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

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

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)
STATE OF NORTH DAKOTA, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 17-1014 (and consolidated cases)

RESPONDENT-INTERVENOR ENVIRONMENTAL AND PUBLIC HEALTH ORGANIZATIONS' OPPOSITION TO MOTION TO SEVER AND CONSOLIDATE

Nearly a year and a half ago, the Environmental Protection Agency ("EPA") promulgated a final rule (the "Clean Power Plan" or "Plan") under the Clean Air Act to address the largest sources of carbon dioxide emissions that are driving

dangerous climate change. This Court granted expedited consideration to the petitions for review of the Clean Power Plan, heard from hundreds of parties and amici, and held a nearly seven hour *en banc* oral argument over five months ago. Now, after full briefing and argument, and after months of judicial deliberation, a few of the challengers ask the Court for an extended delay to bring before the *en banc* panel run-of-the-mill issues raised in a separate case challenging a separate EPA decision to deny their administrative reconsideration petitions.

This Court should reject this extremely inefficient proposal. The *en banc* court should decide the case that has been briefed and argued, including all issues properly brought in the petitions for review of the Plan. As the Court has routinely done, it should consider the challenges to EPA's decision regarding administrative reconsideration separately, and may wish to assign that case to a three-judge panel.

BACKGROUND

Immediately after EPA finalized the Clean Power Plan, petitioners filed legal challenges to, and requests for a judicial stay of, the Plan in *West Virginia v. EPA*, Nos. 15-1363, *et al.* (D.C. Cir.) (the "main case"). Various parties also filed petitions for administrative reconsideration with EPA. A panel of this Court unanimously denied the stay requests, and, notwithstanding the pending administrative reconsideration petitions, established an expedited briefing schedule. Order, No. 15-1363, ECF No. 1594951 (D.C. Cir. Jan. 16, 2016).

After the Supreme Court stayed the Plan, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016), this Court continued to hear the main case on an expedited basis. More than 200 parties and hundreds of amici briefed the case throughout the Spring of 2016. The case was argued for a full day before the *en banc* Court on September 27, 2016.

In January 2017, nearly four months after oral argument, EPA denied almost all of the administrative reconsideration petitions. 82 Fed. Reg. 4864 (Jan. 17, 2017). EPA explained that the petitions did not meet the Clean Air Act requirements for granting reconsideration because the petitioners had "adequate notice" of the relevant issues during the comment period on the Plan, and because they had failed to bring forth "new information or objections of central relevance" to the Plan. Basis for Denial at 4, Doc. ID EPA-HQ-OAR-2013-0602-37338 (Jan. 11, 2017). Shortly thereafter, a subset of the petitioners in the main case filed thirteen petitions for review of EPA's denial of the reconsideration petitions. *North Dakota v. EPA*, Nos. 17-1014, *et al.* (D.C. Cir.) (the "reconsideration case").

On February 24, 2017, four reconsideration petitioners (Utility Air Regulatory Group, American Public Power Association, LG&E, and KU Energy LLC (collectively, the "UARG Movants")), asked this Court to sever their two petitions for review in the reconsideration case and consolidate them with the main case for supplemental briefing. *See* Joint Mot. to Sever & Consol., No. 15-1363,

ECF No. 1663046 (D.C. Cir. Feb. 24, 2017). None of the parties to the eleven other petitions for review in the reconsideration case have sought such relief.

ARGUMENT

I. The Court Should Consider the Reconsideration Case Separately from the Main Case, as It Routinely Does.

The challenges in the main case and the reconsideration case are distinct: they challenge different agency actions and are governed by different requirements. In the main case, petitioners may challenge the Clean Power Plan directly, but may not bring claims that are subject to the statutory bar in 42 U.S.C. § 7607(d)(7)(B), which limits judicial review of a rule to objections raised during the public comment period. *See Portland Cement Ass'n. v. EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011). By contrast, in the reconsideration case, petitioners may bring certain claims subject to the statutory bar, but "cannot challenge the rule directly," and may instead seek "review of the Administrator's refusal" to grant reconsideration. *Id.*; *see* 42 U.S.C. § 7607(d)(7)(B) ("If the Administrator refuses to convene [a reconsideration] proceeding, such person may seek review of *such refusal*….") (emphasis added). Depending on factors such as the stage the litigation in the main case has reached, the timing of EPA's resolution of the reconsideration petitions, judicial economy, and prejudice to the parties, this Court sometimes considers direct petitions for review of a Clean Air Act rule and petitions for review of EPA's administrative reconsideration decision separately

and sometimes consolidates them for briefing and argument. Either way, the separate petitions for review are distinct, as is the relief granted respecting the issues raised in each. *See Portland Cement Ass'n*, 665 F.3d at 189, 194.

The relief requested here—halting the Court's consideration months *after* oral argument to consolidate separate reconsideration challenges—appears to be unprecedented. We have found no case in which this Court, after setting a case for expedited adjudication, has reversed course after oral argument to take additional briefing on reconsideration claims, let alone only those of a small subset of challengers. The effect would be to delay the Court's resolution of the many issues properly presented and thoroughly briefed and argued before the *en banc* court.

Keeping the merits case and reconsideration case on separate tracks is consistent with section 7607(d)(7)(B) and past practice, and avoids delay in giving effect to the Clean Power Plan. The Clean Air Act delineates what issues may be decided in each case: In the main case argued last fall, the Court can adjudicate all claims that it determines were properly brought in that case—*i.e.*, those not subject to the judicial review bar in section 7607(d)(7)(B). Objections that could not have been raised during the comment period and that meet the other requirements of section 7607(d)(7)(B) can be heard in the reconsideration case.

This Court frequently keeps challenges to Clean Air Act rules and those to the EPA's actions regarding reconsideration on separate review tracks. Doing so is

routine when the main case is at an advanced stage of litigation. For example, in *U.S. Sugar Corp. v. EPA*, the parties briefed the main case while EPA underwent administrative reconsideration. *See* 80 Fed. Reg. 3090 (Jan. 21, 2015) (granting reconsideration on three issues); Nos. 11-1108 *et al*. (D.C. Cir. Feb. 11, 2015) (final briefs filed). EPA took final action on the reconsideration petitions, 80 Fed. Reg. 72790 (D.C. Cir. Nov. 20, 2015), shortly before the December 3, 2015, oral argument in the main case. The Court decided the case on July 29, 2016, *see* No. 11-1108 (D.C. Cir.), keeping the reconsideration case on a separate track, *see Sierra Club v. EPA*, No. 16-1021 (D.C. Cir.).

Likewise, in *Delaware Department of Natural Resources v. EPA*, the agency granted administrative reconsideration of three issues, and the Court severed those issues from the main case. *See* Order, No. 13-1093 (D.C. Cir. Aug. 2, 2013). Briefing on the other issues took place during the winter and spring of 2014. EPA took final action on reconsideration, declining to make any changes to the rule, in August 2014. 79 Fed. Reg. 48072 (Aug. 15, 2014). The Court heard oral argument in the main case on September 26, 2014, and decided the case on May 1, 2015. No. 13-1093 (D.C. Cir.). Meanwhile, the reconsideration case proceeded on a separate track. *Conservation Law Found. v. EPA*, No. 13-1233 (D.C. Cir.) (separate challenge to reconsideration decision). *See also, e.g.*, *EME Homer City Generation. 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); *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 743 (D.C. Cir. 2014) (same).

The UARG Movants point to *North Dakota v. EPA*, No. 15-1381 (D.C. Cir.)—the challenge to EPA's carbon pollution standards for new power plants—as an example of what they assert is the Court's "routine[]" practice. Mot. at 5-6. Yet there are crucial differences between the procedural posture of that case and the one at issue here. No party in *North Dakota* sought expedited consideration of the petitions for review of the underlying rule. Rather, with the assent of all parties, the Court consolidated the merits and reconsideration challenges *before* briefing had even begun. Order, No. 15-1381 (D.C. Cir. July 19, 2016) (consolidating merits and reconsideration cases); No. 15-1381 (D.C. Cir. Oct. 13, 2016) (opening brief filed).[1] Moreover, because there was no stay of the rule under review in that case, consolidation did not delay the effectiveness of the rule. Here, because of the stay, respondent-intervenors are prejudiced by any delay, as this Court's policies recognize. D.C. Circuit Handbook of Practice and Internal Procedures at 34 (recognizing that expedition may be important "to minimize

[1] Likewise, in *Portland Cement Association*, discussed above, this Court consolidated the reconsideration case with the main case *before* the conclusion of briefing and on a schedule that would not necessitate delaying the argument. No. 10-1358 (July 25, 2011) (granting motion to sever and consolidate, and for supplemental briefs and maintaining the preexisting oral argument date).

possible harm" where a stay is issued). Indeed, the Clean Air Act directs that the filing and consideration of administrative petitions for reconsideration "shall not postpone the effectiveness of the rule," 42 U.S.C. § 7607(d)(7)(B), but that is precisely what the UARG Movants' proposal would do here.[2]

II. The UARG Movants' Proposal Is Extraordinarily Inefficient.

It would not serve judicial economy for the *en banc* court to receive supplemental briefing on the reconsideration issues. The issues that formed the vast majority of briefing and argument in the main case relate to what the *West Virginia* petitioners themselves assured the Court were foundational, novel, and threshold issues of statutory interpretation and constitutional law. *See* Petitioners' Joint Mot. to Establish Briefing Format & Expedited Briefing Schedule, No. 15-1363, ECF No. 1587531, at 3-4 (D.C. Cir. Dec. 8, 2015) (The "foundational legal

[2] The UARG Movants make the unsupported claim that the Supreme Court stay extends until after this Court "addresses and resolves *all* of the 'applicants' petitions for review' of the Rule that *might be filed*, including as-applied challenges to the Rule and post-comment period objections…." Mot. at 6 (emphasis added). While the Supreme Court will ultimately determine the bounds of its stay, the UARG Movants mischaracterize the plain language of the stay orders. The Supreme Court had before it only the petitions for review in the main case, and directed a stay pending resolution of *those* petitions ("applicants' petitions for review"), not *any* petition challenging agency actions related to the Clean Power Plan that might be filed in the future. Indeed, in granting North Dakota's solo stay application, the Court used the singular "*petition* for review," making clear that the stay governs *that* petition. Order, *North Dakota v. EPA*, No. 15A793 (Feb. 9, 2016) (emphasis added). It is unlikely the Court had jurisdiction to enter a stay that is broader than the petitions actually before it. *See* 5 U.S.C. § 705 (court may enter stay "pending conclusion of the review proceedings").

issues related to whether EPA has authority under the Clean Air Act … to issue the Rule, and even if it does, whether Section 111(d) … authorizes a rule like *this* rule," are "central to the legal validity of the Rule.").

In contrast, the notice-and-comment, as-applied, and related record issues the UARG Movants raise in their petitions for review of the administrative reconsideration denials are run-of-the-mill administrative law challenges. Accordingly, the Court may wish to assign them to a three-judge panel for review, which would be more expeditious and less resource-intensive than *en banc* review.

Not only do the UARG Movants ask this Court to interrupt its deliberations at an exceedingly late juncture, they ask the Court to do so in an extraordinarily inefficient manner. The UARG Movants make up only a small fraction of the petitioners in the reconsideration case, yet seek to sever and consolidate *only* their two petitions for review in the reconsideration case, despite the fact that other petitioners in the reconsideration case raised the same or similar issues in their administrative reconsideration petitions. *Compare*, *e.g.*, UARG's Renewed Statement of Issues Item 2, No. 15-1370, ECF No. 1663048 (D.C. Cir. Feb. 24, 2017) (attacking EPA's approach to calculating Building Block 3) *with*, *e.g.*, State of West Virginia's Petition for Reconsid. at 2, Doc. ID EPA-HQ-OAR-2013-0602-

37197 (Dec. 22, 2015) (same) and Southern Company's Petition for Reconsid. at 15-18, Doc. ID EPA-HQ-OAR-2013-0602-37233 (Dec. 22, 2015) (same).[3]

Moreover, LG&E and KU Energy LLC's "renewed" statement of issues requests that their challenges to aspects of the Clean Power Plan be severed *only* as applied to their facilities in Kentucky. *See* LG&E and KU Energy LLC Statement of Issues Items 1-3, No. 15-1418, ECF No. 1663049 (D.C. Cir. Feb. 24, 2017). Accordingly, were the Court to grant the UARG Movants' motion and consider their issues *en banc*, other petitioners may seek to raise the same or similar issues in the reconsideration case, inviting highly inefficient duplicative proceedings.

By keeping the main and reconsideration cases separate, the Court can expeditiously resolve all the issues properly before the *en banc* court, including the threshold legal issues that were the core subject of the massive and resource-intensive *en banc* review process. The *en banc* court can decline to decide any issues that, under section 7607(d)(7)(B), were not properly brought in the main case, *see Portland Cement Ass'n*, 665 F.3d at 185. The Court can resolve those issues, which are logically and legally distinct, in the proper forum—the challenge to EPA's denial of reconsideration, *see id.* at 185-86, 189, 194.

CONCLUSION

This Court should deny the UARG Movants' motion.

[3] Every issue in UARG Movants' "renewed" statements of issues was also raised in at least one non-moving petitioner's administrative reconsideration petition.

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CERTIFICATE OF SERVICE

I certify that on March 2, 2017, I filed the foregoing response by means of the Court's CM/ECF system, which will serve electronic copies upon all registered counsel.

/s/ *Sean H. Donahue*