaw	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	3.00 1.24
Choctaw Gas Generation LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	2.10 0.00
Crossroads Energy Center	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.29 0.00
Delta	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.70 0.00
Gerald Andrus	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	13.42 0.00
Jack Watson	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	6.33 1.19
Kemper County	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.91 0.60
KGen Hinds LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	5.35 4.67
Magnolia Power Plant	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	8.89 3.31
Moselle	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	1.63 0.31
Natchez	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.00 0.00
NE	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.00 0.10
R D Morrow	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	12.95 11.61
Red Hills Generating Facility	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	19.12 12.23
Rex Brown	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	2.03 0.00
Silver Creek	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	0.28 0.09
Southaven Power LLC	Sum of 2010 Ozone Season Heat Input (Tbtu) Sum of 2012 Base Summer Fuel Use (TBtu)	12.49 7.93
Sweatt	Sum of 2010 Ozone Season Heat Input (Tbtu)	0.03



Sylvarena	Sum of 2010 Ozone Season Heat Input (Tbtu)	0.67
	Sum of 2012 Base Summer Fuel Use (TBtu)	0.00
Victor J Daniel Jr	Sum of 2010 Ozone Season Heat Input (Tbtu)	205.34
	Sum of 2012 Base Summer Fuel Use (TBtu)	111.44
Total Sum of 2010 Ozone Season Heat Input (Tbtu)		205.34
Total Sum of 2012 Base Summer Fuel Use (TBtu)		111.44

EXHIBIT B

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

September 20, 2011

Administrator Lisa P. Jackson
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: SPP's Review of the EPA's IPM Analysis of the Cross-State Air Pollution Rule, Docket ID No. EPA-HQ-OAR-2009-0491

Dear Ms. Jackson:

Southwest Power Pool, Inc. (SPP), in its capacity as a Federal Energy Regulatory Commission (FERC) approved Regional Transmission Organization (RTO) and a Regional Entity, is concerned that the Environmental Protection Agency (EPA) finalized the Cross-State Air Pollution Rule (CSAPR) without adequately assessing the reliability impacts of the CSAPR on the SPP region. SPP originally expressed concern with the reliability impacts of proposed regulations¹ in its July 19, 2011 comment letter to the EPA.

As required by the Energy Policy Act of 2005, FERC has approved mandatory and enforceable reliability standards promulgated by NERC with which the industry must comply. These standards were developed through a well vetted industry process identifying key requirements to ensure the bulk electric system meets an adequate level of reliability. Failure to comply with these standards can affect the ability of the power grid to operate reliably as well subject SPP and its members to financial penalties. These standards require that SPP's Transmission Planners ensure that transmission lines are not overloaded and that voltage is maintained within certain prescribed limits in the event of the failure of a single element in the system. Additionally, the standards require that Transmission Operators operate in real-time within certain limits. In order to meet the demands of the system there needs to be an adequate balance of generation and transmission availability both in the short and long term. The timing of the CSAPR regulations does not provide the SPP region with enough time to ensure that adequate balance.

Our reliability modeling² indicates that the CSAPR Integrated Planning Model 4.1 (IPM) results, as depicted by the EPA, are likely to cause SPP to be out of compliance with the applicable NERC standards as early as 2012. SPP's planning models identified 5.4 GW from the 48 generation units identified by the EPA with zero fuel burn in 2012 that would have been dispatched during the 2012

¹ On July 19, 2011, Nicholas A. Brown, SPP President and CEO, submitted comments to the EPA in Docket ID Nos. EPA-HQ-OW-2008-0667, EPA-HQ-OAR-2009-0234, and EPA-HQ-OAR-2011-0044, additionally providing SPP's preliminary assessment of the potential reliability impacts of proposed EPA regulations impacting generation in the SPP footprint.

² SPP removed all generation units in its models that consumed zero fuel in the EPA models. No other SPP model adjustments were made.



Summer Peak conditions. Our analysis revealed 220 overloads in excess of the required, 100% of emergency ratings under contingencies, and 1047 circumstances at various locations on the transmission system where voltage was below the prescribed lower limit of 90% of nominal rating. The statistics in this analysis must be viewed as being indicative, not definitive, results and are probably very conservative compared to what would be experienced in the real world should the modeled system conditions exist. An even clearer representation of reliability violations can be found by applying higher operability limits of 120% to the overloads. There were 16 such overloads on the system. Using a similar out of normal range there were 93 circumstances where voltage dropped below 85% of nominal. These “clear-cut” examples of standards violations represent the well founded concerns regarding the timeline with which the CSAPR would be instituted.

Additionally, 30 contingency scenarios did not solve, which is indicative of extreme system constraints, including the potential of cascading blackouts similar to what occurred in 2003 or which could require the shedding of firm load (that is, localized rolling black-outs initiated by utilities within the SPP region) to avoid more widespread and uncontrolled blackouts and to remain in compliance with reliability standards. Some of the contingencies could be resolved with other short-term transmission and/or resource solutions, but several could not. In those cases, SPP would be in clear violation of mandatory reliability standards and subject to penalty from FERC. However, SPP cannot be compliant with NERC’s planning standards without placing its generation owners in violation of EPA standards when the unutilized units in the IPM are unavailable to SPP. Further exacerbating this situation, SPP’s analysis also revealed that generation production from “small units”³ increased from 13 to 57 units deployed. Some of these units are likely subject to the reciprocating internal combustion engines (RICE) regulations, which were not evaluated as part of this reliability study. If we look beyond the summer peak hour studied, the unavailability of approximately 11 GWs⁴ of total capacity from the EPA model in SPP’s footprint would likely result in additional localized reliability issues.

The result of SPP’s reliability assessment of the EPA’s CSAPR IPM generation dispatch indicates serious, negative implications to the reliable operation of the electric grid in the SPP region raising the possibility of rolling blackouts or cascading outages that would likely have significant impacts on human health, public safety and commercial activity within SPP. These regulations further compound the reliability impacts addressed by SPP in its July 19, 2011 comment letter, which focused on the MACT regulations to be enacted in 2014/15. The time period between finalization of the CSAPR and its effective date is too short to allow SPP and its members/registered entities to appreciate the effects of the rule and to take actions to ensure reliability.

SPP supports a more flexible approach to meeting the emission requirements under the CSAPR, as stated in a joint letter from the New York Independent System Operator, Midwest Independent System Operator, PJM Regional Transmission Organization, the Electric Reliability Council of Texas, and SPP to the EPA in August. The EPA must provide time to allow the industry to plan an approach to comply with its rules in a reliable and reasonable fashion. As it stands now, SPP and its members may be placed in the untenable position of deciding which agency’s rules to violate, FERC or EPA. Putting an

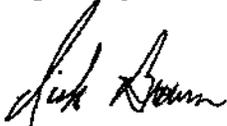
³ “Small units” denotes those units generating 25 megawatts or less per unit.

⁴ Although the EPA model had additional units and capacity with zero fuel burn in 2012 (10.7 - 10.9 GW in total depending on the source of the Pmax), many of these units which were not dispatched in our 2012 summer model will be needed during off-peak load periods to accommodate outages and to maintain system reliability.

industry with critical infrastructure in the position of choosing which agency's rules to violate is bad public policy. SPP suggests that the EPA delay CSAPR's effective date at least a year to allow for investigating, planning, and developing solutions to assist our members in maintaining grid reliability and compliance with both its current regulatory bodies and all of the EPA regulations that impact the electric industry.

Your prompt attention to this matter is greatly appreciated. Please do not hesitate to contact me if you have any questions or would like to discuss this matter further.

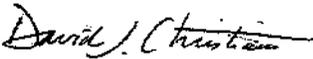
Respectfully submitted,



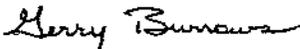
Nicholas A. Brown
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John Meyer
Chairman and Trustee
Southwest Power Pool Regional Entity



David Christiano
Trustee
Southwest Power Pool Regional Entity



Gerry Burrows
Trustee
Southwest Power Pool Regional Entity

cc: SPP Board of Directors
SPP Regional State Committee
SPP Strategic Planning Committee
State Regulators in Arkansas, Kansas, Louisiana, Missouri, Mississippi, Nebraska, New Mexico,
Oklahoma, and Texas



HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

Congressional Delegations of Arkansas, Kansas, Louisiana, Missouri, Mississippi, Nebraska, New Mexico, Oklahoma, and Texas
Governors of Arkansas, Kansas, Louisiana, Missouri, Mississippi, Nebraska, New Mexico, Oklahoma, and Texas
North American Electric Reliability Corporation
President Barack Obama
Secretary of Energy Dr. Steven Chu
Federal Energy Regulatory Commission

EXHIBIT C

generally to “tools” that you and other regulators may have for protecting reliability in the face of retirements of electric generating capacity as a consequence of the EPA rules, but you did not describe those tools or provide any clear indication of when and how they would be used. In fact, based upon reports from the House subcommittee hearing, it is my understanding that, at present, you have no plans for further analysis of these issues by Staff before the EPA rules go into effect.

Consequently, I must ask you to clarify, as soon as possible, the Commission’s plans, if any, for identifying and addressing threats to the nation’s bulk power system that may arise from the EPA actions listed in my previous correspondence. In doing so, I ask also that you specifically address the reliability issues connected with the Utility MACT and Cross State Air Pollution rules. Finally, I ask that you and your colleagues, together with the Electric Reliability Organization (ERO) that the Commission has certified under section 215 of the Federal Power Act – the North American Electric Reliability Corporation (NERC) – immediately initiate and complete within six months a formal process that will address these vital reliability issues in a transparent and fair manner. Unless and until such a process comes to an orderly conclusion, I will remain deeply concerned that reliability may be at risk.

Moreover, I do not believe that what can be described as a “consent decree safety valve” can or should substitute for the work that the Commission and NERC should do or the time necessary to do this work before the EPA rules take effect. As I understand it, this so-called “safety valve” would, pursuant to consent decree, enable what amounts to waivers or exceptions for particular plants on a case-by-case basis after the EPA rules are in effect. Because of the number of plants that even the low end of the projected range of retirements would represent, I do not see how such an approach could protect overall reliability, let alone be practically workable, transparent or fair.

Before embracing the “safety valve,” the Commission should do the required analysis in concert with NERC. In fact, NERC offered thoughtful recommendations in its *2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulation* issued last October at about the time that Staff was presenting to EPA and the Council on Environmental Quality its preliminary assessment. A key recommendation, and one that I believe EPA should follow until the process I have asked you to initiate can be completed, is that “the pace and aggressiveness of these environmental regulations should be adjusted to reflect and consider the overall risk to the bulk power system.”

Today’s transmission systems do not allow for seamless transfer of power from any point in the country to any other. Instead, as the Commission has pointed out time and again, our electric systems are in regions and sub-regions with singular characteristics. Often reliability in a particular sub-region or local control area comes down to a specific plant or plants or one or more transmission lines. A failure at that level can result in a local outage, even though ample generating capacity may be available across the region or across the nation as a whole. The risks are more acute in areas of the country where generating capacity is located far from load centers. These overall risks, if not properly addressed, can result in local outages becoming ones with even more widespread effects.

Although it is too soon to know, we may have witnessed a dramatic example of this phenomenon just recently. I refer, of course, to the major regional outage across portions of Arizona, Southern California, and Northern Mexico that left millions of customers without power. Similar outages can force critical medical facilities to lose power putting lives at risk; lead to failure of vital public infrastructure; and cause significant economic loss. According to reports, for example, the loss of power to San Diego led to significant disruptions in that city. Whatever its immediate causes, the outage in San Diego and the surrounding regions on September 8 serves as a stark reminder that our electric systems currently are stressed, and every power plant and transmission line makes a singular contribution to overall electric reliability.

In this light, it is good that you, your colleagues and I agree that the reliability of the nation's bulk power system cannot be captured in aggregate figures. High-level estimates, although useful to illustrate the magnitude of the challenge, provide only the most general idea of overall electric system stability and security. As you and your colleagues testified before the House subcommittee on September 14, assessing the risks to reliability requires a far more fine-grained and careful approach.

That is why I was taken aback by your acknowledgment that, despite Staff's projection that EPA's current regulatory agenda would likely cause the widespread retirement of electric generating capacity, the Commission apparently has neither undertaken nor ordered any further study. Your August 1 letter and your congressional testimony this week suggest that the Commission has not attempted and might not attempt to ascertain:

- which generating facilities are likely to retire as a result of the EPA rulemaking agenda in general or the Utility MACT and Cross State Air Pollution rules in particular;
- how such retirements would affect the bulk power system;
- whether such retirements would diminish reliability in particular markets and, if so, which markets;
- whether existing or planned transmission facilities will be adequate to accommodate increased demand as a result of the retirements (and, if so, over what time horizon); and
- what, if anything, the Commission should do or must do as a result to maintain the reliability and security of the nation's bulk power system.

The Commission will conduct a joint inquiry into the San Diego outage with NERC even from the beginning of NERC's analysis of that event. In FERC and NERC's statement announcing that joint inquiry, you said such an inquiry will be "an effective way . . . to protect consumers and ensure the reliability of the bulk power system." NERC's president and chief executive officer said that "[p]artnering brings together the expertise of both organizations, and emphasizes the importance placed on reliability of the bulk power system." In fact, the Commission and NERC have brought their collective experience to bear in other recent inquiries on reliability, such as that into service disruptions in Texas and the Southwest this past winter, jointly preparing a comprehensive report within just six months.

Surely the issue of the cumulative impact of the EPA rulemaking agenda generally, or of the Utility MACT or Cross State Air Pollution rules specifically, deserves no less attention from the

Commission and the ERO. Last week's outage – while rightly a cause of concern – was resolved within less than 24 hours, as I understand it. Its causes will be determined in due course and, I expect, duly addressed. The potential retirement of significant amounts of installed generating capacity – whether considering Staff's preliminary assessment of 81 gigawatts or a lower number along the broad range of predicted retirements – deserves a proportionate response by the Commission and NERC. That response must include serious study of the problem, careful projections, and – above all – an orderly and transparent process to complete this assessment. And let me be clear: establishing such a process, and promptly seeing it through, is the Commission's responsibility.

Although the EPA would bear first-order responsibility if its rules were to degrade reliability, it is the Commission's statutory responsibility under the Federal Power Act to oversee the reliability and security of the nation's bulk power system and to certify the ERO. Thus, the Commission and the ERO also would bear responsibility if they had not been diligent and prompt in assessing the risks posed by EPA's actions before those actions became final.

A "wait-and-see" approach with regard to the impact of these major federal rulemakings is both unacceptable and explicitly contrary to one of the Commission's central obligations. Congress, the executive agencies, and the public should be informed of the risks. And the Commission should take every measure within its power to protect the reliability and security of the nation's bulk power system. I trust that you understand the importance of this responsibility and the consequences of failure to fulfill it. I also respectfully request your detailed answers to the questions attached.

It is regrettable that, given Staff's preliminary analysis of a year ago, a formal process to assess the reliability impact of EPA's actions has not been long since underway. At this late date, time is of the essence. For that reason, I ask you to reply as soon as possible and, in any event, no later than September 30, 2011.

Sincerely,



Lisa Murkowski
Ranking Member

cc: The Honorable Philip Moeller
The Honorable Marc Spitzer
The Honorable John Norris
The Honorable Cheryl LaFleur
Mr. Gerry Cauley, President & CEO, NERC

Questions

Please provide detailed answers to the following questions:¹

1. Will EPA's rulemaking agenda, as described in my previous correspondence, degrade reliability in any region, sub-region or electric control area of the United States? In addition to answering this question, please state or explain:
 - a. the basis for this determination;
 - b. your degree of confidence in this determination;
 - c. the regions, sub-regions, or electric control areas that will be affected, with a particular focus on transmission "pockets" and cities where generating capacity is at risk;
 - d. the impacts on system stability or system recovery in the aftermath of wide scale forced outages (e.g., the recent regional outage in Arizona, Southern California, and Northern Mexico);
 - e. the impact on reliability of any change in the balance among different types of generation, particularly during and in the aftermath of forced outages and periods of peak demand; and
 - f. the actions that the Commission is undertaking to understand and address these effects.²
2. In your view, what is the extent of the Commission's responsibility to ensure the reliability and security of the nation's bulk power system? In this regard, please describe that responsibility and what actions by the Commission it may entail.
3. What process will the Commission undertake to assess the impact on reliability of EPA's rulemaking agenda? With respect to this process, please describe:
 - a. the scope of the process;
 - b. the projected timeline for any contemplated activities;
 - c. the division of responsibility between the Commission, NERC, and any other entity;
 - d. any contemplated studies or projections; and
 - e. the agencies and officials participating.
4. As a matter of public policy, do you believe that federal regulations should be generally applicable?
5. Do you intend to involve the Commission in the EPA's rulemaking process sufficiently to ensure that EPA's rules, in fact, can be generally applicable without a threat to reliability?
6. If, *de facto*, EPA's rules are less than generally applicable because they require significant exceptions and waivers to meet reliability requirements, please explain the process you believe should apply. Please describe any proposals for such a waiver or

¹ Please provide your answers to these questions and your reply to this letter electronically as well as on paper.

² If you are not able to answer this question, please explain what information would be required to answer this question and what steps, if any, the Commission is taking to obtain this information.

exception process that that might serve as a “safety valve” that you may have under review, or that you believe may be under review by EPA or any other Executive Agency, for permitting certain power plants to operate under the EPA rules until mitigation measures are put in place to safeguard reliability considerations. Please detail the elements of such a process for providing flexibility or targeted and discrete exceptions or waivers. If such a process would include the use of consent decrees entered in judicial proceedings, please explain how such a process might operate.

7. Please provide any estimate that you or any Commissioner or Commission employee may have developed with respect to the number of generating units that could qualify for such flexibility or targeted and discrete exceptions or waivers.
8. If you expect that completing a reliability assessment of the cumulative impact of EPA’s rulemaking agenda in general – or of the Utility MACT or Cross State Air Pollution rules in particular – will require more than six months, please explain in detail the objectives of the assessment, its methodology, and the time necessary to complete each step. In addition, please explain why it would be infeasible to release an assessment within six months’ time.
9. If the Commission is not undertaking such a process, and has no plans to do so, please either:
 - affirm that EPA’s rulemaking agenda will not materially degrade reliability in any location within the United States; or,
 - explain how the Commission will carry out its statutory obligations with respect to reliability and security in the absence of information regarding expected material degradations to reliability.