

ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016

No. 15-1363 and Consolidated Cases

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

STATE OF WEST VIRGINIA, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

**RESPONDENT-INTERVENOR POWER COMPANIES'
OPPOSITION TO MOTION FOR ABEYANCE**

After an *en banc* panel of this Court devoted substantial resources to this case, Respondent EPA seeks an order placing the case in abeyance, relying on an Executive Order that merely “directs EPA to review and, if appropriate, initiate reconsideration proceedings to suspend, revise or rescind” the Clean Power Plan. Mot., Attach. 2, at 4. The undersigned Power Companies oppose this late-stage request to avoid a decision of this Court on the legality of the Clean Power Plan (hereinafter, “Rule”).

ARGUMENT

This case raises important questions regarding the scope of EPA's authority under section 111 of the Clean Air Act to regulate carbon dioxide emitted by the nation's existing power plants.¹ Granting abeyance at this late stage while leaving these questions unresolved would not serve judicial economy, but would impede it and squander the substantial resources already devoted by the *en banc* panel of the Court and the many parties to this case. Because the U.S. Supreme Court's stay of the Rule pending the ongoing litigation would remain in effect throughout the period of abeyance, placing the case in abeyance would also allow EPA to suspend indefinitely and essentially nullify the Rule, without satisfying any of the requirements of the Clean Air Act or Administrative Procedure Act ("APA") for doing so. The issues in this case are ripe for adjudication and should be decided based on the record, briefing and argument before the Court at this time.

¹ See, e.g., Petitioners' Core Legal Issues Br. at 61-74 (arguing that section 112 categorically prohibits EPA from issuing *any* standards under section 111 for greenhouse gas emissions from power plants); *id.* at 41-55 (arguing that a standard of performance applicable to power plants cannot take account of the electricity grid's interconnected nature).

I. Abeyance Would Not Serve Judicial Economy

While EPA always has the discretion to undertake a proposed rulemaking to suspend, revise or rescind a rule duly promulgated under the Clean Air Act, the Executive Order and EPA notice amount to no such proposal; they merely announce EPA's intention to *consider* whether suspension, revision or rescission of the Rule *may* be appropriate and, if so, to then commence a subsequent formal rulemaking process.² Given the tentative nature of these statements and the complex balancing of policy interests at stake, it is speculative to assume that the Rule will ultimately be suspended, revised or withdrawn upon conclusion of any rulemaking process.

Despite the Executive Order's issuance, the outcome of the ongoing review of the Rule is by no means preordained and cannot, as a matter of law, be decided in advance of rulemaking satisfying the requirements of the Clean Air Act and APA. Indeed, EPA recently

² See Mot. at 7 (“[I]f the review concludes that suspension, revision or rescission of the Rule may be appropriate, EPA’s review will be followed by a rulemaking process.”); Attach. 1 to Mot. at 5 (ordering EPA to commence a notice and comment rulemaking to suspend, review or rescind the Rule “if appropriate”); Attach. 2 to Mot. at 1 (announcing that EPA “is reviewing and, if appropriate will initiate proceedings to suspend, review or rescind the Clean Power Plan”).

found that, due to existing trends within the electricity sector towards lower-emitting generation, the Rule would have a more modest impact on the U.S. electric generating mix and compliance would be less costly than EPA projected when the Rule was initially promulgated.³ It is entirely possible given these facts that EPA could decide to maintain the Rule or revise it in only limited respects upon conclusion of its “nascent review” (Mot. at 8).⁴ If that were to happen, the issues currently before the Court would then very likely need to be litigated all

³ See Basis for Denial of Petition to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions (Jan. 11, 2017), at 2, https://www.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf.

⁴ In similar circumstances spanning the last change in presidential administrations, this Court granted an unopposed motion for abeyance filed by EPA during the early stages of litigation challenging EPA’s 2008 revised primary and secondary ozone national ambient air quality standards, allowing the new administration to review those standards and determine whether they should be reconsidered. See *Mississippi v. EPA*, 744 F.3d 1334, 1341-42 (D.C. Cir. 2013). EPA ultimately decided, more than two years later, to withdraw its reconsideration proceeding and take no new action at all, maintaining the 2008 standards as they were and postponing their reconsideration until the next periodic review; the Court then set a briefing schedule and began considering the merits of the case. See *id.* Whereas briefing had not even commenced at the time that case was put in abeyance, here, the case is fully briefed, argued and submitted and EPA’s motion strenuously opposed.

over again and the substantial amount of time and resources already put into considering these issues by both the *en banc* panel and the parties would be forsaken. That would not amount to “sound stewardship of judicial resources” as EPA suggests (*see* Mot. at 7 (quoting *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012))), but monumental waste.

II. Abeyance Would Amount to Indefinite Suspension of the Rule, Without Satisfying Procedural Requirements of the APA and Clean Air Act for Doing So

Although stayed by the Supreme Court pending judicial review,⁵ the Rule is currently the law of the land. As such, it cannot be suspended or rescinded without notice and comment rulemaking (*see* 5 U.S.C. § 553(b), (c); *id.* § 551(5); *see also* 42 U.S.C. § 7607(d)); EPA acknowledges as much. *See* Mot. at 5; Attach. 2 to Mot. at 3 (noting that “[i]f EPA’s review concludes that suspension, revision or rescission of this Rule may be appropriate, EPA’s review will be followed by a rulemaking process that will . . . follow proper administrative

⁵ *See* Order, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (stay is in effect “pending disposition of the applicants’ petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants’ petition for a writ of certiorari if such writ is sought.”).

procedures”). Yet, by asking the Court to place these cases in abeyance pending conclusion of the review ordered by the Executive Order and any subsequent rulemaking, EPA seeks to avoid a decision on the merits and thereby leave the stay in effect indefinitely and, in effect, nullify the Rule without having to satisfy any of the procedural requirements of the Clean Air Act and APA for suspending a rule or removing it from the Code of Federal Regulations.

In this respect, EPA’s motion closely mirrors one filed last month with the U.S. Supreme Court in a case concerning a recurrent forum dispute arising from challenges to the 2015 regulation defining “waters of the United States” under the Clean Water Act. *See* Notice of Executive Order and Related Agency Action and Motion of the Federal Respondents to Hold the Briefing Schedule in Abeyance, *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, No. 16-299 (Mar. 6, 2017). Just as EPA contends here, the Government argued that the open-ended terms of an Executive Order directing relevant agencies to “review” the underlying rule and take further action as “appropriate” warranted the Court holding that proceeding in abeyance. Likewise, because the underlying rule remains subject to a nationwide stay, a grant of abeyance would

have operated as a judicial inducement to prolong that review indefinitely, thereby allowing for the functional withdrawal of the rule and override of APA requirements necessary to effectuate a lawful repeal. The U.S. Supreme Court denied that request earlier this week, proceeding instead with the dispute before it. *See Order, Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299 (Apr. 3, 2017).

Placing the case in abeyance and thereby leaving the Supreme Court's stay in effect indefinitely while EPA reconsiders the Rule would prolong uncertainty for the Power Companies and others within the power sector regarding whether they will ultimately be subject to standards of performance under section 111(d) and the scope and stringency of any such standards, whether imposed pursuant to the Rule or any successor thereto. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126 (D.C. Cir. 2015) (“[P]eople cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack.”). There can be no claim—and EPA makes none—that these important questions concerning the Rule's legality are moot as a result of either the Executive Order's issuance or EPA's “nascent review” of the Rule. *See Mot.* at 8. Rather,

these questions are ripe for adjudication and should be decided now based on the record, briefing and argument before the Court.

CONCLUSION

The Court should deny Respondent EPA's motion.

Dated: April 6, 2017

Respectfully submitted,

/s/ Kevin Poloncarz

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent-Intervenor Power Companies' Opposition to Motion for Abeyance complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 1,465 words as counted by the word-processing system used to prepare it.

Dated: April 6, 2017

/s/ Kevin Poloncarz

Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will serve electronic copies of such filing on all registered CM/ECF users.

/s/ Kevin Poloncarz

Kevin Poloncarz