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VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL

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RE: Request for Partial Reconsideration and Stay of the U.S. Environmental Protection Agency ("EPA") Final Rule titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals" signed July 6, 2011, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Docket No. EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson and Assistant Administrator McCarthy:

This firm represents the Municipal Electric Authority of Georgia ("MEAG") and submits on its behalf this request to EPA for partial reconsideration and stay of the agency's final rule signed July 6, 2011, and titled "Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals" ("Final Transport Rule"). 76 Fed. Reg. 48,208 (Aug. 8, 2011). If EPA does not grant partial reconsideration and address MEAG's concerns, the Final Transport Rule will remain unlawful as having been issued without adequate notice and comment and as exceeding EPA's Clean Air Act ("CAA") authority as applied to MEAG.

EPA must reconsider the Final Transport Rule in light of the concerns raised by MEAG below. Section 307(d)(7)(B) of the Clean Air Act states: "The Administrator *shall* convene a proceeding for reconsideration" of a final rule in response to a petition for reconsideration if (1) "the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)" and (2) "if such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B) (emphasis added). Here, MEAG's objections arose only upon EPA's issuance of the Final Transport Rule and stem from a shortfall of SO_2 emission

allowances under the final rule that will adversely affect MEAG, the Municipalities (as defined herein), and their citizens that rely upon MEAG (collectively "the MEAG system") in 2012.

Specifically, the Final Transport Rule slashed Georgia's 2012 SO_2 emission budget set forth in the January 2011 Notice of Data Availability ("NODA") by greater than thirty percent (30%) and MEAG's allocation of such allowances[1] by roughly the same percentage.[2] MEAG now faces a significant SO_2 emission allowance shortfall in 2012. This significant change from the NODA to the Final Transport Rule was not a logical outgrowth of the proposed rule, and, therefore, MEAG's objections could not have arisen prior to the issuance of that final rule.[3] Further, as a result of changes from the NODA to the Final Transport Rule, MEAG's compliance options are limited and uncertain, and it is clear that the MEAG system will inevitably suffer severe and irreparable harm.

Furthermore, MEAG objects to the Georgia emission budgets and MEAG unit-level allowance allocations in the Final Transport Rule because they exceed EPA's authority under the CAA. EPA's authority under the Act's "good neighbor" provision with respect to Georgia SO_2 emissions is limited to prohibiting emissions that can be eliminated at a cost of $500 per ton. Under MEAG's best case compliance scenario—which it currently lacks authority to unilaterally implement—its SO_2 emission reduction costs for 2012 are currently expected to significantly exceed $500 per ton.

Emission reductions at such excess cost both exceed EPA's authority under the CAA's good neighbor provision and are unnecessary because MEAG is already constructing additional emission control equipment that is scheduled to be in commercial operation in 2013 and 2014. As a result, all of its coal-fired electricity generating units ("EGUs") will have flue gas desulfurization ("FGD") controls that will reduce SO_2 emissions to at least the extent that is mandated in the Final Transport Rule. As EPA is aware, the implementation of such emission controls was already required pursuant to Georgia's Multipollutant Control Rule (the "MPCR"). Georgia's MPCR mandates a specific schedule for implementing advanced NO_X, SO_2, and mercury emissions controls on MEAG's coal-fired EGUs.

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[1] In this Petition, the allocation of allowances to MEAG has been calculated according to MEAG's ownership interest in the EGUs to which EPA has allocated allowances in the Final Transport Rule. *See* Table 1 below.

[2] The State of Georgia has filed a Petition for Reconsideration and Stay of the Final Transport Rule (October 5, 2011) in response to these decreases and other issues in the Rule, and MEAG supports Georgia's Petition. Furthermore, MEAG hereby incorporates the objections of the State of Georgia based on the distribution of roles and responsibilities between states and the federal government under the CAA, found in Section I of its Petition for Reconsideration and Stay of the Final Transport Rule.

[3] With respect to the inadequacy of the notice and opportunity to comment provided by EPA, MEAG hereby incorporates the objections of the State of Georgia found in Section IV.A of its Petition for Reconsideration and Stay of the Final Transport Rule.

Partly as a result of Georgia's MPCR, MEAG anticipates having sufficient allowances and achieving compliance with the Final Transport Rule in years 2013 and thereafter. However, one potentially unintended consequence of the significantly reduced allowances budgeted for Georgia is that the Final Transport Rule allocates insufficient SO_2 allowances in 2012 to MEAG EGUs for which MEAG has incurred significant cost for the MPCR emissions controls that are completed or under construction, effectively penalizing Georgia and MEAG under the Final Transport Rule for taking early action to install SO_2 and other controls under the MPCR.[4]

Thus, MEAG requests that EPA partially reconsider the Final Transport Rule and stay it during the reconsideration. Ultimately, EPA should address the critical flaws in the Transport Rule identified by MEAG in this Petition by (a) restoring Georgia's 2012 state SO_2 emission budget to the levels contained in either the proposed rule or the January 2011 NODA, (b) staying the application of the Final Transport Rule to units subject to Georgia's MPCR, including the MEAG EGUs, until the controls mandated under the MPCR have been installed and are in commercial operation, (c) delaying the effective date of the rule for MEAG or the State of Georgia until 2013, or (d) providing such other relief to allow MEAG's EGUs to operate in compliance with the Final Transport Rule consistent with the SO_2 allocations budgeted in either the proposed rule or in the NODA.

I. INTRODUCTION

MEAG is not an investor-owned utility, nor is it a for-profit independent power producer. Rather, it is an instrumentality of the State of Georgia created as a public corporation by the Georgia General Assembly and does not operate for profit. *See* O.C.G.A. §§ 46-3-110 to -155 (2004). The statutory purpose of MEAG is to provide an adequate, dependable, and economical wholesale supply of electricity to those political subdivisions of Georgia that owned and operated electric distribution systems on March 18, 1975, and that elected to contract with MEAG for the purchase of wholesale power. *See id.* § 46-3-125. The "creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of [the State of Georgia] and . . . the authority is an institution of purely public charity performing an essential governmental function." *Id.* § 46-3-128(a).

In fulfilling its statutory purposes, MEAG currently provides bulk electric power to forty-eight Georgia public power cities and one Georgia public power county (collectively, the "Municipalities"). Those power resources currently include ownership interests in ten electric generating units, all of which have been placed in service. MEAG's ownership interests in such units represent 2,069 megawatts ("MW") of nominally-rated generating capacity. MEAG's coal-fired generating capacity consists of ownership interests in Plant Wansley Unit Nos. 1 and 2 and Plant Scherer Unit Nos. 1 and 2.

[4] With respect to EPA's treatment of the MPCR in this rulemaking, MEAG hereby incorporates the objections of the State of Georgia found in Section V of its Petition for Reconsideration and Stay of the Final Transport Rule.

In 2007, the Georgia Board of Natural Resources adopted the Georgia MPCR. *See* Ga. Comp. R. & Regs. 391-3-.02(2)(sss). The Georgia Environmental Protection Division ("EPD") enforces the MPCR, which contains a specific schedule for implementing advanced NO_X, SO_2, and mercury emissions controls on specified EGUs operating in the state. In Georgia EPD's view, the MPCR accomplishes SO_2 emission reductions "as expeditiously as practicable" and in coordination with already scheduled maintenance outages. *See* comment letter to Docket Coordinator from James A. Capp, Air Protection Branch Chief, Georgia EPD at 2 (Oct. 1, 2010) [hereinafter, *Georgia EPD Comment Letter*].

As a result, with respect to reducing SO_2 emissions, Plant Wansley Unit Nos. 1 and 2 already operate with modern, high-efficiency FGD controls, and Plant Scherer Unit Nos. 1 and 2, which are NSPS Subpart D units that burn sub-bituminous coal, are scheduled to complete construction and begin commercial operation of new FGD controls beginning in 2013 (Unit No. 2) and 2014 (Unit No. 1). Indeed, to achieve compliance with the MPCR and other air regulatory requirements, MEAG invested approximately $302.7 million from 2000 through 2010 in MPCR and other environmental projects. Compliance under the MPCR and other air regulatory requirements going forward will require significant additional capital investment. MEAG estimates that the total additional capital cost for its ownership share for environmental compliance at Plants Wansley and Scherer over the period 2011-2015 will be at least $291 million. The changes that EPA made in the Final Transport Rule that significantly reduced SO_2 allowances allocated in 2012 to MEAG's EGUs that already are equipped or being equipped with FGD controls will serve no compelling purpose, and in fact, will merely add a substantial burden of additional irrecoverable energy costs to the already strained finances of the Municipalities and their citizens that rely on MEAG.

Without adequate warning, notice, or opportunity to provide comments, the Final Transport Rule slashed Georgia's SO_2 emission budget by over thirty percent (30%) from the January 2011 NODA. As a result, MEAG for the first time since the proposed Transport Rule anticipates a shortfall of approximately 2000 SO_2 allowances in 2012. MEAG could not and did not foresee this SO_2 allowance shortfall in 2012. Under the proposed Transport Rule and NODA, the MEAG system would have been allocated sufficient allowances in 2012 and thereafter. Indeed, the relevant allocations for 2012 only *increased* in the NODA.

But now, as a result of the shortfall of SO_2 allowances in 2012 under the Final Transport Rule, the only thing certain about MEAG's compliance with the Final Transport Rule in 2012 is the resulting irreparable harm to the MEAG system. The primary compliance option that MEAG is considering is to limit the output of Plant Scherer Unit Nos. 1 and 2, but as these are co-owned units in which MEAG has a minority interest and that are not operated by MEAG, MEAG does not have unilateral authority to limit operation of the units. Even if it did have such authority, limiting the output of those units would require MEAG to try and shift generation to its limited other resources at substantial excess costs. Current MEAG modeling estimates indicate that such excess costs will exceed $2,400 per ton of SO_2 eliminated and could possibly reach $6,300 or more per ton. Such excess costs are significantly higher than the cost of $500 per ton targeted in the Final Transport Rule. 76 Fed. Reg. at 48,264, 48,252.

Another compliance possibility is for MEAG to acquire the necessary SO_2 allowances for 2012 from the market ostensibly to be created under the Final Transport Rule. Unfortunately, 2012 is only a few months away, and because of uncertainties surrounding implementation of the Rule that discourage early trading, such a market has not yet materialized for Group 2 EGUs (to which Georgia belongs) and, at this point, does not appear likely to materialize in 2012 (*see* further discussion below).

The Final Transport Rule's adverse impact upon the MEAG system in 2012 appears to be a unique and possibly unintended consequence. EPA explicitly did not intend to require shifts in generation at a cost exceeding $500 per ton of SO_2 reduction. *See* 76 Fed. Reg. at 48,280. Also, it seems unlikely that EPA intended the Final Transport Rule to impose significantly reduced SO_2 allocations upon EGUs that already were scheduled to install emissions controls under the Georgia MPCR prior to the time that such controls were in commercial operation. To reduce the allowances for such units prior to their scheduled installation and commercial operation of controls, which will result in substantially increased costs due to shifting generation or the (unlikely) purchasing of allowances, appears to penalize owners and electricity consumers for costly emissions controls already under construction – a seemingly perverse regulatory result.

EPA should avert such result by one of the following targeted remedies: (1) Returning Georgia's 2012 SO_2 emission budget to the levels contained in either the proposed rule or in the NODA; (2) Exempting from the Rule those EGUs already subject to the Georgia MPCR, including MEAG's coal-fired EGUs, until installation and commercial operation of the mandatory controls are completed; (3) Extending the Rule's effective date to January 1, 2013; or (4) Providing such other relief to allow MEAG's EGUs to operate in compliance with the Final Transport Rule consistent with the SO_2 allocations budgeted in either the proposed rule or January 2011 NODA.

II. The MEAG System and Its Power Resources

The State of Georgia has empowered MEAG to acquire, construct, operate, and maintain electric generating and transmission facilities, solely or in common with others; however, it may not operate any of its projects for profit, except insofar as any such profit will inure to the benefit of the public. *See* O.C.G.A. § 46-3-127. MEAG is a minority-interest co-owner of all of its electric power resources, except for one combined cycle unit at Plant Wansley for which it is the sole owner.

MEAG does not operate and lacks the unilateral authority to schedule how and when generation is committed and dispatched from the co-owned units in the MEAG system, including the coal-fired EGUs. As a result, MEAG cannot unilaterally reduce the electricity produced by the generation at such co-owned EGUs. Furthermore, switching to low sulfur fuel at MEAG's

Plant Scherer EGUs that are currently not equipped with FGD is not a realistic option, as Plant Scherer is currently burning the lowest sulfur coal practically available in Georgia.[5]

Plant Scherer Unit Nos. 1 and 2 are NSPS Subpart D units that currently burn only sub-bituminous coal, emit at less than half of the SO_2 NSPS limits, and control mercury emissions with baghouses and sorbent injection systems. Furthermore, these units are well into construction of additional emissions control equipment scheduled to be in commercial operation in 2013 and 2014 in compliance with Georgia's MPCR. Specifically with respect to SO_2 emissions controls, FGD controls are currently under construction at Plant Scherer Unit No. 2 and are scheduled for commercial operation in 2013, in advance of the December 31, 2013 deadline imposed by the MPCR. *See* Ga. Comp. R. & Regs. 391-3-.02(2)(sss)(9)(ii). FGD controls are currently under construction at Plant Scherer Unit No. 1 and are scheduled for commercial operation by the MPCR's December 31, 2014 deadline. Ga. Comp. R. & Regs. 391-3-.02(2)(sss)(11)(iii). Selective catalytic reduction systems for NOx control are being installed concurrently with the FGD systems. Also pursuant to the MPCR, FGD controls are already operational at Plant Wansley Unit Nos. 1 and 2. Ga. Comp. R. & Regs. 391-3-1-.02(2)(sss)(1)(iii), (3)(ii).

To achieve compliance with the MPCR and other air regulatory requirements, MEAG invested approximately $302.7 million from 2000 to 2010. Compliance with such regulatory requirements going forward will require significant additional capital investment. MEAG estimates that the total capital cost for just its ownership share for environmental compliance at Plants Wansley and Scherer to be expended over the period 2011 to 2015 will be approximately $291 million.

III. CAA § 307(d) REQUIRES EPA TO CONVENE A PROCEEDING FOR RECONSIDERATION OF THE TRANSPORT RULE.

CAA § 307(d)(7)(B) states: "The Administrator *shall* convene a proceeding for reconsideration" of a final rule in response to a petition for reconsideration if (1) "the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)" and (2) "if such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B) (emphasis added). MEAG's comments herein demonstrate that these conditions are satisfied, and, therefore, EPA must partially reconsider the Final Transport Rule.

A. MEAG Could Not Previously Raise its Objections to the Final Transport Rule Because EPA Unlawfully Failed to Provide Adequate Notice and Opportunity for Comment.

The CAA contains "procedural requirements for EPA rulemaking . . . more stringent than those . . . applicable under the Administrative Procedure Act." *Union Oil Co. v. U.S. EPA*, 821 F.2d 678, 681-82 (D.C. Cir. 1987). The CAA "requires a much more detailed notice of proposed

[5] Obtaining lower sulfur coal would appear to require importing such coal from Indonesia at a dramatically more expensive and more politically untenable cost.

rulemaking than does the APA." *Id.* at 682. The notice must contain "a statement of [the proposed rule's] basis and purpose," including a summary of the data on which the rule is based, data gathering and analysis methodologies, and major legal and policy considerations underlying the proposal. *Id.*; 42 U.S.C. § 7607(d)(3).

"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." *Envtl. Integrity Project v. U.S. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). "The 'logical outgrowth' doctrine does not . . . apply where interested parties would have had to 'divine [the agency's] unspoken thoughts . . . because final rule was 'surprisingly distant' from the [a]gency's proposal." *Id.* "[T]he test, imperfectly captured in the phrase 'logical outgrowth,' is whether [a petitioner] should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 548-49 (D.C. Cir. 1983).

Courts have uniformly found that a final rule imposing compliance burdens significantly greater or different in nature than the proposed rule is not a logical outgrowth, and additional notice and opportunity to comment must be provided. In *Small Refiner*, EPA proposed only a final gasoline lead content standard with a delayed effective date. *Id.* at 542. The proposed rule repeatedly assured fuel refiners that the final rule would provide enough lead time to comply. *Id.* The final rule, though, contained an immediately applicable interim standard roughly twenty percent (20%) stricter than the proposed final standard. *Id.* In response to the petitioner's challenge, EPA argued that this new and increased compliance burden was inconsequential by pointing to a market mechanism in the rule. *Id.* at 542, 544-45. The D.C. Circuit rejected EPA's argument and held that the interim standard was not a logical outgrowth of the proposed rule because the agency had applied a stricter standard on a compressed timetable. *Id.* at 542-43. The Court characterized as "implausible" EPA's contention that a lead credit market would ameliorate associated compliance challenges. *Id.* at 544.[6]

1. The Final Transport Rule was not a logical outgrowth of the proposed rule.

Applying this law here demonstrates that the Final Transport Rule is not a logical outgrowth of the proposed rule. MEAG had no reason to expect EPA to impose in the Final Transport Rule the substantially more stringent requirements and the reduced Georgia allowance budget and MEAG unit allocations. Further, the modeling foundation for the final rule is different than that of the proposed rule. The intensity and nature of the compliance burdens imposed by the Final Transport Rule bear little resemblance to the proposed rule or NODA. From the January 2011 NODA, EPA dramatically reduced Georgia's 2012 SO_2 emission budget by over thirty percent (30%), which is even more profound than the twenty percent (20%) stricter requirement rejected by the *Small Refiner* Court. MEAG's allocation of 2012 SO_2 emission

[6] *Accord Envtl. Integrity Project*, 425 F.3d at 996-98 (remanding CAA monitoring rules where approach adopted by EPA in the final rule was antithetical to the approach adopted in the proposed rule); *Int'l Union v. MSHA*, 407 F.3d 1250 (D.C. Cir. 2005) (applying logical outgrowth standard and remanding maximum air flow rule to agency where minimum air flow rule was proposed).

allowances likewise significantly decreased. Therefore, EPA has not provided adequate notice of and opportunity to comment on the Final Transport Rule, and EPA should partially reconsider the rule to address this procedural failure. EPA failing to do so would leave the Final Transport Rule subject to judicial remand on this procedural basis.

In comments EPA appears not to have addressed in the record, the White House Office of Management & Budget ("OMB") concluded that the Final Transport Rule bore little resemblance to the agency's original proposal:

> It is unclear if states and affected facilities will be prepared for a January 1, 2012 start date . . . .[M]odeling 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 SO_2 Group status change; and the sheer magnitude of change to the budgets of all 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*, pp. 11-12 (June 28, 2011), EPA-HQ-OAR-2009-0491-4133.

These dramatic differences in the Final Transport Rule stand in stark contrast to EPA's proposed rule and subsequent NODA, which signaled that the Final Transport Rule's Georgia SO_2 emission budgets and unit-level allocations would equal the levels in the NODA and certainly be no less than those set forth in the proposed rule. MEAG never received adequate notice from EPA to anticipate a significantly reduced Georgia budget and MEAG unit allocations, as well as proportionally increased 2012 compliance burdens in the Final Transport Rule. Further, EPA cannot reasonably rely on a theoretical allowance trading market that has not yet materialized to avoid the adverse impact to the MEAG system of a significant reduction in allowances and increase in compliance obligations for 2012, similar to the *Small Refiner* decision that characterized as "implausible" EPA's contention that a lead credit market would ameliorate associated compliance challenges.

Furthermore, the reduced Georgia allocation budgets, reduced MEAG unit allocations, and other increases in compliance burdens first published in the Final Transport Rule appear to be the result of inadequately explained changes to EPA dispersion and dispatch modeling that occurred between the January 2011 NODA and the issuance of the Final Transport Rule. *See* 76 Fed. Reg. at 48,213, 48253. EPA discusses the modeling changes only generally and sporadically in the Final Transport Rule preamble and other technical documents such as its *Significant Contribution and State Emissions Budgets Final Rule TSD* pp. 4, 16-18 (July 2011) and its *Documentation Supplement for EPA Base Case v.4.10_FTransport – Updates for Final Transport Rule* (June 2011). EPA's inadequate explanation significantly impairs MEAG's ability to meaningfully comment on those changes after the purported completion of the record.

Prior to publishing the Final Transport Rule, EPA should have provided at least the following information in a readily-available form along with an opportunity to comment:

- A list of the dispersion and dispatch modeling platform and input changes that affected the Final Transport Rule's conclusions regarding state-to-state linkage and the extent of significant contribution to nonattainment or interference with maintenance;

- A description of how those changes impacted modeling results; and

- A compendium of records and documents associated with, supporting, and/or criticizing EPA's decision to make those changes.

Additionally, MEAG is concerned that EPA may not have fully and appropriately accounted for all of the aspects of Georgia's MPCR. The MPCR is a detailed and specific rule requiring "[a]ll major EGU emission units (93% of the coal-fired capacity) in the state of Georgia . . . to have controls for SO_2 (flue-gas desulfurization or scrubbers) . . . by the end of 2014." *See* Ga. Comp. R. & Regs. 391-3-.02(2)(sss); *Georgia EPD Comment Letter* at 2. The dates in the rule were established for the affected units "to install the equipment as expeditiously as practicable." *Georgia EPD Comment Letter* at 2. The implementation of the MPCR has and is in the process of greatly reducing the SO_2 emissions from EGUs in Georgia, including with respect to MEAG's interest in Unit Nos. 1 and 2 at Plant Scherer and Unit Nos. 1 and 2 at Plant Wansley.

MEAG is concerned that inappropriately accounting for the scheduled implementation and commercial operation of emissions controls under the Georgia MPCR may have led to the inadvertent under-allocation of SO_2 emission allowances to it in 2012. However, based on the record, MEAG cannot ascertain the extent to which EPA considered the MPCR. EPA has not meaningfully explained in the record how Georgia' MPCR has been accounted for in or affected by EPA's modeling. EPA's modeling documents appear to simply assert that it has been accounted for. EPA, *Documentation Supplement for EPA Base Case v.4.10_FTransport – Updates for Final Transport Rule*, Appendum B (July 2011); EPA, *Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model*, Appendix 3-2 (August 2010). Likewise, the Final Transport Rule indicates only that the MPCR provides a reason to downwardly adjust Georgia's SO_2 emission budget from 2012 to 2014. *See* 76 Fed. Reg. at 48,261.

Thus, the Final Transport Rule violates the logical outgrowth doctrine. Its compliance obligations are significantly stricter than proposed, are based on information and methodologies that have not been subject to public scrutiny, and are contrary to the indications by EPA that the Georgia budgets and resulting MEAG unit-level allocations actually increased from the proposed rule through the NODA. As a result, EPA has unlawfully failed to provide adequate notice and opportunity for comment. *See Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 542-44. EPA must grant this Petition to cure this failure.

2. MEAG was unable to provide comment to EPA regarding the unnecessary and unlawful burdens of the Final Transport Rule.

Under the proposed rule and the NODA, MEAG had no reason to anticipate a shortfall of allowances in 2012. MEAG modeling for 2012 indicated SO_2 emissions of 12,011 to 12,276 tons.[7] MEAG would have received approximately 13,233 SO_2 emission allowances for 2012 under the proposed rule. EPA *increased* this figure in its subsequently-issued January 2011 NODA such that MEAG's allocation of allowances under one option was 14,258 and under the other option was 14,787. Thus, through the proposed rule and NODA, MEAG's total allocations were steadily increasing and sufficient to achieve compliance, including with respect to SO_2 emissions in 2012.

EPA's NODA that increased the SO_2 emission allowances for 2012 for MEAG's units made sense from a policy perspective. In the proposed rule, EPA intended to eliminate SO_2 emissions using certain cost effective technology in 2012. *See* 75 Fed. Reg. at 45,281-82. And, FGD controls were already in place and operational at Plant Wansley Unit Nos. 1 and 2, and scheduled under the MPCR for Plant Scherer Unit Nos. 1 and 2, which already are NSPS Subpart D Units burning sub-bituminous coal. Consequently, through the proposed rule and NODA, EPA made clear to MEAG that sufficient SO_2 allowances would be allocated to MEAG's coal-fired EGUs, on which control technology was already installed or well under construction for scheduled commercial operation starting in 2013 and 2014.

In contrast, the reduction in SO_2 emission allowances for 2012 for MEAG's coal-fired EGUs under the Final Transport Rule does not make sense from a policy perspective or otherwise. As compared to the proposed rule and NODA, the Final Transport Rule dramatically reduces Georgia's SO_2 emission budget and MEAG's unit-level allocations: Georgia's 2012 budget was reduced by over thirty percent (30%) from the January 2011 NODA and the SO_2 emission allowance allocation to MEAG's EGUs was slashed for 2012 from 14,787 in the NODA to 10,185 in the Final Transport Rule. *See* Table 1 below.

[7] MEAG simulates the operation of its system using state-of-the-art and industry standard production costing software.

Table 1.

MEAG 2012 Sulfur Dioxide Allowance Allocation (Based on MEAG Ownership Share for Jointly-Owned Units)					
Unit	August 2010 Proposed Rule	January 2011 NODA Option 1	January 2011 NODA Option 2	Final Rule	Change From NODA Option 2 to Final Rule
Scherer 1 (30.2%)	5,679	4,308	4,694	3,462	– 26.2%
Scherer 2 (30.2%)	4,593	4,398	4,792	3,558	– 25.8%
Wansley 1 (15.1%)	521	2,037	2,219	1,611	– 27.4%
Wansley 2 (15.1%)	2,437	2,103	2,291	1,552	– 32.3%
MEAG Wansley Unit 9 (100%)	3	1,412	791	2	– 99.7%
MEAG Totals	13,233	14,258	14,787	10,185	– 31.1%
Georgia 2012 Statewide Allocation to Existing Units	226,255	226,262	226,262	155,356	– 31.3%

Without adequate prior notice, MEAG is now faced under the Final Transport Rule with the daunting prospect of significantly reduced SO_2 allocations and potential noncompliance in 2012. MEAG is a creature of its non-profit statutory purposes and has accumulated power resources that have allowed it to accomplish those purposes. But MEAG's purposes are limited and, therefore, so are its resources and flexibility. As a result, the only apparent option that may be potentially available to MEAG at this time to avoid the potential non-compliance that would result from the 2012 allowance shortfall would be to try and shift generation from the Plant Scherer Unit Nos. 1 and 2 to the Plant Wansley units.[8] However, MEAG, as a minority interest

[8] In addition to its coal-fired EGUs (Plant Scherer Unit Nos. 1 and 2 and Plant Wansley Unit Nos. 1 and 2) and its combined cycle unit (Plant Wansley Unit No. 9), MEAG is a minority-interest co-owner in nuclear and combustion turbine resources. The nuclear resources dispatch at a nearly constant rate and shifting generation to them, therefore, is not feasible. The combustion turbine unit is for peaking purposes only and could feasibly accommodate some shift in generation from baseload resources such as Plant Scherer Unit Nos. 1 and 2, but at an even

co-owner of the Scherer units, does not have the authority to unilaterally limit the output of such units. As a result, this option is uncertain at this time.

What is certain, however, is that even if MEAG were able to adequately limit output for Plant Scherer Unit Nos. 1 and 2 in 2012, such a limitation would come at a significant cost to the MEAG system well in excess of the cost of $500 per ton upon which the Final Transport Rule rests. MEAG's analysis shows that shifting generation from Plant Scherer Unit Nos. 1 and 2 to the Plant Wansley Units would cost in excess of $2,400 and could possibly reach $6,300 or more per ton of SO_2 eliminated. As noted earlier, such an unanticipated cost impact upon the MEAG system in 2012 effectively penalizes MEAG for early action under the Georgia MPCR, particularly when the FGD controls currently being installed on MEAG EGUs pursuant to that rule will in 2013 and 2014 virtually eliminate any significant impact attributed to Plant Scherer Unit Nos. 1 and 2. The irony of such a multi-million dollar cost penalty on the MEAG system becomes even more pronounced when considered in the context of the considerable capital investment MEAG has made and continues to make to control SO_2 emissions at its EGUs – none of which EPA appeared to meaningfully consider when promulgating a Final Transport Rule that, without affording any notice or opportunity to comment, reduced MEAG's SO_2 allowance allocation in the NODA by more than thirty percent (30%).

The prospect of purchasing adequate SO_2 emission allowances in 2012 is not an assured compliance option for MEAG. To MEAG's knowledge, not a single trade or agreement to trade has been reached within Group 2 (to which Georgia belongs). Thus, no market has developed, let alone a mature, transparent, fungible market in which MEAG may feel confident. With 2012 less than three months away, allowances not yet allocated, and the extent to which the market is deficient, such a market cannot reasonably be expected to develop and meaningfully address MEAG's 2012 SO_2 allowance shortfall. To begin with, according to EPA's analysis, within Group 2 there is an estimated net deficit in SO_2 emission allowances in 2012 of over 300,000 tons, which is about twenty-six percent (26%) of what is needed based upon 2010 operation. [CITE.] Regulated entities will be very hesitant to sell Transport Rule-allocated emission allowances in 2012 – the first compliance year under that rule – and instead are likely to adopt a "wait-and-see" approach to ensure that they retain sufficient allowances for their own compliance and to ensure that a functioning emissions trading market first develops. Thus, MEAG is understandably concerned that the relevant markets for emissions allowances will not develop in 2012.

Further, the timing and terms of the Transport Rule actually tend to deter the development of a market for emission allowances. EPA has recognized conditions conducive to effective market-based regulation: program transparency, simplicity, and certainty, as well as caps that account for economic and technical feasibility. *See* Presentation by Sam Napolitano, Director, EPA Clean Air Markets Division, to the Spring Environmental Marketing Association Meeting (EMA) – "Where We Are in 2008 and Lessons for Future Cap and Trade Programs" pp. 10, 13 (Apr. 28, 2009) at http://www.epa.gov/airmarkt/presentations/index.html. Conditions

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greater expense. The Municipalities also receive an allocation of hydropower from the Southeastern Power Administration (SEPA) that is fully utilized based on water availability.

such as these are "[i]ntegral to the setting of timing and levels," and their absence will "drive up costs." *See id.* at 13.

The Final Transport Rule actually creates the opposite conditions. The Transport Rule divides the regulated states into two Groups (Group 1 and Group 2) and prohibits trading between the Groups, and then goes further to limit trading between States within the Group. Moreover, the power industry is complex and interconnected; utilities cannot reasonably be expected to evaluate their own positions and the positions of others and negotiate and close transactions in the short time required for 2012 compliance. Likewise, EPA recognizes that many emission controls cannot be deployed by 2012 even if the resulting emission reductions would be economically rational. *See* 76 Fed. Reg. at 48252. Thus, these emissions controls do not provide a cap on the cost of allowances as seen in other emissions markets. Additionally, the Final Transport Rule imposes "assurance levels" that retroactively open the door to penalties for reliance on purchased allowances and based on the market behavior of others.

Thus, the resulting "short" market for Transport Rule Group 2 SO_2 emission allowances has prevented up until now and likely will foreclose access to the markets as a feasible compliance option for 2012. Consequently, limiting output from Plant Scherer Unit Nos. 1 and 2 at a cost significantly in excess of the $500 per ton to the MEAG system appears at this juncture to be MEAG's only conceivable, albeit uncertain, compliance option in 2012. If MEAG is unable to limit output in this manner and is forced into noncompliance with the Final Transport Rule in 2012, the irreparable harm will only grow as a result of the Final Transport Rule's automatic and discretionary penalties.

MEAG objects to the lack of the required opportunity to provide comments as discussed herein before EPA issued the Final Transport Rule because MEAG's comments may have allowed EPA to avoid what is possibly an unintended result with respect to MEAG's EGUs that are already controlled or for which controls are under construction and scheduled to be in commercial operation in 2013 and 2014 pursuant to the Georgia MPCR. This result exceeds EPA's statutory authority.

B. The Final Transport Rule's Requirement that MEAG Reduce SO_2 Emissions in 2012 Exceeds EPA's Authority under the CAA's "Good Neighbor" Provision.

1. Georgia SO_2 emissions that may be regulated under the Final Transport Rule are only those that can be eliminated for $500 per ton.

EPA promulgated the Final Transport Rule pursuant to the CAA's "good neighbor" provision. *See* 76 Fed. Reg. at 48,216. As interpreted by EPA, the good neighbor provision requires "*only*" the prohibition of emissions that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any such [NAAQS]." CAA § 110(a)(2)(D)(i)(I); *See* 76 Fed. Reg. at 48,210 (emphasis added). The Final Transport Rule is an effort to implement the good neighbor provision by identifying and prohibiting electricity generating unit NO_X and SO_2 emissions that contribute significantly to nonattainment or interfere with maintenance of NAAQS in downwind states. EPA first identified states whose emissions

contribute more than one percent (1%) of the NAAQS in a downwind state. 76 Fed. Reg. at 48,236. Such upwind and downwind states are "linked." *Id.* According to EPA, Georgia SO_2 emissions are linked to, and only to, Jefferson County, Alabama. *See id.* at 48,241-43. EPA then determined Georgia's SO_2 emissions that contribute significantly to nonattainment of or interfere with maintenance of the $PM_{2.5}$ NAAQS and must be eliminated pursuant to the good neighbor provision. *See id.* at 48,246.

"In summary, EPA determined that SO_2 emissions that could be reduced for $2,300/ton in 2014 should be considered a state's significant contribution to nonattainment and interference with maintenance unless EPA determined that lesser reduction would fully resolve the nonattainment and/or maintenance problem for all the downwind receptors to which a particular state might be linked." *Id.* at 48,264. EPA determined that Georgia's significant contribution to nonattainment and interference with maintenance are those emissions that can be eliminated at a cost of $500 per ton or less:

> For [Georgia], EPA is determining that a lesser reduction of SO_2, based on the amount of SO_2 reductions that can be reasonably achieved by 2012 is appropriate. This level is defined by the reductions observed in the $500/ton cost threshold.

Id. EPA concluded: "There is no longer any significant contribution to nonattainment or interference with maintenance by [Georgia] at levels above $500/ton." *See id.* at 48,252.

Thus, EPA made clear in the Final Transport Rule that Georgia SO_2 emissions that contribute significantly to nonattainment of or interfere with maintenance are those that can be eliminated for $500 per ton. It follows that, under the terms of the CAA's good neighbor provision, these are the only emissions that EPA may reach in the Final Transport Rule.

2. The Final Transport Rule's regulation of MEAG exceeds EPA's authority and is unlawful because the cost of required emission reductions would be significantly higher than $500 per ton.

It appears from the Final Transport Rule that EPA believes there are inexpensive SO_2 emission reductions achievable by MEAG by 2012 and/or 2012 allowances available for purchase by MEAG. Other than the MPCR emissions controls that are currently under construction and scheduled for commercial operation in 2013 and 2014, such emission reductions are not achievable by MEAG units, and MEAG has thus far been unable to secure adequate allowances for 2012 under the Final Transport Rule. The market flexibility in the Final Transport Rule scheme appears illusory, at least for 2012. Therefore, the only potential scenario at this time for MEAG to comply in 2012 is to reduce SO_2 emissions by reducing operation of its NSPS sub-bituminous coal units, at costs significantly higher than the cost of $500 per ton targeted in the Final Transport Rule.

EPA cannot reasonably expect that the reduced Georgia budget and MEAG's resulting allocation under the Final Transport Rule are sufficient for compliance. The mandated reductions exceed EPA's authority because EPA has determined that the SO_2 emissions in

Georgia that significantly contribute to nonattainment or interfere with maintenance are those that can be eliminated at a cost of $500 per ton. EPA did not intend to require shifts in generation at inflated costs; rather, "EPA modeling and selection of a $500/ton cost threshold includes all existing and planned controls operating year round . . . . It also reflects an amount of coal switching and generation shifting that can be achieved for $500/ton." 76 Fed. Reg. at 48,280. Clearly, then, EPA selected the cost per ton thresholds "as a basis for identifying significant contribution to nonattainment and interference with maintenance," and EPA did not intend to reach emission reductions available only at costs much greater than $500 per ton. *Id.* at 48,256.

Consequently, the Final Transport Rule effectively requires MEAG to eliminate SO_2 emissions at costs significantly higher than the cost of $500 per ton targeted in the Final Transport Rule and that, therefore, do not significantly contribute to nonattainment or interfere with maintenance. This high cost to reduce emissions is beyond EPA's authority under the good neighbor provision and must be addressed by EPA through reconsideration if the Final Transport Rule is to survive judicial review.

3. EPA's reliance on an allowance market to find and eliminate SO_2 emissions available at $500 per ton is unreasonable.

EPA structured a market-based allowance allocation and trading scheme to "find" the regulatory reductions in SO_2 emissions. However, EPA cannot rely on the regulated community's ability to trade Transport Rule SO_2 emission allowances in an unproven market to show that the Final Transport Rule will only require emission reductions at costs less than $500 per ton. At the same time that the Final Trading Rule purports to rely on an SO_2 emission market, the rule effectively discourages trading and contains structural flaws to the point that a market cannot reasonably be expected to develop for the 2012 compliance year.

The Final Transport Rule's state assurance level and banking provisions will discourage trading. First, under the state assurance level provisions, regulated entities will be subject to automatic penalties if: (1) the state exceeds its assurance limit in a given year, and (2) the entity (or Designated Representative) took advantage of trading in order to emit more than its allocated number of allowances plus some portion of the state's variability limit. OMB, *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review*, pp. 5-8 (June 28, 2011), EPA-HQ-OAR-2009-0491-4133. This assurance level penalty evaluation can only be done retrospectively, and the penalty is up to 2-to-1 (submission of two emission allowances for each ton emitted above the state's assurance level that is attributed to a unit or Designated Representative). *See* 76 Fed. Reg. at 48,294. The chilling effect of this narrow margin of error on parties' willingness to trade is real. *See* OMB, *Summary of Interagency Working Comments on Draft Language under EO 12866 Interagency Review*, pp. 5-8 (June 28, 2011), EPA-HQ-OAR-2009-0491-4133.

Second, the banking provisions compound the chilling effect of the rule's assurance level provisions. Under the banking provisions, an allowance is good for use in the year it is issued and any subsequent year. *See* 76 Fed. Reg. at 48479. Thus, the banking provisions essentially

allow an entity that does not use all of its emission allowances in 2012 to hold them for use in a future compliance year. The banking provisions generally create an incentive for entities to hold excess allowances rather than trade them because of the value of the allowances as a hedge against the uncertainty of future compliance costs. In MEAG's conversations with possible trading partners, MEAG has repeatedly heard that they prefer to bank, rather than sell, any excess SO_2 emission allowances they may have in 2012 in light of the uncertainty surrounding EPA's implementation of the Final Transport Rule.

Third, the Rule's 2012 compliance schedule does not allow for the installation of even economically rational emission control technologies that would provide a cap on the cost of emission allowances. This flaw results in minimal or no control of the cost of allowances at least during the early years of the program and reduces the likelihood of allowances being available at the EPA-modeled cost.

The chilling effect of the combined assurance level, banking provisions, and compliance schedule is likely to be most pronounced in 2012. The Final Transport Rule becomes effective in less than six months from the date of promulgation and three months from the date of this Petition, and EPA has not shared with the regulated community where the modeled $500 per ton SO_2 reductions can be found. Thus, for a market to develop, regulated entities in very short order and unrealistically are being required to assess their own compliance needs, investigate what other regulated entities may be willing to sell excess emission allowances, and come to terms on any trades

In essence, despite the Final Transport Rule's limited-trading components, EPA effectively expects the market to spring up overnight by 2012. This is unreasonable and EPA cannot rely on the Final Transport Rule's market mechanisms to control compliance costs in 2012. *See Small Refiner*, 705 F.2d at 544-45. Indeed, the absence of a functional, robust Final Transport Rule SO_2 emission allowance market for 2012 is not hypothetical; the terms of the Final Transport Rule and the proximity of the 2012 compliance year virtually ensure it.

IV. EPA SHOULD STAY THE FINAL TRANSPORT RULE AS TO MEAG DURING RECONSIDERATION.

As discussed above, the harms that will accrue to the MEAG system in 2012 are unjust and unnecessary. MEAG is an instrumentality of the State of Georgia performing an essential governmental function—providing power on a not-for-profit basis. Its electric power resources are adequate to meet the needs of the Municipalities and their citizens that rely on MEAG, but are limited both in terms of flexibility and the ability to further reduce SO_2 emissions. SO_2 emissions from MEAG's coal-fired power resources are already well controlled or reduced through the use of FGD controls and sub-bituminous coal. Those SO_2 emissions are already scheduled to be further reduced by the installation of FGD controls at the Plant Scherer Unit Nos. 1 and 2 beginning in 2013. MEAG is already in process of doing everything that should be needed for compliance with the SO_2 emissions reductions contemplated by the Final Transport Rule.

Not only are the burdens the Final Transport Rule imposes on the MEAG system unjust and unnecessary, they are unlawful. As demonstrated above, the likelihood of success for a Petition for Review by MEAG challenging the Final Transport Rule appears high. The Final Transport Rule was not a logical outgrowth of the proposed rule, and, therefore, its promulgation violated the CAA's notice and comment requirements. EPA interpreted its authority in Georgia under the CAA's good neighbor provision to be limited to prohibiting SO_2 emissions that could be eliminated at a cost of $500 per ton or less but, in fact, has exceeded this authority by effectively requiring SO_2 emission reductions from MEAG that will cost about five times or more that amount. Thus, reconsidering the Final Transport Rule and adjusting it in recognition of these issues will address the rule's shortcomings affecting the MEAG system as presented in this Petition.

MEAG's concern over the Final Transport Rule is not merely academic: the MEAG system is facing certain, severe, and irrecoverable costs in 2012 that significantly exceed EPA's targeted emission reduction cost of $500 per ton. *See* 76 Fed. Reg. at 48,264. These costs would be absorbed irrecoverably by the Municipalities and the power-consuming citizens they serve. As EPA has recognized, these are difficult economic times, and it will be very painful for the Municipalities and their citizens that rely on MEAG to absorb additional irrecoverable energy costs. *See* letter from Bob Perciasepe, Deputy Administrator, EPA, to David Campbell, CEO, Luminant (Sept. 11, 2011).

Alternatively, if MEAG is unable to limit the output of Plant Scherer Unit Nos. 1 and 2, it may be forced into noncompliance with the Final Transport Rule, in which case it would be facing automatic *and* discretionary penalties under the CAA. *See* 76 Fed. Reg. at 48,295-96. For example, EPA believes it could impose a penalty up to $37,500 per day if a regulated entity emits more than the number of allowances it has. *See id.* at 48,296. The imposition of any such penalties would magnify the irreparable harm to the MEAG system if EPA implements the Final Transport Rule in 2012 as promulgated.

In the face of this certain and irreparable harm, MEAG is unable to identify any private or public harms or interests that outweigh staying the application of the Final Transport Rule to MEAG during reconsideration. SO_2 emissions from the MEAG EGUs in 2013 and beyond are expected to comply with the Final Transport Rule because of the already deployed or scheduled deployment of FGD controls on MEAG's EGUs. MEAG's modeled SO_2 emission allowance shortfall for 2012 is only about 1.2-1.3 percent of Georgia's 158,527 ton 2012 SO_2 emission budget. *See* 76 Fed. Reg. at 48,261. Furthermore, EPA has issued final rules indicating that the Birmingham Area, including Jefferson County (the apparently sole reason that Georgia is included in the Final Transport Rule for SO_2), is already attaining the $PM_{2.5}$ NAAQS without the Final Transport Rule. *See* 76 Fed. Reg. at 38,023 (June 29, 2011); 75 Fed. Reg. at 57,186 (Sept. 20, 2010). Consequently, staying the Final Transport Rule as to MEAG during reconsideration will not impair Jefferson County's ability to attain or maintain the $PM_{2.5}$ NAAQS. Rather, any impact from MEAG would be truly *de micromis* and would only exist in 2012.

Thus, EPA should reconsider the Final Transport Rule as it applies to MEAG and stay the application of the Rule during the reconsideration.

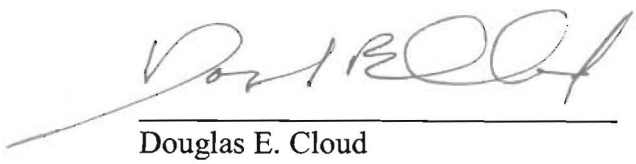
V. CONCLUSION

MEAG could not have made the comments above during the notice and comment period because those comments arise from the 2012 SO_2 emission allowance shortfall that it will experience for the first time under the Final Transport Rule. Because of the magnitude of the changes from the proposed rule, the Final Transport Rule is not a logical outgrowth of the proposal, and EPA deprived MEAG of the opportunity to provide helpful comments. This Petition provides EPA with the opportunity to address fundamental flaws in the Final Transport Rule's adverse impact upon the MEAG system and correct its notice and comment error.

EPA must address the shortfall of 2012 SO_2 allocations to MEAG under the Final Transport Rule in reconsideration. That can be done with a relatively narrow remedy. EPA could simply restore Georgia's 2012 SO_2 emission budget to the levels contained in the NODA or delay the effective date of the rule for the MEAG system or Georgia until January 1, 2013. Alternatively, EPA could exempt each EGU subject to Georgia's MPCR from the Final Transport Rule until the emission controls required by the MPCR have been installed and are commercially operational at that unit. The MPCR has resulted in and will result in further dramatic reductions to Georgia's SO_2 emissions on a schedule that Georgia EPD has indicated is "as expeditiously as practicable." Thus, allowing a unit to implement the MPCR before facing compliance burdens under the Final Transport Rule would be consistent with SO_2 emission reduction goals of the Final Transport Rule.

Thus, MEAG asks EPA to reconsider the Final Transport Rule as it applies to the MEAG system, stay the Final Transport Rule during reconsideration, and adjust the Final Transport Rule consistent with MEAG's comments in this Petition.

Respectfully submitted this 6th day of October, 2011.



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