ARGUED DECEMBER 10, 2013
DECIDED APRIL 15, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE STALLION ENERGY CENTER, LLC, et al.,	)	
Petitioners,	)	**Case No. 12-1100, and consolidated cases**
v.	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CONSOLIDATED RESPONSE OF INDUSTRY RESPONDENT INTERVENORS IN OPPOSITION TO PETITIONERS' MOTIONS TO GOVERN FUTURE PROCEEDINGS

Industry Respondent Intervenors[1] oppose the motions to govern future proceedings filed by Certain State and Industry Petitioners ("Movant Petitioners") (Doc. No. 1574809) and by Tri-State Generation and Transmission Association, Inc. ("Tri-State") (Doc. No. 1574817) (collectively, "Petitioners' Motions"). Movant Petitioners ask the Court to vacate the Mercury and Air Toxics Standards ("Rule"). Tri-State joins in that request, and in the alternative asks the Court to suspend the

[1] Industry Respondent Intervenors are Calpine Corporation, Exelon Corporation, National Grid Generation LLC, and Public Service Enterprise Group, Inc.

requirements of the Rule for any power plants that obtained an extension of time to comply with the Rule until April 16, 2016, or at least for Tri-State's Nucla Station, unless and until EPA reaffirms on remand its determination under section 112(n)(1)(A) of the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A), that it is "appropriate" to regulate hazardous air pollutant emissions from coal- and oil-fired power plants (the "Finding").

Petitioners' Motions should be denied. The movants mischaracterize the inquiry before the Court and misapply the *Allied Signal* factors that guide this Court in determining whether to vacate an administrative action after the courts have determined the action to be flawed. Movant Petitioners and Tri-State fail to address the likelihood that EPA will, after reconsideration, reaffirm the Finding. They ignore the disastrous disruption to the electric power sector that would inevitably follow a vacatur of the Rule, even if EPA reaffirms the Finding in a few months. For the reasons set forth in Industry Respondent Intervenors' Motion to Govern Future Proceedings ("Industry Respondents' Motion") (Doc. No. 1574838), the Court should remand the Finding to EPA for reconsideration, and should not vacate either the Finding or the Rule.

A. Petitioners' Motions Distort The Inquiry Before The Court.

Petitioners' motions are founded on serious errors of fact and law. First, they argue that the Court is statutorily required to vacate the Rule. This proposition is obviously contrary to *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-

51 (D.C. Cir. 1993), and the many cases in which this Court has remanded rules without vacatur. Petitioners cite an inapplicable statute to support their point, referring to the supposedly prescriptive Administrative Procedure Act provision, 5 U.S.C. § 706(2)(c), rather than the plainly permissive Clean Air Act provision governing this Court's review of the Rule, 42 U.S.C. § 7607(d)(9). Movant Petitioners' Motion at 10-11. The judicial review provisions of the Clean Air Act expressly supersede those of the Administrative Procedure Act. 42 U.S.C. § 7607(d). The Clean Air Act grants this Court *authority* to "reverse" EPA's adoption of the Rule, but certainly does not require the Court to vacate in this case. *See also* EPA's Response to Petitioners' Motions (Doc. No. 1579186) ("EPA's Response") at 2-3.

Second, Movant Petitioners conflate the question of whether EPA erred in excluding cost from its deliberations – a question settled by the Supreme Court – with the question relevant to this Court's analysis under the first *Allied-Signal* factor: whether despite this error it is possible that EPA nevertheless "chose correctly" when it made its Finding that regulation of power plants under Section 112 is "appropriate." *See id.* The *Allied-Signal* factors are applied only when the subject of remedy is presented, which presupposes that a court has found some error by the agency in the action under review. Movant Petitioners' interpretation of *Allied-Signal* is circular, arguing that the court's determination that an error occurred necessarily means that the agency did not "choose correctly." This interpretation would create a truism, and effectively read the first *Allied-Signal* factor out of this Court's jurisprudence. Instead,

Allied-Signal requires the Court to go beyond the original finding of error to decide the practical question of whether it is possible EPA nonetheless "chose correctly" in making the Finding.

Third, Movant Petitioners offer an internally inconsistent assessment of the "disruptive consequences" of a vacatur of the Rule. Movant Petitioners claim that the environmental benefits of the Rule are already locked in because many plants have already complied, and others have chosen to retire. Movant Petitioners' Motion at 16. Yet, Movant Petitioners count among the reasons to vacate the Rule that doing so would spare those who have complied from the expenses of operating pollution controls, which would of course negate the environmental benefits that Movant Petitioners suggest would be preserved despite vacatur. *See id.* at 18-19. Petitioners do not acknowledge, much less rebut, the disruptive consequences of vacatur described in Industry Respondents' Motion (at 13-17), nor do they support their allegations of disruption, or the absence thereof, with declarations or other information about the current state of the electric power sector.

As a practical matter, the stakeholders in the electric power sector that would benefit most from vacatur of the Rule are the owners of power plants that have no intention of complying with the Rule. Unencumbered by capital or operating compliance costs, these owners will run their plants until they are forced to comply with the Rule, at which point the plants will be shut down. For as long as these plants

can run, they will enjoy a competitive advantage over plants that have complied or are preparing to comply, reaping higher profits by avoiding compliance costs.[2]

The rest of the electric power sector has either come into compliance or committed the capital necessary to do so by the extended compliance date. No party disputes that most generating units have already complied with the Rule. At this point in late 2015, even units that obtained extensions until April 16, 2016, have either made any substantial capital investments necessary to comply, or irretrievably committed to those costs by entering into contracts to install the needed equipment. *See* Industry Respondents' Motion at 9 (citing Staudt Declaration ¶¶ 3, 15; Berg Declaration ¶¶ 14-17). As a result, vacating the Rule will not prevent any power plant that intends to comply with the Rule from incurring any significant capital cost necessary for compliance. Further, Movant Petitioners and Tri-State acknowledge that capital investments that have already been made to install controls are committed regardless of whether the Rule remains in effect on remand. *See* Tri-State Motion at 13 ("capital investments [to install new control equipment] have already been made and cannot be undone"); Movant Petitioners' Motion at 18.

---

[2] All else being equal, units that do not incur compliance costs can generate electricity more cheaply than those that installed controls and must price those controls into their cost of production of electricity. Units that can generate electricity more cheaply will run more often and make higher profits when they do run, as compared to generators who bear the cost of complying with the Rule.

However, Movant Petitioners suggest that power plant operators – even those who have already complied – could reap substantial savings if the Rule were vacated. Movant Petitioners' Motion at 18-19. They offer scant support for this contention, citing only EPA's 2012 estimate of the expected costs associated with monitoring, reporting, and recordkeeping, and asserting more generally that operating new control equipment will impose more costs. *Id.* Yet, experience has shown that EPA's 2012 cost estimates were wildly high. Industry Respondents' Motion at 8. Moreover, some plants that have installed controls may be unable to avoid these operating costs regardless of this Court's decision, either because the controls are now integrated into plant operations or because they are also necessary to fulfill regulatory obligations independent from those imposed by the Rule. So, while it is possible that some plants might be able to save some operating costs if the Court were to vacate the Rule, Movant Petitioners offer no estimate of these savings, which could be realized only during the limited period in which EPA reconsiders the Finding.

More importantly, even assuming that vacatur could yield some savings, this supposition would not settle the question posed by the second *Allied-Signal* factor. After all, it is a rare regulation that does not impose some cost, and so the vacatur of virtually any rule would result in some savings for some industry members. Instead, the second *Allied-Signal* factor asks whether vacatur would have "disruptive consequences." *Allied-Signal*, 988 F.2d at 150-51. Here, the disruptive consequences of vacatur would flow from the disturbance in the electricity markets that would

ensue, and the disappointment of the reasonable, investment-backed expectations of the power plant owners who complied or prepared to comply with the Rule. Industry Respondents' Motion at 13-19.

Owners equipping their power plants to comply with the Rule are doing so because it makes economic sense to do so, that is, the additional capital investment and operating costs the Rule imposes are economically justified – but only if all power plants are required to comply with the Rule or shut down by April 16, 2016. Industry Respondents' Motion at 13-15. From the time the Rule was released in 2011, power plant owners have based their investment decisions on an understanding of the regulatory landscape that they and their competitors would face, and all that flows from that landscape: which units would retire and which would remain; what fuel and control costs would be; and, above all, what the wholesale price of electricity would be once the Rule is fully in effect. Vacating the Rule, or even suspending it for sources that have received extensions, would upset the reasonable investment-backed expectations of sources that have positioned themselves to comply. *See* Industry Respondents' Motion 13-16 (describing capacity markets and effect of vacatur). Neither Movant Petitioners nor Tri-State addresses the disruptive consequences of that result, nor do they account for lost revenue for these sources resulting from changed market conditions in the event the Rule is vacated. Industry Respondents' Motion at 18 and Exh. B (Berg Decl.) ¶¶ 18-22.

Weighed against the substantial likelihood that EPA will reaffirm its Finding on remand and the disruptive consequences for power plants that made investments to comply with the Rule, Movant Petitioners' general averments about avoided costs do not support vacatur. As Industry Respondent Intervenors have shown, the proper remedy here is to remand the Finding to EPA without vacating the Finding or the Rule.

B. Suspending the Rule for All Units that Obtained a Compliance Extension Would Harm Units that Timely Complied and is Not Necessary to Address Tri-State's Concern for the Nucla Station.

As an alternative to vacatur, Tri-State asks the Court to suspend the Rule's requirements for units that have obtained compliance extensions, on the theory that some plants with extensions may yet be able to escape capital costs associated with compliance. Tri-State Motion at 2. Even this limited remedy would prejudice units that have complied with the Rule. In any case, Tri-State provides no information about the status of any power plant aside from its own Nucla Station, which it claims has not yet decided whether to install controls or to retire. To the contrary, Tri-State acknowledges it is aware of *no* other generator that faces the "choice" of whether to install controls or to retire by April 2016. *Id.* at 3 n.1, 15, 20 n.6. This is not surprising. The electric generation industry is characterized by long planning horizons, and nearly all commitments for capital investments have been made long before now. Industry Respondents' Motion at 9, 13-17.

With the possible exception of Nucla Station,[3] units operating under an extension today fall into two categories: those that already have committed to install and operate controls by April 16, 2016, and have therefore incurred or irretrievably committed those capital costs; and those that will retire and do not plan to install controls. *See* Industry Respondents' Motion at 9. Suspending the Rule for all extended units to address the concern Tri-State raises only for Nucla Station would merely prolong the competitive advantage for units that will *never* install controls, regardless of EPA's action on remand, to the detriment of plants that already have complied with the Rule. Tri-State's Motion should be denied.

Tri-State has twice before asked for individual relief with respect to Nucla Station, and twice before the Court has denied that request without prejudice, recognizing that Tri-State may pursue administrative relief. Sept. 1, 2015 Order (Doc. No. 1570784); Aug. 17, 2015 Order (Doc. No. 1568181); EPA's Response at 16-17. Even if the Court were inclined to offer any relief to Tri-State with respect to its April 16, 2016 compliance obligation for Nucla Station, that relief should be limited to the one compliance obligation for the one facility on which Tri-State's motion is based. Tri-State acknowledges that this relatively narrow form of relief is sufficient to address the concern that motivates its separate motion. *See* Tri-State Motion at 20 n.6. No

---

[3] Nucla Station would need to install controls only for the hydrochloric acid emission standard in the Rule. Even if the Rule stays in place, Tri-State apparently may yet decide to install capital equipment to meet the hydrochloric acid compliance obligation rather than to retire. Tri-State Motion at 14 n.3.

other petitioner with a compliance extension has asked for source-specific relief. No other petitioner has offered the Court any evidence that a source with a compliance extension faces a choice of whether to install controls or to retire that could depend upon the outcome of EPA's reconsideration of its Finding on remand. Tri-State has not offered any evidence that would justify suspending the Rule for all units that obtained a one-year compliance extension.

CONCLUSION

For the reasons set forth above, Industry Respondent Intervenors respectfully request that this Court deny Petitioners' Motions, and remand the Finding to EPA for reconsideration without vacating the Finding or the Rule.

October 21, 2015

Respectfully submitted,

/s/ Brendan K. Collins

Brendan K. Collins
Robert B. McKinstry, Jr.
Ronald M. Varnum
Lorene L. Boudreau
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

Counsel for Industry Respondent Intervenors

CERTIFICATE OF SERVICE

I, Brendan K. Collins, a member of the Bar of this Court, hereby certify that on October 21, 2015, I electronically filed the foregoing "Consolidated Response of Industry Respondent Intervenors In Opposition to Petitioners' Motions to Govern Future Proceedings" 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, which will serve registered counsel through the Court's CM/ECF system.

/s/ Brendan K. Collins
Brendan K. Collins