

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

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

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NORTH DAKOTA)	
)	
Petitioner,)	
)	
v.)	No. 17-1014 and
)	consolidated cases
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	
<hr/>)	
WEST VIRGINIA)	
)	
Petitioner,)	
)	
v.)	No. 15-1363 and
)	consolidated cases
)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Respondents.)	
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JOINT MOTION TO SEVER AND CONSOLIDATE

Petitioners Entergy Corporation (“Entergy”), Westar Energy, Inc. (“Westar”), and NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern Corporation”) (together, “Movants”) respectfully move the Court to (1) sever their respective petitions for review in *North Dakota v. EPA*, No. 17-

1014,¹ which challenge the final agency action of respondent United States Environmental Protection Agency (“EPA”) entitled “*Denial of Reconsideration and Administrative Stay of the Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units.*” 82 Fed. Reg. 4,864 (Jan. 17, 2017) (“CPP Reconsideration Denial”); (2) consolidate those petitions with the Movants’ respective petitions for review in *West Virginia v. EPA*, No. 15-1363,² which challenge the final EPA rule entitled “*Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units.*” 80 Fed. Reg. 64,661 (October 23, 2015) (“CPP Final Rule”); and (3) order the parties in *West Virginia v. EPA* to submit a proposal to govern the scheduling of supplemental briefing in that case, if the Court does not hold that case in abeyance.³

In support of this motion, Movants state as follows:

¹ In *North Dakota v. EPA*, Entergy is the petitioner in No. 17-1037. Westar is the petitioner in No. 17-1062. NorthWestern Corporation is the petitioner in No. 17-1081. All three of these petitions were consolidated with lead case No. 17-1014, by the Court’s orders of February 8, 2017, ECF No. 1660036 (No. 17-1037); March 1, 2017, ECF No. 1663628 (No. 17-1062); and March 14, 2017, ECF No. 1665869 (No. 17-1081).

² In *West Virginia v. EPA*, Entergy is the petitioner in No. 15-1413. Westar is the petitioner in No. 15-1377. NorthWestern Corporation is the petitioner in No. 15-1378. All three of these challenges were consolidated with lead case No. 15-1363.

³ On March 28, 2017, EPA filed a motion to hold *West Virginia v. EPA* and consolidated challenges in abeyance. This Court has not yet ruled on the motion. See Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance, No. 15-1363, ECF No. #1668274 (Mar. 28, 2017). Movants do not oppose EPA’s motion to hold *West Virginia v. EPA* and consolidated cases in abeyance.

1. Movants' challenges to the CPP Reconsideration Denial raise issues fundamental to the legality and scope of the CPP Final Rule. Consolidating Movants' challenges to the CPP Reconsideration Denial with the closely-related challenges to the CPP Final Rule would promote judicial efficiency and economy and avoid duplication of effort by the Court and the parties. This Court routinely consolidates challenges to an agency's denial of petitions for reconsideration of a rule with ongoing challenges to that same rule.⁴

2. Movants' challenges to the CPP Reconsideration Denial share common issues with those raised by other petitioners seeking consolidation of their respective CPP Reconsideration Denial and CPP Final Rule challenges.⁵ Granting all pending motions to consolidate would promote judicial efficiency and economy and avoid having this Court hear shared issues in separate proceedings.

3. In their challenges to the CPP Final Rule, Movants raised objections to EPA's failure to provide adequate notice of and opportunity to comment on elements of the CPP Final Rule that were not available for public comment because they were introduced only when the final rule was published ("Notice

⁴ See, e.g., Order, *North Dakota v. EPA*, No. 15-1381 (and consolidated cases), ECF No. 1625550 (July 19, 2016); Order, *United States Sugar Corporation v. EPA*, No. 11-1108 (and consolidated cases), ECF No. 1436267 (May 15, 2013); Order, *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No. 09-1322 (and consolidated cases), ECF No. 1277479 (Nov. 15, 2010).

⁵ See, e.g., Joint Motion to Sever and Consolidate by Utility Air Regulatory Group and the American Public Power Association ("UARG") and LG&E and KU Energy LLC ("LKE"), Nos. 17-1014 and 15-1363, ECF No. 1663047 and ECF No. 1663046 (Feb. 24, 2017).

Issues”). These Notice Issues are of central relevance to the outcome of the CPP Final Rule and are now indisputably ripe for judicial review in light of the CPP Reconsideration Denial. *See Portland Cement Ass’n. v. EPA*, 665 F.3d 177, 186 (D.C. Cir. 2011) (proceeding to the merits of petitioner’s objection after determining that petitioner “is not jurisdictionally barred from petitioning EPA for reconsideration and that it may therefore seek review in this Court of EPA’s denial”). Consolidating Movants’ CPP Reconsideration Denial and CPP Final Rule challenges and ordering supplemental briefing in the CPP Final Rule challenges would avoid piecemeal review of the CPP Final Rule.

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

March 31, 2017

Respectfully submitted,

/s/ William M. Bumpers

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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) and 32(e)(1), I hereby certify that the foregoing document contains 760 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.

March 31, 2017

/s/ Megan H. Berge

Megan H. Berge

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2017, I caused a copy of the foregoing to be served by the Court's CM/ECF System on all counsel of record in this matter who have registered with the CM/ECF System.

/s/ Megan H. Berge

Megan H. Berge