ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

State of West Virginia, et al., *Petitioners*, v. U.S. Environmental Protection Agency, et al., *Respondents.*	No. 15-1363 and consolidated cases

PETITIONERS' JOINT MOTION TO ESTABLISH
BRIEFING FORMAT AND EXPEDITED BRIEFING SCHEDULE

These consolidated cases involve 28 petitions to review a final rule promulgated by the U.S. Environmental Protection Agency ("EPA" or "Agency") entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Rule"). As detailed below and in 9 stay motions filed with the Court, the Rule requires a restructuring of the American electric utility industry that States and other affected parties have already been forced to begin implementing in light of the Rule's first deadline in September 2016. Given the acute importance of this case to the nation's energy system and its customers, and the irreparable harm the Rule is presently causing, Movants believe it is critical that the lawfulness of the Rule be adjudicated as soon as possible. Thus, though there are pending requests to stay the Rule, Petitioners are also filing this motion to ensure the Court has sufficient time to enter an expedited briefing schedule with oral argument this term—*i.e.*, by May 2016—on the fundamental legal issues raised by the Rule. Movants propose one possible schedule (*infra* at 15-17), but stress that the focus of this request is on argument on the Rule's fundamental legal issues occurring this coming spring, rather than being delayed until the fall.

Counsel for the undersigned Petitioners have had good-faith discussions with counsel for EPA to try to reach agreement on a joint proposal. They have informed Petitioners that they do not agree with this proposal and plan to file one or more responses.

PRELIMINARY STATEMENT

EPA's Rule establishes carbon dioxide ("CO_2") emission performance rates for coal- and gas-fired electric generating units ("EGUs"), which are used to calculate emission performance goals for 47 of the 50 States. As EPA acknowledges, to achieve these emission rates, many existing coal-fired power plants will need to be closed and the operation of the remaining units will be substantially curtailed, a large amount of replacement generation and associated electric transmission and natural gas pipeline infrastructure will need to be developed, and measures must be taken to induce consumers to reduce electric consumption significantly. For some States, natural gas-fired electric generation must be replaced by renewable energy, or a reduction in the demand for electricity, in order to comply. Achievement of these CO_2 emission reductions will require many States to rewrite their laws and regulations to effectuate these changes. These new state laws and regulations must be passed by the States' legislatures and signed by their governors, and must be in effect in less than one year, by September 6, 2016, unless the State seeks and EPA approves an extension. Even if a State gets an extension, it must submit an initial progress report to EPA by September 6, 2016, including an interim plan setting forth proposed changes in state laws and regulations by September 6, 2017, and a final plan by September 6, 2018.

As numerous States have attested, accomplishing all of this in the timeframes contemplated by the Rule will be extraordinarily difficult, if not impossible. *See, e.g.*, State Pet'rs Mot. for Stay & for Expedited Consideration of Pet. for Review at 15-19,

ECF No. 1579999 ("States' Stay Mot.") (citing declarations). The development of state plans is already underway; virtually every State in the country is now engaged in ongoing regulatory, interagency, and stakeholder processes to restructure their electric utility sectors in time to meet EPA's schedule. *Id.* Electric generators are also undertaking substantial efforts now, including having to identify and prepare EGUs for retirement, to prepare for corresponding increases in natural gas and renewable generation, and planning, permitting, and constructing new generation to replace those units. *See* Mot. of Utility & Allied Pet'rs for Stay of Rule at 14-16, ECF No. 1580014 ("Util. and Union Stay Mot.").

Accordingly, several Petitioners have filed motions with this Court asking it to stay the effectiveness of the Rule, and to toll the deadlines contained therein, pending resolution of their petitions. *See, e.g.*, States' Stay Mot.; Util. and Union Stay Mot.; Coal Ind. Mot. for Stay, ECF No. 1580004 ("Coal Stay Mot."); Mot. for Stay of EPA's Final Rule, ECF No. 1580020 ("Bus. Stay Mot."). In addition to the stay motions, the undersigned Petitioners, representing 27 States, the electric utility and coal sectors, labor unions, and the general business community, respectfully request that this Court set an expedited briefing schedule that would permit argument prior to the end of this term of the fundamental legal issues raised by the Rule.

To meet this goal, Movants respectfully propose that the Court (i) set for expedited briefing a discrete set of fundamental issues (specified below) that are central to the legal validity of the Rule and that are ripe for immediate resolution; and

(ii) sever and establish a separate docket for state-specific and programmatic issues. Given the large number of these latter types of issues that EPA's massive regulation raises for each of the 47 States to which it applies, the most efficient way of managing the case while allowing for expeditious resolution of EPA's legal authority to change the entire economic and regulatory structure of the electric utility industry is to bifurcate the briefing between the fundamental legal issues and individual record-based challenges. This will enable the Court to resolve promptly the foundational legal issues related to whether EPA has authority under the Clean Air Act ("CAA") to issue the Rule, and even if it does, whether Section 111(d) of the CAA, 42 U.S.C. § 7411(d), authorizes a rule like *this* rule. Depending on how the Court resolves those foundational legal issues, briefing of the state-specific and record-based issues could be narrowed or avoided altogether.

Bifurcation and severance of the fundamental legal authority issues from the challenges to the programmatic elements, and speedy briefing and resolution of the former, will promote the fair and efficient management of these cases, and is in the interest of judicial economy. It will allow the Court to resolve whether EPA has any authority under the CAA to adopt the Rule *before* addressing the multitude of complex and fact-based individual issues relating to the Rule's implementation.

Prompt review of the common fundamental legal issues presents distinct advantages for all involved. First, depending on how the Court resolves the fundamental legal issues, briefing on all or many of the programmatic issues may

become unnecessary. Second, given how quickly the Rule seeks to force States to make unprecedented legislative and regulatory changes, and given the profound and immediate impacts on industry and the public that the mandated restructuring of the electric sector will have, speedy resolution of the fundamental legal issues will benefit both the regulators and the regulated. *See, e.g.*, States' Stay Mot. at 15-20; Util. and Union Stay Mot. at 14-19; Coal Stay Mot. at 14-18; Bus. Stay Mot. at 17-19; Basin Electric Stay Mot. at 15-19, ECF No. 1582159; Pet. Oklahoma's Motion for Stay of EPA's Existing Source Performance Standards for Electric Generating Units at 17-19, ECF No. 1580577 ("Okla. Stay Mot."); Pet. State of North Dakota's Motion for Stay of EPA's Final Rule at 9-15, ECF No. 1580920 ("N.D. Stay Mot.").

DISCUSSION

I. Overview of Section 111 of the CAA and the Rule

Section 111(d) of the CAA authorizes EPA to issue regulations calling on States to submit plans containing state-established performance standards for existing sources of air pollution, but only for sources not in "a source category which is regulated under section [112] of this title." 42 U.S.C. § 7411(d); *see Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). For source categories that EPA is authorized to regulate under Section 111(d), any standards of performance must reflect the "best system of emission reduction" ("BSER") that has been "adequately demonstrated" for "existing source[s]" of the air pollutant. 42 U.S.C. § 7411(a)(1), (d)(1). In "applying a standard of performance to any particular [existing] source," a

State is expressly permitted by the statute to consider the source's "remaining useful life" and "other factors." *Id.* § 7411(d)(1); *see also* 40 C.F.R. § 60.24(f) (recognizing States' authority to "provide for the application of less stringent emissions standards or longer compliance schedules" based on "remaining useful life" and other factors).

In the 45-year history of the CAA, EPA has undertaken more than 60 rulemakings defining standards of performance for categories of *new* sources under CAA § 111(b). *See* 40 C.F.R. pt. 60. It has also promulgated regulations under CAA § 111(d) containing guidelines for the States' establishment of performance standards for *existing* sources in six source categories, five of which remain in place. *Id.* sbpts. Cc, Cd; 42 Fed. Reg. 12,022 (Mar. 1, 1977); 42 Fed. Reg. 55,796 (Oct. 18, 1977); 44 Fed. Reg. 29,828 (May 22, 1979). Each time EPA has promulgated new source performance standards or guidelines for existing source performance standards, the new source rule or existing source guideline has been based on a "system of emission reduction" (emissions control technology or lower-polluting production processes) that could be incorporated into the design or operation *of the individual sources in the regulated industrial category*.[1]

[1] *See, e.g.*, 41 Fed. Reg. 19,585, 19,585 (May 12, 1976) (§ 111(d) emission guideline based on "spray cross-flow packed scrubbers as the best adequately demonstrated technology"); 41 Fed. Reg. 48,706, 48,706 (Nov. 4, 1976) (§ 111(d) emission guideline based on "fiber mist eliminators"); 44 Fed. Reg. 29,828, 29,829 (May 22, 1979) (§ 111(d) emission guideline based on digester systems, multiple-effect evaporator systems, and straight kraft recovery furnace systems); 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980) (§ 111(d) emission guideline based on "effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by wet

By contrast, the "system" for reducing emissions on which this Rule is based largely involves measures that *cannot* be implemented at the existing source. Rather, EPA treats competing companies and generation as control devices and mandates new renewable generation units. 80 Fed. Reg. at 64,728. EPA's national performance standards for individual EGUs and binding emission goals for States require the replacement of coal-fired generation with natural gas-fired and renewable energy generation, *id.* at 64,671 (Section 111 "authorize[s] the EPA to consider measures that could be carried out by parties other than the affected sources," including the measures addressed in EPA's BSER determination.), and assume an unprecedented reduction in demand for electricity. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, at 3-14, Tbl. 3-2 (Aug. 2015) ("RIA"), Docket ID No. EPA-HQ-OAR-2013-0602-37105. Creating the "system" imagined by EPA will extend far beyond the "sources" to which § 111(d) applies and will require fundamental and far-reaching changes in many existing state laws. *See* States' Stay Mot. at 15-19; Okla. Stay Mot. at 9-12.

Finally, all of these changes in state laws and regulations must begin immediately and many have already been started. States are required, within less than 11 months of the Rule's publication, to develop and submit for EPA approval a final

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scrubbers"); 61 Fed. Reg. 9905, 9914 (Mar. 12, 1996) (§ 111(b) and § 111(d) standards based on "[p]roperly operated gas collection and control systems achieving 98 percent emission reduction").

plan for restructuring the State's electric system in line with EPA's mandates, 40 C.F.R. § 60.5760(a), or an initial submittal describing their progress in changing state laws and regulations and requesting more time to complete the process, *id.* §§ 60.5760(b), 60.5765(a), (c). The extension request criteria EPA imposes are not a simple "push the button" approach. They require each State to have started identifying and developing how its electricity industry will be restructured, and presenting a draft initial plan to the public in sufficient detail to allow meaningful public feedback. If approved, state plans restructuring their electric systems become federally enforceable by EPA and through citizen suits, and are subject to revision only with the approval of EPA. 42 U.S.C. §§ 7411(d)(2)(B), 7604(a)(1)(A); 40 C.F.R. § 60.28(c). As described in the States' motions, States have already begun this labor- and resource-intensive process of developing plans. States' Stay Mot. at 18-19.

II. Issues Presented by These Cases

Fundamental Issues of Legal Authority – All of the Petitioners raise fundamental issues regarding EPA's authority under the CAA to issue the Rule at all or to issue *this* Rule. As described below, these issues include EPA's authority to regulate EGUs under Section 111(d) when this source category is already regulated under Section 112, and to use Section 111(d) to fundamentally restructure the way in which electricity is generated and distributed. Petitioners include electric utilities that have EGUs subject to the performance standards established by the Rule; coal companies, their associations, transporters of coal, and suppliers to the coal industry

that are all directly affected by the Rule due to sharply lower demand for their product; labor unions whose members face loss of employment as a result of the Rule; the general business community that will be harmed by higher prices for electricity, and the decreased demand for goods and services that the Rule will cause; and States that are required to restructure their energy sectors in response to the Rule.

Programmatic Issues – Beyond fundamental issues of legal authority and validity, and assuming EPA has authority to issue a rule like this, Petitioners raise record-based and fact-bound issues regarding the Rule's treatment of specific sources and specific States. For example, EPA has established different emission rates for 47 of the 50 States (Vermont, which has no affected sources, is excluded, as are Alaska and Hawaii, which are not connected to the continental contiguous grid) based on new and mistaken assumptions by EPA regarding the operational characteristics of certain EGUs, the regional availability of natural gas and renewable generating capacity, the ability of individual States to implement measures that reduce electricity demand, constraints on available transmission and other infrastructure, and numerous other unit-specific, state-specific, and regional conditions that do not reflect the circumstances that exist in individual States or for individual EGUs.

Many of the programmatic issues are specific and diverse. For example, a sampling of State Petitioners' programmatic issues include:

1. Arkansas's objection to the Rule's treatment of existing nuclear energy sources, particularly EPA's refusal to provide clean energy credit for Entergy's Arkansas Nuclear One power plant;

2. Wyoming's challenge to EPA's failure to consider the impact of the Rule throughout the State on the greater sage grouse and other sensitive species;

3. South Dakota's objection that the Rule threatens reliability of electric supply in the State because the only coal-fired power plant and the only natural gas-fired power plant in the State lack common ownership, have different regional transmission operators, and do not share a common customer base;

4. Wisconsin's objection to how the Rule applied a 4.3% heat rate improvement to Wisconsin steam power plants and how the Rule treats biomass energy;

5. Florida's objections to EPA's failure to consider its unique peninsular geography and the fact that only two States border Florida, thus limiting Florida's power transfer opportunities;

6. Kansas's objection to the Rule's failure to provide a method to account meaningfully for over three billion dollars in stranded investments made by Kansas utilities to install criteria pollutant control equipment on power plants;

7. Texas's objection that the Rule will force the State to redesign the Electric Reliability Council of Texas ("ERCOT"), which is the only Independent System Operator in the continental United States that operates an electricity market that is

wholly contained within one State and is not synchronously interconnected with the rest of the country, and which has otherwise been a vibrant and extremely successful competitive wholesale and retail electricity market for Texas; and

8. Texas's objection that it is being punished as a first mover in the area of wind energy because, under the Rule, none of the renewable energy installed prior to January 6, 2013 (or capacity upgrades to existing renewable energy completed prior to that date) can be used by generators or the State to demonstrate compliance with the Rule.

As can be seen from even this short, illustrative list, briefing of all significant programmatic issues for each of the 47 States would require multiple, lengthy briefs to address issues that may be mooted based upon the Court's resolution of the core legal issues.

III. Factors Supporting Bifurcation and Severance of Issues for Briefing

As the foregoing discussion establishes, several factors support bifurcation and severance of issues for briefing. First, as explained in the motions for stay, there is an immediate need to resolve whether EPA has authority to adopt the Rule at all. The core issues of legal authority could by themselves result in vacatur of the Rule, were raised in response to the proposed rule, and were the subject of comment.

Second, there are numerous challenges to programmatic aspects of the Rule that could affect the magnitude of the burden imposed on certain States and sources, the implementation schedule and process, and compliance requirements.

Finally, aspects of the Rule that differ markedly from the proposed rule will be addressed in reconsideration petitions filed with EPA. These programmatic issues may not be ripe for review until the reconsideration petitions are decided by EPA.

In these circumstances, Petitioners respectfully request that the Court expedite briefing of the overarching and fundamental legal issues with the Rule to ensure oral argument by May 2016, and that it sever and create a separate docket for programmatic issues, to be briefed promptly (if needed) after the Court's decision on the fundamental legal issues.[2]

SUMMARY OF BRIEFING PROPOSAL

As described above, Petitioners propose a briefing format and schedule that allows for expedited briefing now of fundamental legal issues, with briefing and argument to be completed by May 2016. Depending on the Court's disposition of these issues, subsequent briefing of programmatic issues could then be scheduled.

I. Fundamental Core Issues To Be Briefed on an Expedited Basis

A. The fundamental legal issues that State Petitioners propose to address in their brief include the following:

[2] Because all of the arguments in Petitioners' stay motions relate to fundamental legal issues, any stay granted by the Court would extend only until those legal issues have been resolved.

1. Whether the Rule, which regulates existing power plants under CAA § 111(d), 42 U.S.C. § 7411(d), is unlawful because EPA has regulated the same power plants under CAA § 112, 42 U.S.C. § 7412;

2. Whether EPA has the authority to force States to transform their energy economies to favor only certain sources of electricity, under the guise of regulating power plants under CAA § 111(d), 42 U.S.C. § 7411(d); and

3. Whether EPA's threat that it will seize control over the States' energy economies if they do not submit state plans violates the States' rights under the Tenth Amendment and the Federal Power Act, 16 U.S.C. § 824(a).

B. The fundamental legal issues that Industry and Other Non-State Petitioners propose to address in their brief include the following:

1. Statutory Authority Issues – Whether the Rule violates Section 111 by:

a. Establishing "standards of performance for any existing source" in the fossil fuel-fired EGU category that are not achievable in practice by any existing EGU through either technological or operational processes that continuously limit the rate at which CO_2 is emitted by that source;

b. Establishing "standards of performance for any existing" fossil fuel-fired EGUs that require the curtailment or closure of affected facilities and replacement of their generation by EPA-preferred sources such as wind, solar, geothermal, and hydroelectric power, rather than relying on feasible improvements in emissions performance of existing fossil fuel-fired EGUs;

c. Defining the "best system of emission reduction" for existing fossil fuel-fired EGUs to include measures that cannot be implemented at the sources themselves or that impermissibly require construction of new sources;

d. Subjecting existing fossil fuel-fired EGUs to performance rates under Section 111(d) that are more stringent than the concurrently-finalized performance standards under Section 111(b) for new sources in the same category; and

e. Depriving States of their authority under Section 111(d)(1), "in applying a standard of performance to any particular source ... to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."

2. Agency Overreach and Constitutional Avoidance Issues – Whether the Rule:

a. Impermissibly violates the Tenth Amendment by intruding on powers reserved to the States, such as the power to establish intrastate energy policies, and must be held unlawful because any interpretation of the CAA that allows the Rule would violate constitutional principles including federalism and separation of powers; and

b. Impermissibly intrudes on the exclusive authority of the Federal Energy Regulatory Commission to regulate the interstate electricity market.

C. The fundamental legal issues that Petitioner-Intervenors propose to address in their brief include the following:

1. Whether the Rule raises separation of powers, principles of federalism, and Fifth Amendment issues, all of which the CAA should be interpreted to avoid; and

2. Whether the Rule violates the requirements of 42 U.S.C. § 7607(d).

II. Proposed Briefing Format and Expedited Briefing Schedule

In briefing the issues set forth above, Petitioners propose the following potential schedule that would ensure oral argument by May 2016. Petitioners propose that the opening briefs of Petitioners be divided into two briefing groups with standard word limits (14,000 words) applying to each. Specifically, (i) State Petitioners would file one joint opening brief that addresses overarching issues relevant broadly to those petitioners, and (ii) Industry and Other Non-State Petitioners would file one joint opening brief that addresses overarching issues relevant broadly to those petitioners. These briefs would not exceed a combined total of 28,000 words, and Petitioners will coordinate to eliminate duplication between briefs. Opening briefs would be due 38 days after the end of the 60-day statutory period for filing a petition for review, on January 29, 2016.

EPA would be entitled to file a brief of up to 28,000 words (the combined length of the opening briefs). EPA's brief would be due 40 days after the due date for

opening briefs, on March 9, 2016. Petitioners would file reply briefs of no more than 14,000 words total, due 21 days after the due date for EPA's brief, on March 30, 2016.

Intervenors in support of Petitioners and Respondents would each be allowed to file a joint intervenors' brief with a total limit for each such brief of 8,750 words. The Petitioner-Intervenor brief would be due 7 days after the due date for Petitioners' briefs, and the Respondent-Intervenor brief would be due 7 days after the due date for Respondents' brief. Oral argument would take place in May 2016.

The following table summarizes the proposed briefing format and schedule, which is offered only as an example of one possible schedule that would allow for oral argument by May 2016:

Document	Due Date	Word Limits
Petitioners' Opening Briefs on Fundamental Legal Issues	38 days from the end of the 60-day statutory review period, or January 29, 2016	Up to 2 briefs; 28,000 words combined
Joint Brief of Petitioner-Intervenors	7 days after Petitioners' opening briefs are due, or February 5, 2016	8,750 words
EPA's Response Brief	40 days after Petitioners' opening briefs are due, or March 9, 2016	28,000 words
Joint Brief of Respondent-Intervenors	7 days after EPA's brief is due, or March 16, 2016	8,750 words
Petitioners' Reply Briefs	21 days after EPA's brief is due, or March 30, 2016	Up to 2 briefs; 14,000 words combined
Petitioner-Intervenors' Reply Brief	7 days after Petitioners' reply briefs are due, or April 6, 2016	4,375 words

Document	Due Date	Word Limits
Deferred Joint Appendix	2 days after Petitioner-Intervenors' reply brief is due, or April 8, 2016	N/A
Final Briefs	4 days after Deferred Joint Appendix is due, or April 12, 2016	N/A
Oral Argument	May 2016	N/A
Briefs on Programmatic Issues (if necessary)	After the Court's decision on Core Issues	To be determined

The approach laid out above is consistent with briefing formats in similar cases, where this Court has bifurcated briefing when fundamental legal issues were ripe and reconsideration petitions of other issues were pending before EPA. *See*, *e.g.*, Order, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100 (D.C. Cir., June 28, 2012), ECF No. 1381112; Order, *Natural Res. Def. Council v. EPA*, No. 06-1045 (D.C. Cir. June 19, 2006), ECF No. 975173. As noted, Movants' core request is to ensure that oral argument occurs by May 2016, and the schedule proposed here is merely an example of any one of several variations that could achieve that goal.

III. Potential Briefing on Programmatic Issues

Given that, as discussed above, briefing programmatic issues should be delayed until the Court issues its decision on the fundamental legal issues, Petitioners request that the Court sever from these cases all issues except the fundamental legal issues. The Court should establish a separate docket for briefing those issues, if necessary, after final resolution of the fundamental legal issues. If the Court resolves these issues

in a way that does not result in the Rule being set aside, Petitioners respectfully request the Court direct the parties to submit a proposal to govern further briefing on all remaining issues within 30 days of the Court's decision on the merits.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court adopt the briefing format and schedule proposed herein, or a similar schedule that will ensure oral argument by May 2016. If the Court resolves the core legal issues in a way that does not result in the Rule being set aside and there is a need for a second round of briefing, the Court should order the parties to submit a proposal to govern further briefing on the remaining issues within 30 days of the Court's decision on the merits of the core legal issues.

Dated: December 8, 2015

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Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 8th day of December, 2015, I caused the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system. The following non-CM/ECF counsel will be served by U.S. mail:

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