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

EME HOMER CITY GENERATION, L.P., et al. *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *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 LUMINANT'S MOTION FOR A PARTIAL STAY OF THE TRANSPORT RULE

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Movant-Intervenors American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club respectfully submit this Response in Opposition to the motion of Luminant, *et al*. ("Luminant") for a partial stay of the Transport Rule. 76 Fed. Reg. 48,208 (Aug. 8, 2011). As shown below, Luminant's motion should be denied. Even apart from material changes made to the Transport Rule proposed by the Environmental Protection Agency ("EPA") the day of this filing, Luminant in no way meets the requirements for a stay.

BACKGROUND

The Rule at Issue. The Transport Rule, promulgated under the Clean Air Act ("the Act"), governs interstate transport of fine particulate matter and ozone. 76 Fed. Reg. 48,208. The rule requires reductions in emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") from power plants in 27 states starting in 2012, and further 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 this rule in response to this Court's remand of a prior rule with the same purpose, the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25,162 (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 CAIR's NO_x program superseded a pre-existing EPA-designed NO_x trading program of slightly smaller geographic scope and used newly created types of NO_x allowances.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. 25,162.

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. It was evident from this ruling 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 *North Carolina* Court found that EPA lacks authority to require retirement of title IV SO_2 allowances. 531 F.3d at 922. Based on this pair of facts, 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 drop 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 Transport

[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). EPA, Clean Air Markets, Annual Auction, Archive of EPA Allowance Auction Results for Years 1993-2011, http://www.epa.gov/airmarkets/trading/auction.html.

Rule in part by establishing the earliest practicable deadlines for emission reductions and in part by exercising its statutory FIP authority.

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 48,309, 48,313-14; EPA, Transport Rule http://www.epa.gov/airtransport/. Relative to a baseline that includes CAIR, in 2012 the Rule is projected to prevent between 2,550 and 6,560 premature deaths and create a monetized value of between $20 and $49.3 billion. Schoengold Decl. ¶¶ 13-14. These benefits 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 in 2012. *Id.* ¶¶ 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.* ¶ 11.

[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. at 48,229.

Luminant. Luminant can trace its history back to Texas Power and Light, formed in 1912, and TXU, formed in 2004.[3] Since 2007, the company, renamed Luminant, has been owned, through the vehicle of Energy Future Holdings Corporation, by a private investment group led by Goldman Sachs, Kohlberg Kravis Roberts & Co., and TPG. Biewald Decl. ¶ 29.

STAY STANDARD

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

[3] Energy Future Holdings, Our History, http://www.energyfutureholdings.com/about/history.aspx .

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. Petroleum 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).

ARGUMENT

I. THE REGULATORY REQUIREMENTS ON WHICH LUMINANT BASES ITS CLAIMS OF IRREPARABLE HARM ARE LIKELY TO CHANGE.

On the day of this filing, EPA issued proposed revisions to the Transport Rule that, if finalized, will materially diminish the Rule's impact on Luminant. *Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule*, EPA-HQ-OAR-2009-0491 (Oct. 6, 2011) (attached as Exhibit 1). Luminant's claims of harm rest on the assertion that its only compliance option is to reduce its 2012 emissions by 64% for SO_2 and 22% for NO_x. Campbell Decl. ¶14. Even assuming *arguendo* that Luminant is correct, the new proposal would afford Luminant significantly greater flexibility. The proposed revisions would increase the SO_2 pollution allowances allotted to sources in Texas by 70,067 tons in 2012, an increase of almost 30% from the previous

statewide SO_2 budget. Ex. 1 at 23. Because Luminant's fleet represents approximately one-third of the state's power plant heat input, Luminant's share of this increase is more than 23,000 tons. *See* 76 Fed. Reg. at 48,284-85 (Transport Rule methodology for individual unit allowances); *Allowance Allocation Final Rule TSD*, Final Allocations & Underlying Data, *available at* http://epa.gov/airtransport/actions.html. The proposal also increases NO_x allowances for Texas, and in turn, Luminant. *Id.*; Ex. 1 at 40. Further, for 2012 and 2013, the new proposal lifts the penalties that the Rule would have imposed on emissions that exceed a state's budget by more than the permitted "variability" limit. Ex. 1 at 2, 59-68. This increases opportunities to use allowances purchased out of state in the first two years the rule is in effect, allowing Luminant additional time to add pollution controls. In sum, as of today, Luminant will likely have many more options for compliance than at the time the company requested a stay, rendering its predictions of closures at its plants and mines out of date and irrelevant. Given these changed circumstances, Luminant's claims of irreparable harm are at best stale, and this motion is either moot or likely to become moot imminently.

II. LUMINANT HAS NOT MET THE REQUIREMENTS FOR A STAY.

Luminant has failed to satisfy any of the requirements for the stay. First, Luminant is not likely to succeed on the merits: Luminant's claims of inadequate

notice are without merit because the inclusion of Texas in the Transport Rule was no surprise. Indeed, during public comment, EPA considered and rejected Luminant's current critique (offered in public comment by UARG) of the analysis that mandates the inclusion of Texas in the program. As for Luminant's contention that EPA used an improper analytic basis to include Texas in the Transport Rule, Luminant's approach is itself analytically flawed. Second, Luminant's claims regarding irreparable harm are based on self-inflicted wounds. Finally, its contention that the issuance of a stay would be in the public interest is based on fatally flawed analyses and assumptions. In fact, a stay would seriously harm public health and welfare.

A. LUMINANT HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

1. The Inclusion of Texas in the Transport Rule's $PM_{2.5}$ Program Was a Logical Outgrowth of the Proposal.

Luminant complains that EPA violated the Clean Air Act's notice requirements because EPA did not include Texas in the Transport Rule program for SO_2 and NOx reductions to resolve downwind $PM_{2.5}$ nonattainment problems, but did include Texas in this program in the final rule. Luminant Mot., 7-10. Consequently, Luminant argues that the final rule was not a logical outgrowth of the proposal. This argument will ultimately fail because the proposal provided sufficient detail to permit meaningful comment.

An agency may promulgate a final rule that differs from a proposal if the final rule is a "logical outgrowth" of the proposal. Thus notice is sufficient "if interested parties 'should have anticipated' that . . . change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'" *Intl Union, UMW v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (*citing Northeast Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004); *see also Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1310-1311 (D.C. Cir. 1991) ("This court has consistently interpreted that requirement to mean that an agency's notice must 'provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully.'"); *Florida Power & Light Co. v. United States* 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989).

In this situation, EPA *specifically* solicited comment on whether Texas should be included in the Transport Rule's $PM_{2.5}$ program. 75 Fed. Reg. 45,210, 45,824 (Aug. 2, 2010). Luminant splits hairs by contending that the reason EPA solicited comment on whether to include Texas in the $PM_{2.5}$ program differed from the rationale for that state's ultimate inclusion. Luminant Mot., 7-8. However, Luminant itself filed comment on the proposal and noted that it was a member of

and supported the comments of UARG.[4] UARG's comments, in turn, criticized EPA for using modeling alone, rather than modeling plus monitoring in making decisions on whether an upwind state is a significant contributor to downwind nonattainment.[5] This complaint is at the heart of Luminant's beef with EPA over the inclusion of Texas in the programs aimed at reducing $PM_{2.5}$. *See* Luminant Mot., 14-16. Yet, in developing its final rule, EPA specifically considered and rejected this complaint. 76 Fed. Reg. at 48,230. Thus, Luminant was provided with the opportunity to make meaningful comment, and it and others took advantage of that opportunity. Plainly, the final rule was a logical outgrowth of the proposal.

2. Luminant's Contention that EPA used an Improper Analytic Basis to Include Texas in the $PM_{2.5}$ Program is Itself Analytically Flawed.

Luminant complains that Texas should not have been included in the $PM_{2.5}$ program because while EPA's modeling shows that emissions from Texas will contribute to $PM_{2.5}$ nonattainment in the St. Louis metropolitan area (Madison, Illinois), some recent data suggests concentrations at the Madison monitor that could be consistent with attainment. Luminant Mot., 14-16.

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[4] *See* Luminant Comments at 4, n. 2 (EPA-HQ-OAR-2009-0491-2729), attached as Exhibit 2.

[5] *See* UARG Comments at 53-55, (EPA-HQ-OAR-2009-0491-2756), attached as Exhibit 3.

Luminant's likelihood of success with this argument is remote. Here Luminant is essentially asking this Court to second-guess EPA in an analytical area deep within EPA's expertise. EPA had very good reasons for making its finding that Texas would contribute to "*future* year nonattainment." 76 Fed. Reg. at 48,230 (emphasis added). First, as EPA explained in the preamble to the final rule, the Transport Rule is not a supplement to CAIR, but rather a replacement. *Id*. Accordingly, EPA found that it would not be appropriate to assume that reductions made as a result of CAIR would remain in place. *Id*. Furthermore, EPA is concerned that areas measuring attainment based on recent data are at risk for falling back into nonattainment. *Id*. EPA's duty under 42 U.S.C. § 7410(a)(2)(D)(i) of the Act is not only to address nonattainment in downwind states, but also to ensure the maintenance of attainment in those states. *See North Carolina*, 531 F.3d at 910-11 (remanding CAIR, in part, because that rule did not adequately address the "interfere with maintenance" prong of the good neighbor provision). Indeed, although the Madison, Illinois monitor is currently indicating attainment concentrations, EPA has not designated the St. Louis area as being in attainment. *See* 76 Fed. Reg. at 29,652.

Based on EPA's thorough analysis of future $PM_{2.5}$ nonattainment, a methodology that the agency used with respect to every state, EPA made the reasoned determination that Texas should be included in the $PM_{2.5}$ program.

Indeed, given the record before it, the exclusion of Texas would have been arbitrary and capricious.

B. LUMINANT HAS NOT DEMONSTRATED IRREPARABLE HARM.

Luminant's claims of "irreparable" harm do not warrant a stay because any such harm is largely self-inflicted, arising from the realization of a foreseeable risk assumed by Luminant in its choice of business strategy. *See Cuomo v. USNRC*, 772 F.2d 972, 977 (D.C. Cir. 1985) (refusing to consider certain harms cited by intervenor-respondents opposing a stay motion, ruling: "Such self-imposed costs are not properly the subject of inquiry on a motion for stay."); *see also Va. Petroleum*, 259 F.2d at 926-27.

When the current owners created Luminant in 2007, CAIR was in place and not yet remanded, and Texas was a participant in the rule. Had Luminant's sophisticated owners pursued a compliance strategy that involved the installation of controls, by now those controls could well be operational. *See* 76 Fed. Reg. at 48,282 (estimating that scrubbers can be installed in 27 months); *but see* Campbell Decl. ¶ 19 (Luminant's CEO opining that the installation of controls typically takes three years or more).

The next year, in 2008 when this Court remanded CAIR, Luminant should have been keenly aware that EPA's CAIR replacement rule would not be reliant on out-of-state pollution credits, and Luminant had every reason expect that EPA

would again include Texas in its cross-state pollution control program. Accordingly, at that point, given this Court's admonition to EPA in *North Carolina* to craft a CAIR replacement rule quickly, a prudent company would have begun investing in pollution control technology for plants it intended to keep open. Many other power producers, including some in Texas, elected to install controls.[6] Luminant's failure to invest in controls at the time was a particularly risky decision for Luminant because most of its plants have higher emission rates than other Texas plants.[7] Installing SO_2 controls at that point would have made good business sense for other reasons: such controls would facilitate compliance with EPA's haze and mercury emission control rules. Final Transport Rule, 76 Fed. Reg. at 48,216.

The first inkling that Luminant had that Texas might not be included in the Transport Rule was when EPA issued its proposal a year ago August, 75 Fed. Reg. 45,210 (Aug. 2, 2010), and even then, EPA took comment on whether Texas should be included in the program. *Id*. at 45,824. More to the point, by last August, Luminant had already foregone the installation of controls, which again are likely to take on the order of 27 months to come on line. Thus, even if EPA

[6] In the last several years, the owners of the Fayette, Gibbons Creek, and Pirkey plants in Texas have all added or upgraded scrubbers. *See, e.g.*, http://www.lcra.org/newsstory/2011/fppcompletesemissionsreducingproject.html.

[7] As of 2010, eight of the top nine units in Texas ranked in terms of their SO_2 emission rates were Luminant units. EPA, Clean Air Markets Database, Data and Maps, camdataandmaps.epa.gov/gdm/index.cfm.

had included Texas in the proposed rule, Luminant could not have adjusted its fleet fast enough to avoid the hardship it now claims.

Furthermore, while Luminant's current financial situation is precarious, that has little or nothing to do with the Transport Rule. Luminant was created in 2007 as part of the largest equity buyout in history. Biewald Decl. ¶ 29. The value of the company has dropped precipitously since 2007, a decline partially attributed to a decrease in natural gas prices which track closely with wholesale electricity prices. *Id*. ¶ 30-32. The resulting depression in electricity revenues has contributed to the company's immense debt. *Id*. ¶ 33. Currently, the company is carrying over $36 billion in debt, of which $22.5 billion will mature in 2014. *Id*. KKR now estimates its share at 20% of its original value while TPG estimates its share at 40%. *Id*. ¶ 34. Faced with the consequences of these business decisions, it is unfair and misleading of Luminant to blame EPA for its current situation.

C. GRANTING A PARTIAL STAY WOULD NOT BE IN THE PUBLIC INTEREST.

Luminant's arguments regarding the effect of the Transport Rule on the public interest ignore the health-related benefits associated with the rule. Indeed, a stay will likely result in 25 to 65 premature deaths per year in Texas and costs of $197 to $485 million per year. Schoengold Decl. ¶ 16. Outside of the state, 78 to 202 premature deaths would be expected annually as well as costs valued at $615

million to $1.5 billion. *Id*. In contrast, Luminant's public interest arguments, as shown below, are groundless.

1. Luminant's Contention that the Transport Rule Will Lead to Blackouts in Texas is Based on Highly Questionable Analysis and Assumptions.

Luminant wrongly contends that the Transport Rule threatens the reliability of the Texas electric grid. Luminant Mot., 18-19. As the accompanying declaration of Bruce Biewald demonstrates, a proper study of future electric reliability is prospective, rather than retrospective in nature. Biewald Decl. ¶¶ 7-8. Luminant bases its arguments on the Lasher declaration, which mirrors the accompanying report by the Electric Reliability Council of Texas ("ERCOT"). Lasher simply assumes that power provided by two Luminant units, Monticello 1 and 2, will disappear without replacement, and that electricity demand in the summer of 2012 will exactly replicate 2011. *Id*. ¶¶ 10-11, 17. A proper prospective study would analyze demand scenarios for future years, specific measures of reliability, and actions that could mitigate reliability issues . *Id*. Although ERCOT complains the five-month gap between the final rule and the date it goes into effect does not give the organization time to undertake such a study and implement reliability fixes, Lasher Decl. ¶ 31, ERCOT's own rules

require that generators give only 90-days notice of any suspension or retirement.[8] Because ERCOT typically addresses the reliability issues resulting from the loss of a generator in 90 days or less, its claim that it cannot do so in response to the Transport Rule rings hollow.

Indeed, with respect to the issue of future replacement power, Luminant's arguments are disconnected from relevant ERCOT planning documents, such as the May 2011 annual forecast of demand and capacity resources.[9] This report and others show that ERCOT expects to have capacity in 2012 in excess of its targeted reserve margins, even if Monticello 1 and 2 are idled. Biewald Decl. ¶¶ 12, 20-22. ERCOT studies show reserve margins for both 2012 and 2013 exceeding the ERCOT planning criterion and identify mothballed gas capacity of over 2400 megawatts, exceeding the 1400 megawatt reduction in peak capacity from coal units that the Lasher declaration asserts could result from implementation of the Transport Rule. *Id*.

Another critical flaw in Luminant's analysis is that it does not acknowledge that extreme weather events, such as the high temperatures experienced in the summer of 2011, are already taken into account in system planning. *Id*. ¶¶ 13-19.

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[8] ERCOT Protocol 3.14.1.1, *at* www.ercot.org/content/mktrules/nprotocols/current/TOC-092711.doc.

[9] Report on the Capacity, Demand, and Reserves in the ERCOT Region, *at* http://www.ercot.com/content/news/presentations/2011/ERCOT_2011_%20Capacity,_Demand_and%20Reserves_Report.pdf

ERCOT routinely assesses the amount of capacity that will be needed to meet demand, considering the risk of both unit outages and extreme weather. *Id.* ¶ 15. As noted above, ERCOT's comprehensive studies – in marked contrast to the one-off, retrospective comparisons included in the Lasher declaration – show that the system will continue to have capacity reserves exceeding its target in both 2012 and 2013 even without Monticello 1-2. *Id.* ¶ 12.

2. Luminant's Contention that the Transport Rule Will Lead to Job Losses Incorrectly Ignores the Increased Employment that Will Necessarily Result from New Pollution Control Projects.

Luminant's claims that the public interest favors a stay fail, in part, because Luminant ignores the very significant harms to public health (including premature deaths) that a stay would likely cause, and the large economic costs associated with those harms to public health. But even the factors Luminant does address are not treated accurately or fairly: In particular, its estimates of job losses and related economic impacts are incomplete and, for the aspects that the estimates do cover, highly inaccurate. As discussed in the declaration of William Steinhurst, Luminant's estimates are incomplete because they focus on job losses that would occur at the plants and supporting mines, but fail to include the jobs that would be created elsewhere. Steinhurst Decl. ¶ 12-15.

The company's motion discusses the job losses at the Monticello plant and supporting mines that would allegedly result from compliance with the Transport

Rule. Luminant Mot., 18. However, Luminant also claims that it would have to spend an initial $280 million in 2011 and 2012 to install scrubber upgrades at Martin Lake, Monticello Unit 3, and Sandow Unit 4 as well as selective non-catalytic reduction (SNCR) at Martin Lake . Campbell Decl. ¶ 18. In total, Luminant claims it will invest $1.5 billion in upgrades by 2020 to comply with the EPA regulation. Steinhurst Decl. ¶ 11. While the motion discusses these expenses as evidence of further harm to the company, it fails to mention the resulting stimulus to the local economy. As the company itself states, in order to perform upgrades it "must start ordering major equipment and commissioning engineering and construction work immediately." Campbell Decl. ¶ 8. These activities do not perform themselves; more equipment manufacturing workers, engineers, and construction workers would be required. Steinhurst Decl. ¶ 12.

The installation of emissions controls for compliance with the Transport Rule will generate jobs at Luminant's plants and many other plants throughout the country. *Id.* ¶13. A Ceres and PERI (Political Economy Research Institute) report estimated the economic impacts of 36 states' (not including Texas) compliance with new EPA emission regulations. *Id.* The report distinguished between impacts from installation of pollution controls and those from replacement capacity (e.g., new renewable investments). The average direct job impact of construction of pollution controls is 3.5 job-years (i.e. one job for one year) per million dollars in

spending. *Id.* When including indirect effects (i.e. suppliers of this activity) this number increases to 7.2 job-years per million dollars spent. *Id.* Using these average figures and Luminant's own estimate of spending on emission controls of $1.5 billion in eight years—their upgrades would create an estimated 5,200 direct job-years and an additional 5,400 in indirect job-years involving construction. In total, this amounts to 10,600 job–years. This equates to 650 direct jobs and 675 indirect jobs for the eight years of upgrades. Each of these figures outweighs the claimed losses at Luminant's plants and mines. *Id.* In addition, long-term operations and maintenance jobs would be created with the new emissions controls. Again, using the Ceres and PERI estimates this would create an estimated 115 direct and 226 indirect long term jobs. *Id.* This report also measures the losses of jobs at coal plants, concluding that the new O&M jobs exceed those lost at coal plants by 2,000 jobs across the 36 states. *Id.* ¶ 14.

There is, additionally, evidence of actual job creation from other plants that have upgraded their scrubbers. For example, the Ceres and PERI report mentions that Westar, which operates Jeffrey Energy Center in Kansas, spent $500 million in upgrading the plant, requiring 850 construction workers (*i.e.*,direct jobs) on-site at the peak of installation. *Id.* ¶ 15.

Given Luminant's failure to analyze properly the economic impacts associated with the Transport Rule and the health benefits associated with the

Rule's implementation, the issuance of a stay here would not be in the public interest.

CONCLUSION

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

October 6, 2011

Respectfully submitted,

/s/ *George E. Hays*
George E. Hays

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2011, I will cause the foregoing RESPONSE OF MOVANT-INTERVENORS AMERICAN LUNG ASSOCIATION, CLEAN AIR COUNCIL, ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB IN OPPOSITION TO LUMINANT'S MOTION FOR A PARTIAL STAY OF THE TRANSPORT RULE, including all exhibits, to be served through the CM/ECF system, which will send a notice of filing to all registered attorneys of record.

/s/ *George E. Hays*
George E. Hays