

**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**

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

The Utility Air Regulatory Group and the American Public Power Association (“UARG, *et al.*”) and LG&E and KU Energy LLC (“LKE”) (collectively, “Movants”) respectfully move the Court to: (1) sever their respective petitions for review in *State of*

North Dakota, et al. v. EPA, No. 17-1014 (“*North Dakota v. EPA*”),¹ which involve indisputably ripened post-comment period objections to EPA’s final emission guideline to address carbon dioxide emissions from existing electric utility generating units (the “Rule”) that were presented in Movants’ requests for administrative reconsideration that were denied by the U.S. Environmental Protection Agency (“EPA” or “the Agency”); (2) consolidate those petitions for review with the Movants’ respective petitions in *State of West Virginia, et al. v. EPA*, No. 15-1363 (“*West Virginia v. EPA*”);² and (3) issue an order directing the parties in *West Virginia v. EPA* to submit after the close of the period for filing a petition for review in *North Dakota v. EPA* (i.e., after March 20, 2017) a proposal to govern the scheduling of supplemental briefing of the newly-ripened objections to the Rule. These now-ripened challenges to the Rule, certain of which are as-applied challenges, must be resolved in order to dispose of the petitions for review of the Rule that are currently pending before the Court in *West Virginia v. EPA*.

Movants contacted counsel for other Petitioners, Petitioner-Intervenors, Respondents, and Respondent-Intervenors in *West Virginia v. EPA* and *North Dakota v. EPA* regarding their positions on this motion. Petitioners and Petitioner-

¹ UARG, *et al.* are petitioners in No. 17-1018. LKE are petitioners in No. 17-1019. Both petitions were consolidated with lead case No. 17-1014, by the Court’s order of January 25, 2017. ECF No. 1657354.

² In *State of West Virginia v. EPA*, UARG, *et al.* are petitioners in No. 15-1370. LKE are petitioners in No. 15-1418.

Intervenors do not oppose the motion. Respondent EPA takes no position on the motion at this time and reserves the right to file a response. Respondent-Intervenor States and Environmental and Public Health Organizations (several of whom are also Movant Respondent-Intervenors in *North Dakota v. EPA*), and Respondent-Intervenor Power Companies and Renewable Energy Associations (except for Respondent-Intervenors NextEra Energy and Solar Energy Industries Association) oppose the motion. Respondent-Intervenor NextEra Energy takes no position on the motion, and Respondent-Intervenor Solar Energy Industries Association did not inform Movants' counsel of its position on the motion.

In support of this motion, Movants state as follows:

1. EPA took final action promulgating the Rule on October 23, 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Numerous petitions for review of the Rule were filed in this Court, nearly all of which were subsequently consolidated under lead docket *State of West Virginia v. EPA*, No. 15-1363. The case was briefed on an expedited schedule, and oral argument was held before this Court, sitting *en banc*, on September 27, 2015. A decision in the case is pending.

2. While litigation in *West Virginia v. EPA* was proceeding in this Court, EPA received between October 23, 2015, and January 28, 2016, at least 38 separate administrative petitions for reconsideration of various aspects of the Rule. A number of those petitions set forth objections to the Rule that stemmed from EPA's having failed to provide notice and an opportunity to comment on elements of the Rule that

were introduced only upon its final promulgation. The Agency had argued in its briefing in the *West Virginia v. EPA* litigation that such objections were not ripe for resolution by this Court in that case. *See, e.g.*, EPA Br., *West Virginia v. EPA*, No. 15-1363, ECF No. 1609995 at 108 n.97 (Apr. 22, 2016). At oral argument, several members of the *en banc* Court voiced concerns about the appropriateness of the Court's addressing in that litigation objections that were pending before the Agency in administrative petitions for reconsideration and subject to section 307(d)(7)(B) of the Clean Air Act. *See, e.g.*, Transcript, *West Virginia v. EPA*, No. 15-1363, ECF No. 1646159 at 231, 237-42.

3. On January 12, 2017, EPA informed this Court that the Agency had taken final action denying the pending petitions for reconsideration.³ To date, 10 separate petitions for review have been filed in this Court seeking judicial review of EPA's final action denying the administrative petitions for reconsideration. Those petitions have been consolidated under the lead docket *State of North Dakota v. EPA*, No. 17-1014.

³ *See* Letter from E. Hostetler, U.S. Dept. of Justice, to M. Langer, Clerk (Jan. 12, 2017), *West Virginia v. EPA*, No. 15-1363, ECF No. 1655632; *see also* 82 Fed. Reg. 4864 (Jan. 17, 2017) (EPA "received 38 petitions for reconsideration" of the Rule, and "is providing notice that it denied the petitions for reconsideration except to the extent they raise topics concerning biomass and waste-to-energy, and it is deferring action on the petitions to the extent they raised those topics.").

4. Section 307(d)(7)(B) of the Clean Air Act provides that “[o]nly an objection to a rule or a procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review,” but that “if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, [EPA] shall convene a proceeding for reconsideration of the rule” 42 U.S.C. § 7607(d)(7)(B). That provision further provides that, if EPA “refuses to convene such a proceeding,” the person raising the objection “may seek review of such refusal in the United States court of appeals for the appropriate circuit.” *Id.* In *Utility Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014), the Court interpreted section 307(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 an administrative 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).

5. In the situation presented here, where the original petitions challenging a final EPA rule are still pending before the Court, petitions for review of the Agency’s denial of reconsideration are routinely consolidated with those original petitions. For instance, this Court recently did so in *State of North Dakota v. EPA*, No. 15-1381, a case challenging EPA’s final rule establishing new source performance standards for

greenhouse gas emissions from new, modified, and reconstructed electric utility steam generating units. *See* Petitioners and Petitioner-Intervenors' Unopposed Motion to Consolidate, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1624282 (July 12, 2016); Order, *State of North Dakota, et al. v. EPA*, No. 15-1381, ECF No. 1625550 (July 19, 2016) (consolidating petitions to review EPA's denial of administrative reconsideration petitions with ongoing case). The Court has long taken this approach. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). In such circumstances, a petitioner may both (1) challenge EPA's failure to grant the request for administrative reconsideration, and (2) challenge the final rule itself, based on an objection to the rule that ripened as a result of the denial of reconsideration.

6. On February 9, 2016, the U.S. Supreme Court issued orders staying the Rule. The orders state that the Rule "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 writ of certiorari, if such writ is sought." Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016). On its face, the Supreme Court order anticipates that this Court would address and resolve all of the "applicants' petitions for review" of the Rule that might be filed, including as-applied challenges to the Rule and post-comment period objections that are indisputably ripened as a result of requests for reconsideration being denied.

7. In conjunction with their submittal of this motion, Movants are each submitting in *West Virginia v. EPA* a separate renewed non-binding statement of those issues that they seek to have addressed by the Court following supplemental briefing. The issues identified in those statements are identical to those presented in the non-binding statements of issues that Movants had originally submitted to the Court in *West Virginia v. EPA*. At that time, UARG, *et al.* specifically identified a number of “[i]ssues [t]hat [w]ill [b]e the [s]ubject of a [f]orthcoming [p]etition for [r]econsideration.”⁴ As for LKE, in a separate motion filed on December 18, 2015, LKE asked the Court to sever and hold in abeyance certain of its issues that were the subject of LKE’s own administrative petition for reconsideration.⁵ In an order dated January 21, 2016, the Court denied LKE’s motion, keeping these issues as a part of the *State of West Virginia v. EPA* consolidated cases. Order, *West Virginia v. EPA*, No. 15-1363, ECF No. 1594951 (Jan. 21, 2016). Those issues are identified in LKE’s renewed statement of issues. The issues raised by LKE – which are now indisputably ripe – represent separate as-applied challenges to the Rule that must be resolved to dispose of the *West Virginia v. EPA* petitions for review. *Cf. EPA v. EME Homer City*

⁴ See Nonbinding Joint Statement of Issues of Petitioners UARG, *et al.*, *Utility Air Regulatory Group, et al. v. EPA*, No. 15-1370, ECF No. 1589590 at 6 (Dec. 18, 2015).

⁵ See Motion To Sever Certain Issues and Hold Them in Abeyance Pending Administrative Reconsideration, *LG&E and KU Energy LLC v. EPA*, No. 15-1418, ECF No. 1589612 (Dec. 18, 2015).

Generation, LP, 134 S. Ct. 1584, 1609 (2014) (finding that “[i]f any upwind State concludes it has been forced to regulate emissions below the one-percent threshold or beyond the point necessary to bring all downwind States into attainment, that State may bring a particularized, as-applied challenge to the Transport Rule, along with any other as-applied challenges it may have.”).

8. Movants respectfully request that, upon granting this motion, the Court issue an order in *West Virginia v. EPA*, directing the parties to submit proposals after March 20, 2017 (the date on which the period of time to file a petition for review of the denial of the administrative petitions for reconsideration expires) to govern the supplemental briefing of the issues identified by Movants (including a proposed briefing format and schedule).

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

Dated: February 24, 2017

Respectfully submitted,

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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 Rules 32(a)(1) and 32(e)(1), I hereby certify that the foregoing document contains 1,756 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.

Dated: February 24, 2017

/s/ Allison D. Wood

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of February 2017, a copy of the foregoing document was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Allison D. Wood