ORAL ARGUMENT NOT YET SCHEDULED

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

White Stallion Energy Center, LLC, et al.,	)	
Petitioners,	)	
v.	)	No. 12-1272
United States Environmental Protection Agency,	)	
Respondent.	)	

EPA'S OPPOSITION TO PETITIONERS' MOTION FOR AN ORDER ESTABLISHING A RULEMAKING DEADLINE OR, IN THE ALTERNATIVE, FOR RESUMPTION OF EXPEDITED BRIEFING AND CONSIDERATION

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners contest emission standards for hazardous air pollutants emitted from new coal and oil-fired electric utility steam generating units ("EGUs"). On July 20, 2012, Respondent United States Environmental Protection Agency ("EPA") announced its determination to reconsider the challenged new source standards. EPA further announced its intent to expedite that reconsideration proceeding and to complete it by March of 2013.

In view of its determination to reconsider the challenged standards for new EGUs, EPA promptly moved to suspend an expedited briefing schedule that had been previously entered by the Court and to hold the case in abeyance.[1] ECF Doc. No. 1384888. EPA also took action to stay the effectiveness of the current standards for three months (which is the period EPA is authorized to stay the standards during a reconsideration proceeding under 42 U.S.C. § 7607(d)(7)(B)).[2]

On September 12, 2012, this Court entered an order granting EPA's motion and holding the case in abeyance. Doc. No. 1394140. The Court directed EPA to file status reports at 30-day intervals. *Id.* EPA filed its first 30-day status report on October 12, 2012, in which EPA reported significant progress towards completing the reconsideration rulemaking and represented that it was on track to complete the rulemaking by March 2013. Doc. No. 1399415. The next status report is due on

[1] This Court on June 28, 2012, severed the two issues raised in this case related to *new* EGUs from a set of related cases challenging more generally EPA's hazardous air pollutant emission standards for EGUs. The set of related cases are consolidated under lead Case No. 12-1100. Pursuant to a briefing schedule entered on August 24, 2012, Petitioners' opening briefs in Case No. 12-1100 were filed on October 23, 2012. Certain Petitioners in Case No. 12-1272 are also participating as Petitioners in Case No. 12-1100.

[2] EPA further represented to this Court in moving for abeyance that it would not oppose the imposition of a judicial stay of the current standards until EPA issues new standards in the reconsideration proceeding. Doc. No. 1384888 at 6-7. Petitioners, however, indicated in response that they did not seek such relief. Doc. No. 1297278 at 12-13.

November 13, 2012. At that time, EPA will further update the Court on its progress towards completing action on reconsideration.

In response to EPA's first 30-day status report, Petitioners filed a motion requesting either (1) an order requiring EPA to complete the reconsideration rulemaking by March 1, 2013, or, in the alternative, (2) reconsideration of this Court's September 12 Order and reinstatement of an expedited briefing schedule. Both of Petitioners' alternative requests should be denied. Addressing the latter request first, there has been no material change in circumstances in the period of weeks since the Court's September 12 Order that warrants reconsideration. As was the case on September 12, the challenged standards are the subject of an expedited reconsideration proceeding. Any revised standards that result from the reconsideration process will be subject to judicial review based on a new administrative record. Litigating Petitioners' challenges to the current standards would waste the time and resources of the parties and the Court.

Moreover, EPA still intends to conclude that reconsideration proceeding in March of 2013. As set forth in the accompanying declaration of Regina McCarthy, Assistant Administrator for EPA's Office of Air and Radiation, EPA has prepared near-final drafts of the proposed rule and associated technical support documents. EPA has also carefully assessed the time-frames needed to finalize the reconsideration

rule in March of 2013, and remains on track to finalize the reconsideration rule in March of 2013.

Petitioners' continued speculation regarding the potential final outcome of a different rulemaking, involving separate emission standards for different pollutants – greenhouse gases – does not warrant any departure from this Court's usual practice of holding challenges to agency action in abeyance pending agency reconsideration. The April 2013 "construction deadline" that Petitioners reference in their motion (*see* Motion at 2, 5) and that Petitioners have referenced in previous briefing, is premised on speculation that EPA will take final action on a separate proposed rule concerning greenhouse gas standards without amending that proposal. As EPA has explained previously in moving for abeyance, EPA has invited comment on all aspects of its separate greenhouse gas proposal, and has *not* made any final decisions concerning that proposal. *See* EPA Reply in Supp. of Mot. To Hold Case in Abeyance, Doc. No. 1388677 at 9-10.[3] Petitioners will have a full and fair opportunity to contest any *final* decision regarding that proposal, just as Petitioners will have a full and fair opportunity to contest the final reconsidered emission standards for hazardous air

[3] Petitioners White Stallion Energy Center, LLC, Sunflower Electric Power Corp., Tri-State Generation and Transmission Association, Inc., and Power4 Georgians, have also filed petitions for review in this Court challenging EPA's proposed greenhouse gas standards. *See* Case No. 12-1248 and consolidated cases. Because these greenhouse gas standards are not final, EPA has moved to dismiss those petitions for review. *See* Case No. 12-1248, Document No. 13884445.

pollutants that are at issue in the instant case. In short, there is no reason for this Court to reconsider the abeyance order it entered just a few short weeks ago.

Petitioners' alternative request for an order directing EPA to promulgate a final rule on reconsideration by no later than March 1, 2013, should also not be granted. First, the United States District Court for the District of Columbia has exclusive jurisdiction, pursuant to section 304(a) of the Clean Air Act, to consider claims of unreasonable delay. 42 U.S.C. § 7604(a). Second, even if this Court hypothetically had jurisdiction to consider the unreasonable delay claim asserted (and the Court does not have any such jurisdiction), Petitioners would still have to seek such relief through the filing of a petition for a writ of mandamus, and they have not properly filed any such petition. *See* Fed. R. of App. P. 21, D.C. Circuit R. 21; *D.C. Circuit Handbook of Practice and Internal Procedures* III.G (2011) (proscribing procedures for filing a petition for writ of mandamus alleging unreasonable delay). Third, even if this Court had jurisdiction and even if Petitioners had properly filed a petition for a writ of mandamus, the extraordinary relief requested would still not be warranted applying the factors set forth by this Court in *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). EPA is in the process of conducting a rulemaking proceeding on an expedited schedule, and only a little more than three months have elapsed since EPA first announced its

determination to conduct a rulemaking proceeding. EPA's already-expedited pace easily meets a "rule of reason." *TRAC*, 750 F.2d at 80.

For these reasons, and as discussed further below, Petitioners' motion should be denied.

ARGUMENT

I. RECONSIDERATION OF THE COURT'S RECENT ORDER HOLDING THE CASE IN ABEYANCE IS NOT WARRANTED

We first address Petitioners' request for reconsideration of the Court's September 12 Order holding the case in abeyance pending completion of agency reconsideration proceedings. Motions for reconsideration are "rarely granted" by this Court. *See D.C. Circuit Handbook of Practice and Internal Procedures* VII.D. ("The Court rarely grants" motions for reconsideration of a panel's disposition of a motion). This is not the rare case that warrants reconsideration.

The judicial economy and prudential ripeness considerations underlying this Court's decision to hold the case in abeyance remain just as valid today as they were when that decision was reached a few weeks ago. *See* EPA Reply in Supp. of Mot. To Hold Case in Abeyance, Doc. No. 1388677 at 3-6. As before, conclusion of the reconsideration proceeding could narrow the issues that need to be litigated or eliminate the need for litigation on these issues altogether. Therefore, holding the

case in abeyance will preserve the time and resources of both the parties and the Court. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) ("[]n the context of agency decision making, letting the administrative process run its course before binding parties to a judicial decision prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protect[s] the agencies from judicial interference' in an ongoing decision-making process.") (citation omitted).

Furthermore, contrary to Petitioners' speculation (*see* Motion at 6-10), EPA remains on track to promulgate a reconsideration rule within the same time frame it had previously indicated it would act in moving for abeyance. *See* Decl. of Regina McCarthy. The new source standard issues that are being reconsidered are limited and discrete. *Id.* ¶ 9. EPA has carefully assessed the time-frames needed to finalize a reconsideration rule addressing these issues, and based on this careful assessment, EPA intends to, and believes it can, conclude the reconsideration proceeding in March of 2013. *Id.*

Contrary to Petitioners' characterization of EPA's October status report (*see* Motion at 6-7), EPA is not "far from" finalizing a rulemaking proposal. EPA, in fact, has prepared near-final drafts of the proposed rule on reconsideration and preamble,

as well as the associated technical support documents. McCarthy Decl. ¶ 7.[4] EPA has carefully analyzed the time-frames needed to finalize the reconsideration rule in March of 2013 and concludes, based on its review of the relevant time-frames, that it can finalize the reconsideration rule in March of 2013. *Id.* ¶¶ 8-9.[5]

Furthermore, Petitioners' request for a decision by this Court by April 2013 still rests, as it did before, on Petitioners' speculation regarding the potential outcome of a separate EPA rulemaking proceeding concerning emission standards for different pollutants – greenhouse gases. But the outcome of that separate proceeding will not be resolved in this case.

By way of background, EPA in April 2012 issued a proposed rule to establish greenhouse gas emission standards for new EGUs. Under that proposed rule, greenhouse gas emission standards for new sources would not apply to "transitional sources," which were defined in the proposal to include sources that already have a

[4] Petitioners assert that "[a]t the time EPA sought abatement in July 2012, it was expected to issue proposed standards in September 2012," (Motion at 9), but EPA, in fact, never represented to the public or the Court that it would issue proposed standards in September, nor did EPA represent that a September proposal was needed to support a March 2013 final action.

[5] EPA intends, consistent with Clean Air Act section 307(d)(5), 42 U.S.C. § 7607(d)(5), to provide for at least a 30 day public comment period, and after the close of the comment period, EPA intends to devote the staff necessary to process and respond to the comments as expeditiously as possible. If a public hearing is requested, on a parallel track with the 30 day comment period, EPA intends to hold such hearing 15 days after publication of the proposed rule, and, consistent with Clean Air Act section 307(d)(5), will keep the rulemaking docket open for 30 days after any public hearing. McCarthy Decl. ¶ 8.

complete preconstruction permit and that actually commence construction by April 2013. 77 Fed. Reg. 22,392, 22,392 (Apr. 13, 2012). EPA invited comment on all aspects of its greenhouse gas rule proposal. New unit developers have subsequently submitted comments proposing that EPA adjust its proposal to eliminate the need to commence construction by April 2013 to qualify as a "transitional source." *See* EPA Reply in Supp. of Mot. to Hold Case in Abeyance, Doc. No. 1388677, Ex. D. Were EPA to be persuaded by this comment and alter the proposed rule, April 2013 would have no regulatory significance. At the same time, environmental groups proposed that EPA do away with the concept of "transitional sources" entirely, contending that creating any exemptions from standards for new "transitional sources" of greenhouse gases is unlawful. *See id.*, Ex. E. Were EPA to be persuaded by *this* comment, April 2013 would also have no regulatory significance.

EPA has not reached any final decisions concerning greenhouse gas emission standards. The fundamental point here is that Petitioners' alleged need for a decision in this case by April 2013 continues to rest, just as it did before, on speculation regarding the potential contents of separate standards for different pollutants which have not yet been promulgated. Because the Agency is still in the midst of an ongoing administrative rulemaking process concerning such separate standards, this Court simply cannot provide Petitioners with any regulatory certainty concerning what greenhouse gas emission standards will apply to their new plants.

In any event, the Agency remains on track to issue the final new source hazardous air pollutant reconsideration rule in March of 2013, and Petitioners have not identified any material change in circumstances that would warrant reconsideration of the abeyance decision reached in September. Nothing in the Agency's first status report signaled anything other than that the Agency is on track to complete the expedited rulemaking in March of 2013. Ms. McCarthy's declaration confirms that the Agency remains on track and that she intends to commit the necessary resources to complete the rulemaking in March of 2013. EPA's next 30-day status report is due on November 13, 2012, at which time EPA will provide the Court with a further update on the status of the reconsideration proposal. Given that the Agency remains on course to complete the reconsideration rulemaking in March 2013, it would be premature for the Court to change course before EPA has even filed its second 30-day status report.

II. THIS COURT LACKS JURISDICTION TO CONSIDER PETITIONERS' REQUEST FOR A RULEMAKING DEADLINE, AND THERE HAS BEEN NO UNREASONABLE DELAY.

With respect to Petitioners' alternative request that the Court find unreasonable delay and enter an order directing EPA to promulgate a final rule on reconsideration no later than March 1, 2013, this Court lacks jurisdiction to provide such relief. Further, even if hypothetically this Court had jurisdiction to consider the unreasonable delay claim asserted, Petitioners would still have to seek such relief

through the filing of a petition for a writ of mandamus, and they have not properly filed any such petition. Finally, even if the Court had jurisdiction and even if Petitioners had filed a proper petition for mandamus, such extraordinary relief would not be warranted applying the factors set forth by this Court in *TRAC*, 750 F.2d at 80.

A. This Court Lacks Jurisdiction Over Unreasonable Delay Claims Under the Clean Air Act.

As an initial matter, the United States District Court for the District of Columbia has exclusive jurisdiction, pursuant to section 304(a) of the Clean Air Act as amended in 1990, to consider a claim that EPA has unreasonably delayed concluding the reconsideration proceeding at issue. 42 U.S.C. § 7604(a) ("The district courts of the United States shall have jurisdiction to compel . . . agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title.).[6] Here, the agency action at issue is the promulgation of hazardous air pollutant emission standards under 42 U.S.C. § 7412, and 42 U.S.C. § 7607(b) refers expressly to such actions. Accordingly, section 304(a) of the Clean Air Act, 42 U.S.C. § 7604(a), plainly applies and specifies district court jurisdiction over the unreasonable claim asserted. *See TRAC*, 750 F.2d at 77 ("It is well settled that

[6] Section 304(a) requires provision of 180 days notice to the EPA Administrator prior to commencement of an unreasonable delay action. *Id.*

even where Congress has not expressly stated that statutory jurisdiction is 'exclusive,' . . . a statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute.").

We recognize that in *TRAC*, this Court found that it had original jurisdiction to hear unreasonable delay claims that might affect the court of appeals' future statutory review of final agency action, in a situation where Congress had not specified exclusive district court jurisdiction. 750 F.2d at 78. But this Court has clarified that the jurisdictional principle articulated in *TRAC* "does not apply where a statute instead commits review of an alleged instance of agency . . . inaction . . . to the district court." *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C. Cir. 1987). Because section 304(a) of the Clean Air Act commits unreasonable delay claims to the district court, *TRAC* jurisdiction does not apply.[7]

B. Even if this Court Otherwise Had Jurisdiction, Petitioners Have Not Complied with Applicable Procedures for Pursuing a Petition for a Writ of Mandamus.

Even if this Court had jurisdiction to consider the unreasonable delay claim asserted under the jurisdictional principle articulated in *TRAC*, Petitioners would have to seek such relief through the filing of a petition for a writ of mandamus. *See* Fed. R.

[7] In *Sierra Club v. Thomas*, this Court found that it had jurisdiction over unreasonable delay claims brought under the Clean Air Act. Critically, however, the *Sierra Club* decision *preceded* the 1990 Clean Air Act amendments and the addition of the grant of exclusive jurisdiction to district courts over unreasonable delay claims.

App. P. 21, D.C. Cir. R. 21; *D.C. Circuit Handbook of Practice and Internal Procedures* III.G.[8] Here, Petitioners have not properly filed any such petition. Among other requirements, a petition for a writ of mandamus must be titled "In re [name of petitioner]," and the petitioner seeking a writ of mandamus must remit a docketing fee to the Clerk of the Court before the petition will be accepted for filing. Fed. R. App. P. 21; *D.C. Circuit Handbook* IV.C. A petition for a writ of mandamus alleging unreasonable delay cannot be granted unless and until a response is formally requested by the Court. D.C. Cir. R. 21(a).

C. Even if this Court Had Jurisdiction and Even if a Petition for a Writ of Mandamus Had Been Properly Filed, Petitioners Are Not Entitled to Extraordinary Mandamus Relief.

Even if this Court had jurisdiction to consider Petitioners' unreasonable delay claim, and even if Petitioners had properly filed a petition for a writ of mandamus, Petitioners would not be entitled to the extraordinary mandamus relief requested. "Mandamus is an extraordinary remedy, warranted only when agency delay is egregious." *In re Monroe Communic's Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988) (citations omitted); *see also, e.g., Kerr v. U.S. District Court*, 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."). The party seeking a writ of mandamus bears the burden of proving that its right to

[8] Petitioners expressly rely upon the Court's mandamus authority as the basis for the relief requested; yet, they fail to follow the Court's proscribed procedures for seeking such relief. *See* Motion at 8 (citing to All Writs Act, 28 U.S.C. § 1651(a)).

issuance of the writ is "clear and indisputable." *In re Int'l Union, United Mine Workers of Am.,* 231 F.3d 51, 54 (D.C. Cir. 2000) (citations omitted). The circumstances here do not present any such "clear and indisputable" "extraordinary" circumstances.

In *TRAC*, this Court identified six factors to guide the inquiry whether an agency's delay is "so egregious as to warrant mandamus." 750 F.2d at 79-80. The factors identified in *TRAC* include:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
>
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (citations omitted).

The ultimate and most important question in any unreasonable delay case is encompassed by the first factor: whether the time an agency takes to act satisfies a

"rule of reason." Here, EPA's timetable for concluding a reconsideration proceeding easily meets a "rule of reason." EPA announced its intent to commence a reconsideration proceeding on July 20 along with its intent to conclude that reconsideration proceeding expeditiously by next March. Only a little more than three months have expired since EPA first announced its intent to conduct a reconsideration proceeding on an expedited basis. As EPA reported in its initial status report, and reaffirms today, EPA remains committed to concluding that reconsideration proceeding expeditiously, and EPA remains on track to conclude the reconsideration proceeding by next March.

EPA's pace is reasonable. Petitioners identify no precedent where this Court has *ever* directed an agency to conclude an administrative reconsideration proceeding within as short a period of time as Petitioners seek here. *Cf. Sierra Club v. Th*omas, 828 F.2d at 798 (finding no unreasonable delay under Clean Air Act where less than three years had passed since EPA initially proposed a rulemaking); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (holding agency was proceeding to completion of rule making within a reasonable time when agency projected it could conclude rulemaking in two years).

With respect to the second factor in *TRAC*, the reasonableness of an agency's delay is assessed with reference to the statute that authorizes the agency to act. Here, the statute contains no applicable deadline for action. Section 304(a) of the Clean Air

Act, 42 U.S.C. § 7604(a), however, does provide that before a party can even commence an action for unreasonable delay under the Act, that party must give EPA 180 days notice. Thus, Congress determined that before a party can even initiate an unreasonable delay suit, it must give EPA an *additional* 180 days to act. In this case, EPA expects to conclude action within that period of time.

The third *TRAC* factor, relating to human health and welfare, also does not support a conclusion that there has been any unreasonable delay. Petitioners here are not seeking to have the Agency act to further protect human health and welfare, as was the situation in the two cases they principally rely on. *See* Pet. Mot. at 8 (citing *In re Int'l Chem. Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) and *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987)).[9] They instead represent developers of new EGUs who do not believe that EPA should be promulgating *any* hazardous air pollutant emission standards for their new plants.

Indeed, at the same time Petitioners have moved for this Court to set a deadline requiring EPA to conclude its reconsideration proceeding concerning the new source standards, Petitioners White Stallion Energy Center, LLC and Tri-State

[9] In *In re International Chemical Workers Union*, OHSA for three years had not met any timetable proposed to the court regarding a rulemaking to address admittedly serious health risks associated with the standards in place establishing permissible levels of cadmium exposure. In *Brock*, the Court had previously ruled that OSHA's decision to forego a short-term exposure limit for the toxin ethylene oxide was unsupportable and, in that context, concluded that an additional delay of more than two years to comply with the Court's mandate on remand would be unreasonable.

Generation and Transmission Association, Inc. have separately joined a brief in the related consolidated cases in which they contend that all EPA hazardous air pollutant standards for EGUs must necessarily be vacated because EPA, in their view, did not make a valid threshold "appropriate and necessary" finding under Section 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A). *See* Case No. 12-1100, Doc. No. 1401252 at 26-55. Thus, these Petitioners are requesting that this Court invoke extraordinary mandamus power to direct EPA to promulgate revised hazardous air pollutant emission standards for new plants on an expedited basis, while at the same time requesting that the Court invalidate these very same standards as exceeding EPA's authority. Petitioners cannot have it both ways.

Under the fourth *TRAC* factor, the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority. This Court has recognized that agencies are in a "unique - and authoritative - position to view [their] projects as a whole" and optimally allocate their limited resources, and courts are highly reluctant to interfere with this prioritization. *In re Barr Labs*, 930 F.2d 72, 76 (D.C. Cir. 1991). As explained above, EPA already intends to conclude its reconsideration rulemaking expeditiously in March of 2013. The fact that EPA is already voluntarily exercising discretion to expedite a rulemaking does not support a conclusion that EPA has engaged in unreasonable delay.

Under the fifth *TRAC* factor, the Court takes into account the nature and extent of interests adversely affected by a delay. Here, Petitioners miscast the extent to which their interests are adversely affected by any delay. Petitioners refer to a presumed April 2013 "deadline" to commence construction as the basis for needing revised hazardous air pollutant standards by March 2013, but, as discussed above, no such construction "deadline" actually exists. Petitioners' "deadline" instead turns on speculation regarding the *possible* outcome of an entirely separate administrative proceeding concerning greenhouse gas emission standards. Speculation does not provide a sound basis for extraordinary mandamus relief. Moreover, Petitioners previously represented to this Court in opposing abeyance that because their projects are "highly complicated undertakings" they would not be able, in any event, to commence construction within a matter of weeks of conclusion of EPA's rulemaking. Petitioners' Opp'n to Abeyance Mot., Doc. No. 1387278 at 8-9 (contending that even if a reconsidered rule is issued by March 2013, "it will be too late for Petitioners to commence construction by April 12, 2013").

In short, there has been no clear and indisputable unreasonable delay warranting an extraordinary mandamus remedy. But since the Court clearly lacks jurisdiction to consider the claim, and it has not been properly presented through a mandamus petition, the Court should deny Petitioners' request without even reaching the merits.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioners' Motion for an Order Establishing a Rulemaking Deadline or, in the Alternative, for Resumption of Expedited Briefing and Consideration, should be denied.

Respectfully submitted,

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DATED: November 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Motion for an Order Establishing a Rulemaking Deadline or, in the Alternative, for Resumption of Expedited Briefing and Reconsideration, has been served through the Court's CM/ECF system on all registered counsel this 1st day of November, 2012.

DATED: November 1, 2012 /s/ Eric Hostetler

Counsel for Respondent