

ORAL ARGUMENT NOT YET SCHEDULED
No. 16-1430 (Consolidated with No. 16-1447)
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**TRUCK TRAILER MANUFACTURERS
ASSOCIATION, INC.,**

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,**

Respondents.

On Petition for Review of Decision of the U.S. Environmental
Protection Agency and the U.S. Department of Transportation

**STATE INTERVENORS' OPPOSITION TO PETITIONER
TRUCK TRAILER MANUFACTURERS ASSOCIATION'S
PROPOSED BRIEFING SCHEDULE**

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INTRODUCTION

On December 3, 2019, Petitioner Truck Trailer Manufacturers Association (TTMA) filed a motion to lift the abeyance in this case and proposed a briefing and hearing schedule for resolution of the merits. State Intervenors¹ oppose TTMA's proposed briefing and hearing schedule. TTMA's proposed schedule fails to allow State Intervenors any time to review responsive briefing by Respondents U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) prior to the deadline for State Intervenors' own responsive briefing and, in fact, appears to seek expedition of this case without any attempt to meet the standard for that relief. State Intervenors take no position on TTMA's request to lift the abeyance in this case.

BACKGROUND

On October 25, 2016, EPA and NHTSA jointly published a final rule in the Federal Register, in which, among other things, the Agencies promulgated greenhouse gas emission and fuel efficiency standards, respectively, for certain types of trailers (collectively, trailer standards). 81 Fed. Reg. 73,478, 73,481 (Oct. 25, 2016).

¹ "State Intervenors" are the California Air Resources Board, and the States of Connecticut, Iowa, Massachusetts, Oregon, Rhode Island, Vermont and Washington.

On December 22, 2016, TTMA filed this action challenging the parts of the final rule that established the trailer standards for heavy-duty trailers. The California Air Resources Board (CARB) and seven States intervened to defend the standards, as did several non-governmental organizations.

In April of 2017, TTMA sought reconsideration of their respective trailer standards from EPA and NHTSA.

In August of 2017, then-EPA Administrator Scott Pruitt sent TTMA a letter indicating EPA had “decided to revisit the ... trailer provisions in general, and the issue of EPA’s authority to regulate trailers in particular” and also expressed EPA’s intent to “develop and issue a Federal Register notice of proposed rulemaking on this matter.” Letter from E. Scott Pruitt, Administrator of U.S. EPA, to Jonathan S. Martel, attorney representing TTMA, and Jeffrey M. Sims, President of TTMA (August 17, 2017).² That same month, NHTSA granted TTMA’s request for reconsideration, treating it as a petition for rulemaking.³

On September 25, 2017, TTMA sought a stay from this Court to prevent EPA’s greenhouse gas emission standards for trailers from taking effect, as they were scheduled to do, on January 1, 2018. On October 27, 2017, this Court

² Accessible through EPA’s website at <https://www.epa.gov/sites/production/files/2017-08/documents/hd-ghg-phase2-ttma-ltr-2017-08-17.pdf>, last visited December 6, 2019.

³ See Petitions to NHTSA, at <https://www.nhtsa.gov/laws-regulations/petitions-nhtsa>, last visited December 8, 2019.

granted the stay as to EPA's standards. NHTSA's standards are scheduled to go into effect on January 1, 2021.

The Court's October 2017 order also granted the Agencies' motion to hold this case in abeyance pending administrative reconsideration of the standards. EPA and NHTSA have reported to the Court that they are continuing to assess next steps regarding their reconsideration of the trailer standards.

TTMA informed State Intervenors of its proposed briefing schedule on December 3, 2019, the day TTMA filed its motion. TTMA made no effort, and indeed provided no opportunity, to confer with State Intervenors regarding a reasonable briefing schedule.

ARGUMENT

I. TTMA'S PROPOSED BRIEFING SCHEDULE FAILS TO PROVIDE INTERVENORS SUFFICIENT TIME TO RESPOND

TTMA's proposed briefing schedule in this matter would require all Intervenors to file their responsive briefs on the same day that Respondents' briefs would be due, giving State Intervenors no opportunity to first review briefing by Respondents. State Intervenors need that opportunity because Respondents' position on the merits in this case is unknown. As noted herein, and in TTMA's Motion, EPA has stated its intent to "revisit the ... trailer provisions" and "EPA's authority to regulate trailers," and repeatedly stated its intent to engage in further rulemaking that might obviate the need for judicial review. NHTSA has likewise

indicated its granting of TTMA's request to reconsider the trailer standards, treating that request as a petition for rulemaking. It is thus unclear whether Respondents will defend their trailer standards, and what the scope or nature of such defense may be. Without first having an opportunity to review Respondents' positions on the merits, it will be difficult for State Intervenors to effectively brief the key issues in this case, and impossible for them to do so without risk of substantial duplication of Respondents' briefing, because it is unknown whether or not State Intervenors' briefing will be supportive of Respondents' positions.⁴

If the Court lifts abeyance in this case, State Intervenors request that the Court set a deadline for Intervenors' brief that is thirty days after the deadline for submission of briefing by Respondents. This Court has adopted comparable briefing schedules in other cases similar to this one. *See Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, Case No. 97-1715

⁴ State Intervenors note that while Respondents' own response to TTMA's motion agrees with Intervenors' position that TTMA's proposed briefing schedule is unnecessarily compressed, Respondents' proposed briefing schedule would give Respondent-Intervenors only one week to review Respondents' briefing and prepare their own, which is insufficient.

State Intervenors also observe that they are likely to require more than the standard number of words for their brief in the event that Respondents choose not to defend the trailer standards or to do so on only limited grounds. This further supports the requested time interval between Respondents' brief and Respondent-Intervenors' briefs, as Respondent-Intervenors may well need to move the Court for an additional word allocation while reviewing Respondents' brief and preparing their own.

(D.C. Cir. Aug. 13, 1998); *State of Michigan, Michigan Department of Environmental Quality v. Environmental Protection Agency*, Case No. 99-1151 (D.C. Cir. Nov. 15, 2000), ECF Doc. No. 556644; *Coalition for Responsible Regulation, Inc., et al. v. Environmental Protection Agency*, Case No. 09-1322 (D.C. Cir. March 22, 2011), ECF Doc. No. 1299368; *White Stallion Energy Center, LLC v. Environmental Protection Agency*, Case No. 12-1100 (D.C. Cir. Jun. 28, 2012), ECF Doc. No. 1381112; *State of Wisconsin, et al. v. Environmental Protection Agency, et al.*, Case No. 16-1406 (D.C. Cir. Sept. 6, 2017), ECF Doc. No. 1691655. The most recent case of *Wisconsin v. EPA* is particularly similar to this case in that, at the time the Court set the merits briefing schedule, it was unclear whether, and to what extent, EPA would defend its challenged regulation. Intervenors in that case were ordered to file their briefs 30 days after respondent EPA filed its initial brief.

II. TTMA'S PROPOSED BRIEFING SCHEDULE IS ESSENTIALLY AN UNSUPPORTED REQUEST FOR EXPEDITION

While TTMA now asks the Court to leap into action and hear this case immediately in order to avoid asserted uncertainty and prejudice to its members, TTMA provides insufficient reason as to why it waited until now to request that the Court lift the abeyance in this case, and likewise why it failed to discuss a briefing schedule with the other parties. TTMA could easily have filed its motion

six months or more ago and avoided prejudice to itself or any other party; the asserted urgency with which TTMA calls the Court to action is of its own making. In fact, the compressed briefing schedule proposed in TTMA's motion fails to consider the interests of intervenors and is, effectively, a request for expedited consideration. But, TTMA failed to articulate its request as such, or to address, let alone demonstrate satisfaction of, the requirements for expedition set forth in the Court's *Handbook of Practice and Internal Procedures* at p. 33-34.

This Court grants motions to expedite cases "very rarely" and only when the reasons for doing so are "strongly compelling." *Id.*

TTMA makes no attempt to provide "strongly compelling" reasons for the accelerated schedule it proposes. Essentially, TTMA argues that "[t]he continuing uncertainty as to what the Agencies will do, with no end in sight, is untenable for TTMA's members." Mot. at 7-8. But, as discussed above and indicated in TTMA's own motion, this purportedly untenable situation has existed for quite some time. Thus, any urgency now is not "strongly compelling" because it is purely a result of TTMA's *choice* not to bring this motion at an earlier date, which would have allowed the parties and the Court to address this case in the normal course without prejudice to any party or unnecessary imposition on the Court. The Court should reject TTMA's unnecessarily rushed briefing and hearing schedule.

CONCLUSION

State Intervenors take no position on TTMA's request that the Court lift abeyance in this case. If the Court is inclined to do so, however, State Intervenors request that the Court set a briefing schedule that gives State Intervenors 30 days to review Respondents' briefing prior to submitting their own.

Dated: December 13, 2019

Respectfully Submitted,

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⁵ For purposes of ECF-3(b) of this Court's Administrative Order Regarding Electronic Case filing (May 15, 2009), counsel for CARB hereby represents that the other parties listed in the signature blocks have consented to the filing of this pleading.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume requirements of Fed. R. App. P. 27(d)(2)(C) because it contains 1,420 words, excluding the parts of the filing exempted under Fed. R. App. P. 32(f), according to Microsoft Word.

Dated: December 13, 2019

/s/ M. Elaine Meckenstock
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing OPPOSITION TO PETITIONER TRUCK TRAILER MANUFACTURERS ASSOCIATION'S PROPOSED BRIEFING SCHEDULE on all parties via the Court's electronic case filing system.

Dated: December 13, 2019

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