ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2017

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

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| STATE OF NORTH DAKOTA, *et al.*,<br><br>*Petitioners*,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,<br><br>*Respondents*. | No. 15-1381 (and consolidated cases) |

**RESPONDENTS' OPPOSITION TO PETITIONERS' AND PETITIONER-INTERVENORS' MOTIONS TO EXTEND THE BRIEFING SCHEDULE**

A group of Petitioners and Petitioner-Intervenors (collectively, "Petitioners") have moved on December 16, 2016, to delay the filing of their reply briefs for a period of over five weeks (with concordant extensions of the dates for filing the deferred appendix and final briefs). Petitioners claim this relief is necessary to allow the new presidential administration to consider its position on this litigation. ECF Nos. 1651468 (Petitioners' and Petitioner-Intervenors' Corrected Motion), 1651463 (North Dakota's Motion) (collectively, "Extension Motions"). Respondents the United States Environmental Protection Agency and Gina McCarthy, Administrator (collectively "the United States"), do not agree that a delay of the date for filing Petitioners' reply briefs is appropriate and, therefore, oppose Petitioners' motion.

Under the D.C. Circuit's Handbook of Practice and Internal Procedures, "[o]nce a case has been calendared, the Court strongly disfavors motions to extend the briefing schedule." Handbook IX.A.1 at 37. Extension motions "will be granted only for *extraordinarily* compelling reasons." Id. (emphasis added); accord D.C. Cir. Rule 28(e)(1). Petitioners' invocation of the bare inconvenience of filing reply briefs in light of highly speculative assumptions about the possibility of the next presidential administration adopting some new litigation position by February 24 is not "extraordinarily compelling." Rather, it causes unwarranted delay for which there is no apposite precedent.

First, Petitioners' request is detrimental to the Court's preparation for oral argument. As the Court's Handbook explains, the date for oral argument is typically set "a minimum of 45 days after briefing is completed." Handbook X.D at 47. But under Petitioners' proposal, final briefs—including appropriate citations to the joint appendix—would be filed on March 10, 2017, 38 days before argument. By comparison, under the current schedule the Court would have nearly twice that period, 70 days, to review the briefs. While in other matters a narrower window between final briefs and oral argument might not prove detrimental to the Court's consideration, this matter concerns a number of highly technical, record-dependent questions regarding the engineering, operation, and economics of carbon capture and storage systems. In addition, the briefs are significantly longer than usual, with Petitioners' and Petitioner-Intervenors' opening briefs *alone* totaling 38,000 words—

more than the total words regularly afforded to brief an entire case. See Fed. R. App. P. 32(a)(7)(B)(i)-(ii) (providing 13,000 words for principal briefs and 6500 words for reply briefs); ECF No. 1632712 (Amended Briefing Schedule and Format). Under these circumstances, proceeding to argument in less than 45 days is detrimental to the Court and, thus, to the parties.

Second, Petitioners' suggestion that an extension might further judicial economy is wholly speculative. Petitioners claim that a five-week delay of their reply briefs is necessary to allow the incoming presidential administration to "assess its position on this litigation and to file any motions to reflect a change of position." ECF No. 1651468 at 3. Petitioners rely on the presidential transition team's statement that it will "review … all anti-coal regulations issued by the Obama Administration" to conclude that the incoming administration "is likely to consider adopting policy changes that could significantly alter the scope of this litigation." Id. This "crystal-ball inquiry," to borrow a phrase from Petitioners' merits briefs, is not an adequate foundation for interrupting the regular disposition of this matter.

Even if EPA under new leadership undertakes the kind of regulatory review Petitioners anticipate, Petitioners' assumptions regarding the resulting short-term impact on this litigation are highly speculative. It is pure guesswork that a new Administrator will even have been confirmed by February 24, much less that the new

Administrator will have arrived at some new position with respect to reviewing this Rule that would affect this litigation.[1]

In speculating that they ultimately might decide, by February 24, not to proceed with their case, Petitioners also ignore the rigorous administrative process that would be required even should the incoming administration seek to reconsider the Rule. Should the new administration in fact decide to reconsider and/or revise the rule, there would be more than ample time at that juncture for the Agency to announce its intentions in a concrete fashion, and for interested parties to seek whatever corresponding relief from the Court they deem appropriate prior to the currently-scheduled April 17, 2017, argument date. Any action to reconsider or revise the Rule—if initiated—would then take a significant period of time, requiring development of a proposal, solicitation of public comment, and preparation and promulgation of a final rule. However, there is no basis to presume *now* whether or how these events will occur, and certainly no basis for delaying the present briefing schedule, with its attendant adverse effects described above, solely to save Petitioners the inconvenience of filing their reply briefs.

Third, Petitioners' request is unsupported by any apposite precedent. Petitioners point to a handful of previous filings that they claim show that courts

[1] The President-Elect's designated nominee for EPA Administrator, Mr. E. Scott Pruitt, is presently participating in this litigation as counsel for Petitioner State of Oklahoma, which has not joined Petitioners' request for delay.

"regularly grant[] extensions of time (and stays) in litigation spanning presidential transitions." ECF No. 1651468 at 5. Petitioners have chosen their words carefully, as their examples do involve "*litigation*" spanning presidential transitions. But the fact that litigation may span many years, and sometimes more than one presidential administration, does not countenance a request to speculatively interrupt briefing in this matter before a new administration is in office. As the particular facts of each of Petitioners' cited cases show, none of those cases supports their request. See id. at 4-6; ECF No. 1651463 at 2-3.

In New Jersey v. EPA, No. 08-1065 (D.C. Cir. filed February 19, 2008), and Mississippi v. EPA, No. 08-1200 (D.C. Cir. filed May 23, 2008), EPA—not a petitioner—was the moving party and sought an abeyance *after* President Obama was already in office.[2] In both cases, briefing had not yet begun. In California v. EPA, No. 08-1178 (D.C. Cir. filed May 5, 2008), Petitioners moved for an extension of their reply brief, ECF No. 1163354, but did so only *after* President Obama had taken office and issued a Memorandum specifically instructing EPA to "assess" whether the challenged action was appropriate and to "initiate any appropriate action" based on

[2] In New Jersey, EPA first filed a motion to hold the matter in abeyance pending agency reconsideration in March 2008, more than seven months *before* the election, ECF No. 1107796, and then filed a second motion on behalf of the new administration—and at the Court's request—to keep the matter in abeyance. ECF No. 1160780. In Mississippi, briefing was scheduled to begin in April 2009, ECF No. 1155614; EPA filed to hold the case in abeyance in March 2009, after the change of administration, ECF No. 1169527.

that assessment. See 74 Fed. Reg. 4905 (January 28, 2009). And significantly, EPA then itself moved for an abeyance to allow reconsideration of its decision within two days of Petitioners' motion. ECF No. 1163890. Moreover, unlike in this case, oral argument had not yet been scheduled.

Petitioners' reliance on the certiorari filings in EPA v. New Jersey, and the post-Supreme Court remand in Texas v. United States, likewise provides no basis for these Extension Motions. In the former, No. 08-512 (S. Ct. petition for writ of certiorari filed Oct. 17, 2008), parties were granted extensions to respond to EPA's petition for certiorari, the last of which required that responses be filed on January 21, 2009—the day after Inauguration Day and before the incoming administration could or did take further action with respect to the pending petition.[3] In the latter, No. 1:14-cv-254 (S.D. Tex. filed Nov. 18, 2016), the parties were required to confer and report on a scheduling order by November 18, 2016, following appeal of a preliminary injunction to the 5th Circuit and the Supreme Court. ECF No. 422. The parties jointly agreed to a stay of proceedings, given the "unique" timing in relation to the change in administrations. ECF No. 430. But unlike here, the Texas case involved a policy that could be modified or revoked by the new administration at any time. This litigation, by contrast, involves regulations that remain legally binding unless and until new administrative notice-and-comment procedures are completed. See supra.

[3] See https://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-512.htm.

The only matter Petitioners cite that bears any similarity to this case is the Court's recent decision in U.S. House of Representatives v. Burwell, No. 16-5202 (D.C. Cir. appeal noticed July 14, 2016), to hold in abeyance a case challenging the validity of the Affordable Care Act. ECF No. 1649251. There, the appellee, the U.S. House of Representatives, argued that an abeyance was warranted in light of the forthcoming change of administration, and the Court granted that motion. Here, Petitioners assert that Burwell and this matter have "nearly identical circumstances" because the two challenges have not been expedited and have similar briefing schedules. ECF No. 1651468 at 4-5 & n.5. But Petitioners overlook several significant differences.

First, in Burwell the appellee's grounds for an abeyance were significantly less speculative than those asserted here. The House of Representatives is in a position to take legislative action *itself* as part of, or even separate from, the incoming administration's potential efforts to moot the subject of the lawsuit. To that end, the House of Representatives' Motion stated that it was in direct discussions with the President-Elect's transition team regarding "potential options for resolution of this matter." ECF No. 1647228 at 1. By contrast, Petitioners here are speculating about the actions of an executive branch of which they are not a part and with regard to which they have only the same, generalized interest as other states or parties.

Second, the Court had not set a date for oral argument in Burwell, so the movant in Burwell was not required to demonstrate "extraordinarily compelling

reasons" for the requested extension. Petitioners must meet that higher standard here, and have not. Likewise, Burwell did not implicate the Court's practice of providing at least 45 days between the end of briefing and the date of argument.

Finally, the motion in Burwell was filed before an appellee brief was filed and nearly two months before the United States' reply brief was due, allowing for adjudication of the motion at an earlier stage in the case and well before the United States invested further resources in briefing the matter. See ECF No. 1644319 (Briefing Schedule Order); ECF No. 1647228 (Appellee's Motion). The conservation of party resources was thus both greater and more equitable than in this case, where Petitioners filed their Extension Motions two days after the United States' only brief was filed.[4]

Lastly, Petitioners fail to explain why a presidential transition should constitute an "extraordinarily compelling reason[]" for an extension, when Petitioners have known for months—and indeed proposed—that their reply briefs would come due the day before the Inauguration of a new president. The January 19 deadline for reply briefs was included in the parties' adjusted briefing schedule, proposed jointly to the Court on August 4, 2016. ECF No. 1628713 at 4. If Petitioners had misgivings about

[4] Petitioners disingenuously assert that they contacted counsel for Respondents and certain Respondent-Intervenors "well before their briefs were due." ECF No. 1651468 at 2. This contact on Friday evening, December 9, 2016, came just five days (including a weekend) before the United States' brief was due, at which point the brief was virtually complete.

the propriety of filing a brief shortly before a new administration took office—which, regardless of party, might choose to review and revise the Agency's rulemakings—such concerns could have and should have been raised at that time. Instead, Petitioners have waited until the last minute to attempt to disrupt briefing and now request a total of 72 days to prepare their reply briefs—twice the interval afforded them under the parties' jointly negotiated briefing schedule and more than five times the interval allowed under the Federal Rules. See id.; Fed. R. App. P. 31(a)(1).

In short, Petitioners fall far short of meeting this Court's demanding standard for granting extensions arising after argument has been calendared.

## CONCLUSION

For the foregoing reasons, the undersigned Respondents respectfully request that the Court deny Petitioners' and Petitioner-Intervenors' Motions to Extend the Briefing Schedule.

Respectfully submitted,

December 21, 2016

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition to Petitioners' and Petitioner-Intervenors' Motions to Extend the Briefing Schedule complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 2046 words, excluding exempted portions, according to the count of Microsoft Word.

*/s/ Brian H. Lynk*
BRIAN H. LYNK

## CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing Opposition to Petitioners' and Petitioner-Intervenors' Motions to Extend the Briefing Schedule with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

*/s/ Brian H. Lynk*
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