Congress of the United States
Washington, DC 20515

September 22, 2011

Dear Clean Energy Group companies:

We write to provide you, your customers, and the public with the facts about the Obama EPA's regulatory agenda affecting coal-fired power plants, which federal agencies and several independent observers believe will cost jobs, raise consumer electricity prices, and threaten the reliability of the nation's electric power grid.

These views stand in marked contrast to your own. You have asserted, in various forums, that the characterization of EPA's concentrated barrage of regulations as a train wreck is "simply false." You have made this charge claiming that, among other things, utilities opposing EPA's rules lacked proper foresight about their content, as well as the proper commitment to environmental protection—attributing both virtues to yourselves.

For instance, you recently "congratulated" EPA for its Utility MACT rule, urging the agency "to finalize it to "reap...significant public health benefits." Leaving aside the legitimate questions about the claimed benefits of the rule as proposed, your comments obscure how your companies would benefit from this and other EPA regulations. Critics argue that your advocacy for these rules is rooted neither in concern for public health nor for the environment, but in rent seeking.

These rules will confer on your companies—which predominantly generate electricity from natural gas and nuclear power— a competitive advantage in the marketplace at the expense of consumers. In many respects the advocacy for the train wreck agenda is reminiscent of your support for the Waxman-Markey cap-and-trade legislation. Critics argue that the reason then (as now) was clear: cap-and-trade meant higher electricity prices, which in turn meant higher profits for your companies.

Take Exelon as an example. CEO John Rowe described to investors how Waxman-Markey would have created $1.5 billion a year in additional revenue for Exelon. It's no secret that the additional revenue would have poured in from consumers paying higher electric bills. That would also be true if the Obama EPA train wreck is allowed to move forward.

Your companies and their surrogates have dismissed any concerns about the train wreck as flawed analysis, absurd claims, misstatements of fact, and a deliberate refusal to acknowledge and fairly characterize independent analysis confirming serious economic harm due to these rules. The following facts will help set the record straight. We look forward to discussing them with you.

CEG: "The electric sector has known that these rules were coming."

FACT: Let's consider just two of the myriad rules affecting the electric power sector, the Utility MACT and the Cross-State Air Pollution Rule (CSAPR).

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As to the Utility MACT, the 1990 Clean Air Act Amendments (Section 112(n)(1)(A)) required the Environmental Protection Agency, before regulating mercury and certain other pollutants from power plants, to analyze those emissions in a report to Congress, and then determine whether regulating those pollutants was "appropriate and necessary." In 2000 (after extending the deadline for two years), the EPA concluded that it was. The Clinton Administration declined to act further. Then in March 2005, the Bush Administration promulgated the first-ever rule to reduce mercury from power plants. That rule was legally challenged and then vacated by a federal court in 2008. Under the Obama Administration, the EPA then proposed an entirely different rule on March 16, 2011.

When you wrote, "The electric sector has known that these rules were coming," did you mean that the electric sector knew when the Section 112 study by EPA would be completed? What it would conclude? How EPA would make its "appropriate and necessary" determination? When that determination would be made? When a rule would be proposed? What the substantive requirements of the rule would be? That the rule would be litigated? How and when the litigation would resolve itself? And when a rule would ultimately be finalized?

In 2005, many utilities believed they had adequate control technologies, and long-term pollution control plans, to meet the requirements of the mercury rule. But when the D.C. Circuit Court vacated the rule in 2008, one wonders how those utilities, even with the expectation that a plant-by-plant mandate was likely, could have foreseen the onerous, costly control requirements EPA is now proposing. One can't expect companies to transform generation fleets by installing massive amounts of emission controls, shut down plants, or both, in just three years to comply with a wholly different, and far more complex, regulatory regime.

One wonders further how your member companies, or any other utility, could have foreseen the substantive requirements of the Cross-State Air Pollution Rule (CSAPR), finalized by EPA on July 6. CSAPR followed the Bush Administration's Clean Air Interstate Rule (CAIR), promulgated in March 2005, which required steep reductions of sulfur dioxide and nitrogen oxides from power plants by 2018. Covered entities made significant technology investments pursuant to CAIR, only to have the rule challenged, vacated, and then subsequently remanded to EPA in December 2008.

The Obama EPA proceeded to finalize a completely different rule, with more stringent emissions targets and reduced compliance flexibility set over a drastically compressed timetable. Consider utilities in Texas, a state that was not included in CSAPR as proposed, because EPA, according to its own modeling, had concluded Texas had no downwind impact on non-attainment of fine particulate matter. Without adequate notice and comment, EPA changed its mind, and now utilities in Texas must cut SO2 emissions by half and greatly reduce NOx emissions *in less than five months.*

Our conclusion is that the utility industry did know that these rules were coming, in the same way one knows that death is coming: certain, but unknowable as to timing, content, and context.

CEG: "Many companies, including ours, have already invested in modern air-pollution control technologies and cleaner and more efficient power plants. For over a decade, companies have

recognized that the industry would need to install controls to comply with the Act's air toxicity requirements, and the technology exists to cost effectively control such emissions, including mercury and acid gases."

FACT: Exelon—to pick just one CEG member company— touts its foresight in making "clean energy investments" to comply with regulatory requirements under the Clean Air Act. But those "investments" bear little connection to the regulations now in question. A quick look at Exelon's fleet of power plants, and when they were built, tells the story. According to the Exelon's website, 93 percent of the power it sells is generated by nuclear plants, which have no emissions (http://www.exeloncorp.com/energy/generation/Pages/generation.aspx). Just five percent comes from coal. When did construction start on those nuclear plants? *Prior to* passage of the 1990 Clean Air Act, which included the "good neighbor provision" and section 112(d), the basis for EPA's Cross-State Air Pollution Rule and the Mercury Air Toxics Rule, respectively.

Moreover, Exelon's divestiture of its coal assets appears to not have been driven by environmental considerations. According to a website chronicling the history of Exelon (http://www.answers.com/topic/unicom-corporation), CEO John Rowe sold 16 "non-nuclear plants" for $4.8 billion in early 1999 "to focus more on delivery of power than production, opening the door to purchasing energy from outside providers."

Consider, too, PSEG, based in New Jersey. About 54 percent of PSEG's electricity generation comes from nuclear power (another 19 percent from natural gas). Its nuclear fleet consists of the Salem Nuclear Power Plant, the Hope Creek Generating Station, as well as a 50 percent stake in Peach Bottom (the other half is owned by Exelon), located in York County, Pennsylvania. All of these plants were built in 1981 or earlier. *None of them* had anything to do with EPA's current barrage of rules, or with the 1990 Clean Air Act Amendments.

We conclude that CEG companies are the beneficiaries of decisions made for other purposes and at other times. It is difficult to look at the record and believe that the generation portfolios of the companies were intentionally constructed over the course of 30 years with the current regulatory train wreck in mind.

CEG: "There is no reason to delay the implementation of the Utility Toxics Rule. Proceeding on schedule with the flexibility that is available will provide the business certainty the industry needs."

FACT: CEG's optimism about the time horizon for a massive installation of pollution control equipment is not shared by the Federal Energy Regulatory Commission (FERC). In a letter to Sen. Lisa Murkowski (R-Alaska), FERC Chairman Jon Wellinghoff identified the factors raised by several utilities that could make compliance with CSAPR's 2012 and Utility MACT's 2014 deadlines unachievable. "In discussing whether there is enough time for new generation to come online by 2018 to offset coal retirements," Wellinghoff wrote, "Commission staff identified several factors that can extend the project build horizon. These include the long lead time needed for some equipment, potential protests against pipeline siting and construction, transmission siting and construction issues, and environmental permitting. These factors slow the industry response in replacing retired units." (We hope in particular that CEG and its

member companies publicly oppose the protests and lawsuits that will inevitably impede siting, permitting, and other measures needed to comply with EPA's rules.)

We would simply note that organizations as diverse as unions, PJM management, FERC, and other utilities have all strongly advised that a longer compliance schedule is a completely appropriate response in this instance. On this point, your member companies stand alone.

CEG: "Contrary to the claims that the EPA's agenda will have negative economic consequences, our companies' experience complying with air quality regulations demonstrates that regulations can yield important economic benefits, including job creation, while maintaining reliability."

FACT: One wonders on what basis the CEG claims complying with regulations has created "important economic benefits." Certainly CEG disagrees with James Wood, a Deputy Assistant Secretary at the Department of Energy, who foresees two overall impacts from EPA's rules: "Number one, electric rates are going to go up. Number two, whether or not construction jobs in the green industry are created, I think there's virtually no manufacturing jobs that are likely to be created from the replacement of coal."

We suspect the basis for CEG's claim is EPA's recent report, "Benefits and Costs of the Clean Air Act 1990 to 2020." The report claims that by 2020, regulations issued under the Clean Air Act Amendments will provide an annual benefit of almost $2 trillion, compared to costs of $66 billion, a 30 to 1 benefit-cost ratio. But as NERA economist David Montgomery points out, this $2 trillion figure is largely based on a "willingness to pay number," which is constructed from surveys asking how much one would pay to reduce pollution. It has nothing to do with the actual cost of goods and services produced in the economy.

As Montgomery wrote, "Surveys of willingness to pay have been widely criticized for providing inaccurate and sometimes grossly exaggerated measures of benefits." EPA's "monetized benefits" based on willingness to pay, Montgomery continued, "*do not create a single new job, nor do they make more tangible goods and services available to consumers*." [Emphasis added]

EPA also conducted a macroeconomic study of the impacts of the Clean Air Act, and, as Montgomery further points out, reached (for EPA) a surprising conclusion: "existing EPA regulations have created no net new jobs and are reducing economic output (measured as GDP)." EPA's "past regulatory decisions," Montgomery shows, "are slowing the economy now, with a loss of up to $79 billion attributable to those regulations in 2010, growing to up to $110 billion by 2020."

However, once the EPA's pending regulatory decisions take root the nation will see even worse ramifications than what existing regulations have meant for economic output. Using the Department of Energy's widely respected National Energy Modeling System, NERA found that four of EPA's regulations affecting the power sector would cost $21 billion per year, destroy almost 1.7*million net jobs* and raise electricity rates *by as much as 19 percent* in some regions of the country.

CEG: "To suggest that plants are retiring because of the EPA's regulations fails to recognize that lower power prices and depressed demand are the primary retirement drivers. The units retiring are generally small, old and inefficient. These retirements are long overdue."

FACT: First, plants *will* close because of EPA rules. Does CEG believe that its colleagues and peers at other utilities asserting this fact are deliberately misleading their customers and the public? The *Atlanta Journal Constitution* reported on July 11 that Southern Company intends to close two plants late in 2013. "The decision to shutter the coal-fired units," the paper reported, "is based on the pending Environmental Protection Agency rules that would require the utility to install equipment to meet stricter environmental controls, the company has said."

Consider, too, American Electric Power (AEP), which will close several plants due to EPA rules. AEP's announcement was dismissed by EPA Administrator Lisa Jackson as "scare tactics," based on her misleading claim that those plants were scheduled to close under New Source Review settlement agreements finalized in 2007. But as AEP CEO Mike Morris noted in a July 8 letter to Jackson, two AEP units under the consent decree could retire before 2014; another 7 units must retire before 2018. "All of those units," Morris wrote, "and approximately 16 more would instead be retired early in order to satisfy the schedule in the proposed rules." In other words, Morris continued, of the "nearly 6,000 [megawatts] facing retirements, roughly 5,400 MW would be retired sooner than would otherwise occur."

In short, we are left to conclude that the CEOs of the CEG member companies believe that Tom Fanning at Southern Company and Michael Morris at AEP are not being truthful.

CEG: "We can move forward with this rule [Utility MACT] without compromising the reliability of the electric system."

FACT: AEP's shutdowns, along with other plant closings, could present electric reliability problems for customers. Not surprisingly, CEG has waved away any concern about outages—and one wonders if CEG's indifference stems from EPA's assurances that its rules will not affect reliability. For EPA has insisted that it consulted FERC about its rules and the electric grid. Yet we now know those assurances are empty; in responses from FERC to the Senate Energy and Natural Resources Committee, the Commission noted that no analysis had been shared with EPA.

In a letter to Murkowski, FERC Chairman Jon Wellinghoff wrote, "FERC staff have done only an *informal assessment [that] offered only a preliminary look* at how coal-fired units could be impacted by EPA rules, and *[it] is inadequate to use as a basis for decision-making, given that it used information and assumptions that have changed.*" [Emphasis added] Wellinghoff also wrote that, "The Commission has not provided EPA with any research, documentation or analysis on the Clean Air Transport Rule, except for discussion of Commission staff's informal assessment as described above."

Despite EPA's abdication of responsibility for assessing the impacts of its rules, others have taken stock of what they portend for reliability. James Wood, DOE's Deputy Assistant Secretary, said he believes that, because of EPA's rules, "transmission grid stability is likely to

Despite EPA's abdication of responsibility for assessing the impacts of its rules, others have taken stock of what they portend for reliability. James Wood, DOE's Deputy Assistant Secretary, said he believes that, because of EPA's rules, "transmission grid stability is likely to emerge as a major issue, both because of the shutdowns and because of the intermittency of renewables."

And grid manager PJM, which oversees the electricity market in which many CEG companies operate, agrees, as it recently wrote the following recently in its assessment of EPA's Utility MACT: "The Joint RTO Commentators are concerned that EPA's Proposed Rule *may accelerate the number of generation retirements as generation asset owners assess the costs of complying with this rule in the context of a host of new environmental imperatives being imposed on them*...Environmental compliance is a cost of doing business in a market environment. However, *if the impact of the EPA rulemakings increases retirements to the point of creating reliability violations without providing for adequate time to respond to the reliability concerns, this could undermine the reliability of the electric grid for an unacceptable prolonged period.*" [Emphasis added]

There seems to be little doubt among impartial observers that EPA's rules will increase and expedite retirements—and dramatically so. Chairman Wellinghoff reported to Sen. Murkowski that FERC staff thinks 81 gigawatts of coal-fired capacity are "likely" or "very likely" to retire. This confirms assessments from several other independent observers, including investment firm Credit Suisse, which believes at least 60 gigawatts will retire in large part because of EPA's rules.

In short, it is impossible to conclude that reliability will not be affected by the disruptive nature of the EPA regulatory agenda.

Sincerely,

Bill Johnson

Jim Jordan

Jean Schmidt

Pat Tiberi

Steve Chabot