ORAL ARGUMENT SCHEDULED FOR JUNE 2, 2016

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

STATE OF WEST VIRGINIA ET AL, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 15-1363 (and consolidated cases)

RESPONDENTS' PROPOSED BRIEFING FORMAT AND SCHEDULE

Pursuant to the Court's January 21 order (ECF No. 1594951), Respondent United States Environmental Protection Agency ("EPA") and Respondent-Intervenors (collectively "Respondents") propose the briefing format set forth in paragraph 16 below. Petitioners are filing a separate proposed schedule and format. In support of their proposed format and schedule, Respondents submit as follows:

Background

1. These consolidated petitions seek review of the Clean Power Plan Rule ("the Rule"). The Rule was promulgated by EPA under authority of section 111 of the Clean Air Act, 42 U.S.C. § 7411, and secures important reductions in carbon dioxide ("CO_2") emissions from the largest emitters in the United States: existing fossil-fuel-

fired power plants. The statutory and regulatory background are discussed in greater detail in EPA's opposition to the motions for a stay. ECF No. 1586661.

2. Thirty-nine petitions for review of the Rule have been filed and consolidated under lead case No. 15-1363. While there are numerous state and industry Petitioners, along with several Petitioner-Intervenors, the interests of Petitioners and Petitioner-Intervenors are aligned.[1] All of the Petitioners and Petitioner-Intervenors contend that EPA exceeded its authority in promulgating the Clean Power Plan. See Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule, filed on December 8, 2015 at 8-9, ECF No. 1587531 (hereinafter "Bifurcation Motion"). Certain Petitioners also raise narrower specific objections to particular aspects of the CO_2 emission guidelines. See id. at 10-11.

3. A number of states and other governmental entities, industrial entities, and environmental groups have intervened in support of EPA in regard to Petitioners' challenges. These intervenors are described further in paragraph 9 below. *Amici* supporting both Petitioners and EPA have been granted leave to file briefs. Additional amici have pending motions for leave to file, and Respondents understand that other amici will be filing motions for leave to file briefs shortly.

[1] Case Nos. 15-1363, 15-1364, 15-1380 and 15-1409 were filed by state governmental entities. The remaining cases were filed by companies, trade organizations, and labor groups, all of which for purposes of this proposal will be referred to as "Industry Petitioners."

Proposed Word Limits

4. Respondents recognize that Petitioners have identified a significant number of potential issues for briefing. In view of the complexity of the Rule and the considerable number of issues to be raised by Petitioners, Respondents believe that Petitioners are justified in seeking more words than a standard-length brief. Respondents are mindful, however, of the Court's admonition that it "looks with extreme disfavor upon repetitious submissions" and its "encourage[ment]" of the parties "to limit both the number and size of the briefs . . . ." See January 21, 2016 Order, ECF No. 1594951.

5. As set forth above, all of the State and Industry Petitioners contest EPA's authority to promulgate the Clean Power Plan. See Bifurcation Motion at 8-9. In this respect, all of the Petitioners raise substantially overlapping or duplicative legal arguments (referred to by Petitioners as "core" legal issues). Certain Petitioners additionally raise a set of narrower record-based challenges to particular aspects of the CO_2 emission guidelines. These narrower challenges are also overlapping or duplicative in many cases. For example, some issues overlap in that they contest generally applicable methodologies as applied to specific states or companies. Compare, e.g., LG&E and KU Energy LLC Issue No. 3 (ECF No. 1589605), UARG Issue 14 (ECF No. 1589590), Luminant Issue 4.c. (ECF No.1589565), Oklahoma Issue No. 12 (ECF No. 1589304) and Entergy Issue 4 (ECF No. 1589516) (all raising

overlapping issues relating to EPA's conclusions regarding renewable energy generating capacity).

6. Taking into consideration the complexity of the case, the number of issues to be raised, and the number of overlapping or duplicative issues, Respondents believe that the number of words allotted to Petitioners should be in the same general ballpark as the number of words allotted to petitioners in similarly complex cases involving challenges to other significant EPA rules promulgated under authority of the Clean Air Act. Specifically, Respondents propose that a collective allotment of 35,000 words in aggregate to Petitioners and Petitioner-Intervenors for opening briefs would be reasonable here. See, e.g., White Stallion Energy Ctr., LLC v. EPA, Case No. 12-1100, August 24, 2012 Order (ECF No. 1391295) (allotting a combined total of 28,000 words to state, environmental and industry petitioners in challenge to EPA's rule setting emission standards for hazardous air pollutants emitted by fossil-fuel-fired power plants); EME Homer City Generation, L.P. v. EPA, Case No. 11-1302, January 18, 2012 Order (ECF No. 1353334) (allotting a combined total of 28,000 words to petitioners, and 7,000 words to intervenors and amicus curiae in support of petitioners, in challenge to rule governing interstate transport of pollutants); Coalition for Responsible Regulation v. EPA, Case No. 10-1073, March 21, 2011 Order (ECF No. 1299257) (allotting a combined total of 33,000 words for opening briefs in challenge to EPA's "Tailoring Rule," which addressed the regulation of greenhouse gas emissions from fossil-fuel-fired power plants and other stationary sources under

the Prevention of Significant Deterioration program).[2] A collective allotment of 35,000 words would be comparable to – and in fact exceeds – the number of words that were allotted to the petitioners in the similarly complex cases referenced above.

7. The interests of Petitioner-Intervenors are aligned with Petitioners. Petitioner-Intervenors are companies affiliated with the coal and utility industries, and these companies share the same interests as other industry Petitioners affiliated with these industries. Many (if not all) of the Petitioner-Intervenors are also members of at least one trade association that is a petitioner in the case. Accordingly, there is no reason to believe that Petitioner-Intervenors and Industry Petitioners cannot join in the same brief. But if Petitioner-Intervenors are granted leave to file a separate brief, there is no reason to expand the overall word limit for Petitioners and Petitioner-Intervenors to account for that separate brief addressing the same issues.[3]

8. Because of the need to address the issues raised by all Petitioners in a comparable level of detail, EPA requests that it be accorded the same total number of words allotted for Petitioners' and Petitioner-Intervenors' opening briefs collectively

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[2] The Tailoring Rule cases were ultimately coordinated procedurally, for purposes of oral argument, with three separate sets of cases challenging different EPA rules relating to greenhouse gases. See Coalition for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2014). These cases involve challenges to one EPA rule, the Clean Power Plan. They have not been procedurally coordinated, as was the case in the Coalition for Responsible Regulation matter, with wholly separate challenges to different EPA actions implementing other regulatory programs.

[3] Respondents do not have a position on the number of briefs that Petitioners should be granted leave to file.

(i.e., 35,000 words if EPA's proposal were to be accepted). See, e.g., Coalition for Responsible Regulation v. EPA, Case No. 10-1073, March 21, 2011 Order (ECF No. 1299257) (allotting EPA same total number of words as allotted to Petitioners and Petitioner-Intervenors collectively).

9. Respondent-Intervenors are composed of four distinct groupings, each of which includes many individual parties. These four groupings are as follows:

> ***State Intervenors.*** State Intervenors consist of eighteen states, the District of Columbia, five cities, and a county; each has a compelling interest in addressing the deleterious effects of climate change on its residents. State Intervenors have been pursuing legislative, regulatory, and judicial avenues to address greenhouse gas emissions from fossil-fuel-fired power plants for years. Indeed, some of the State Intervenors sought to compel EPA to regulate greenhouse gas emissions from electric generating units. See New York v. EPA (D.C. Cir. No. 06-1322).
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> ***Environmental and Health Intervenors***. The environmental respondent-intervenors are 15 nonprofit organizations dedicated to protecting public health and the environment. These organizations participated extensively in the judicial and administrative proceedings that preceded the Clean Power Plan; have broad expertise with the legal, administrative, technical, and public health aspects of air pollution control; and collectively have millions of members who could be affected by the Court's decision in this case.
>
> ***Trade Association Intervenors***. The American Wind Energy Association (AWEA), Advanced Energy Economy (AEE), and the Solar Energy Industries Association (SEIA), represent entities with a common interest in increasing adoption of low- and zero-greenhouse gas emitting energy generation technologies, an interest likely to be affected by the implementation of the Rule. Collectively, AWEA, AEE, and SEIA represent the views of more than 3,000 companies in the clean and advanced energy industry.

> ***Power Companies.*** Power company intervenors include 10 of the nation's largest electric utilities and owners of generating units subject to the Clean Power Plan, including Calpine Corporation; the City of Austin d/b/a Austin Energy; the City of Los Angeles, by and through its Department of Water and Power; the City of Seattle, by and through its City Light Department; National Grid Generation, LLC; New York Power Authority; NextEra Energy, Inc.; Pacific Gas and Electric Company; Sacramento Municipal Utility District, and Southern California Edison Company (Power Companies). The Power Companies have invested heavily in more efficient, lower-emitting and zero-emitting technologies and thereby reduced CO_2 emissions in their generation portfolios and therefore have a strong interest in defending the lawfulness of the Clean Power Plan, the achievability of its goals and the flexibility it provides to states to achieve the required reductions in the most cost-effective fashion.

10. Respondent-Intervenors respectfully request that they be granted an allocation of words that allows them fairly and adequately to brief the case, and that is proportionate to the Court's determination of what the appropriate word limit is for Petitioners and Petitioner-Intervenors and for Respondent EPA. Specifically, Respondent-Intervenors request a collective allocation of words equivalent to 62.5 percent of the words allocated to the Petitioners and Petitioner-Intervenors' for their opening briefs. See Fed. R. App. P. 32(e)(2)(B)(1) (prescribing a 8,750-word limit for the brief of an intervenor, or 62.5% of a 14,000-word opening brief). Thus, if the Court allocates 35,000 words to petitioners, as proposed herein, Respondent-Intervenors request a total of 21,875 words, to be divided among them.

11. Respondents propose that Petitioners' (and if allowed, Petitioner-Intervenors') reply briefs be one-half the length of their opening briefs, consistent with Fed. R. App. P. 32(a)(7)(B)(ii).

Proposed Deadlines for Initial Briefs

12. In its January 21 Order, the Court provided for expedited briefing, with all initial briefs to be submitted by April 15, 2016.

13. Petitioners have already had a period of several months to prepare their opening briefs. State Petitioners first requested expedited briefing on October 23, 2015. See State Petitioners' Motion for Stay and for Expedited Consideration of Petition for Review, filed on October 23, 2015 (ECF No. 1579999). State Petitioners subsequently represented that they would be prepared to file a brief addressing all ripe issues "on any schedule this Court would set to make a May 2016 argument possible." See Joint Reply of State Petitioners on Merits Briefing Proposal at 2 (filed on December 31, 2015, ECF No. 15931397). And Industry and State Petitioners jointly proposed in their bifurcation motion filed on December 8, 2015, that they be directed to file briefs addressing all "core" legal issues by January 27, 2016. In addition, Petitioners have had almost a week of briefing time since the Court's January 21 Order. Respondents accordingly request that Petitioners be directed to file their opening briefs by February 19, 2016.

14. Respondents believe that a briefing interval of at least 40 days between Petitioners' briefs and Respondents' briefs is required in view of: (1) the substantial

size of Petitioners' briefs (35,000 aggregate words if EPA's proposal were to be accepted); (2) the considerable number of issues to be raised by Petitioners; and (3) the need for time-intensive review of government briefs by multiple levels of management personnel at EPA and the Department of Justice. Accordingly, EPA requests that its responsive brief be due on March 31, 2016 (or 41 days after Petitioners' briefs if such briefs are filed on February 19 as proposed above). Respondent-Intervenors request that their briefs be filed one day later, on April 1, 2016. Consistent with the Court's January 21, 2016 Order, Respondents request that reply briefs be filed by April 15, 2016.

15. Respondents further propose that any *amici* supporting Petitioners file their briefs within four days after Petitioners' opening briefs, and *amici* supporting EPA file their briefs within four days after EPA's brief.[4]

16. In summary, in light of the considerations discussed above, Respondents request that the Court establish the following briefing schedule and format:

Documents	Due Date	Word Limits
Petitioners' Opening Brief(s)	Feb. 19, 2016	The aggregate length of the brief(s) submitted by Industry and State Petitioners and Petitioner-Intervenors shall not exceed **35,000** words
Amici for Petitioners	Feb 23, 2016	
EPA's Brief	Mar. 31, 2016	**35,000** (the same number of words as Petitioners'/Petitioner-Intervenors' Opening Briefs in aggregate)

[4] Respondents take no position on appropriate word limits for *amicus* briefs.

Respondent-Intervenors' Briefs	Apr. 1, 2016	**21,875** words (to be divided among Respondent-Intervenors)
Amici for EPA	Apr. 5, 2016	
Petitioners' Reply Briefs	Apr. 15, 2016	**17,500** words in aggregate (one-half the word allocation for Petitioners'/Petitioner-Intervenors' opening briefs)
Joint Appendix	Apr. 18, 2016	N/A
Final Briefs	Apr. 22, 2016	N/A

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January 27, 2016

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Proposed Briefing Format have been served through the Court's CM/ECF system on all registered counsel this 27th day of January 2016.

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