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 Petitions for Review of an Action of the
United States Environmental Protection Agency

RESPONSE OF STATE AND LOCAL PETITIONERS TO EPA'S MOTION TO GOVERN FUTURE PROCEEDINGS

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The State of Kansas and other State and Local Petitioners[1] (collectively "the State and Local Petitioners") respectfully respond to EPA's motion to govern future proceedings.

Background

In the briefing that preceded this Court's August 21, 2012 decision in this case, State and Local Petitioners presented a range of challenges to the Transport Rule that focused on the unlawfulness of EPA's decisions to impose federal implementation plans ("FIPs") regulating emissions from sources within those States. The briefing in this Court resulted in a judgment vacating all Transport Rule FIPs based on, *inter alia*, the invalidity of EPA's approach to defining what constitutes a "significant contribution to nonattainment" (hereinafter, the "significant contribution rule"). Of the issues briefed by State and Local Petitioners, this Court did not resolve a challenge to EPA's approach to defining what constitutes "interference with maintenance," a challenge to EPA's disapprovals of interstate transport state implementation plans ("SIPs") under section 110(k)(6) of the Clean Air Act, 42 U.S.C. § 7410(k)(6), and

[1] This group includes the petitioners listed at the end of this brief, as well as the City of Ames, Iowa; the State of Wisconsin; the State of Louisiana, the Louisiana Department of Environmental Quality, and the Louisiana Public Service Commission; and the State of Texas, the Public Utility Commission of Texas, the Railroad Commission of Texas, the Texas Commission on Environmental Quality, and the Texas General Land Office. These petitioners filed separate motions to govern future proceedings and are filing separate responses to EPA's motion to govern.

certain issues concerning EPA's failure to provide adequate public notice and meaningful opportunity for comment before promulgating the Transport Rule.

On review, the Supreme Court held that exercise of FIP rulemaking authority with respect to interstate transport requirements need only be preceded by an EPA notice of failure to submit an interstate transport SIP or by EPA disapproval of an interstate transport SIP. *EPA v. EME Homer City Generation, L.P.,* 134 S. Ct. 1584, at 1600 (2014). While disagreeing that EPA's significant contribution rule was facially invalid, the Supreme Court agreed with this Court that the Clean Air Act precluded EPA from requiring reductions in upwind state emissions that are "more than the amount necessary" to eliminate significant contributions to nonattainment. *Id.* at 1608.

It was in this setting that the Supreme Court held that "State[s] may bring … particularized, as-applied challenge[s] to the Transport Rule, along with any other as-applied challenges [they]…may have." *Id.* at 1609. Because Transport Rule emission reduction requirements are imposed by EPA through promulgation of FIPs, "as-applied" challenges are challenges to the emission-reduction obligations imposed by EPA in individual FIPs. With respect to the remand briefing in this Court, those as-applied challenges range from record-based "over-control" arguments, to the lawfulness of EPA's disapproval of interstate transport SIPs, to the validity of interstate transport FIPs issued at the same time as EPA SIP disapprovals. By recognizing that – in addition to record-based "over-control" challenges that "any

upwind State . . . may bring" – a State may bring "any other as-applied challenges it may have," *id.*, the Supreme Court's decision authorizes "as-applied" challenges based on, for example, the lawfulness of FIPs based on an upwind State's contributions to air quality in downwind State's maintenance area.

This response focuses on the State and Local Petitioners' Joint Brief proposed in their motion to govern. That Joint Brief would address (1) two unresolved issues (the challenge to EPA's interfere with maintenance approach and the section 110(k)(6) SIP disapprovals)[2], (2) EPA's actions disapproving the Kansas and Georgia SIPs, which are the subject of separate motions to consolidate (*see* Doc. No. 1500967 in No. 12-1019 (consolidated with No. 11-1333) and Doc. No. 1500969 in No. 11-1427), and (3) statutorily-based as-applied challenges to FIPs that flow logically from the SIP-disapproval and interference with maintenance arguments. As stated in their motion, State and Local Petitioners request a total limit of 14,000 words for the opening Joint Brief and 7,000 words for the corresponding joint reply brief.

Argument

The parties appear to agree on the need for supplemental briefing in light of the Supreme Court's decision in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), as well as the schedule for that briefing. But there is substantial

[2] In addition, "notice/opportunity-for-comment" issues remain unresolved. These issues would be submitted on the previously filed briefs. *See* Note 3 *infra* and Doc. No. 1500966, p. 6.

disagreement over the scope of that briefing. Specifically, EPA would have the Court allocate a mere 7,000 words for all opening briefs (or only 3,500 for State and Local Petitioners, if words are split evenly with Industry/Labor Petitioners). This meager allocation is insufficient to address the substantial issues that State and Local Petitioners have identified for briefing on remand.

As discussed in their motion to govern, the Joint Brief proposed by State and Local Petitioners would address the Kansas and Georgia SIP disapprovals, the impact of the Supreme Court's decision on issues previously briefed but not resolved by this Court, i.e., EPA's interfere with maintenance approach and section 110(k)(6) SIP disapprovals, and related as-applied legal challenges to individual FIPs. EPA's proposed word limit would effectively prevent State and Local Petitioners from obtaining review of the validity of individual FIPs under Clean Air Act § 307(b), 42 U.S.C. § 7607(b), a right that the Supreme Court explicitly held includes obtaining review of "any other as-applied challenges" that these States may have. *EME Homer City*, 134 S. Ct. at 1609.

EPA's "waiver" arguments lack merit and cannot justify its briefing proposal. To begin, there is no credible argument that State and Local Petitioners have waived any of the arguments they propose to present in the Joint Brief described in State and Local Petitioners' motion to govern. The section 110(k)(6) issue and the interfere with maintenance issue were raised in the original round of briefing and the State and Local Petitioners would only supplement their arguments on these issues in the Joint

Brief.[3] *See* State and Local Pet'rs' Opening Br. at 24-29 (addressing section 110(k)(6)); *id.* at 37-42 (addressing interfere with maintenance issue) (Doc. No. 1364206). The SIP-disapproval arguments that Georgia and Kansas would present have not been waived. Indeed, these States have not had *any opportunity* to brief *any arguments* related to these disapprovals. As explained more fully in the motions to consolidate filed by Kansas and Georgia, all proceedings were suspended in these cases on EPA's motion. *See* Doc. No. 1500967 in No. 12-1019 (consolidated with No. 11-1333) at4-5; Doc. No. 1500969 in No. 11-1427 at 4-5; *EME Homer City*, 134 S. Ct. at 1597 n.11. Most importantly, the Supreme Court's decision plainly contemplates further briefing on as-applied arguments that EPA exceeded its statutory authority with respect to particular States. As a result, even if the prudential waiver doctrine had been triggered by earlier actions of this Court, that waiver argument here would have to yield to the Supreme Court's clear mandate. *See* Luminant's Resp. in Opp'n to EPA's Mot. To Govern Future Proceedings at 6 n.3 (Doc. No. 1501970); *see* also State of Wisconsin's Opp'n to EPA's Mot. To Govern Future Proceedings at 3-6 (Doc. No. _____). Finally, we note that EPA can raise and brief whatever arguments it may have for limiting judicial scrutiny and agency accountability, including an argument relying on waiver theories, when it files its brief responding to State and Petitioners' Joint Brief.

[3] The unresolved "notice/opportunity-for-comment" issues would be submitted on the previous briefs. *See* State and Local Pet'rs' Opening Br. at 42-55 (Doc. No. 1364206).

The reasonableness of the requested 14,000-word allocation for the Joint Brief is underscored by the fact that that brief will address, in addition to statutory as-applied issues and the unresolved issues previously briefed, all issues raised by the Kansas and Georgia SIP disapprovals (assuming those petitions are consolidated with these cases). As the Kansas and Georgia petitioners have explained in their motion to consolidate, *see* Doc. No. 1500967 in No. 12-1019 (consolidated with No. 11-1333) and Doc. No. 1500969 in No. 11-1427, those challenges, which both States originally sought to have heard together with the present consolidated petitions, are inextricably intertwined with Kansas and Georgia's challenges to their Transport Rule FIPs and have issues in common with challenges to other FIPs. The Kansas and Georgia petitions in these consolidated cases simply cannot be resolved without resolving the legality of EPA's SIP disapproval for each of those States. Doc. No 1500967 in No. 12-1019 (consolidated with No. 11-1333) at 7; Doc. No. 1500969 in No. 11-1427 at 7.

Assuming this Court agrees to consolidate the Kansas and Georgia cases, the 14,000-word limit for the Joint Brief proposed by State and Local Petitioners is far less than the Court's rules would permit if the cases were not consolidated and briefed separately. If briefed independently, Kansas and Georgia would each have a 14,000-word limit for an opening brief on EPA's disapproval of its SIP. In contrast, under the States' joint briefing proposal, all of the Kansas and Georgia disapproval issues would be briefed together with the other issues described above in the Joint Brief. Finally, as will be discussed in their separate responses, the four shorter briefs

proposed by other State and Local Petitioners (*see supra* note 1) are appropriate in light of the highly fact-specific, record-based nature of the issues that these petitioners propose to brief.

CONCLUSION

For the foregoing reasons, State and Local Petitioners respectfully request that the Court adopt the briefing format and schedule proposed in their motions to govern filed on July 3, 2014. These petitioners' proposals allow for efficient briefing of the substantial issues relating to the legality of the Transport Rule and its related administrative actions that remain pending before the Court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I caused the foregoing Response of State and Local Petitioners 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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