ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

RESPONDENT INTERVENORS' JOINT CONSOLIDATED RESPONSE TO ALL PENDING MOTIONS BY PETITIONERS TO GOVERN FUTURE PROCEEDINGS

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Respondent State and City Intervenors, [1] Public Health Intervenors,[2] and Industry Intervenors[3] (collectively "Respondent Intervenors") hereby provide a joint response to the pending motions to govern future proceedings filed by the various Petitioners in the instant case.[4] In the interest of judicial economy, and because most of the pending Petitioners' motions to govern further proceedings raise common issues, the Respondent Intervenors are providing a consolidated response to all pending motions filed by Petitioners. The Public Health Intervenors and Industry Intervenors previously joined Respondent Environmental Protection Agency's ("EPA") Motion to Govern Future Proceedings (*See* EPA's Motion to Govern Future Proceedings at 3 nn.2 & 3, No. 11-1302 (D.C. Cir. July 3, 2014)). Respondent State and City Intervenors did not join in EPA's Motion, but as stated

[1] Respondent States and City Intervenors are: the States of Connecticut, Delaware, Illinois, Maryland, New York, North Carolina, Rhode Island, and Vermont; the Commonwealth of Massachusetts; the District of Columbia and the Cities of Baltimore, MD; Bridgeport, CT; Chicago, IL; New York, NY; and Philadelphia, PA.

[2] Respondent Public Health Intervenors are: the American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club.

[3] Respondent Industry Intervenors are Calpine Corp. and Exelon Corp.

[4] Respondent Intervenors hereby respond to motions to govern proceedings filed by: Industry/Labor Petitioners; State and Local Petitioners; State of Wisconsin, *et al.*; State of Texas, *et al.*; State of Louisiana, *et al.*; and the City of Ames, Iowa (collectively, "Petitioners").

below, fully support that motion as the most reasonable and efficient way to proceed on remand.

In short, Petitioners' motions, which envision some six (or more) separate merits briefs, six (or more) replies and consolidation of two separate and distinct cases, are excessive, unnecessary, and prejudicial to Respondent Intervenors and the other parties. Rather, this Court should proceed with the framework laid out in EPA's Motion, which will best lead to an efficient resolution of any remaining issues properly pending before this Court.

1. In Light Of The Supreme Court's Holding, Only Limited Additional Briefing Is Appropriate.

In their motions to govern, several of the Petitioners mischaracterize what the Supreme Court in *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014), held or did not hold regarding the Transport Rule. The instant motions are not the proper place to litigate these issues, which should be presented in the limited briefing proposed in EPA's motion to govern further proceedings. However, given that Petitioners seek to use their characterizations to support their call for extensive briefing on remand, Respondent Intervenors provide a brief response to several of those points.

The Supreme Court only specifically mentioned one issue as appropriate for remand in this case, namely challenges to EPA's disapprovals of previously

approved state implementation plans ("SIPs"). *See id.* at 1599 n.12. On the issue of "as applied" challenges, upon which Petitioners' requests for extensive briefing primarily rest, the Court explained that a petitioner could bring an "as applied" challenge in the *hypothetical* circumstances where EPA mandated state reductions "by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked" or that were at odds with the one percent threshold. *Id.* at 1608 (emphasis in original). The Supreme Court did not authorize any challenges on remand of this case that were not properly preserved below and any argument to the contrary should be rejected.

2. Petitioners' Proposed Additional Briefing Is Excessive And Unnecessary For Efficient Resolution Of The Case.

Petitioners propose some six or more separate briefs, totaling 45,000 words, supplemented by an additional 25,500 total words in reply. This is in addition to the 28,000 words in the briefs already filed by these parties in the case, and not including the intervenor briefs, amici briefs, and replies. In their various motions, Petitioners propose merits and reply briefs by: 1) Industry/Labor Petitioners (including potentially separate "as applied" briefs by some of their members, (Industry/Labor Pet'rs Motion to Govern Proceedings on Remand at 8-9, No. 11-1302 (D.C. Cir. July 3, 2014)); 2) State and Local Petitioners; 3) Texas and related

parties; 4) Wisconsin and related parties; 5) Louisiana and related parties; and 6) the City of Ames, Iowa.[5]

Such extraordinarily lengthy and complicated supplemental briefing is excessive and wholly unnecessary to move this case toward prompt resolution. Indeed, it would dwarf the initial briefing in the case *after* the issues have been narrowed considerably by the Supreme Court. In fact, Petitioners' proposal would revise and even exceed their initial proposal for the original briefing which this Court rejected. There they sought two rounds of briefing, the first on "over-arching" issues and the second on more party-specific arguments. *See, e.g.*, Pet'rs Proposed Briefing Format and Schedule at 3- 9-11 and Exs. 4 & 5, No. 11-1302 (D.C. Cir. Jan. 17, 2012). In rejecting that proposal, this Court recognized then, as it should now, that Petitioners must make their arguments in a concise manner that does not inject unnecessary complexity and delay into the case. *See* Order, No. 11-1302 (D.C. Cir. Jan. 18, 2012).[6] Petitioners are seeking a second bite at the apple and to obtain briefing this Court initially rejected.

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[5] Notably, Petitioners have not specifically requested oral argument for their supplemental briefing, and Respondent Intervenors do not believe any such oral argument is necessary since Petitioners had full opportunity to be heard on their issues before this Court.

[6] The delay concern is as important now. When the Court previously denied extensive briefing, it noted that such briefing was not appropriate while a stay remains in place. Pet'rs Proposed Briefing Format and Schedule at 3, 9-11, Exs. 4

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Such extensive supplemental briefing is wholly unnecessary and inappropriate. This Court required Petitioners to raise all their issues properly preserved for appeal in their merits briefs. The parties thereafter filed extensive merits briefs, responses and replies. Hence, any issues that were properly raised have been extensively briefed, supplemented by three hours of oral argument. By contrast, none of petitioners' merits briefs to this Court presented arguments regarding Louisiana or Ames, Iowa and contained only a passing reference to the impact of the Transport Rule on Wisconsin. *See* State and Local Pet'rs Reply Br. at 16, No. 11-1302 (D.C. Cir. Mar. 12, 2012) (parenthetical citing to comment submitted by Wisconsin).

The only issues properly on remand are those that were briefed by the Petitioners but not decided by this Court. Petitioners describe their view of these issues in their motions. *See* Industry/Labor Pet'rs Motion to Govern Proceedings on Remand at 6; State and Local Pet'rs Motion to Govern Proceedings on Remand at 3-4, No. 11-1302 (D.C. Cir. July 3, 2014) (listing allegedly unresolved issues). But this Court should not allow the Petitioners on remand to raise or brief any issues that were not initially briefed pursuant to this Court's 2012 briefing order,

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& 5. As noted below, at least some of the Petitioners intend to oppose EPA's current motion to lift the stay.

i.e. "new" issues. Moreover, any such supplemental briefing should be just that, supplemental, and limited to how the Supreme Court ruling impacts those pending and undecided issues that have already been briefed.

Therefore, on remand, Petitioners should be allowed to file supplemental briefs only on the effect of the Supreme Court's decision on their arguments about EPA's disapproval of prior approved SIPs as well as its effect on any "as applied" challenges, *but only if the challenges were properly raised and briefed initially before this Court*.[7] The Supreme Court's statement on "as applied" briefing is not an open invitation for Petitioners to raise new issues in this matter that have not been briefed before. Moreover, the briefing should be limited to indexing or directing the Court as to where Petitioners raised those issues to assist the Court in resolving the pending matters and to how the Supreme Court's opinion impacts those pending, briefed issues.[8] Beyond this limited scope, the Court should not

[7] Although Petitioners cite the Supreme Court transcript as a basis for extensive briefing of their "as applied" challenges, the United States made clear its position that any "as applied" challenges be limited to those which had been "properly preserved" for this Court. Tr. of Oral Arg. at 29, *EPA v. EME Homer City Generation*, 134 S. Ct. 1584 (2014) (D.C. Cir. No. 12-1182).

[8] Notably, Petitioner Luminant, in its Response in Opposition to EPA's Motion to Govern Future Proceedings, goes to great lengths describing the many issues that have already been briefed and thus are not "new." *See* Luminant's Response In Opposition to EPA's Motion to Govern Future Proceedings at 6-9, No. 11-1302 (D.C. Cir. July 10, 2014). If these issues have all been briefed, there is no reason

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allow new briefing on issues not raised previously before this Court as these would inject new matters into the litigation.

3. EPA's Proposal Provides The Most Reasonable Framework For Further Proceedings.

For the reasons stated above, EPA's proposal provides the most efficient and reasonable way to resolve any remaining issues in the litigation: supplemental briefing limited to the effect of the Supreme Court's decision on the issues already raised by Petitioners in their merits briefs but left unresolved by this Court's opinion.[9] Moreover, the Petitioners should identify the properly preserved issues they believe remain to be decided, with citations to the pages in their prior briefs where those issues are addressed. EPA Motion to Govern Future Proceedings at 10-11.

Respondent Intervenors agree with the timing and page limits set forth by the EPA, as these should provide a reasonable amount of supplemental briefing in a time period that would allow the Court to promptly resolve the matter. EPA's page limit proposal recognizes the ratio of words generally provided by this Court's rules for briefs by petitioners, respondents and intervenors (*e.g.* one half

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to allow further "elaboration" on them in the guise of an "as applied" action.

[9] Industry Respondents continue to believe that no further briefing is needed, beyond perhaps an indexing of the claims Petitioners' believe remain properly

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the usual 14,000 words cumulatively for petitioner and respondents and 8,750 words for intervenors). Any such briefing ordered by the Court, at minimum, should preserve these ratios.

4. Consolidation Would Delay Resolution Of This Case And Unfairly Prejudice Respondent Intervenors

Respondent Intervenors strongly object to the proposal by State Petitioners to consolidate related but separate challenges by Georgia and Kansas. State and Local Pet'rs Motion to Govern Proceedings on Remand at 4-5. Although the Supreme Court recognized that these appeals were pending in other actions, *EPA v. EME Homer City Generation*, 134 S. Ct. at 1598 n.11, it did not direct or even suggest that this Court hear those cases on remand in this matter. Such consolidation would introduce new issues and records into this litigation, long after the parties have litigated the record and issues raised by the Transport Rule. Indeed, State and Local Petitioners plainly acknowledge that these challenges have not been briefed at all and would require full briefing if consolidated in the remand. *Id*. at 1596.

Such consolidation would also unjustly delay prompt resolution of this matter. Industry/Labor Petitioners have already stated in their motion to govern that they will oppose EPA's motion to lift the stay issued by this Court in

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pending, as EPA has suggested. Nevertheless, they support EPA's motion in full.

December 2011. Industry/Labor Pet'rs Motion to Govern Proceedings on Remand at 6 n.5. Such opposition (which may well be joined by State and Local Petitioners) lends further reason to reject Petitioners' motions, including the motion for consolidation, as they could significantly prolong final resolution of the matter, especially if the Petitioners would also seek oral argument on the consolidated cases or any other issues they raise. Indeed, resolution of these appeals is not a necessary prerequisite to reinstitution of the Transport Rule. Kansas and Georgia are free to litigate their issues before the appropriate tribunals but should not use their separate lawsuits as a means to further delay implementation of the Transport Rule for all. As explained by Respondent Public Heath Intervenors in their response to EPA's motion to lift the stay (Response of Public Health Intervenors to Respondents' Motion to Lift the Stay Entered on December 30, 2011 Combined with Motion for Alternative Relief at 4-8, No. 11-1302 (D.C. Cir. July 11, 2014)), further delays in implementing the Transport Rule will likely cause harm to public health.

Further, were the cases consolidated, Respondent Intervenors would need to spend considerable additional time and resources reviewing the new records and briefing these matters.[10] Such a requirement of additional resources, beyond the

[10] Even if respondents ultimately decided not to brief these new matters, they

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limited scope briefing proposed by EPA, would prejudice Respondent Intervenors. Thus, consolidation would neither be fair nor warranted.

5. Conclusion

For the reasons stated above this Court should order further proceedings on remand to follow the framework proposed by EPA for scope, timing and word limits. It should reject each of the Petitioners' motions.

The counsel listed below have authorized James W. Rubin, counsel for Calpine Corp., to sign and file this response on their behalf.

July 17, 2014

Respectfully submitted,

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would still expend considerable time reviewing the record and briefs to make a determination as to whether to file a response.

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CERTIFICATE OF SERVICE

I, James W. Rubin, a member of the Bar of this Court, hereby certify that on July 17, 2014, I electronically filed the foregoing "Respondent Intervenors' Joint Consolidated Response To All Pending Motions By Petitioners To Govern Future Proceedings" with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ James W. Rubin
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