

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

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

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NORTH DAKOTA		)	
		)	
Petitioner,		)	
		)	
v.		)	<b>No. 17-1014 and</b>
		)	<b>consolidated cases</b>
		)	
UNITED STATES ENVIRONMENTAL		)	
PROTECTION AGENCY,		)	
		)	
Respondent.		)	
<hr/>		)	
WEST VIRGINIA		)	
		)	
Petitioner,		)	
		)	
v.		)	<b>No. 15-1363 and</b>
		)	<b>consolidated cases</b>
		)	
UNITED STATES ENVIRONMENTAL		)	
PROTECTION AGENCY, <i>et al.</i> ,		)	
		)	
Respondents.		)	
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**REPLY IN SUPPORT OF JOINT MOTION  
TO SEVER AND CONSOLIDATE**

Petitioners Entergy Corporation (“Entergy”), Westar Energy, Inc. (“Westar”), and NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern Corporation”) (together, “Movants”) submit this reply to the

oppositions filed by Respondent-Intervenor Public Health and Environmental Organizations (“Environmental Respondent-Intervenors”), ECF #1670227 (No. 17-1014); ECF #1670225 (No. 15-1363), and Respondent-Intervenor States and Municipalities (“State Respondent-Intervenors”), ECF #1670118 (No. 17-1014); ECF. #1670114 (No. 15-1363), to Movants’ Joint Motion to Sever and Consolidate, ECF #1668921 (No. 17-1014); ECF #1668932 (No. 15-1363). Respondent United States Environmental Protection Agency (“EPA”) does not oppose Movants’ motion.<sup>1</sup>

For the following reasons, Respondent-Intervenors’ arguments lack merit:

1. Respondent-Intervenors do not deny that this Court repeatedly has consolidated petitions for review of an agency’s reconsideration denial with ongoing challenges to the same rule. *See* *Envtl. Resp.-Intvs.’ Mtn.* at 3-4, 9; *State Resp.-Intvs.’ Mtn.* at 6-7. Respondent-Intervenors argue that such consolidation is inappropriate here given the “late phase of the litigation” in the main *West Virginia* cases, *Envtl. Resp.-Intvs.’ Mtn.* at 2; *see also* *State Resp.-Intvs.’ Mtn.* at 5, 7-8, but Respondent-Intervenors cite no authority for the proposition that this Court

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<sup>1</sup> EPA, *Respondents’ Response to Motions to Sever and Consolidate* at 2, No. 17-1014, ECF #1670437 (Apr. 10, 2017); No. 15-1363, ECF #1670438 (Apr. 10, 2017) (“EPA does not object to consolidation of the challenges to the Clean Power Plan [in *West Virginia v. EPA*, No. 15-1363]. . . with the challenges to EPA’s action denying reconsideration petitions” of the Clean Power Plan in *North Dakota v. EPA*, No. 17-1014).

may grant consolidation only at an early phase of the litigation (*e.g.*, before briefing has begun) in the main case. It is within this Court’s authority to grant consolidation even after briefing and oral argument is complete in the main case, especially if doing so would promote judicial economy.<sup>2</sup>

2. Environmental Respondent-Intervenors characterize the issues Movants raise in their challenges to the reconsideration denial as “workaday notice and record-based issues,” while at the same time acknowledging that Movants’ reconsideration denial challenges involve “direct challenges to the Rule.” *Envtl. Resp.-Intvs.’ Mtn.* at 4, 6; *see also* *State Resp.-Intvs.’ Mtn.* at 7 (referring to “record-specific issues” raised in Movants’ reconsideration petitions). Far from being “workaday,” the issues raised in Movants’ reconsideration denial challenges are fundamental to the legality and scope of the Clean Power Plan.<sup>3</sup> If Movants’ arguments are accepted by this Court, they could result in full or partial vacature of the rule. These issues are of “exceptional importance” and appropriate for review before the *en banc* panel in *West Virginia*. Fed. R. App. P. 35.

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<sup>2</sup> As explained in Movants’ motion, consolidating Movants’ challenges to the Clean Power Plan reconsideration denial with the closely-related challenges to the Clean Power Plan would promote judicial efficiency and economy and avoid duplication of effort by the Court and the parties. *See* *Mvnts.’ Mtn.* at ¶¶ 1-3.

<sup>3</sup> These issues are of central relevance to the outcome of the Clean Power Plan and are now indisputably ripe for judicial review in the main *West Virginia* cases in light of the reconsideration denial. *See* *Mvnts.’ Mtn.* at ¶ 3.

3. Respondent-Intervenors also argue that consolidation would prejudice their interests by delaying resolution of the main *West Virginia* cases and the opportunity to lift the U.S. Supreme Court's stay of the Clean Power Plan. Env'tl. Resp.-Intvs.' Mtn. at 5; State Resp.-Intvs.' Mtn. at 8. EPA recently filed motions with this Court to hold the *West Virginia* and *North Dakota* cases in abeyance pending EPA's administrative review of the Clean Power Plan and any resulting forthcoming rulemakings to rescind or modify the rule.<sup>4</sup> This Court has not yet ruled on EPA's motions. If this Court grants EPA's motion to hold *West Virginia* in abeyance, then Respondent-Intervenors' concerns that consolidation would delay resolution of that case likely would become moot.

4. Even if this Court does not grant EPA's motion to hold *West Virginia* in abeyance, the stay of the Clean Power Plan will remain in place until after the resolution of any Supreme Court review of this Court's *en banc* decision in that case, as Respondent-Intervenors acknowledge. See Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016); Env'tl. Resp.-Intvs.' Mtn. at 5. Such final resolution may not occur until 2018 or later. Given this extended

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<sup>4</sup> See Notice of Executive Order, *EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance* ("Abeyance Motion"), No. 15-1363, ECF #1668274 (Mar. 28, 2017); No. 17-1014, ECF #1668936 (Mar. 31, 2017); see also 82 Fed. Reg. 16,329 (Apr. 4, 2017) (announcing administrative review of Clean Power Plan). Movants do not oppose EPA's motions to hold the cases in abeyance.

timeframe for the potential lifting of the stay of the Clean Power Plan, any additional delay in the resolution of the underlying case from consolidation would not unduly prejudice the interests of Respondent-Intervenors.

5. Finally, not consolidating the challenges would prejudice Movants and other regulated entities and states. In both challenges, Movants raise issues that, if accepted by the court, could result in full or partial vacature of the Clean Power Plan. Unless the cases are consolidated, it is possible that this Court or the U.S. Supreme Court could issue a decision in *West Virginia* that would result in a lifting the stay of the rule while *North Dakota* remains pending. A subsequent decision in *North Dakota* could then result in full or partial vacature of the rule, after the stay is lifted. Under this scenario, States would end up wasting substantial resources implementing a rule that ultimately would be overturned or significantly altered—resources that could be devoted to other environmental programs and priorities.<sup>5</sup> This scenario also would create substantial regulatory

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<sup>5</sup> In light of its administrative review of the Clean Power Plan, EPA already has withdrawn proposed guidance that would have assisted states in crafting their implementation plans for the rule. See EPA, *Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details*, 82 Fed. Reg. 16,144 (Apr. 3, 2017). Should the stay of the rule be lifted before EPA's administrative review and any forthcoming rulemakings are complete, states would be left to implement the highly-complex and resource-intensive rule in a vacuum.

uncertainty for regulated entities like Movants. To avoid the inefficiency and prejudice that would result, this Court should consider *all* arguments on the legality of the Clean Power Plan in *West Virginia* before issuing a decision in that case.<sup>6</sup>

For the foregoing reasons, Movants respectfully request that the Court grant their motion.

April 13, 2017

Respectfully submitted,

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<sup>6</sup> Contrary to what Respondent-Intervenors contend, *see* State Resp.-Intvs.' Mtn. at 8; Env'tl. Resp.-Intvs.' Mtn. at 5, consolidation would effectuate expedited review of the Clean Power Plan by allowing this Court to review the entirety of the rule in one go, instead of a piecemeal approach across two separate proceedings.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(e)(1), I hereby certify that the foregoing document contains 1,162 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

April 13, 2017

/s/ Megan H. Berge

Megan H. Berge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of April, 2017, I caused a copy of the foregoing to be served by the Court's CM/ECF System on all counsel of record in this matter who have registered with the CM/ECF System.

/s/ Megan H. Berge

Megan H. Berge