ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NORTH DAKOTA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 17-1014 (and consolidated cases)

MOVANT RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTION TO HOLD RECONSIDERATION DENIAL CASES IN ABEYANCE

The public health and environmental organizations that have moved to intervene in this case oppose the Environmental Protection Agency's motion to hold these petitions for review in abeyance until it completes a newly announced agency review of the Clean Power Plan and any subsequent rulemakings. EPA's decision to undertake a new, potentially very long, and necessarily uncertain administrative process to review the Clean Power Plan does not justify an indefinite abeyance of these petitions for review. Movant respondent-intervenors would not, however, oppose an order that the parties in this case submit motions to

govern briefing in this case after the *en banc* Court decides *West Virginia v. EPA*, No. 15-1363, the consolidated challenges to the Clean Power Plan.[1]

BACKGROUND

After receiving merits briefing from the more than 200 parties last spring, this Court heard *en banc* oral argument in *West Virginia v. EPA* on September 27, 2016.

In January 2017, EPA denied more than 30 petitions for administrative reconsideration of the Clean Power Plan. 82 Fed. Reg. 4,864 (Jan. 17, 2017). Subsequently, various parties filed petitions for review of those denials, consolidated as *North Dakota v. EPA*, No. 17-1014.

No briefing schedule has yet been set in this "reconsideration" case. Some of the petitioners in No. 17-1014 have filed motions asking the Court to sever their petitions for review and consolidate them with *West Virginia v. EPA*, No. 15-1363, and to provide for supplemental, post-oral argument briefing.[2] Movant-

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[1] The State and Local Government Movant-Respondent-Intervenors (*see* Joint Mot. for Leave to Intervene, No. 157-1014, (D.C. Cir. Jan. 27, 2017), ECF 1657878) have authorized the undersigned counsel to represent that they oppose the relief sought in EPA's motion but do not oppose delaying the establishment of a briefing schedule in this case until a reasonable period following the Court's issuance of its merits decision in *West Virginia v. EPA*, No. 15-1363.

[2] On February 24, 2017, the Utility Air Regulatory Group and other parties filed a motion to sever their two petitions for review from No. 17-1014, and consolidate them with *West Virginia*. ECF No. 1663046. Three similar motions to sever and consolidate were filed on March 31, 2017. ECF No. 1668952 (filed by West Virginia and other states); ECF No. 1668921 (Entergy Corp., *et al.*); ECF No.

respondent-intervenors have opposed those motions as inefficient, dilatory, and prejudicial to the parties supporting the Clean Power Plan. As we explained in that opposition,[3] the challenges to the underlying Clean Power Plan rule and the challenges to the denial of reconsideration petitions are, and should remain, distinct. We likewise oppose the present EPA motion for indefinite abeyance of the reconsideration cases, No. 17-1014, (D.C. Cir. Mar. 31, 2017), ECF 1668936 [hereinafter "Mot."], and suggest instead that the Court establish a briefing schedule for these cases after it decides *West Virginia.*

ARGUMENT

EPA seeks to place the reconsideration petitions in indefinite abeyance based upon an Executive Order signed on March 28, 2017, entitled "Promoting Energy Independence and Economic Growth" (Mot., Attach. 1) and a related EPA "Notice of Review" (Mot., Attach. 2). The Order calls for a review of regulations, including the Clean Power Plan, according to new policies articulated in the Order, including a policy against "unduly burden[ing] the development of domestic

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1668929 (National Association of Home Builders). Sixteen of the petitioners in No. 17-1014 have not filed motions for severance and consolidation.

[3] *See* Resp't-Intervenor Envt'l and Pub. Health Orgs.' Opp. to Mot. to Sever and Consolidate, at 4-10, No. 17-1014, (D.C. Cir. Mar. 2, 2017), ECF No. 1663909; *see also* State and Municipal Resp't-Intervenors' Opp. to Mot. to Sever and Consolidate, No. 17-1014, (D. Cir. Cir. March 13, 2017), ECF No. 1665786. Movant-respondents-intervenors will soon be filing an opposition to the three motions to sever and consolidate filed on March 31, 2017.

energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." Mot., Attach. 1 at 2. The Notice states that EPA will conduct a review and may, depending on its results, commence a new rulemaking to consider proposed changes to that rule. Mot., Attach. 2 at 2.

As respondent-intervenors have urged in our oppositions to other recent EPA abeyance motions, the agency's mere initiation of a "nascent review" (Mot. 7) of the Clean Power Plan and other rules– with the even more indeterminate possibility of initiating a new rulemaking to consider regulatory changes – is not a valid basis for an indefinite halt to judicial review. *See, e.g.*, Pub. Health & Envt'l Resp't-Intervenors' Opp. to Mot. to Hold Case in Abeyance, No. 15-1381 (D.C. Cir. Apr. 5, 2017) ("New Source Abeyance Opp."), ECF No. 1669762.

The reasons EPA offers for abeyance – including that merely having to defend existing regulations would improperly interfere with the possible consideration of regulatory changes (Mot. 6-7) – are unsound. New Source Abeyance Opp. 7-17. EPA is not compelled to take any particular position in this case going forward, and intervenors are willing and able to continue their defense of the Clean Power Plan regardless of any change in the government's position. Moreover, it would in no way compromise EPA's regulatory review were this Court to resolve the various legal issues presented in this litigation, many of which would be relevant in any future regulatory action related to the Clean Power Plan.

EPA's proffered reasons fail to overcome a court's "virtually unflagging" "obligation to hear and decide cases within its jurisdiction." *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (citations and internal quotation marks omitted). The indefinite abeyance requested here should be denied.

At the same time, Movant-Respondent-Intervenors recognize that, in contrast to *West Virginia v. EPA*, and *North Dakota v. EPA*, Nos. 15-1381 (the case involving the rule for new power plants), litigation of the petitions in No. 17-1014 is in its earliest stages, with no briefing schedule set and relatively little investment of time and resources by the parties or the Court.

As explained in our opposition to one of the pending motion for severance and consolidation, the *West Virginia* case reviewing the Clean Power Plan and the instant cases reviewing the denial of reconsideration are distinct, and should not be merged. *See* Resp't-Intervenor Envt'l and Pub. Health Orgs.' Opp. to Mot. to Sever and Consolidate, at 4-10, No. 17-1014, (D.C. Cir. Mar. 2, 2017), ECF No. 1663909. The stay imposed by the Supreme Court in *West Virginia* does not extend to these petitions, which concern an action taken after the Supreme Court's stay in *West Virginia*. *See id*. at 8 & n.2. Because the stay is causing enormous ongoing harm to the Clean Power Plan's beneficiaries, there is a compelling need for the *en banc* Court to decide *West Virginia*. The instant petitions for review

carry no equivalent need for dispatch and would be more readily briefed and resolved after this Court has decided *West Virginia*.

Accordingly, Movant Respondent-Intervenors oppose EPA's requested indefinite abeyance in No. 17-1014. We would not, however, oppose a delay in the setting of a briefing schedule in this case until after the *en banc* court has issued a decision in *West Virginia*, followed by an order requiring the parties in No. 17-1014 to submit motions to govern within 30 days (or some other reasonable time) of the *en banc* Court's decision.

CONCLUSION

The motion for abeyance should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 1219 words.

CERTIFICATE OF SERVICE

I certify that on April 5, 2017, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue