

ORAL ARGUMENT HEARD EN BANC  
ON SEPTEMBER 27, 2016 IN CASE NO. 15-1363  
ORAL ARGUMENT NOT YET SCHEDULED IN CASE NO. 17-1014

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

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

**STATE AND MUNICIPAL RESPONDENT-INTERVENORS'  
OPPOSITION TO MOTIONS TO SEVER AND CONSOLIDATE**

The undersigned Intervenor-Respondent States and Municipalities (State Interveners) oppose the additional motions to sever and consolidate filed on March 31, 2017 by three sets of petitioners in the above-referenced cases: (1) Entergy Corporation, Westar Energy, Inc., and NorthWestern Corporation d/b/a NorthWestern Energy (collectively, Entergy Movants); (2) the National Association of Home Builders (NAHB); and (3) the States of West Virginia, et al. (State Movants) (Entergy, NAHB, and State Movants collectively, Movants). Movants all seek an order (1) severing their reconsideration petitions for review in *North Dakota v. EPA* (No. 17-1014) from the other reconsideration petitions; (2) consolidating them with *West Virginia v. EPA* (No. 15-1363), which has already been fully briefed and argued to the *en banc* court; and (3) allowing supplemental briefing in *West Virginia* more than six months after oral argument. See ECF Nos. 1668932, 1668937, & 1668960.

For the reasons previously stated by State Interveners in their opposition (ECF No. 1665788) to the nearly identical motion to sever and consolidate filed by petitioners Utility Air Regulatory Group, American Public Power Association, LG&E, and KU Energy LLC (collectively, UARG) on February 24, 2017 (ECF No. 1663046), the Court should deny these motions and resolve the *North Dakota* reconsideration proceedings in the regular course. Movants' proposed approach

would be inefficient and inconsistent with this Court's practice in similar cases, and would result in unnecessary delay in resolving the *West Virginia* case.

### **BACKGROUND**

Movants are a fraction of the petitioners in *West Virginia* challenging the Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the Rule), and a subset of the petitioners in *North Dakota* challenging EPA's denial of administrative reconsideration petitions, 82 Fed. Reg. 4,864 (Jan. 17, 2017). In *West Virginia*, this Court established an expedited briefing schedule, Per Curiam Order (Jan. 28, 2016), ECF No. 1595922, and, after the Supreme Court granted a stay of the Rule, took the unusual step of ordering that the case be heard before the full *en banc* Court in the first instance. *See Per Curiam En Banc Order* (May 16, 2016), ECF No. 1613489. More than two hundred entities, including about two dozen groups of amici, participated in briefing in the case, including briefing on the notice issues raised in Movants' petitions for reconsideration. Oral argument occupied a full day before the *en banc* Court on September 27, 2016, and a segment of the oral argument concerned those same notice issues. A decision remains pending.

In January 2017, EPA denied the petitions seeking reconsideration of the Rule on procedural and/or substantive grounds, with certain exceptions that are not relevant here. 82 Fed. Reg. at 4,864. EPA concluded that the reconsideration petitions raised issues on which there had been adequate notice and opportunity to

comment during the rulemaking process and which, in any case, were not of central relevance, and therefore would not have altered the outcome of EPA rulemaking. *See* 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), at 4.<sup>1</sup>

Thereafter, a subset of petitioners in *West Virginia* filed seventeen petitions for review of EPA's decision denying reconsideration. The Court consolidated those petitions and designated the *North Dakota* proceeding as the lead case. On February 24, 2017, UARG filed a motion seeking to sever their two petitions for review and consolidate them with their petitions in *West Virginia* for supplemental briefing. ECF No. 1663046. This motion remains pending.

Over one month later, on March 31, 2017, Movants filed nearly identical motions seeking to sever their five petitions from the reconsideration petitions in the *North Dakota* proceeding, to consolidate them with their earlier petitions in *West Virginia*, and for supplemental briefing in *West Virginia*. *See* ECF Nos. 1668932, 1668937, & 1668960. Petitioners in the remaining ten petitions for

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<sup>1</sup> Available at [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](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).

review consolidated in *North Dakota* thus far have not sought such relief, and the time for filing procedural motions in at least some of those cases has expired.

## ARGUMENT

### **Movants' Requested Relief Would Be Both Inefficient and Inconsistent with This Court's Usual Practice.**

The *West Virginia* case has been fully briefed and argued before the *en banc* Court. This Court has never consolidated newly-filed petitions with a case that has been fully briefed and argued—let alone a case that this Court has ordered be given expedited consideration or a case that this Court has taken the extraordinary step of hearing *en banc* in the first instance. Rather, the usual path followed by this Court has been to rule on the merits of the original petition while resolving at a later time the challenges to EPA's subsequent denial of reconsideration petitions. *See, e.g., EME Homer City Gen. v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015) (deciding merits of rule notwithstanding pending administrative reconsideration petitions); *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 549 (D.C. Cir. 2015) (same); *Utility Air Regulatory Group v. EPA*, 744 F.3d 741, 743-744 (D.C. Cir. 2014) (same).<sup>2</sup> There is no basis for adopting a different approach here.

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<sup>2</sup> *See also* Respondent-Intervenor Env'tl. & Pub. Health Orgs.' Opp. to Mot. to Sever & Consolidate, ECF No. 1663907, at 5-7 (Mar. 2, 2017) (citing additional examples).

Contrary to State Movants' assertion, State Movants' Mot. at ¶ 5, the Court is not required to resolve newly-ripened post-comment period objections raised in separate petitions for review of agency reconsideration decisions in order to dispose of pending direct petitions for review of Clean Air Act rules. The cases cited by Movants do not support such a proposition. Rather, as evidenced by the examples cited above, depending on factors such as the stage of the litigation, judicial economy, and prejudice to the parties, the decision of whether or not to consolidate lies firmly within the Court's discretion. A decision to consolidate in light of these factors here would be unprecedented.

Movants' examples<sup>3</sup> of this Court's supposedly "routine[]" practice of consolidating reconsideration petitions are readily distinguishable. In *State of North Dakota v. EPA*, No. 15-1391, petitioners had brought an unopposed motion for such consolidation very early in the litigation, before even a briefing schedule had been established, and neither the original nor reconsideration proceedings were before the *en banc* Court. See Unopposed Motion to Consolidate, No. 15-1381, ECF No. 1624282 (July 12, 2016); Unopposed Motion Concerning Briefing Schedule, No. 15-1381, ECF No. 1628713 (August 8, 2016). Similarly, in *Sierra Club v. Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981), the Court consolidated the

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<sup>3</sup> See State Movants' Mot. at ¶ 6; Entergy Movants' Mot. at 3, n.4; NAHB Mot. at 3, n.4.

original petitions with the reconsideration petitions before the case was briefed or argued. See Feb. 29, 1980 Order, *Electric Utilities v. EPA* (D.C. Cir. No. 79-1719). And in *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322 (and consolidated cases), involving challenges to EPA's endangerment finding for greenhouse gases, the Court had held the original petitions for review in abeyance pending EPA's decision on administrative petitions for reconsideration and consolidated the reconsideration petitions for review well before even establishing a briefing format. Orders, No. 09-1322, ECF No. 1250245 (June 16, 2010) (holding case in abeyance), ECF No. 1277479 (Nov. 15, 2010) (consolidating 10-1234 and 09-1322), ECF No. 1299368 (Mar. 22, 2011) (establishing briefing format).<sup>4</sup>

The procedural context is markedly different here. The case has been fully briefed and argued, and more than six months have elapsed since oral argument. Moreover, *West Virginia* was heard *en banc* at the outset—and Movants do not explain why the record-specific issues raised in their reconsideration petitions also

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<sup>4</sup> Similarly, in *U.S. Sugar Corp. v. EPA*, No. 11-1108 (and consolidated cases), prior to any briefing in the case, the Court consolidated petitions challenging three rules, which had been held in abeyance pending decisions on administrative reconsideration petitions, with petitions challenging the revised rules issued upon reconsideration. And most relevant here, the Court proceeded to hear oral argument and decide the case, ECF No. 1627694 (July 29, 2016), notwithstanding the filing of challenges to EPA's denial of reconsideration of the revised rules, which were kept on a separate track. See No. 16-1021 (D.C. Cir.) (separate challenge to denial of reconsideration).

warrant such extraordinary treatment. Under these circumstances, reopening the *West Virginia* proceeding to additional issues and briefing would be both unprecedented and uniquely disruptive, and would needlessly delay this Court's resolution of the case.

Moreover, Movants' proposed approach would undermine the expedited consideration of these proceedings that this Court ordered in January 2016. ECF No. 1595951. At that time, this Court specifically declined to sever issues that were then subject to pending reconsideration petitions before EPA, and instead decided to address them along with the core legal issues in the *West Virginia* proceeding. After the Rule was stayed by the Supreme Court, this Court took further steps to resolve the proceedings expeditiously by reviewing the case *en banc* in the first instance. *See* ECF 1613489 (May 16, 2016). Movants' proposed approach would prevent expedited resolution of the case by reopening briefing on issues this Court previously declined to sever and hear separately.

In short, rather than injecting Movants' reconsideration arguments into this proceeding at the eleventh hour, this Court should require Movants to brief and argue their reconsideration petitions alongside all the other pending reconsideration petitions in the *North Dakota* proceeding before a three-judge panel of this Court.

## CONCLUSION

This Court should deny the motion.

Dated: April 7, 2017

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Morgan A. Costello, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing system used in this office, this document, exclusive the caption, signature block, and any certificates of counsel, contains 1,570 words.

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/s/ Morgan A. Costello

MORGAN A. COSTELLO

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition to Motions to Sever and Consolidate was filed on April 7, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Morgan A. Costello  
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