

**ORAL ARGUMENT REMOVED FROM APRIL 17, 2017
CALENDAR**

No. 15-1381 (and consolidated cases)

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

STATE OF NORTH DAKOTA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions for Review of Final Agency Action
of the United States Environmental Protection Agency
80 Fed. Reg. 64,510 (Oct. 23, 2015) and 81 Fed. Reg. 27,442 (May 6, 2016)

**SUPPLEMENTAL BRIEF OF INTERVENORS CALPINE
CORPORATION, THE CITY OF AUSTIN D/B/A AUSTIN
ENERGY, THE CITY OF LOS ANGELES, BY AND
THROUGH ITS DEPARTMENT OF WATER AND POWER,
THE CITY OF SEATTLE, BY AND THROUGH ITS CITY
LIGHT DEPARTMENT, NATIONAL GRID GENERATION,
LLC, NEW YORK POWER AUTHORITY, PACIFIC GAS AND
ELECTRIC COMPANY AND SACRAMENTO MUNICIPAL
UTILITY DISTRICT**

Kevin Poloncarz

Counsel of Record

Donald L. Ristow

David Woodsmall

Paul Hastings LLP

101 California St., Forty-Eighth Floor

San Francisco, CA 94111

(415) 856-7000

kevinpoloncarz@paulhastings.com

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*Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

EPA United States Environmental Protection Agency

Rule Standards of Performance for Greenhouse Gas Emissions
From New, Modified, and Reconstructed Stationary Sources:
Electric Utility Generating Units, 80 Fed. Reg. 64,510
(October 23, 2015)

INTRODUCTION AND SUMMARY OF ARGUMENT

The undersigned power companies (hereinafter, “Power Companies”) submit this supplemental brief in response to the Court’s April 28, 2017, order for “supplemental briefs addressing whether these consolidated cases should be remanded to the agency rather than held in abeyance.” Order, *North Dakota v. EPA* (D.C. Cir. Apr. 28, 2017), ECF No. 1673072.

Because the standards of performance for new fossil fuel-fired electric generating units at issue in these consolidated cases are currently in effect and will remain in effect unless and until Respondent Environmental Protection Agency (“EPA”) completes a rulemaking to suspend, revise or rescind them, the Power Companies express no preference between remanding these consolidated cases to EPA and holding them in abeyance.

ARGUMENT

The Power Companies have supported EPA’s promulgation of the Standards of Performance for Greenhouse Gas Emissions From New, Modified and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (“Rule”)

because, by establishing the first-ever federal carbon dioxide emission standards for new, modified and reconstructed fossil fuel-fired generating sources, the Rule assures that decisions to modernize the nation's fossil fleet meet federal minimum standards.

As described by Respondent EPA in its motion for abeyance of these cases, on March 28, 2017, the President signed an executive order that directs the Administrator of EPA to, *inter alia*, “immediately take all steps necessary” to review the Rule for consistency with certain policies and further instructs the Administrator, “if appropriate [and] as soon as practicable . . . [to] publish for notice and comment proposed rules suspending, revising, or rescinding” the Rule. *See* Notice of Executive Order, EPA Review of Rule and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance at 5, *North Dakota v. EPA*, No. 15-1381 (D.C. Cir. Mar. 28, 2017), ECF No. 1668276. Pursuant to that order, EPA “announce[d] that it is reviewing and, if appropriate, will initiate proceedings to suspend, revise or rescind the [Rule].” Review of the Standards of Performance for Greenhouse Gas Emissions From New, Modified,

and Reconstructed Stationary Sources: Electric Generating Units, Announcement of Review, 82 Fed. Reg. 16,330 (Apr. 4, 2017).

Unlike in the companion case concerning the corresponding standards for existing sources, *West Virginia v. EPA*, No. 15-1363, where the rule at issue is subject to a highly unusual stay imposed by the Supreme Court before any decision on the merits,¹ no stay has been sought or imposed in these consolidated cases. Accordingly, the Rule remains in effect and will remain so unless and until Respondent EPA completes its review and any subsequent rulemaking to suspend, revise or rescind the Rule. As a consequence, any fossil fuel-fired electricity generating unit that commenced construction after January 8, 2014, or is modified or reconstructed after June 18, 2014, must meet minimum federal standards of performance for its emissions of carbon dioxide. *See* 40 C.F.R. § 60.5508; *id.* § 60.5509.

Regardless whether these cases are held in abeyance or remanded to EPA, the Rule will continue to apply to any affected unit that is constructed, reconstructed or modified during EPA's

¹ *See* Order, *West Virginia v. EPA*, No. 15A773 (S. Ct. Feb. 9, 2016).

review of the Rule and any subsequent rulemaking. In light of this, the Power Companies express no preference between abeyance and remand of these cases and believe either would be appropriate, assuming the Court decides not to proceed with consideration of these cases and Respondent EPA adheres to the requirements of the Administrative Procedure Act and Clean Air Act during any forthcoming rulemaking proceedings to suspend, revise or rescind the Rule.

CONCLUSION

In the event the Court does not proceed with consideration of these cases at this time, the Power Companies express no preference between remanding them to EPA or holding them in abeyance.

Dated: May 15, 2017

Respectfully submitted,

/s/ Kevin Poloncarz

Kevin Poloncarz

Counsel of Record

Donald L. Ristow

David Woodsmall

Paul Hastings LLP

101 California St. Forty-Eighth Floor

San Francisco, CA 94111

(415) 856-7000

kevinpoloncarz@paulhastings.com

Counsel for Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company and Sacramento Municipal Utility District

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, I hereby certify that the foregoing Supplemental Brief of Intervenors Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company and Sacramento Municipal Utility District contains 628 words as counted by the word-processing system used to prepare this brief and therefore complies with the limitation imposed by the Court in its April 28, 2017 Order (ECF No. 1673072).

/s/ Kevin Poloncarz

Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via U.S. Mail on counsel for the following parties at the following addresses:

Janice M. Alward
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

Randy E. Brogdon
Troutman Sanders LLP
600 Peachtree Street, NE
5200 Bank of America Plaza
Atlanta, GA 30308-2216
Counsel for Petitioner Southern Power Company

Kelvin Allen Brooks
Office of the Attorney General, State of New Hampshire
33 Capitol Street
Concord, NH 03301-6397
Counsel for Intervenor State of New Hampshire

William F. Cooper
State of Hawaii Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
Counsel for Intervenor State of Hawai'i

Tannis Fox
Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Counsel for Intervenor State of New Mexico

Karen R. Harned
National Federation of Independent Business
1201 F Street, NW
Suite 200
Washington, DC 20004
Counsel for Petitioner National Federation of Independent Business

Karl. A. Racine
Office of the Attorney General, District of Columbia
Office of the Solicitor General
441 4th Street, NW
One Judiciary Square, Sixth Floor
Washington, DC 20001-2714
Counsel for Intervenor District of Columbia

William H. Sorrell
Office of the Attorney General, State of Vermont
109 State Street
Montpelier, VT 05609-1001
Counsel for Intervenor State of Vermont

Ben H. Stone
Balch & Bingham LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Counsel for Petitioner Mississippi Power Company

Luther J. Strange, III
Office of the Attorney General, State of Alabama
501 Washington Avenue
Montgomery, AL 36130
Counsel for Petitioner State of Alabama

Laurence H. Tribe
Harvard Law School
Griswold 307
1563 Massachusetts Avenue
Cambridge, MA 02138
Counsel for Petitioner Peabody Energy Corporation

Thiruvendran Vignarajah
Office of the Attorney General, State of Maryland
200 St. Paul Place
20th Floor
Baltimore, MD 21202-2021
Counsel for Intervenor State of Maryland

Janet F. Wagner
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2927
Counsel for Petitioner Arizona Corporation Commission

/s/ Kevin Poloncarz
Kevin Poloncarz