ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012

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

EME HOMER CITY GENERATION, L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 11-1302 (and
	)	consolidated cases)
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY, et al.,	)	Complex
	)	
Respondents.	)	
	)	

RESPONDENT EPA'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTION TO GOVERN FUTURE PROCEEDINGS AND ITS OPPOSITION TO TEXAS'S MOTION FOR SUMMARY VACATUR

Respondent United States Environmental Protection Agency ("EPA") hereby submits its consolidated reply in support of EPA's motion to govern future proceedings (EFC No. 1500830, filed July 3, 2014),[1] combined with its opposition

[1] By this consolidated reply EPA responds to nine separate responses filed on July 17, 2014, in opposition to EPA's motion to govern future proceedings, including: Luminant's Response in Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1501970); Response of State and Local Petitioners to EPA's Motion to Govern Future Proceedings (EFC No. 1503207); Texas's Combined Response in Opposition to EPA's Motion to Govern Future Proceedings and Motion for Summary Vacatur (EFC No. 1503258); Environmental Committee of the Florida Electric Coordinating Group's Response in Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1503259); Wisconsin Petitioners' (footnote continued. . .)

to Texas's motion for summary vacatur of the Transport Rule (EFC No. 1503258, filed July 17, 2014).

Petitioners' nine separate oppositions to EPA's motion to govern largely repeat each other and reflect little to no effort at coordination among petitioners to streamline their arguments and lessen the burden on the Court in resolving these motions to govern. In addition, Petitioners generally mischaracterize the Supreme Court's mandate in *EME Homer City* as authorizing them to bring any "as-applied" challenges that they might possibly conceive of, whether or not such challenges are preserved. EPA submits that the oppositions illustrate precisely why this Court should adopt reasonable limits on supplemental briefing for these remand proceedings, as proposed by EPA in its motion to govern.

Texas's motion for summary vacatur was filed outside the time provided in D.C. Circuit Rule 27(g)(1) and improperly seeks to pre-empt this Court's action on the pending motions to govern future proceedings. Further, requiring EPA to respond to Texas's arguments now, before the Court acts on the pending motions

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Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1503267); Response of the State of Louisiana in Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1503299); Response of the Utility Air Regulatory Group in Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1503302); ARIPPA's Response in Opposition to EPA's Motion to Govern Future Proceedings (EFC No. 1503307); City of Ames, Iowa's Response Opposing U.S. EPA's Motion to Govern Future Proceedings (EFC No. 1503309).

to govern, would be burdensome and prejudicial to EPA and the other parties. Therefore, the Court should deny Texas's motion for summary vacatur.

I. The Court Should Adopt EPA's Proposal for Supplemental Briefing.

Petitioners largely oppose EPA's motion to govern future proceedings because, in their view, it would not provide them sufficient opportunity to re-litigate issues already briefed or to raise new "as-applied" challenges to the Transport Rule that they now wish they had raised, but for strategic reasons chose not to raise, in their opening briefs in this case. However, the primary focus of proceedings on remand should be simply to advise the Court as to the impact of the Supreme Court's decision in *EME Homer City Generation, LP v. EPA*, 134 S. Ct. 1584 (2014), if any, on the remaining issues in this case that have already been briefed, including any properly preserved "as-applied" challenges, so that the Court may quickly resolve the remaining issues. EPA's proposal for supplemental briefing in its motion to govern provides a reasonable framework for this Court's limited task on remand and therefore the Court should grant EPA's motion.

EPA explained in its motion to govern and its consolidated opposition to petitioners' six separate motions to govern why the Supreme Court's decision in *EME Homer City* does not open the door to new "as-applied" challenges that petitioners did not raise in their opening briefs or necessitate voluminous briefing on issues properly preserved, and EPA does not repeat those arguments here. *See*

ECF No. 1503229 (filed July 17, 2014); EFC No. 1500830 (filed July 3, 2014). That petitioners filed *nine* separate, and largely duplicative, oppositions to EPA's motion to govern serves to underscore why the Court should impose reasonable limits on supplemental briefing in these remand proceedings.

EPA's proposal for supplemental briefing would provide petitioners collectively with half of the amount of words that typically would be permitted for briefing on the merits.[2] This should be adequate for petitioners to file a joint, consolidated brief or (briefs) limited to the impact of the Supreme Court decision's on the remaining issues in this case, which have already been briefed. Petitioners' opposition to EPA's proposal merely shows that they are unwilling—not that they are unable—to coordinate such a joint supplemental brief (or briefs).

Contrary to assertions of a number of petitioners, the Court's prior order setting word limits for the initial round of merits briefing did not preclude any petitioner from raising as-applied challenges in the opening briefs. *See* Ames Opp. (EFC No. 1503309) at 8; Texas's Opp. (EFC No. 1503258) at 6; Fla. Utilities Opp. (EFC No. 1503259) at 3; Wisc. Opp. (EFC No. 1503267) at 3. The order required state and local petitioners to file a joint brief, but did not limit the issues to be

[2] EPA proposed up to two opening briefs not to exceed a combined total of 7,000 words; a single response brief not to exceed 7,000 words; up to three respondent-intervenor briefs not to exceed a combined total of 4,375 words; and up to two reply briefs not to exceed a combined total of 3,500 words.

addressed or preclude any petitioner from briefing their "individualized" challenges. *See* Wisc. Opp. at 3 (EFC No. 1503267). If state and local petitioners elected to use their words to brief "cross-cutting" issues and "focus[] little on any one State's particular situation" (Texas Opp. at 6 (EFC No. 1503258)), that was petitioners' strategic choice. In light of the Supreme Court's decision rejecting those "cross-cutting" challenges, petitioners may feel that they chose wrongly. However, that is not a basis for allowing petitioners to inject additional "as-applied" challenges that were not properly preserved into the proceedings on remand or to file an unlimited number of individual briefs. Petitioners have not shown that they would be unable to address their as-applied challenges in a consolidated supplemental brief, as proposed by EPA. A requirement to file a consolidated brief does not foreclose any petitioner from raising arguments challenging the Transport Rule on grounds that are specific to that petitioner, as long as those challenges were previously preserved.

Petitioners also assert that the Supreme Court's decision authorizes them to raise on remand *any* as-applied challenges they may have. *See*, *e.g.*, State/Local Government Opp. (EFC No. 1503207) at 2-3 (quoting *EME Homer City*, 134 S. Ct. 1609). Leaving aside that nothing in the Supreme Court's decision suggests that petitioners may bring challenges on remand that were not properly preserved, Petitioners expansive reading of the Supreme Court's decision suggests that there

is *no* limit whatsoever to the issues they intend to raise on remand. Petitioners, in fact, assert that because the Transport Rule emission reduction requirements were promulgated through Federal Implementation Plans, any and all challenges to those plans constitute "as-applied" challenges that, under their reading of the Supreme Court decision, can now be brought even if not properly preserved. *See id.* at 2. Even if the Court declines to decide in the context of these motions to govern whether petitioners may attempt to raise issues that were not properly preserved, the Court should impose reasonable word limits on the parties to avoid turning these remand proceedings into a free-for-all to raise any conceivable "as-applied" challenge petitioners wish they had raised in their opening briefs.

II. The Court Should Deny Texas's Motion for Summary Vacatur.

The Court should deny Texas's motion for summary vacatur because the motion clearly comes too late. Pursuant to D.C. Circuit Rule 27(g)(1), the time for filing a dispositive motion that would summarily dispose of Texas's petition expired long ago. And, Texas has not come close to showing good cause for allowing Texas's motion to go forward at this stage of the proceedings, nearly three years after Texas filed its petition for review, following review on the merits and an appeal to the Supreme Court.

Pursuant to D.C. Circuit Rule 27(g)(1), motions for summary vacatur may be filed beyond the 45-day limit set forth in the rule only with leave of the Court.

Texas did not file a motion for leave to file its out-of-time motion for summary vacatur and the motion should be denied on that basis alone. Further, Texas's claim in a footnote that the Supreme Court's reference in *EME Homer City* to "as-applied" challenges is good cause for waiving the time limits in Rule 27(g)(1) only highlights the procedural impropriety of its motion. Texas Opp. at 1 n.* (EFC No. 1503258). The issue of what further briefing, if any, is appropriate is presently pending before the Court. Notwithstanding, Texas's motion essentially seeks to forge ahead with supplemental briefing of its purported "as-applied" challenges to the Transport Rule on its own timetable without waiting for a ruling from the Court on the extent of supplemental briefing it will allow. Thus, Texas improperly seeks to pre-empt the Court's direction on the scope and extent of any supplemental briefing in this case. Allowing Texas to proceed to supplemental briefing on its challenges ahead of the other parties in the case would be prejudicial to the other petitioners and EPA, as well as burdensome on the Court and a completely inefficient use of judicial resources.[3]

[3] EPA respectfully requests that, if the Court were inclined to consider Texas's motion on the merits, the court provide EPA and other parties with a reasonable opportunity to file a merits response. This would be consistent with D.C. Circuit Rule 27(g)(4), which provides that no response is required to an untimely dispositive motion until a decision is rendered on the motion for leave to file such untimely motion.

Moreover, it is absurd for Texas to suggest that the court's standard for summary disposition is met here. "Summary reversal is rarely granted and is appropriate only where the merits are 'so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision.'" D.C. Circuit Handbook of Practices and Procedures at 36 (quoting *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)). This is especially true in this case, where extensive merits briefing has already occurred, and Texas, along with the other petitioners in this case urge the Court to permit 50,000-word petitioner-side opening briefs on remand, including a separate 5,000-word brief for Texas. To be sure, EPA seeks to have all of the remaining issues in this case resolved as expeditiously as possible and to that end has put forth a reasonable framework for briefing on remand. Texas's motion fails to show that the merits of its challenges are so clear as to warrant resolution by the Court in advance of the anticipated proceedings on remand. Further, Texas's motion for summary vacatur would lead to piece-meal litigation and further delay the ultimate resolution of this case.

Accordingly, the Court should deny Texas's motion for summary vacatur.

CONCLUSION

For the reasons stated above and in EPA's motion to govern future proceedings and its opposition to petitioners' motions to govern, the Court should

grant EPA's motion, deny petitioners' motions to govern, and deny Texas's motion for summary vacatur.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served this 28th day of July, 2014, on all registered counsel, through the Court's CM/ECF system.

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