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 REPLY

The motions to govern in this case and the responses thereto have focused on the question of whether the MATS rule should be vacated or left in place until EPA responds to the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (June 29, 2015). In its motion to govern, Tri-State Generation and Transmission Association, Inc. ("Tri-State") put forth another alternative – that MATS requirements should be suspended for a small number of plants that have *not* already been required to come into compliance with MATS because they received valid compliance extensions. *See* Tri-State Mot. to Govern, ECF No. 1574817.

Tri-State pointed out that most power plants were required to come into compliance with MATS by April 2015 and have already done so—either by installing

new control equipment or shutting down. *Id.* at 4. Tri-State also noted that the compliance deadline for some plants was extended to April 2016 and that these plants still face a future deadline by which they must either install new control equipment or shut down. *Id.* In its motion to govern, Tri-State requested that, if the MATS rule is not vacated, MATS compliance obligations be suspended for any plant that faces a future compliance deadline under MATS unless and until EPA takes appropriate action to respond to the *Michigan* decision. *Id.* at 2-3.

Tri-State and other parties to this proceeding have also noted, however, that some and perhaps even most of the plants with future compliance deadlines have already made irrevocable commitments to install controls or shut down by April 2016 and might not have an interest in having the MATS compliance obligations suspended. *See, e.g., id.* at 15-16. Tri-State is not in this position with respect to one of its plants known as Nucla Station. *Id.* at 16. For the reasons discussed in its motion to govern, *id.* at 7, Tri-State still faces a difficult decision with respect to Nucla – whether to incur the cost of installing new control equipment that is not economically justified or to shut it down and run the risk of power outages in southwestern Colorado until a new transmission project is completed. Tri-State does not believe it should be forced to make this decision unless and until EPA makes a new "appropriate and necessary" determination that is consistent with *Michigan*.

Although Tri-State originally requested that MATS compliance obligations be suspended for any plant with future compliance deadlines, Tri-State also told the

Court that it was not aware of any other company that faces the type of situation that Tri-State faces with Nucla Station. *Id.* at 3 n.1. As other parties have noted, no other companies have come forward to say they are in the same situation as Tri-State or are interested in the alternative put forth in Tri-State's motion to govern. *See* ECF No. 1579252 at 8; ECF No. 1579245 at 15. Because the broader alternative that Tri-State requested does not seem to be warranted, Tri-State agrees that the Court's action in this case need not be so broad. Therefore, Tri-State renews the narrowest request it made in its motion to govern – that the Court, at a minimum, suspend the hydrogen chloride ("HCl") compliance obligation for Tri-State's Nucla Station plant unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and that this obligation be tolled for at least the number of days between the Supreme Court's decision in *Michigan* and the effective date of such a finding.

ARGUMENT

I. Tri-State is not required to exhaust its administrative remedies to participate in the motions to govern process.

This Court has asked the parties to submit motions to govern the proceedings following the Supreme Court's decision in *Michigan*, which found that the MATS Rule is based on an improper regulatory finding. *See* ECF No. 1567220. The Court must now decide, based on these motions, whether to vacate the MATS Rule, remand it to EPA without vacatur, or take other action regarding the status of the Rule in light of *Michigan*.

Given this order, it is odd that EPA and its allies believe that Tri-State was required to exhaust its administrative remedies before providing a recommendation to the Court as to how it should address the Rule. *See, e.g.,* ECF No. 1579186 at 17; ECF No. 1579245 at 19. Case law that pertains to injunctive relief (which Tri-State is not requesting) is completely irrelevant to the motions to govern process.[1] Neither EPA nor any of its allies has cited any case law to support the view that Tri-State must exhaust its administrative remedies before submitting a motion to govern or that Court should not grant Tri-State's motion to govern unless Tri-State has exhausted all possible administrative remedies. Tri-State is not "circumvent[ing] an administrative process" where it has been ordered by the Court to submit a motion to govern the proceedings. *Contra Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986) (addressing plaintiffs' motion for a preliminary injunction prior to receiving a decision on the merits of the case). Tri-State merely seeks to maintain the status quo until EPA responds to the Supreme Court's decision in *Michigan*. Granting Tri-State's alternative relief is also consistent with this Court's precedent in *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) ("industry should not have to [install] expensive new [equipment] until the standard is finally determined.").

[1] As EPA notes, Tri-State has met with EPA to discuss obtaining relief from Nucla Station's current April 2016 compliance deadline based on the need to keep Nucla in service beyond April 2016 to avoid reliability risks. *See* ECF No. 1579186 at 16-17. Tri-State very much appreciates the fact that EPA has been open to these discussions even during the motions to govern process and is hopeful that EPA will grant the requested administrative relief. However, the status of those discussions has no bearing on what the status of the rule should be during remand.

II. Tri-State's requested alternative relief is not based on an interest in maintaining a "competitive advantage."

As Tri-State has informed the Court, Tri-State is a non-for-profit cooperative that serves rural areas that *traditional investor-owned utilities have determined are not profitable to serve*. *See* ECF No. 1569466 at 16-17; ECF No. 1565685 at 8-9. As a non-for-profit cooperative, Tri-State is focused on providing reliable, affordable power to its members who already pay higher electricity rates than customers in more urbanized areas. *See* ECF No. 1569466 at 16. Allowing Nucla Station to continue to operate during the remand process is not about increasing Tri-State's profits[2] and will not give Tri-State a competitive advantage over other companies because Tri-State does not compete for customers with other companies. *See* ECF No. 1569466 at 16-17; ECF No. 1565685 at 8-9; *contra* ECF No. 1579252 at 5, 9.

III. Allowing Nucla Station to continue to operate during remand will not cause any appreciable harm.

One party has argued that allowing Nucla Station to continue to operate would create a public health risk because "Nucla Station emitted over 27,000 pounds of

[2] One of the responses to the motions to govern purports to estimate the cost of installing controls at Nucla Station to achieve compliance with the HCl emissions limit. *See* ECF No. 1579245 at 19. This estimate is based on a statement made by a declarant who has never been an employee of or consultant to Tri-State. He does not have any knowledge about the specific circumstances at Nucla Station and has no credible basis upon which to make representations to this Court about the cost of installing controls at Nucla Station. His estimate is much lower than Tri-State's own informed judgment. Because Tri-State is a non-for-profit cooperative, its members would have to pay for any such expenditures, and they already pay higher electricity rates than customers in more urbanized areas. *See* ECF No. 1569466 at 16-17.

hydrochloric acid into the air last year." ECF No. 1579245 at 20. This is like saying a 6-foot-tall, 90-pound man is overweight because he weighs more than 40,000 grams. As this Court is well aware, air emissions are typically reported in tons per year. HCl emissions at Nucla were about 13.5 tons last year – a very small amount that has never been considered a threat to human health or the environment. No evidence has been presented to show that HCl emissions from Nucla Station will cause any adverse health or environmental impacts.

CONCLUSION

For the foregoing reasons, Tri-State respectfully requests (1) that the Court suspend the HCl compliance obligation under the MATS Rule for Tri-State's Nucla Station unless and until EPA makes a new "appropriate and necessary" finding that is consistent with *Michigan* and (2) 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: November 4, 2015

Respectfully submitted,

/s/ Jeffrey R. Holmstead
Jeffrey R. Holmstead
Sandra Y. Snyder
Bracewell & Giuliani LLP
2000 K Street, NW
Suite 500
Washington, DC 20006-1872
202.828.5852 telephone
202.857.4812 facsimile
jeff.holmstead@bgllp.com
Counsel for Tri-State Generation and Transmission Association, Inc.

CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing Tri-State Generation and Transmission Association Inc.'s Reply 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:

Ms. Blake, Wendy Lynn
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, NW
Ariel Rios Building
Washington, DC 20460-0000

Mr. Branstad, Terry E.
1007 East Grand Avenue
Des Moines, IA 50319

Mr. Brooks, Kelvin Allen
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397

Mr. Bruning, Jon Cumberland
Office of the Attorney General, State of Nebraska
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509-8920

Mr. Crabtree, David Finley
Deseret Power
10714 South Jordan Gateway
South Jordan, UT 84092

Mr. Fossum, Drew J.
General Counsel
Tenaska, Inc.
1044 North 115th Street
Suite 400
Omaha, NE 68154-4446

Mr. Geraghty, Michael C.
Office of the Attorney General, State of Alaska
Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501

Ms. Jacobs, Wendy B.
Emmett Environmental Law & Policy Clinic
Harvard Law School
6 Everett Street
Suite 4119
Cambridge, MA 02138

Mr. Smary, Eugene Elling
Warner Norcross & Judd LLP
2000 Town Center
Suite 2700
Southfield, MI 48075

Mr. Toth, Jeremy Christopher
Erie County Department of Law
95 Franklin Street
Buffalo, NY 14202

Mr. Strange, Luther J., III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130

Mr. Wasden, Lawrence G.
Office of the Attorney General, State of Idaho
Natural Resources Division
P.O. Box 83720
700 West Jefferson, Room 210
Boise, ID 83720-0010

Dated: November 4, 2015

/s/ Jeffrey R. Holmstead

Jeffrey R. Holmstead
DC Bar Number: 457974