

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,	)	No. 15-1381 (and
	)	consolidated cases)
v.	)	
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
_____	)	

**RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO  
SUSPEND BRIEFING SCHEDULE AND CROSS-MOTION TO  
ESTABLISH MODIFIED BRIEFING SCHEDULE**

Petitioners and Petitioner-Intervenors (collectively, "Petitioners") moved on May 24, 2016, to suspend the briefing schedule previously established in this case for at least two and a half months, to allow for the consolidation of new anticipated petitions for review that will challenge a related action of the United States Environmental Protection Agency ("EPA"). ECF No. 1614749. EPA and Respondent-Intervenors (collectively "Respondents") do not agree that a suspension of briefing is necessary to accomplish the stated purpose of consolidation and, therefore, oppose Petitioners' motion. Respondents request, instead, that the Court simply modify the schedule in a manner that will reasonably accommodate consolidation as well as the need for the parties' briefs to address any new issues that

may arise from the new petitions. Respondents have identified the schedule modification they propose for these purposes in Paragraph 15 *infra*. The grounds for Respondents' opposition and cross-motion are further stated below:

## **BACKGROUND**

### **A. Current Petitions for Review, Related Litigation, and Anticipated New Petitions**

1. The current consolidated petitions on file with the Court seek review of EPA's "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule" ("the 111(b) Rule"). 80 Fed. Reg. 64,510 (Oct. 23, 2015). The 111(b) Rule secures CO<sub>2</sub> emission reductions from new, modified, and reconstructed fossil-fuel-fired power plants by establishing standards of performance for two subcategories of plants: fossil fuel-fired electric utility steam generating units (chiefly utility boilers) and stationary combustion turbines (chiefly natural gas-fired units). See generally id.

2. Fifteen petitions for review of the 111(b) Rule, filed by state governmental entities, companies, trade organizations and labor groups, have been consolidated under lead case No. 15-1381.<sup>1</sup> A number of states and other governmental entities, industrial entities, and environmental groups have intervened as Respondents in support of EPA. See ECF No. 1600183 ¶ 9 (Respondents' Proposed

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<sup>1</sup> A sixteenth petition, filed by Biogenic CO<sub>2</sub> Coalition (No. 15-1480), was severed and held in abeyance pending further order of the Court. ECF No. 1605581 (Order dated March 24, 2016).

Briefing Format and Schedule filed Feb. 22, 2016, describing more fully the entities that have intervened as Respondents).

3. A separate but related rule commonly known as the “Clean Power Plan,” which was promulgated on the same date as the 111(b) Rule, establishes emission guidelines for states to follow in developing plans to limit CO<sub>2</sub> emissions from existing fossil fuel-fired power plants. 80 Fed. Reg. 64,662 (Oct. 23, 2015); see generally 42 U.S.C. § 7411(d). Although the litigation challenging these two rules has not been consolidated into one action, the rules themselves are clearly related; indeed, the statute requires the establishment of standards for existing sources “to which a standard of performance under this section [111] would apply if such existing source were a new source.” 42 U.S.C. § 7411(d)(1). Petitions challenging the Clean Power Plan are consolidated under West Virginia v. EPA, No. 15-1363.

4. On May 6, 2016, EPA published a new final action denying five administrative petitions for reconsideration of the 111(b) Rule. See “Reconsideration of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Notice of final action denying petitions for reconsideration,” 81 Fed. Reg. 27,442 (the “Reconsideration Denial”). The deadline under the Clean Air Act to file judicial petitions for review of this final action is July 5, 2016. See 42 U.S.C. § 7607(b)(1).

5. At least three of the five entities whose administrative reconsideration petitions were denied by EPA are expected to file judicial petitions for review—the

State of Wisconsin, the Energy & Environmental Legal Institute, and the Utility Air Regulatory Group. See Petitioners' Motion to Suspend Briefing Schedule ¶ 3. All three are already current Petitioners in the 111(b) Rule case. Id.; see Petitions Nos. 15-1399, 15-1397, and 15-1448. The remaining two entities whose administrative reconsideration petitions were denied by EPA are American Electric Power and Ameren Corporation, and at least one of them is a member of a current Petitioner (specifically, the American Coalition for Clean Coal Electricity, No. 15-1481).<sup>2</sup>

### **B. Current Litigation Schedules for Clean Power Plan and 111(b) Rule**

6. In West Virginia, the Court ordered an expedited schedule for briefing the challenges to the Clean Power Plan, pursuant to which the parties submitted their final briefs on April 22, 2016. ECF No. 1595922. After originally scheduling oral argument in that case to be held before a three-judge panel on June 2, 2016, the Court issued an order on May 16, 2016, cancelling that argument and scheduling an *en banc* argument to be held September 27, 2016. ECF No. 1613489.

7. Although the Court has not ordered expedited briefing for the 111(b) Rule as it did for the Clean Power Plan, both Petitioners and Respondents have long made clear their interest in resolving challenges to the 111(b) Rule as promptly as is feasible without having to simultaneously prepare briefs or argument in both cases,

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<sup>2</sup> See <http://www.americaspower.org/about-accce/bios/members/> (reviewed online on June 3, 2016).

given the extensive overlap of the parties in the two cases and the burden that simultaneous briefing or argument in the two cases would entail. See, e.g., ECF No. 1593420 ¶ 2 (Reply of North Dakota and Energy & Environment Legal Inst. to Response to Motion to Extend Time to File Briefing Schedule, noting that “petitioners in both cases desire expeditious proceedings, [b]ut have devoted their finite resources first to *West Virginia et al*”); ECF No. 1600183 ¶ 16 (Respondents’ Proposed Briefing Schedule and Format).

8. The scheduling order currently governing the 111(b) Rule case was entered on March 24, 2016. ECF No. 1605581. Under that order, Petitioners’ opening briefs are due July 15, 2016, approximately six weeks after the June 2 date when the parties until recently were preparing to present oral argument regarding the Clean Power Plan. EPA’s and Respondent-Intervenors’ briefs in the 111(b) Rule case are currently due on September 23 and 30, respectively, with replies to be filed on October 21 and final briefs on November 14, 2016. Id.

## ARGUMENT

### **A. Respondents Do Not Oppose Consolidation, But Oppose Suspending the Schedule Because That Will Cause Needless Delay.**

9. Petitioners’ new procedural motion in the 111(b) Rule case asks that the Court: (a) suspend the current schedule; (b) require that a motion to consolidate petitions challenging the Reconsideration Denial with the current case be filed by July

12, 2016; and (c) further require that a motion to amend the briefing schedule be filed by August 4, 2016. Petitioners' Motion to Suspend Schedule ¶¶ 5-7.

10. Respondents support consolidation in the particular circumstances of this case, and agree that the parties should be able to brief and argue at one time the merits of all issues raised by the 111(b) Rule and the related Reconsideration Denial. Id. ¶ 4. However, such consolidation should not come at the expense of unnecessarily delaying the final resolution of these issues. This is particularly the case given the relationship between the 111(b) Rule and the Clean Power Plan.<sup>3</sup> The Court has expressly adopted measures to expedite its resolution of the challenges to the latter rule; an extended delay of the 111(b) Rule litigation should therefore be avoided to prevent lingering uncertainty regarding the judicial resolution of the challenges to *both* rules.

11. The Court can consolidate the 111(b) Rule case with the anticipated Reconsideration Denial challenges, while also preventing or at least minimizing delay of the current schedule, by entering a modified briefing schedule *now*. Petitioners suggest that waiting until August to consider a proposed schedule modification “will allow any new petitioners to the case to be known and to be consulted.” Petitioners’

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<sup>3</sup> See 42 USC § 7411 (d)(1)(A)(ii) (section 111 (d) applies to existing sources “to which a standard of performance under this section would apply if such existing source were a new source”); 80 Fed. Reg. 64,710 (Oct. 23, 2015) (“section 111 (d) applies only to air pollutants for which the existing source would be regulated under section 111 if it were a new source”).

Motion to Suspend Briefing Schedule ¶ 7. Such reasoning made sense at the outset of this litigation, when a few early petitions of the 111(b) Rule had been filed and a large number of additional entities were expected to potentially seek review of the rule.<sup>4</sup> It does not make sense now because, as shown above, at least four of the five entities who are likely to challenge the Reconsideration Denial *already* are parties in the 111(b) Rule case, and the identity of the remaining entity, Ameren Corporation, is known.

Supra ¶ 5.

12. Moreover, Petitioners acknowledge that when they finally submit their anticipated briefing schedule modification in August, they envision merely “a uniform shifting of the deadlines by a fixed number of days” and “proposing appropriate additions to the word allocations for the briefs to accommodate the new issues arising from the Reconsideration Denial,” with no other change needed to the existing briefing format. Petitioners’ Motion to Suspend Briefing Schedule ¶ 7.

As discussed further below, EPA’s proposal would establish the envisioned shift of the briefing deadlines *now*, in a fashion that will not prejudice the current Petitioners or Ameren, while allowing the parties an opportunity prior to the opening brief deadline to seek additions to the word allocations if necessary.

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<sup>4</sup> See ECF No. 1585345 (Respondent EPA’s Motion to Extend Time for Establishing a Briefing Schedule, filed Nov. 24, 2015). At the time of this motion, four petitions for review of the 111(b) Rule had been filed, and many more were expected, with the identity of the additional filers impossible to ascertain. Id. ¶¶ 2, 5. Ultimately, a total of sixteen petitions were filed, including one that was later severed from the rest and held in abeyance. Supra ¶ 2 & n.1.

13. Finally, modifying the schedule now rather than waiting until August to propose an unspecified “uniform shifting of the deadlines” will enable the parties to prevent needless inconvenience by setting filing deadlines on dates that will avoid schedule and staff disruptions in periods overlapping with major holidays. A sixty-day shift of the current filing deadlines, for example, would make EPA’s brief due Tuesday, November 22, 2016—two days before Thanksgiving—while the joint appendix would become due Tuesday, January 3, 2017. See ECF No. 1605581 at 2-3. Respondents’ proposal, which is set forth in Paragraph 15 below, avoids such problems.

14. Because consolidation may be accomplished without the additional delay and other potential complications that would result from Petitioners’ suggested approach, Respondents oppose Petitioners’ request to suspend the briefing schedule.

**B. Respondents’ Proposed Modification of the Schedule Reasonably Accommodates Consolidation and May Be Adopted Now.**

15. In order to allow time for consolidation of Reconsideration Denial challenges with the current 111(b) Rule case, and to brief any additional issues arising from such challenges, Respondents propose that the following new or revised deadlines be adopted as a modification to the March 24, 2016 briefing schedule order:

- Motion to consolidate petitions to be filed no later than Tuesday, July 12, 2016;



- EPA to file the certified index to the administrative record for the Reconsideration Denial within five business days after the first petition for judicial review of that action is filed, and no later than July 12, 2016;
- Motion/s to modify the current word allocations to be filed no later than July 12, 2016, with responses due by Friday, July 15, 2016;
- Petitioners' opening briefs and Petitioner-Intervenor's brief due Friday, August 12, 2016;
- EPA's brief due Friday, October 7, 2016;
- Respondent-Intervenors' briefs due Wednesday, October 12, 2016;
- Petitioners' reply briefs due Wednesday, November 2, 2016;
- Joint appendix due Wednesday, November 9, 2016; and
- Final briefs due Monday, November 14, 2016.

16. EPA's schedule will not cause any prejudice to Petitioners or to Ameren Corporation if that entity elects to seek review of the Reconsideration Denial. EPA proposes the same deadline for a consolidation motion that Petitioners have suggested; and it proposes to give Petitioners until August 12, 2016, to file their opening briefs—effectively, a four-week extension of the current opening brief deadline. EPA posted its denial of the reconsideration petitions and the key

document explaining its decision on May 2, 2016.<sup>5</sup> In addition, all documents relating to the Reconsideration Denial were docketed and publically available from the date of promulgation of the denial, as required by the Clean Air Act. See 42 USC § 7607(d)(4)(B)(ii). Consequently, petitioners will have had access to all of the documents comprising EPA's administrative record for the Reconsideration Denial for more than three months by the date Respondents propose that their opening briefs be due (i.e., August 12).

17. Under Respondents' proposal, Petitioners also will have at least four weeks after EPA files the certified index to the record for the Reconsideration Denial to complete preparation of their briefs. Although 40 days is the standard interval for filing opening briefs after the certified index is submitted, Fed. R. App. P. 31(a), the record for the Reconsideration Denial adds only a relatively small number of documents to the original record for the 111(b) Rule, and, as noted above, Petitioners have had access to all of those documents since early May. Accordingly, four weeks is a reasonable period by which to submit briefs taking these additional record documents into account. Moreover, the certified index for the original record will have been on file for some eight months by the time EPA proposes that opening

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<sup>5</sup> See [https://www.epa.gov/sites/production/files/2016-04/documents/111b\\_recondocument\\_april2016.pdf](https://www.epa.gov/sites/production/files/2016-04/documents/111b_recondocument_april2016.pdf).

briefs be due, far longer than in a typical petition case. See ECF No. 1588089 (EPA's Notice of Filing of Certified Index, submitted Dec. 14, 2015).

18. Respondents also propose that Petitioners retain the same filing interval they have now for their reply briefs—i.e., such briefs would be 21 days after the Respondent-Intervenors' briefs. Compare supra ¶ 15 with ECF No. 1605581 at 2 (March 24, 2016 scheduling order).

19. Moreover, Respondents' proposal allows Petitioners to avoid any overlap of their obligation to prepare briefs in the 111(b) Rule case with their presentation of oral argument concerning the Clean Power Plan, as Respondents' proposed deadline for Petitioners' opening briefs (August 12, 2016) is nearly seven weeks prior to the oral argument (September 27, 2016), while the proposed reply date is five weeks afterward. Respondents' proposal thus meets Petitioners' stated preference to avoid substantial overlap in their litigation deadlines in the two cases. See supra ¶ 7.

20. Respondents further propose that any motions to modify word allocation be due by July 12, 2016, and that responses be filed within three business days—by Friday, July 15, 2016—to facilitate the Court's entry of a final word allocation order reasonably well in advance of when the opening briefs would be due.

21. The only changes Respondents propose to the existing schedule that would modestly shorten any filing dates involving Petitioners are as follows: (a) Respondents propose that the joint appendix be submitted seven days after the reply

briefs, rather than fourteen; and (b) Respondents propose that final briefs be submitted five days after the joint appendix, rather than ten. Compare supra ¶ 15 with ECF No. 1605581 at 2-3. These intervals, though shortened, are still consistent with schedules the Court routinely orders in other petition cases, and are more generous than the comparable filing intervals that the Court ordered in the Clean Power Plan case. See ECF No. 1595922 at 2 (January 28, 2016 scheduling order in West Virginia, allowing three days to submit the joint appendix and four to submit final briefs).

22. Respondents' proposal avoids any delay in the filing of final briefs, which currently are due on November 14, 2016 and would remain so under this proposal. Compare supra ¶ 15 with ECF No. 1605581 at 3. Respondents propose to achieve this result primarily by shortening the filing interval for EPA's brief from 70 days to 49, and by shortening the filing interval for Respondent-Intervenors' briefs from seven days after EPA's brief to five. Compare supra ¶ 15 with ECF No. 1605581 at 2. All of the signatories to this Opposition and Cross-Motion agree that any inconvenience to Respondents occasioned by this alteration of their briefing interval intervals is reasonable and acceptable given the public interest in avoiding a delay of the final resolution of this case.

## CONCLUSION

23. For the foregoing reasons, the undersigned Respondents respectfully request that the Court deny Petitioners' Motion to Suspend Briefing Schedule and instead enter an order adopting the modified schedule described in Paragraph 15 above.

Respectfully submitted,

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June 6, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Respondents' Opposition to Petitioners' Motion to Suspend Briefing Schedule and Cross-Motion to Establish Modified Briefing Schedule has been served through the Court's CM/ECF system on all registered counsel this 6th day of June 2016. I further certify that an additional copy was sent by electronic mail on the same date to the following counsel for

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