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.	)	
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondent.	)	

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION INC.'S RESPONSE TO MOTIONS TO GOVERN

The Court must now decide how to proceed after the U.S. Supreme Court held in *Michigan v. EPA*, 135 S. Ct. 2699 (June 29, 2015) that the United States Environmental Protection Agency's ("EPA's") Mercury and Air Toxics Standard (the "MATS Rule") is based on an improper regulatory finding. A number of parties have called on the Court to vacate the Rule. *See* ECF No. 1574809. EPA and its allies argue that the Court should leave all the requirements of MATS in effect and simply remand the Rule to EPA. *See* ECF Nos. 1574820, 1574825, 1574838. These two options, however, are not the only options before the Court. Tri-State Generation and Transmission Association, Inc. ("Tri-State") has raised another alternative:

suspending the requirements in the Rule for the small number of power plants that received compliance extensions and thus face *a future compliance deadline* under MATS.[1]

At a minimum, the Court should suspend the MATS compliance obligations for plants that still need to make decisions about whether to install new control equipment or shut down to comply with MATS unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan*. As further explained below, if the Court does not vacate the Rule, it should grant this limited relief because doing so will maintain the status quo until EPA responds to the Supreme Court and will not cause harm to other parties.

ARGUMENT

I. The limited relief requested by Tri-State will maintain the status quo and not cause harm to other parties or anyone else.

[1] Tri-State has requested that, if the Rule is not vacated, the compliance deadlines for such plants be suspended and tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of a new finding. Tri-State believes that this relief should be given to any plant that received a valid MATS compliance extension and thus faces a future compliance deadline. However, Tri-State is not aware of any other plant that faces the dilemma now faced by Tri-State: whether to spend millions of dollars on control technology to comply with a requirement that may or may not remain in effect, depending on EPA's response to *Michigan*. Because Tri-State is not aware of any other company or plant in a similar situation, Tri-State requests that, at the very least, the Court stay the hydrogen chloride ("HCl") compliance obligation for its Nucla Station plant unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that the HCl compliance deadline for Nucla Station be tolled for at least the number of days between the U.S. Supreme Court's decision in *Michigan* and the effective date of such a finding.

As EPA acknowledges, most power plants have already come into compliance with the MATS Rule. *See* EPA Mot. to Govern at 19. EPA Administrator Gina McCarthy has stated that "Most of [the power plants] are already in compliance, investments have been made. . . we're still going to get at the toxic pollution from these facilities" regardless of what happens in the courts.[2]

Tri-State's alternative relief essentially asks the Court to maintain the status quo until EPA responds to the Supreme Court's decision in *Michigan*. This will ensure that companies like Tri-State will not be forced to make additional financial commitments to comply with a regulation issued under section 112 of the CAA until EPA decides whether, in light of the costs of compliance, it is "appropriate and necessary" to regulate power plants under section 112 of the CAA. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011).

As explained in Tri-State's motion to govern, some power plants have not yet been required to meet all the requirements of the MATS Rule because they received valid compliance extensions. It appears that, even among these facilities, many have already made irreversible decisions about whether to install control equipment or shut down, but Tri-State has not made such a decision about a small plant called Nucla Station, which is located in a remote part of southwestern Colorado. As the Court is well aware, Nucla Station has not yet made irretrievable commitments to purchase

[2] Timothy Cama & Lydia Wheeler, *Supreme Court overturns landmark EPA air pollution rule,* The Hill (June 29, 2015), http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule.

and install new control equipment to meet the HCl standard in the MATS rule.[3] *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 16. Forcing Tri-State "to comply in the meantime with the existing Rule will result in wasteful investments. . . ." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015).

None of the motions to govern filed in this case even try to claim that, if the Rule is not vacated, anyone would be harmed by the limited alternative relief Tri-State has requested. Indeed, EPA and its allies focus entirely on whether power plants might turn off the pollution control devices that have already been installed to comply with MATS if the Rule is vacated. *See* EPA Mot. to Govern at 18 ("Power plants would not be required to operate controls to limit hazardous air pollutant emissions, and similarly would have no obligation to report or monitor those emissions."); State, Local Government and Public Health Respondent-Intervenors' Mot. to Govern at 12-13 ("If the Rule is vacated, many or most of the plants that have installed control

[3] *Contra* Mot. of Industry Resp't-Intervenors at 18 ("There are no material additional capital expenditures planned before April 2016."). Industry Respondent-Intervenors supported this statement with a declaration from James E. Staudt, Ph.D., CFA which states that "To the extent that a contract has not been executed for a generating unit operating under a compliance extension, the owner of the generating unit will plan to retire that unit or to use natural gas in lieu of coal or oil to fuel the unit." Mot. of Industry Resp't-Intervenors Ex. A at ¶ 4. This statement, made on September 24, 2015, may be true for most plants, but it is not true with respect to Nucla. It is puzzling that Industry Respondent-Intervenors would make this claim given that they responded to Tri-State's two emergency motions which explained that, with respect to Nucla, Tri-State had not yet made an irretrievable commitment to purchase and install new control equipment or retire the unit. *See* ECF Nos. 1567025, 1570391.

technologies may decide to turn off some of those controls, or to operate them less often.").

Setting aside the speculative nature of these concerns,[4] Tri-State's alternative should be acceptable to those who claim to support maintaining the status quo. *See, e.g.,* EPA Mot. to Govern at 18 (advocating that the Court maintain the status quo). In fact, they want to maintain the status quo for units that have already been forced to make compliance decisions but not for units that still face such decision in the future. Their view is that all the power plants in the country should be forced to comply with MATS before EPA responds to the Supreme Court's decision in *Michigan*. This makes no sense. Further action should not be required of those that have yet to install controls or make commitments to do so. *See Portland Cement*, 665 F.3d at 189 ("industry should not have to [install] expensive new [equipment] until the standard is finally determined.").

Not requiring further action from units with future compliance obligations is even more critical now that EPA has backed away from its original commitment to issue its "appropriate and necessary" determination in Spring 2016. *See* EPA Second Opp'n at 15. In its recent motion to govern, EPA softened its commitment to the Court, stating that it "*intends* to complete the required consideration of cost for the 'appropriate and necessary' finding *as close to* April 15, 2016, as possible." *See* EPA

[4] Such statements disregard the potential that some facilities may be required to continue to run such controls for other reasons (e.g., to comply with State obligations).

Mot. to Govern at 12 (emphasis added). As this Court has acknowledged, agencies have little incentive to respond promptly to the court's concerns if a rule remains in effect during remand. *See, e.g., Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such."); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) ("experience suggests that this remedy [allowing a rule to remain in effect during remand] sometimes invites agency indifference").

Given that the timing of EPA's "appropriate and necessary" determination may be in question, the Court should maintain the status quo. Otherwise, if the Court does not suspend the Rule for plants with future effective dates, all the power plants in the country will have been forced to comply with the MATS Rule before EPA makes the requisite finding,[5] thereby making the Supreme Court's decision in *Michigan* essentially meaningless.

II. Not granting relief to facilities with future compliance dates will cause them irreparable harm.

Tri-State will suffer irreparable harm if the MATS HCl compliance obligation remains in effect for Nucla Station during remand and Tri-State decides that it must

[5] EPA's Enforcement Response Policy does provide the option of seeking an "Administrative Order" with EPA's enforcement office that provide up to one additional year for plants that are necessary to maintain electric reliability. Tri-State has met with EPA and has had discussions with FERC about this option but has not yet been able to secure such relief.

incur the cost of installing new equipment at Nucla. Even if EPA or the courts later decide that a new "appropriate and necessary" determination is not justified, these costs cannot be recovered. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("the *temporary* loss of income, ultimately to be recovered, does not usually constitute irreparable injury." (emphasis added)). As Tri-State has repeatedly explained, its members already pay higher electricity rates than customers in more urbanized areas and its members must pay for any cost that Tri-State must incur to meet regulatory requirements. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 4. A significant percentage of Tri-State's residential customers live at or below the poverty line so these customers would be irreparably harmed if Tri-State is forced to purchase new equipment unnecessarily and these customers must help to pay the cost. *See id.* at ¶¶ 4, 18, 25; *contra Mexichem*, 787 F.3d at 556 (where the overall economic impact of the final rule on affected entities and consumers would be low).

Shutting down Nucla Station by April 2016 would also impose a significant hardship on the town of Nucla, its residents, and many of the residents of Montrose County, Colorado because Nucla Station is critical to the local economy. *See* Tri-State Second Emergency Mot. Ex. 4 at ¶ 18, 25. Tri-State is the largest taxpayer in Montrose County, paying approximately $1.1 million annually in taxes. *Id.* at ¶ 18. The town of Nucla receives most of its tax revenue from Nucla Station. *Id.* Nucla Station also creates approximately $72.4 million in direct and indirect economic impacts and

has an annual payroll of approximately $14.6 million (including contractors who work on outages and other projects). *Id.*

Moreover, as Tri-State has previously explained, keeping Nucla Station online is particularly important given Tri-State's plans to conduct a multi-year transmission upgrade project. *See id.* at ¶ 16. Until this ongoing transmission upgrade is completed, there will be a higher risk of power outages in southwestern Colorado if Nucla Station is shut down. *Id.*

CONCLUSION

For the foregoing reasons, Tri-State respectfully requests (1) that the Court suspend the compliance obligations under the MATS Rule for any power plant *with a future compliance deadline* unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and (2) that compliance deadlines for such plants be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of the new finding.[6]

[6] Because Tri-State is not aware of any other companies or plants in a similar situation, Tri-State requests that the Court at least stay the HCl compliance obligation at Tri-State's Nucla Station unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that the HCl compliance deadline for Nucla Station be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of the new finding.

Dated: October 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing Tri-State's Response to Motions to Govern electronically through the Court's CM/ECF system, for electronic service on all ECF registered counsel. I further certify that a copy has been served by first-class U.S. mail on the following:

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