UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma, and OKLAHOMA INDUSTRIAL ENERGY CONSUMERS,	)	
Petitioners,	)	
v.	)	**NO.: 12-9526**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	
----------	)	
SIERRA CLUB,	)	
Intervenor – Respondent.	)	
	)	
OKLAHOMA GAS AND ELECTRIC COMPANY,	)	
Petitioner,	)	
v.	)	**NO.: 12-9527**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	
----------	)	
SIERRA CLUB,	)	
Intervenor – Respondent.	)	

PETITIONERS' MOTION FOR STAY OF FINAL RULE

In its quest to issue a Federal Implementation Plan ("FIP") that requires Oklahoma Gas and Electric Company ("OG&E") to spend over $1.2 billion to install dry flue gas desulfurization technology ("scrubbers") on four electric generating units in the next five years to address aesthetic concerns about regional haze, the Environmental Protection Agency ("EPA") eviscerated the authority and discretion given to the State of Oklahoma by the Clean Air Act ("CAA" or "Act"). The only way that EPA could achieve this predetermined outcome was to ignore the Act and its own guidance and violate the Administrative Procedures Act ("APA") by raising and relying on new rules and methodologies for the first time in its final rule adopting the FIP. The Agency's action is sure to raise the costs of electricity to consumers, including those who are members of Oklahoma Industrial Energy Consumers ("OIEC"), with a corresponding loss of jobs and economic activity. The State of Oklahoma , OG&E and OIEC (collectively, "Petitioners") move the Court pursuant to Fed. R. App. P. 18 to stay, pending judicial review, the final rule that resulted from EPA's refusal to follow the law and its own guidance.[1]

The results-oriented review conducted by EPA – culminating in a Final Rule that will force OG&E to install scrubbers – was fatally flawed substantively and procedurally,

[1] The final rule was published on December 28, 2011 and is titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"). Petitioners do not request a stay of the portion of the Final Rule that approved Oklahoma's BART determinations for particulate matter and nitrogen oxides at OG&E's Muskogee, Sooner and Seminole Generating Stations and for sulfur dioxide ("SO_2") at the Seminole Generating Station (Units 1, 2 and 3).

and Petitioners meet all of the requirements for the issuance of a stay. The administrative record shows that Petitioners are likely to succeed on the merits because EPA's "nothing but scrubbers" approach led it to reject a final regional haze state implementation plan ("SIP") that Oklahoma sent to EPA over a year before EPA proposed to adopt the FIP. In substituting its judgment for the judgment of the State, EPA illegally usurps the broad authority given by Congress to the States to make best available retrofit technology ("BART") determinations for regional haze. *See* 42 U.S.C. § 7491. The Oklahoma SIP included a state-specific balancing of BART factors that considered Oklahoma's unique energy and economic needs; a balancing that EPA is neither equipped nor authorized to conduct. Instead, EPA improperly mandated its desired outcome in place of Oklahoma's considered judgment as to the appropriate BART for facilities in the state. For EPA to accomplish this objective, it had to ignore its own policies and procedures for making these determinations and, in the Final Rule, use new approaches regarding cost effectiveness and visibility improvement that it had not identified in the proposed rule. This approach precluded public comment and violated Petitioners' procedural rights.

EPA's illegal adoption of the Final Rule will have an immediate and irreparable impact on the State (whose CAA authority has been eviscerated by EPA's actions), OG&E (which, because it must install four scrubbers at an estimated cost exceeding $1.2 billion, will be required to begin installation activities immediately with no recourse against EPA if the Final Rule is reversed), and the electricity consumers in Oklahoma, like those represented by OIEC (who face significant electricity rate increases as a result of the costs imposed by the Final Rule). Finally, where Congress has set 2064 as the

timeframe for achieving the elimination of visibility impacts, and EPA has not demonstrated through its own actions any urgency in adopting regional haze SIPs or FIPs, the balance of the equities favor the relatively short delay in the effective date of the Final Rule sought by Petitioners here.

Petitioners submitted petitions for reconsideration and requests for a stay of the Final Rule to EPA more than 30 days prior to filing this motion.[2] Although the Final Rule is fatally defective, EPA has taken no action on those requests, and EPA and Sierra Club have indicated that they oppose this motion.

BACKGROUND

OG&E's affected Muskogee Units, located near Muskogee, Oklahoma, are two approximately 500 MW coal-fired generating units, and the Sooner Units, located near Red Rock, Oklahoma, are two approximately 500 MW coal-fired generating units. Ex. 1, Declaration of Ken Johnson ("Johnson Decl.") ¶ 2 (attached as Ex. A to Petition for Reconsideration). For more than a decade, OG&E has voluntarily burned very low sulfur coal at the electrical generating units ("EGUs") at the Muskogee (Units 4 and 5) and Sooner (Units 1 and 2) Generating Stations (the "OG&E Units") in order to limit SO_2 emissions. (*Id.* ¶ 5.) OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas.

[2] *See* Petition for Reconsideration and Request for Administrative Stay, filed by Oklahoma and OG&E on February 24, 2012 (attached hereto as Exhibit 1); OIEC Request for a Stay of Implementation of the Federal Implementation Plan for Oklahoma Concerning Interstate Transport of Pollution Affecting Visibility, received by EPA on February 28, 2012 (attached hereto as Exhibit 2).

OIEC is a non-partisan, unincorporated association of large consumers of energy with facilities located in the State of Oklahoma. OIEC Members are engaged in energy price-sensitive industries such as pulp and paper, cement, refining, glass, industrial gases, plastic, film and food processing. OIEC Members employ thousands of Oklahoma citizens.

In Section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In Section 169B, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See*, *e.g.*, 123 Cong. Rec. 13,696, 13,709

(1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39,107.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility.[3] EPA recognizes that "States are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that . . . no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The RHR require States to submit their BART determinations, along with other required elements, as SIP revisions to EPA for approval ("Regional Haze SIPs"). EPA may disapprove a Regional Haze SIP and issue a FIP only when a SIP fails to meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, the applicable requirements are that the emission limitations developed to address regional haze be developed pursuant to the evaluation process and balancing of the BART factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

[3] The five BART factors are: (i) the costs of compliance; (ii) the energy and non-air quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii).

Oklahoma, on February 17, 2010, submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002 (relevant portions attached hereto as Exhibit 3). After properly balancing the statutory factors, Oklahoma determined that low sulfur coal constituted BART for SO_2 emissions from the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units—one that both EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the EPA Air Polluton Control Cost Manual ("CCM")[4] —and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate. *See id*. Both the 2008 Cost Analysis and 2009 Cost Analysis were prepared with the assistance of OG&E's engineering consultant, Sargent & Lundy LLC ("S&L").[5] Oklahoma concluded, based on this and other information, that scrubbers are not cost effective for the OG&E Units. Here, unlike the New Mexico regional haze proceedings, [6] all supporting documentation, including costs of control, were properly included in the administrative record before EPA acted.

[4] *See* Comment from OG&E, Doc. ID No. EPA R06-OAR-2010-0190-0038, dated May 23, 2011 ("OG&E Comment"), at Ex. A, comment 2 (attached hereto as Exhibit 4); *see also* Ex. 3, Oklahoma SIP, App. 6-4.

[5] S&L is well qualified to perform the cost analysis for the OG&E Units. S&L has decades of experience providing comprehensive consulting, engineering, design, and analysis for electric power generation, specifically in the area of retrofit and environmental compliance projects. To develop both the 2008 and 2009 cost estimates, S&L reviewed OG&E data in detail and visited the Muskogee and Sooner Generating Stations numerous times so as to understand the specific design and engineering aspects of the affected units and the overall facilities.

[6] *See Martinez v. EPA*, No. 11-9567 (consolidated with No. 11-9552 and 11-9557), Order (10th Cir. Mar. 1, 2012) (denying motion to stay).

On March 22, 2011, more than one year after Oklahoma submitted its SIP to EPA, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice, and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final—i.e., without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP—EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, the State of Oklahoma, OIEC, and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action and arguing that, for numerous reasons, EPA's proposed action was contrary to the CAA and RHR and was otherwise arbitrary and capricious.[7] Despite these comments, EPA published the Final Rule with respect to the Oklahoma SIP on December 28, 2011, disapproving the State's SO_2 BART determinations for the OG&E Units and for two units at another facility in the State. *See* 76 Fed. Reg. 81,728. EPA then simultaneously finalized the Oklahoma FIP that imposed an SO_2 emission limit of 0.06 lbs/MMBtu for each OG&E Unit, which would require the installation of a scrubber at each affected unit by January 27, 2017. Moreover, in support of the FIP, EPA adopted entirely new approaches not contained in its proposed rule without proper notice and the opportunity to comment, in violation of APA requirements.

[7] *See* Comment from Okla. Attorney General, Doc. ID No. EPA-R06-OAR-2010-0190-0040, dated May 23, 2011 (attached hereto as Exhibit 5); Comment from OIEC, Doc. ID No. EPA-R06-2010-0190-0051, dated May 23, 2011 (attached hereto as Exhibit 6); Exhibit 4, OG&E Comment.

ARGUMENT

The Tenth Circuit applies its preliminary injunction standard in deciding motions to stay agency action. *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (same). The Tenth Circuit has adopted a modified requirement as to the likelihood of success, allowing a lesser showing on the merits where the other factors are strongly demonstrated, and vice versa. *See O Centro Beneficiente Uniao Do Begetal v. Ashcroft*, 389 F.3d 973, 1002 (10th Cir. 2004). For the reasons described below, Petitioners satisfy each of the stay factors.

I. Petitioners Are Likely To Succeed on the Merits and Are Entitled to a Stay.

A. EPA Illegally Usurped Authority Congress Delegated to Oklahoma.

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA,

70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR, and that "States are free to determine the weight and significance to be assigned to each factor." *See* 76 Fed. Reg. 16,168, 16, 174 (Mar. 22, 2011). As the Oklahoma SIP clearly shows, Oklahoma did properly engage in that process in making its BART determinations for the OG&E Units.

This case stands in contrast to the Court's recent decision denying a stay of a regional haze FIP for New Mexico.[8] Unlike the situation in New Mexico, where there was no regional haze SIP at the time the proposed FIP was issued, and the BART determination and corresponding cost record was not submitted until *after* the FIP comment period closed, Oklahoma submitted its SIP to EPA long before EPA proposed the Oklahoma FIP, and with a full record. Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA was not free to reject Oklahoma's BART determinations with respect to the OG&E Units and promulgate a FIP substituting its judgment for that of the State.

The U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's

[8] *See Martinez v. EPA*, *supra* n.6.

provisions giving the *states* broad authority over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install"). EPA lacks the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources. *See Train*, 421 U.S. at 79 (EPA has "no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of [the Act] . . . the Agency may devise and promulgate a specific plan of its own only if a [s]tate fails to submit an implementation plan which satisfies those standards.").

EPA's only basis for finding that Oklahoma deviated from the BART guidelines is the assertion that the 2009 site-specific cost estimates did not comply with the CCM.[9] This position is fundamentally flawed in at least two respects. First, EPA ignores OG&E's 2008 cost estimates, which EPA and ODEQ both acknowledged were calculated in accordance with the CCM, and which justify the State's BART determinations for the OG&E Units. Instead, EPA focuses solely on and criticizes the 2009 site-specific cost estimates for not complying with the CCM. In fact, however, the 2009 cost estimates did use the categories of costs identified in the CCM, but at EPA's request, went beyond the assumed CCM values to provide site specific, vendor-supported cost estimates for the BART analysis. *See* Ex. 4, OG&E Comment at 7, 8.

[9] *See* Final Rule, 76 Fed. Reg. at 81,744 ("The Control Cost Manual must be followed to the extent possible when calculating the cost of BART controls.").

EPA also ignored the detailed analysis in the State's BART determination, which expressly considered both the 2008 and 2009 cost estimates in detail and concluded that they were reasonable.[10] *See* Ex. 3, Oklahoma SIP, App. 6-5, Item 1, Sooner BART Review at pp. 14-18, and Muskogee BART Review at pp. 14-18. The CAA gave Oklahoma the right to conduct this analysis and make a determination without being second-guessed by EPA. Oklahoma exercised the authority granted by the CAA and determined that "[t]he cost for [scrubbers] is too high, the benefit too low and these costs, if borne, further extend the life expectancy of coal as the primary fuel in the Sooner facility for at least 20 years and beyond. BART is the continued use of low sulfur coal." *Id*. at p. 29.

EPA second guessed Oklahoma's authority by rejecting significant portions of the 2009 site-specific costs estimates, in many instances simply assuming, without verifying, that they resulted in the double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, once EPA reached the conclusion that the CCM estimates should control, the proper response by EPA should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM and which support the State's BART determinations for the OG&E Units. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates)

[10] The reasonableness of the scrubber costs determined by Oklahoma is demonstrated by their consistency with the estimated scrubber costs in the recent filing by Southwestern Electric Power Company for the installation of a scrubber at its Flint Creek Power Plant, a 528 MW coal-fired generating plant near Gentry, Arkansas. *See* Petition for Declaratory Order at ¶ 17 (Arkansas Public Service Commission Docket No. 12-008-U (available at http://www.apscservices.info/efilings/docket_search.asp)).

nor reflective of the CCM general estimates (like OG&E's 2008 cost estimates). EPA's "cherry-picking" approach to the cost estimates for the OG&E Units in order to justify its predetermined conclusion that scrubbers were BART was, therefore, arbitrary and capricious.

The way that EPA developed and considered these cost estimates demonstrates that its process was results oriented. When EPA requested the 2009 cost estimates, OG&E informed the Agency that the estimates would not strictly follow the CCM because the 2008 cost estimates already did, but EPA persisted in the request. EPA then proceeded to reject the State's BART determination for the precise reason that the 2009 cost estimates did not follow the CCM. This is not a process by which to consider fairly the State's BART determination; to the contrary, it is arbitrary and capricious.

Second, even if only the 2009 cost estimates were used to evaluate the cost effectiveness of scrubbers, Oklahoma's reliance on those site-specific estimates was proper. EPA's contrary conclusion is flatly inconsistent with its own recognition that "States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated that States take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility, particularly by substituting its own arbitrary approach. EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful.[11]

[11] In addition, because EPA published a notice that certain States, including Oklahoma, had initially failed to meet the deadline for submitting regional haze SIPs, the CAA unequivocally imposed a two-year requirement for EPA to issue a FIP. *See* 42

B. EPA's Disapproval of the Oklahoma SIP Was Arbitrary and Capricious.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider. Indeed, EPA's own cost analysis is internally inconsistent, arbitrary, speculative and unsound. EPA analyzed an "Option 1" that grossly inflated emission reductions contrary to EPA's own guidance and an "Option 2" that estimated costs for a system that, as a matter of basic engineering principles, cannot be installed without significantly decreasing the generation capacity of the OG&E Units. EPA's approach simply cannot be supported.

1. EPA's failure to accept the 2008 cost estimate is unjustified.

In May 2008, OG&E submitted BART evaluations, including cost estimates for installing and operating scrubbers at the OG&E Units, which were prepared according to the CCM. In November 2008, EPA sent a letter to ODEQ in which EPA acknowledged that "OG&E did utilize the 'EPA Air Pollution Control Cost Manual' when constructing its [May 2008] cost estimates." *See* Ex. 4, OG&E Comment, Ex. A; *see also* Ex. 3,

(continued…)

U.S.C. § 7410(c); *Gen. Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as an example of "explicit deadlines" established by the CAA). It is undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

Oklahoma SIP, App. 6-4. The 2008 cost estimates showed that the costs of scrubbers per ton of SO_2 removed for the OG&E Units would be more than 10 times EPA's stated average costs per ton for this technology, and nearly five times as much as the upper limit of EPA's expected cost range. *See* 70 Fed. Reg. at 39,132 (estimating an average cost of $919 per ton and a cost range of $400 to $2,000 per ton of SO_2 removed).

Despite EPA's acknowledgment that the 2008 cost estimates complied with the CCM, OG&E complied with EPA's request that OG&E supply more detailed, site-specific information.[12] Although OG&E used the cost categories prescribed by the CCM to develop the 2009 cost estimates, their site-specific nature meant that they could not achieve the CCM's primary objective of national comparability for costs of control equipment at one facility to costs of similar equipment at another facility, a fact which OG&E pointed out in its comments to the proposed Oklahoma SIP. *See* Ex. 4, OG&E Comment at 25.

Under these circumstances, it is clear that EPA's rejection of the 2009 estimates (after it requested them) for allegedly failing to follow the CCM is arbitrary and designed to achieve its predetermined judgment that scrubbers should be specified as BART for the OG&E Units. Not only does EPA's decision rest on a faulty analysis of the 2009 cost estimates, but EPA completely and improperly ignored the 2008 cost estimates that, in full accordance with the CCM (as even EPA admitted), independently demonstrated that scrubbers are not cost effective. EPA's inconsistent positions regarding the nature of the

[12] The 2008 cost estimates were updated in September 2009 to reflect the use of annual actual baseline emissions for the 2004-2006 periods, as required by EPA, but this did not alter the total annual costs of control contained in the original May 2008 estimates.

cost estimates necessary for the BART analysis for the OG&E Units illustrates the arbitrariness of the Final Rule.

2. EPA's Option 1 disregarded BART guidelines by failing to use baseline actual emissions to determine cost effectiveness.

Under Option 1, rather than using past actual emissions as the baseline for determining emission reductions, EPA arbitrarily assumes a higher future level of emissions from the OG&E Units and then takes credit for eliminating those fictitious emission levels. Yet, per EPA's own guidance, the amount of a pollutant that a device will control on an annual basis must be determined using past actual emissions from the source and projections of future emissions following installation of a particular control technology. The purpose of using past actual emissions as the baseline is to provide a realistic depiction of the amount of a pollutant that a device will actually control. 70 Fed. Reg. 39,167. EPA has, in fact, revised cost effectiveness calculations in connection with BART determinations for other facilities to ensure that emission reductions are calculated this way. *See, e.g.*, 74 Fed. Reg. 44,313, 44,321 (Aug. 28, 2009). Use of this consistent calculation methodology helps to achieve the national uniformity that EPA seeks in the regional haze context.

EPA argues in the Final Rule that the "RHR states that when differences from 'past practice' have 'a deciding effect in the BART determination, you must make these parameters or assumptions into enforceable limitations,' and the OG&E analysis does not propose making the basis of their reductions enforceable." *See* Response to Technical Comments for Sections E through H, EPA ID No. EPA-R06-OAR-2010-0190-0057

(dated Dec. 13, 2011) ("Response to Comments"), at 6 (attached hereto as Exhibit 7). EPA's argument misses the mark in two significant ways. First, EPA is simply wrong that the emissions reductions used as the basis for OG&E's calculations are not made enforceable. To the contrary, the Oklahoma SIP finds that the low sulfur coal OG&E has been burning for years is BART and specifically requires OG&E to continue burning that fuel in the future. Accordingly, OG&E's analysis (unlike EPA's) represents the real actual emission reductions that could be expected with the controls installed. EPA's contrary argument is circular and nonsensical.

Second, EPA's argument reflects the flawed assumption at the heart of EPA's Option 1, *i.e.*, that one must combine a scrubber of the size recommended by S&L for the OG&E Units with higher sulfur coal or there is a mismatch. That fundamental engineering error leads EPA – not OG&E or Oklahoma – to depart from past practices and *assume* that OG&E burns a much higher sulfur coal than it actually does (thereby theoretically removing more SO_2 and lowering the $/ton of pollutant removed). Cost effectiveness, however, is based on the amount of SO_2 reduction when comparing emissions pre- and post-control. *See* 70 Fed. Reg. 39,167. For example, if an emitter emits 10,000 tons per year ("tpy") of SO_2 pre-control and 2,000 tpy of SO_2 post control, the amount of SO_2 controlled is 8,000 tpy because that is the reduction from pre-control emissions and, thus, the improvement from current practices to be expected from the installation of the controls. Whatever other fluctuations could occur *after* the controls are installed do not change the before and after comparison reflected in the use of actual baseline emissions.

3. EPA's Option 2 demonstrates a profound lack of engineering judgment and skill.

As an alternative to Option 1, EPA utilized past actual emissions but, based on the flawed assumption that sulfur content drives scrubber size, substantially decreased the size of the scrubbers that S&L, OG&E's expert engineering consultants, indicated would be needed for facilities with the capacity of the OG&E Units. EPA's disregard of basic engineering principles in this Option 2 reflects EPA's lack of understanding of the engineering and operational processes at issue, and leads it to reach a capricious conclusion.

Scrubber size is dependent upon gas flow, not the sulfur content of a particular coal. A scrubber must be sized to reflect the maximum potential heat input from the facility, and that number is essentially the same whether a facility burns high or low sulfur coal. *See* Ex. 4, OG&E Comment at 13. The reduced scrubber size reflected in EPA's Option 2 is not technically feasible and, if used, would significantly diminish the electrical generating capacity of the OG&E Units, thereby impeding their ability to meet the supply requirements for OG&E's customers and for the regional power grid operated by the Southwest Power Pool. Option 2, therefore, is not a valid analysis, because EPA guidance requires the elimination of technically infeasible options. *See* 40 C.F.R. Pt. 51, App. Y(II)(A); Proposed Regional Haze Regulations, 69 Fed. Reg. 25,184, 25,186 (May 5, 2004).

C. The Final Rule Is Based On New EPA Theories That Were Not Presented for Comment.

The Final Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et. seq*., because it introduces and relies upon rules or approaches not previously discussed in the proposed rule. *See* 5 U.S.C. § 553(b)(3) (requiring agencies to give notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."). "To satisfy the APA's notice requirement, . . . an agency's final rule need only be a logical outgrowth of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (internal quotations and citations omitted). However, "a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where interested parties would have had to divine the agency's unspoken thoughts because the final rule was surprisingly distant from the proposed rule." *Id.* (vacating portion of agency's final rule for violating APA's notice requirements) (internal quotations and citations omitted). Here, Petitioners had no means by which to divine EPA's introduction of several new outcome determinative approaches set forth for the first time in the Final Rule and, therefore, had no opportunity to properly comment on or present evidence regarding them. The issues raised by the use of these new approaches is particularly important in this case because they tread on areas that the CAA commits to the discretion of the State in the first instance.

1. The Final Rule introduces for the first time the "overnight" cost method of calculating the costs of environmental controls.

In attacking Oklahoma's BART determinations, EPA asserts that Oklahoma failed to apply the so-called "overnight" cost method—a method not previously referred to or

applied by EPA in connection with the Proposed Rule or in other BART determinations, or used in the RHR or CCM. *See* 76 Fed. Reg. at 81,744. The "overnight" cost approach is an estimate of the cost at which a plant could be constructed assuming the entire process from planning through completion could be accomplished in a single day. *See* Declaration of John Wroble ("Wroble Decl.") ¶ 4 (attached hereto as Exhibit 8). The new "overnight" cost method used by EPA to determine the cost effectiveness of scrubbers is at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying its FIP. EPA's failure to raise these new approaches as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity to comment on them. It was, therefore, improper under the APA and it deprived the State of the authority delegated to it by the CAA to determine the reasonable and appropriate methods for evaluating costs in making BART determinations.

In the Final Rule, EPA erroneously asserts for the first time that the CCM requires parties to use the "overnight" cost method, although EPA candidly admits that the CCM never uses the terminology "overnight cost." *See* Response to Comments at 9. In contrast, in the Proposed Rule, EPA claimed that the CCM required compliance with a "constant dollar" approach—an approach different from the "overnight" cost method. The constant dollar methodology, which allows comparability by removing the effects of inflation, was used by OG&E in the 2009 site-specific cost estimates. *See* Ex. 8, Wroble Decl. ¶ 5. EPA's newly minted "overnight" cost method phraseology is inconsistent with the CCM, its own past regulatory practices, and the BART cost effectiveness analysis conducted by EPA for other facilities. It represents an entirely new approach to

calculating costs for purposes of RHR BART determinations. *See* Declaration of Ken Snell ¶¶ 4-7 (attached hereto as Exhibit 9). EPA's Final Rule is fatally defective because of its failure to provide notice of this new approach and allow comment on it.

2. EPA's "visibility improvement" analysis employs a new "number of days" approach to visibility improvement.

The Final Rule also reveals, for the first time, EPA's new methodology to determining visibility improvement—the so-called "number of days" approach. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, the Final Rule is fatally defective.

Not only was this approach raised for the first time in the Final Rule, but EPA does not and cannot suggest that it is required by published EPA guidance or the CAA. In contrast, EPA acknowledges that the $/deciview approach used by Oklahoma in the Oklahoma SIP (but rejected by EPA here) is an optional cost effectiveness measure that can be used consistent with BART guidelines. *Id.* at 81,747. EPA offered no proper basis under the Act to reject Oklahoma's reasoned judgment to consider the $/deciview metric consistent with BART guidelines and to substitute an entirely new and different approach for the first time in the Final Rule—and to do so without allowing interested parties the opportunity to comment or present evidence regarding it.

Because the Final Rule fails the logical outgrowth test, Petitioners' challenges to the Oklahoma FIP are likely to succeed, justifying a stay of the FIP.

II. Petitioners Will Suffer Irreparable Harm Absent a Stay.

First, as noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. Compelling OG&E to proceed while the Court reviews EPA's actions here undermines the State's authority and damages the ability of Oklahoma to fulfill its regulatory function as created by Congress.

Second, the compliance deadline established in the Oklahoma FIP—January 27, 2017—places OG&E in an untenable position. Unlike the New Mexico proceedings, where only one EGU requires retrofit controls, the installation of four different scrubbers on the OG&E Units will be a massive construction effort requiring extensive planning and logistical coordination. Johnson Decl. ¶ 9. OG&E's engineering consultants have performed cost estimates demonstrating that the cost will range between $1.2 billion and $1.5 billion, with a resultant increase in annual Operating & Maintenance costs of between $70 million and $150 million. *Id*. Certainly if scrubbers must be installed on four separate units at two generation stations, the timing of the installation will need to be coordinated to ensure that OG&E can meet its load requirements during construction.

Because of this need to stagger the construction interruption for each unit, OG&E must begin promptly permitting efforts and the contracting process for engineering, equipment fabrication, and construction. Costs for activities during the first year are estimated at approximately $30 million, with another $200 million through the second

year. *Id.* ¶ 10. No mechanism exists for OG&E to recover the scrubber costs from EPA if the Final Rule is found to be invalid. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) ("Imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

Finally, if some of these costs are imposed on consumers in Oklahoma, like those represented by OIEC, the increased electricity rates will have an adverse economic impact as consumers pay higher rates directly and businesses look to pass their higher costs through to their customers.[13] Indeed, as a large electricity consumer, the State too will feel the economic impact of higher rates directly. Neither the State nor its citizens has recourse for such unnecessary costs. Thus, irreparable harm will result from continuation of the current effective date for the Oklahoma FIP.

III. The Balance of Equities Favors Granting Petitioners' Stay Request, and Granting a Stay Is in the Public Interest.

The balance of equities and the public interest strongly support granting Petitioners' stay request pending completion of judicial review of the Final Rule. Here, balancing the equities focuses on a comparison of (i) the effects of keeping the Final Rule's compliance deadline in place pending review and assuming that the Final Rule is eventually overturned, with (ii) the effects of suspending the effective date and

[13] 17 O.S. § 286(B) provides in pertinent part: "An electric utility subject to rate regulation by the Corporation Commission may file an application seeking Commission authorization of a plan by the utility to make capital expenditures for equipment or facilities necessary to comply with the federal Clean Air Act. . . . If approved by the Commission, . . . the equipment or facilities specified in the approved utility plan are conclusively presumed used and useful. The utility may elect to periodically adjust its rates to recover the costs of the expenditures."

compliance deadline in the Final Rule pending review and assuming that the Final Rule is eventually affirmed. In the context of regional haze, this is not a close call.

If the FIP and its compliance deadline remain effective and the Final Rule is overturned, Petitioners have already demonstrated the substantial economic impact that would have on the State, OG&E, and/or its customers. OG&E will be required to expend significant resources immediately in order to implement the installation of the scrubbers with any chance of meeting the five year deadline, and just in the first two years, the costs will exceed $200 million. Even if OG&E were able to roll some of those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma and Arkansas who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

Moreover, a stay of the effective date of the FIP would also reflect an appropriate respect for State sovereignty as embodied in the regional haze provisions of the CAA and the RHR. While EPA has indicated its disagreement with Oklahoma's BART determinations with respect to the OG&E Units, Congress's unquestioned intent to make the States the lead entity in designing regional haze programs counsels in favor of a stay where EPA has taken the extraordinary step of rejecting Oklahoma's exercise of that Congressional authority and substituted its own conclusions in place of the State's considered judgment. Moreover, a stay would give the EPA the opportunity to correct its fatally defective rule-making process and allow it to provide proper notice and comment on its newly formulated approaches. It also would allow the affected parties and EPA the opportunity to disentangle the error created by EPA's simultaneous consideration of the

Oklahoma SIP and its promulgation of the Oklahoma FIP, particularly if EPA also grants Petitioners' request for reconsideration. *See* 42 U.S.C. § 7410(c) (requiring final action on a SIP as predicate for promulgation of a FIP).

On the other hand, granting Petitioners' stay request will have no negative consequences. Congress has established the goal for the regional haze program to be achieving "natural visibility conditions by the year 2064." *See* 40 C.F.R. § 51.308(d)(1)(i)(B). Even if the Final Rule is ultimately upheld, a 2-3 year delay in the effective date of the FIP portion of the Final Rule pending judicial review will not interfere with achieving the Congressional objective for visibility. Indeed, though Congress first adopted the regional haze provisions in 1990, EPA itself delayed taking action to formulate the RHR for almost ten years. *See* 64 Fed. Reg. 35,714 (July 1, 1999). Importantly, the regional haze statutory provisions and the RHR do not address matters of public health. Instead, the regional haze program is designed for the prevention and remedying of impairment of visibility in national parks and other public lands. *See* 42 U.S.C. § 7491(a)(1). Thus, delaying the effective date of the FIP does not create any health risks to the public, much less risks that would justify compelling immediate capital projects that will be expensive and disruptive of the State economy and OG&E's electric generating operations. *See, e.g., Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1364 (Fed. Cir. 2002) (noting the absence of a public health threat as a significant factor favoring a preliminary injunction).

CONCLUSION

For the foregoing reasons, the Court should stay the effective date for the FIP provisions in the Final Rule pending completion of judicial review.

Dated: April 4, 2012

Respectfully submitted,

/s/ E. Scott Pruitt
E. Scott Pruitt, OBA #15828
Oklahoma Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 522-0669
Service Email: fc.docket@oag.ok.gov
scott.pruitt@oag.ok.gov

P. Clayton Eubanks, OBA #16648
Assistant Attorney General
Public Protection Unit/Environment
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 522-8992
Facsimile: (405) 522-0085
Service Email: clayton.eubanks@oag.ok.gov

ATTORNEYS FOR PETITIONER STATE OF OKLAHOMA, EX REL., E. SCOTT PRUITT

/s/ Michael Graves
Michael Graves, OBA #3539
Thomas P. Schroedter, OBA #7988
Hall Estill, Attorneys at Law
320 South Boston Avenue
Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0443
Facsimile: (918) 594-0505
Email Address: mgraves@hallestill.com
tschroedter@hallestill.com

ATTORNEYS FOR PETITIONER OKLAHOMA INDUSTRIAL ENERGY CONSUMERS

Respectfully Submitted,

/s/ Thomas E. Fennell
Thomas E. Fennell (TX SBN 06903600)
JONES DAY
2727 North Harwood Street
Dallas, TX 75201
Telephone: (214) 969-5130
Facsimile: (214) 969-5100
Email Address: tefennell@jonesday.com

Michael L. Rice (TX SBN 16832465)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3640
Facsimile: (832) 239-3600
Email Address: mlrice@jonesday.com

Charles T. Wehland (IL SBN 6215582)
JONES DAY
77 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
Email Address: ctwehland@jonesday.com

ATTORNEYS FOR OKLAHOMA GAS AND ELECTRIC COMPANY

CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

The undersigned certifies that:

(1) All required privacy redactions have been made; and

(2) This digital submission was scanned for viruses with McAfee VirusScan Enterprise v8.7i,. which was last updated on April 2, 2012. According to this program, this submission is free of viruses.

/s/ Thomas E. Fennell
Thomas E. Fennell

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2012, a copy of Petitioners' Motion For Stay of Final Rule was served electronically on all parties to this matter via the Court's CM/ECF system.

/s/ Thomas E. Fennell
Thomas E. Fennell