EN BANC ORAL ARGUMENT HELD SEPTEMBER 27, 2016

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

STATE OF WEST VIRGINIA, *et al.*, *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Respondents.*	No. 15-1363 (and consolidated cases)

PETITIONERS' AND PETITIONER-INTERVENORS' STATUS REPORT IN SUPPORT OF CONTINUED ABEYANCE

Petitioners and Petitioner-Intervenors (collectively "Petitioners") respectfully submit this status report to respond to the questions raised by Judges Tatel and Wilkins (which were joined by Judge Millett) regarding whether abeyance continues to be appropriate in these consolidated cases. *See* Order, ECF No. 1737735 at 2, 3 (June 26, 2018) (Tatel, J., statement; Wilkins, J., statement) ("June 26 Abeyance Order"). For the reasons described below, the Court should continue to hold these cases in abeyance. Any other course of action would waste judicial and party resources and could jeopardize Petitioners' right to judicial review of the rule challenged in this litigation.

ARGUMENT

I. Abeyance Continues To Be the Appropriate Course of Action in These Proceedings.

For the reasons articulated in Petitioners' Supplemental Brief addressing the issue of whether to hold the case in abeyance or remand it to EPA, the Court should continue to hold these consolidated cases in abeyance pending completion of EPA's review of the Clean Power Plan. *See* Suppl. Br. of Pet'rs & Pet'r-Intervenors, ECF No. 1675250 (May 15, 2017) ("Supplemental Brief"). The considerations that supported the Court's initial grant of abeyance have not changed during that abeyance period.

First, holding these cases in abeyance protects Petitioners' rights to judicial review. Petitioners' challenge to the Clean Power Plan has not been mooted. As the Agency noted in its July 26, 2018 Status Report, EPA has published and taken comments on a proposed rule to repeal the Clean Power Plan and an advance notice of proposed rulemaking ("ANPR") soliciting input related to replacement of the Clean Power Plan. EPA Status Report at 3 ¶¶ 5-6, ECF No. 1742722 (July 26, 2018) ("EPA July Status Report"). As the Agency explained in its August 24, 2018 Status Report, the EPA Acting Administrator signed a proposed rule to replace the Clean Power Plan, called the Affordable Clean Energy Rule, on August 20, 2018. EPA Status Report at 4-5, ¶¶ 9-10, ECF No. 1747298 (Aug. 24, 2018) ("EPA August Status Report"). None of these *proposed* actions resolve the dispute between EPA and

Petitioners regarding the Clean Power Plan, as only a final agency action can change that rule, and there indisputably has been no such action yet. Until the Clean Power Plan is repealed and/or replaced in final form, Petitioners' challenges remain properly before this Court. Once EPA takes final action on one or both of its proposals, these cases could become moot depending on the content of the final repeal and/or replacement rule. For example, if EPA leaves in place portions of the Clean Power Plan, then this Court may need to resolve any challenges to those provisions of the rule.

The possibility that EPA could decide not to finalize its proposed rules also exists. As Petitioners noted in their Supplemental Brief, this happened in a previous analogous case involving a high-profile rule. There, this Court held in abeyance for several years a challenge to an EPA rule pending its reconsideration by the then-new presidential administration. Supplemental Brief at 3. Although EPA formally proposed to revise the rule (75 Fed. Reg. 2938 (Jan. 19, 2010)), it ultimately reversed course, decided to leave the rule unchanged (*see Mississippi v. EPA*, No. 08-1200, ECF No. 1327617 (D.C. Cir. Sept. 2, 2011)), and successfully defended it before this Court (*Mississippi v. EPA*, 744 F.3d 1334 (D.C. Cir. 2013) (per curiam)). The Court's decision to hold that case in abeyance and retain jurisdiction over the pending petitions for review for over two years, rather than remand the rule to EPA for reconsideration, allowed the Court to decide the merits of the legal challenges once EPA decided not to revise the rule.

By contrast, remanding to EPA notwithstanding the unresolved petitions for review raises questions about continued judicial review if EPA ultimately does not repeal or replace the Clean Power Plan, or repeals or replaces only portions of the Clean Power Plan. The Rules of this Court provide that if the Court remands the case, it "does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted on remand." D.C. Cir. R. 41(b). Thus, if the Court remands these consolidated cases without vacating the Clean Power Plan or otherwise retaining jurisdiction over the consolidated petitions, and if EPA ultimately keeps the rule or some portions of it in place, Petitioners could face jurisdictional challenges to subsequent review of the Clean Power Plan or elements of the Plan.

The Clean Air Act requires that a petition for review "shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register," unless it is "based solely on grounds arising after such sixtieth day." 42 U.S.C. § 7607(b)(1). Any post-remand challenge to the Clean Power Plan or portions of the Plan would occur well after the expiration of the initial 60-day period, and the exception for cases filed on after-arising grounds has been narrowly construed by this Court. *See* Supplemental Brief at 5 n.2. As a result, even though Petitioners timely filed their petitions for review in these cases, they would face the argument that these statutory limitations shield the Clean Power Plan, or any retained portions thereof, from any renewed judicial review. Notably, even a dismissal "without

prejudice" would leave Petitioners potentially vulnerable to these statutory limitations. June 26 Abeyance Order at 3 (Wilkins, J., statement). Indeed, this Court recently confirmed this in a case involving a different EPA regulation that "[w]hen combined with [a] statutory provision requiring any challenge to be brought within [a specified period of time] of the Rule's promulgation, the legal effect of remand without vacatur is simple: The Rule remains in force and … Petitioners cannot bring another challenge until and unless the EPA takes additional regulatory action." *See Util. Solid Waste Activities Group v. EPA*, No. 15-1219, slip op. at 39-40 (D.C. Cir. Aug. 21, 2018). Although Petitioners would object to these arguments, the need to resolve these questions would be avoided by continuing to hold these cases in abeyance, with no prejudice to the parties or undue burden to the Court.

Second, it is the Court's ordinary practice to hold cases in abeyance when an agency decides to review a challenged rule. This practice has extensive precedential support, both historically and in recent years, and has been followed in a wide variety of procedural circumstances. *See* Supplemental Brief at 5-6 (listing examples). As this Court has explained, it makes little sense to actively proceed with judicial review and expend the Court's and parties' resources when an agency has embarked on a review that could ultimately lead to a substantial revision to or rescission of the rule. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388-89 (D.C. Cir. 2012) (holding case in abeyance where new proposal "would likely moot the analysis [the court] could undertake" in deciding the case); *see also U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 382 (D.C. Cir.

2017) (per curiam) (Srinivasan & Tatel, JJ., concurring in denial of rehearing en banc) (noting "[e]n banc review would be particularly unwarranted" where "agency will soon consider adopting a [proposal] that would replace the existing rule with a markedly different one"). This established practice recognizes that abeyance conserves judicial and party resources, and allows the Court to dismiss petitions for review if the challenges become moot—or to resolve those petitions if the underlying rule is not revised or rescinded.

Third, any issue concerning the stay issued by the Supreme Court can be addressed in that forum. In the June 26 Abeyance Order, Judge Tatel expressed the view that the Supreme Court should be "advised of circumstances as they stand today" to determine whether the stay should remain in effect while EPA pursues the repeal and replacement of the Clean Power Plan. June 26 Abeyance Order at 2 (Tatel, J., concurring). On July 27, 2018, the Public Health and Environmental Respondent-Intervenors in this case sent such a letter to Chief Justice Roberts and noted there that "the Court may wish to require the parties to explain why the stay should continue in effect." Letter from Sean H. Donahue, Counsel of Record for Environmental Defense Fund, et al., to The Hon. John G. Roberts, Jr., Chief Justice of the United States & Circuit Justice for the D.C. Circuit, Supreme Court of the United States, at 3 (July 27, 2018), *West Virginia v. EPA*, No. 15A773 (S. Ct.). The letter, which is included here as Attachment 1, has been docketed. Docket, *West Virginia v. EPA*, No. 15A773 (S. Ct.).

II. EPA Is Proceeding Expeditiously with Its Review of the Clean Power Plan.

Since this Court first granted a 60-day abeyance in these consolidated cases on August 8, 2017, ECF No. 1687838, EPA has proceeded diligently with its administrative review of the Clean Power Plan pursuant to Executive Order 13783, 82 Fed. Reg. 16,093 (Mar. 31, 2017). EPA's status reports have set forth the steps it has taken to reconsider the Clean Power Plan. As those reports indicate, the Agency announced its review of the Clean Power Plan on April 4, 2017 (82 Fed. Reg. 16,329), published its proposed repeal on October 16, 2017 (82 Fed. Reg. 48,035), solicited public comment on options to possibly replace the Clean Power Plan on December 28, 2017 (82 Fed. Reg. 61,507), and signed the proposed Affordable Clean Energy Rule to replace the Clean Power Plan on August 20, 2018 (*see* EPA August Status Report at 4, ¶ 9). Thus, EPA has been actively engaged in the rulemaking process for approximately 10 months and is expected to conclude in the next 5 or 6 months. *See* EPA July Status Report at 4, ¶ 8; EPA August Status Report at 5, ¶ 11.

The timetable for repeal and/or replacement of the Clean Power Plan is consistent with and in many cases is more expeditious than the time EPA has required to complete other rulemakings of similar scope and importance. For comparison, the Agency's rulemaking to promulgate new source performance standards for greenhouse gas emissions from new electric utility generating units under the prior Administration lasted over three and a half years: EPA's first proposal was published

in April 2012 and was then superseded by a new proposal in January 2014 before the rule was finalized in October 2015. *See* 77 Fed. Reg. 22,392 (Apr. 13, 2012); 79 Fed. Reg. 1430 (Jan. 8, 2014); 80 Fed. Reg. 64,510 (Oct. 23, 2015). Likewise, in the case of the Mercury and Air Toxics Standards Rule, EPA initiated its rulemaking proceedings with an information collection request (which, like the ANPR on replacement of the Clean Power Plan, sought information to assist in development of a proposed rule) in November 2009 and did not publish a final rule until February 2012, 27 months later. *See* 74 Fed. Reg. 58,012 (Nov. 10, 2009); 77 Fed. Reg. 9304 (Feb. 16, 2012). Accordingly, viewed in the context of other similar rulemakings, the duration of EPA's proceedings on review of the Clean Power Plan is reasonable and reflects diligent efforts to complete that review as expeditiously as practicable.

CONCLUSION

In sum, EPA is moving with all deliberate speed, consistent with the complex subject matter involved, to complete its review of the Clean Power Plan. That process will conclude soon. There is no need for the Court to depart from its longstanding policy of holding cases in abeyance where a new administration announces its intent to reconsider a prior rule. These consolidated cases should remain in abeyance pending EPA's finalization (or its abandonment) of its proposals to repeal and/or replace the Clean Power Plan.

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Respectfully submitted,

/s/ Allison D. Wood
F. William Brownell
Allison D. Wood
Henry V. Nickel
Tauna M. Szymanski
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@HuntonAK.com
awood@HuntonAK.com
hnickel@HuntonAK.com
tszymanski@HuntonAK.com

Counsel for Petitioners Utility Air Regulatory Group and American Public Power Association

/s/ Peter S. Glaser
Peter S. Glaser
TROUTMAN SANDERS LLP
401 Ninth Street N.W., Suite 1000
Washington, D.C. 20004
Tel: (202) 274-2998
peter.glaser@troutmansanders.com

Carroll W. McGuffey III
TROUTMAN SANDERS LLP
600 Peachtree Street, N.E., Suite 5200
Atlanta, GA 30308
Tel: (404) 885-3000
mack.mcguffey@troutmansanders.com

Counsel for Petitioner National Mining Association

/s/ Lindsay S. See
Patrick Morrisey
ATTORNEY GENERAL OF WEST VIRGINIA
Lindsay S. See
Solicitor General
Counsel of Record
Paul Anthony Martin
Chief Deputy Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel: (304) 558-2021
Fax: (304) 558-0140
lindsay.s.see@wvago.gov
anthony.p.martin@wvago.gov

Counsel for Petitioner State of West Virginia

/s/ Scott A. Keller
Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
First Assistant Attorney General
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, TX 78711-2548
Tel: (512) 936-1700
scott.keller@oag.texas.gov

Counsel for Petitioner State of Texas

/s/ Peter D. Keisler
Peter D. Keisler
C. Frederick Beckner III
Ryan C. Morris
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8027
pkeisler@sidley.com
rbeckner@sidley.com
rmorris@sidley.com

Counsel for Petitioners Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association

/s/ Andrew Brasher
Steven T. Marshall
ATTORNEY GENERAL OF ALABAMA
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Avenue
Montgomery, AL 36130
Tel: (334) 353-2609
abrasher@ago.state.al.us

Counsel for Petitioner State of Alabama

/s/ Dominic E. Draye
Mark Brnovich
ATTORNEY GENERAL OF ARIZONA
Dominic E. Draye
Solicitor General
Counsel of Record
Keith J. Miller
Assistant Solicitor General
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007-2997
Tel: (602) 542-3333
Fax: (602) 542-8308
dominic.draye@azag.gov
keith.miller@azag.gov
SolicitorGeneral@azag.gov

Counsel for Petitioner Arizona Corporation Commission

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Tel: (202) 624-2500
tlorenzen@crowell.com

Counsel for Petitioners National Rural Electric Cooperative Association; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Electric Power Cooperative, Inc., Corn Belt Power Cooperative; Dairyland Power Cooperative; East River Electric Power Cooperative, Inc.; Georgia Transmission Corporation; Kansas Electric Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northwest Iowa Power Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Seminole Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; and Upper Missouri G. & T. Electric Cooperative, Inc.

/s/ Lee Rudofsky
Leslie Rutledge
ATTORNEY GENERAL OF ARKANSAS
Lee Rudofsky
Solicitor General
Counsel of Record
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Suite 400
Little Rock, AR 72201
Tel: (501) 682-5310
lee.rudofsky@arkansasag.gov

Counsel for Petitioner State of Arkansas

/s/ Frederick Yarger
Cynthia H. Coffman
ATTORNEY GENERAL OF COLORADO
Frederick Yarger
Solicitor General
Counsel of Record
1300 Broadway, 10th Floor
Denver, CO 80203
Tel: (720) 508-6168
fred.yarger@coag.gov

Counsel for Petitioner State of Colorado

Rae Cronmiller
Environmental Counsel
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Blvd.
Arlington, VA 22203
Tel: (703) 907-5500
rae.cronmiller@nreca.coop

Counsel for Petitioner National Rural Electric Cooperative Association

/s/ Eric L. Hiser
Eric L. Hiser
JORDEN HISER & JOY, PLC
5080 N. 40th Street, Suite 245
Phoenix, AZ 85018
Tel: (480) 505-3927
ehiser@JHJLawyers.com

Counsel for Petitioner Arizona Electric Power Cooperative, Inc.

/s/ Brian A. Prestwood
Brian A. Prestwood
Senior Corporate and Compliance Counsel
ASSOCIATED ELECTRIC COOPERATIVE, INC.
2814 S. Golden, P.O. Box 754
Springfield, MO 65801
Tel: (417) 885-9273
bprestwood@aeci.org

Counsel for Petitioner Associated Electric Cooperative, Inc.

/s/ Jonathan A. Glogau
Pamela Jo Bondi
ATTORNEY GENERAL OF FLORIDA
Amit Agarwal
Solicitor General
Jonathan A. Glogau
Counsel of Record
Special Counsel
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Tel: (850) 414-3818
Fax: (850) 410-2672
amit.agarwal@myfloridalegal.com
jonathan.glogau@myfloridalegal.com

Counsel for Petitioner State of Florida

/s/ Sarah Hawkins Warren
Christopher M. Carr
ATTORNEY GENERAL OF GEORGIA
Sarah Hawkins Warren
Solicitor General
Counsel of Record
Office of the Attorney General
40 Capitol Square S.W.
Atlanta, GA 30334-1300
Tel: (404) 463-0070
Fax: (404) 657-8773
swarren@law.ga.gov

Counsel for Petitioner State of Georgia

/s/ David Crabtree
David Crabtree
Vice President, General Counsel
DESERET GENERATION & TRANSMISSION CO-OPERATIVE
10714 South Jordan Gateway
South Jordan, UT 84095
Tel: (801) 619-9500
Crabtree@deseretpower.com

Counsel for Petitioner Deseret Generation & Transmission Co-operative

/s/ John M. Holloway III
John M. Holloway III
WILLIAMS MULLEN
1666 K Street, N.W., Suite 1200
Washington, D.C. 20006
Tel: (202) 293-8127
Fax: (202) 293-5939
jholloway@williamsmullen.com

Counsel for Petitioners East Kentucky Power Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Minnkota Power Cooperative, Inc.; and South Mississippi Electric Power Association

Joshua L. Belcher
EVERSHEDS SUTHERLAND (US) LLP
1101 Fannin Street, Suite 3700
Houston, TX 77002
Tel: (713) 470-6118
Fax: (713) 654-1301
joshuabelcher@eversheds-sutherland.com

Counsel for Petitioner East Kentucky Power Cooperative, Inc.

/s/ Thomas M. Fisher
Curtis T. Hill, Jr.
ATTORNEY GENERAL OF INDIANA
Thomas M. Fisher
Solicitor General
Counsel of Record
Office of the Attorney General
Indiana Government Ctr. South
Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Tel: (317) 232-6255
Fax: (317) 232-7979
tom.fisher@atg.in.gov

Counsel for Petitioner State of Indiana

/s/ Jeffrey A. Chanay
Derek Schmidt
ATTORNEY GENERAL OF KANSAS
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
Bryan C. Clark
Assistant Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
Tel: (785) 368-8435
Fax: (785) 291-3767
jeff.chanay@ag.ks.gov

Counsel for Petitioner State of Kansas

/s/ Patrick Burchette
Patrick Burchette
HOLLAND & KNIGHT LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 469-5102
Patrick.Burchette@hklaw.com

Counsel for Petitioners East Texas Electric Cooperative, Inc.; Northeast Texas Electric Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; and Tex-La Electric Cooperative of Texas, Inc.

/s/ Christopher L. Bell
Christopher L. Bell
GREENBERG TRAURIG LLP
1000 Louisiana Street, Suite 1700
Houston, TX 77002
Tel: (713) 374-3556
bellc@gtlaw.com

Counsel for Petitioner Golden Spread Electrical Cooperative, Inc.

/s/ Mark Walters
Mark Walters
Michael J. Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
Fax: (512) 236-2002
mwalters@jw.com
mnasi@jw.com

Counsel for Petitioners San Miguel Electric Cooperative, Inc., South Texas Electric Cooperative, Inc.

/s/ Joe Newberg
Andy Beshear
ATTORNEY GENERAL OF KENTUCKY
Joseph A. Newberg, II
Counsel of Record
Samuel R. Flynn
Assistant Attorneys General
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5611
joe.newberg@ky.gov
samuel.flynn@ky.gov

Counsel for Petitioner Commonwealth of Kentucky

/s/ Elizabeth B. Murrill
Jeff Landry
ATTORNEY GENERAL OF LOUISIANA
Elizabeth B. Murrill
Counsel of Record
Harry J. Vorhoff
Assistant Attorneys General
Office of the Louisiana Attorney General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6085
Fax: (225) 326-6099
murrille@ag.louisiana.gov
vorhoffh@ag.louisiana.gov

Counsel for Petitioner State of Louisiana

/s/ Randolph G. Holt
Randolph G. Holt
Jeremy L. Fetty
PARR RICHEY OBREMSKEY FRANDSEN & PATTERSON LLP
Wabash Valley Power Association, Inc.
722 N. High School Road
P.O. Box 24700
Indianapolis, IN 46224
Tel: (317) 481-2815
R_holt@wvpa.com
jfetty@parrlaw.com

Counsel for Petitioner Wabash Valley Power Association, Inc.

/s/ Megan H. Berge
Megan H. Berge
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com

Counsel for Petitioner Western Farmers Electric Cooperative

/s/ Steven C. Kohl
Steven C. Kohl
Gaetan Gerville-Reache
WARNER NORCROSS & JUDD LLP
2000 Town Center, Suite 2700
Southfield, MI 48075-1318
Tel: (248) 784-5000
skohl@wnj.com

Counsel for Petitioner Wolverine Power Supply Cooperative, Inc.

/s/ Donald Trahan
Herman Robinson
Executive Counsel
Donald Trahan
Counsel of Record
Elliott Vega
Spencer R. Bowman
Charlotte Goudeau
Courtney J. Burdette
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
Legal Division
P.O. Box 4302
Baton Rouge, LA 70821-4302
Tel: (225) 219-3985
Fax: (225) 219-4068
donald.trahan@la.gov
spencer.bowman@la.gov
charlotte.goudeau@la.gov
courtney.burdette@la.gov

Counsel for Petitioner State of Louisiana Department of Environmental Quality

/s/ Lesley Foxhall Pietras
Lesley Foxhall Pietras
LISKOW & LEWIS, P.L.C.
701 Poydras Street, Suite 5000
New Orleans, LA 70139
Tel: (504) 556-4125
Fax: (504) 556-4108
lfpietras@liskow.com

Counsel for Petitioner Louisiana Public Service Commission

/s/ Christina F. Gomez
Christina F. Gomez
Jill H. Van Noord
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Tel: (303) 295-8000
Fax: (303) 295-8261
cgomez@hollandhart.com
jhvannoord@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Tel: (307) 778-4200
Fax: (307) 778-8175
pday@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5800
Fax: (801) 799-5700
ecschilling@hollandhart.com

Counsel for Petitioner Basin Electric Power Cooperative

/s/ Aaron D. Lindstrom
Bill Schuette
ATTORNEY GENERAL FOR THE PEOPLE OF MICHIGAN
Aaron D. Lindstrom
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, MI 48909
Tel: (515) 373-1124
Fax: (517) 373-3042
lindstroma@michigan.gov

Counsel for Petitioner People of the State of Michigan

/s/ Harold E. Pizzetta, III
Jim Hood
ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI
Harold E. Pizzetta
Assistant Attorney General
Civil Litigation Division
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205
Tel: (601) 359-3816
Fax: (601) 359-2003
hpizz@ago.state.ms.us

Counsel for Petitioner State of Mississippi

/s/ Stacey Turner
Stacey Turner
SOUTHERN COMPANY SERVICES, INC.
600 18th Street North
BIN 14N-8195
Birmingham, AL 35203
Tel: (205) 257-2923
staturner@southernco.com

Counsel for Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

/s/ C. Grady Moore, III
C. Grady Moore, III
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, AL 35303-4642
Tel: (205) 251-8100
Fax: (205) 488-5704
gmoore@balch.com

Counsel for Petitioner Alabama Power Company

/s/ Margaret Claiborne Campbell
Margaret Claiborne Campbell
Angela J. Levin
TROUTMAN SANDERS LLP
600 Peachtree Street, NE, Suite 5200
Atlanta, GA 30308-2216
Tel: (404) 885-3000
margaret.campbell@troutmansanders.com
angela.levin@troutmansanders.com

Counsel for Petitioner Georgia Power Company

/s/ Donna J. Hodges
Donna J. Hodges
Senior Counsel
MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY
P.O. Box 2261
Jackson, MS 39225-2261
Tel: (601) 961-5369
Fax: (601) 961-5349
dhodges@deq.state.ms.us

Counsel for Petitioner Mississippi Department of Environmental Quality

/s/ Todd E. Palmer
Todd E. Palmer
Valerie L. Green
MICHAEL, BEST & FRIEDRICH LLP
601 Pennsylvania Ave., N.W., Suite 700
Washington, D.C. 20004-2601
Tel: (202) 747-9560
Fax: (202) 347-1819
tepalmer@michaelbest.com
vlgreen@michaelbest.com

Counsel for Petitioner Mississippi Public Service Commission

/s/ Terese T. Wyly
Terese T. Wyly
Ben H. Stone
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501-1931
Tel: (228) 214-0413
twyly@balch.com
bstone@balch.com

Counsel for Petitioner Mississippi Power Company

/s/ Jeffrey A. Stone
Jeffrey A. Stone
BEGGS & LANE, RLLP
501 Commendencia Street
Pensacola, FL 32502
Tel: (850) 432-2451
JAS@beggslane.com

James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

Counsel for Petitioner Gulf Power Company

/s/ D. John Sauer
Josh Hawley
ATTORNEY GENERAL OF MISSOURI
D. John Sauer
Solicitor General
Counsel of Record
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102
Tel: (573) 751-1800
Fax: (573) 751-0774
john.sauer@ago.mo.gov

Counsel for Petitioner State of Missouri

/s/ Dale Schowengerdt
Timothy C. Fox
ATTORNEY GENERAL OF MONTANA
Dale Schowengerdt
Solicitor General
Counsel of Record
215 North Sanders
Helena, MT 59620-1401
Tel: (406) 444-7008
dales@mt.gov

Counsel for Petitioner State of Montana

/s/ James S. Alves
James S. Alves
2110 Trescott Drive
Tallahassee, FL 32308
Tel: (850) 566-7607
jim.s.alves@outlook.com

Counsel for Petitioner CO_2 Task Force of the Florida Electric Power Coordinating Group, Inc.

/s/ John J. McMackin
John J. McMackin
WILLIAMS & JENSEN
701 8th Street, N.W., Suite 500
Washington, D.C. 20001
Tel: (202) 659-8201
jjmcmackin@wms-jen.com

Counsel for Petitioner Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation

/s/ Megan H. Berge
Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

Counsel for Petitioner Entergy Corporation

/s/ Justin D. Lavene
Douglas J. Peterson
ATTORNEY GENERAL OF NEBRASKA
Dave Bydlaek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2834
justin.lavene@nebraska.gov

Counsel for Petitioner State of Nebraska

/s/ Eric E. Murphy
Michael DeWine
ATTORNEY GENERAL OF OHIO
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for Petitioner State of Ohio

/s/ Paul J. Zidlicky
Paul J. Zidlicky
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
pzidlicky@sidley.com

Counsel for Petitioners GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC

/s/ David M. Flannery
David M. Flannery
Kathy G. Beckett
Edward L. Kropp
STEPTOE & JOHNSON, PLLC
707 Virginia Street East
Charleston, WV 25326
Tel: (304) 353-8000
dave.flannery@steptoe-johnson.com
kathy.beckett@steptoe-johnson.com
skipp.kropp@steptoe-johnson.com

Counsel for Petitioner Indiana Utility Group

/s/ David B. Rivkin, Jr.
Mike Hunter
ATTORNEY GENERAL OF OKLAHOMA
P. Clayton Eubanks
Deputy Solicitor General
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax: (405) 522-0608
clayton.eubanks@oag.ok.gov

David B. Rivkin, Jr.
Counsel of Record
Mark W. DeLaquil
Andrew M. Grossman
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Tel: (202) 861-1731
Fax: (202) 861-1783
drivkin@bakerlaw.com

Counsel for Petitioners State of Oklahoma and Oklahoma Department of Environmental Quality

/s/ F. William Brownell
F. William Brownell
Eric J. Murdock
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
bbrownell@HuntonAK.com
emurdock@HuntonAK.com

Nash E. Long III
HUNTON ANDREWS KURTH LLP
Bank of America Plaza, Suite 3500
101 South Tryon Street
Charlotte, NC 28280
Tel: (704) 378-4700
nlong@HuntonAK.com

Counsel for Petitioner LG&E and KU Energy LLC

/s/ James Emory Smith, Jr.
Alan Wilson
ATTORNEY GENERAL OF SOUTH CAROLINA
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel: (803) 734-3680
Fax: (803) 734-3677
esmith@scag.gov

Counsel for Petitioner State of South Carolina

/s/ Steven R. Blair
Marty J. Jackley
ATTORNEY GENERAL OF SOUTH DAKOTA
Steven R. Blair
Assistant Attorney General
Counsel of Record
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel: (605) 773-3215
steven.blair@state.sd.us

Counsel for Petitioner State of South Dakota

/s/ P. Stephen Gidiere III
P. Stephen Gidiere III
Thomas L. Casey III
Julia B. Barber
BALCH & BINGHAM LLP
1901 6th Ave. N., Suite 1500
Birmingham, AL 35203
Tel: (205) 251-8100
sgidiere@balch.com

Stephanie Z. Moore
Executive Vice President & General Counsel
VISTRA ENERGY CORP.
6555 Sierra Drive
Irving, Texas 75039

Daniel J. Kelly
Vice President & Associate General Counsel
VISTRA ENERGY CORP.
6555 Sierra Drive
Irving, Texas 75039

Counsel for Petitioners Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC

/s/ Tyler R. Green
Sean Reyes
ATTORNEY GENERAL OF UTAH
Tyler R. Green
Solicitor General
Counsel of Record
Parker Douglas
Federal Solicitor
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
pdouglas@agutah.gov

Counsel for Petitioner State of Utah

/s/ Misha Tseytlin
Brad D. Schimel
ATTORNEY GENERAL OF WISCONSIN
Misha Tseytlin
Solicitor General
Counsel of Record
Delanie M. Breuer
Chief of Staff
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53707
Tel: (608) 267-9323
tseytlinm@doj.state.wi.us

Counsel for Petitioner State of Wisconsin

/s/ Ronald J. Tenpas
Ronald J. Tenpas
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 739-3000
rtenpas@morganlewis.com

Counsel for Petitioner Minnesota Power (an operating division of ALLETE, Inc.)

/s/ Allison D. Wood
Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@HuntonAK.com
tszymanski@HuntonAK.com
aknudsen@HuntonAK.com

Counsel for Petitioner Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

/s/ James Kaste
Peter K. Michael
ATTORNEY GENERAL OF WYOMING
James Kaste
Deputy Attorney General
Counsel of Record
Erik Petersen
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
Tel: (307) 777-6946
Fax: (307) 777-3542
james.kaste@wyo.gov

Counsel for Petitioner State of Wyoming

/s/ Dennis Lane
Dennis Lane
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 785-9100
Fax: (202) 785-9163
dennis.lane@stinson.com

Parthenia B. Evans
STINSON LEONARD STREET LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106
Tel: (816) 842-8600
Fax: (816) 691-3495
parthy.evans@stinson.com

Counsel for Petitioner Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas

/s/ Megan H. Berge
Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

Counsel for Petitioner NorthWestern Corporation d/b/a NorthWestern Energy

/s/ Joshua R. More
Joshua R. More
Jane E. Montgomery
Amy Antoniolli
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 7100
Chicago, IL 60606
Tel: (312) 258-5500
jmore@schiffhardin.com
jmontgomery@schiffhardin.com
aantoniolli@schiffhardin.com

Counsel for Petitioner Prairie State Generating Company, LLC

/s/ Allison D. Wood
Allison D. Wood
Tauna M. Szymanski
Andrew D. Knudsen
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
Tel: (202) 955-1500
awood@HuntonAK.com
tszymanski@HuntonAK.com
aknudsen@HuntonAK.com

Counsel for Petitioner Tri-State Generation and Transmission Association, Inc.

/s/ Megan H. Berge
Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

Counsel for Petitioner Westar Energy, Inc.

/s/ Jeffrey R. Holmstead
Jeffrey R. Holmstead
Brittany M. Pemberton
BRACEWELL LLP
2001 M Street, N.W., Suite 900
Washington, D.C. 20036
Tel: (202) 828-5852
Fax: (202) 857-4812
jeff.holmstead@bracewelllaw.com

Counsel for Petitioner American Coalition for Clean Coal Electricity

/s/ John D. Lazzaretti
John D. Lazzaretti
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Tel: (216) 479-8350
john.lazzaretti@squirepb.com

Counsel for Petitioner Murray Energy Corporation

/s/ Andrew C. Emrich
Andrew C. Emrich
HOLLAND & HART LLP
6380 South Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
Tel: (303) 290-1621
Fax: (866) 711-8046
acemrich@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Tel: (801) 799-5753
Fax: (202) 747-6574
ecschilling@hollandhart.com

Counsel for Petitioners Newmont Nevada Energy Investment, LLC and Newmont USA Limited

/s/ Charles T. Wehland
Charles T. Wehland
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, IL 60601-1692
Tel: (312) 782-3939
Fax: (312) 782-8585
ctwehland@jonesday.com

Counsel for Petitioners The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, L.L.C.; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company

/s/ Robert G. McLusky
Robert G. McLusky
JACKSON KELLY, PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Tel: (304) 340-1000
rmclusky@jacksonkelly.com

Counsel for Petitioner West Virginia Coal Association

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (301) 639-5238
emtrisko7@gmail.com

Counsel for Petitioner International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (301) 639-5238
emtrisko7@gmail.com

Counsel for Petitioner International Brotherhood of Electrical Workers, AFL-CIO

/s/ Eugene M. Trisko
Eugene M. Trisko
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 596
Berkeley Springs, WV 25411
Tel: (301) 639-5238
emtrisko7@gmail.com

Grant F. Crandall
General Counsel (Ret.)
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (703) 291-2429
gcrandall@umwa.org

Arthur Traynor, III
Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Triangle, VA 22172
Tel: (571) 383-4013
atraynor@umwa.org

Counsel for Petitioner United Mine Workers of America

/s/ Steven P. Lehotsky
Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
slehotsky@uschamber.com

Counsel for Petitioner Chamber of Commerce of the United States of America

/s/ Peter Tolsdorf
Peter Tolsdorf
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
Tel: (202) 637-3000
ptolsdorf@nam.org

Counsel for Petitioner National Association of Manufacturers

/s/ Richard S. Moskowitz
Richard S. Moskowitz
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, N.W., Suite 700
Washington, D.C. 20006
Tel: (202) 457-0480
rmoskowitz@afpm.org

Counsel for Petitioner American Fuel & Petrochemical Manufacturers

/s/ Karen R. Harned
Karen R. Harned
Executive Director
Elizabeth A. Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
Tel: (202) 314-2061
karen.harned@nfib.org
elizabeth.milito@nfib.org

Counsel for Petitioner National Federation of Independent Business

/s/ Megan H. Berge
Megan H. Berge
William M. Bumpers
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 639-7700
megan.berge@bakerbotts.com
william.bumpers@bakerbotts.com

Counsel for Petitioner National Association of Home Builders

/s/ Kathryn D. Kirmayer
Kathryn D. Kirmayer
General Counsel
Evelyn R. Nackman
Associate General Counsel
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
Tel: (202) 639-2100
kkirmayer@aar.org

Counsel for Petitioner Association of American Railroads

/s/ Chaim Mandelbaum
Chaim Mandelbaum
Litigation Manager
FREE MARKET ENVIRONMENTAL LAW CLINIC
726 N. Nelson Street, Suite 9
Arlington, VA 22203
Tel: (703) 577-9973
chaim12@gmail.com

Counsel for Petitioner Energy and Environment Legal Institute

/s/ Catherine E. Stetson
Catherine E. Stetson
Eugene A. Sokoloff
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Tel: (202) 637-5600
Fax: (202) 637-5910
cate.stetson@hoganlovells.com
eugene.sokoloff@hoganlovells.com

Counsel for Petitioner Denbury Onshore, LLC

/s/ Adam R.F. Gustafson
C. Boyden Gray
Adam R.F. Gustafson
Counsel of Record
James R. Conde
BOYDEN GRAY & ASSOCIATES, PLLC
801 17th Street, N.W., Suite 350
Washington, D.C. 20006
Tel: (202) 955-0620
gustafson@boydengrayassociates.com

Counsel for Petitioners Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist

Sam Kazman
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street, N.W., 7th Floor
Washington, D.C. 20005
Tel: (202) 331-1010

Counsel for Petitioner Competitive Enterprise Institute

Robert Alt
BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS
88 E. Broad Street, Suite 1120
Columbus, OH 43215
Tel: (614) 224-4422
robert@buckeyeinstitute.org

Counsel for Petitioner Buckeye Institute for Public Policy Solutions

/s/ Tristan L. Duncan
Tristan L. Duncan
SHOOK HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64018
Tel: (816) 474-6550
Fax: (816) 421-5547
tlduncan@shb.com
jxsmith@shb.com

Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
Fax: (312) 379-0467
jmassey@masseygail.com

Counsel for Petitioner-Intervenors Dixon Bros., Inc., Nelson Brothers, Inc., Wesco International, Inc., Norfolk Southern Corp., Joy Global, Inc., and Gulf Coast Lignite Coalition

/s/ Jonathan S. Massey
Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Tel: (202) 652-4511
Fax: (312) 379-0467
jmassey@masseygail.com

Counsel for Petitioner-Intervenor Peabody Energy Corporation

/s/ Mark Walters
Mark Walters
Michael Nasi
JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Tel: (512) 236-2000
mwalters@jw.com
mnasi@jw.com

Douglas Bryan Hughes
LAW OFFICES OF D. BRYAN HUGHES
701 N. Pacific Street
Mineola, TX 75773
Tel: (903) 569-8880
bryan@hughesfirm.com

Counsel for Petitioner-Intervenor Gulf Coast Lignite Coalition

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of August 2018, a copy of the foregoing Petitioners' and Petitioner-Intervenors' Status Report in Support of Continued Abeyance was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Allison D. Wood
Allison D. Wood

ATTACHMENT 1

July 27, 2018

Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the D.C. Circuit
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

Re: *West Virginia v. EPA*, No. 15A773
Basin Elec. Power Coop. v. EPA, No. 15A776
Murray Energy Corp. v. EPA, No. 15A778
Chamber of Commerce v. EPA, No. 15A787
North Dakota v. EPA, No. 15A793

* * * *

West Virginia v. EPA, No. 15-1363 (D.C. Cir.)

Dear Chief Justice Roberts:

On February 9, 2016, this Court stayed the Environmental Protection Agency's Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), pending disposition of petitions for review in the United States Court of Appeals for the District of Columbia Circuit and of any petitions for certiorari in this Court.

The undersigned public health and environmental organizations, who are respondent-intervenors in the D.C. Circuit litigation, hereby notify the Court of developments in the underlying litigation, as suggested by D.C. Circuit judges who highlighted litigants' "continuing duty to inform th[is] Court of any development which may conceivably affect the outcome," *Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)).

Issued in October 2015 pursuant to section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), the Clean Power Plan provides for limits on emissions of carbon dioxide from existing power plants. *See Am. Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011). A number of states and private entities petitioned for judicial review, and other states and private entities intervened to support the rule in *West Virginia v. EPA*, D.C. Cir. Nos. 15-1363, *et al*. After a D.C. Circuit panel denied stay motions and ordered expedited merits briefing, various parties filed stay applications with you as Circuit Justice. On February 9, 2016, this Court granted those applications. The stay orders provide that the Clean Power Plan

> is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate

> automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Order, *West Virginia v. EPA*, No. 15A773. The court of appeals subsequently decided to hear the case initially en banc, and the full D.C. Circuit (with Chief Judge Garland not participating) heard nearly seven hours of oral argument on September 27, 2016.

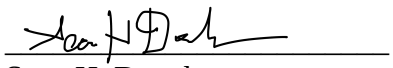
In March 2017, with the support of the petitioners challenging the Clean Power Plan, and over the opposition of the state, industry, and nongovernmental organization intervenors supporting the rule, EPA moved to put the litigation over the current regulation in abeyance while the agency undertook administrative proceedings to consider revising or repealing the Clean Power Plan. The D.C. Circuit placed the litigation in abeyance for 60 days and has granted a succession of additional 60-day abeyances since. In October 2017, EPA published a proposed regulation to repeal the Clean Power Plan, 82 Fed. Reg. 48,035 (Oct. 16, 2017), but the agency has not finalized that proposal nor proposed any other changes to the Clean Power Plan. *Cf.* 82 Fed. Reg. 61,507 (Dec. 28, 2017) (advance notice of proposed rulemaking, which "does not propose any regulatory requirements"). The agency is reported to be considering a new proposal to revise the Clean Power Plan rather than finalize the proposal to repeal it, but no such proposal has yet issued. EPA has not committed to a firm schedule for issuing the new proposed rule or any final rule, representing only its "intention and expectation is that the [proposed rule] will be published in the Federal Register by late summer or early fall so that the Agency will be in a position to take final action . . . by the first part of 2019." Status Report, ECF No. 1742722 (July 26, 2018).

Approximately two and one-half years have elapsed since this Court issued a stay pending the D.C. Circuit's disposition of the petitions for review and any appeal to this Court therefrom, and nearly two years have elapsed since the en banc oral argument. On June 26, 2018, the D.C. Circuit issued the latest 60-day extension of the abeyance. Three judges issued concurring statements noting that the merits review anticipated when this Court stayed the regulations has not materialized; two judges urged the parties to inform this Court of these circumstances. *See* Attachment A, Concurring Statement of Tatel, J., joined by Millett, J. ("[T]he Supreme Court is entitled to decide for itself whether the temporary stay it granted pending *judicial* assessment of the Clean Power Plan ought to continue now that it is being used to maintain the status quo pending *agency* action.") (emphasis in original); *see also* Attachment B (statement of Judge Tatel and Judge Millett concurring in August 8, 2017 abeyance order). In a separate statement concurring in the June 26 order, Judge Wilkins, also joined by Judge Millett, stated that petitioners and respondent EPA "have hijacked the Court's equitable power for their own purposes," and urged that "[i]f EPA or the Petitioners wish to delay further the operation of the Clean Power Plan, then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court's authority under the guise of preserving jurisdiction over moribund petitions." Concurring Statement of Wilkins, J., joined by Millett, J., Attachment A.

As the D.C. Circuit judges' statements highlight, about two and one-half years after the stay *pendente lite* was granted, and contrary to the premise of the stay orders, the litigation has

come to a protracted standstill with the support of the parties that sought a stay in this Court. In light of these changed circumstances, the Court may wish to require the parties to explain why the stay should continue in effect.

Respectfully submitted,



Sean H. Donahue
Counsel of Record
Susannah L. Weaver
Donahue, Goldberg & Weaver, LLP
1111 14th Street, N.W., Suite 510A
Washington, D.C. 20005
(202) 277-7085
sean@donahuegoldberg.com
Counsel for Environmental Defense Fund

David Doniger
Benjamin Longstreth
Melissa J. Lynch
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, D.C. 20005
(202) 513-6256
Counsel for Natural Resources Defense Council

Tomás Carbonell
Vickie L. Patton
Martha Roberts
Benjamin Levitan
Environmental Defense Fund
1875 Conn. Avenue, N.W. Suite 600
Washington, D.C. 20009
(202) 572-3610
Counsel for Environmental Defense Fund

Joanne Spalding
Andres Restrepo
Alejandra Núñez
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5725
Counsel for Sierra Club

Ann Brewster Weeks
James P. Duffy
Clean Air Task Force
114 State Street, 6th Floor
Boston, MA 02109
(617) 624-0234, ext. 156
Counsel for American Lung Association, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, and The Ohio Environmental Council

Howard I. Fox
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036
(202) 797-5241
Counsel for Sierra Club

Vera P. Pardee
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
(415) 632-5317
Counsel for Center for Biological Diversity

William V. DePaulo
122 N Court Street, Suite 300
Lewisburg, WV 24901
(304) 342-5588
Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition, and Keepers of the Mountains Foundation

cc: Listed Counsel, by U.S. Mail and Electronic Mail Where Indicated

Noel J. Francisco
Solicitor General of the United States
United States Department of Justice
Washington, DC 20530-0001

Eric G. Hostetler
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
Email: eric.hostetler@usdoj.gov

Counsel for the United States

Lindsay S. See
Solicitor General
State of West Virginia
State Capitol, Bldg. 1, Room 26-E
Charleston, WV 25305

Scott A. Keller
Solicitor General
P.O. Box 12548
Austin, TX 78741-2548
Email: scott.keller@texasattorneygeneral.gov

Counsel for Applicants in No. 15A773

Christina F. Gomez
Hollard & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Email: cgomez@hollandhart.com

Counsel for Applicants in No. 15A776

Laurence H. Tribe
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
Email: tribe@law.harvard.edu

Geoffrey K. Barnes
Squire Patton Boggs (US) LLP
127 Public Square, Suite 4900
Cleveland, OH 44114
Email: geoffrey.barnes@squirepb.com

Counsel for Applicants in No. 15A778

Peter D. Keisler
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
Email: pkeisler@sidley.com

Counsel for Applicants in No. 15A787

Paul M. Seby
Special Assistant Attorney General State of North Dakota
Greenberg Traurig LLP
1200 17th Street, Suite 2400
Denver, CO 80202
Email: sebyp@gtlaw.com

Counsel for Applicant in No. 15A793

Steven C. Wu
Deputy Solicitor General
Michael J. Myers
Assistant Attorney General
120 Broadway, 25th Floor
New York, NY 10271
Email: steven.wu@ag.ny.gov

Counsel for State Respondents

Kevin Poloncarz
Donald L. Ristow
Paul Hastings LLP
55 2nd Street #2400
San Francisco, CA 94105
(415) 856-7000
Email: kevinpoloncarz@paulhastings.com

Counsel for Industry Respondents Calpine, et al.

ATTACHMENT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2017**

EPA-80FR64662
EPA-82FR4864

Filed On: June 26, 2018

State of West Virginia, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

American Wind Energy Association, et al.,
Intervenors

Consolidated with 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland*, Chief Judge; Henderson, Rogers, Tatel,** Griffith, Kavanaugh, Srinivasan, Millett, Pillard, Wilkins,** and Katsas*, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that these consolidated cases remain in abeyance for 60 days from the date of this order. EPA is directed to continue to file status reports at 30-day intervals beginning 30 days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Chief Judge Garland and Circuit Judge Katsas did not participate in this matter.

** A statement by Circuit Judge Tatel, joined by Circuit Judge Millett, concurring in the order granting further abeyance, is attached.

** A statement by Circuit Judge Wilkins, joined by Circuit Judge Millett, is attached.

TATEL, *Circuit Judge*, joined by MILLETT, *Circuit Judge*, concurring in the order granting further abeyance:

Like Judge Wilkins, I have reluctantly voted to continue holding this case in abeyance for now. Although I might well join my colleagues in disapproving any future abeyance requests, I write separately only to reiterate what I said nearly a year ago: that the untenable status quo derives in large part from petitioners' and EPA's treatment of the Supreme Court's order staying implementation of the Clean Power Plan pending judicial resolution of petitioners' legal challenges as indefinite license for EPA to delay compliance with its obligation under the Clean Air Act to regulate greenhouse gases. *See* Per Curiam Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (Tatel and Millett, JJ., concurring in the order granting further abeyance).

In early 2016, petitioners represented to the Supreme Court that a stay was necessary to protect them from irreparable injury while the federal courts resolved their legal challenges to the Clean Power Plan. *See* Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 38–45, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016). Since then, however, EPA has proposed to repeal the Plan, *see* Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035, 48,035 (proposed Oct. 16, 2017), and both petitioners and EPA itself have urged this court—successfully, so far—to refrain from conducting the very legal analysis the Supreme Court stay was designed to accommodate, *see* Petitioners' and Petitioner-Intervenors' Response in Support of EPA's Motion to Hold Cases in Abeyance at 8, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 6, 2017) (explaining that because "the case could ultimately be mooted by EPA's forthcoming action," any present effort to resolve the Rule's legality "would be wasted").

The Supreme Court has reminded parties that they "have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of [a] litigation." *Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)); *cf. Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983) ("As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation."). Perhaps, if advised of circumstances as they stand today, the Supreme Court would extend the stay to give EPA additional time to consider its options for replacing the Clean Power Plan with greenhouse-gas regulations that better align with the agency's current views. Or perhaps, given EPA's own judicially upheld determination that greenhouse gases pose an ongoing threat to public health and welfare, *see Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part and rev'd in part on other grounds sub nom. Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and the Court's decade-old recognition in *Massachusetts v. EPA* that "[u]nder the clear terms of the Clean Air Act," EPA must take regulatory action in the face of such a determination, 549 U.S. 497, 533 (2007), the Court would determine that the need for expeditious agency action does not permit the luxury of continued delay. Either way, and especially given that EPA has yet to present any concrete alternative for complying with *Massachusetts v. EPA*, the Supreme Court is entitled to decide for itself whether the temporary stay it granted pending *judicial* assessment of the Clean Power Plan ought to continue now that it is being used to maintain the status quo pending *agency* action.

WILKINS, *Circuit Judge*, joined by MILLETT, *Circuit Judge*:

Over a year has passed since we first held in abeyance our decision in this case – and nearly two years since oral argument. I will join in one further abeyance, but I am writing to apprise the parties that it is the last one that I am inclined to grant.

The Court's ability to hold a case in abeyance – or to stay a rule – derives from the Court's inherent equitable power to "preserv[e] rights" and "to save the public interest from injury or destruction while an appeal is being heard." *See Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 15 (1942). The Administrative Procedure Act codifies this in the rulemaking context by enabling courts, where "necessary to prevent irreparable injury," "to postpone the effective date of an agency action or to preserve status or rights *pending conclusion of the review proceedings*." 5 U.S.C. § 705 (emphasis added). Thus, the Court's equitable power to maintain the status quo is inextricably tied to the Court's authority to resolve disputes. *Nken v. Holder*, 556 U.S. 418, 421 (2009) (power to stay an action or ruling "allow[s] an appellate court the time necessary to review it"); *see also* 28 U.S.C. § 1651(a) (All Writs Act empowers courts to "issue all writs necessary or appropriate *in aid of their respective jurisdictions*" (emphasis added)). Courts cannot simply issue stays without an active case pending. *See In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985) (Absent a petition, "there was no ongoing proceeding in this court in which a motion for stay could have been filed and thus the court did not have jurisdiction to grant the motion for stay.").

While this matter technically remains pending before us, in reality, the dispute appears to have dissipated. From the beginning of the abeyance proceedings, Petitioners and Petitioner-Intervenors have supported the request by the Environmental Protection Agency (EPA) that the Court detain its decision, on the basis that the Clean Power Plan may be short-lived after agency review. *See* Doc. #1669984, Pet'rs' and Pet'r-Intervenors' Resp. in Supp. of EPA's Mot. to Hold Cases in Abeyance. In other words, the parties who brought this controversy have joined their erstwhile adversary in seeking indefinite delay of the very result that their Petitions request – that is, this Court's review of the Clean Power Plan – and Petitioners appear to have no current interest in prosecuting this action to disposition. Meanwhile, EPA has offered no indication of when it expects its review of the CPP to be complete, and instead simply asserts that "these cases should remain in abeyance pending the conclusion of [its] rulemaking [process]." Doc. #1733943, EPA Status Report (June 1, 2018). In this posture, our abeyance does not serve to maintain the status quo while *the Court decides* the disposition of the Petitions: instead, the result is the maintenance of the status quo while *EPA decides* the disposition of the rule that the Petitions challenge. The upshot is that the Petitioners and EPA have hijacked the Court's equitable power for their own purposes. If EPA or the Petitioners wish to delay further the operation of the Clean Power Plan while the agency engages in rulemaking, then they should avail themselves of whatever authority Congress gave them to do so, rather than availing themselves of the Court's authority under the guise of preserving jurisdiction over moribund petitions.

Unless Petitioners articulate a good reason to conclude otherwise, it would appear that the equities will no longer favor granting further abeyance in 60 days. At that time, I will urge the Court to dismiss the Petitions without prejudice and remand the case to EPA.

ATTACHMENT B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2016**

EPA-80FR64662
EPA-82FR4864

Filed On: August 8, 2017

State of West Virginia, et al.,

Petitioners

v.

Environmental Protection Agency and E. Scott Pruitt, Administrator, United States Environmental Protection Agency,

Respondents

American Wind Energy Association, et al.,
Intervenors

Consolidated with 15-1364, 15-1365, 15-1366, 15-1367, 15-1368, 15-1370, 15-1371, 15-1372, 15-1373, 15-1374, 15-1375, 15-1376, 15-1377, 15-1378, 15-1379, 15-1380, 15-1382, 15-1383, 15-1386, 15-1393, 15-1398, 15-1409, 15-1410, 15-1413, 15-1418, 15-1422, 15-1432, 15-1442, 15-1451, 15-1459, 15-1464, 15-1470, 15-1472, 15-1474, 15-1475, 15-1477, 15-1483, 15-1488

BEFORE: Garland*, Chief Judge, and Henderson, Rogers, Tatel**, Brown, Griffith, Kavanaugh, Srinivasan, Millett**, Pillard, and Wilkins, Circuit Judges

O R D E R

It is **ORDERED**, on the court's own motion, that these consolidated cases remain in abeyance for 60 days from the date of this order. EPA is directed to continue to file status reports at 30-day intervals beginning 30 days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

* Chief Judge Garland did not participate in this matter.

** A statement by Circuit Judges Tatel and Millett, concurring in granting further abeyance is attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1363 **September Term, 2016**

TATEL, *Circuit Judge*, and MILLETT, *Circuit Judge*, concurring in the order granting further abeyance:

The Supreme Court stayed the Rule under review here "pending disposition of the . . . petitions for review" in this court and, if certiorari were granted, in the Supreme Court. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). As this court has held the case in abeyance, the Supreme Court's stay now operates to postpone application of the Clean Power Plan indefinitely while the agency reconsiders and perhaps repeals the Rule. That in and of itself might not be a problem but for the fact that, in 2009, EPA promulgated an endangerment finding, which we have sustained. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (*per curiam*), *aff'd in part and rev'd in part on other grounds*, *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). That finding triggered an affirmative statutory obligation to regulate greenhouse gases. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."). Combined with this court's abeyance, the stay has the effect of relieving EPA of its obligation to comply with that statutory duty for the indefinite future. Questions regarding the continuing scope and effect of the Supreme Court's stay, however, must be addressed to that Court.