ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, and NATIONAL FOREIGN TRADE COUNCIL,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

OXFAM AMERICA,

Intervenor for Respondent.

ON PETITION FOR REVIEW

Case No. 12-1398

PETITIONERS' RESPONSE TO MOTION OF OXFAM AMERICA TO FILE SEPARATE BRIEF

Intevenor Oxfam America ("Oxfam") has moved the Court to modify its November 1, 2012 Briefing Order, which requires Oxfam to file a "Joint Brief of Intervenor and any Amici in support of Respondent (not to exceed 8,750 words)." In seeking to file its own brief, separate from any *amici*, Oxfam argues that as a

party, it "cannot be forced to present an argument it does not support," and that the Briefing Order "arguably puts Oxfam in the untenable position of serving as a gatekeeper for all Amici arguments." Oxfam Mot. 5-6. (Oxfam's brief is due January 16.)

No *amici* have entered an appearance in this case, and Oxfam concedes that it is "certainly prepared to file a joint brief with any prospective Amicus with aligned interests and arguments." *Id.* at 5. Its motion therefore is premature. Moreover, this Court's Rules require litigants with common interests to coordinate and file joint briefs so long as it is "practicable," even if they do not agree on every issue. The Court's orders commonly require intervenors and *amici* to join a single brief. *Infra* at 6-7.

Petitioners nonetheless do not oppose Oxfam's request to file a brief separate from any *amici*, so long as the briefs together do not exceed the 8,750 words provided by the Court's Order. Oxfam does not request additional words in its motion, and in any event, a combined total of 22,750 words is ample for Respondent and its supporting intervenor and *amici* to present their case. Moreover, Petitioners would be prejudiced if they were required to respond to as many as 29,750 additional words (or more) in the 7,000 word Reply Brief they have been permitted in this expedited case.

ARGUMENT

This case concerns the "Extractive Industries Rule" that the Commission recently adopted pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78m(q). *See* Final Rule, 77 Fed. Reg. 56,365 (Sept. 12, 2012). Because the Rule threatens to impose billions of dollars in costs on regulated companies in the next year and beyond (*see id.* at 56,398/1, 56,412/1), Petitioners informed the Court of the need for prompt resolution of this case, which resulted in an expedited briefing schedule. *See* Per Curiam Order, Nov. 1, 2012 (DN 1402612). That Order required Oxfam to file a "Joint Brief of Intervenor and any Amici in support of Respondent (not to exceed 8,750 words)." *Id.* By requiring joint briefing among intervenors and amici who share similar interests, the Order is consistent with numerous Rules of this Court governing intervenors and *amici*.

For example, under the Court's Rules, "[i]ntervenors on the same side must join in a single brief to the extent practicable." D.C. Cir. R. 28(d)(4). Indeed, "[w]here an intervenor or *amicus* files a separate brief, counsel must certify in the brief why a separate brief is necessary." Handbook at 39; *see also* D.C. Cir. R. 28(d)(4); 29(d). An intervenor cannot justify filing a stand-alone brief by making "representations that the issues presented require greater length than these rules allow (appropriately addressed by a motion to exceed length limits), that counsel

cannot coordinate their efforts due to geographical dispersion, or that separate presentations were allowed in earlier proceedings." D.C. Cir. R. 28(d)(4); *see also id.* R. 29(d) (same rule for *amici*). This Court even encourages principal parties in consolidated cases to "join in a single brief where feasible." D.C. Circuit Handbook 37.

These Rules all serve the salutary purpose of requiring parties that share similar interests to present their arguments to the Court in a single, succinct brief. They apply to intervenors and even principal parties in certain cases. Oxfam therefore errs in arguing that because it is an intervenor, and an intervenor is a party, it is specially privileged to file its own brief.

This Court also espouses a general policy against briefs that exceed the word limits. Parties that seek to exceed a word limitation must file a motion with this Court requesting such relief, which will be granted "only for extraordinarily compelling reasons." D.C. Cir. Rule 28(e)(1). Neither Oxfam nor any potential *amici* have filed a motion for additional words, which is itself sufficient reason to deny Oxfam's motion for relief from the Order and its built-in word limitation. *See* Fed. R. App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."). In any event, Oxfam does not set forth any "extraordinarily compelling reasons" why it should be provided permission to file its own 8,750 word brief.

Oxfam argues that it should be relieved from the Court's Order because (1) it would put Oxfam in the "untenable position of vetting Amici arguments," (2) it would "depriv[e] the Court of Amici viewpoints that may assist it in adjudicating this case," and (3) it would "not [be] consistent with the Court's ordinary practice and the Appellate and Circuit rules." Mot. 2. Each of those arguments is mistaken.

First, there is no basis to believe that Oxfam would be put in the "untenable" position of "vetting" arguments with which it may disagree, Mot. at 4-5, any more than any other litigant required to file a joint brief under this Court's Rules. Oxfam has not even identified a single *amicus* by name, nor has any sought leave to participate in this expedited proceeding—despite this Court's instruction that any proposed *amici* should notify the Court "as soon as practicable after a case is docketed in this Court." Handbook at 38. Even assuming that *amici* do materialize, receive leave to participate, and view an issue in the case differently than Oxfam, this Court's administrative law docket routinely requires litigants with potentially varying interests to file joint briefs. In the unlikely event that a disagreement emerged between Oxfam and an *amicus* on an argument included in the brief, they could note in a footnote that one or the other litigant did not join that argument.

Second, Oxfam does not explain how the Court's Order would deprive it of any *amici* viewpoints. Oxfam notes that "there is little prospect that Oxfam would have the space to adequately present the positions of prospective Amici," Mot. 6

n.1, but as noted above, a desire for additional words is not an appropriate basis to request leave to file a separate brief. D.C. Cir. R. 28(d)(4); 29(d). Oxfam also does not explain how its interests supposedly diverge so drastically from that of any *amici* that separate briefs or additional words are necessary. Oxfam has an obligation to coordinate with the Commission to ensure that its brief does not merely repeat arguments made by the SEC. D.C. Cir. R. 28(d)(2). Thus, Oxfam's brief does not need to (nor should it) address all "seven separate issues" raised by Petitioners in their brief. Mot. 3. The only argument that Oxfam identifies on which it and the Commission diverge is the issue of this Court's jurisdiction (*see id.* at 6), and that plainly will not occupy 8,750 words.

Third, Oxfam erroneously contends that it is this Court's "ordinary practice" to permit intervenors and *amici* to file separate briefs. To the contrary, this Court has previously required intervenors and *amici* on the same side to file a joint brief, using language that mirrors that of the Order filed in this case. In *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir.), for example, this Court ordered a "Joint Brief for Intervenors and Amicus Curiae in Support of Petitioners (not to exceed 7,000 words)." Order of Jan. 18, 2012 (DN 1353334). Likewise, in *Transmission Agency of Northern California v. FERC*, No. 05-1402 (D.C. Cir), this Court ordered a "Joint brief for intervenor and amici curiae supporting petitioners (not to exceed 8,750 words)." Order of September 13, 2006 (DN 991174). In both

cases, the joint briefs were filed as ordered. The Court's Order here is consistent with these prior orders and furthers the same policies favoring efficient briefing.

In short, Oxfam would not be disadvantaged by joint briefing, which this Court commonly requires. But permitting Oxfam and any other *amici* to exceed a total limit of 8,750 words would cause prejudice to Petitioners, because this Court's Briefing Order provides Petitioners with only 7,000 words to reply to the arguments raised by the Commission, Oxfam, and *amici*—which could total 22,750 words under the current Order and could reach 29,750 words (or more) if Oxfam were afforded relief from the word limits.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that any briefs filed by Oxfam and any *amici* in support of Respondent be limited to a combined total of 8,750 words.

Dated: December 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2012, I electronically filed the foregoing Response to Motion of Oxfam America to File Separate Brief, with the clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I have caused 4 copies to be hand delivered to the Clerk's office.

/s/ Eugene Scalia
Eugene Scalia