

**ARGUED APRIL 13, 2012**  
**DECIDED AUGUST 21, 2012**  
**BEFORE THE UNITED STATES COURT OF APPEALS**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

**CITY OF AMES IOWA’S RESPONSE OPPOSING**  
**U.S. EPA’S MOTION TO GOVERN FURTHER PROCEEDINGS**

**INTRODUCTION**

Petitioner City of Ames Iowa (“City of Ames” or “City”) submits this response supporting in part and opposing in main Respondent U.S. EPA’s (“EPA’s”) Motion to Govern Further Proceedings in this case on remand from the U.S. Supreme Court. [ERC Doc. 1500830] While the City of Ames agrees with EPA’s contention that further briefing is necessary and also agrees that the proposed schedule is acceptable, the City disagrees strongly with EPA’s proposal to limit such briefing to no more than 3,500 words in a single brief to be submitted by all fourteen State and four Local Government Petitioners. Therefore the Court should deny EPA’s Motion to Govern Further Proceedings in this regard.

## **BACKGROUND**

1. These petitions for review in this consolidated case challenged EPA's Cross-State Air Pollution Rule, published at 76 Fed. Reg. 48,208 (Aug. 8, 2011). The rule is referred to by both this Court and the Supreme Court as EPA's "Transport Rule," which was promulgated under section 110(a)(2)(D) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D), requiring State Implementation Plans to "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any . . . [NAAQS]." 42 U. S. C. §7410(a)(2)(D)(i) (2006 ed.).

2. On August 21, 2013, this Court vacated the Transport rule on the grounds that it violated the Clean Air Act. 696 F. 3d 7 (D.C. Cir. 2013).

3. The Supreme Court granted Respondent EPA's Petition for *Certiorari* on June 24, 2013, 133 S.Ct. 2857, 186 L.Ed.2d 907, and reversed this Court's August 21, 2013 decision vacating the entire Transport Rule on April 29, 2013. *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). 134 S. Ct. 1584 (2014). The Supreme Court remanded the case to this Court for further proceedings with the following direction:

"If any upwind State concludes it has been forced to regulate emissions below the one-percent threshold or beyond the point

necessary to bring all downwind States into attainment, that State may bring a particularized, as-applied challenge to the Transport Rule, **along with any other as-applied challenges it may have.** Cf. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 699-700 (1995) (approving agency's reasonable interpretation of statute despite possibility of improper applications); *American Hospital Assn. v. NLRB*, 499 U. S. 606, 619 (1991) (rejecting facial challenge to National Labor Relations Board rule despite possible arbitrary applications). Satisfied that EPA's cost-based methodology, on its face, is not "arbitrary, capricious, or manifestly contrary to the statute," *Chevron*, 467 U. S., at 844, we uphold the Transport Rule. **The possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety.**

Slip Op. 36, 134 S. Ct. 1584, 1609 (2014) (*emphasis added*).

4. On June 3, 2014, this Court issued a Per Curiam Order for Motions to be submitted to Govern Further Proceedings. [ECF No.1495788]

5. All Motions Governing Further Proceedings submitted by the Parties conceded the need for additional briefing in light of the Supreme Court's remand. [ECF Nos. 1500830, 1500945, 1500, 1500, 150095, 1500961, 150963, 1500964, 1500966]

6. The amount of briefing by the Parties differed significantly. EPA requested that the fourteen State and four Local Petitioners be limited to a joint brief not to exceed 3,500 words [ECF No. 1500830 at 11]; and State and Local Petitioners requested a joint brief not to exceed 14,000 words. [ECF Nos. 1500966] In addition to supporting the State/Local Joint Briefing Motion, the City of Ames

requested the ability to submit a separate brief limited to 4,000 words and a reply brief of not more than 3,000 words that would explain the City's particularized "as applied challenges." [ ECF Nos. 1500951] Three other States requested supplemental briefing of a comparable length. [ECF Nos. 1500 945,1500 961, 1500964]

## ARGUMENT

### **A. The Supreme Court's Remand of the Case(s) for Further Proceedings Contemplates Resolution of Issues that were Already Briefed and Other Claims that the Transport Rule "As Applied" were Unlawful.**

EPA argues in its Motion Governing Further Proceedings that parties' opportunity for supplemental briefing should be limited "to the effect of the Supreme Court's decision in *EME Homer City* on the issues already raised by Petitioners in their opening briefs in this Court but left unresolved by this Court's August 21, 2012 briefs. [See ECF No. 1500830 at 2] EPA's briefing proposal appears to be predicated on EPA's view that all issues remaining to be resolved already are fully briefed and extremely short supplemental briefs are all that is needed "to identify the properly-preserved issues, with citations to the pages in their prior briefs where those issues are addressed" *Id.* The City of Ames disagrees that briefing should be so limited.

The Supreme Court's remand to this Court on its face contemplates that EPA's actions imposing the Transport rule may in fact have been inconsistent with

law. For the reasons outlined in the Joint Response in Opposition to EPA's Motion by State and Local Petitioners, adopted by the City of Ames herein, the Supreme Court reversed this Court's vacatur of the Transport Rule in its entirety because "[ ] the possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety." Slip Op. 36, 134 S. Ct. 1584, 1609. Accordingly, the City submits that this Court is tasked to resolve, in addition to the cross-cutting issues that already have been briefed but this Court found unnecessary to decide, other individual "applied challenges" which have been preserved but have not been briefed fully.

**B. This Court's Original Briefing Order Does Not Preclude Additional Briefing.**

EPA requested only 3,500 words for the State and Local governments to reference their former preserved claims in the briefs already submitted in this case is based apparently on EPA's view that such "as applied challenges" that remain have been fully briefed or are now precluded because they were not preserved before this Court. [ECF No. 1500830 at 11] Additionally, EPA attempts to cast these remaining issues to be briefed as "procedural or technical challenges" on which EPA enjoys substantial deference are simply misleading. EPA Motion to Govern 2, 7; accord EPA Motion to Lift the Stay 8 (Doc. No. 1499505)

Issues that the City of Ames wishes to present to the Court, and those of other State and Local Government Petitioners involve specific facts which are

necessary to brief for the Court to resolve. EPA's efforts to make the need for additional briefing appear casual or merely a reference so obviate the need to read the original briefs in their entirety do a disservice to the genuine assertions that the Transport Rule is inconsistent with law. A 3,500-word brief to tie together all the references to the prior briefs for this Court's review would, we submit, not suffice to explain these preserved challenges.

Further the Original Briefing Order in the case, on its face, does not preclude further briefing as EPA claims. And in light of the Supreme Court's remand of the case recognizing that "as applied challenges" may exist, a Joint Brief limited to 3,500 words is not adequate for the Court to resolve such challenges. "In construing orders and judgments, the entire contents of the instrument and the record should be taken into consideration in ascertaining the intent." *Capetan v. Brownell*, 148 F.Supp. 519, 520 (E.D.N.Y. 1957), citing *Smith v. Comm'r of Internal Revenue*, 67 F.2d 167 (4th Cir.1933). As happened in the Court's decision, the overarching legal issues requested to be briefed disposed of the case without briefing individual "as-applied" cases. This Court' order certainly did not preclude the Court from ordering further briefing on issues that were preserved and retained for decision following the initial briefing, if necessary

**C. The City of Ames Has Preserved Its “As Applied” Challenges and Has Not Waived Its Opportunity to Further Briefing.**

The City of Ames also asserts that the Court’s original Briefing Order does not support EPA’s contention that Petitioners forever waived their right to brief “as applied issues.” [ECF No. 1500830 at 8-9] Such challenges were preserved by the City of Ames in its November 14, 2011 Statement of Issues in case 11-1378 [ECF No. 1341708] and the City’s October 24, 2011 Motion for Partial Stay of the Transport Rule [ECF No.1337266] in which these issues were described in more detail as the basis for seeking a Stay of the Transport Rule as to Ames, the relief granted by this Court. Moreover, these issues also are preserved generally in the Joint State and Local Petitioners’ Brief generally [ECF 1364206] and Reply [ECF No.1364210].

**D. The City of Ames Has Not Had An Adequate Opportunity to Brief its Preserved Claim that EPA’s Actions Imposing the Transport Rule on Iowa and the City of Ames was Unlawful.**

The City of Ames has not had, as EPA attempts to argue, either an ample or a fair opportunity to present the issues raised by the Transport Rule as applied to the City, particularly with regard to seasonal ozone allocations under the Transport Rule. [See ECF No. 1500830 at 7] The Court’s Briefing Order, as already discussed provided for a Joint State and Local Petitioners Brief not to exceed a combined total of 28,000 words on "cross-cutting issues." It therefore precluded such individual briefing by State and Local Petitioners. Divided evenly,

the Order allocated only 14,000 words to each brief to present all cross-cutting issues, of which several remain to be resolved. There was not a sufficient opportunity for individual Petitioners to describe in detail their challenges. In fact, this Court denied bifurcated briefing by specific Petitioners, limiting briefing to cross-cutting issues.

The City of Ames submits therefore that additional briefing is necessary to present its issues for this Court's resolution, which would be impossible to present in 3,500 words shared by fourteen other States and Three Local Governments. Therefore it has requested an opening brief not to exceed 4,000 words and a reply brief not to exceed 3,000 words.

## CONCLUSION

**Wherefore**, the City of Ames respectfully submits that EPA's Motion to Govern Further Proceedings be rejected with regard to briefing format and length.

Respectfully submitted,  
/s/ Leslie Sue Ritts Leslie Sue Ritts  
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July 17, 2014.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2014, I caused the foregoing **RESPONSE OF PETITIONER CITY OF AMES IOWA'S OPPOSING U.S. EPA'S MOTION TO GOVERN FURTHER PROCEEDINGS** to be served by the Court's CM/ECF system on all registered counsel through the Court's CM/ECF system.

/s/ Leslie Sue Ritts

Leslie Sue Ritts,

Counsel for Petitioner, City of Ames