ORAL ARGUMENT NOT YET SCHEDULED IN NO. 17-1014
ORAL ARGUMENT HELD SEPTEMBER 27, 2016 IN NO. 15-1363

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No. 17-1014 and consolidated cases
STATE OF WEST VIRGINIA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	No. 15-1363 and consolidated cases

REPLY IN SUPPORT OF JOINT
MOTION TO SEVER AND CONSOLIDATE

Petitioners Utility Air Regulatory Group, American Public Power Association, and LG&E and KU Energy LLC (collectively, "Movants") hereby reply to the oppositions filed by Respondent-Intervenors to Movants' Joint Motion To Sever and Consolidate. Respondent United States Environmental Protection Agency ("EPA")

does not oppose Movants' motion. ECF No. 1665819. For the reasons discussed below, Respondent-Intervenors' arguments lack merit.

1. Respondent-Intervenors Environmental and Public Health Organizations ("Environmental Intervenors") assert that "[t]he challenges in the main case"—*i.e.*, those seeking review of EPA's Clean Power Plan rule ("Rule") in *West Virginia v. EPA*, No. 15-1363 and consolidated cases (hereinafter "*West Virginia*")—and the challenges in "the reconsideration case"—*i.e.*, those seeking review of EPA's denial of petitions for administrative reconsideration of the Rule in *North Dakota v. EPA*, No. 17-1014 and consolidated cases (hereinafter "*North Dakota*")—"are distinct." Environmental Intervenors' Opposition to Motion To Sever and Consolidate at 4, ECF No. 1663909 (Mar. 2, 2017) ("Env. Opp."). According to Environmental Intervenors, EPA's denial of Movants' administrative reconsideration petitions ("Reconsideration Petitions") raises *only* the issue of the validity of "'the Administrator's refusal' to grant reconsideration" and nothing more. *Id.* On this basis, they assert that denial of reconsideration is a "different agency action[] … governed by different requirements" than those that apply to judicial review of the underlying Rule.[1] *Id.*

[1] Environmental Intervenors cite *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011), as support for this assertion. Env. Opp. at 4. Respondent-Intervenors' reliance on *Portland Cement* is misplaced. The Court's observation that, "[i]f [a request for] reconsideration is denied, review of the Administrator's refusal is available," *Portland Cement*, 665 F.3d at 185, was simply a restatement of the substance
(Continued . . . .)

2. Despite these assertions, Environmental Intervenors recognize elsewhere in their opposition that the issues that "Movants raise in their petitions for review of" EPA's denial of the Reconsideration Petitions include "notice-and-comment, as-applied, and related record issues,"—issues that challenge the validity of the Rule itself. Env. Opp. at 9. These are the same notice-and-comment, as applied, and record-based issues that Movants in December 2015 specifically identified in *West Virginia v. EPA* as being both raised by their petitions for review of the Rule and the subject of pending Reconsideration Petitions.[2]

3. Recognizing that the Court might conclude that one or more of these notice-and-comment, as-applied, and record-based issues was not then ripe for review, Movant LG&E and KU Energy asked this Court in December 2015 to sever and to hold these issues in abeyance until they could be addressed following EPA's

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of section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). Nowhere did the Court hold that, in such a situation, a petitioner is precluded from having a ripened post-comment period objection resolved in the same proceeding as challenges to the rule that were raised during the comment period. Quite the contrary: in *Portland Cement*, after "[h]aving determined that [Portland Cement Association was] not jurisdictionally barred from petitioning EPA for reconsideration and that it may therefore seek review in this Court of EPA's denial," the Court "proceed[ed] to the merits of [Portland Cement Association's] objection." *Id.* at 186.

[2] *See* Nonbinding Joint Statement of Issues of Petitioners Utility Air Regulatory Group, *et al.*, at 6-9, No. 15-1370, ECF No. 1589590 (Dec. 18, 2015); Nonbinding Statement of Issues of Petitioner LG&E and KU Energy LLC, at 1-3, No. 15-1418, ECF No. 1589605 (Dec. 18, 2015).

action its Reconsideration Petition.[3] In response, Respondent-Intervenors at that time opposed severing the issues raised in the Reconsideration Petition, arguing they were "closely related to issues … raised in … rulemaking comments."[4] Similarly, Respondent EPA questioned whether substantive reconsideration issues were "discrete issues on which targeted abeyance may be warranted," and informed the Court that it would "identify any issues for which [severance and] abeyance may be appropriate in developing its briefing format proposal."[5] In its proposed briefing format, however, EPA identified no issues for severance and abeyance. This Court accepted positions stated by EPA and the Respondent-Intervenors, declining to sever from the *West Virginia* case the notice-and-comment, as-applied, and related record issues that Movants had identified as being raised by their petitions for review and also addressed in their Reconsideration Petitions. *See* Briefing Order at 2, No. 15-1363, ECF No. 1594951 (Jan. 21, 2016) (ordering "that the motion in No. 15-1418 to sever certain issues and hold them in abeyance be denied").

4. Respondent-Intervenors' oppositions simply ignore the fact that EPA's denial of the Reconsideration Petitions lifted any statutory bar to judicial review of the

[3] Motion To Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration, No. 15-1418, ECF No. 1589612 (Dec. 18, 2015).

[4] Respondent-Intervenors' Joint Response to Motion To Sever Certain Issues and Hold Them in Abeyance at 2, No. 15-1418, ECF No. 1594442 (Jan. 19, 2016).

[5] Respondent EPA's Opposition to Motion To Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration at 5, 6, No. 15-1418, ECF No. 1594331 (Jan. 19, 2016).

post-comment period objections that had been identified in Movants' Statements of Issues in *West Virginia*. As in *Portland Cement*, this Court may "proceed to the merits of [the] objection[s]" once reconsideration is denied. 665 F.3d at 186.

5. In other words, two separate and distinct consequences flowed from EPA's denial of the Reconsideration Petitions. One was to create a right to judicial review of a new final agency action—*i.e.*, the denial of reconsideration itself. The second was to ripen any post-comment period objections raised by the *West Virginia* petitions for review. As a result, the Court can no longer fully dispose of the *West Virginia* petitions by resolving only those issues previously briefed and argued. As Environmental-Intervenors themselves concede, "[t]he *en banc* court should decide … all issues properly brought in the petitions for review of the [Rule]." Env. Opp. at 2. These issues now include "the notice-and-comment, as-applied, and related record issues" ripened by EPA's denial of the Reconsideration Petitions. *Id.* at 9.

6. The issues for which Movants seek severance, consolidation, and supplemental briefing in *West Virginia* involve objections to the Rule itself, not to EPA's denial of reconsideration. The Clean Air Act's limits on review of post-comment period objections are not jurisdictional and, in any event, cease upon EPA's denial of a reconsideration request. *See Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (noting "that the Section 7607 exhaustion/finality rule we describe today likely should not be considered jurisdictional under the Supreme Court's recent cases that have tightened the

definition of when a rule is considered jurisdictional"). Because EPA denied the reconsideration petitions before this Court's disposition of the *West Virginia* petitions for review, Movants' post-comment period objections became justiciable under those *West Virginia* petitions when notice of the denial was published in the Federal Register on January 17, 2017. 82 Fed. Reg. 4864 (Jan. 17, 2017). Now, all objections to the Rule—those already briefed and those now indisputably ripened—must be resolved in order to dispose of Movants' *West Virginia* petitions for review. *See, e.g.*, *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (court addressing ripened objections after determining administrative procedures were exhausted); *Portland Cement*, 665 F.3d at 186 (same); *see also Mexichem Specialty Resins, Inc. v. EPA,* 787 F.3d 544, 553 (D.C. Cir. 2015).

7. Respondent-Intervenors cite various cases where petitions for review of final rules were disposed of while reconsideration requests were pending before the Agency. *See* State and Municipal Respondent-Intervenors' Opposition to Motion To Sever and Consolidate at 4-5, ECF No. 1665786 (Mar. 13, 2017); Env. Opp. at 5-7. Here, by contrast, EPA denied the pending reconsideration petitions before this Court's disposition of the pending *West Virginia* petitions for review. EPA's denial, accompanied by a 257-page, single-spaced Basis for Denial of Petitions to Reconsider

and Petitions to Stay the Clean Power Plan and 140 pages of appendices,[6] ripens the objections raised in the reconsideration petitions and requires supplemental briefing focused on both the rulemaking record and the new reconsideration denial record. *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 361 nn. 253, 256 (D.C. Cir. 1981) (citing the original rulemaking record (44 Fed. Reg. at 33,592) *and* the reconsideration record (45 Fed. Reg. at 8225) in resolving objections to final rule); *see also id.* at 384 ("EPA has … established that the standard … is achievable …. The post-promulgation record does not require a contrary conclusion …."). Moreover, the Supreme Court's stay of the Rule contemplates "disposition of" the *West Virginia* petitions for review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016) (ordering that the Rule "is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit"). Disposition of the *West Virginia* petitions requires this Court to resolve whether *any* ripened objection to the Rule justifies granting any or all of the petitions for review.

8. In its 257-page, single-spaced Basis for Denial of Reconsideration Petitions document, EPA offers extensive new arguments and authorities regarding the notice-and-comment, as applied, and record-based issues raised by the *West Virginia* petitions. EPA, Office of Air Quality Planning and Standards, Sector Policies

[6] EPA, Clean Power Plan Petitions for Reconsideration January 2017, https://www.epa.gov/cleanpowerplan/clean-power-plan-petitions-reconsideration-january-2017.

and Programs Division, Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units (Jan. 11, 2017), https://www.epa.gov/cleanpowerplan/clean-power-plan-petitions-reconsideration-january-2017. Fundamental fairness requires supplemental briefing on these issues now, in light of these new arguments and authorities, as well as the information submitted in support of the Reconsideration Petitions, in order to determine the Rule's validity. For example, when the notice-and-comment issues were briefed and argued earlier in *West Virginia*, EPA and members of the en banc Court at oral argument characterized Petitioners' notice-and-comment arguments as post-comment period objections that could not be resolved by the Court at that time because of the pending reconsideration petitions. EPA Br. at 116-17, No. 15-1363, ECF No. 1609995 (Apr. 22, 2016); Oral Arg. Tr. at 229-42, No. 15-1363, ECF No. 1640958, *West Virginia v. EPA*. The notice-and-comment objections are now indisputably ripe and, if Petitioners' arguments are accepted, would require vacatur of the Rule. Similarly, acceptance of Petitioners' arguments regarding the ripened as-applied and record-based objections could result in vacatur of the Rule's provisions establishing a particular State's emissions budget, for example, or could require vacatur of the entire Rule depending on the magnitude of the as-applied or record-based defects.

9. As EPA recognized in responding to Petitioners' original briefing proposal in *West Virginia*, "issues that could not have been raised in comments during

the rulemaking" would present "a ripeness problem" and would require briefing following disposition of "reconsideration petitions … rais[ing] discrete issues that are not yet ripe …." Respondent's Opposition to Petitioners' Joint Motion to Establish Briefing Format and Expedited Briefing Schedule at 9, *West Virginia v. EPA*, ECF No. 1589819 (Dec. 21, 2015) ("EPA Briefing Format Opp."). Recognizing that these issues are now ripe, EPA, in responding to this Motion, does not object to severing Movants' petitions for review of the denial of the Reconsideration Petitions from *North Dakota v. EPA* and consolidating those petitions with the petitions for review in *West Virginia v. EPA*. Respondents' Response to Motion To Sever and Consolidate at 2, ECF No. 1665819 (Mar. 13, 2017).

10. EPA, however, has also suggested that the Court consider consolidation of other petitions for review in *North Dakota* with the *West Virginia* petitions for review. *Id.* In the motion for severance and consolidation, Movants specifically requested that this Court wait until "after March 20, 2017 (the date on which the period of time to file a petition for review of the denial of the administrative petitions for reconsideration expires)" before requiring the parties to submit motions to govern supplemental briefing of Movants' issues. Joint Mot. at 8. Movants made this request so that the full universe of petitioners in *North Dakota* would be known, and so that other petitioners in *North Dakota* could identify any "discrete issues that [were] not yet ripe" at the time of initial briefing in *West Virginia*, EPA Briefing Format Opp. at 9, for supplemental briefing with the consolidated *West Virginia* petitions as appropriate.

For the foregoing reasons, Movants respectfully request that the Court grant their motion.

Dated: March 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1), I hereby certify that the foregoing document contains 2,059 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: March 20, 2017 /s/ Allison D. Wood

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of March 2017, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Allison D. Wood