

ORAL ARGUMENT HELD APRIL 13, 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

**RESPONSE OF THE STATE OF LOUISIANA, THE LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY, AND THE
LOUISIANA PUBLIC SERVICE COMMISSION IN OPPOSITION TO
EPA'S MOTION TO GOVERN FUTURE PROCEEDINGS**

Petitioners, the State of Louisiana, the Louisiana Department of Environmental Quality, and the Louisiana Public Service Commission (collectively “State of Louisiana”), submit this response to EPA’s motion to govern future proceedings [Doc. #1500830]. The State of Louisiana joins in “Luminant’s Response in Opposition to EPA’s Motion to Govern Future Proceedings” [Doc. # 1501970], and the joint “Response of State And Local Petitioners to EPA’s Motion To Govern Proceedings” [Doc. # 1503207], as well as the various arguments advanced by the City of Ames, Iowa and the States of Texas and Wisconsin in

response to EPA's motion to govern future proceedings. In addition, without repeating the background or arguments contained in those responses, the State of Louisiana provides the following response to EPA's motion to govern future proceedings.

The State of Louisiana agrees with the universal contentions of the other parties, including EPA, that further briefing is necessary and also agrees that EPA's proposed briefing schedule is acceptable; however, the State of Louisiana strongly disagrees with EPA's proposal to limit such briefing to a single brief of no more than 3,500 words for all Petitioners. Instead, the State of Louisiana urges this Court to allow Louisiana to file an abbreviated short brief of not more than 4,000 words directed specifically to Louisiana "over control" and other "as-applied" challenges, and a reply brief of not more than 3,000 words, in addition to the consolidated joint brief the State and Local Petitioners (including Louisiana) will file directed to other common issues.

The Supreme Court agreed with this Court that the Clean Air Act ("CAA") precludes EPA from requiring reductions in upwind state emissions that are more than necessary to eliminate significant contributions to nonattainment.¹ The Supreme Court exemplified this type of "over control" by stating that "EPA cannot require a State to reduce its output of pollution by more than is necessary to

¹ *EPA v. EME Homer City*, 134 S.Ct. 1584, 1608 (2014).

achieve attainment in every downwind State or at odds with the one-percent threshold the Agency has set.”² In other words, the Supreme Court on its own volition directed the consideration of the following “over control” issues in light of its opinion: 1) whether the emission reduction obligations EPA imposed on Louisiana were greater than necessary to achieve downwind attainment in the areas to which Louisiana is linked; and 2) whether the emission reduction obligations EPA imposed on Louisiana drove Louisiana contribution to downwind nonattainment below the 1% “insignificance” threshold. Louisiana believes it falls into both of these categories and must be allowed to brief these issues to this Court just as the Supreme Court has mandated.

The Supreme Court also recognized that, in addition to any particularized “over control” challenges a State may bring, a State may bring “any other as-applied challenges it may have.”³ The State of Louisiana has already raised and properly preserved a number of “as-applied” challenges to EPA’s Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (“the Transport Rule”) not only through the general briefing in the joint State and Local Petitioners’ Opening Brief [Doc. #1357570], but also in the State of Louisiana’s Statement of Issues [Doc. #1341643], and its Motion for a Stay, or, in the Alternative, for Expedited Review

² *Id.*

³ *Id.* at 1609.

[Doc. #1334498].⁴ Many of the challenges raised by the State of Louisiana were not decided by this Court or the Supreme Court. In addition to other “cross-cutting” challenges of a legal nature common to the State and Local Petitioners to be addressed in the proposed joint brief, Louisiana’s specific challenges preserved for decision on remand include:

1. Whether EPA’s development of Louisiana’s emissions budget through reliance on significant erroneous facts and assumptions regarding the Louisiana transmission grid and its electric generators was arbitrary, capricious, an abuse of discretion, or otherwise unlawful under the CAA;⁵
2. Whether EPA’s use of 2005 emissions data to project baseline emissions instead of using actual 2010 emissions data to determine baseline, thereby excluding certain legally enforceable emissions reductions from its calculations, was arbitrary, capricious, an abuse of discretion, or otherwise unlawful under the CAA;⁶
3. Whether EPA’s inclusion of Louisiana in CSAPR was arbitrary, capricious, an abuse of discretion, or otherwise unlawful;⁷
4. Whether CSAPR is arbitrary and capricious because the EPA model does not take into account significant intrastate and interstate transmission constraints and the unrealistic level of power imports from out of state EGUs to meet loads within Louisiana;⁸

⁴ The State of Louisiana has also raised these issues in its Petition for Reconsideration and Request for Immediate Stay of the Cross-State Air Pollution Rule filed in the Environmental Protection Agency, Docket No. EPA-HQ-OAR-2009-0491, but EPA has not yet acted on that petition.

⁵ Petitioners’ Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 11-15; Louisiana’s Nonbinding Statement of Issues [Doc. #1341643], p. 2.

⁶ Petitioners’ Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 7-9; Louisiana’s Nonbinding Statement of Issues [Doc. #1341643], p. 2.

⁷ Petitioners’ Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 7-9; Louisiana’s Nonbinding Statement of Issues [Doc. #1341643], p. 2; State and Local Petitioners’ Opening Brief [Doc. #1357570], pp. 16, 44-52, 54.

⁸ Petitioners’ Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 12-14; Louisiana’s Nonbinding Statement of Issues [Doc. #1341643], p. 2.

5. Whether CSAPR is arbitrary and capricious because the EPA model of Louisiana's power markets is deficient, in error, and does not recognize the unique nature of older Louisiana EGUs that are used to meet system reliability requirements;⁹ and
6. Whether CSAPR is arbitrary and capricious as applied to Louisiana because it includes incorrect assumptions about the current and anticipated operations status of certain units, as well as their historic operating efficiencies.¹⁰

Through raising these issues, the State of Louisiana clearly demonstrated the desire and need to brief the invalidity of the Transport Rule "as-applied" to the State of Louisiana. Moreover, these issues fall squarely within the Supreme Court's mandate that this Court consider any "over control" and other "as-applied" challenges a State may bring.¹¹

Despite the Supreme Court's directive, EPA attempts to restrict the State and Local Petitioners' preservation of issues to those issues addressed in the joint opening brief, suggesting that the waiver doctrine so restricts challenges in this Circuit. However, the cases cited by EPA are inapposite because in those cases the waived arguments were not raised *in any court or administrative agency* until *after* the filing of the opening brief in this Circuit. Simply put, the cases cited by EPA

⁹ Petitioners' Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 14-15; Louisiana's Nonbinding Statement of Issues [Doc. #1341643], p. 2.

¹⁰ Petitioners' Motion for a Stay, or, in the Alternative, For Expedited Review [Doc. #1334498], pp. 12-14; Louisiana's Nonbinding Statement of Issues [Doc. #1341643], p. 2.

¹¹ *EPA v. EME Homer City*, 134 S.Ct. 1584, 1609 (2014).

stand for the proposition that “[A]n argument *first made* in a reply brief comes too late”¹² – a proposition plainly inapplicable here.

Contrary to the cases cited by EPA, in this case the State of Louisiana raised its “as-applied” challenges in the administrative proceeding below, specifically its Petition for Reconsideration and Request for Immediate Stay of the Cross-State Air Pollution Rule filed in Docket No. EPA-HQ-OAR-2009-0491, in the Petitioners’ Motion for a Stay, or, in the Alternative, For Expedited Review thereafter filed in this Court [Doc. #1334498], and in Louisiana’s Nonbinding Statement of Issues [Doc. #1341643] filed in this proceeding by order of the Court, in addition to raising the issues generally in the joint opening brief filed by the State and Local Petitioners. Quite simply, Louisiana’s “as-applied” challenges were not *first made* in this brief or some reply brief, but rather *made repeatedly* in the proceeding below and in this Court *before* the filing of the joint opening brief. This Court’s waiver principle has no application here.

In sum, whether the Transport Rule results in “over control” in Louisiana and more generally whether the Transport Rule is valid or invalid “as-applied” to the State of Louisiana is dependent on the methodology and facts specifically applied to the State of Louisiana. These issues cannot be decided within the context of the overarching issues already briefed and those to be briefed jointly.

¹² See, e.g., Benkelman Telephone Co. v. FCC, 220 F.3d 601, 607 n.10 (D.C. Cir. 2000). (Emphasis added).

The State of Louisiana preserved, but did not have the opportunity to fully brief, these issues as the U.S. Supreme Court recognized the Petitioners should have the right to do.¹³

Accordingly, the State of Louisiana requests that the Court allow it to file, simultaneously with the joint brief directed to common issues of the State and Local Petitioners, a supplemental brief of not more than 4,000 words directed specifically to the specific State of Louisiana issues relative to the “over-control” and other “as-applied” challenges that are not covered by the joint brief and a reply brief of not more than 3,000 words.

[Signatures on following page.]

¹³ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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