ARGUED APRIL 13, 2012
DECIDED AUGUST 21, 2012
No. 11-1302 (and consolidated cases) (COMPLEX)

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

EME Homer City Generation, L.P., et al.
Petitioners,
v.

United States Environmental Protection Agency, et al.,
Respondents,

On Petition for Review of an Action of the
United States Environmental Protection Agency

ENVIRONMENTAL COMMITTEE OF THE FLORIDA ELECTRIC POWER COORDINATING GROUP'S RESPONSE IN OPPOSITION TO EPA'S MOTION TO GOVERN FUTURE PROCEEDINGS

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Dated: July 17, 2014

INTRODUCTION

The Environmental Committee of the Florida Electric Power Coordinating Group, Inc. ("FCG-EC") joins and incorporates by reference the Luminant Petitioners' Response in Opposition to the U.S. Environmental Protection Agency's ("EPA") Motion to Govern Future Proceedings filed on July 10, 2014. *See* Document# 1501970. As Luminant rightly states in its Response, restricting the Industry/Labor Petitioners to a 3,500-word initial brief would not allow for meaningful review of the substantial questions left for this Court to decide. In particular, while this Court may rely substantially on prior papers to address previously briefed – but unresolved – facial challenges, the as-applied challenges specifically contemplated by the U.S. Supreme Court merit more significant supplemental briefing. Florida's circumstance presents a prime example of the need for such supplemental briefing. Thus, in contrast to EPA's request, the Industry/Labor Petitioners' request for a 14,000-word initial brief and 7,000-word reply brief is both appropriate and necessary in light of the U.S. Supreme Court decision.

ARGUMENT

Contrary to EPA's contention, the U.S. Supreme Court's ruling did not reduce this case to mere "procedural and technical issues." EPA Mot. 7–8. Rather, the U.S. Supreme Court expressly "*agree[d]*" with two of this Court's holdings regarding the statutory limits on EPA's authority under the Clean Air Act's "Good Neighbor Provision," and only disagreed that a violation of those limits required invalidation of the entire rule.[1] *EPA v. EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1608-1609 (2014) (emphasis added). The U.S. Supreme Court instead held that such violations may be remedied through as-applied challenges, explaining that an upwind "State may bring a particularized, as-applied challenge to the Transport Rule" if it "has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attainment" – the latter being referred to as "over-control." *Id.*

The Industry/Labor Petitioners have previously raised and preserved for challenge allegations that EPA exceeded its Good-Neighbor authority by imposing overly-restrictive emission budgets on upwind States that were linked exclusively to

[1] As Luminant points out, EPA's representation at oral argument before the U.S. Supreme Court was that as-applied challenges could be considered by this Court on remand. *See* Transcript of Oral Argument at 27–28, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (No. 12-1182); Luminant Resp. 4-5; n. 2.

downwind locations that would have achieved attainment at higher emission levels.[2] *See* Luminant Resp. 6-8. However, given the number of parties, issues raised, and applicable word limits, these "as-applied" examples of EPA's violation of its Good-Neighbor authority could only be allocated minimal space in prior briefs.

Florida's treatment in the prior briefs is an example of this abbreviated approach. In prior briefs, Industry/Labor Petitioners were limited to summarizing Florida's as-applied example of over-control in a few sentences. *See* Industry/Labor D.C. Cir. Br. 46 & n. 29; Industry/Labor D.C. Cir. Reply 19–20 & n.10. Yet Florida's as-applied concerns are significant, and are precisely the type of as-applied challenge contemplated by the U.S. Supreme Court. Specifically, EPA's own modeling shows that the two downwind maintenance receptors that are the *sole* basis for Florida's inclusion in the Cross-State Air Pollution Rule ("CSAPR")[3] have no air quality maintenance issues by 2014 without *any* emission reductions from CSAPR, or the rule it is intended to replace, the Clean Air Interstate Rule. *Id.* Despite the fact that these receptors do not need CSAPR's help, EPA nevertheless requires Florida to reduce

[2] Furthermore, the FCG-EC agrees with Luminant that further briefing on as-applied challenges should not be limited to only those examples that Industry/Labor Petitioners mentioned within the word limits of their prior briefs. If other states can demonstrate as-applied challenges under the same theories that have been advanced throughout this litigation and as specifically identified by the U.S. Supreme Court, they have a right to be heard as well.

[3] Both maintenance receptors are located in the Houston area, which has a 2019 deadline to comply with the relevant ozone standard. *See* Industry/Labor D.C. Cir. Br. 46 & n. 29.

emissions by one-third from a projected 2012 baseline of 42,000 tons to a limit of 27,825 tons. *See* 76 Fed. Reg. 48,208; 48,250; 48,262-63 (Aug. 8, 2011). Thus, EPA has overstepped its Good-Neighbor authority as applied to Florida. *EME Homer*, 134 S.Ct. at 1608 ("If EPA requires an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind state to which it is linked, the Agency will have overstepped its authority.").

Supplemental briefing on this and other as-applied challenges would benefit the Court's adjudication of these issues. Overly restrictive limits on briefing would provide only piecemeal information, making the Court's work harder, not easier. It would, for example, deprive the Court of background and explanation regarding Florida's downwind linkages and the associated state-specific and program-wide emission reductions required by CSAPR. Concerns such as these should not be relegated to a few sentences, and footnotes.

EPA's restrictive supplemental briefing proposal would be equally unfair to State and Local Petitioners, who also have legitimate unresolved issues to present to this Court. This includes, among other things, the need to explain how the U.S. Supreme Court's ruling and any other intervening legal developments affect the "interfere-with-maintenance and section 110(k)(6) issues" previously briefed by the State and Local Petitioners. *See* State and Local Petitioners' Mot. 6. This Court's

ruling on those issues will directly and significantly affect Florida,[4] and this Court should ensure that they are afforded the necessary supplemental briefing to be adequately addressed and adjudicated. EPA's requested supplemental briefing limits would prevent this. In contrast, the State and Local Petitioners' Motion to Govern Proceedings on Remand from the Supreme Court proposes reasonable word limits and should be granted.

CONCLUSION

Accordingly, in light of the U.S. Supreme Court's decision, the number and variety of parties involved, and the nature of the issues to be resolved, the Court should allocate to the Industry/Labor Petitioners a 14,000-word initial brief and 7,000-word reply brief to address as-applied challenges (such as Florida's) and any impacts from the U.S. Supreme Court's decision on issues that were previously briefed but unresolved by this Court. EPA's competing proposal to limit Industry/Labor Petitioners to a 3,500-word initial brief and a 1,750-word reply brief is insufficient to address these issues and would only make this Court's review and adjudication more difficult.

[4] Florida is one of the states whose approved state implementation plan for the Clean Air Interstate Rule was retroactively disapproved under section 110(k)(6) and is also only included in CSAPR under the interfere-with-maintenance prong of Clean Air Act section 110(a)(2)(D)(i)(I).

For all the reasons stated above, this Court should deny EPA's Motion to Govern Future Proceedings and grant the Industry/Labor Petitioners' and State and Local Petitioners' Motions to Govern Future Proceedings as filed on July 3, 2014.

Respectfully submitted,

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Dated: July 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I caused the foregoing Response in Opposition to EPA's Motion to Govern Proceedings to be served on all those registered counsel through the Court's CM/ECF system.

/s/ Joseph A. Brown
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