

No. 15-1363 (and consolidated cases)

**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.

On Petition for Review of Final Agency Action of the United
States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)

**SUPPLEMENTAL BRIEF OF INTERVENORS CALPINE
CORPORATION, THE CITY OF AUSTIN D/B/A AUSTIN
ENERGY, THE CITY OF LOS ANGELES, BY AND
THROUGH ITS DEPARTMENT OF WATER AND POWER,
THE CITY OF SEATTLE, BY AND THROUGH ITS CITY
LIGHT DEPARTMENT, NATIONAL GRID GENERATION,
LLC, NEW YORK POWER AUTHORITY, PACIFIC GAS
AND ELECTRIC COMPANY, SACRAMENTO MUNICIPAL
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GLOSSARY

APA	Administrative Procedure Act
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
Rule	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (October 23, 2015)

INTRODUCTION AND SUMMARY OF ARGUMENT

The undersigned Power Companies submit this supplemental brief in response to the Court’s April 28, 2017, order for the parties to “file supplemental briefs addressing whether these consolidated cases should be remanded to the agency rather than held in abeyance.” Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017), ECF No. 1673071.

Due to the continued effect of the Supreme Court stay, holding these cases in abeyance indefinitely—while Respondent United States Environmental Protection Agency (“EPA”) reviews its Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (“Rule”), decides whether suspension, revision or rescission of the Rule may be appropriate, and then completes any subsequent rulemaking—would be tantamount to indefinite suspension of the Rule. It would allow Respondent EPA to circumvent the procedural requirements of the Administrative Procedure Act (“APA”) and the Clean Air Act (“CAA”) for suspension or withdrawal of the Rule and contravene the underlying

premise upon which the stay was granted: ongoing and expedited judicial review by this Court.

Remanding these cases would dispose of the petitions for review and allow the stay to terminate as soon as the period for filing a petition for a writ of certiorari expires if no petition is filed or, if one is, upon denial of any such petition. This would avoid the fundamental problem associated with placing these cases in abeyance in these unique circumstances, where the Supreme Court issued a stay prior to this Court's ruling on the merits and the EPA, under a new administration, now seeks to avoid any merits ruling by this Court. Accordingly, of the two options presented by the Court's April 28, 2017, order and in the event the Court does not issue a decision on the merits at this time, remand is sounder and more consistent with foundational principles of administrative law.

ARGUMENT

I. Abeyance Would Amount to Indefinite Suspension of the Rule Without Satisfying the Procedural Requirements of the APA and CAA

The Power Companies previously opposed Respondent EPA's motion for abeyance for two reasons: First, holding these cases in

abeyance at this late stage based on EPA's announcement of its mere intention to review the Rule¹ would squander the extraordinary resources that both the *en banc* panel and parties have respectively committed to considering and litigating these cases. See Respondent-Intervenor Power Companies' Opposition to Motion for Abeyance at 3-5, *West Virginia v. EPA* (D.C. Cir. Apr. 6, 2017), ECF No. 1669991.

Second, although stayed by the Supreme Court pending disposition of these petitions for review,² the Rule remains the law of the land.³ As such, it cannot be suspended or rescinded without satisfying the notice and comment rulemaking requirements of the APA and CAA. See 5 U.S.C. § 553(b), (c); *id.* § 551(5); see also 42 U.S.C. §

¹ See Motion to Hold Cases in Abeyance at 7, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2016), ECF No. 1668274 (“[I]f the review concludes that suspension, revision or rescission of the Rule may be appropriate, EPA’s review will be followed by a rulemaking process.”); Review of the Clean Power Plan, Announcement of Review, 82 Fed. Reg. 16,329 (Apr. 4, 2017) (announcing that EPA “is reviewing and, if appropriate will initiate proceedings to suspend, revise or rescind the Clean Power Plan”).

² See Order, *West Virginia v. EPA*, No. 15A773 (S. Ct. Feb. 9, 2016) (stay is in effect “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.”).

³ See 40 C.F.R. §§ 60.5700 *et seq.* (2016).

7607(d). Yet, by asking the Court to place these cases in abeyance pending conclusion of the review ordered by the President and any subsequent rulemaking, EPA seeks to avoid a decision on the merits and to leave the stay in effect indefinitely, short-circuiting the procedural requirements of the APA and CAA for suspending a rule or removing it from the Code of Federal Regulations.

II. Remanding These Cases Would Appropriately Allow for Termination of a Stay Designed to Apply Only During Ongoing Judicial Review and Not During Administrative Reconsideration

Remanding these cases to Respondent EPA would constitute a disposition of the petitions for review.⁴ Accordingly, if the Court were to remand these cases to EPA, the stay would terminate as soon as the period for filing a petition for a writ of certiorari expires if no petition is filed or, if one is, upon its denial. Any further suspension of the Rule

⁴ See D.C. Circuit Rule 41(b) (“If the case is remanded, this court 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.”); see also D.C. Circuit Handbook of Practice and Internal Procedures, § XIII.A.3.

could only be accomplished in accordance with procedural requirements of both the APA and CAA.⁵

The Power Companies opposed Petitioners' requests for a stay of the Rule, both in this Court and in the Supreme Court. *See, e.g.*, Response of Power Companies in Opposition to Motions for Stay, *West Virginia v. EPA* (D.C. Cir. Dec. 8, 2015), ECF No. 1587423. The Power Companies have continued to defend the Rule since then because it provides a reasonable, market-based framework to reduce power-sector carbon dioxide emissions.

Allowing the stay to remain in effect indefinitely, while EPA avoids a decision on the merits and conducts its review of the Rule and any subsequent rulemaking, will effectively nullify the Rule without requiring EPA to articulate a rationale for doing so. For that reason,

⁵ *See Natural Res. Def. Council v. EPA*, 683 F.2d 752, 763 n. 23 (3rd Cir. 1982) (rejecting an “indefinite postponement of a rule” without compliance with the APA because it “would allow an agency to do indirectly what it cannot do directly”); *Council of the S. Mountains v. Donovan*, 653 F.2d 573, 580 n. 28 (D.C. Cir. 1981) (reasoning that deferral of a rule requires notice and comment rulemaking); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004) (invalidating rule delaying compliance deadlines for failure to comply with APA’s notice-and-comment requirements); 42 U.S.C. § 7607(d)(7)(B) (providing that the EPA Administrator or a court may stay the effectiveness of a rule during reconsideration for a period not to exceed three months).

and because remand would allow the stay to terminate while EPA considers whether suspension, revision or rescission of the Rule may be appropriate, the Power Companies believe that remanding these cases to EPA would be more consistent with foundational principles of administrative law and the premise upon which the Supreme Court's stay was granted than holding these cases in abeyance indefinitely.

CONCLUSION

If the Court does not decide these consolidated cases based on the record, briefing and argument before it at this time, it should remand them to Respondent EPA rather than hold them in abeyance.

Dated: May 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and the Circuit Rules of this Court, I hereby certify that the foregoing Supplemental Brief of Intervenors Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Los Angeles, by and through its Department of Water and Power, The City of Seattle, by and through its City Light Department, National Grid Generation, LLC, New York Power Authority, Pacific Gas and Electric Company, Sacramento Municipal Utility District and Southern California Edison Company in Support of Respondents contains 1,176 words as counted by the word-processing system used to prepare this brief and does not exceed the word limit set by the Court in its April 28, 2017 Order (ECF Doc. No. 1673071).

/s/ Kevin Poloncarz
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. I also caused the foregoing to be served via U.S. mail on counsel for the following parties at the following addresses:

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