

**ORAL ARGUMENT ON REMAND FEBRUARY 25, 2015**

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

No. 11-1302 (and consolidated cases)  
COMPLEX

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EME HOMER CITY GENERATION, L.P., et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, et al.

Respondents.

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On Petitions for Review of EPA Final Action, 76 Fed. Reg. 48,208

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**BRIEF OF INDUSTRY RESPONDENT INTERVENORS ON REMAND**

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DATED: January 23, 2015

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### (A) Parties and Amici

All parties, intervenors, and amici appearing in this court are listed in the Brief for Industry and Labor Petitioners.

### (B) Rulings Under Review

The Agency action under review is “Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals,” 76 Fed. Reg. 48,208 (Aug. 8, 2011).

### (C) Related Cases

All cases consolidated with No. 11-1302 are listed in in the Brief for Industry and Labor Petitioners. The Court issued a previous opinion in this case in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The Supreme Court granted petitions for a writ of certiorari and, in *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), reversed this Court’s judgment and remanded the cases for further proceedings.

This Court severed certain issues concerning the Rule’s electronic data reporting requirements, which were placed in *Utility Air Regulatory Group v. EPA*, No. 12-1043, which is being held in abeyance.

Review of three EPA regulations that supplement or modify the rule under review are pending in this Court in *Public Service Co. v. EPA*, No. 12-1023 and consolidated cases; *Wisconsin Public Service Corp. v. EPA*, No. 12-1163 and consolidated cases; and *Utility Air Regulatory Group v. EPA*, No. 12-1346 and consolidated cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Industry Intervenors provide the following corporate disclosures:

**Calpine Corporation** states that Calpine Corporation (“Calpine”) is a major U.S. power company which owns 88 primarily low-carbon, natural gas-fired and renewable geothermal power plants in operation or under construction that are capable of delivering more than 27,000 megawatts of electricity to customers and communities in 18 U.S. states and Canada. Calpine’s fleet of combined-cycle and combined heat and power plants is among the largest in the nation. Calpine is a publicly-traded corporation, organized and existing under the laws of the State of Delaware. Its stock trades on the New York Stock Exchange under the symbol CPN. Calpine has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in Calpine.

**Exelon Corporation** states that Exelon Corporation (“Exelon”) is a publicly-traded corporation, organized and existing under the laws of the Commonwealth of Pennsylvania. Its stock trades on the New York Stock Exchange under the ticker symbol EXC. Exelon has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in Exelon.

Exelon owns Exelon Generation Company, LLC which owns or controls

approximately 35,000 MW of generating facilities, and is engaged in the generation and sale of electricity in wholesale and retail markets. Exelon is also engaged in the purchase, transmission, distribution and sale of electricity through its regulated electric utility subsidiaries, Baltimore Gas and Electric Company (“BGE”) of Baltimore, MD, Commonwealth Edison Company (“ComEd”), of Chicago, IL, and PECO Energy Company (“PECO”), of Philadelphia, PA. Together, BGE, ComEd and PECO own transmission and distribution systems and serve approximately 6.6 million retail electric customers in central Maryland, northern Illinois, and the Philadelphia area.

On March 12, 2012, Exelon merged with Constellation Energy Group, Inc. in a stock-for-stock transaction. The resulting company retained the Exelon name and is headquartered in Chicago.

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## GLOSSARY

CAA	Clean Air Act, 42 U.S.C. § 7401 et seq.
CAIR	Clean Air Interstate Rule, <i>Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call</i> , 70 Fed. Reg. 25,162 (May 12, 2005)
EPA	United States Environmental Protection Agency
EPA Br.	Brief for Respondents (Corrected) United States Environmental Protection Agency, <i>et al.</i> , Doc. 1532597
Good Neighbor Provision	42 U.S.C. § 7410(a)(2)(D)(i)(I)
I&L Br.	Brief for Industry and Labor Petitioners, Doc. 1526613
IPM	Integrated Planning Model
JA	Joint Appendix
Transport Rule	Cross-State Air Pollution Rule, <i>Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals</i> , 76 Fed. Reg. 48,208 (Aug. 8, 2011)

## **STATUTES AND REGULATIONS**

The pertinent statutes and regulations are set forth in Industry and Labor Petitioners' addendum.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' "overcontrol" arguments unduly focus on a single paragraph of the Supreme Court's opinion upholding EPA's Transport Rule ("Rule"). Although the Supreme Court articulated two conceptual limits on EPA's authority to regulate under the CAA Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i), it simultaneously upheld EPA's use of uniform cost thresholds to establish state obligations, made clear that EPA's duty to ensure attainment of air quality standards takes priority over any duty to mitigate the upwind state obligations, and set a high bar for any petitioner to make out a "particularized, as-applied challenge" to the Rule. Petitioners' "overcontrol" arguments conflict with the Supreme Court's holding, do not meet the Supreme Court's rigorous standards for as-applied challenges, and should be rejected.

Petitioners' arguments regarding EPA's use of modeling tools in developing the Rule ask this Court to trample the discretion owed EPA in matters of its core technical competence. The Supreme Court acknowledged the complexity of addressing interstate pollution, here compounded by the continued enforcement of the CAIR as an interim measure after this Court invalidated that rule. EPA used the best tools available to develop the Rule's state emission budgets and allowance allocations, and reasonably concluded that the flexibility built into the Rule

adequately compensates for any shortcomings in its models. This Court should deny the petitions for review.

## **ARGUMENT**

### **I. The Transport Rule Requires Permissible Emission Reductions.**

Petitioners argue that the Rule exceeds EPA's authority in two respects. First, they suggest that some states could have eliminated their downwind contributions at a lower cost than EPA uniformly used to determine necessary emission reductions. Second, they claim that EPA's models showed that air quality was getting better all by itself, and that if EPA had only waited until 2014 to address the nonattainment and maintenance problems in downwind states, there would have been no need for the Rule at all, at least for some states. I&L Br. at 7-8.

#### **A. The Supreme Court Specifically Affirmed EPA's Use of Uniform Cost Standards.**

The Supreme Court explicitly addressed the central issue in this case of EPA's use of uniform costs to determine the emission reductions required of upwind states. It not only upheld EPA's use of uniform costs, it endorsed the approach as "[e]quitable because, by imposing uniform cost thresholds on regulated States, EPA's rule subjects to stricter regulation those States that have done relatively less in the past to control their pollution." *Env't'l Prot. Agency v.*

*EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 (2014). There is no room for this Court to reject EPA's use of uniform costs to determine the obligations of all states.

However, that is exactly what petitioners ask this Court to do when they assert that EPA must adjust the emission budget of any state that might, hypothetically, be able to eliminate its downwind contributions for less than \$500 per ton. *See* I&L Br. at 13-14. The necessary implication of such a holding would be to require EPA to calculate new budgets for those states based on different costs. *See id.* at 27 (requesting such relief). The Rule would be neither uniform nor fully functional if EPA used different costs to determine the obligations of each state.

EPA selected uniform costs for this Rule because doing so effectively places the same value on allowances regardless of the state in which they originate. This allows sources to trade allowances across state boundaries, ensuring the most cost-effective compliance across states. *See* 134 S. Ct. at 1607. Moreover, the methodology reflects the actual operation of the electricity grid, where power generation and resulting emissions shift to power plants that can generate electricity at the lowest cost, without regard to state boundaries. EPA also determined that using the same cost to determine emission obligations for

each state facilitated trading of allowances between states. *See* 76 Fed. Reg. 48,208, 48,263-4, 48,271-2 (Aug. 8, 2011). If different costs were used, power generation would shift to the states where the lowest cost was used, increasing emissions in those states and putting linked downwind states at increased risk. EPA took this factor *and* lower cost thresholds into account. *See id.*; EPA Br. at 27, 51-52.

Moreover, without use of uniform costs, the Rule would lack the “equitable” quality lauded by the Supreme Court. In order to prevail on their “overcontrol” arguments, petitioners must show not only that a *single* state could eliminate its downwind contribution at a lower cost (*e.g.*, \$400 per ton), but that a lower *uniform* cost applied to *all* upwind states would eliminate *all* downwind contributions. Petitioners cannot do that, and have not attempted to do so.

B. Petitioners Cannot Meet The Supreme Court’s Prerequisites For “As-Applied” Challenges.

Even if the Supreme Court intended that a state be entitled to individual relief from uniform cost standards in certain circumstances, petitioners have not met their heavy burden to prove that EPA’s choices underlying the Rule were arbitrary and capricious. The Supreme Court explicitly held that some degree of what petitioners characterize as “overcontrol” is permissible; it is not enough for petitioners to show that the Rule would require a state to reduce pollution “by

more than is necessary to achieve attainment in every downwind State or at odds with the one-percent threshold [EPA] has set.” 134 S. Ct. at 1608. Petitioners must also demonstrate that such “overcontrol” is not merely “incidental to reductions necessary to ensure attainment elsewhere.” *Id.* That is, petitioners must show that the incremental reductions they complain of are “unnecessary to downwind attainment *anywhere.*” *Id.* at 1609.

Petitioners must also show that any purported “overcontrol” is not merely a byproduct of EPA’s statutory mandate “to seek downwind attainment of [air quality standards] notwithstanding the uncertainties” associated with the complex problem of interstate air pollution. *Id.* at 1605, 1609. The Supreme Court acknowledged that “a degree of imprecision is inevitable in tackling the problem of interstate air pollution,” and “[h]ence, some amount of over-control, *i.e.*, emission budgets that turn out to be more demanding than necessary, would not be surprising. Required to balance the possibilities of under-control and over-control, EPA must have leeway in fulfilling its statutory mandate.” *Id.* To prevail, petitioners must prove that the incremental reductions of which they complain fall outside of this “leeway” that must be afforded to EPA in implementing the CAA.

Finally, petitioners must also show that the “overcontrol” they complain of is real, not merely hypothetical or predicated on an underdeveloped assessment of

air quality. *Id.* Petitioners' arguments are premised on the incorrect assumption that EPA is prohibited from requiring further upwind reductions once the monitors in any downwind state measure below the applicable standards. In their view, the Rule imposes unlawful "overcontrol" whenever it appears that air quality, whether measured or modeled, meets air quality standards, however fleetingly. This is not the case. Re-designation to attainment can be demonstrated only through sustained compliance protected by force of law, and backed by an approved maintenance plan.<sup>1</sup> An improvement in air quality due to happenstance, such as favorable wind patterns, an unfavorable economy or, in the case of power plants, falling prices for a relatively cleaner fuel (natural gas), cannot be relied upon by downwind areas seeking "attainment" status. EPA is charged with creating a rule that assures attainment over the long-term, taking into account potential changes in economic conditions, demographics, fuel costs and other factors which could

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<sup>1</sup> The CAA prescribes a specific process for changing the status of a nonattainment area. A state must petition EPA to re-designate the area as in attainment and show that the emission reductions are "permanent and enforceable" and the state has adopted a maintenance plan, approved by EPA, which demonstrates the area will maintain air quality standards for at least 10 years after re-designation. 42 U.S.C. §7407(d)(3)(E). This process precludes reliance on emission reductions that are "temporary" such as those which may result from short-term changes in industrial or economic activity or unusually favorable meteorology. *See Sierra Club v. EPA*, No. 12-2853 (7th Cir. Dec. 16, 2014) slip op. at \*19-20.

impact dispatch of generation units, and ultimately emissions. *See* 76 Fed. Reg. at 48,231.

Ultimately, petitioners fail to demonstrate “overcontrol” because they fail to demonstrate downwind attainment in 2012, when the Rule was to take effect, let alone attainment everywhere in 2012 or 2014 “notwithstanding the uncertainties” of predicting interstate air pollution. *See* 134 S. Ct. at 1609. They point to EPA-modeled air quality projections, but such metrics, even if reflected in actual field measurements, are insufficient to demonstrate “attainment” everywhere under all conditions. Petitioners do not show that the Rule imposes “overcontrol” beyond that which the Supreme Court permits as either “incidental” to other necessary reductions or within the “leeway” that EPA has to fulfill its statutory mandate to assure attainment of air quality standards. All of petitioners’ claims regarding overcontrol should be rejected.

#### C. Petitioners Overstate The Precision Required Of EPA.

Petitioners’ arguments also incorrectly assume that for each upwind state there is a precise and unchanging quantity of each pollutant that causes the state’s contribution to nonattainment in each linked downwind state. That is not so. Indeed, the Supreme Court allowed that “a degree of imprecision is inevitable” when fulfilling the Good Neighbor Provision’s obligations. *Id.* at 1608. This

Court also noted the complexities of determining how multiple upwind state emissions may impact downwind states, some of which are upwind of other downwind states. *See North Carolina v. EPA*, 531 F.3d 896, 908 (D.C. Cir. 2008) (EPA may determine “significant contribution” “even if that measurement does not directly correlate with each state’s individualized air quality impact on downwind nonattainment relative to other upwind states.”) (*citing Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000)).

EPA addresses this complexity by modeling air quality and economic costs over an extended time to predict both the extent of upwind emissions and how they may impact downwind states. EPA does not have the ability to determine the *exact* minimum amount of pollution that must be eliminated for any one upwind state to ensure each of its linked downwind states achieves and maintains attainment. The Supreme Court accepted this limitation, noting that “[s]light changes in wind patterns or energy consumption, for example, may vary downwind air quality in ways EPA may not have anticipated.” 134 S. Ct. at 1609. Regarding the latter, emissions from electric generating units are subject to myriad economic factors which are constantly in flux. Changing fuel costs, control costs, electricity demand and other factors determine which sources are primarily called on for generation and the resultant emissions. When these variables and

uncertainties were presented to the Supreme Court, it declined to demand precision from EPA, accepting some degree of “overcontrol” as an inevitable result of the process. *Id.* at 1608.<sup>2</sup>

Moreover, petitioners’ claim that EPA can require only reductions absolutely necessary to achieve attainment, and no more, is inconsistent with the most basic requirements of the CAA that states and EPA protect air quality even when it is cleaner than the standard. *See Sierra Club et al. v. Ruckelshaus*, 344 F. Supp. 253, 255-56 (D.D.C.), *aff’d per curiam*, 4 E.R.C. 1815, 2 Env. L. Rep. 20656 (D.C. Cir. 1972), *aff’d, Fri v. Sierra Club*, 412 U.S. 541 (1973).<sup>3</sup> Congress incorporated that principle into the Good Neighbor Provision through subsequent CAA amendments. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(II) (states to prevent significant deterioration of air quality).

## II. EPA’s Use of Modeling For Air Quality And Emission Reductions Was Reasonable.

Petitioners challenge EPA’s methodology for determining state budgets by attacking its use of modeling to estimate the impacts to air quality and emission

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<sup>2</sup> The same arguments as above apply to the maintenance prong arguments by the state petitioners; EPA properly applied this prong. *See* EPA Br. at 18-22.

<sup>3</sup> Congress specifically endorsed and preserved these judicial decisions. *See* Pub. L. No. 95-95, § 406, 91 Stat. 685, 796 (1977), as amended by Pub. L. No. 95-190, § 14(b)(6), 91 Stat. 1405 (1977).

reductions from those budgets. These challenges fail because EPA's use of modeling was reasonable, considered measured and projected emissions as well as transmission constraints, and was well within EPA's technical expertise.

A. EPA's Air Quality Modeling Was Reasonable.

Petitioners assert that EPA acted arbitrarily by refusing to benchmark its air quality modeling with "actual" emissions data and by ignoring "current" air quality data. I&L Br. at 15-16. EPA's brief thoroughly refutes this argument and explains that EPA reasonably excluded air quality data reflecting emission reductions resulting from CAIR, especially given this Court's invalidation of CAIR. *See* EPA Br. 31-32, 35-40. EPA also explains that it did indeed use "real world" monitored air quality as the basis for its modeling and to confirm the validity of its projections, and considered more recent monitoring data. EPA Br. at 33-34, 39-40. In addition, as noted above, air quality can change based on numerous factors, making it important to model potential future scenarios and industry responses.

B. EPA Made Proper Use of Economic Modeling To Determine The Impact of Reductions At Various Levels of Control Costs.

Petitioners also reprise their claim that EPA's use of the IPM to determine cost-effective reductions at various cost levels was flawed because IPM did not accurately predict generation and emissions for each individual electric generating

unit or for co-generation units. They argue that EPA should have considered “actual” emissions at the unit level to determine budgets. I&L Br. at 24-27.

EPA properly used IPM to predict emissions on a state-by-state basis under multiple scenarios. IPM is recognized as the most comprehensive, sensitive model for predicting the operation of generation units based on factors including electricity demand, emission controls and economic conditions.<sup>4</sup> IPM is a peer-reviewed model used by EPA, states, grid regulators and private industry.<sup>5</sup> EPA did not rely solely on IPM, as petitioners imply, but used its predictions as a starting point, adjusting state emission budgets to reflect data not reflected by the model, especially where supporting data was brought to EPA’s attention through the comment process.<sup>6</sup>

That IPM did not perfectly predict real-world outcomes does not render EPA’s use of the model arbitrary and capricious. EPA reasonably addressed IPM’s limitations, including those specifically raised by the petitioners.<sup>7</sup> IPM was

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<sup>4</sup> EPA, *IPM Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model* at 2-1 (Aug. 2010) (JA02339) (“IPM Documentation”).

<sup>5</sup> *See Appalachian Power Co., et al. v. EPA*, 249 F.3d 1032, 1052-534 (D.C. Cir. 2001) (approving of EPA reliance on IPM). For a complete discussion of the purpose and capabilities of IPM, see IPM Documentation at §2.1 (JA02339-2340).

<sup>6</sup> *See, e.g.* Response to Comments at 2106-08, 2171-72 (JA02088-2090, 2097-2098); 77 Fed. Reg. 10,324 (Feb. 21, 2012); EPA Br. at 43.

<sup>7</sup> In fact, EPA specifically addressed the co-generation issue and transmission  
(continued...)

the method by which EPA could best “provide[] forecasts of least cost capacity expansion, electricity dispatch, and emission control strategies while meeting energy demand and environmental, transmission, dispatch, and reliability constraints.”<sup>8</sup> EPA’s task was to design a rule that would work well into the future within the context of the national grid, where the location of least cost dispatch -- and hence emissions -- can vary widely based on economic, regulatory and other market forces. Focusing on actual emissions data from any one year could not provide the same flexibility for estimating long-term emissions over changing generation patterns, especially given the multiple factors discussed above that could lead to temporary reductions of emissions. For example, IPM was programmed to incorporate the fact that historically low natural gas prices shifted more generation from coal to gas, and thus reduced emissions. 75 Fed. Reg. 53,613, 53,614 (Sept. 1, 2010). When gas prices rebound, generation shifts back to coal and emissions rise. EPA’s use of the IPM model was a reasonable exercise of its technical expertise and thus is entitled to deference. *West Virginia v. EPA*, 362 F.3d 861, 867-68, 871 (D.C. Cir. 2004).

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(...continued)

<sup>8</sup> constraints in its rulemaking. *See* EPA Br. at 41-45. IPM Documentation at 1-1 (JA02333).

IPM's limitations also were insignificant under the Rule's trading approach, which does not impose any control requirements on any specific unit. Even if IPM predicts that a given unit will not operate when local conditions actually require it to, as petitioners allege with respect to co-generation plants, this does not result in any fatal flaw. Such circumstances primarily affect *which* units operate, and do not dramatically affect the total amount of pollution emitted. To the extent any unit operates more than it has in the past, the unit's owner can simply buy more allowances.<sup>9</sup> EPA designed the Rule to provide budget flexibility for variations in electricity demand among units and among states, allowing states to exceed their budgets by up to 21% without penalty. 76 Fed. Reg. at 48,267. Such flexibility amply offsets any intermittent or individualized shortcomings of IPM. *See* EPA Br. at 44.

## CONCLUSION

The petitions for review should be denied.

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<sup>9</sup> EPA used IPM to determine state budgets, but allocated allowances to units based on their historic use. *See* EPA Br. at 43-44. Moreover, EPA specifically authorized states to reallocate allowances as part of a streamlined State Implementation Plan revision, effective as soon as the second year of the program. 76 Fed. Reg. at 48,327.

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**CERTIFICATE OF COMPLIANCE**

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a), I hereby certify that the foregoing Brief of Industry Respondent Intervenors contains 2,866 words as counted by the Microsoft Office Word 2003 word processing system. I further certify that the combined words of the Public Health Intervenors, the State and Local Intervenors, and the Industry Intervenors do not exceed 8,750, as mandated by this Court's October 23, 2014 Order.

January 23, 2015

/s/ Brendan K. Collins

Brendan K. Collins

**CERTIFICATE OF SERVICE**

I, Brendan K. Collins, a member of the Bar of this Court, hereby certify that on January 23, 2015, I electronically filed the foregoing “Brief of Industry Respondent Intervenors” with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ Brendan K. Collins

Brendan K. Collins