

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

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

STATE OF NORTH DAKOTA,)	
)	
Petitioner,)	
)	
v.)	Case No. 17-1014 and
)	consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

STATE OF WEST VIRGINIA, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Case No. 15-1363 and
)	consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Respondents.)	

MOTION TO SEVER AND CONSOLIDATE

Petitioner Basin Electric Power Cooperative (Basin Electric) respectfully requests that the Court sever Basin Electric's petition for review in *North Dakota v. EPA*, No. 17-1014, and consolidate it with Basin Electric's petition for review in *West Virginia v. EPA*, No. 15-1363. Basin Electric further requests that the Court, if it

does not grant EPA's requested abatement in *West Virginia v. EPA*, No. 15-1363, issue an Order directing the parties to confer and submit proposals for supplemental briefing in that case. As grounds for this motion, Basin Electric states as follows:

1. Basin Electric filed a petition for review in No. 15-1393, challenging EPA's Final Rule commonly referred to as the Clean Power Plan. That case was consolidated with the lead case of *West Virginia v. EPA*, No. 15-1363. Basin Electric more recently filed a petition for review in No. 17-1091, challenging EPA's denial of the reconsideration petitions addressing various issues with the Final Rule. That case has been consolidated with the lead case of *North Dakota v. EPA*, No. 17-1014.

2. Several Petitioners in *North Dakota v. EPA*, No. 17-1014 have filed motions requesting that the Court sever their petitions for review and consolidate them with the petitions for review filed in *West Virginia v. EPA*, No. 15-1363. Those motions explain the various reasons why it makes sense to consolidate the Movants' challenges to the Reconsideration Denial with their challenges to the underlying Final Rule. Basin Electric will not repeat those points here, but will simply add a few further considerations.

3. Basin Electric is filing this motion after some of the other parties because it filed its petition for review of the Reconsideration Denial later in time than those parties, it is accordingly subject to later deadlines, and it is only today filing its Statement of Issues. Basin Electric filed a timely petition for review of the Reconsideration Denial (which was published in the Federal Register on January 17,

2017) on March 17, 2017. Pursuant to the Court's Order issued that same date (Doc. No. 1666599), Basin Electric's deadline for filing a Docketing Statement and Statement of Issues is today, April 17. This motion is filed within 30 days of the docketing of Basin Electric's appeal, and is filed simultaneously with Basin Electric's Docketing Statement and Statement of Issues.

4. The issues Basin Electric intends to raise in *North Dakota v. EPA*, No. 17-1014 are closely intertwined with and should be decided together with the issues Basin Electric and other Petitioners have raised in *West Virginia v. EPA*, No. 15-1363. The issues raised on Reconsideration can address the ripeness challenge to Petitioners' Clean Air Act section 307(d)(7)(B) argument in *West Virginia v. EPA*, No. 15-1363. Yet even more fundamentally, the Reconsideration issues further demonstrate the arbitrariness and capriciousness of EPA's Final Rule, EPA's major shifts between the Proposed Rule and the Final Rule, and EPA's failure to adequately address through the Reconsideration process fundamental problems with the revised best system of emission reduction in its Final Rule.

5. Other Petitioners have cited various cases in which this Court has consolidated petitions for review challenging a reconsideration denial with petitions for review that were still pending challenging the underlying rule. Although this case may differ from many in that it is being heard initially by the *en banc* Court, that fact does not militate against consolidation. Rather, it bolsters the reasons for it. The Court should not issue a decision *en banc* on a narrower record and narrower scope of

issues, when the related issues presented on Reconsideration might alter the analysis and change the outcome.

6. Considerations of judicial economy, efficiency, and the avoidance of piecemeal appeals further support consolidating the issues raised in the two actions.

Accordingly, Basin Electric respectfully requests that the Court grant this motion; sever Basin Electric's petition for review in No. 17-1091, which has been consolidated with *North Dakota v. EPA*, No. 17-1014; consolidate that petition with Basin Electric's petition for review in No. 15-1393, which has been consolidated with *West Virginia v. EPA*, No. 15-1363; and, if the Court does not grant EPA's motion to abate *West Virginia v. EPA*, No. 15-1363, issue an Order directing the parties to confer and submit proposals for supplemental briefing in that case.

Dated: April 17, 2017.

Respectfully submitted,

s/ Christina F. Gomez

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(1), I hereby certify that the foregoing document contains 694 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.

s/ Christina F. Gomez

Christina F. Gomez

Counsel for Petitioner Basin
Electric Power Cooperative

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Sever and Consolidate was electronically filed today through the Court's CM/ECF system, which will electronically serve all registered counsel for the parties to this case.

Dated: April 17, 2017

s/ Christina F. Gomez _____

Christina F. Gomez

Counsel for Petitioner Basin

Electric Power Cooperative