ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1363 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition for Review of a Final Rule of the
United States Environmental Protection Agency

REPLY OF MOVANT-INTERVENOR PEABODY ENERGY CORP. IN SUPPORT OF MOTIONS FOR STAY OF EPA'S FINAL RULE

TRISTAN L. DUNCAN
THOMAS J. GREVER
JUSTIN D. SMITH
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Mo 64108
Tel: (816) 474-6550
tlduncan@shb.com
tgrever@shb.com
jxsmith@shb.com

LAURENCE H. TRIBE
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, Ma 02138
Tel: (617) 495-1767
tribe@law.harvard.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com

December 23, 2015

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

CO_2	Carbon dioxide
EGUs	Electric Generating Units
EPA	United States Environmental Protection Agency
Peabody	Peabody Energy Corporation
Rule	*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, issued Aug. 3, 2015, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

Peabody joins in the arguments in Petitioners' reply briefs.

I. The Rule Raises Fifth Amendment Concerns.

By suggesting that Petitioners' proper remedy is a Tucker Act suit (EPA Br. 49), EPA essentially ***admits*** that the Rule ***does*** entail a compensable taking. In *Bell Atl. Tel. Cos. v FCC*, 24 F.3d 1441 (D.C. Cir. 1994), this Court held that the rule of constitutional avoidance superseded *Chevron* where an agency rule raised serious takings concerns. The Court instructed that "use of a narrowing construction prevents executive encroachment on Congress's exclusive powers to raise revenue and to appropriate funds." *Id.* at 1445. It warned that "*Chevron* deference to agency action" in such a situation "would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen." *Id.* The Court construed the statute as not authorizing the regulation at issue. The same approach is required here.

EPA admits that "[d]irecting plants to shut down would be an action entirely different in nature from setting emission performance guidelines." EPA Br. 30 n.18. But the Rule does just that. It targets coal-fueled plants for closure. EPA's own modeling shows the Rule will direct the shutdown of dozens of plants. EPA does not deny that the Rule's announcement caused Peabody's public shares to lose more than $90 million in value. *Ex parte* communications between EPA and environmental groups reveal that the Rule was carefully calibrated to shut down coal-fueled EGUs. *See* Response of EELI to Stay Motions (ECF Doc. 1582259). Such forced shutdowns

will make worthless hundreds of millions of dollars in investments. *See* Mot. to Intervene of Dixon Bros., *et al.*, at 9-10 (ECF Doc. 1584767).

The Rule's singling out of coal to bear a disproportionate, targeted, and severe burden raises serious Fifth Amendment questions. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 523-24 (1998).[1] EPA insists closing coal plants enhanced the U.S. bargaining position in the Paris negotiations. But not even foreign policy interests of the highest order can endow the Executive Branch with missing legal authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If U.S. foreign policy demands a sacrifice of property rights for public use, the government must pay compensation. *Id.* at 630-31 (Douglas, J., concurring).

II. The Rule Raises Separation of Powers and Federalism Concerns.

The Rule raises serious questions under the separation of powers because it represents agency lawmaking rather than interstitial rulemaking. Under *King v. Burwell*, 135 S. Ct. 2480 (2015), EPA is not entitled to *Chevron* deference. Even if there were

[1] In *Eastern Enterprises*, the Court invalidated the law in question, with the plurality relying on the Fifth Amendment's Takings Clause and Justice Kennedy relying on its Due Process Clause. Contrary to EPA's denial of any "retroactivity concern" (EPA Br. 49), the Rule represents an abrupt about-face in federal policy, which for decades strongly promoted coal investment for U.S. energy independence. *See*, *e.g.*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 2, 88 Stat. 246 (1974) (codified at 15 U.S.C. § 792); Fuel Use Act, Pub. L. No. 95-620, Title I, § 102, 92 Stat. 3291 (1978) (codified at 42 U.S.C. § 8301 et seq.). The bait and switch in policies creates a compensable taking, just as it did in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1010-14 (1984).

two "versions of Section 111(d)" (and there are not), EPA would lack the lawmaking power to choose which one to make operative.

EPA also ignores that anti-commandeering bars unlawful ***complicity*** as much as ***coercion***. *See Printz v. United States*, 521 U.S. 898, 921 (1997) (federal-state separation is one of "structural protections of liberty" designed to "reduce the risk of tyranny and ***abuse from either front***") (emphasis added). Thus, no State – including the States that support the Rule – can permissibly ***collude*** with EPA to aggrandize its federal authority. *See New York v. United States*, 505 U.S. 144, 181-82 (1992).

III. EPA's Claims of Climate Harms Are Unsubstantiated.

EPA's projections of potential climate harm (EPA Br. 1) go well beyond the latest report of the Intergovernmental Panel on Climate Change (IPCC).[2] EPA has admitted the Rule is "not about pollution control." (Peabody Stay Motion 17).

CONCLUSION

The Stay Motions should be granted.

[2] EPA's projections substantially outrun the available evidence. *See* IPCC, Climate Change 2013: The Physical Science Basis 37, 63 ("hiatus" in warming since 1998); 42, 44, 50, 73 ("low confidence" that extreme weather events such as hurricanes or droughts are attributable to human CO_2 emissions); 40 (Antarctic sea ice increasing, not decreasing); 290 (sea levels not rising any faster now than between 1920 and 1950); 25, 70 (catastrophic scenarios of "runaway" warming lack scientific basis). A compendium of current peer-reviewed science submitted to the National Academy of Sciences makes the same point. *See* Submission of Peabody Energy Corp. to NAS Board on Environmental Change and Society, Committee on Assessing Approaches to Estimates of the Social Cost of Carbon (DBASSE-BECS-15-02) (Dec. 23, 2015).

/s/ Tristan L. Duncan

TRISTAN L. DUNCAN
THOMAS J. GREVER
JUSTIN D. SMITH
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Mo 64108
Tel: (816) 474-6550
tlduncan@shb.com
tgrever@shb.com
jxsmith@shb.com

LAURENCE H. TRIBE
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, Ma 02138
Tel: (617) 495-1767
tribe@law.harvard.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com

December 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 23, 2015, I filed the above document using the ECF system, which will automatically generate and send service to all registered attorneys participating in this case.

/s/ Tristan L. Duncan