No. 11-1302 (and consolidated cases) – Complex

Oral Argument Held April 13, 2012; decided August 21, 2012

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

EME HOMER CITY GENERATION, L.P.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petitions for Review of Final Action of the
United States Environmental Protection Agency

PUBLIC HEALTH INTERVENORS' REPLY IN SUPPORT OF ALTERNATIVE MOTION TO LIFT THE STAY AND IMPLEMENT PHASE 2 OF THE TRANSPORT RULE IN 2015

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REPLY IN SUPPORT OF ALTERNATIVE MOTION TO LIFT THE STAY AND IMPLEMENT PHASE 2 OF THE TRANSPORT RULE IN 2015

The stay of the Transport Rule has already delayed implementation of the Rule by more than two and a half years, depriving millions of people of important health benefits. The stay is no longer justified in light of the long lapse of time and the Supreme Court's April 2014 decision, which rejected both grounds on which this Court had invalidated the Rule, upheld EPA's methodology for defining abatement obligations, and emphasized that EPA's judgments are owed deference on judicial review. As we showed, the appropriate course now—the course more faithful to the Rule and to the Clean Air Act's public health goals—would be to lift the stay and allow the Rule's Phase 2 budgets to take effect beginning in 2015.

Petitioners' responses offer prescriptions for perpetual delay and misguided arguments that would convert the stay into the practical equivalent of a merits invalidation. Petitioners utterly fail to make the case for continuation of the stay.

A. The Delays Resulting from the Stay Itself Are Not a Valid Basis for Perpetuating It.

Petitioners rely in large part on the delays wrought by the stay itself as a basis for keeping the stay in place. Industry petitioners say that because the Transport Rule budgets were established for "*specific years*" that have now passed, Opp. 1 (emphasis in original), the Rule cannot be allowed to go into effect, and that it would be "*illegal* to impose 2012 budgets in 2015," *id*. 5 (emphasis in original). According

to petitioners, "EPA must undertake a notice-and-comment rulemaking to reset the various deadlines in the Transport Rule and related rules and address the regulatory issues that flow from the new deadlines." *Id.* 9*; see also* State Opp. 11-12. Petitioners' startling position, then, is that the grant of the stay effectively rendered the Transport Rule permanently invalid.[1]

These arguments are unreasonable. Having urged this Court to use its equitable powers to stay this complex rule, petitioners cannot rely on the very delays and administrative complications the stay occasioned as grounds to prevent the Rule from taking effect. A federal court's equitable powers are not so one-sided:

> [A] reviewing court may not resolve a conflict between considered review and effective relief by reflexively holding a final order in abeyance pending review. A stay is an "intrusion into the ordinary processes of administration and judicial review," . . . and accordingly "is not a matter of right, even if irreparable injury might otherwise result to the appellant[.]" . . . The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.

Nken v. Holder, 556 U.S. 418, 426-27 (2009) (citations omitted). If petitioners' professed concerns about this Court's authority to adjust the Rule's schedule (*see* Industry Opp. 8-9) had any merit, the proper judicial response would be simply to dissolve the stay without adjusting the schedule.

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[1] Indeed, petitioners' position would appear to mean that the Rule could not be implemented (without new notice and comment rulemaking proceedings) even after this Court issued a final judgment upholding the Rule in all respects.

The same equitable powers that allowed the Court to block implementation of the Transport Rule in December 2011 allow it to restore it in a manner that minimizes disruption. Assuming the stay retained vitality after the vacatur of the Transport Rule and subsequent Supreme Court ruling, *cf.* Public Health Response/Motion 7-8, this Court's power to dissolve it on reasonable terms cannot be doubted. *See* Fed. R. Civ. P. 60, Adv. Comm. Note to 1946 Amt. ("[I]nterlocutory judgments . . . are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."); *see also Holland v. Florida*, 560 U.S. 631, 649-50 (2010) (noting "'flexibility' inherent in 'equitable procedure'") (citation omitted).

Nor is there any basis for petitioners' suggestions that further rulemaking must precede the Rule's coming into effect. The Transport Rule remains a duly enacted, presumptively valid legislative rule. If petitioners believe that "relevant circumstances have changed since 2012," Industry Opp. 9, they may petition EPA to reopen the Rule on that basis, but they must give the agency an opportunity to consider such claims in the first instance. *See Advanced Comm'ns Corp. v. F.C.C.*, 376 F.3d 1153, 1156 (D.C. Cir. 2004).

B. Petitioners Are Unable to Justify Perpetuation of the Stay.

Given the Supreme Court's decision in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), and the fact that the December 2011 stay was not intended to last so long, *see* Public Health Response/Motion 7, the burden to justify

any further delays rests squarely upon the Transport Rule's challengers. Indeed, petitioners fail to explain how a December 2011 preliminary stay outlasted the 2012 final judgment and 2013 mandate of this Court (or expired with this Court's judgment and mandate but sprang back into effect as a result of a Supreme Court decision *upholding* the Rule) and cite no authority for placing the burden on the agency in such circumstances. It is petitioners who must show that a stay is warranted now, and they have not borne that burden.

Instead, petitioners' arguments turn largely on a bold revision of the Supreme Court's decision. They recast a High Court ruling firmly rejecting their positions on both questions presented into one *sustaining* their "central statutory arguments," Industry Opp. 9, and portray an opinion that declares "we uphold the Transport Rule," 134 S. Ct. at 1609, as "fatal" to the Rule, *see* Industry Opp. 2.

While it is true that the Supreme Court acknowledged that the Rule *might* contain some flaws in "uncommon particular applications," 134 S. Ct. at 1609, the Court firmly rejected the grounds on which this Court had struck down the Rule, and its opinion emphasized the deference due EPA in this area. *See, e.g.*, *id.* at 1609 (noting that "while EPA has a statutory duty to avoid over-control, the Agency also has a statutory obligation to avoid 'under-control,' *i.e.*, to maximize achievement of attainment downwind," and that "a degree of imprecision is inevitable in tackling the problem of interstate air pollution").

Arguments that a stay is warranted based upon the legal challenges not resolved by the Supreme Court should be rejected. First of all, as noted, petitioners should be required to submit fresh motions to stay; they, and not EPA, should bear the burden to justify further delays. Furthermore, they should have to demonstrate why a likelihood of success on as-applied claims regarding "uncommon particular applications" would justify a blanket stay of the entire Rule that would provide healthier air for millions of Americans.

The unresolved merits issues that petitioners invoke do not justify a blanket stay of the Transport Rule. For example, petitioners previously failed to demonstrate—in the administrative proceedings and the merits briefing—that the Rule compels even a single upwind state to drive its contribution to every downwind state to which it is linked below one percent of the relevant air quality standard. *See* EPA Merits Br. 33-34 & n.20. And the States' argument that EPA improperly relied on 42 U.S.C. 7410(k)(6) to correct its prior, pre-*North Carolina* approvals of Clean Air Interstate Rule (CAIR) plans rests upon purported non-textual limitations that do not overcome the deference due EPA's interpretation of the Act—and, in any event, do not apply to the 2006 fine particle standard, which was covered by the Transport Rule and not by CAIR. *See also* EPA Merits Br. 49-51.

C. The Public Health Intervenors' Proposed Implementation Schedule Is Reasonable and Feasible and Best Serves the Public Interest.

Trying to create an endless loop of delay, petitioners complain that there is no "evidence in the administrative record," Industry Opp. 6, establishing regulated entities' ability to comply with Transport Rule budgets *by 2015*. But the Rule's administrative record showed that petitioners could satisfy the Phase I budgets in 2012, and the Phase 2 budgets *in 2014*. *See* Public Health Response/Motion 14. Our position is not that "regulated parties should have been complying with the Transport Rule even when it was stayed," Industry Opp. 7, but that the stay did not entitle regulated entities to an *additional* period of lead time, *after the stay terminates*, to prepare for compliance. If any party chose to sit on its hands, it, and not the public, should bear the consequences. No case precedent or principle of equity supports petitioners' theory that the stay excused regulated entities from present compliance with the Rule, but also from any obligation to prepare for future compliance.[2]

Petitioners' position on post-stay implementation of the Rule is equally brazen and unfounded. Industry petitioners allege that they are unable to meet the Rule's full Phase 2 reductions (*i.e.*, what EPA determined was required to fully comply with

[2] A party that wins a preliminary injunction remains liable for damages attributable to the injunction if the party loses on the merits, *see* Fed. R. Civ. P. 65(c); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2954, demonstrating that a grant of interim relief does not immunize the movant from responsibility for the resulting delays.

the statute) in 2015 because it would require them to exert some effort beyond what they have been doing while the stay has been in effect. For instance, petitioners argue that, in 2015, sources cannot be expected to: achieve an emissions rate that they have already demonstrated over an entire one- to three-year period (Industry Opp., Ex. 2, Declaration of J. Marchetti ¶¶ 12, 33); operate existing pollution control equipment or install pollution control equipment as originally planned[3] (*id*. ¶¶ 21, 33; Public Health Response/Motion, Att. A, Sahu Decl. ¶¶ 6-7); burn lower-polluting coal (Marchetti ¶¶ 13, 18, 27, 33); buy allowances to comply with the Rule (*id*. ¶¶ 18, 19; Industry Opp. 17); achieve emissions rates for which their pollution controls were designed[4] (Marchetti ¶¶ 23, 26, 27, 30); or shift utilization to lower-emitting sources if it does not serve the economic interests of the displaced plants (*id*. ¶ 27). According to petitioners, in evaluating whether to perpetuate the stay, this Court should not expect anything of the affected sources beyond what they were already planning to do in 2015 in the absence of the Rule. But, as demonstrated by Public

[3] *See, e.g.*, Homer City Generation, L.P., March 31, 2013 Financial Statements at 3 ("[c]onstruction of the [pollution controls] is in progress and anticipated to be completed in 2014") (available at http://www.homercitygeneration.com/docs/Homer_City_Generation_LP_Q1_13.pdf) (accessed Aug. 21, 2014).

[4] *See, e.g.*, Power Magazine, *Reliant Energy Commits $350 Million for Environmental Upgrades at Two Key Facilities* (Sep. 1, 2006) ("scrubbers at [Keystone and Cheswick] units will remove approximately 98% of SO_2 from the stations' flue gases") (available at http://www.powermag.com/projects-2/) (accessed Aug. 21, 2014).

Health Intervenors, each state's Phase 2 reductions are achievable in 2015 through a combination of fully operating existing or soon-to-be completed controls, completing announced retirements, and increasing dispatch of lower-emitting generation. *See* Public Health Response/Motion 16-18.

Complying with the Clean Air Act and the Rule will require regulated entities to make some effort. Due to the Rule's design, however, the effort is by no means unreasonable. EPA designed the Rule to include numerous features that reduce compliance burdens, including an annual or season-long emissions measurement period, an extended timeframe to purchase allowances, statewide emissions budgets, and variability limits. And as EPA recognized, *e.g.*, 76 Fed. Reg. 48,208, 48,272 (Aug. 8, 2011), a diversified and interconnected power sector facilitates compliance through shifts in utilization, while maintaining a reliable electricity supply.[5]

Petitioners' effort to cast the risks and costs of delay entirely upon the public should be rejected. The long lapse of time since publication of the Rule strongly favors the Public Health Intervenors' proposal that the Rule be allowed to take full

[5] Petitioners' arguments about "extremely tight reserve margins," Marchetti ¶ 17, are not only reminiscent of the dubious prognostications in the original motions for a stay (*see* Luminant Mot. (Doc. 1329866) 18-19; Texas Mot. (Doc. 1331052) 15-16), but also ignore the fact that reserve margins are only relevant during periods of peak demand (usually parts of Summer and Winter). The Rule's lengthy compliance periods allow a state to rely more heavily on lower-emitting sources during predominant non-peak periods instead of when demand is highest.

effect in 2015, so as to minimize further delays in protecting public health. That proposal represents a realistic effort to restore as much of the Rule's original operation as is reasonably possible under present circumstances. It is surely a far less "fundamental change to the Transport Rule" (State Resp. 13) than *petitioners*' proposal, which is that the Rule be deemed invalid because it was (at petitioners' instance) not implemented on the original schedule. Of the various proposals now before the Court, ours departs the least from the regulation as adopted, while also being administrable and offering a reasonable transition period.

D. Dissolving the Stay Would Benefit Public Health.

Dissolving the stay is not, as industry petitioners suggest, a matter of "litigation advantage," Industry Opp. 19, but of providing vital, long-delayed health protections for millions of Americans, *see* Public Health Response/Motion 17-19.

Petitioners' claims that the continued application of CAIR adequately protects the interests served by the Transport Rule, *e.g.*, Industry Opp. 19 & n.19; State Opp. 15, are unfounded. *See* Public Health Response/Motion 5, 19. Six years ago in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), this Court declared CAIR unlawful and, in key respects, underprotective, and EPA still has an obligation to fulfill *North Carolina*'s mandate, which was centrally concerned with *expeditious* pollution abatement. *See id.* 5-6, 11-12; *U.S. Postal Service v. Postal Regulatory Comm'n*, 747 F.3d 906, 910 (D.C. Cir. 2014) (agency obligated to comply with

mandate). CAIR is not as protective and does not even cover the 2006 fine particle standard addressed by the Transport Rule. *See* EPA Motion 10-12.

Furthermore, and contrary to petitioners' claims (*e.g.*, Industry Opp. 19 & n.19), because the air quality standards at issue in the Transport Rule are insufficiently protective of public health, EPA has issued new, more protective air quality standards for both ozone and fine particles. *Mississippi v. EPA*, 744 F.3d 1334, 1342-48 (D.C. Cir. 2013) (upholding 2008 ozone standard); *Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921, 922 (D.C. Cir. 2014) (upholding 2013 fine particle standard). Monitoring data indicate that many areas within the Rule's coverage area are in violation of these new standards,[6] which is yet another reason why the balance of harms tips decidedly against staying the Transport Rule.

CONCLUSION

The Court should dissolve the stay and adjust the Transport Rule's implementation schedule such that the Phase 2 obligations commence on January 1, 2015, for the annual programs, and May 1, 2015, for the ozone-season program.

Respectfully submitted,

/s/ Sean H. Donahue

[6] *See* http://www.epa.gov/airtrends/values.html (2011-13 monitoring data for ozone and fine particle pollution).

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Dated: August 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served this 22nd day of August, 2014, upon all registered counsel, through the Court's CM/ECF system.

/s/ Sean H. Donahue
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