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.	)	

REPLY OF INDUSTRY RESPONDENT INTERVENORS IN SUPPORT OF ITS MOTION TO GOVERN FUTURE PROCEEDINGS

With all motions and responses now before the Court, one thing is clear: *virtually no one* in the industry regulated by the Mercury and Air Toxics Standards (the "Rule") is asking the Court to vacate the Rule. Industry Respondent Intervenors,[1] who collectively own more than 75 GW of generation capacity, have asked the Court to remand EPA's finding without vacating the Rule. Indus. Resp. Intervenor Motion (Doc. No. 1574838) at 17-20. Utility Air Regulatory Group, which opposes virtually

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

every air pollution regulation imposed on the electric power industry,[2] declined to seek vacatur or even to join the pending motions seeking vacatur or a stay. Even when it filed a response to EPA's motion (Doc. No. 1574825), UARG scrupulously avoided asking for vacatur. *See* UARG Response (Doc. No. 1579258) at 7 (seeking

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[2] *See, e.g.*, *UARG v. EPA*, No. 15-1370 (D.C. Cir. petition for review filed Oct. 23, 2015) (challenging "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units); *UARG v. EPA*, No. 15-1013 (D.C. Cir. petition for review filed Jan. 20, 2015) (challenging "Reconsideration of Certain Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units"); *UARG v. EPA*, No. 13-1202 (D.C. Cir. petition for review filed June 24, 2013) (challenging "Reconsideration of Certain New Source Issues: National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units"); *UARG v. EPA*, No. 12-1346 (D.C. Cir. petition for review filed Aug. 9, 2012) (challenging "Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone"); *UARG v. EPA*, No. 12-1252 (D.C. Cir. petition for review filed June 12, 2012) (challenging "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units (Proposed Rule)"); *UARG v. EPA*, No. 09-1111 (D.C. Cir. petition for review filed March 27, 2009 (challenging "Standards of Performance for Fossil-Fuel-Fired Steam Generators"); *UARG v. EPA*, No. 08-1127 (D.C. Cir. petition for review filed March 24, 2008) (challenging "Revisions to the Continuous Emissions Monitoring Rule for the Acid Rain Program, NOx Budget Trading Program, Clean Air Interstate Rule, and the Clean Air Mercury Rule"); *UARG v. EPA*, No. 05-1353 (D.C. Cir. petition for review filed Sept. 6, 2005) (challenging "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations").

relief "without regard to whether the [Rule] is remanded with, or without, vacatur"). EPA lists in its response a number of other electric industry petitioners conspicuous by their absence from those seeking vacatur, including FirstEnergy Generation Corporation (17 GW). *See* EPA Response (Doc. No. 1579186) at 1 n.2. Of the army of electric generators that opposed the Rule directly or through organizations like UARG or the Midwest Ozone Group, only two small, uniquely positioned generators are now asking the Court to vacate the Rule. *See* J. Walke, John Walke's Blog, "Is Your Power Company Fighting in Court Against Safeguards From Mercury and Toxic Air Pollution?" (listing power companies opposing the Rule) (posted May 25, 2012).[3] The reason is simple: like Industry Respondent Intervenors, these companies have already planned their investments and operations around universal compliance with the Rule, and they have no appetite for the severe disruption in the electric markets that would follow vacatur of the Rule. *See* Ind. Resp. Intervenor Mot. at 13-19; Declaration of William B. Berg (attached as Exhibit B thereto) ¶¶ 9-13, 18-22.

With two small exceptions,[4] the parties seeking vacatur are not industry participants; they are coal industry groups and States. The Rule does not regulate or

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[3] *Available at* http://switchboard.nrdc.org/blogs/jwalke/is_your_power_company_fighting.html (last visited Nov. 2, 2015).

[4] A prospective industry entrant, White Stallion Energy Center, LLC, which does not operate any power plants, also joined in the motion requesting vacatur. White Stallion had proposed a new coal-fired power plant that would have been subject to the Rule had the plant been constructed, but White Stallion

otherwise impose obligations on States or coal producers. These parties have no experience in – much less responsibility for – operating the electric power sector and have made no investments that would be jeopardized by the disruptive consequences of the relief they seek. These parties cannot speak with authority as to the severe disruption that would beset the electricity generation industry were the Court to vacate the Rule. Indeed, the moving petitioners do not even try. They offer no declarations or other support for their vague assertions that vacatur would not be disruptive. *See* Certain State and Industry Petitioners' Motion ("Movant Petitioners") (Doc. No. 1574809) ("Movant Pet. Motion") at 16-17; Tri-State Generation and Transmission Association, Inc. ("Tri-State") (Doc. No. 1574817) ("Tri-State Motion") at 11-12 (collectively, "Petitioners' Motions").

The two exceptions among Movant Petitioners add little weight to the case for vacatur. Tri-State, the owner of less than 2 GW of generation capacity, only nominally joins in the broad request for vacatur. Tri-State primarily seeks relief only for the very small 0.1 GW Nucla plant, or 5% of Tri-State's generation capacity. Tri-State Mot. at 3 n.1, 6. The only other power plant operator seeking vacatur is Oak Grove Management Company LLC, the operator of a lone 1.6 GW power plant in

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abandoned the project in 2013. *See* Matthew Tresaugue, Houston Chronicle, "Developers drop plans for Texas coal plant," (Feb. 15, 2013), *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Developers-drop-plans-for-Texas-coal-plant-4283433.php (last visited Nov. 3, 2015).

Texas. Tellingly, unlike Tri-State's Nucla plant, the Oak Grove plant is new, and already equipped with all of the emission controls it needs to comply with the Rule. *See* Oak Grove Fact Sheet[5] (plant equipped with scrubbers for acid gas control, sorbent injection for mercury control and fabric filters for particulate and non-mercury metal control). The only reason for Oak Grove to seek vacatur of the Rule would be to obtain the Court's license to turn off the emission controls it has already installed, capturing a price advantage and earning a few incremental dollars by emitting mercury, other hazardous metals and acid gases. *See* State & NGO Respondent Intervenors Response (Doc. No. 1579245) at 11-12. The interests of Tri-State and Oak Grove are idiosyncratic and not representative of the electric industry as a whole.

Of course, the Court's task here is not to tally a vote based on gigawatts of generation capacity, but carefully to apply the analysis set forth in *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), and its progeny. Movant Petitioners have offered various distortions of this analysis. They maintain, for example, that the first *Allied-Signal* factor countenances remand without vacatur only when the agency's action is "not adequately explained," and not when it suffers from a more serious defect. Movant Petitioners' Resp. at 5. Yet, this Court has remanded without vacatur when it has declared rules to be "fundamentally flawed," and where

[5] *Available at* http://www.luminant.com/wp-content/uploads/2015/02/OakGrove_Facts.pdf (last visited Nov. 4, 2015).

agencies have failed to make prerequisite findings required by statute before taking certain actions. *See North Carolina v. EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008) (declining to vacate Clean Air Interstate Rule it found to be "fundamentally flawed"); *Sugar Cane Growers Co-op. of Florida v. Veneman,* 289 F.3d 89, 97-98 (D.C. Cir. 2002) (declining to vacate action even though agency failed to make four prerequisite findings required by statute, including a finding regarding cost).

Regarding the second *Allied-Signal* factor, Movant Petitioners maintain that the disruptive consequences of vacatur described by Industry Respondent Intervenors should not be considered by the Court because they are "financial impacts." Movant Petitioners' Resp. (Doc. No. 1579194) at 10. Setting aside the irony of Movant Petitioners taking the position *in this case* that the Court should ignore the "financial impacts" of vacatur while EPA reconsiders the financial impact of the Rule, this limitation is impossible to reconcile with *Allied-Signal* and its progeny.

Movant Petitioners contend that the Court may consider only environmental effects when evaluating whether vacatur would have "disruptive consequences." Movant Petitioners' Resp. at 10. That is wrong. To begin with, *Allied-Signal* does not apply *only* to environmental cases. Indeed, *Allied-Signal* was not an environmental case but a purely economic case, and the Court first used the term "disruptive consequences" in reference to the financial impacts of vacating a rule addressing the allocation of oversight costs among industry participants. 988 F.2d at 151 (remanding without vacating because "the consequences of vacating may be quite

disruptive" where vacatur of rule allocating fees among licensees would require refunding collected fees). There are many examples of cases that were exclusively concerned with "financial impacts" in which the *Allied-Signal* factors were applied. *See NACS v. Board of Governors of Federal Reserve System*, 746 F.3d 474, 493 (D.C. Cir. 2014) (remanding without vacating where "'disruptive effect of vacatur' [wa]s high" because vacatur would lead to an entirely unregulated market for transaction fees charged for debit cards); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (remanding without vacating subsidy program for milk producers because monies were disbursed three years earlier); *Sugar Cane Growers*, 289 F.3d at 97 (remanding without vacating a payment-in-kind program in which sugar had been disbursed among sugar beet farmers and crops had been plowed under, analogizing that "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante"). "Financial impacts" are unquestionably appropriate for the Court to consider in applying the second *Allied-Signal* factor.

Movant Petitioners do not rebut Industry Respondent Intervenors' description of the severe disruption to the electricity industry that would follow vacatur of the Rule. In considering the second *Allied-Signal* factor, the Court should weigh the credibility represented by Industry Respondent Intervenors' 75 GW of capacity, the evidence supporting their motion to remand without vacatur, and the persuasive silence of UARG, FirstEnergy and the legion of other electric industry participants that have *not* asked for vacatur, against the tiny slice of the industry – less

than 2 GW of capacity – represented by Oak Grove and Nucla. The risk to the electric industry is real, and the disruption would be severe. *See* Indus. Resp. Intervenor Motion at 13-19; Declaration of Dr. James E. Staudt (attached as Exhibit A thereto) ¶ 15 (concluding that virtually all capital investments required to comply with the Rule have been made or contractually committed); Berg Decl. ¶¶ 9-13, 18-22 (explaining the long-term planning horizon that characterizes the electric power industry and concluding that electricity price predictions and capacity payments would be undermined if the Rule is vacated). *Allied-Signal* counsels against vacatur of the Rule.

CONCLUSION

For the reasons set forth above and in their Motion to Govern Future Proceedings, 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.

November 4, 2015

Respectfully submitted,

/s/ Brendan K. Collins

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CERTIFICATE OF SERVICE

I, Brendan K. Collins, a member of the Bar of this Court, hereby certify that on November 4, 2015, I electronically filed the foregoing "Reply of Industry Respondent Intervenors In Support of Its Motion 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
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