Scenic America Lawsuit Seeks to Overturn FHWA Ruling on Digital Billboards

Scenic America's mission to preserve and enhance scenic beauty often puts it into conflict with proponents of outdoor advertising, especially the billboard industry. During the last few months of George W. Bush's administration, the billboard companies were given a huge windfall with the stroke of a pen. On September 25, 2007, the Federal Highway Administration (FHWA) issued a memorandum, entitled "Guidance On Off-Premise Changeable Message Signs," which reversed the agency's long-held position that barred intermittently changing commercial billboards.[1] The primary federal law regulating outdoor advertising on federal-aid roads is the Highway Beautification Act of 1965 (HBA). Most of the state-federal agreements (FSAs) that uphold the HBA require that "no sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights."[2] Despite these standards, the agency's 2007 Guidance effectively cleared the way for digital billboards.

The 2007 de facto rule-making excluded commercial, changeable, or continuously electronic variable message signs (CEVMS) from FHWA's definition of 'intermittent' or 'flashing' or 'moving' so long as these digital billboards do not change messages more frequently than once every four seconds.[3] This Guidance also required the digital billboards to meet new standards that the memorandum created.[4] This Guidance was not enacted as a rule-making proceeding, but it had the effect of allowing billboards it had always forbidden before.

On FHWA's website, the agency concedes that it historically considered that the prohibition of flashing, intermittent, or moving lights in various State-Federal agreements applied to all off-premise CEVMS, regardless of message interval.[5] However, in 2007 the FHWA concluded that because these digital billboards display "stationary messages for a reasonably fixed time," they do not violate the prohibition against 'intermittent' or 'flashing' or 'moving' signs.

On January 23, 2013, Scenic America filed a lawsuit asking the court to overturn FHWA's 2007 controversial ruling.[6] Scenic America wants the FHWA to issue a regulation that defines "flashing, intermittent, or moving light or lights" in a manner consistent with the agency's position prior to 2007, and consistent with the policies of the HBA, to promote highway safety and preserve scenic beauty.[7]

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[1] Memorandum from the Federal Highway Administration on Guidance on Off-Premise Changeable Message Signs to Division Administrators. (Sept. 25, 2007).
[2] *See* 23 C.F.R. Sect.750.108(c)(2010).
[3] Memorandum, *supra* note 1, at 3.
[4] *See id*.
[5] A History and Overview of the Federal Outdoor Advertising Control Program *available at http://www.fhwa.dot.gov/real_estate/practitioners/oac/oacprog.cfm.*
[6] Complaint against Federal Highway Administration, Ray Lahood, Victor Mendez, United States Department of Transportation, Scenic America Inc. v. Dept. of Transportation et al, No. 1:13-cv-00093 (D.D.C. Jan 23, 2013).
[7] Petition for rulemaking from Scenic America requesting FHWA to issue a definition of "flashing, moving, or intermittent light or lights." (Feb. 23, 2010).

Part of Scenic America's mission is to reduce the roadside billboard blight that undermines the Highway Beautification Act (HBA).[8] Scenic America opposes digital billboards because of the adverse effects they have upon the scenic beauty of the national highway system and because the signs distract drivers, which increases the risk of crash or near-crash accidents.[9] Moreover, because Congress intended FHWA to protect the public's interest in highway safety and scenic beauty, FHWA has a duty to prioritize the public's interest in safety and beauty over private, corporate interests in profit from commercial advertising.[10]

The year following the 2007 de facto rule, there were an estimated 800 digital billboards in the United States.[11] In 2012, there were an estimated 3600 digital billboards in the United States, an increase of almost 400% in just five years.[12] Scenic America and its affiliates have challenged the flood of new digital billboard permits and scenic groups have spent thousands of dollars trying to stop proliferation of these signs, but the 2007 rule has impaired the effectiveness in combating billboard blight.[13] Shielded by the FHWA's rule change, advertising companies have increasingly constructed digital billboards across the United States.[14]

In the January 2013 lawsuit against the United States Department of Transportation (USDOT) and the FHWA, Scenic America asserted that the FHWA did not issue its 2007 Guidance in accordance with rulemaking procedure required by law and it also did not develop new agreements with the States.[15] The 2007 Guidance created new legal rights and duties by lifting FHWA's historical prohibition on off-premise digital signs throughout the United States.[16] Procedurally, the Administrative Procedure Act (APA) requires that the Defendants publish a notice of proposed rulemaking and allow "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments," before issuing a new legislative and substantive rule.[17] Accordingly, Scenic America's Complaint sought declaratory and injunctive relief against the Defendants' issuance of the 2007 de facto rule.[18] In March 2013, the Outdoor Advertising Association of America, Inc. (OAAA) joined the lawsuit as an Intervenor-Defendant and in June 2013, all the Defendants filed Motions to Dismiss Scenic America's Complaint.[19]

In October 2013, the judge assigned to this case, Judge Boasberg, ruled that Scenic America has standing to sue. Judge Boasberg also denied the Defendants' and Intervenor's Motions to

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[8] *Id.* at 2.
[9] "Scenic America Lawsuit Seeks to Overturn FHWA Ruling on Digital Billboards" *available at* http://www.scenic.org/billboards-a-sign-control/digital-billboards/scenic-america-lawsuit-on-fhwa-ruling.
[10] Petition, *supra* note 7, at 27.
[11] Complaint against Federal Highway Administration, Ray Lahood, Victor Mendez, United States Department of Transportation, Scenic America Inc. v. Dept. of Transportation et al, No. 1:13-cv-00093 (D.D.C. Jan 23, 2013).
[12] *Id*.
[13] *Id.* at ¶ 17.
[14] *Id.*
[15] *See Id*. ¶ 48-62.
[16] *Id.* at ¶ 49.
[17] Administrative Procedure Act, 5 U.S.C §553 (2006).
[18] Compl., ¶ 1.
[19] *See* Court Docket, Scenic America, Inc. v. Dept. of Transportation et al., Docket No. 1:13-cv-00093 (D.D.C. Jan 23, 2013).

Dismiss on the grounds that the 2007 Guidance was not final agency action, and ordered the case to proceed.[20]

The Defendants' and Intervenor responded in January 2014 by moving for summary judgment against Scenic America's claims.[21] They asked the Judge to rule in their favor on the grounds that the FHWA's 2007 Guidance was exempt from the notice-and-comment requirements of the APA because it was interpretive[22] - merely interpreting common Federal/State Agreement (FSA) lighting standards, not a new or amended legislative rule.[23]

Scenic America opposed the Defendants' and Intervenor's Motions for Summary Judgment and also filed a Motion for Summary Judgment in February 2014.[24] Scenic America argued that FHWA's 2007 Guidance is a legislative rule because it establishes the basis for FHWA Division Offices to approve state digital proposals.[25] FHWA did not clarify any ambiguous terms, but rather amended prior legislative rules by making a substantive change to the FSA lighting standards.[26] Scenic America also noted that none of the D.C. Circuit cases cited by the Defendants and Intervenor in their motion briefs suggests that the 2007 Guidance qualifies as an interpretive rule.[27] Even assuming that the FHWA's 2007 Guidance is an interpretive rule, notice-and-comment procedure is still required under *Alaska Hunters* doctrine. "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."[28] Consequently, the 2007 Guidance violates the APA's notice-and-comment requirements.

Scenic America also argued that the 2007 Guidance violates the Highway Beautification Act (HBA) because it does not conform to the procedures for establishing lighting standards under the HBA, and because it creates lighting standards that are not "consistent with customary use," as required under the HBA.[29] The HBA mandates that billboard "size, lighting, and spacing" standards "be determined by agreement between the several States and the Secretary."[30] FHWA's 2007 Guidance creates new lighting standards without state agreement and consequently violates the HBA.[31] OAAA asked the court to ignore these arguments, reasoning that the agency could address them on remand, if necessary, however Scenic America requested the court to make a decision

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[20] *See* Scenic America Inc. v. Dept. of Transportation et al, Civil Action No. 13-93 (JEB), 2013 BL 293609 (D.D.C. Oct. 23, 2013).
[21] *See* Motion for Summary Judgment by Outdoor Advertising Association on America, Inc., and Motion for Summary Judgment by Federal Highway Administration, United States Department of Transportation, entered on Jan. 29, 2014, Scenic America Inc. v. Dept. of Transportation et al, Docket No. 1:13-cv-00093, 2013 BL 293609.
[22] *See* Administrative Procedure Act, 5 U.S.C. §553 (b)(A).
[23] *See supra* note 21.
[24] Memorandum in opposition filed by Scenic America, Inc. on Feb. 28, 2014, Scenic America Inc. v. Dept. of Transportation et al, Docket No. 1:13-cv-00093, 2013 BL 293609 (D.D.C. Jan 23, 2013).
[25] *Id.* at *30.
[26] *Id.* at *33.
[27] *Id.* at 34-5.
[28] Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).
[29] *Id.* at 37.
[30] *See* Highway Beautification Act, 23 U.S.C. § 131(d) (2006).
[31] Memorandum in Opposition filed on Feb. 28, 2014 at *38.

based on its legal arguments that the 2007 Guidance is an unlawfully promulgated legislative rule and because it violates the HBA.[32]

In March 2014, the Defendants and Intervenor submitted memorandums to oppose Scenic America's Motion for Summary Judgment and replied in support of the Motions they filed earlier in January 2014.[33] They argued that FHWA's 2007 Guidance was an interpretive, not substantive rule, because it did not amend a prior legislative rule and because there would be other agency action to ensure the performance of duties in the absence of the Guidance.[34] They argued the Guidance did not contravene the *Alaska Hunters* doctrine because their new interpretation "can reasonably be interpreted" as consistent with prior documents and does not significantly revise previous interpretations.[35] Defendants argued that FHWA's 2007 Guidance can reasonably be interpreted as consistent with the prior authoritative agency interpretation and the purpose of the Guidance was to clarify the agency's position.[36] Thus, the Guidance was exempt from the APA's notice-and-comment requirements.

The Defendants' also argued that FHWA's 2007 Guidance does not violate the HBA because it did not create a new lighting standard inconsistent with customary use and in violation of the procedural requirements of the HBA.[37] The Defendants' reasoned that because the Guidance was interpretive and not a substantive amendment of the FSA's, it did not implement "a new regulation" and thus did not need to conform to the procedures required under the HBA.[38]

Scenic America responded to the arguments in the Defendants' and Intervenor's memorandums in April 2014 in support of its Motion for Summary Judgment.[39] Scenic America argued that digital billboards violate prohibitions against signs "which contain, include or are illuminated by any flashing, intermittent or moving lights."[40] The Defendants use an artificially narrow definition of "flashing" and "intermittent" to dispute the premise that digital billboards use flashing and intermittent lights to cycle through messages thousands of times per day.[41]

Scenic America argued that the 2007 Guidance is a legislative rule that requires notice and comment because the Guidance revises FHWA's previous authoritative interpretation of state lighting controls.[42] The Court even previously held that "Division Offices 'may no longer reject' a State's digital-billboard proposal on the ground that digital billboards are 'categorically

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[32] *Id.* at *1-2.
[33] Memorandum in Opposition by Outdoor Advertising Association on America, Inc., and Memorandum in opposition by Federal Highway Administration, United States Department of Transportation, entered on Mar. 21, 2014, Scenic America Inc. v. Dept. of Transportation et al, Docket No. 1:13-cv-00093, 2013 BL 293609.
[34] *See, e.g,.* Memorandum in opposition by Federal Highway Administration, et al., entered on Mar. 21, 2014, at *8.
[35] *Id.* at 15.
[36] *Id.*
[37] *See id*. at *18-21.
[38] *Id*. at *21.
[39] Reply to opposition to motion filed by Scenic America, Inc. on Apr. 11, 2014, Scenic America Inc. v. Dept. of Transportation et al, Docket No. 1:13-cv-00093, 2013 BL 293609.
[40] *Id.* at *3.
[41] *Id.* at *3-6.
[42] *Id.* at *15.

unacceptable'" under FSA lighting prohibitions, which indicates that the 2007 Guidance established an adequate legislative basis for Division Offices to evaluate digital billboard proposals.[43]

Lastly, Scenic America argued that it is in the interest of fairness, judicial and administrative economies for the Court to make a prompt resolution on its HBA violation claims.[44] If the court does not resolve whether the 2007 Guidance violates the HBA's procedures and lighting standards, it would leave the industry free to continue erecting digital billboards and owners would be entitled to "just compensation" under the HBA if a state later orders removal of the billboards.[45]

As the parties cross-moved for summary judgment, the Court considered the arguments from all the briefs and records in its ruling.

On June 20, 2014, Judge Boasberg dismissed Scenic America's lawsuit challenging the 2007 FHWA Guidance.[46] In his opinion, Judge Boasberg said that FHWA's Guidance might not have offered the best reading of lighting standards by stating that digital billboards are not "flashing, intermittent, or moving" lights, but it did constitute an interpretation rather than a substantive change. It was therefore appropriate for FHWA to skip the notice-and-comment procedures.[47] Additionally, Judge Boasberg ruled that the *Alaska Doctrine* does not apply because the 2007 Guidance does not significantly revise, and is in harmony with the agency's prior position of lighting provisions.[48] The Court will issue an Order that will grant in full Defendants' and Intervenor's Motions for Summary Judgment and will deny Scenic America's challenges.[49]

After careful review, Scenic America has decided it will file an appeal to the D.C. Circuit Court of Appeals. A notice of appeal will be filed by August 19.

It is worth noting that one of the purposes of the HBA was to limit and reduce the visual pollution caused by roadside billboards. It appears that over time the purpose of the Act has changed to one of protecting the interests of billboard owners. It is no wonder then that the outdoor advertising industry makes protecting the HBA one of its top priorities.

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[43] *Id.* at * 7, *See also* Natural Res. Defense Council v. EPA, 643 F.3d 311, 319 (D.C. Cir. 2011).
[44] *Id.* at *17.
[45] *See* Highway Beautification Act, 23 U.S.C. § 131(b) (g); *See also* Outdoor Advertising Policy 23(C.F.R. § 750.302(b) (1) (2010) (Federal reimbursement will be made on the basis of 75 percent of the acquisition, removal and incidental costs legally incurred or obligated by the State).
[46] *See* Memorandum Opinion filed by United States District Court for the District of Columbia on June 20, 2014, Scenic America Inc. v. Dept. of Transportation et al, No. 1:13-cv-00093 (D.D.C. Jan 23, 2013).
[47] *Id*. at *2.
[48] *Id*. at *26.
[49] *See id*. at *29.