ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Lung Association, *et al.*, *Petitioners*, v. U.S. Environmental Protection Agency, *et al.*, *Respondents*.	No. 19-1140 (and consolidated cases)

STATE, PUBLIC HEALTH AND ENVIRONMENTAL, POWER COMPANY, CLEAN ENERGY TRADE ASSOCIATION PETITIONERS' AND BIOGENIC PETITIONERS' PROPOSED BRIEFING FORMAT AND SCHEDULE

Petitioners States and Municipalities (Nos. 19-1165, 19-1177), Public Health and Environmental Organizations (Nos. 19-1140, 19-1166, 19-1173), Clean Energy Trade Associations (Nos. 19-1186, 19-1187), Power Companies (No. 19-1188), and Petitioner-Intervenor State of Nevada (No. 19-1189) ("Coordinating Petitioners") and Petitioner Biogenic CO_2 Coalition (No. 19-1185) ("Biogenic Petitioner") submit this briefing format proposal pursuant to the Court's November 22, 2019 Order (ECF 1817249).[1] Coordinating Petitioners discuss their proposed

[1] The States and Municipalities and Public Health and Environmental Organizations are also Respondent-Intervenors in some challenges brought by other Petitioners.

briefing format in Sections A-B below, while Biogenic Petitioner's proposed format is set forth in Section C. Although Coordinating Petitioners are not aligned with Biogenic Petitioner (in fact Public Health and Environmental Organizations have intervened to oppose Biogenic Petitioner's challenges), these groups have agreed on a common briefing format, which is set forth in the table in Section B.

A. Background

These consolidated petitions seek review of three "separate and distinct rulemakings" of the Environmental Protection Agency ("EPA" or "Agency"): "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 Fed. Reg. 32,520 (July 8, 2019) ("Rules"). The first two of these rules (repeal and replacement of the Clean Power Plan) concern fossil fuel-fired power plants, the nation's largest stationary source of carbon dioxide pollution that EPA has found is endangering public health and welfare. They interpret and apply Section 111 of the Clean Air Act, a provision that "speaks directly" to such power plant emissions. *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). Section 111(d) and its implementing regulations require EPA to issue emission guidelines reflecting the degree of emission limitation achievable by existing power plants through application of the best system of emission reduction the Administrator determines is adequately

demonstrated, considering costs, energy requirements, and other enumerated factors. States then promulgate plans for existing sources establishing standards of performance consistent with the federal emission guidelines. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.22(b)(5).

In the first action, EPA repealed the Clean Power Plan, the first nationwide regulation limiting carbon dioxide emissions from existing coal- and gas-fired power plants, at issue in *West Virginia v. EPA* (No. 15-1363). 84 Fed. Reg. at 32,522-32. Rejecting the principal legal and factual premises of the Clean Power Plan, EPA announced a new position that the Agency's prior interpretation of "best system of emission reduction" is unambiguously prohibited by the statute and that standards under Section 111 must be "based on the application of equipment and practices at the level of an individual facility" – a limitation that EPA asserts the Clean Power Plan did not observe. *Id*. at 32,523.

Second, EPA adopted a replacement regulation, the "Affordable Clean Energy Rule" (ACE), limited to certain coal-fired power plants, and premised on its new interpretation of "best system of emission reduction." 84 Fed. Reg. at 32,532-64. EPA rejected various systems of emission reduction applicable at the level of individual facilities, however, and based ACE on only minor technological changes to improve coal-fired plants' operational efficiency. EPA's own Regulatory Impact Analysis indicates that ACE will achieve only a fraction of one

percent reduction in carbon dioxide emissions by its full implementation in 2030[2] and will likely *increase* emissions (compared to no regulation at all) in fifteen states plus the District of Columbia.[3] EPA also categorically rejected the use of emissions averaging and trading as a means of enabling more cost-effective achievement of significant degrees of emission reduction under Section 111.

In the third action, EPA revised provisions of the longstanding framework regulations governing the procedure under Section 111(d) for regulating all types of stationary sources. 84 Fed. Reg. at 32,564-71. Among other things, these changes significantly lengthened the deadlines for states to submit, and for EPA to act upon, plans to achieve emission reductions under Section 111(d). These extended deadlines will apply to implementation of ACE, as well as future rulemakings for all sources regulated under Section 111(d).

B. Proposed Briefing Schedule

The table below sets forth our proposed briefing format. Following the table is a discussion explaining the rationale for each aspect:

[2] EPA-HQ-OAR-2017-0355-21182, at ES-6, tbl. ES-4 (2019) ("RIA").

[3] Kathy Fallon Lambert, *et al*., "Carbon Standards Re-Examined: An Analysis of Potential Emission Outcomes for the Affordable Clean Energy Rule and Clean Power Plan," (July 17, 2019), EPA-HQ-OAR-2017-0355-26746 (analyzing data underlying RIA).

Brief	**Word Allocation**	**Deadline**
Opening Briefs for State/Municipal; Health/Environmental; Power Companies; and Clean Energy Ass'n Petitioners (4 briefs)	58,500 total Estimated allocations: State/Muni. – 19,500 Health/Envt'l – 19,500 Power Cos. – 11,500 Clean Energy Ass'ns – 8,000	60 days from Court Order establishing briefing format
Opening Brief for Biogenic Petitioner	7,800	
Opening Brief(s) for Coal/Robinson Petitioners (up to 2 briefs)	13,000	
Briefs for Amici for Petitioners	6,500 each	7 days from Petitioners
Brief for Respondents	79,300	60 days from Petitioners
Briefs for Amici for Respondents	6,500 each	7 days from Respondents
Briefs for Respondent-Intervenors (5-6 briefs)	State/Muni. & Health/Envt'l Intervenors opposing Coal/Robinson Pet'rs– 9,100 (2 briefs) Health/Envt'l Intervenors opposing Biogenic Pet'r – 5,460 State Intervenors, Industry Intervenors & N. Dakota opposing Coordinating Pet'rs – 21,700 (up to 3 briefs)	30 days from Respondents
Petitioner Reply Briefs	State/Muni. – 9,750 Health/Envt'l – 9,750 Power Cos. – 5,750 Clean Energy – 4,000 Biogenic – 3,900 Coal/Robinson – 6,500	14 days from Respondent-Intervenors
Joint Appendix		14 days from Reply Briefs
Final Briefs		7 days from JA Filing

1. Number of Briefs

The four groups of Coordinating Petitioners—State/Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association—request permission to file separate briefs. As explained below, although our four groups are coordinating, we have different perspectives and interests in litigating this matter, plan to press different arguments on important issues, and have historically been granted leave to file separate briefs in similar cases:

- **State and Municipal Petitioners and Petitioner-Intervenor Nevada** ("State Petitioners") include 23 states, the District of Columbia, and 7 cities. Governmental entities have a compelling interest in addressing the deleterious effects of climate change on their residents. State Petitioners have been pursuing legislative, regulatory, and judicial avenues to address greenhouse gas emissions from the nation's power plants for years. Indeed, some State Petitioners first sought to compel EPA to regulate power plants' greenhouse gas emissions 13 years ago. *See New York v. EPA*, No. 06-1322 (D.C. Cir.). Since effective control of carbon dioxide emissions from U.S. power plants requires adherence to Clean Air Act requirements by EPA and by *all* states, State Petitioners have a strong interest and a unique perspective

in ensuring that EPA's regulations are consistent with the statute, reflective of the record evidence, reasonable, timely and effective.

- **Public Health and Environmental Petitioners** are 13 nonprofit organizations dedicated to protecting public health and the environment from increasingly dangerous climate change driven by greenhouse gas emissions. Collectively they have millions of members throughout the country affected by the Rules. They have broad expertise in the legal, administrative, technical, environmental, and public health aspects of power plant air pollution control. These organizations participated extensively in nearly 20 years of administrative and judicial proceedings that preceded the Rules, submitting hundreds of pages of legal and technical comments at every stage, backed by thousands of pages of documentary exhibits.
- **Power Company Petitioners** include Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Public Service Enterprise Group, Inc., Sacramento Municipal Utility District, and Power Companies Climate Coalition, whose members include, in addition to these companies and their regulated subsidiaries, Los Angeles Department of Water and Power, Pacific Gas and Electric Company and Seattle City Light. With operations in 49 states and the District of Columbia, the Power Company Petitioners collectively serve approximately 26 million customer

accounts, amounting to a total service population of more than 60 million. They own or operate over 84,000 megawatts of generating capacity from an increasingly diverse set of resources, including coal, oil, natural gas, nuclear, hydropower, wind and solar units, and are committed to increasing their reliance upon renewable and other zero-emitting resources to reduce greenhouse gas emissions, meet customer demand, and improve the reliability and resiliency of the electric grid. As representatives of the industry directly regulated and impacted by the challenged actions, they have a perspective distinct from any of the other Petitioners and can explain with authority how the challenged actions ignore the primary means by which they and others within the electric sector continue to reduce emissions while maintaining reliability and affordability.

- **Clean Energy Trade Association Petitioners** include American Wind Energy Association (AWEA), Advanced Energy Economy (AEE), and the Solar Energy Industries Association (SEIA), comprising the nation's largest organizations representing clean energy technologies, with more than 3,000 members and companies. The organizations have a common interest in reducing carbon emissions from high-polluting fossil fuel-fired power plants through the use of low- and zero-greenhouse gas emitting energy generation technologies. This interest is directly affected by EPA's statutory

interpretation and conclusion in the Rules that the Agency may not take account of the use of clean generation technologies to reduce power plants' greenhouse gas emissions, a practice already widely used by states and the power sector. In addition, the Clean Energy Trade Associations have special expertise to address the legal and technical issues related to the feasibility and cost-effectiveness of using clean energy technologies to reduce emissions in the energy industry.

This Court permitted these same four coalitions to file separate briefs as Respondent-Intervenors supporting the Clean Power Plan in the *West Virginia* litigation. It is standard practice for the Court to allow governmental petitioners to file a separate brief due to their sovereign and quasi-sovereign interests. *See, e.g.*, D.C. Cir. R. 28(d)(4). Likewise, it is standard practice for this Court to permit separate briefs from environmental and industry parties. *See, e.g.,* Order, at 2, *West Virginia v. EPA*, ECF 1595922 (Jan. 28, 2016).

With respect to other Petitioners with other, adverse interests – 1) two coal mining companies (Westmoreland Mining Holdings (No. 19-1176, and North American Coal Corp. (No. 19-1179)) and 2) a group of business and advocacy interests (Robinson Enterprises, *et al*. (No. 19-1175)) – we propose that they be allowed to file no more than two briefs. And we support a separate brief for Biogenic Petitioner, whose statement is below.

The coal companies and the Robinson Petitioners contend that EPA exceeded its authority under Section 111 of the Act in establishing *any* limits on carbon dioxide emissions from existing power plants. Biogenic Petitioner intends to assert that in ACE, EPA needed to recognize biogenic emissions as low-carbon, not regulated, or otherwise exempt those emissions from regulation.

There is no overlap between these issues and those that Coordinating Petitioners intend to raise. On the contrary, State Petitioners and the Public Health and Environmental Petitioners have intervened in Case Nos. 19-1175, 19-1176, and 19-1179 in opposition to the coal companies and the Robinson Petitioners, and Public Health and Environmental Petitioners have intervened in case 19-1185 in opposition to Biogenic Petitioner. EPA's proposal to assign our four coalitions and the adversely-positioned Biogenic Petitioner a total of only 26,000 words (EPA Proposal, at 4-5, ECF 1820685 (Dec. 18, 2019)), is entirely unreasonable. Words allotted to Biogenic Petitioner challenging ACE as improperly regulating biogenic emissions should not be counted against petitioners who are challenging the Rules as unlawfully under-protective.

Consistent with D.C. Circuit Rule 28(d)(4), the State Respondent-Intervenors and the Public Health and Environmental Respondent-Intervenors each propose to file briefs in opposition to these adverse petitioners. The format

proposed here also provides for Respondent-Intervenor briefs by other state and industry interests that have intervened in support of the Rules.

Finally, undersigned Petitioners anticipate that there will be multiple *amici* participating in the litigation, as was the case in *West Virginia*.

2. Schedule for Briefing

Coordinating Petitioners suggest a briefing schedule appropriate for a case of this complexity, and one that the Court has determined does not meet the standards for expedition. In contrast, EPA has proposed an extremely compressed schedule – one even shorter than the truncated schedule the Court rejected in EPA's previous motion to expedite because Respondents failed to "articulate[] 'strongly compelling' reasons that would justify expedition of this case. D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018)." *See* Order, ECF 1817249 (Nov. 22, 2019).[4]

EPA's proposed schedule is essentially a rerun of that motion, which was likewise predicated upon the asserted need for a Spring 2020 oral argument. EPA has again failed to demonstrate that this is the "very rare" case in which expedition is warranted. Handbook at 33. EPA makes no effort to demonstrate that the panel

[4] EPA recently castigated private parties for proposing a briefing schedule that was effectively a motion to expedite advanced without the required showing. EPA Resp. to Lift Abeyance and Set Br. Schedule, at 3-4, *Trailer Truck Mfrs. Ass'n, Inc. v. EPA*, No. 16-1430, ECF 1820078 (Dec. 13, 2019).

that denied its motion misapprehended any relevant law or facts. The undeniable importance and complexity of the issues in the case calls for an orderly and normal schedule, not a rushed one. And the fact that EPA is simultaneously proposing an extremely restrictive word allocation for the principal challengers to its Rules (amounting to *less than half* the 52,000 words allocated to the Petitioners and Petitioner-Intervenors who challenged the Clean Power Plan, Order, ECF 1595922 (Jan. 28, 2016)), makes its proposed schedule especially unfair and unrealistic.

We propose a schedule that would allow for efficient and complete briefing considering the complexity of the Rules and the numerous issues raised, as well as the number and diversity of the parties. Our coalitions must coordinate within and among their own groupings to ensure effective and non-duplicative briefing. Moreover, each entity, particularly State Petitioners, has an internal approval process that can take significant time. For instance, State Petitioners have multiple levels of review for merits briefs, including review by the environmental bureau or division, solicitor general, and executive.[5] And given the centrality of the Rules for

[5] In recent cases considerably less complex than this one, EPA has asserted the need to have 60 or more days' time for its own coordination needs. For instance, in *Trailer Truck Manuf. Ass'n, Inc. v. EPA*, EPA noted that a 60-day interval between briefs is standard for "typical" petitions for review but that the *Trailer Truck* case was not typical because it required coordination between two federal agencies. EPA Resp. to Lift Abeyance and Set Br. Schedule, at 3-4, No. 16-1430, ECF 1820078 (Dec. 13, 2019). And in *New York v. EPA*, in opposing a request for expedited briefing predicated on the need for timely relief from public

state clean air and climate policies – and the Rules' sharp departures from the Clean Power Plan and preexisting framework regulations – it is important to allow sufficient time for state attorneys general to seek input from their state air permitting agencies as well.

In contrast to the fixed dates suggested by EPA, our proposed schedule is keyed to the date the Court issues a briefing Order. Especially since the competing briefing proposals are being submitted during the holidays, it could take the Court some time to resolve the differences between them. Petitioners can only go so far in preparing briefs without knowing the briefing format – especially here, where EPA and its supporters are proposing a format that would allocate to our four distinct coalitions of challengers less than half of the words we believe necessary to present our cases (and less than half the allocation the Court allowed for the challengers to the Clean Power Plan).

Taking all these considerations into account, we propose 60 days from the Court Order for opening briefs, with Respondents' briefs due 60 days thereafter – the time period the Justice Department usually insists upon (at a minimum) for

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health harms from interstate air pollution, EPA counter-proposed a six-month schedule that would, among other things, grant it 80 days between the filing of Petitioner's and Respondent's briefs, which the Agency asserted would "allow[] a reasonable time for the parties, including the five prospective intervenors, to submit briefs on the complex issues in this case." EPA's Resp. in Opp. to Pet'rs Mot. for Expedited Consideration, Abbreviated Br. and Oral Arg. by May 2020, at 16-17, No. 19-1231, ECF 1819197 (Dec. 6, 2019).

itself. Because the Justice Department does not share draft briefs with aligned intervenors, and to avoid unnecessary duplication, we propose that Intervenor briefs be due 30 days after EPA's brief is filed. This proposed schedule is more expeditious than those set in other complex Clean Air Act cases. *See*, *e.g.*, Order, 1-2, *Wisconsin, et al. v. EPA*, ECF 1691655 (Sept. 17, 2017); Order, at 2-3, *White Stallion Energy Center, LLC v. EPA*, ECF 1391295 (Aug. 24, 2012); Order, at 2, *Coal. for Responsible Regulation, et al. v. EPA*, ECF 1299368 (Mar. 22, 2011).

By contrast, the briefing schedule proposed by EPA would unreasonably curtail Coordinating Petitioners' ability to coordinate within their own groups (especially given the coordination needs of State Petitioners discussed above) and with each other to ensure efficient briefing. EPA's schedule is also unreasonable when viewed in comparison to other cases in which the Court *granted* motions to expedite. For example, in *West Virginia*, where the Court ordered expedited briefing, the period of time from the Court's Order to the filing of final briefs was 89 days. *See* Order, at 2, ECF 1595922 (Jan. 28, 2016). In an Order issued Friday in *New York v. EPA* (No. 19-1231) granting Petitioners' motion to expedite, the period provided from issuance of the Order to filing of final briefs is 97 days. *See* Order, at 1, ECF 1821221 (Dec. 20, 2019). And in *Air Alliance Houston v. EPA*, a case involving fewer parties and less complexity, the period spanned 128 days. *See* Order, at 1-2, No. 17-1155, ECF 1694791 (Sept. 26, 2017). Under

EPA's proposal, if the Court were to issue a briefing format Order by January 8, for example, the total briefing period for this ostensibly *non-expedited* case would be only 86 days.[6]

In addition, the extraordinarily compressed schedule proposed by EPA – 63 days from the filing of opening briefs to the deadline for final briefs – is also unreasonably truncated compared to EPA's motion to expedite, in which the Agency sought 91 days between filing of opening and final briefs. The Agency has provided no explanation how the case can be reasonably briefed in four weeks *fewer* than under its previously-proposed schedule, which the Court denied.

3. Proposed Word Allocation

Mindful of our obligation to avoid repetitive briefing, Coordinating Petitioners seek a combined allocation for opening briefs of 58,500 words. That amounts to one-and-a-half normal-sized briefs each for the State Petitioners and the Public Health and Environmental Petitioners, and a word allocation for each of the opening briefs of the Power Company Petitioners and Clean Energy Trade Association Petitioners that is below the normal limit. This is reasonable considering the number of major rules combined for review, the voluminous

[6] EPA's assertion that Coordinating Petitioners have had several months to work on their briefs prior to this filing, EPA Proposal, at 6, also overlooks that between September 20 and November 22, 2019, this Court was contemplating motions from many Petitioners seeking to hold the petitions for review in abeyance pending EPA action in various closely related administrative proceedings.

record, and the number of contested issues. In the challenge to the Clean Power Plan, Petitioners and aligned Petitioner-Intervenors received 52,000 words. Order, at 2, ECF 1595922 (Jan. 28, 2016).[7] Here, the Rules repeal the Clean Power Plan, raising legal issues addressed (but never decided) in *West Virginia*; replace it with an entirely new rule; and promulgate revisions to the implementing regulations for Section 111(d). Coordinating Petitioners, therefore, respectfully submit that an overall word allocation significantly more than allowed in *West Virginia* could be justified. However, we believe that with careful coordination, 58,500 words divided between four briefs will be sufficient to fully present the issues.

EPA argues that this three-part Rule raises issues "that are likely to be far less complex than those raised in the Clean Power Plan litigation." EPA Proposal at 7. This record combines three rulemakings, each of which, standing alone, would be a substantial and consequential Agency action presenting significant legal issues. The certified index in this matter alone is 3,027 pages (ECF 1810646). The multiple proposed rules garnered millions of public comments (including thousands of pages from the groups on this submission). EPA's suggestions that

[7] EPA's characterization of the allocation to the *West Virginia* Petitioners, EPA Proposal, at 1, ignores the 10,000 words that were allocated to industry Petitioner-Intervenors, who closely aligned with Petitioners and were granted 10,000 words for their opening brief. Order, at 2, ECF 1595922 (Jan. 28, 2016). Thus, the Clean Power Plan challengers in fact had 52,000 words for opening briefs, not 42,000 as EPA asserts.

the number of Federal Register pages in the respective preambles should dictate the number of words allocated to Petitioners, *id*. at 9, has no merit. Coordinating Petitioners challenge EPA's *failure* to meet its mandate and explain itself. The massive record underlying the original Clean Power Plan is also at issue in this litigation.[8]

The Rules give rise to numerous significant issues that Coordinating Petitioners must raise at the risk of forfeiting them pursuant to Section 307(b) of the Act, 42 U.S.C. § 7607(b). *See* Statements of Issues of State Petitioners, (ECF 1809777) (raising 20 issues); Public Health and Environmental Petitioners (ECF 1809587) (raising 21 issues); Clean Energy Trade Association Petitioners (ECF 1809817) (raising 7 issues), (ECF 1809838) (raising 6 issues); and Power Company Petitioners (ECF 1809809) (raising 4 issues). The Court should not accept EPA's assertions that the Coordinating Petitioners' have only limited grounds for objecting to these Rules.

Although the requested 19,500 words for briefs of State Petitioners and Public Health and Environmental Petitioners exceed the default allocation of 13,000 words, it is reasonable here in light of the circumstances discussed above and is consistent with the Court's practice in similarly complex multi-party

[8] *See FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.").

litigation. *Coalition for Responsible Regulation* also involved three separate but related rulemakings and briefs for Petitioners and Petitioner-Intervenors totaled 72,000 words. *See* Orders, *Coal. for Responsible Regulation v. EPA*, ECF Nos. 1299368, 1299440, 1299257 (Mar. 22, 2011). And in a case addressing two orders issued by the Federal Energy Regulatory Commission, this Court granted Petitioners and supporting Petitioner-Intervenors 127,500 words for opening briefs. *See* Order, *Transmission Access Policy Study Grp. v. FERC*, 1998 WL 633827 (Aug. 13, 1998).

Pursuant to the Court's Order, Coordinating Petitioners provide the following additional information on the issues they intend to brief and why a word allocation in excess of the standard allotment is justified to adequately frame their arguments. Each of the four groups of Coordinating Petitioners intend to brief aspects of EPA's core legal errors that underlie the repeal of the Clean Power Plan and the promulgation of ACE: EPA's claim that the Clean Air Act unambiguously limits a Section 111(d) standard of performance to equipment and measures that can be applied to an individual source, and EPA's failure to consider means of reducing emissions that reflect the way individual power plants actually operate to deliver electricity to customers.

Below, we provide further information on additional areas our respective briefs would address. Coordinating Petitioners propose that the Court allow us the flexibility to share words under the overall cap of 58,500 words.

State Petitioners (approximately 19,500 words). State Petitioners expect to brief the following additional issues: (a) EPA's failures to consider important aspects of the regulatory problem and reasonably explain its change in position; (b) EPA's exclusion of available systems of emission reduction from its determination of the "best" system; (c) EPA's decision that heat rate improvements alone constitute the best system; (d) EPA's failure to quantify the degree of emission limitation state plans must require power plants to achieve; (e) EPA's decision to repeal emission limitations for gas-fired power plants without replacing them; (f) EPA's prohibition of proven systems of emission reduction as compliance measures; and (g) EPA's failure to explain its omission of early action provisions to address pollution in environmental justice communities.

Public Health and Environmental Petitioners (approximately 19,500 words). In addition to the core legal issues regarding the Clean Power Plan repeal and fundamental basis for ACE listed above, Public Health and Environmental Petitioners intend to argue (a) that ACE fails to establish a legally adequate "best system" and fails to identify a mandatory emission

limitation requirement reflective of that system; (b) that EPA's categorical exclusion of averaging and trading in designating a best system of emission reduction under Section 111 is illegal; (c) that ACE unlawfully fails to establish guidelines for existing oil- or gas-fired power plants; and (d) that the revisions to the implementing regulations are unlawful because EPA failed to provide a reasonable basis for extending the timelines for state plans submission and approval.

Power Company Petitioners (approximately 11,500 words). The Power Company Petitioners are seeking less than the standard allocation for their brief and are willing to share a total number of words with Clean Energy Trade Association Petitioners, split between two separate briefs, amounting to the equivalent of only one and one-half standard briefs (19,500 words). As some of the nation's largest investor-owned and public utilities serving a combined service population of over 60 million, the Power Company Petitioners are distinct from the Clean Energy Trade Associations, described below. The two groups each seek to bring their distinct perspective to bear and can only do that by submitting separate briefs, as they were permitted by this Court in *West Virginia*. In particular, the Power Company Petitioners seek to focus on how the Rules ignore the primary means by which they and

others within the power sector have reduced carbon emissions while improving the reliability and resilience of the electricity grid.

Clean Energy Trade Association Petitioners (8,000 words). The Clean Energy Trade Association Petitioners have a unique interest in advancing the development and deployment of clean energy technologies, consistent with Section 111's technology-forcing mandate. Thus, in addition to addressing the core issues above, especially as they affect their interests, the Clean Energy Trade Association Petitioners intend to focus on EPA's failure to consider the Clean Power Plan's well-developed record on the potential for lower-emitting, clean energy generation to replace higher-emitting generation.

The word allocations for the Coal/Robinson Petitioners are based upon their own separate request; the allocation for the Biogenic Petitioner is explained below.

The total for all Petitioners – 79,300 words – is reasonable in light of the very different interests of the Coordinating Petitioners, the Coal and Biogenic Petitioners (unlike the Petitioners in *West Virginia,* who were all aligned). Here, with parties attacking the Rules from both sides and several angles, an enlargement of words is necessary.

The remaining word allocations for Respondents' and Respondent-Intervenors' briefs reflect the normal proportions in the rules, except that the word

allocation for the Respondent-Intervenors supporting the repeal and ACE are capped at 21,700 words – a limit reflecting the same ratio to the Petitioners and Petitioner-Intervenor's allocation as the word limit the Court imposed for Respondent-Intervenors supporting the Clean Power Plan in *West Virginia*. Order, at 2, ECF 1595922 (Jan. 28, 2016).[9]

C. Separate Briefing Format Proposal of Biogenic CO_2 Coalition

The Biogenic CO_2 Coalition, Petitioner in No. 19-1185, intends to raise unique issues with respect to EPA's treatment of biogenic air emissions under ACE that are unrelated to any other petition in this consolidated proceeding, and which require distinct consideration of the relevant Clean Air Act legal provisions, discussion of prior Agency actions and applicable law specifically concerning biogenic emissions, and examination of portions of the administrative record that will not be implicated in other party briefs. For example, the Biogenic CO_2 Coalition intends to argue that EPA articulated in ACE a new policy with regard to regulation of biogenic emissions which is unsupported by the administrative record, inconsistent with scientific principles, contrary to EPA's definition of air pollution with respect to greenhouse gases, inconsistent with Supreme Court

[9] Coordinating Petitioners take no position on North Dakota's request to file an intervenor brief separate from State Intervenors West Virginia, *et al.* As reflected in the summary table above, if the Court grants North Dakota's request, the briefing of the one issue North Dakota identifies should be covered by the overall proposed limit of 21,700 words.

precedent, and which improperly establishes legal precedent that could adversely affect stationary sources of air emissions in other industrial categories. The Biogenic CO_2 Coalition also intends to argue that ACE illegally and unnecessarily forecloses and disqualifies the use of low-carbon fuels as a compliance measure to meet EPA and state emissions limitations established under ACE emissions guidelines and that EPA's position is inconsistent with the Consolidated Appropriations Act of 2018. None of these issues have been briefed previously in the Clean Power Plan litigation or elsewhere.

Normally these complex issues would warrant a separate brief of normal length. However, being mindful of the complexity of this proceeding and multiplicity of parties, the Biogenic CO_2 Coalition respectfully requests a separate brief for the "biogenic issues" (but on the same schedule as the Court deems appropriate for other parties) consisting of an opening brief of **7,800** words and reply brief of **3,900** words.[10]

The requested length for the separate biogenic brief is substantially less than standard briefs, shorter than the normal limits for intervenor briefs, and only

[10] Petitioner Biogenic CO_2 Coalition moved (ECF 1808208) to sever and hold in abeyance the biogenic issues in this proceeding while EPA considered the Biogenic CO_2 Coalition's separate petition for administrative reconsideration which remains pending before the Agency; however, EPA opposed severance (ECF 1808554) and this Court denied the motion on November 22, 2019 (ECF 1817249).

somewhat more than amicus briefs. No party has objected to separate briefing for the biogenic issue, and conversely, no party group has expressed a desire to include the biogenic issue within a group brief due to the distinct nature of the biogenic issues and possible conflicts or tensions with other issues and party positions. For the Court's convenience, the Biogenic CO_2 Coalition has cooperated with the Petitioners who joined in this submission in order to reduce the number of briefing format filings; but the Biogenic CO_2 Coalition is not aligned with any other petitioner group and will not join in any other issues raised in other party grouping brief. Indeed, although the Biogenic CO_2 Coalition is challenging Respondent EPA's action in promulgating ACE with respect to the biogenic issue, some of its members are industrial manufacturers and may be adversely affected by positions which the other petitioner groups intend to advance in this proceeding; accordingly, grouping the Biogenic CO_2 Coalition and biogenic issues with other petitioner groups would be awkward, probably unworkable, and possibly prejudicial.

Conclusion

For all the foregoing reasons, the undersigned parties respectfully request that the Court adopt the briefing format proposal set forth above.

Respectfully submitted,

Dated: December 23, 2019

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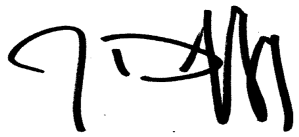
CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 23th day of December 2019, I caused the foregoing **State, Public Health and Environmental, Power Company, Clean Energy Trade Association Petitioners' and Biogenic Petitioners' Proposed Briefing Format and Schedule** 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.



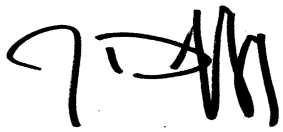
James P. Duffy

CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 27(d)(2), I hereby certify that **State, Public Health and Environmental, Power Company, Clean Energy Trade Association Petitioners' and Biogenic Petitioners' Proposed Briefing Format and Schedule** complies with the type-volume limitations. According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 5,165 words.

2. Pursuant to Fed. R. App. P. 32(a)(5)-(6), I hereby certify that **State, Public Health and Environmental, Power Company, Clean Energy Trade Association Petitioners' and Biogenic Petitioners' Proposed Briefing Format and Schedule** complies with the typeface requirements and the type-style requirements because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: December 23, 2019



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