

**ORAL ARGUMENT NOT YET SCHEDULED**

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

<b>LG&amp;E AND KU ENERGY LLC,</b>	)	
	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>No. 15-1418</b>
	)	<b>(consolidated with</b>
<b>UNITED STATES ENVIRONMENTAL</b>	)	<b>No. 15-1363 and</b>
<b>PROTECTION AGENCY,</b>	)	<b>other cases)</b>
	)	
<b>Respondent.</b>	)	
	)	

**MOTION TO SEVER CERTAIN ISSUES  
AND HOLD THEM IN ABEYANCE  
PENDING ADMINISTRATIVE RECONSIDERATION**

LG&E and KU Energy LLC (hereinafter “LKE”) respectfully moves the Court to: (1) sever from the remainder of this litigation the issues that are the subject of a pending request for administrative reconsideration filed by LKE with the U.S. Environmental Protection Agency (“EPA”) on December 16, 2015, and that are described in Items 2 through 4 of LKE’s Nonbinding Statement of the Issues in this case (Document #1589605); (2) establish a new docket for these severed issues with a newly-assigned case number and hold that new case in

abeyance pending the completion of reconsideration proceedings; and (3) order the parties to file a motion or motions to govern further proceedings in the new case within 30 days after the conclusion of EPA's reconsideration proceedings. In support of this motion, LKE states as follows:

1. In its petition to this court, LKE seeks judicial review of EPA's final rule entitled "Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units," published at 80 Fed. Reg. 64662 (October 23, 2015) and to be codified at 40 C.F.R. Part 60, Subpart UUUU (the "Clean Power Plan Rule" or "CPP Rule"). As summarized in its Nonbinding Statement of Issues, LKE objects to certain aspects of the CPP Rule as applied to affected electric utility generating units owned and operated by LKE's operating companies.

2. In its petition to EPA for administrative reconsideration of the CPP Rule, LKE presents objections to changes that EPA made to the Clean Power Plan rule, as well as to the methodology and analysis used to support the requirements, after the close of the public comment period, and explains why those changes are flawed and require reconsideration. These objections correspond to Items 2 through 4 of LKE's Nonbinding Statement of Issues filed in this case.

3. On December 8, 2015, LKE joined with other petitioners in these consolidated cases in a Motion to Establish Briefing Format and Expedited

Briefing Schedule (Document #1587531) (“Petitioners’ Briefing Motion”). That motion requested that the Court sever from these consolidated cases all but the core, fundamental legal questions regarding EPA’s authority to issue the CPP Rule. If the Court grants the relief requested by Petitioners’ Briefing Motion, the issues to be raised by LKE will be among those severed from this case, and this motion therefore will be mooted and proceedings under LKE’s petition will be governed by the Court’s order in response to the Petitioners’ Briefing Motion. However, if the Court does not grant the relief requested in the Petitioners’ Briefing Motion, then LKE respectfully requests that Items 2 through 4 of its Nonbinding Statement of Issues be severed and held in abeyance for the reasons stated below.

4. The Court has not yet set a schedule in these consolidated cases for briefing on the merits or oral argument.

5. In *Utility Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014), the Court interpreted 42 U.S.C. § 7607(d)(7)(B) to require substantive and procedural challenges that were not raised during the notice and comment period and were raised for the first time in a petition for reconsideration to “await EPA’s action on that petition.” *Id.* at 747. This bar “applies even if the objections could not have been raised during the comment period.” *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 (D.C. Cir. 2015).

6. The issues presented in LKE's petition to EPA for administrative reconsideration (which correspond to Items 2 through 4 of LKE's Nonbinding Statement of Issues) were not raised during the comment period on the CPP Rule because the actions complained of occurred after the close of the comment period. Specifically, LKE is petitioning EPA for reconsideration of two key aspects of the final rule that are materially different from what was proposed: (1) the promulgation of uniform, nationally applicable "emission performance rates," instead of emission targets established separately for each state, that are not achievable by affected generating facilities owned and operated by LKE's operating companies; and (2) the substantially changed methodology for calculating a key element of EPA's "best system of emission reduction" (which serves as the basis for determining the emission guidelines set out in the rule) by applying the renewable energy "building block" on a broad regional basis rather than the proposed state-by-state basis, coupled with an entirely new methodology that substantially increased the level of generation assumed to be available in the future from new renewable generating resources, which will result in emission reduction requirements pursuant to the rule that are not achievable by affected generating facilities owned and operated by LKE's operating companies.

7. Based on the foregoing, LKE requests that the Court sever from this litigation the issues raised to EPA in LKE's petition for administrative

reconsideration (Items 2 through 4 in LKE's Nonbinding Statement of Issues), establish a new docket for these severed issue with a newly-assigned case number, hold that new case in abeyance pending the completion of EPA's reconsideration proceedings, and order the parties to file a motion or motions to govern further proceedings in the new case within 30 days after the conclusion of those proceedings. If the court severs these issues, and if LKE decides to seek review of EPA's final action on its petition for reconsideration, LKE will file a petition for review with this court and request that its petition be consolidated with the case number created pursuant to this Court's action on this motion.

8. Counsel for LKE has consulted with counsel for EPA regarding this motion, and has been advised that EPA does not consent to the motion, but will review the motion once it is filed, consider its position, and file an appropriate response.

Respectfully submitted,

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Dated: December 18, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2015, I have served the foregoing **Motion to Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration** on all registered counsel through the court's electronic filing system (ECF).

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