

ORAL ARGUMENT HEARD EN BANC  
ON SEPTEMBER 27, 2016 IN CASE NO. 15-1363  
ORAL ARGUMENT NOT YET SCHEDULED IN CASE NO. 17-1014

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

STATE OF WEST VIRGINIA, et al.,	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	
	)	No. 15-1363
	)	(and consolidated cases)
UNITED STATES	)	
ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
<i>Respondent.</i>	)	
	)	
STATE OF NORTH DAKOTA,	)	
	)	
	)	
<i>Petitioner,</i>	)	
	)	
v.	)	
	)	No. 17-1014
	)	(and consolidated cases)
UNITED STATES	)	
ENVIRONMENTAL PROTECTION	)	
AGENCY, et al.,	)	
	)	
<i>Respondents.</i>	)	
	)	

**STATE AND MUNICIPAL RESPONDENT-INTERVENORS’  
OPPOSITION TO MOTION TO SEVER AND CONSOLIDATE**

The undersigned Intervenor-Respondent States and Municipalities (State Intervenor) oppose the motion of Utility Air Regulatory Group, American Public Power Association, LG&E, and KU Energy LLC (collectively, Movants) for an order (1) severing their reconsideration petitions for review in *State of North Dakota, et al. v. EPA* (No. 17-1014) from the other reconsideration petitions; (2) consolidating them with *West Virginia v. EPA* (No. 15-1363), which has already been fully briefed and argued to the *en banc* court; and (3) allowing supplemental briefing in *West Virginia* more than five months after oral argument. *See* Joint Motion to Sever and Consolidate, ECF No. 1663046 (Feb. 24, 2017). Movants' proposed approach would be inefficient and inconsistent with this Court's practice in similar cases, and would result in unnecessary delay in resolving the *West Virginia* case. This Court should deny the motion and resolve the *North Dakota* reconsideration proceedings in the regular course.

### **BACKGROUND**

Movants are a small subset of the petitioners in *West Virginia* challenging the Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), EPA's regulation of greenhouse gas emissions from existing fossil-fuel fired power plants under section 111(d) of the Clean Air Act. This Court previously denied a motion by Movants LG&E and KU Energy LLC to sever issues that were then the subject of pending reconsideration petitions before EPA. *See* Order, ECF No. 1594951 (Jan. 21,

2016); Motion to Sever, ECF No. 1589612 (Dec. 18, 2015). This Court then ordered expedited briefing and argument before the *en banc* Court on all of the issues in *West Virginia*, including the notice issues raised in Movants' petitions for reconsideration. Oral argument occupied a full day before the *en banc* Court on September 27, 2016. A decision remains pending.

In January 2017, EPA denied the petitions seeking reconsideration of the Clean Power Plan on procedural and/or substantive grounds, with certain exceptions that are not relevant here. 82 Fed. Reg. at 4,864 (Jan. 17, 2017).<sup>1</sup> EPA concluded that the reconsideration petitions raised issues on which there had been adequate notice and opportunity to comment during the rulemaking process and which, in any case, were not of central relevance, and therefore would not have altered the outcome of EPA rulemaking. *See* Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units (Jan. 11, 2017), at 4.

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<sup>1</sup> *See also* Basis for Denial of Petitions to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units (Jan. 11, 2017), *available at* [https://www.epa.gov/sites/production/files/2017-01/documents/basis\\_for\\_denial\\_of\\_petitions\\_to\\_reconsider\\_and\\_petitions\\_to\\_stay\\_the\\_final\\_cpp.pdf](https://www.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf).

Shortly thereafter, Movants and others filed new petitions for review of EPA's decision denying reconsideration. *State of North Dakota, et al. v. EPA* (No. 17-1014). The Court consolidated those petitions and designated the *North Dakota* proceeding as the lead case.

Movants now seek to sever their reconsideration petitions alone from all the other reconsideration petitions in the *North Dakota* proceeding and to consolidate them with their earlier petitions in *West Virginia*. See Joint Motion to Sever and Consolidate ("Mot."), ECF No. 1663046 (Feb. 24, 2017). They also seek to submit supplemental briefing in *West Virginia*, thereby effectively and unnecessarily delaying the resolution of that case. This Court should reject Movants' inefficient approach.

## ARGUMENT

### **Movants' Request Seeks Unprecedented Relief and Would Be Both Inefficient and Inconsistent with This Court's Usual Practice.**

Movants' proposal requests unprecedented relief. The *West Virginia* case has been fully briefed and argued before the *en banc* Court. This Court has never consolidated newly-filed petitions with a case that has been fully argued—let alone a case that this Court has taken the extraordinary step of hearing *en banc* in the first instance. Rather, the usual path followed by this Court has been to rule on the merits of the original petition while resolving at a later time the challenges to EPA's subsequent denial of reconsideration petitions. See, e.g., *EME Homer City*

*Gen. v. EPA*, 795 F.3d 118, 137 (D.C. Cir. 2015) (deciding merits of rule notwithstanding pending administrative reconsideration petitions); *Mexichem Specialty Resins v. EPA*, 787 F.3d 544, 549 (D.C. Cir. 2015) (same); *Utility Air Regulatory Group v. EPA*, 744 F.3d 741, 743-744 (D.C. Cir. 2014) (same). There is no basis for adopting a different approach here.

Movants' examples (Mot. ¶ 5) of this Court's supposedly "routine[]" practice of consolidating reconsideration petitions are distinguishable. In *State of North Dakota v. EPA*, No. 15-1391, petitioners had brought an unopposed motion for such consolidation very early in the litigation, before even a briefing schedule had been established, and neither the original nor reconsideration proceedings were before the *en banc* Court. See Unopposed Motion to Consolidate, No. 15-1381, ECF No. 1624282 (July 12, 2016); Unopposed Motion Concerning Briefing Schedule, No. 15-1381, ECF No. 1628713 (August 8, 2016). Similarly, in *Sierra Club v. Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981), the Court consolidated the original petitions with the reconsideration petitions before the case was briefed or argued. See Feb. 29, 1980 Order, *Electric Utilities v. EPA* (D.C. Cir. No. 79-1719).

The procedural context is markedly different here. The case has been fully briefed and argued, and more than five months have elapsed since oral argument. Moreover, *West Virginia* was heard *en banc* at the outset—and Movants do not explain why the record-specific issues raised in their reconsideration petitions also

warrant such extraordinary treatment. Under these circumstances, reopening the *West Virginia* proceeding to additional issues and briefing would be both unprecedented and uniquely disruptive, and would needlessly delay this Court's resolution of the case.

Moreover, Movants' proposed approach would undermine the expedited consideration of these proceedings that this Court ordered in January 2016. ECF No. 1595951. At that time, this Court specifically declined to sever issues that were then subject to pending reconsideration petitions before EPA, and instead decided to address them along with the core legal issues in the *West Virginia* proceeding. After the Rule was stayed by the Supreme Court, this Court took further steps to resolve the proceedings expeditiously by reviewing the case *en banc* in the first instance. *See* ECF 1613489 (May 16, 2016). Movants' proposed approach would prevent expedited resolution of the case by reopening briefing on issues this Court previously declined to sever and hear separately.

In short, rather than injecting Movants' reconsideration arguments into this proceeding at the eleventh hour, this Court should require Movants to brief and argue their reconsideration petitions alongside all the other pending reconsideration petitions in the *North Dakota* proceeding before a three-judge panel of this Court.

## CONCLUSION

This Court should deny the motion.

Dated: March 13, 2017

Respectfully Submitted,

FOR THE STATE OF NEW YORK

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*/s/ Brian Lusignan<sup>2</sup>*

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<sup>3</sup> The State of New Hampshire joins in the filing in Case No. 15-1363, but not in the filing in Case No. 17-1014.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Brian Lusignan, hereby certifies:

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*/s/ Brian Lusignan*

BRIAN LUSIGNAN

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Opposition to Motion to Sever and Consolidate was filed on March 13, 2017 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Brian Lusignan  
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