

ORAL ARGUMENT NOT YET SCHEDULED

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

CALPINE CORPORATION,  
CONSOLIDATED EDISON, INC.;  
NATIONAL GRID USA; NEW YORK  
POWER AUTHORITY; and POWER  
COMPANIES CLIMATE COALITION,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; UNITED  
STATES DEPARTMENT OF  
TRANSPORTATION; and NATIONAL  
HIGHWAY TRAFFIC SAFETY  
ADMINISTRATION,

*Respondents.*

No. 19-1245 (and consolidated)

**PETITIONERS' NON-BINDING STATEMENT OF ISSUES**

Petitioners Calpine Corporation, Consolidated Edison, Inc., National Grid USA, New York Power Authority, and Power Companies Climate Coalition submit the following non-binding statement of issues to be raised in this proceeding to challenge the final agency actions of Respondents United States Environmental Protection Agency (“EPA”) and National Highway Traffic Safety Administration (“NHTSA”) published together at 84 Fed. Reg. 51,310 (Sept. 27, 2019), without waiving their right to modify these issues or raise additional ones:

(1) Whether EPA’s partial withdrawal of the waiver of preemption it had previously granted to the State of California pursuant to 42 U.S.C. § 7543(b)(1) to

enforce its greenhouse gas emissions and zero emission vehicle standards is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act, Administrative Procedure Act, or other laws.

(2) Whether EPA's determination that states other than California cannot use 42 U.S.C. § 7507 to adopt or enforce greenhouse gas emissions standards identical to standards for which it has granted the State of California a waiver of preemption pursuant to 42 U.S.C. § 7543(b)(1) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act, Administrative Procedure Act, or other laws.

(3) Whether NHTSA abused its discretion and acted in a manner that was arbitrary, capricious, *ultra vires*, or otherwise not in accordance with the Administrative Procedure Act, the Energy Policy and Conservation Act of 1975, and other laws, in adopting regulations that declare any state law or regulation that regulates or prohibits, or has the direct or substantial effect of regulating or prohibiting, tailpipe emissions of carbon dioxide from automobiles to be expressly and impliedly preempted under 49 U.S.C. § 32919, and in determining that state greenhouse gas and zero emission vehicle standards fall within the scope of such preemption, even if the EPA has granted a waiver of preemption for enforcement of such standards pursuant to 42 U.S.C. § 7543(b)(1).

Dated: January 2, 2020

Respectfully submitted,

/s/ Kevin Poloncarz

Kevin Poloncarz

Donald L. Ristow

Jake Levine

COVINGTON & BURLING LLP

Salesforce Tower

415 Mission Street, 54th Floor

San Francisco, CA 94105-2533

(415) 591-7070

kpoloncarz@cov.com

*Counsel for Calpine Corporation,  
Consolidated Edison, Inc., National  
Grid USA, New York Power Authority,  
and Power Companies Climate  
Coalition*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of January, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will cause all registered CM/ECF users to be served by the CM/ECF System.

Dated: January 2, 2020

/s/ Kevin Poloncarz  
Kevin Poloncarz