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.	)	
	)	

RESPONDENTS' CONSOLIDATED OPPOSITION TO PETITIONERS' MOTIONS TO GOVERN FUTURE PROCEEDINGS

Respondent United States Environmental Protection Agency ("EPA") hereby submits this opposition to the six separate motions to govern future proceedings filed by petitioners in the above-captioned consolidated cases.[1] The

[1] The referenced motions to govern are: No. 11-1302, State and Local Petitioners' Motion to Govern Proceedings on Remand from the Supreme Court (EFC No. 1500966) (filed July 3, 2014) ("State Mot."); No. 11-1302, Motion of Petitioner City of Ames, Iowa to Govern Further Proceedings (ECF No. 1500951) (filed July 3, 2014) ("Ames Mot."); No. 11-1302, Motion of the State of Wisconsin to Govern Further Proceedings (ECF No. 1500945) (filed July 3, 2014) ("Wisconsin Mot."); No. 11-1302, Motion of the State of Louisiana to Govern Further Proceedings on Remand from the Supreme Court (ECF No. 1500964) (filed July 3, 2014) ("Louisiana Mot."); No. 11-1302, Texas's Motion to Govern Future Proceedings (ECF No. 1500961) (filed July 3, 2014) ("Texas Mot."); No.

(footnote continued. . .)

Court should deny each of petitioners' proposals, which collectively seek a total of 50,000 words for petitioner-side supplemental briefs—almost double the length of the initial merits briefing for all issues in this case—because their proposals unjustifiably seek to re-litigate the entire case and to raise new issues that petitioners failed to preserve. Petitioners' request is contrary to well-settled principles of waiver as well as this Court's prior order denying petitioners' request for two rounds of briefing.

To the extent petitioners chose not to raise certain issues in their merits briefs, that choice reflected a strategic decision on their part to place relatively more emphasis on broad facial challenges to the Rule. Petitioners apparently regret that choice now that they have lost those facial challenges, but that regret is not a basis for expanding the remaining issues this Court must decide on remand. The posture of this case now should be no different than if this Court had, in the first instance, rejected petitioners' broad legal challenges, rather than having this result from EPA's successful appeal to the Supreme Court. Either way, the basic task at hand now is simply to resolve the remaining, properly-preserved challenges

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11-1302, Industry/Labor Petitioners' Motion to Govern Proceedings on Remand from the Supreme Court (ECF No. 1500963) (filed July 3, 2014) ("Industry Mot.").

that have not yet been decided, not to indefinitely expand the litigation horizon as petitioners' proposals would require.

Simply put, the Supreme Court's decision does not create a new cause of action or give rise to any as-applied challenges that petitioners could not have raised in their opening briefs in this case. Moreover, most of the issues that were properly preserved and that remain to be decided are largely procedural and record-based, technical challenges, unaffected by the Supreme Court's decision. There is no reason resolution of these discrete issues, which were already fully briefed, requires any more than the 7,000-word principal briefs proposed in EPA's motion to govern future proceedings (No. 11-1320, ECF No. 1500830).

I. Background

This case now comes to the Court on remand from the Supreme Court's decision in *EPA v. EME Homer City Generation, LLP*, 134 S. Ct. 1584 (2014), reversing this Court's prior decision vacating a final rule (commonly known as the Transport Rule) implementing the "good neighbor" provision of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D).[2] The Supreme Court resolved petitioners' two primary legal challenges to EPA's authority to issue the Transport Rule: It held that "the

[2] "Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 Fed. Reg. 48,208 (Aug. 8, 2011).

CAA does not command that States be given a second opportunity to file a SIP after EPA has quantified the State's interstate pollution obligations." 134 S. Ct. at 1609-10. The Supreme Court also held that "EPA's cost-effective allocation of emission reductions among upwind States . . . is a permissible, workable, and equitable interpretation of the Good Neighbor Provision," and rejected this Court's interpretation of the statute to require "EPA to disregard costs and consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem." *Id.* at 1610.

On remand, this Court is presented with the remaining issues that petitioners raised at the merits briefing stage, but that this Court did not reach because it vacated the Rule on the mainly statutory grounds reversed by the Supreme Court. In its decision, the Supreme Court noted two issues in particular that this Court had not reached and that it was not deciding. The Supreme Court did not reach arguments previously raised that "EPA could not impose FIPs on several upwind States whose SIPs had been previously approved . . . under CAIR." *Id.* at 1599 n.12. In addition, the Supreme Court noted that a State may have a particularized challenge that it "has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attainment," *id.* at 1609. As will be discussed below, and contrary to petitioners' arguments, the Supreme Court's statement that it was not deciding those two

categories of as-applied challenges to the Transport Rule did not open the door on remand to new as-applied challenges that were not raised in petitioners' opening briefs. The Supreme Court's decision does not create a new cause of action or otherwise give rise to new grounds for challenging the Transport Rule; the "as-applied" challenges petitioners seek to raise existed at the time petitioners filed their initial briefs.

On July 3, 2014, in accordance with this Court's Order of June 3, 2014, the parties submitted multiple motions to govern proceedings on remand. While the parties' proposals regarding a schedule for resolving the remaining issues in this case are similar, the parties disagree about the scope of briefing on remand and the number of briefs and words required to accomplish this task. For the reasons set forth in its motion to govern, EPA submits that supplemental briefing should be limited to the effect of the Supreme Court's decision on the issues already raised by petitioners in their opening briefs in this Court, and that the parties can accomplish that with briefs of half the length typically permitted for merits briefing, in accordance with a briefing format that is similar to the one this Court

ordered for the original briefing on the merits. EPA Motion to Govern Future Proceedings at 2-3, 10-11 (ECF No. 1500830) (filed July 3, 2014).[3]

Petitioners' proposal would permit an indeterminate number of separate petitioner-side opening briefs amounting to 50,000 words and another 25,500 words for replies—amounts equivalent to more than three full-size opening briefs and three-and-one-half reply briefs.[4] Petitioners thus seek to have a second round of merits litigation more expansive than the first, notwithstanding that the Supreme Court's decision has narrowed the issues for this Court to decide. Below, we explain why petitioners' proposals should be denied.

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[3] 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.

[4] Industry and Labor Petitioners seek 14,000-word opening briefs and 7,000-word reply briefs, to be allocated among as many briefs as they see fit. Industry Mot. at 8. Industry and Labor Petitioners also propose a 5,000-word brief for petitioner-intervenors and amicus curiae and up to three briefs subject to a combined total of 10,000 words for respondent-intervenors. *Id.* In addition, State and Local Government Petitioners seek joint opening and reply briefs of 14,000 and 7,000 words, respectively, while Ames, Iowa, and the States of Louisiana, Texas, and Wisconsin request four additional separate opening briefs totaling 17,000 words and replies totaling 11,500. States Mot. 6-7; Ames Mot. 2; Louisiana Mot. 3; Texas Mot. 4; Wisconsin Mot. 3.

II. Reasons to Deny Petitioners' Briefing Proposals

Petitioners' proposal for what amounts to a second full round of merits briefing in this case is entirely unnecessary and unwarranted. Petitioners claim additional briefing is needed on two sets of issues: issues petitioners raised in their opening merits briefs that this Court did not reach, and "as-applied" challenges petitioners chose not to raise in their opening briefs. With regard to the first category, the parties already had an opportunity to fully brief those issues, and only limited supplemental briefing is necessary to address the impact of the Supreme Court's decision, if any, on those remaining issues. The second set of "as-applied" challenges the petitioners wish to brief also were required to be raised in petitioners' opening briefs and therefore do not warrant any, let alone voluminous, supplemental briefing. The Supreme Court's mandate does not entitle petitioners to raise new issues that were not properly preserved in petitioners' opening briefs. Allowing petitioners to raise new issues would be contrary to principles of waiver and this Court's prior order requiring petitioners to present all of their challenges to the Transport Rule in their opening merits briefs.

A. Voluminous Supplemental Briefing Is Unnecessary Because Petitioners Already Had a Full and Fair Opportunity to Brief All of Their Challenges to the Transport Rule.

Petitioners are not entitled to a second full round of over-length merits briefing in this case. Petitioners and EPA already filed over-length principal briefs

of 28,000 words each, supplemented by petitioners' reply briefs, intervenor respondent briefs, and amicus briefs. Under well-settled principles, petitioners were required to raise all of their challenges at the time of their initial opening briefs or risk waiving them. *See, e.g., Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003) (argument petitioner raised for first time at oral argument is "waived because it was not raised in [petitioner's] briefs"); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) ("[W]e ordinarily do not entertain arguments not raised by parties"). Indeed, the principles of waiver should apply with special force where, as here, petitioners asked the court to defer briefing on some of the issues in the case, particularly including "as-applied" challenges to the Rule, to a second, later round of briefing, and this Court denied their request. *See* No. 11-1302, Pets.' Proposed Briefing Format and Schedule at 3, 9-11, and Exs. 4-5 (ECF No. 1353049) (filed Jan. 17, 2012); No. 11-1302, Order at 2 (ECF No. 1353334) (Jan. 18, 2012). Petitioners clearly were on notice that they were required to raise any and all challenges to the Transport Rule in their opening briefs. *See* No. 11-1302, Pets.' Proposed Briefing Format and Schedule at 19 (acknowledging that absent relief from the Court, petitioners would be "compelled" to raise all of their arguments against the Rule in order to "preserve" them).

Petitioners' initial briefs in this case did, in fact, raise numerous statutory, procedural, and record-based technical, *i.e.*, "as-applied," challenges to the Transport Rule. In their motions to govern, petitioners identify the issues raised in their opening briefs that they submit remain to be decided. *See* States Mot. at 2-3; Industry Mot. at 6. Petitioners' further acknowledge that the issues they identify were addressed in the briefs already submitted to the Court, yet they fail to explain why voluminous supplemental briefing would be useful in deciding these issues. *See* Industry Mot. at 6 (citing pages in their opening briefs where these issues were addressed) and 7 (noting that "the Court may rely upon the existing briefs"); States Mot. 2-3 (citing pages in their opening briefs where remaining issues were addressed).

Moreover, the procedural and record-based technical challenges identified by petitioners as left to be decided have little, if any, overlap with the issues decided by the Supreme Court. The Supreme Court held that (1) EPA reasonably interprets the "good neighbor" provision to permit the use of cost-effectiveness in determining states' obligations to reduce emissions that contribute significantly to downwind nonattainment and maintenance issues, and (2) EPA may issue FIPs identifying those good neighbor obligations for states that have previously failed to meet them without giving those states a second opportunity to submit good neighbor SIPs. *EME Homer City*, 134 S. Ct. at 1610. The Supreme Court's

decision on these central legal issues is unlikely to change much, if anything, about the analysis relating to issues such as whether EPA committed procedural errors or relied on flawed modeling results to establish emissions budgets. Therefore, voluminous supplemental briefing about the effect of the Supreme Court's decision on these issues is not necessary.

Because petitioners already briefed the merits of the issues that remain to be decided in this case and only limited briefing is necessary to address the impact of the Supreme Court's decision on the central legal issues, petitioners' request for 50,000-word supplemental briefs on remand is plainly excessive and not justified.

B. The Supreme Court's Mandate Does Not Open the Door to Never-Before Raised "As-Applied" Challenges or Justify Expansive Elaboration of "As-Applied" Challenges Already Raised.

While petitioners essentially admit that little, if any, additional briefing is required for the issues already briefed, petitioners assert that 50,000-word supplemental briefs are needed to permit them to elaborate on "as-applied" challenges to the Transport Rule identified by the Supreme Court's decision. Any as-applied challenges to the Rule were required to be raised in petitioners' opening briefs and therefore do not require extensive supplemental briefing. To the extent petitioners' as-applied arguments were not raised in petitioners' opening briefs, the issues are waived and petitioners should be precluded from raising them now. Petitioners have already had ample opportunity to brief their challenges to the Rule

and should be precluded from using supplemental briefing on remand to raise new issues and arguments that were not properly preserved in their opening briefs.

The Supreme Court's observation that states may have as-applied challenges to certain aspects of the Rule, *see EME Homer City*, 134 S. Ct. at 1599 n.12, 1609, does not entitle petitioners to raise such challenges anew, where they failed to raise them in their initial merits briefs in this case. The Supreme Court's mandate neither creates new causes of action nor requires the Court to decide issues that were not preserved. Rather, the Supreme Court simply recognized that its ruling in EPA's favor on broad statutory issues did not preclude further consideration by this Court of petitioners' more specific as-applied challenges, to the extent those challenges were properly raised and preserved below. Moreover, the Court should disregard petitioners' attempt to misconstrue the statements by EPA counsel at oral argument before the Supreme Court. The Deputy Solicitor General's argument on behalf of EPA observed that any state with "a *properly preserved* challenge to the effect that it is actually likely to be subject to overcontrol" could be heard by the court of appeals. *EME Homer City*, No. 12-1182, Tr. of Oral Argument at 29 (emphasis added). Neither the Supreme Court's acknowledgment that its decision does not preclude properly preserved as-applied challenges nor the Deputy Solicitor's statements at oral argument entitle petitioners to raise new as-applied challenges on remand.

Furthermore, nothing in the Supreme Court's holdings alters the scope of as-applied challenges that were available at the time of the initial briefing on the merits. Petitioners could not be sure, when writing their opening briefs, that the court would agree with their arguments that the Transport Rule exceeded EPA's statutory authority under the Clean Air Act's "good neighbor" and FIP provisions. Therefore, petitioners would have had to raise any other bases for challenging the Rule, including their as-applied challenges, at the same time.[5] The Supreme Court's opinion did not change the legal landscape such that petitioners have claims now that did not exist when they filed their opening briefs. As such, any supplemental briefing on remand should be limited to the effect, if any, of the Supreme Court's opinion on properly preserved as-applied challenges, which were already briefed.

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[5] In this connection, it bears noting that in both *Michigan v. EPA*, and *North Carolina v. EPA*, two earlier cases relating to EPA rules issued pursuant to the "good neighbor" provision, petitioners raised and this Court decided state-specific "as-applied" challenges to the rules. In *Michigan*, 213 F.3d 663, 681-85 (D.C. Cir. 2000), the Court held that Wisconsin and parts of Georgia and Missouri were improperly included in the NOx SIP Call and rejected arguments that South Carolina was improperly included. In *North Carolina*, 531 F.3d 896, 923-28 (D.C. Cir. 2008), the Court rejected arguments that EPA erred in including all or parts of Texas, Florida and Minnesota in CAIR, and ultimately remanded EPA's decision to include Minnesota. These cases demonstrate that petitioners here could have brought state-specific challenges to EPA's methodology (which was fundamentally the same in all three rules) in their original briefing in this case.

In their motion to govern, Industry petitioners state that their supplemental brief would address whether the Transport Rule requires emissions reductions from a state that are unnecessary to achieve attainment and maintenance in every downwind state or would drive its contribution to every downwind state below 1% of the relevant NAAQS. As an initial matter, petitioners' characterization of this issue as being limited to the *remedy* for EPA's failure to adhere to statutory limits is incorrect because it assumes the Supreme Court decided this issue when it did not. *See* Industry Mot. at 7. The Supreme Court expressly noted petitioners' claims that the Rule results in unnecessary overcontrol or requires states to reduce their emissions below the one-percent threshold for inclusion in the Rule were "contested" and declined to reach those questions. *EME Homer City*, 134 S. Ct. at 1609. Nevertheless, these issues could and should have been raised in petitioners' opening briefs and thus petitioners are not entitled to extensive supplemental briefing to "elaborate" on these challenges. *Cf. U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) (concluding that a "party's failure to pursue one of several available lines of argument is hardly an 'error' of the sort that would warrant" an exception to applying waiver). Indeed, Luminant Corporation's opposition to EPA's motion to govern (No. 11-1302, ECF No. 1501970 at 8 (filed July 10, 2014)), asserts that Industry petitioners' opening brief did raise as-applied challenges that EPA's rule "overcontrolled" in some areas,

evidencing that petitioners were aware such claims were available even before the Supreme Court's decision in *EME Homer City*.

Industry petitioners also contend that this Court must decide on remand "whether EPA required upwind States to reduce emissions compensate for downwind State emissions that caused NAAQS to be exceeded." Industry Mot. at 5. Contrary to petitioners' argument, this issue was part of this Court's holding that the Clean Air Act required EPA to consider exclusively each upwind State's physically proportionate responsibility for each downwind air quality problem in determining its good neighbor obligations, *EME Homer City*, 696 F.3d at 26-27, which the Supreme Court reversed, *EME Homer City*, 134 S. Ct. at 1610. Petitioners should not be permitted to re-litigate this issue on remand. In any event, petitioners fully briefed this issue in their opening briefs in this Court and therefore petitioners' desire to re-brief this issue does not justify lengthy supplemental briefs.

For their part, the State petitioners mischaracterize both the scope and significance of the "as-applied" challenges the Supreme Court left open on remand. In addition to the alleged "overcontrol" and "one percent threshold" issues Industry petitioners seek to pursue, State petitioners assert that the Supreme Court's decision authorizes states to bring "as-applied" challenges to three additional categories of issues: (1) the legality of EPA's Transport Rule FIPs that

are based on linkages to so-called "maintenance areas"; (2) FIPs intended to abate significant contributions to nonattainment that are based on linkages to areas designated as "attainment" or "unclassifiable"; and (3) FIPs based on invalid disapprovals or that were promulgated at the same time that SIPs were disapproved. States Mot. at 4-5. The first two issues, purporting to relate to linkages to maintenance areas and attainment/unclassifiable areas, have nothing to do with the "as-applied" challenges noted by the Supreme Court or the FIP issues the Supreme Court declined to consider. Either these issues were already raised in petitioners' opening briefs, or they are waived and petitioners are precluded from raising them now. In either case, these issues do not justify lengthy supplemental briefs.

Only the third set of "as-applied" challenges the States wish to raise has anything to do with issues noted in the Supreme Court's opinion. *See EME Homer City*, 134 S. Ct. at 1597-98 n.11 & 1599 n.12. The separate challenges by Kansas and Georgia to EPA's disapprovals of their respective SIPs are not consolidated with this action, and EPA opposes consolidating them at this late stage of proceedings in this case. As explained in EPA's opposition to Kansas and Georgia's consolidation motion, filed on July 17, 2014 (No. 12-1019, 11-1427, ECF No. 1503099), it is unnecessary and impractical to consolidate those separate actions with the Transport Rule litigation. As to the States' issue of whether

EPA's decision to promulgate FIPs for states whose CAIR SIPs previously had been approved by EPA violates section 110(k)(6) of the Clean Air Act, 42 U.S.C. § 7410(k)(6), State petitioners acknowledge that this issue was already briefed and submit that briefing on remand "would be limited to referencing relevant portions of previously-filed briefs and explaining how those issues are impacted by the Supreme Court's decision or other intervening legal developments." States Mot. at 6. Accordingly, the presence of this issue on remand does not justify the expansive word limits proposed by petitioners.

C. The Court Should Deny the Motions Filed by Ames, Louisiana, Texas, and Wisconsin to File Separate Briefs.

In addition to the joint motions to govern filed by State and Industry petitioners, the City of Ames, Iowa and the States of Louisiana, Texas, and Wisconsin filed separate motions requesting leave to file four separate opening and reply briefs, in addition to the joint briefs that would be filed by Industry and State petitioners (these separate state/local government-specific briefs make up 17,000 of the 50,000 words petitioners collectively request for supplemental opening briefs and 11,500 of the 25,500 words requested for the supplemental reply briefs). *See supra* n.4. These briefs would address a collection of ill-defined issues that petitioners claim are specific to each state or local government and purportedly "arise out" of the Supreme Court's decision in *EME Homer City*. These petitioners

fail to demonstrate why four additional sets of briefs are required to brief the remaining issues in this case and therefore their requests should be denied.

For the reasons already explained, any supplemental briefing should be limited to how the Supreme Court's decision affects issues properly raised and preserved at the merits briefing stage. Ames, Louisiana, and Wisconsin fail to explain how the state/local government-specific issues they wish to raise either are among the issues previously presented to this Court but not decided or "arise out" of the Supreme Court's decision in *EME Homer City*. Indeed, Louisiana and Wisconsin's motions essentially concede that the specific issues they would raise in their separate briefs were not addressed in the opening briefs previously submitted to the Court. *See* Louisiana Mot. at 2-3; Wisconsin Mot. at 2. And, Ames's motion does not provide *any* detailed explanation of the as-applied challenge for which Ames seeks a separate brief or whether its as-applied challenge was properly preserved. *See* Ames Mot. at 2.

As to the Texas petitioners, they merely state that they intend to raise issues "based on points that the petitioners have already asserted but that require state-specific, record-intensive elaboration." Texas Mot. at 4. Thus, Texas is simply asking again for the relief previously denied when the Court denied petitioners' motion for bifurcated briefing. The Texas petitioners' generic assertion would be insufficient to justify their request for an additional opening brief of 5,000 words

and a reply brief of 4,000 words (on top of Industry and State petitioners' already inflated requests for *two* 14,000-word opening and 7,000-word reply briefs) under ordinary circumstances. Texas's justification for an additional 9,000 words is particularly lacking here where the issues remaining in this case have already been briefed and supplemental briefing should be limited to the impact of the Supreme Court's decision on only a few of those issues.

Further, these petitioners fail to demonstrate why the issues they wish to raise cannot be addressed in a reasonable-length, joint supplemental brief by all state and local government petitioners, in accordance with this Court's practice. *See D.C. Circuit Handbook of Practices and Internal Procedures* at 37 (Nov. 2013) ("Parties with common interests in consolidated or joint appeals must join in a single brief where feasible."). That an issue may be particular to a single state or local government or rely on facts specific to that entity does not preclude presentation of the issue in a joint brief, and the Court frequently orders state and local government petitioners to consolidate their arguments into a single brief, as it did for the merits briefing in this case. *See* No. 11-1302, Order (ECF No. 1353334) (Jan. 18, 2012). Typically, a party may avoid this Court's requirement for consolidated briefing only upon a specific showing that its interests so substantially diverge from other petitioners that it would be unfair to require the

parties to file a consolidated brief. The motions by Ames, Louisiana, Texas, and Wisconsin lack such a showing.

Because Ames, Louisiana, Texas, and Wisconsin fail to justify the additional separate briefs they wish to file, their motions should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny petitioners motions to govern and grant EPA's motion to govern.

DATED: July 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Consolidated Opposition To Petitioners' Motions To Govern Future Proceedings, were served this 17th day of July, 2014, on all registered counsel, through the Court's CM/ECF system.

/s/ *Jessica O'Donnell*
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