ORAL ARGUMENT HELD SEPTEMBER 27, 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, ET AL. Respondents.	No. 15-1363 (and consolidated cases)

NOTICE OF EXECUTIVE ORDER, EPA REVIEW OF CLEAN POWER PLAN AND FORTHCOMING RULEMAKING, AND MOTION TO HOLD CASES IN ABEYANCE

Respondents United States Environmental Protection Agency, et al. (collectively "EPA"), hereby provide notice of (1) an Executive Order from the President of United States titled "Promoting Energy Independence and Economic Growth" and directing EPA to review the Clean Power Plan – the Rule at issue in this case; and (2) EPA's initiation of a review of the Clean Power Plan; and (3) if appropriate, a forthcoming rulemaking related to the Rule and consistent with the Executive Order. Pursuant to these developments, the Clean Power Plan is under close scrutiny by the EPA, and the prior positions taken by the agency with respect to the Rule do not necessarily reflect its ultimate conclusions. EPA should be afforded

the opportunity to fully review the Clean Power Plan and respond to the President's direction in a manner that is consistent with the terms of the Executive Order, the Clean Air Act, and the agency's inherent authority to reconsider past decisions. Deferral of further judicial proceedings is thus warranted.

Accordingly, EPA respectfully requests this Court to hold these cases in abeyance while the agency conducts its review of the Clean Power Plan, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period. As discussed further below, such abeyance will promote judicial economy by avoiding unnecessary adjudication and will support the integrity of the administrative process. Respondents contacted coordinating counsel for Petitioners, Petitioner-Intervenors, and Respondent-Intervenors regarding their positions on this motion. Petitioners and Petitioner-Intervenors do not oppose the motion. Respondent-Intervenors oppose the motion and intend to file responses in opposition, except that Respondent-Intervenor Next Era Energy Inc. takes no position on the motion.

BACKGROUND

The Executive Order and EPA's current review of the Clean Power Plan follow various proceedings undertaken during the prior Administration. These proceedings and the more recent developments under the new Administration are summarized below.

On October 23, 2015, EPA promulgated "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" (the "Rule" or "the Clean Power Plan"). The Rule established "CO_2 [carbon dioxide] emission guidelines for existing fossil fuel-fired electric generating units." 80 Fed. Reg. 64,662, 64,663 (Oct. 23, 2015). EPA cited its authority under the Clean Air Act as the basis for the Rule. Id. at 64,707-10.

Numerous petitions for review of the Rule were filed in this Court and were subsequently consolidated under lead case West Virginia v. EPA, No. 15-1363 ("West Virginia"). The Supreme Court granted applications for a stay of the Rule pending judicial review on February 9, 2016. Order, West Virginia v. EPA, No. 15A773. Following full merits briefing, oral argument was held before this Court, sitting en banc, on September 27, 2016.

While the West Virginia litigation was proceeding, EPA received 38 petitions for administrative reconsideration of various aspects of the Rule. On January 11, 2017, shortly before the change in Administrations, EPA denied most of the petitions for reconsideration. See 82 Fed. Reg. 4864 (Jan. 17, 2017) (the "Denial Action"). To date, 17 petitions for review of the Denial Action have been filed in this Court and consolidated under lead case State of North Dakota v. EPA, No. 17-1014.[1]

[1] On February 24, 2017, petitioners Utility Air Regulatory Group, American Public Power Association and LG&E and KU Energy LLC filed a motion to sever their

On March 28, 2017, the President of the United States signed an Executive Order establishing the policy of the United States that executive departments and agencies (Agencies) "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." Executive Order, "Promoting Energy Independence and Economic Growth," (Attachment 1 hereto), § 1(c). The Executive Order also sets forth the policy that "all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic." Id. § 1(d).

With respect to the Rule, the Executive Order directs the Administrator of EPA to "immediately take all steps necessary" to review it for consistency with these and other policies set forth in the Order. Id. at § 4. The Executive Order further

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petitions for review in North Dakota v. EPA, No. 17-1014, consolidate those petitions with the Movants' respective petitions in West Virginia v. EPA, No. 15-1363, and issue an order directing the parties in West Virginia v. EPA to submit a proposal to govern the scheduling of supplemental briefing. EPA filed a response to this motion in which it noted that while it did not oppose consolidation, "consolidation of all of the petitions for review of the Denial Action with the challenges to the Rule would be more appropriate than consolidating only two of the petitions for review of the Denial Action, so as to avoid having overlapping claims challenging the same Denial Action pursued within separate proceedings." No. 15-1363, DN1665820 (filed Mar. 13, 2017), at 2.

instructs the agency to "if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding" the Rule. Id.

In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA's review of the Rule and providing advanced notice of forthcoming rulemaking proceedings. See Notice of Review of the Clean Power Plan (Attachment 2 hereto). Specifically, the Federal Register notice announces that EPA "is initiating its review of the [Clean Power Plan]," and "providing advanced notice of forthcoming rulemaking proceedings consistent with the President's policies." Id. at 3. The Federal Register notice further notes that if EPA's review "concludes that suspension, revision or rescission of this Rule may be appropriate, EPA's review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." Id.

SUMMARY OF ARGUMENT

The Executive Order, Clean Power Plan review, and potential rulemaking proceedings mark substantial new developments that warrant holding this litigation in abeyance. Consistent with the inherent authority of federal agencies to reconsider past decisions and EPA's statutory authority under the Clean Air Act, EPA should be afforded the opportunity to respond to the Executive Order by reviewing the Clean Power Plan in accordance with the new policies set forth in the Order.

Because the Rule is under agency review and may be significantly modified or rescinded through further rulemaking in accordance with the Executive Order, holding this case in abeyance is the most efficient and logical course of action here. Abeyance will further the Court's interests in avoiding unnecessary adjudication, support the integrity of the administrative process, and ensure due respect for the prerogative of the executive branch to reconsider the policy decisions of a prior Administration.

ARGUMENT

Agencies have inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("State Farm"). EPA's interpretations of statutes it administers are not "carved in stone" but must be evaluated "on a continuing basis," for example, "in response to . . . a change in administrations." Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). See also Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (a revised rulemaking based "on a reevaluation of which policy would be better in light of the facts" is "well within an agency's discretion," and "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its

programs and regulations'") (quoting State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). The Clean Air Act complements EPA's inherent authority to reconsider prior rulemakings by providing the agency with broad authority to prescribe regulations as necessary to carry out the Administrator's authorized functions under the statute. 42 USC § 7601(a).

Courts may defer judicial review of a final rule pending completion of reconsideration proceedings. See Am. Petroleum Inst. v. EPA ("API"), 683 F.3d 382 (D.C. Cir. 2012). And this Court has often held challenges to Clean Air Act rules, in particular, in abeyance pending completion of reconsideration proceedings. See, e.g., Sierra Club v. EPA, 551 F.3d 1019, 1023 (D.C. Cir. 2008); New York v. EPA, No. 02-1387, 2003 WL 22326398. at *1 (D.C. Cir. 2003) (same).

With these principles in mind, and based on recent developments, abeyance is warranted in this case. The President of the United States has directed EPA to immediately take all steps necessary to review the Rule and, if appropriate and as soon as practicable, initiate a new rulemaking relating to the Rule. In accordance with this directive, EPA has begun a review of the Rule. EPA has also announced that if the review concludes that suspension, revision, or rescission of the Rule may be appropriate, EPA's review will be followed by a rulemaking process. Thus, "[i]t would hardly be sound stewardship of judicial resources to decide this case now." API, 683 F.3d at 388. Abeyance would allow EPA to "apply its expertise and correct any errors, preserve[] the integrity of the administrative process, and prevent[]

piecemeal and unnecessary judicial review," id., while furthering the policy set forth in the Executive Order, as consistent with the Clean Air Act.

Abeyance is also warranted to avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the subject of EPA's nascent review. A decision from the Court at this time would almost certainly generate a petition for writ of certiorari from some party to the litigation or another, thereby compelling further briefing on substantive questions prior to EPA's completion of its review. This could call into question the fairness and integrity of the ongoing administrative process.

Holding the present challenges in abeyance will preserve the status quo, in which the Rule is presently stayed pending judicial review by Order of the Supreme Court. None of the Petitioners challenging the Rule oppose the requested abeyance of proceedings. Respondent-Intervenors oppose abeyance, but they face no immediate harm arising from the postponement of judicial review. The requirements of the Rule, which have been stayed by the Supreme Court, would not become effective any time soon even were this litigation to proceed and the stay ultimately lifted. Indeed, no carbon dioxide emission reductions are required from sources under the Rule until 2022 at the earliest.

WHEREFORE, EPA requests that this Court hold these cases in abeyance while the agency conducts its review of the Clean Power Plan, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting

forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.[2]

Respectfully submitted,

BRUCE S. GELBER
Deputy Assistant Attorney General

DATED: March 28, 2017 BY: */s/ Eric G. Hostetler*

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[2] EPA is willing to provide status reports at regular intervals during the abeyance period (EPA suggests every 120 days) if the Court would find that useful.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains approximately 1,950 words according to the count of Microsoft Word and therefore is within the word limit of 5,200 words.

Dated: March 28, 2017

/s/ *Eric G. Hostetler*
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Executive Order, EPA Review of Clean Power Plan, and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance have been served through the Court's CM/ECF system on all registered counsel this 28th day of March, 2017.

/s/ *Eric G. Hostetler*
Counsel for Respondent