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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

REPLY BRIEF OF INDUSTRY AND LABOR PETITIONERS ON REMAND

F. William Brownell
Hunton & Williams LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

P. Stephen Gidiere III
Balch & Bingham LLP
Suite 1500
1901 Sixth Avenue North
Birmingham, Alabama 35203

Counsel for Luminant Petitioners

Peter D. Keisler
C. Frederick Beckner III
Roger R. Martella, Jr.
Eric D. McArthur
Benjamin Beaton
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

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GLOSSARY

CAIR	Clean Air Interstate Rule
EPA	Environmental Protection Agency
IPM	Integrated Planning Model
NAAQS	National Ambient Air Quality Standard
NO_X	Nitrogen Oxides
$PM_{2.5}$	Fine Particulate Matter
SO_2	Sulfur Dioxide

SUMMARY OF ARGUMENT

I. EPA does not dispute that the Transport Rule requires numerous upwind States to reduce emissions by more than the amount necessary to achieve attainment in every downwind State to which they are linked. Instead, EPA contends that *no* upwind State is overcontrolled so long as *any* downwind location will have attainment problems, even if the upwind State is not linked to that location, and that EPA may impose "uniform cost thresholds" even when they require a State to reduce more emissions than necessary to resolve all attainment problems at the downwind locations to which it is linked. These contentions—which would mean that no State could ever have a valid as-applied overcontrol challenge—are inconsistent with the standard adopted by the Supreme Court for showing overcontrol. Under the controlling legal standard, our overcontrol showing stands unrefuted.

II.A. EPA likewise offers no valid justification for its refusal to test its air-quality projections against its recent real-world data, which showed that EPA's model was consistently overstating the impact of upwind emissions on downwind air quality. That the data were impacted by CAIR is irrelevant—they still could and should have been used to test the reliability of EPA's facially implausible air-quality projections.

II.B. EPA's defense of its emission model fares no better. Its assertion that unit-level errors that systematically skewed the model's projections would "wash out" is *ipse dixit*. Indeed, since the Transport Rule, EPA has conceded that its modeling was flawed and produced unrealistic and improper emission budgets.

ARGUMENT

I. THE TRANSPORT RULE OVERCONTROLS NUMEROUS UPWIND STATES.

EPA does not dispute our central showing: that the Transport Rule requires numerous individual upwind States to cut emissions far more than necessary for the downwind locations to which they are linked to attain and maintain air-quality standards. Industry/Labor Br. 16–24. That the Rule transgresses this limit on EPA's authority, *see EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1608 (2014), is unsurprising. As this Court recognized, EPA never sought to determine whether *lesser* emission reductions could still achieve downwind attainment. *EME Homer City Generation, L.P. v. EPA,* 696 F.3d 7, 27 (D.C. Cir. 2012). It would therefore be only happenstance if EPA did not overcontrol any upwind State—particularly given that the vast majority of downwind locations were already attaining NAAQS at higher, pre-Rule emission levels. Industry/Labor Br. 18.

In asking the Supreme Court to reverse this Court's facial invalidation of the Rule, EPA's counsel argued that petitioners could instead bring "as-applied" overcontrol challenges on remand. Tr. of Oral Arg. 27–28. And the Supreme Court agreed. 134 S. Ct. at 1609. Yet EPA now advances an as-applied overcontrol standard that flouts the Supreme Court and renders the right to bring as-applied challenges meaningless. According to EPA, the agency may regulate *all* upwind States—including those that are *not* "linked" (*i.e.*, do not "contribute significantly") to any downwind

location with attainment problems—so long as there is an attainment problem "anywhere." *See* EPA Br. 47, 53–55 & n.18. And, EPA argues, it may impose "uniform cost thresholds" even if they require an upwind State to reduce more emissions than necessary to resolve all attainment problems at the downwind locations to which it is linked. *See id.* at 51–52, 55, 58.

These contentions contradict the standard the Supreme Court adopted when, agreeing with this Court's statutory interpretation, it held that EPA may not "requir[e] an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State *to which it is linked*." 134 S. Ct. at 1608 (second emphasis added). In so holding, the Supreme Court expressly identified the downwind locations that are relevant to an upwind State's as-applied overcontrol challenge: those to which it is "linked." And it adopted a procedure for enforcing that standard—"as-applied" challenges by individual States—that necessarily entails variation in individual States' cost thresholds where required to avoid overcontrol. Under the Supreme Court's test, EPA clearly overcontrolled: EPA does not dispute that it required numerous upwind States "to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which [they were] linked." *Id.*

A. Overcontrol Of Texas For $PM_{2.5}$ And Ozone.

Texas is a prime example. For $PM_{2.5}$, Texas was linked only to Madison, Illinois, which according to EPA's data would attain and maintain the $PM_{2.5}$ NAAQS with uniform SO_2 emission controls costing $100/ton (far less costly than the

$500/ton controls EPA imposed). Industry/Labor Br. 11–12. EPA's data further showed that Madison had attained NAAQS under the much higher upwind emissions that occurred before the Rule. *Id.* at 10–11; *see* 77 FR 38183 (June 27, 2012) (finding Madison attained NAAQS). For ozone, Texas was linked only to Allegan, Michigan and East Baton Rouge, Louisiana—locations that attained NAAQS under higher, pre-Rule upwind emission levels, making the substantial reductions below those levels required by the Rule unnecessary to achieve attainment. Industry/Labor Br. 12.

Nowhere in its brief does EPA dispute that every downwind location to which Texas was linked would attain and maintain NAAQS at upwind emission levels greater than the Rule allowed. Nonetheless, EPA asserts it did not overcontrol. EPA's arguments rest on a misreading of the Supreme Court's decision and a mischaracterization of our as-applied challenges.

1. EPA's principal argument is that the Supreme Court did not adopt our standard for showing overcontrol—*i.e.*, that "the Transport Rule unlawfully over-controls any upwind State that is linked solely to locations that would attain and maintain the relevant NAAQS with lesser upwind emission reductions." EPA Br. 47. According to EPA, the test is whether emission reductions are unnecessary to achieve downwind attainment "'anywhere.'" *Id.* (quoting *EME Homer*, 134 S. Ct. at 1609).

EPA's distinction makes no sense. The Supreme Court expressly identified the subset of downwind locations to be considered in determining whether a particular upwind State is overcontrolled—the locations to which the upwind State is "linked."

134 S. Ct. at 1608. As the Supreme Court recognized, EPA determined that an upwind State does not "contribute significantly to nonattainment" at locations to which it is not "linked." *Id.* ("[S]tates whose contributions are below th[e] thresholds do not significantly contribute to nonattainment.") (quoting 76 FR 48208, 48236 (Aug. 8, 2011)).

Accordingly, where EPA imposes emission reductions on an upwind State that are greater than necessary for all downwind locations to which it is linked to attain NAAQS, those reductions *are* "unnecessary to downwind attainment *anywhere*." *Id.* at 1609. They are "unnecessary" to attainment in linked downwind locations because those locations would attain NAAQS even with higher upwind emissions. And they are "unnecessary" to attainment in other downwind locations because an upwind State not linked to those locations, by definition, does not "significantly contribute" to nonattainment at those locations.

2. This same error underlies EPA's contention that Texas must reduce more because *other* upwind States linked to Madison also contribute to nonattainment at *other* downwind locations. EPA Br. 53–55 & n.18. EPA made this argument before the Supreme Court, asserting there could be no overcontrol because "in the EPA's final air-quality modeling, several populous locations were projected to continue experiencing nonattainment or maintenance problems despite the emission reductions required." EPA S. Ct. Br. 53.

The Supreme Court, however, rejected EPA's contention that emission-reduction obligations can be justified everywhere so long as they can be justified anywhere. It recognized that an upwind State that is linked to downwind locations A and B and that needs to make significant reductions to eliminate its contribution to A might incidentally reduce its contribution to B by more than the amount necessary for B to achieve attainment. 134 S. Ct. at 1608 & n.22. But it expressly *distinguished* that situation from that of upwind States like Texas, which are required "to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which [they are] linked." *Id.* Indeed, it italicized "every" to make this precise distinction. *See also id.* at 1605 n.19 (making same distinction)

The Supreme Court's holding makes good sense. Under EPA's view, it could require Texas to adopt controls far more stringent than required for Madison to attain NAAQS because *other* upwind States were impacting air quality at *other* downwind locations—even though Texas was not linked to those locations and was not affecting their air quality. Taken to its illogical extreme, this would permit EPA to impose costly and unnecessary emission controls on *all* upwind States because EPA found there was at least one location that would not attain NAAQS regardless of the level of upwind controls, even though most upwind States did not significantly contribute to nonattainment at that location. 76 FR at 48259.

3. EPA also claims we are impermissibly attacking the agency's right to set "uniform cost thresholds." EPA Br. 52, 55. This assertion is untenable. EPA

successfully argued before the Supreme Court that overcontrol should be addressed through as-applied challenges to individual upwind States' emission budgets and that this Court would then determine the validity of the Rule "as to that State." Tr. of Oral Arg. 27–28. Some departure from uniform cost thresholds will necessarily result from any remedy for meritorious as-applied challenges. Having invited as-applied challenges to avoid vacatur of the entire Rule, EPA cannot now advance arguments that would bar them from proceeding.

Moreover, contrary to its lawyers' claims now, EPA has no absolute policy of "uniform cost thresholds." EPA in the Transport Rule distinguished between "Group 1" and "Group 2" upwind States, and used different cost thresholds ($2300/ton and $500/ton, respectively) for each group, because it recognized that Group 2 States could eliminate their contributions to the downwind locations to which they were linked at lower cost than Group 1 States could for the downwind locations to which those States were linked. 76 FR at 48257. Moreover, EPA expressly acknowledged that multiple cost thresholds could be used for "meeting the requirements of [the good-neighbor provision]." *Id.* at 48249; *see also* 75 FR 45210, 45274 (Aug. 2, 2010). Indeed, EPA emphasized that it "believe[d] it is *appropriate* to use multiple thresholds where one group of states can, for a lower cost, eliminate nonattainment and maintenance *for all the downwind nonattainment and maintenance areas to which they are linked*." *Id.* (emphases added). Texas's as-applied challenge invokes the same principle, and would require only that EPA further recognize that nonattainment at Madison—the

only downwind location to which Texas is linked for the $PM_{2.5}$ NAAQS—can likewise be achieved at a lower cost threshold of $100/ton.[1]

In all events, the Supreme Court made clear that any discretion EPA might have to adopt uniform cost thresholds does not override the good-neighbor provision's prohibition on overcontrol. The Supreme Court described this Court's "over-control" holding as follows: "Once a State was screened in at step one of EPA's analysis, its emission budget was calculated solely with reference to the *uniform cost thresholds* the Agency selected at step two. The Transport Rule thus left open the possibility that a State might be compelled to reduce emissions beyond the point at which every affected downwind State is in attainment, a phenomenon the Court of Appeals termed 'over-control.'" 134 S. Ct. at 1608 (emphasis added). It then noted its *"agree[ment]"* with this aspect of this Court's ruling, and remanded for determinations whether EPA "overstepped its authority" by overcontrolling individual States. *Id.* (emphasis added). Thus, in the event of conflict between uniform cost thresholds and the statutory requirement to avoid overcontrol, the latter trumps.

Indeed, implicit in EPA's argument is yet another notion the Supreme Court rejected—that "costs" can be used to increase upwind obligations beyond those

[1] EPA counsel's post-hoc argument that eliminating overcontrol might preclude efficient emission-allowance trading, EPA Br. 52, is barred by *SEC v. Chenery Corp.* 318 U.S. 80, 87 (1943), as EPA made no such finding in the Rule. *See also* Industry Resp. Br. 3. Regardless, the good-neighbor provision does not allow EPA to overcontrol upwind States in order to facilitate allowance trading—the tail does not wag the dog.

necessary for downwind attainment. The Supreme Court emphasized that EPA's authority under the good-neighbor provision is limited to reducing the "overage"—*i.e.*, the collective amounts that "contribute significantly to downwind *nonattainment*." *Id.* at 1604; *see also id.* at 1603–04 ("EPA's task is to reduce upwind pollution, but only in 'amounts' that push a downwind State's pollution concentrations above the relevant NAAQS."). Cost-effectiveness was permitted only as a mechanism to "allocate" reduction obligations among upwind States, not to define and enlarge the collective reduction obligation. *Id.* at 1603–04.[2]

4. Rather than forthrightly address our evidence demonstrating overcontrol, EPA asserts our showing rests on the claim that Madison was "per se" overcontrolled because it was expected to have post-Rule air quality superior to NAAQS. EPA Br. 53. EPA suggests Madison's "better-than-minimum" air quality is the "incidental" effect of reductions required of other upwind States linked to Madison to address their contributions to other downwind locations. *Id.* at 53–55.

That is not our argument. Instead, as explained above, *see supra* pp. 3–4, our showing was based on, among other things, EPA's data showing that less costly emission controls (*i.e.*, those costing only $100/ton) on *all* upwind States linked to

[2] Intervenors similarly err in claiming *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), authorizes uniform cost thresholds regardless of whether they overcontrol. Pub. Resp. Br. 6. *Michigan* held only that EPA could allocate collective emission-reduction obligations nonproportionally. *See* 213 F.3d at 679. It did not hold that EPA can use cost to determine the collective reduction obligation, and even if it had, such a holding would not be good law after the Supreme Court's decision.

Madison would have allowed Madison to attain and maintain NAAQS. That other upwind States linked to Madison may have needed to adopt costlier controls to address their contributions to other downwind locations provides no basis for requiring Texas to do so to address its contribution to Madison. Nor does it mean Texas is "free riding" off other States' emission reductions. EPA Br. 55. EPA's data show that Texas would eliminate *all* of *its* "significant contribution to nonattainment" with much less stringent controls than other regulated upwind States were required to install. Indeed, aided by Texas's emission reductions, JA1873, Madison attained NAAQS even before EPA promulgated the Transport Rule, *supra* p. 4.

5. To the limited extent EPA addresses our actual evidence of overcontrol, its arguments are unavailing.

a. EPA does not dispute that its own data demonstrated that, with emission controls costing $100/ton (versus the $500/ton controls imposed on Texas), Madison would attain NAAQS. EPA instead claims lower cost thresholds would not eliminate all downwind nonattainment "collectively." EPA Br. 51. This merely restates EPA's erroneous argument that it can impose reductions on all upwind States if at least one downwind location may not attain, regardless of whether the upwind States are linked to that location. *See supra* pp. 5–6. EPA does not dispute that its data demonstrate that Texas (and several other States, *see infra* §I.B–C) were exclusively linked to downwind locations that would attain NAAQS with lesser emission-reduction obligations.

b. EPA's response to our alternative showing—that under EPA's own air-quality modeling, Madison's attainment problems would be almost entirely resolved by 2014 with *no* good-neighbor controls—is a non sequitur. EPA says that because Madison had an obligation in 2010 to satisfy the annual $PM_{2.5}$ NAAQS, it was "reasonable for Texas to be subject to Transport Rule emission reductions beginning in 2012." EPA Br. 56 n.19. But the issue now is whether EPA has a statutory basis for imposing substantial emission reductions in 2014 when EPA's own data show these reductions are unnecessary for Madison to attain and maintain NAAQS.

c. Finally, EPA makes a fundamental error in dismissing the fact that Madison attained NAAQS before the Transport Rule. EPA asserts that in some cases the Transport Rule's budgets "do not depart significantly from … CAIR emission budgets." *Id.* at 56. But CAIR's paper *budgets* are beside the point; what matters are the *actual* upwind emissions that permitted Madison to attain NAAQS. As EPA acknowledges, actual emissions under CAIR could be higher than CAIR budgets because CAIR permitted unrestricted trading and banking of allowances. *See id.* at 57. EPA has conceded the relevant point: that the Transport Rule "mandates even greater reductions than have already *occurred* under CAIR." 76 FR 70091, 70099 (Nov. 10, 2011) (emphasis added). Indeed, EPA's data show that the Transport Rule required Texas and the other upwind States linked to Madison to reduce their aggregate

emissions substantially below emissions that occurred during CAIR.[3] EPA has no explanation for why Texas should be required to make steep emission reductions even though Madison attained NAAQS at higher, pre-Rule emission levels.[4]

6. EPA also fails to address the substance of our argument that it overcontrolled Texas with respect to ozone. EPA does not dispute that Allegan and East Baton Rouge attained the ozone NAAQS under the higher upwind emissions that occurred pre-Rule. Industry/Labor Br. 12. Instead, EPA says that "[h]ad [it] excluded Texas and other States from the Transport Rule" on this basis, "nothing would prevent those excluded States from increasing emissions above CAIR levels, and downwind areas currently in attainment due to CAIR emission reductions would later be faced with attainment or maintenance problems." EPA Br. 58.

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[3] In addition to Texas, the Transport Rule linked several other upwind States to Madison. 76 FR at 48241–43 (tbls.V.D-2, V.D-5). The Rule's budgets required these States collectively to reduce annual SO_2 and NO_X emissions by more than a million tons from *actual* pre-Rule emission levels. *See id.* at 48262 (tbl.VI.D-3) (emission budgets); *Air Markets Program Query*, *available at* http://ampd.epa.gov/ampd/QueryToolie.html (historical-emissions database) (2010 CAIR-NO_X emissions).

[4] Intervenors try to excuse EPA's overcontrol on the ground that EPA should have "'leeway'" to overcontrol because of "'imprecision'" in its air-quality projections. Industry Resp. Br. 5 (quoting *EME Homer*, 134 S. Ct. at 1609); *see also* EPA Br. 47. But EPA adopted a conservative "maintenance" standard designed to ensure downwind attainment even under worst-case meteorological conditions "promoting ozone or fine particle formation." 76 FR at 48228. We thus demonstrated without contradiction that the Rule overcontrolled even under EPA's conservative "maintenance" standard—and by a substantial amount. Industry/Labor Br. 10–12 & nn.8–9.

EPA attacks a straw man. We are *not* arguing Texas should be "excluded" from the Rule. We made clear we sought only an increase in Texas's emission budget, not elimination of regulation altogether. Industry/Labor Br. 27–28 & n.31. Thus, we agree that allowing upwind States to increase aggregate emissions above pre-Rule levels could threaten attainment at Allegan and East Baton Rouge. But that does not undermine our point, to which EPA offers no response: that upwind emissions under CAIR were sufficient to allow those locations to attain NAAQS, and that the Rule's requirements to reduce emissions below those levels were thus unnecessary.

B. Overcontrol Of Alabama, Georgia, And South Carolina For $PM_{2.5}$.

The foregoing also is the complete answer to EPA's response regarding the Rule's overcontrol of Alabama, Georgia, and South Carolina. The Rule linked these three States to only a handful of downwind locations, finding that they were not making significant contributions to any other locations. *Id.* at 13 & n.11.[5] EPA's data further demonstrated that controls costing less than the $500/ton threshold established by the Rule would eliminate *all* attainment and maintenance problems at *all* downwind locations to which Alabama, Georgia, and South Carolina were linked. *Id.* at 13 & nn.11–12. EPA again does not dispute this; its argument to the contrary is based on its position that it may regulate an upwind State so long as any downwind

[5] In providing linkages in our opening brief (at 13 n.12), we incorrectly listed "Montgomery, Ohio" as "Montgomery, Alabama."

location has attainment concerns. EPA Br. 59. But, as explained above, the Supreme Court expressly rejected that position. *See supra* pp. 5–6.

Moreover, as with our overcontrol showing for Texas, EPA mischaracterizes our argument. It asserts our showing of overcontrol for Alabama, Georgia, and South Carolina was based solely on the fact that the downwind locations to which they were linked would all have post-Rule air quality superior to NAAQS. EPA Br. 59. But that was not our argument. *See* Industry/Labor Br. 13–14. Rather, as explained above, we relied on EPA data showing that lesser emission reductions than those imposed by the Rule would have sufficed to ensure that *all* downwind locations linked to Alabama, Georgia, and South Carolina would attain and maintain NAAQS. *Id.*

C. Overcontrol Of Several States For Ozone.

We demonstrated that the Transport Rule imposes NO_X ozone-season emission budgets on 14 upwind States that were linked *only* to downwind receptors that EPA projected would attain and maintain the ozone NAAQS in 2014 without *any* good-neighbor obligations. Industry/Labor Br. 14–15 & n.13. EPA does not contest this, and thus has overstepped its authority by requiring these upwind States to "reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which [they are] linked." *EME Homer*, 134 S. Ct. at 1608.

Instead of meeting our argument, EPA invents a new one: "Petitioner[s] conten[ded] … that EPA improperly used 2012 air-quality projections, rather than 2014 projections, to determine which States would be subject to the Transport Rule."

EPA Br. 60. EPA then "refutes" this argument: EPA "reasonably based the determination of which States are subject to the Transport Rule on the basis of the downwind air quality projected for 2012." *Id.*

EPA's 2012 air-quality projections are irrelevant to our argument here. Since the outset of the litigation, we have maintained that emission budgets *for 2014* (and thereafter) for these upwind States cannot be justified given EPA's own projections of 2014 attainment, regardless of whether or not 2012–13 emission budgets could be justified based on 2012–13 air-quality projections. EPA's data established that, as of 2014, good-neighbor emission controls in these upwind States were unnecessary for linked downwind locations to attain NAAQS. Industry/Labor Br. 14 & n.13. Yet EPA continued imposing emission-reduction obligations on those upwind States.[6] As of 2014, any good-neighbor obligations on these 14 upwind States would, by definition, overcontrol because the downwind locations to which they were linked were projected by EPA to attain and maintain the ozone NAAQS *without* such obligations.

Finally, EPA seeks to justify its regulation on the ground that it needed to ensure downwind locations would "expeditiously" meet NAAQS. EPA Br. 61. Again, this is beside the point. Regardless of whether EPA was justified in imposing emission budgets in 2012 to ensure downwind attainment and maintenance then, no such

[6] For example, the Rule required Florida to reduce its ozone-season NO_X emissions by over 25%. *See infra* n.7.

rationale existed as of 2014. As noted, EPA found that even without any good-neighbor obligations, the relevant downwind locations would attain and maintain the ozone NAAQS *by 2014*. Imposition of ozone-season emission budgets at this point would thus require these upwind States to go *beyond* their statutory obligation to reduce emissions that contribute significantly to downwind attainment problems. *See EME Homer*, 134 S. Ct. at 1603–04 (EPA may "prohibi[t] only upwind emissions that contribute significantly to downwind *nonattainment*"—it may thus "reduce" only those "'amounts' that push a downwind State's pollution concentrations above the relevant NAAQS.") (emphasis in original).

II. EPA'S RELIANCE ON FLAWED MODELING WAS ARBITRARY AND CAPRICIOUS.

A. EPA Arbitrarily Ignored Relevant, Real-World Data In Making Its Air-Quality Projections.

EPA does not dispute our showing that real-world air-quality data revealed that most downwind locations had already achieved attainment at pre-Rule upwind emission levels. Industry/Labor Br. 18. Nor does it dispute that its model often projected that downwind air quality would be *worse* after the Transport Rule *decreased* contributing upwind emissions. *Id.* at 18–21. None of EPA's responses explains why it was appropriate to rely on a model that generated such implausible predictions, or justifies EPA's arbitrary refusal to examine relevant, real-world data.

1. EPA's primary justification for its refusal to cross-check its modeled air-quality projections against its recent real-world air-quality data is that those "data

reflected emission reductions from CAIR," which EPA was replacing with the Transport Rule. EPA Br. 31–33; *see* 76 FR at 48230. EPA contends that if it had "us[ed] post-CAIR air quality as the modeling baseline," States would have been "free to ramp back up to [their] pre-CAIR emission levels." EPA Br. 32.

Again, EPA attacks a straw man. We are not contending that EPA was required to "us[e] post-CAIR air quality as the modeling baseline" or to "assum[e] that CAIR would remain in effect in 2012." *Id.* Rather, we are contending that the downwind air quality achieved at pre-Rule emission levels provided relevant, real-world information that EPA should have used to check its model's reliability. As to our actual contention, EPA's "we were replacing CAIR" response is, again, a non sequitur: from the fact that EPA was replacing CAIR it does not follow that CAIR-impacted air-quality data were irrelevant. The *reason* for pre-Rule emission levels does not matter. What matters is that data from the pre-Rule period provided an established relationship between a given level of upwind emissions and downwind air quality. EPA could, and should, have used those data to assess whether (and how well) its computer modeling worked in projecting air-quality impacts.

Instead of disputing this, EPA points to its decision to exclude CAIR-imposed limitations in projecting "baseline emissions." *See* EPA Br. 32 (citing 76 FR at 48223–24). We are not challenging that. Rather, we are challenging EPA's separate refusal to consider CAIR-impacted data to test its computer model's ability to accurately predict air-quality impacts.

To illustrate this distinction, suppose that monitored air-quality data from the period immediately preceding the Rule showed that all downwind attainment and maintenance concerns had been resolved at the upwind emission levels during that period. Surely that fact would be relevant to assessing the reliability of an EPA model projecting that significant upwind emission reductions *below* pre-Rule levels were necessary to resolve downwind air-quality concerns. And the relevance of that fact would not depend on whether pre-Rule emission levels were affected by CAIR, the economic recession, or other circumstances. It would depend solely on the fact that when upwind emissions were X, downwind air quality was Y.

Nor would taking account of that fact allow upwind States to escape regulation and increase emissions above pre-Rule levels. It would, however, strongly suggest that Transport Rule budgets should be no more stringent than necessary to maintain pre-Rule emission levels, and it would place on EPA the burden of explaining any decision to set budgets requiring significant reductions from pre-Rule levels. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1055 (D.C. Cir. 2001) (EPA must "explain why results that appear arbitrary on their face are, in fact, reasonable determinations.").

This hypothetical is essentially the situation here. *See* Industry/Labor Br. 18–20 (showing most downwind attainment and maintenance concerns were resolved at pre-Rule emission levels, and yet the Rule required further reductions from pre-Rule levels). But rather than attempt to explain this apparent anomaly, EPA ducked the

issue by arbitrarily refusing to "examine the most recent ambient data" on the ground that those data "include[d] large emission reductions from CAIR." 76 FR at 48230. EPA did not explain in the Rule—or, indeed, in its briefs on appeal—why it could not use CAIR-impacted air-quality data to assess the reliability of its computer modeling and the soundness of its conclusion that further reductions in upwind emissions were needed to address downwind air-quality problems.

EPA's action was, therefore, doubly arbitrary: It refused to consider relevant real-world data showing widespread downwind attainment at pre-Rule emission levels. And the principal reason it gave for refusing to consider those data—that they were impacted by CAIR—is illogical. *See, e.g., SecurityPoint Holdings, Inc. v. TSA*, 769 F.3d 1184, 1187 (D.C. Cir. 2014) ("An agency's action is arbitrary and capricious if it has 'entirely failed to consider an important aspect of the problem' it faces."). The Rule should be remanded for EPA to address the real-world data that demonstrate flaws in its air-quality model. *See* Industry/Labor Br. 27–28.

2. Nor is there merit to EPA's response that it "[a]nchored" its model with 2003–2007 monitoring data and tested the model's performance with 2005 air-quality data. EPA Br. 33–34. Neither in the Rule nor in its initial brief on appeal did EPA argue that it validated its model through "retrodiction"; thus, no such argument can justify the Rule on review. *See Chenery*, 318 U.S. at 87.

In any event, the argument is meritless. The issue is whether EPA should have taken the *additional* step of testing its model against the most recent real-world data to

determine whether it accurately predicted *future* air quality. As EPA has recognized before, given the "uncertainties inherent in regionwide modeling many years into the future," the "most recent period of available ambient data" provides the best check on the reliability of EPA's projections. 70 FR 25162, 25241 (May 12, 2005). Had EPA been interested in testing the reliability of its modeling—as opposed to trying to justify the additional emission reductions required by the Rule—there was no reason not to examine readily available real-world data from the period immediately preceding the Transport Rule to determine whether its model was accurately projecting future air-quality impacts. Its refusal to do so was arbitrary. *See Appalachian Power*, 249 F.3d at 1053 (EPA's reliance on model was arbitrary where model "fail[ed] to reflect the best information available to the Agency").

3. The proof is in the pudding: had EPA analyzed its most recent air-quality data, it would have recognized that its model made implausible predictions. Industry/Labor Br. 18–21. EPA now attempts to explain away these anomalies, EPA Br. 35–40, but its contentions come too late. Having refused during its rulemaking to examine the most recent real-world data to determine whether they undermined its projections, EPA cannot do so for the first time on appeal. *See Chenery*, 318 U.S. at 87.

Regardless, EPA has no persuasive answer. In the main, it simply repeats its assertion that the data "provide no meaningful benchmark" because they "reflect CAIR emission reductions," EPA Br. 35, which is wrong for the reasons discussed above. That "CAIR-induced emission reductions … will not recur unless CAIR is

replaced," *id.* at 36, does not make the downwind air quality achieved at pre-Rule emission levels irrelevant to the reliability of EPA's air-quality projections.

EPA fails to explain why, if downwind attainment and maintenance were achieved at pre-Rule emission levels, its model projected that significant reductions *below* those levels would be necessary for downwind attainment and maintenance. *See* Industry/Labor Br. 18. Contrary to EPA's contention, we are not "rel[ying] on the erroneous *assumption* that the Transport Rule *is meant* to require upwind States to make emission reductions from pre-Rule emission levels." EPA Br. 35–36 (emphases added). Rather, we are relying on the *fact* that the Rule *does* require upwind States to make emission reductions from pre-Rule emission levels, even when pre-Rule emission levels were sufficient to achieve the relevant air-quality standards.[7]

[7] EPA required numerous States to reduce emissions below pre-Rule levels even though they were linked exclusively to downwind locations that achieved attainment at pre-Rule emission levels. For example, Georgia was linked only to two Jefferson, Alabama receptors for $PM_{2.5}$. Both those locations attained NAAQS pre-Rule, Industry/Labor Br. 13 n.12; *id.* ADD-1, ADD-2 (showing pre-Rule air quality for Jefferson locations), but the Rule required Georgia to reduce substantially its emissions from pre-Rule levels, *compare Air Markets Program Query*, *supra* n.3 (CAIR-NO_X database) (2010 annual SO_2 and NO_X emissions of 218,911 and 60,588 tons, respectively), *with* 76 FR at 48261 (tbl.VI.D-3) (2014 annual SO_2 and NO_X budgets of 95,231 and 40,540 tons, respectively). Similarly, Florida was linked only to two Harris, Texas receptors for ozone. Both met NAAQS pre-Rule, Industry/Labor Br. 15; *id.* ADD-3 (showing pre-Rule air quality for both Harris locations), but the Rule required Florida to reduce ozone-season NO_X emissions from 37,565 to 27,825 tons, *Air Markets Program Query*, *supra* n.3 (2010 CAIR-OS emissions), 76 FR at 48262 (tbl.VI.D-4) (2014 budget). *See also supra* pp. 11–12 (demonstrating Texas was required to make steep emission reductions even though it was linked only to locations that attained NAAQS pre-Rule).

Likewise, EPA fails to explain why its model so often projected that air quality would be *worse* after the Transport Rule *reduced* contributing upwind emissions. *See* Industry/Labor Br. 18–21 & tbls.1–3. EPA responds that "some Transport Rule State budgets are larger than CAIR State budgets." EPA Br. 38. But "CAIR State budgets" are irrelevant to our showing, which compares Transport Rule budgets to *actual pre-Rule emissions*, not to CAIR State budgets. EPA does not and cannot dispute that the Rule required substantial additional emission reductions below actual pre-Rule emission levels. *See* 76 FR at 70099 (Transport Rule "mandates even greater reductions than have already *occurred* under CAIR") (emphasis added).

As to the relevant metric, EPA's generalized assertion simply ignores our detailed showing that its model projected that many downwind locations' air quality would be worse after the Transport Rule required the contributing upwind States to reduce their aggregate emissions. Industry/Labor Br. 20 & nn.16–17. In fact, EPA projected that air quality under the Rule would be worse for *all* downwind locations listed in our Tables 1–3 that were linked to upwind States, *id.* at 19, even though, in each case, the Rule's emission budgets required the upwind States linked to each such downwind location to reduce their aggregate emissions below pre-Rule levels.[8]

[8] Of the downwind locations listed in our Tables 1–3, 27 were linked to upwind locations. JA2715–27. (Four Harris locations were not linked to any upwind State. 76 FR at 48244 n.35.) Upwind States' emissions are available in EPA's historical-emissions database. *See Air Markets Program Query*, *supra* n.3 (CAIR-NO_X database for States subject to CAIR for annual emissions; CAIR-OS for ozone-season States; Acid Rain Program for annual emissions in non-CAIR States; Acid Rain Program (May-

We thus are not simply assuming "air quality should be better everywhere under the Transport Rule than under CAIR," nor are we relying on "conjecture." EPA Br. 37. Rather, we made detailed showings, based on EPA's own data, that *nearly half the time*, EPA's model projected that air quality would *degrade* at specific downwind locations after the Transport Rule *reduced* contributing upwind emissions. At the very least, these results "appear arbitrary, and the EPA can point to nothing in the record to dispel this appearance." *Appalachian Power*, 249 F.3d at 1053.

That the Transport Rule allows "less geographic shifting of emissions" than CAIR, EPA Br. 38, does not dispel the appearance of arbitrariness. The Rule's assurance provisions and trading restrictions were designed to ensure downwind locations received the benefits of emission reductions from contributing upwind States, *see* 76 FR at 48210–11, 48266, 48294, and thus provide no reason to believe downwind air quality should be worse after the Rule reduced contributing upwind emissions.

Nor does it matter that the air-quality data we cited reflected that "sources reduced emissions more quickly and more extensively than EPA had predicted," EPA

September) for ozone-season emissions in non-CAIR States) (2010 emissions). EPA's emission budgets are at 76 FR at 48261–63 (tbl.VI.D-3–4) (2014 budgets), and 76 FR 80760, 80769 (tbl.III.E-1) (Dec. 27, 2011) (2014 ozone-season NO_X budgets for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin). *See also* 76 FR 40662, 40666 (tbl.I.C-1) (July 11, 2011) (proposed 2014 Kansas budget). In each instance, the Rule's budgets required the linked upwind States to reduce substantially their emissions from aggregate pre-Rule levels. (In our opening brief (at 20 n.17), we inadvertently omitted Fulton's linkages with North and South Carolina. They were included in this analysis.)

Br. 38, that "year-to-year emissions var[y] due to economic and other factors," *id.*, or that pre-Rule emissions were relatively low due to "temporary factors such as … the severe economic recession," *id.* at 40. Neither the reasons for pre-Rule emission levels nor the fact that emissions vary over time bears on our point—that where pre-Rule upwind emission levels were sufficient to achieve downwind attainment, no basis exists for requiring reductions below those levels, and that downwind air quality should not routinely *degrade* after contributing upwind emissions *decrease*.

As for "meteorological variability," *id.*, we are relying on downwind design values from 2010, a year when meteorological conditions caused abnormally high downwind concentrations of ozone and $PM_{2.5}$, as EPA itself recognized, 76 FR at 48231. Our reliance on those data thus is *conservative*—except for unusual meteorological conditions in 2010, downwind air quality would have been even *better* in 2010, making EPA's projected post-Rule degradation all the more anomalous.

EPA further errs in claiming the "relevant comparison" is that EPA's 2014 remedy-case projections "show better air quality than the 2012 base case design values." EPA Br. 39. This shows only the unremarkable fact that downwind air quality would be better with the Rule than without *any* good-neighbor restrictions on upwind emissions. It does not justify EPA's incongruous projections that decreasing contributing upwind emissions would degrade downwind air quality.

4. Finally, there is no merit to EPA's contention that this Court should ignore "arguments based on 2008–2010 data" because no commenter "presented analysis"

using those data and they were not included in the record. EPA Br. 35. The 2008–2010 data—whose accuracy EPA does not dispute, since they are EPA's own data—merely illustrate what EPA would have found had it examined the most recent data, as commenters urged it to do. 76 FR at 48230. It would be perverse indeed if EPA could evade judicial review by relying on its arbitrary refusal to analyze relevant data and include them in the record. That is particularly so given EPA's concession that it "[i]n fact … reviewed and considered the ambient design values for the 2007–2009 period and preliminary 2010 ambient data." EPA Br. 39–40.

Moreover, commenters told EPA that "if [it] had looked at the most recent ambient data [it] would see that most of the modeled nonattainment and maintenance receptors [were] already attaining." 76 FR at 48230. Those comments were sufficient to preserve the issue. Our illustration of that point with specific examples that rely on the data commenters urged EPA to examine introduces no new "objection" to the Rule. 42 U.S.C. §7607(d)(7)(B). No rule restricts briefs to parroting rulemaking comments. Our examples are well within the bounds of permissible elaboration on an argument that was indisputably raised before—and expressly rejected by—EPA. *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).[9]

[9] In any event, EPA's objection concerns only 2008–2010 data; it cannot complain about 2007–2009 data, which are in the record, *see, e.g.*, JA1050 n.32 (52 of 92 projected $PM_{2.5}$ nonattainment areas already in attainment, per 2007–2009 data), and undermine EPA's modeling through similar anomalies, Industry/Labor Br. 22 n.21.

B. EPA Arbitrarily Failed To Validate Its Projections Of Cost-Effective Emission Reductions With Available Real-World Data.

EPA's failure to account for the flaws in its use of IPM with respect to transmission constraints and cogeneration units was arbitrary and capricious and based on intentional disregard of real-world facts.

As to transmission constraints, EPA acknowledges—but then ignores—its model's shortcomings:

> EPA recognized that its model may not capture all local transmission constraints that may lead to variations in unit-level operations compared to IPM projections. However, *EPA reasonably determined that making system-wide adjustments to the model to account for unit-level constraints was unnecessary because any discrepancies between projected and actual unit-level generation are statistically likely to negate themselves when aggregated to the State level.*

EPA Br. 42 (citing Primary RTC at 2107–08 (JA2089–90)) (emphasis added).

In fact, no support exists for EPA's multiple-errors-cancel-each-other-out approach. By assuming lower-emitting units are available when transmission constraints in fact prevent them from being dispatched, IPM, as used by EPA, *systematically* overstated the amount of emissions that can be reduced. Thus, EPA's "aggregation" only *increased* the error's magnitude. Industry/Labor Br. 24–27. EPA would have determined its assumptions were flawed had it tested IPM's results against available real-world data, *id.* at 26–27, but it failed to do so.

The record materials cited by EPA contain not a shred of analysis to support EPA's determination that it is unnecessary to model local transmission constraints accurately. *See* JA2089–90. Indeed, EPA essentially conceded this point by

subsequently issuing two "error correction" rules that confirm that IPM's errors did not "wash out." In those rulemakings, EPA made *ad hoc* arithmetic adjustments to emissions predicted at specific units to address some of the consequences of IPM's flawed assumption of perfect local transmission. These adjustments demonstrate that unit-level errors can affect state-level budgets significantly. *See generally* 77 FR 34830 (June 12, 2012); 77 FR 10324 (Feb. 21, 2012).[10]

As to cogeneration units, EPA incorrectly assumed multiple cogeneration units would cease operating and should receive zero allowance allocations. Industry/Labor Br. 26–27. It does not matter that "only" 6% of the generation covered by IPM is cogeneration, EPA Br. 45; 6% of total IPM-covered generation is substantial. Moreover, contrary to EPA's assertion, *id.*, its "adjustments" did not fix the basic problem. The Rule applied a "multiplier" to increase the emissions attributable to the electricity produced by cogeneration units. For many cogeneration units, however, IPM incorrectly had predicted zero generation: applying the Rule's multiplier to "zero" generation still yields zero. Industry/Labor Br. 26. This was arbitrary.

[10] EPA cannot rely on its subsequent rulemakings to defend its arbitrary methodology for establishing the Rule's emission budgets. *See AT&T v. FCC*, 978 F.2d 727, 731–32 (D.C. Cir. 1992) (agencies cannot "avoid judicial review" through "a sort of administrative law shell game").

CONCLUSION

This Court should hold that the Transport Rule is beyond EPA's statutory authority and constitutes arbitrary action, and should direct the remedy described at pages 27–28 of our opening brief.

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Respectfully submitted,

/s/ Peter D. Keisler

Peter D. Keisler
C. Frederick Beckner III
Roger R. Martella Jr.
Eric D. McArthur
Benjamin Beaton
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
Tel. (202) 736-8000
Fax (202) 736-8711
pkeisler@sidley.com

F. William Brownell
Hunton & Williams LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

P. Stephen Gidiere III
Balch & Bingham LLP
Suite 1500
1901 Sixth Avenue North
Birmingham, Alabama 35203

Counsel for Luminant Petitioners[11]

[11] Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, Luminant Energy Company LLC, and Luminant Holding Company LLC.

Daniel J. Kelly
Associate General Counsel
Energy Future Holdings Corp.
1601 Bryan Street, 41st Floor
Dallas, Texas 75201

Counsel for Energy Future Holdings Corp.

William M. Bumpers
Joshua B. Frank
Megan H. Berge
Baker Botts LLP
1299 Pennsylvania Ave., NW
The Warner, Suite 1300 West
Washington, DC 20004
(202) 639-7700

Counsel for Entergy Corp., Northern States Power Company – Minnesota, Southwestern Public Service Co.

Kelly M. McQueen
Assistant General Counsel
Entergy Services, Inc.
425 W. Capitol Ave., 27th Floor
Little Rock, AR 72201
(501) 377-5760

Counsel for Entergy Corp.

Stephanie Zapata Moore
General Counsel
Luminant Generation Company LLC
1601 Bryan Street, 22nd Floor
Dallas, Texas 75201

Counsel for Luminant Generation

Grant Crandall
Arthur Traynor, III
United Mine Workers of America
18354 Quantico Gateway Dr., Suite 200
Triangle, VA 22172
(703) 291-2457

Eugene M. Trisko
Law Offices of Eugene M. Trisko
P.O. Box 47
Glenwood, MD 21738
(301) 639-5238

Counsel for United Mine Workers of America

Ann M. Seha
Assistant General Counsel
XCEL Energy
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401
(612) 215-4619

Counsel for Southwestern Public Service Co. and Northern States Power Company – Minnesota

Todd E Palmer
Jordan J. Hemaidan
Valerie L. Green
One South Pinckney Street, Suite 700
P.O. Box 1806
Madison, WI 53701-1806
(608) 257-3501

Counsel for Wisconsin Paper Council, Inc., Wisconsin Manufacturers and Commerce, Midwest Food Processers Association and Wisconsin Cast Metals Association

Janet J. Henry
Deputy General Counsel
American Electric Power Service Corp.
1 Riverside Plaza
Columbus, OH 43215
(614) 716-1612

Counsel for AEP Texas North Co., AEP Generation Resources, Inc., Appalachian Power Co., Indiana Michigan Power Co., Kentucky Power Co., Ohio Power Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co.

Jeffrey L. Landsman
Vincent M. Mele
Wheeler, Van Sickle & Anderson, S.C.
25 West Main Street
Suite 801
Madison, WI 53703-3398
(608) 255-7277

Counsel for Dairyland Power Cooperative

Robert A. Manning
Joseph A. Brown
Mohammad O. Jazil
Hopping Green & Sams, PA
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for the Environmental Committee of the Florida Electric Power Coordinating Group

Richard G. Stoll
Brian H. Potts
Foley & Lardner LLP
3000 K Street, NW, 6th Floor
Washington, DC 20007-5143
(202) 672-5300

Counsel for Wisconsin Public Service Corp.

Bart E. Cassidy
Katherine L. Vaccaro
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 901
Bala Cynwyd, PA 19004
(484) 430-5700

Counsel for ARIPPA

William L. Wehrum, Jr.
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500

Counsel for National Rural Electric Cooperative Association

Margaret Claiborne Campbell
Byron W. Kirkpatrick
Hahnah Williams Gaines
Troutman Sanders LLP
600 Peachtree St., N.E.
5200 Bank of America Plaza
Atlanta, GA 30308
(404) 885-3000

Counsel for Georgia Power Co., Southern Co. Services, Inc., and Southern Power Co.

Jeffrey A. Stone
Beggs & Lane, RLLP
501 Commendencia Street
Pensacola, FL 32502
(850) 432-2451

James S. Alves
Gary V. Perko
Hopping Green & Sams, P.A.
119 S. Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for Gulf Power Co.

Steven G. McKinney
C. Grady Moore, III
Balch & Bingham LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35203
(205) 251-8100

Counsel for Alabama Power Co.

Ben H. Stone
Terese T. Wyly
Balch & Bingham LLP
1310 Twenty Fifth Ave.
Gulfport, MS 39501
(228) 864-9900

Counsel for Mississippi Power Co.

Karl R. Moor
Southern Company Services, Inc.
42 Inverness Center Parkway – BIN B232
Birmingham, AL 35242
(205) 992-6371

Julia A. Bailey Dulan
Southern Company Services, Inc., BIN 1201
30 Ivan Allen Jr., Blvd., Suite 1200
Atlanta, GA 30308

Counsel for Southern Co. Services, Inc.

David R. Tripp
Parthenia B. Evans
Stinson Leonard Street, LP
1201 Walnut, Suite 2900
Kansas City, MO 64106
(816) 842-8600

Dennis Lane
Stinson Leonard Street, LP
1775 Pennsylvania Ave., NW, Suite 800
Washington, DC 20006
(202) 785-9100

Counsel for Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas, Kansas Gas and Electric Co., Sunflower Electric Power Corp., and Westar Energy, Inc.

David M. Flannery
Kathy G. Beckett
Laura M. Goldfarb
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326

Counsel for Midwest Ozone Group

William F. Lane
Kilpatrick Townsend & Stockton LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
(919) 420-1700

Counsel for CPI USA North Carolina LLC

Peter S. Glaser
Troutman Sanders LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20001

Counsel for National Mining Association

Maureen Harbourt
Keen Miller, LLP
400 Convention Street, Suite 700
Baton Rouge, LA 70802
(225) 382-3412

Counsel for Louisiana Chemical Association and Lafayette Utilities System

Andrea Bear Field
Norman W. Fichthorn
E. Carter Chandler Clements
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500

Counsel for Utility Air Regulatory Group

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 7,021 words exclusive of the certificate required by Circuit Rule 28(a)(1), table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The combined words of the Industry and Labor Petitioners' Reply Brief and the State and Local Petitioners' Reply Brief do not exceed 14,000 words, as mandated by this Court's October 23, 2014 Order. Dkt.1518738. The undersigned used Microsoft Word 2007 to compute the count.

/s/ Peter D. Keisler

Peter D. Keisler
Counsel for Luminant Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2015, I caused the foregoing brief to be served on all registered counsel through the Court's CM/ECF system.

/s/ Peter D. Keisler
Peter D. Keisler
Counsel for Luminant Petitioners