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*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents*.	No. 15-1381 (and consolidated cases)

PETITIONERS AND PETITIONER-INTERVENORS' REPLY IN SUPPORT OF MOTION TO SUSPEND BRIEFING SCHEDULE AND IN OPPOSITION TO CROSS-MOTION TO ESTABLISH MODIFIED BRIEFING SCHEDULE

Respondents EPA *et al.* and Respondent-Intervenors (collectively, "Respondents") have filed: (1) an opposition to Petitioners and Petitioner-Intervenors' (collectively, "Petitioners") motion to suspend the briefing schedule, and (2) a cross-motion to establish a modified briefing schedule. Respondents' Opposition to Petitioners' Motion To Suspend Briefing Schedule and Cross-Motion To Establish Modified Briefing Schedule, ECF No. 1617195 ("Resp. Opp."). Both Petitioners and Respondents agree the existing briefing schedule should be set aside in light of EPA's recent denial of administrative petitions to reconsider the EPA rule establishing new source performance standards for new, modified, and reconstructed

electric generating units under section 111(b) of the Clean Air Act (the "Rule"). Both further agree that petitions for review of the denial of the administrative petitions for reconsideration should be consolidated with the present petitions for review of the underlying Rule. The parties disagree about whether a new briefing schedule should be set *now*, before all parties have filed their challenges to the reconsideration denial (Respondents' view), or whether the schedule should be set in early August so that new parties to the newly consolidated case can participate in formulation of the briefing schedule that will bind them (Petitioners' view).

Because Respondents' proposal would unfairly prejudice as-yet-unknown parties that may challenge the reconsideration denial, Petitioners oppose Respondents' cross-motion to establish a modified briefing schedule. Moreover, because no party sought a stay of the Rule and the Rule remains in effect, Respondents will not be harmed by waiting a few additional weeks so that *all* parties may have input on a new proposed briefing schedule.

In further support of their motion to suspend briefing and in opposition to the cross-motion to establish a modified briefing schedule, Petitioners state the following:

1. Petitioners and Respondents agree that petitions for review of EPA's denial of the reconsideration petitions should be consolidated with these cases so that all issues related to the validity of the Rule can be briefed and argued at the same time. Resp. Opp. ¶ 10; Petitioners and Petitioner-Intervenors' Motion To Suspend Briefing Schedule, ECF No. 1614749, ¶¶ 4, 5, 6 ("Pet. Mot.").

2. Respondents mistakenly imply that the only parties that may challenge EPA's refusal to reconsider the Rule are the five entities that filed the administrative reconsideration petitions that EPA denied. Resp. Opp. ¶¶ 5, 11. But nothing in the Clean Air Act restricts the parties who may seek judicial review of petitions for reconsideration to those filing such petitions. *See* 42 U.S.C. § 7607(b). Indeed, entities opposed to the Rule may have decided not to file administrative reconsideration petitions because pending petitions before EPA addressed their concerns. Thus, the fact that an entity did not file a reconsideration petition does not mean that it cannot or will not seek judicial review of the denial of reconsideration. In fact, in Clean Air Act judicial review proceedings like this one, entities that did not file administrative petitions for reconsideration have challenged EPA's denial of reconsideration petitions filed by others. *See, e.g.*, https://www3.epa.gov/climatechange/endangerment/petitions.html (EPA website listing parties that filed petitions for administrative reconsideration of EPA's endangerment finding for greenhouse gas emissions from light-duty vehicles that does not include the Utility Air Regulatory Group); *Utility Air Regulatory Group v. EPA*, No. 10-1320 (D.C. Cir.) (challenge by the Utility Air Regulatory Group to EPA's denial of the endangerment finding reconsideration petitions even though that group did not file an administrative petition for reconsideration).

3. It is irrelevant that three of the five entities that filed the administrative petitions for reconsideration that EPA denied are already parties to this case (and that

one entity is a member of a trade association that is a party to this case). *See* Resp. Opp. ¶ 5. What is relevant is that neither Petitioners nor Respondents know (or can know) whether *other* entities may come forward and challenge the denial of the reconsideration petitions. That information will not be known until July 6, 2016, the day after the period for filing a petition for review expires. 42 U.S.C. § 7607(b)(1). In addition, it is unknown whether any entities will intervene in such proceedings, either on behalf of the reconsideration petitioners or on behalf of EPA. The identity of any new intervenors may not be known until August 4, 2016. *See* Fed. R. App. P. 15(d) (providing 30 days to file a motion to intervene after the related petition for review is filed). Moreover, as Respondents acknowledge, two of the entities that filed reconsideration petitions (Ameren and AEP) are *not* parties to this case.[1] Any new parties to this case should be given the same opportunity other parties have had to provide the Court with information that may be relevant to the briefing schedule. Thus, Respondents have already identified at least two entities that may file petitions

[1] Respondents note that AEP is a member of the trade association American Coalition for Clean Coal Electricity ("ACCCE"), which is a petitioner here. The fact that AEP is a member of that trade association does not mean that it will not decide to file a petition for review in its own individual capacity. Indeed, the website that Respondents cite listing the members of ACCCE lists several entities that are petitioners in this case in their individual capacity (Murray Energy Corporation, No. 15-1396; Peabody Energy Corporation, No. 15-1438; Southern Company (in these consolidated cases through its operating companies Alabama Power Company, et al.), No. 15-1468; and Tri-State Generation and Transmission Association, Inc., No. 15-1484. Resp. Opp. ¶ 5 n.2 (citing http://www.americaspower.org/about-accce/bios/members/).

for review of the reconsideration denial that, because they are not parties to the present case, have no opportunity to respond to the briefing schedule proposed by Respondents in their cross-motion.

4. Respondents propose that any "motion[] to modify the current word allocations . . . be filed no later than" seven days after the deadline for filing judicial review petitions—July 12, 2016— and that responses to any such motions be filed within three days thereafter. Resp. Opp. ¶ 15. Respondents further propose that Petitioners file their opening briefs on August 12, 2016. *Id.* Even if the Court were to rule on those motions by the very next business day, July 18, 2016, Petitioners would be learning their word allocations less than four weeks before their briefs were due. And if the Court took a week or more to address these motions, Petitioners would have less than three weeks—and possibly only days—to fit their briefs to the ordered word limits. Respondents' proposal is unfair and conflicts with this Court's practice and rules. *See id.* ¶ 17 (noting that "40 days is the standard interval for filing opening briefs after the certified index is submitted").

5. Respondents' proposal also fails to account for the requirement that the petitioners in the reconsideration cases must file initial submissions, including non-binding statements of issues and docketing statements. Petitioners noted that time would be needed for these filings in their motion. Pet. Mot. ¶ 5. This Court typically provides petitioners with 30 days to make these filings. *See, e.g.*, ECF No. 1580614

(providing 30 days for initial submissions); ECF No. 1581375 (same); ECF No. 1582440 (same).

6. The non-binding statements of issues, in particular, are critical because those statements will inform the degree to which additional words may be needed to brief new issues. Respondents' proposed schedule would require that the word allotment motions be filed within one week after the judicial review period expired, which will be *before* non-binding statements of issues are filed, meaning that any requests for additional words would be made in a vacuum. Petitioners, by contrast, propose that the motion addressing any required adjustments to *both* the briefing schedule *and* the word allotments be filed August 4, 2016. Pet. Mot. ¶ 7. This deadline is only 30 days after the deadline for filing petitions for review and will allow time for the reconsideration petitioners, including those presently unknown, to identify the issues that they intend to raise. The August 4, 2016 deadline ensures that the non-binding statements of issues will be filed by, or shortly after, that date, given the Court's typical practice of requesting these statements be filed within 30 days. Waiting until August 4, 2016, ensures that any motions seeking additional words to address new issues raised by the reconsideration petitions will be fully informed, and it also allows the existing and new petitioners to develop a joint proposal on words and schedule.

7. Respondents' proposed approach of bifurcating the Court's consideration of changes to the briefing schedule and its consideration of changes to

the word allocations is unfair and inefficient. Petitioners and Respondents agree that consolidation with these cases of any petitions for review of the denial of the reconsideration petitions is appropriate. Petitioners and Respondents also agree that more time is needed for that consolidated briefing. There is no reason why the briefing schedule needs to be set *now* before all of the parties are in the case, particularly when the parties agree that other aspects of the briefing order (such as the word allocations) will need to be amended *later*.

8. Respondents assert that the only changes they propose to the existing briefing schedule that would prejudice Petitioners are that the time for filing the joint appendix and the final briefs would each be cut in half. Resp. Opp. ¶¶ 15, 21. This is untrue. Respondents also propose cutting the time for Petitioner-Intervenors to file their brief by 10 days. In Respondents' proposal, Petitioner-Intervenors would file at the same time as Petitioners. *Id.* ¶ 15. Under the current briefing order, Petitioner-Intervenors file 10 days after Petitioners. ECF No. 1605581.

9. Respondents assert that their schedule "avoid[s] schedule and staff disruptions in periods overlapping with major holidays." Resp. Opp. ¶ 13. Respondents neglect to consider that the new date on which they propose Petitioners' opening briefs to be due, August 12, occurs at the height of the summer vacation season (long after most summer vacations have been planned and with only a few weeks' notice) and will almost certainly cause significant disruption and inconvenience. Under Petitioners' proposed approach to file a motion to amend the

briefing order later once all the parties have been ascertained, consideration can be given to a schedule that avoids holiday conflicts for *all* parties, known and unknown, including Respondents.

10. Respondents claim that "consolidation should not come at the expense of unnecessarily delaying the final resolution of these issues." *Id.* ¶ 10. Nothing Petitioners have proposed causes unnecessary delay. Petitioners have proposed a schedule that calls for motions to consolidate to be filed within one week of the expiration of the judicial review period and for a motion to modify the briefing order to be filed within 30 days of that expiration date. This can hardly be characterized as unreasonable or unnecessary delay. Indeed, Petitioners view the slight delay as absolutely necessary to afford all parties the same fair and reasonable opportunity to file petitions for review, issues statements, and to coordinate on a proposal that will provide the Court with complete information on which to determine a revised briefing schedule and format. Moreover, the Rule is in effect and has been since the date it was proposed (January 8, 2014). Pet. Mot. ¶ 9. No harm will be suffered by Respondents from suspending the briefing order as Petitioners propose. If anyone is harmed by the delay, it is Petitioners, who remain subject to a Rule they assert is unlawful. Finally, Petitioners are committed to having the new consolidated cases briefed expeditiously. As Petitioners represented in their motion, they will "propose expeditious deadlines for the filing of briefs and the deferred appendix." *Id.* at 5.

WHEREFORE, Petitioners request that the Court grant their motion to suspend the briefing schedule and deny Respondents' cross-motion to establish a modified briefing schedule. Petitioners respectfully ask the Court to issue an order: (1) suspending the briefing schedule in this case; (2) directing Petitioners to file a motion to consolidate the petitions for review of the denial of the petitions for reconsideration with this case no later than July 12, 2016; and (3) directing Petitioners to file a motion to amend the briefing order in this case and the consolidated reconsideration cases no later than August 4, 2016.

Dated: June 14, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2016, the foregoing document was electronically filed with the Clerk of the Court using the Court's CM/ECF system. All registered CM/ECF counsel were electronically served by the Court's CM/ECF system.

/s/ Allison D. Wood
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