ORAL ARGUMENT NOT YET SCHEDULED

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

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

RESPONSE OF MOVANT-INTERVENORS AMERICAN LUNG ASSOCIATION, CLEAN AIR COUNCIL, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN OPPOSITION TO MOTION OF PETITIONER GENON ENERGY, INC., FOR A STAY OR, IN THE ALTERNATIVE, EXPEDITED REVIEW (CASE NO. 11-1323)

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Movant-Intervenors American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club (collectively "Environmental Intervenors") respectfully submit this Response in Opposition to the motion of Petitioner GenOn Energy, Inc. ("GenOn") for a stay or, in the alternative, expedited review.

BACKGROUND

The Rule at Issue. This case concerns the Cross-State Air Pollution Rule ("Transport Rule" or "Rule"), 76 Fed. Reg. 48208 (Aug. 8, 2011), issued by the U.S. Environmental Protection Agency ("EPA") to address interstate air pollution prohibited under the Clean Air Act (the "Act"). The Rule requires reductions in emissions of sulfur dioxide ("SO_2") and/or nitrogen oxides ("NO_x") from power plants in 27 states starting in 2012, and additional SO_2 reductions from plants in some of those states starting in 2014, in order to facilitate downwind states' compliance with national ambient air quality standards ("NAAQS") for ozone and fine particulate matter ("$PM_{2.5}$"). EPA developed the Transport Rule in response to the remand by this Court of a prior rule with the same purpose, the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162 (May 12, 2005). *See North Carolina v. EPA*, 531 F.3d 896, *remedy modified on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

In CAIR, issued in 2005, EPA found that 28 states and the District of Columbia were violating the Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i), with respect to the 1997 NAAQS for $PM_{2.5}$ and ozone. CAIR was designed to reduce emissions through the use of several new cap-and-trade programs for power plant SO_2 and NO_x emissions. CAIR's NO_x programs superseded a pre-existing EPA-designed NO_x trading program of slightly smaller geographic scope and used newly created types of NO_x allowances. However, the pre-existing SO_2 trading program could not be similarly superseded by CAIR because it was of national scope and statutorily established under title IV of the Act. *See* 42 U.S.C. §§ 7651b-7651o. EPA therefore designed CAIR's SO_2 program to integrate with the title IV program by making title IV allowances the "currency" for the CAIR SO_2 program and requiring multiple title IV allowances to be surrendered or retired for each ton of SO_2 emitted in states subject to CAIR's SO_2 caps. *See* 70 Fed. Reg. 25162 *et seq*.

The *North Carolina* Decision. In 2008 this Court remanded CAIR, finding "more than several fatal flaws." *North Carolina*, 531 F.3d at 901. Three of the *North Carolina* rulings are of particular relevance to this case. First, the Court found that emission reductions required under the "good neighbor" provision must be quantified and achieved on a state-specific basis. *Id.* at 908. This ruling made clear that, under CAIR's successor rule, any ability of power plants with high SO_2

emissions to meet their compliance obligations using emission allowances purchased out-of-state, instead of making physical emission reductions, would be considerably more limited than under CAIR or earlier programs.

Second, while leaving intact EPA's mandate under the "good neighbor" provision to require SO_2 emissions to be reduced to levels below the title IV cap, the Court found that EPA lacks authority to require retirement of title IV SO_2 allowances. *Id.* at 922. Based on this pair of facts taken together, industry participants quickly realized that the large then-existing bank of title IV SO_2 allowances was the start of an effectively permanent surplus, causing prices of those allowances to plummet.[1] This fall in allowance prices drastically reduced near-term economic incentives for power plant operators with discretion over their SO_2 emission levels to incur other kinds of costs (such as fuel price premiums or scrubber operating costs) in order to achieve lower SO_2 emissions.

Third, the *North Carolina* Court admonished EPA to set the timing of required emission reductions early enough to help downwind states meet their NAAQS attainment deadlines. *Id.* at 912. EPA has responded in the Rule in part by establishing the earliest practicable deadlines for emission reductions and in part by exercising its statutory FIP authority.

[1] Prices in EPA's annual title IV SO_2 allowance spot auctions fell from $380 per ton in 2008 (before *North Carolina*) to $62 in 2009, then to $36 in 2010 (before the proposed Transport Rule), and $2 in 2011 (before the final Transport Rule). *See* EPA, Annual Auction, http://www.epa.gov/airmarkets/trading/auction.html.

Public Health Benefits of the Transport Rule. EPA estimates that relative to a pre-CAIR baseline,[2] the Rule when fully implemented will prevent 13,000 to 34,000 premature deaths per year, create $120 to $280 billion in annual monetized value from these and other health benefits, and improve air quality for 240 million Americans. 76 Fed. Reg. at 48309, 48313-14; EPA, Cross-State Air Pollution Rule, http://www.epa.gov/airtransport/. Relative to a baseline that includes CAIR, starting in 2012 the Rule is projected to prevent between 1700 and 6600 premature deaths per year and create an annual monetized value of between $13 and $49 billion. Schoengold Decl. ¶¶ 13-14 (Ex. A). These benefits over and above CAIR arise mainly from the incremental reductions in SO_2 emissions that the Transport Rule will cause relative to CAIR, estimated at 1.5 million tons annually starting in 2012. *Id.* ¶¶ 10-11, 15. The emission reductions and the associated health benefits and monetized value will increase upon implementation of the Rule's second phase in 2014. *Id.* ¶¶ 10-11.

GenOn. Petitioner GenOn was formed by the December 2010 merger of Mirant Corp. ("Mirant") and RRI Energy, Inc. ("RRI"), combining Mirant's four coal-fueled plants in Maryland and Virginia with RRI's eleven in Pennsylvania and

[2] EPA developed the Transport Rule using a pre-CAIR baseline in order to properly account for the fact that under *North Carolina*, the emission reductions required for compliance with CAIR, unless also required for compliance with CAIR's replacement rule (or some other statute, regulation, permit, or court order), will be legally unenforceable once the replacement rule is implemented. 76 Fed. Reg. 48223-24.

Ohio. In 2005, out of these fifteen plants, only three of RRI's plants and none of Mirant's were fully equipped with SO_2 controls, and the two coal fleets had the two highest SO_2 emission rates among the largest 40 coal fleets in the nation. Brooks Decl. ¶¶ 6-8 (Ex. B).

Between 2005 and 2010 Mirant reduced SO_2 emission rates across its fleet, largely due to a 2006 Maryland law mandating in-state emissions reductions, Md. Code Ann., Envir. §§ 2-1001 to 2-1005, but possibly influenced by CAIR as well.[3] *Id.* ¶¶ 8-9. However, in this same period RRI added new SO_2 controls to only two additional plants, a much more modest response to CAIR than was made by other owners of coal fleets with high average SO_2 emission rates, leaving RRI's fleet with by far the highest average SO_2 emission rate of any major coal fleet in the nation. *Id.* ¶¶ 8-10. In 2010 RRI's coal fleet, viewed on a stand-alone basis, emitted SO_2 at a rate twice as high as the next highest of the top 40 coal fleets and three times the average for all U.S. coal-fueled units. *Id.* ¶ 9. Even including Mirant's now-cleaner fleet, the aggregated GenOn coal fleet in 2010 still emitted SO_2 at a rate substantially higher than any other major U.S. coal fleet. *Id.*

RRI's business decision to forego emission control investments at most of its plants, even after the *North Carolina* decision made clear that CAIR would

[3] Mirant also reduced emissions at its one Virginia plant, which was the subject of recurring disputes with local officials and is now scheduled to retire in 2012. *See* City of Alexandria and GenOn Agree to Close Potomac River Generating Station (Aug. 30, 2011), http://alexandriava.gov/news_display.aspx?id=51390.

have to be replaced by a more stringent rule, has left GenOn in the near-term position of needing to either switch to more expensive lower-sulfur coal, generate less power, or continue purchasing relatively large quantities of SO_2 emission allowances – but a new type of SO_2 allowance that will be scarcer and therefore more expensive under the Transport Rule than the title IV SO_2 allowances used under CAIR. GenOn now seeks to stay the Rule, at a very large cost to the public in terms of lost health benefits, in order to avoid this entirely predictable, private financial consequence of RRI's business strategy.

ARGUMENT

I. THE COURT SHOULD DENY THE MOTION FOR A STAY.

A stay is an "extraordinary remedy," *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985), and "an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (quoting *Va. Petr. Jobbers Assn. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

In considering whether to grant a stay, a court will examine four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 129 S. Ct. at 1761 (citation and internal quotations omitted). The first factor requires movants to

make a "strong" showing of likely merits success. *Id.* As to the second factor, movants' alleged irreparable harm must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 673 (D.C. Cir. 1985). *See also Winter v. NRDC*, 129 S. Ct. 365, 375 (2008). In litigation involving "the administration of regulatory statutes designed to promote the public interest, [the public interest factor] necessarily becomes crucial." *Va. Petr. Jobbers Ass'n*, 259 F.2d at 925. Movants must make strong, independent showings on these factors – especially the first two – to justify issuance of a stay. *See Nken*, 129 S. Ct. at 1761; *see also Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring).

GenOn has failed to satisfy any of the traditionally stringent requirements for a stay. Further, rigorous application of those requirements is warranted in the peculiar circumstances here. A stay would have the perverse effect of suspending implementation of a major administrative rule based upon an abbreviated consideration of its legal merits, while leaving in place an earlier rule, CAIR, that was fully reviewed in this Court more than three years ago; that was found unlawful in large part because of its failure to provide adequate protection for downwind air quality; and that this Court, in December 2008, remanded to the agency to replace promptly. *See North Carolina*, 550 F.3d at 1178.

A. GENON IS UNLIKELY TO SUCCEED ON THE MERITS.

1. EPA Has Authority to Issue the Rule.

GenOn asserts that EPA lacks authority to issue the Transport Rule in the form of FIPs. This claim was also raised in the motion for a stay by EME Homer City Generation, L.P., in consolidated Case No. 11-1302 and was fully rebutted in the response to that motion submitted by EPA and the joint response submitted by Clean Air Council, Environmental Defense Fund and Sierra Club. Environmental Intervenors incorporate those responses here by reference.

2. The Rule is Not Arbitrary or an Abuse of Discretion.

GenOn claims that the Rule is arbitrary because it will disadvantage GenOn's relatively high-emitting plants in their competition with other plants with lower emission rates. The driver of this change in competitive position is the increased cost of emission allowances, estimated by GenOn at $18 per megawatt-hour ("MWh"), that GenOn's uncontrolled units will bear under the Rule as a variable operating cost. (Mot. 11.) GenOn is doubtless correct in stating that a variable cost increase of this magnitude would cause its uncontrolled units to be dispatched less by the regional system operator while cleaner units are dispatched more. However, GenOn is not correct in asserting that structuring the Rule so as to cause such a shift of generation from dirtier to cleaner units is arbitrary and an abuse of discretion because EPA has allegedly not "first" given dirtier plants an

opportunity to install controls so as to lower their emission rates. This is so for two principal reasons.

First, GenOn's assertion ignores the Rule's origin. The Transport Rule was not invented out of whole cloth but is a replacement rule for CAIR, issued in response to this Court's remand. Like its competitors, GenOn (and its predecessors) has had ample opportunity to install controls in response to CAIR and in anticipation of the replacement rule. Most other operators of large coal fleets with high average SO_2 emission rates at the time CAIR was issued have since reduced their emission rates substantially. Brooks Decl. ¶ 10. Second, contrary to GenOn's apparent belief, its argument actually illustrates the significant policy merits of the Rule. One of the important roles played by emission allowance prices in a cap-and-trade program is to cause emission rates to be taken into account in decisions of which generating units to dispatch first. A critical, but unstated, reason why GenOn can estimate that emission costs at its uncontrolled units will be $18 per MWh higher under the Rule than under CAIR is that SO_2 emission allowance prices today are approximately $0 because of the permanent surplus of title IV allowances created by the *North Carolina* decision. *See* Brooks Decl. ¶ 11. The Transport Rule will restore a positive price to SO_2 allowances (the new SO2 allowances created by and required under the Rule, not the title IV SO_2 allowances) and thereby provide an incentive for generators to operate scrubbers

and switch to lower sulfur coal even when there might be some incremental cost of doing so. Positive allowance prices will also cause system operators to tend to dispatch lower-emitting plants more and higher-emitting plants less. These near-term responses by generators and system operators will reduce power sector SO_2 emissions and produce substantial public health benefits starting as soon as the Rule is implemented, as discussed *infra*. The fact that the Rule will cause uncontrolled plants to be dispatched less is thus very sensible policy and in no way arbitrary. It is a strong argument for denying, not granting, a stay of the Rule.

GenOn's related claim that the Rule transfers wealth among power plant operators who "have shared in the cost of installing and operating the advanced controls" (Mot. 10) distorts the facts. By allowing generators to buy and sell surplus allowances, cap-and-trade programs do encourage the most cost-effective emission reductions available among a given set of covered sources to be achieved first. However, GenOn's characterization that uncontrolled facilities "share in the cost" of controls, as though an owner of an uncontrolled facility agrees to pay a portion of the life-time cost of building and operating a scrubber at another operator's unit in exchange for a share of the emission allowances thereby saved, is misleading and unsupported. Rather, operators who install controls and operators who do not install controls are choosing to pursue different business strategies

involving different sets of business risks, and there is a well-established market in which they buy and sell allowances over time.

Generators who install controls are effectively preparing for a future in which they expect (or hope) that the market prices of the surplus allowances they plan to sell will be higher than the cost of building and operating controls, while generators who do not install controls expect (or hope for) a future in which the allowances they plan to buy will be inexpensive. In retrospect, generators like Mirant who invested in SO_2 controls shortly after CAIR was issued, when SO_2 allowance prices were relatively high, had their investment expectations severely disappointed when title IV SO_2 allowance prices fell after *North Carolina*, while generators like RRI and now GenOn (because RRI's allowance deficit in Pennsylvania and Ohio is considerably larger than Mirant's surplus in Maryland and Virginia, *see* Gaudette Decl. ¶¶ 32-33) have profited greatly from the ability to purchase title IV allowances to cover their uncontrolled SO_2 emissions at unexpectedly low prices. Far from "transfer[ring] wealth … without any rational basis" (Mot. 10) the Transport Rule merely ends the windfall enjoyed by generators who failed to prepare for predictably more stringent limits on emissions after CAIR and *North Carolina* and whose financial gains due to the low title IV SO_2 allowance prices since *North Carolina* have already exceeded any reasonable business expectation.

3. EPA Has Not Violated Notice-and-Comment Requirements.

GenOn claims that the state budgets in the final Rule are not a "logical outgrowth" of the state budgets in the proposal and that EPA has therefore violated notice-and-comment requirements. (Mot. 12-15.) In particular, GenOn suggests that it was surprised that EPA set the 2012-13 state budgets so as to require elimination of the portion of unlawful emissions that can be eliminated through "newly discovered" near-term actions, and asserts that EPA's imposition of such a requirement in the final Rule therefore constitutes a fundamental change. (Mot. 14-15.) GenOn further suggests that the mere magnitude of change in some state budgets proves that a fundamental change must have taken place. *Id.*

The question underlying the "logical outgrowth" principle is "whether … [the party], ex ante, should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). The principle does not require that new comments be taken on every change from a proposal, because "[i]n most cases, if the agency … alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Following receipt of comments an agency may make substantial changes, even reaching the opposite conclusion from its proposal, as long as "a

reasonable party should have understood" that such an outcome was possible. *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C. Cir. 2000).

GenOn's claim that the state budgets in the final Rule are not a "logical outgrowth" of the proposal is apparently grounded in a failure to understand the proposal. In the proposal, as in the final Rule, EPA set the 2012-13 state budgets so as capture emission reductions available through actions with short lead-times, including more aggressive operation of existing controls, switching to lower-sulfur coals, and installation of low-NOx burners. 75 Fed. Reg. at 45281-82. The proposal stated that the 2012-13 budgets would require emission reductions available through these means "consistent with the Act's requirement that downwind states attain the NAAQS as expeditiously as possible." *Id.* EPA pursued precisely the same goal in setting the state budgets in the final Rule, with precisely the same rationale. 76 Fed. Reg. at 48252. There is no "fundamental change" here, only revisions in EPA's estimates of the emission levels achievable through these short lead-time actions. The revisions arise partly from data updates and partly from adjusting the 2012 budget calculation methodology to be more consistent with the previously proposed 2014 budget calculation methodology. *Id.* at 48260-61. Both the data updates and the adjustment to the budget calculation methodology were made either wholly or in large part in response to comments received. *Id.* Given the clear consistency between the proposal and final Rule

regarding both the goal of the 2012-13 budgets and the types of emission reductions they would be designed to capture, as well as the fact that the quantitative changes arise in response to comments received, EPA's final state budgets fall well within the range of permissible "logical outgrowths" of the proposal.

B. GENON HAS NOT DEMONSTRATED IRREPARABLE HARM.

The harm claimed by GenOn does not qualify as "irreparable harm" for purposes of a stay motion because any such harm is largely self-inflicted, arising from the realization of a foreseeable risk assumed by GenOn and its predecessors in the choice of business strategy. *See Cuomo v. NRC*, 772 F.2d 972, 977 (D.C. Cir. 1985) (refusing to consider certain harms cited by intervenor-respondents opposing a stay motion, ruling that "[s]uch self-imposed costs are not properly the subject of inquiry on a motion for stay"); *see also Va. Petr. Jobbers Ass'n v. FPC*, 259 F.2d 921, 926-27 (D.C. Cir. 1958).

As discussed *supra*, in contrast to the strategies pursued by other operators of once-similarly high-emitting coal fleets, the strategy of GenOn's predecessor RRI regarding its SO_2 emissions after CAIR and *North Carolina* was exceptionally dependent on purchasing allowances rather than reducing emissions. This strategy has proven very profitable for RRI, and now GenOn, since *North Carolina* and will remain profitable until the implementation of CAIR's successor rule causes GenOn

to need to purchase a new and more expensive type of SO_2 allowance. However, the possibility that the company's strategy would involve a period of higher costs for allowance purchases during the interval between implementation of the successor rule and the point in time at which the company would have the ability, if desired, to physically reduce its emissions through the installation of major controls such as scrubbers was entirely foreseeable. GenOn's increased costs in the early years of the Transport Rule are not a prospective "harm" from the Rule but are rather just one of a much longer series of impacts, some unprofitable but some profitable, flowing from long-term business decisions made years ago by RRI with full knowledge of the range of possible consequences.

GenOn is correct in stating that the environmental compliance strategies chosen by its predecessors – specifically RRI's strategy of purchasing allowances in preference to reducing its emissions – were permitted under past cap-and-trade programs. (Mot. 18.) Further, it remains lawful to be a net purchaser of allowances under the Transport Rule, although this strategy will not be as profitable under the Rule as in the recent past. However, past compliance with environmental regulations (particularly where, as here, those regulations have been invalidated by this Court) does not create an entitlement to the availability of future compliance strategies that are as inexpensive as RRI's past compliance strategies. After the *North Carolina* decision, it was clear that CAIR's successor rule would

have to mandate emission reductions on a state-specific basis and would have to achieve emission reductions more quickly than CAIR in order to enable downwind states to meet their NAAQS attainment deadlines. GenOn's claim that RRI, and subsequently GenOn, was somehow disadvantaged by EPA's structuring of the Rule so as to comply with this Court's earlier decision is without merit.

C. THE BALANCE OF INTERESTS WEIGHS AGAINST A STAY.

1. A Stay of the Rule Would Cause the Permanent Loss of Significant Public Health Benefits.

By establishing 2012-13 state budgets that require near-term actions to reduce power plant emissions, the Transport Rule will lead to large emission reductions and health benefits starting in 2012. Any delay in implementation of the Rule through imposition of a stay would permanently forego these benefits, with a cost to the public measurable in thousands of lives and billions of dollars in equivalent monetized value from a delay of less than one year.

The likely effect of the Transport Rule's more stringent SO_2 emission caps on prices of the new type of SO_2 allowances created by and required under the Rule, along with the attendant stronger incentives to operate scrubbers more aggressively, switch to lower-sulfur fuels, and revise dispatch orders so as to run cleaner plants more and dirtier plants less, was discussed *supra*. By comparing projected emissions from EPA-modeled scenarios that include the Rule with projected emissions from other EPA-modeled scenarios that include CAIR, it is

possible to estimate that in 2012 the result of these strengthened emission standards would be a reduction in SO_2 emissions of approximately 1.0 to 1.5 million tons relative to CAIR across the set of states affected under both rules. Schoengold Decl. ¶¶ 8, 10.

Both SO_2 and NO_x are precursors of ambient $PM_{2.5}$ in downwind areas, and $PM_{2.5}$ exposure has been associated with premature mortality as well as non-fatal heart attacks, chronic and acute bronchitis, and asthma. 76 Fed. Reg. at 48310. NO_x is also a precursor of ozone in downwind areas, and ozone exposure has been associated with premature mortality as well as asthma and reduction in lung function. 76 Fed. Reg. at 48311. According to EPA's models, annual SO_2 emission reductions on the order of 1.0 to 1.5 million tons will prevent 1700 to 6600 premature deaths each year. Schoengold Decl. ¶¶ 13-14. The monetized value of these reductions ranges from $13 to $49 billion per year, *id.* ¶ 14, a figure dwarfing the Rule's estimated annual compliance costs of $1 to $2 billion, *see* 76 Fed. Reg. at 48313. Further, these estimates of the annual benefits from the Transport Rule are understated because they do not include other positive health impacts that would result from the emission reductions, such as substantial decreases in non-fatal heart attacks, hospital admissions, emergency room visits, and lost work days. *See* 76 Fed. Reg. 48308-09. Any delay in the Rule's

effectiveness due to a stay, even for a period of less than one year, would be extremely costly to the public interest.

These public health benefits are not diminished merely because power plant emissions might continue to decline in the absence of the Rule due to some combination of CAIR, state laws, permits, and settlements. One reason to expect the Transport Rule to provide lower emissions in some locations and hence greater health benefits than CAIR under any scenario is that the Transport Rule is designed to prohibit interstate air pollution that contributes to violations of the 2006 24-hour $PM_{2.5}$ NAAQS in addition to interstate air pollution that contributes to violations of the 1997 ozone NAAQS and the 1997 annual $PM_{2.5}$ NAAQS. By contrast, CAIR was designed to address only the 1997 ozone NAAQS and the 1997 annual $PM_{2.5}$ NAAQS. Schoengold Decl. ¶ 6.

2. **GenOn's Claim That the Rule Will Threaten the Reliability of Electricity Supplies Is Unsubstantiated.**

As evidence of a threat the Rule purportedly poses to the reliability of electric supplies, GenOn cites an informal assessment prepared by the staff of the Federal Energy Regulatory Commission ("FERC") estimating that a combination of very aggressive environmental rules could cause 81,000 megawatts ("MW") of coal-fueled generating capacity to retire. (Mot. 18-19.) In fact, the cited estimate has been debunked by none other than the FERC Chairman, who testified before Congress that the assessment was preliminary in nature and assumed a hypothetical

set of environmental rules considerably more aggressive than the rules EPA has subsequently issued or proposed. *The American Energy Initiative: Hearing Before the H. Subcomm. on Energy & Power*, 112th Cong. (Sept. 14, 2011) (statement of Jon Wellinghoff, Chairman, FERC, at 8), available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/091411/Wellinghoff.pdf . GenOn also cites a second study estimating that the Transport Rule as originally proposed could cause 7,000 MW of coal plant retirements, presumably throughout the entire region affected by the proposal. (Mot. 19.) Yet a more recent study by the independent system operator for GenOn's electricity region has concluded that even if 7,000 MW were to retire entirely within that one region, resource adequacy would not be threatened. PJM Interconnection, *Coal Capacity at Risk for Retirement in PJM: Potential Impacts of the Finalized EPA Cross State Air Pollution Rule and Proposed National Emissions Standards for Hazardous Air Pollutants* iv (Aug. 26, 2011), available at http://pjm.com/documents/~/media/documents/reports/20110826-coal-capacity-at-risk-for-retirement.ashx. GenOn's claim of adverse reliability impacts from the Rule lacks any support whatsoever.

II. THE COURT SHOULD NOT GRANT EXPEDITED REVIEW.

GenOn has not demonstrated a need for expedited briefing. As discussed *supra*, any harm to GenOn from the Rule will be self-inflicted. Further, GenOn

has not proposed any specific expedited schedule to which other parties could respond.

CONCLUSION

For the foregoing reasons, the Court should deny the motion.

October 6, 2011

Respectfully submitted,

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Certificate of Service

I certify that on this 6th day of October, 2011, the foregoing Response was electronically filed using the CM/ECF system, with notification sent to registered counsel.

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