

ORAL ARGUMENT HELD ON SEPTEMBER 27, 2016

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 Petitions for Review of Final Action
by the United States Environmental Protection Agency

**SUPPLEMENTAL BRIEF OF RESPONDENT EPA
IN SUPPORT OF ABEYANCE**

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GLOSSARY

CO₂ Carbon Dioxide

EPA Environmental Protection Agency

ECF Electronic Case Files

STATEMENT OF THE ISSUE

On April 28, 2017, this Court issued an order holding these cases in abeyance for 60 days and further ordering the parties to file supplemental briefs addressing whether the cases should be remanded to the Environmental Protection Agency (“EPA”) rather than held in abeyance. Pursuant to the Court’s order, Respondent EPA respectfully submits this supplemental brief urging the Court to continue to hold these cases in abeyance.

SUMMARY OF THE ARGUMENT

Abeyance is the proper course of action because it would better preserve the status quo, conserve judicial resources, and allow the new Administration to focus squarely on completing its current review of the Clean Power Plan (“the Rule”) as expeditiously as possible. The status quo is that the Rule has been stayed by the Supreme Court. See Order, West Virginia v. EPA, No. 15A773 (Feb. 9, 2016) (hereinafter “Stay Order”). Whereas abeyance would maintain the Supreme Court’s stay, a remand would raise substantial questions regarding the stay’s vitality. And as the Stay Order expressly contemplates possible petitions for certiorari after disposition of the Petitioners’ petitions for review, a remand order could result in unnecessary petitions for certiorari. Post-remand litigation could also complicate this Court’s own docket. Depending on the terms of the remand and any subsequent EPA actions, Petitioners could file new petitions for review of the Rule, or Respondent-Intervenors could challenge interim administrative actions that extend

compliance deadlines pending EPA's review of the Rule. EPA's consideration of interim administrative actions following remand (including extension of the Clean Power Plan's present enforcement deadlines) and any related litigation would also consume limited agency and staff resources that could otherwise be devoted to the agency's substantive review and possible revision of the Rule. These consequences can be—and manifestly should be—avoided by continuing to hold this litigation in abeyance.

BACKGROUND

On October 23, 2015, EPA promulgated “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” (“the Rule”). 80 Fed. Reg. 64,662. Numerous petitions for review of the Rule were filed in this Court and were subsequently consolidated under lead case West Virginia v. EPA, No. 15-1363. The Supreme Court granted applications for a stay of the Rule pending judicial review on February 9, 2016. Stay Order at 1.

On March 28, 2017, the President of the United States issued an Executive Order establishing the policy of the United States that executive departments and agencies “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” Executive Order, “Promoting Energy Independence

and Economic Growth,” § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). The Executive Order also sets forth the policy that “all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.” Id. § 1(d).

With respect to the Rule in particular, the Executive Order directs the Administrator of EPA to “immediately take all steps necessary” to review it for consistency with these and other policies set forth in the Order. Id. § 4. The Executive Order further instructs the agency to “if appropriate [and] as soon as practicable . . . publish for notice and comment proposed rules suspending, revising, or rescinding” the Rule. Id.

In accordance with the Executive Order and his authority under the Clean Air Act, the EPA Administrator signed a Federal Register notice on March 28, 2017, announcing EPA’s review of the Rule and noting that if EPA’s review “concludes that suspension, revision or rescission of this Rule may be appropriate, EPA’s review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law.” “Review of the Clean Power Plan,” 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017). EPA is moving forward with its review of the Rule as previously announced by the Administrator and may be

prepared to begin the interagency review process of a resulting proposed regulatory action in the near future. We will update the Court as EPA takes further steps.

On March 28, 2017, EPA filed a motion to hold these cases in abeyance pending completion of EPA's review and any resulting forthcoming rulemaking. ECF No. 1668274. By order dated April 28, 2017, this Court held the cases in abeyance for 60 days and directed the parties to file supplemental briefs by May 15, 2017, addressing "whether these consolidated cases should be remanded to the agency rather than held in abeyance." ECF No. 1673071.

ARGUMENT

In considering whether to hold these cases in abeyance beyond the current 60-day deferral period or instead to remand the cases to EPA, this Court should pursue the course that maintains the status quo, conserves judicial resources, and yields the least disruptive consequences to the parties in these proceedings. For three reasons, abeyance rather than remand is the far superior mechanism to achieve these goals.

First, only abeyance is certain to maintain the status quo, namely, the Supreme Court's stay of the Rule. See Stay Order at 1 (providing that the Rule "is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the D.C. Circuit and disposition of the applicants' petition for a writ of certiorari, if such a writ is sought"). The stay relieves Petitioners of any burdens imposed by the Rule. If the cases were to be remanded, however, this Court would not retain jurisdiction. See D.C. Cir. 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.”). At that point, the legal effect of the stay would come into question. EPA and Petitioners would consequently have to consider the present legal effect of the Rule and take responsive action as necessary.

Second, and relatedly, there is a substantial likelihood that any remand could result in unnecessary litigation both in the Supreme Court and in this Court. If this Court remands these cases, the Petitioners who sought and are protected by the stay would presumably consider protecting their claims and interests by filing a petition for a writ of certiorari or seeking other appropriate relief from the Supreme Court. On the other hand, if this Court continues to hold these cases in abeyance, the Supreme Court is unlikely to need to consider further near-term requests for relief from Petitioners.¹

This Court would also face the prospect of unnecessary litigation after remand. Under the Supreme Court’s stay, Petitioners have not been required to work towards meeting the Rule’s compliance deadlines, some of which have passed.² Should this

¹ As set forth in EPA’s motion for abeyance, ECF No. 1668274, any petition for writ of certiorari could also prejudice EPA by compelling further briefing on substantive questions prior to EPA’s completion of its review.

² The Rule directs states to provide either a final plan to limit CO₂ from existing plants, or an alternative initial submission requesting a two-year extension, by September 2016. 80 Fed. Reg. at 64,669, 64,946-47.

Court decide to remand, resulting in the potential dissolution of the stay, EPA could need to engage in rulemaking to extend those deadlines. Either Petitioners or Respondent-Intervenors could ask this Court to review *that* rulemaking. And if these cases are remanded and EPA ultimately decides to reaffirm the existing Rule, this Court would almost certainly have to manage new petitions for review, consolidation motions, merits briefing, and related proceedings. Abeyance, by marked contrast, would allow the Court to simply resume the current litigation and save substantial judicial resources.

Finally, abeyance will enable EPA to complete its current review of the Rule in a more expeditious manner than remand would allow. Under an order for a continued abeyance, EPA will be able to focus squarely on completing the review of the Rule and undertaking potential rulemaking as promptly as possible. This would be consistent with the terms and obligations of the President's March 28, 2017 Executive Order and other applicable law and policy, and mindful of this Court's interest in avoiding longer-than-necessary abeyance periods. Conversely, a remand will force EPA to devote limited resources to the above-described collateral procedural matters and thereby impede the agency's substantive evaluation of the Rule and potential alternative approaches.

For these reasons, the Court should continue to defer further judicial proceedings and refrain from issuing a remand with all its attendant complications.³

CONCLUSION

WHEREFORE, EPA respectfully requests that these cases be held in abeyance while the agency conducts its review of the Rule, and that the abeyance remain in place until 30 days after the conclusion of review and any resulting forthcoming rulemaking, with motions to govern further proceedings due upon expiration of the abeyance period.

Respectfully submitted,

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DATED: May 15, 2017

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³ While abeyance is the most suitable procedure here, in the event that the Court disagrees and opts to remand the case and terminate its jurisdiction, EPA requests that the Court stay its mandate for a period of 180 days, to allow EPA time to complete administrative actions to avoid any disruptive consequences flowing from the potential dissolution of the Supreme Court's stay Order.

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of this Court's order dated April 28, 2017, because it contains 1,577 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Eric G. Hostetler

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Eric G. Hostetler

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