

ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF WISCONSIN, <i>et al.</i>,)	
)	
)	
Petitioners,)	
)	
v.)	No. 16-1406 and
)	consolidated cases
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY and)	
E. SCOTT PRUITT, Administrator, United)	
States Environmental Protection Agency,)	
)	
Respondents.)	
)	

**JOINT MOTION FOR MODIFICATION OF BRIEFING SCHEDULE TO
ALLOW FOR AGENCY CONSIDERATION OF PETITIONS FOR
RECONSIDERATION OF THE AGENCY RULE UNDER REVIEW**

Pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure and Circuit Rule 28(e), the undersigned parties in these consolidated cases (hereinafter “Movants”)¹ respectfully submit this joint motion for modification of the briefing

¹ Movants are: Petitioner and Intervenor-Respondent Utility Air Regulatory Group (“UARG”); Petitioner and Intervenor-Respondent Murray Energy Corporation; Petitioners Indiana Energy Association and Indiana Utility Group; Petitioners Luminant Generation Company LLC and affiliated companies Big Brown Power Company LLC, Luminant Mining Company LLC, La Frontera Holdings, LLC, Oak Grove Management Company LLC, and Sandow Power Company LLC; Petitioner Mississippi Power Company; Petitioner Midwest Ozone Group; Petitioner Ohio Utility Group and its member companies (AEP Generation Resources Inc., Buckeye Power, Inc., The Dayton Power and Light Company, Duke Energy Ohio, Dynegy Commercial Asset Management, LLC, First Energy Solutions, and Ohio Valley

schedule, including the deadline for submission of Petitioners' opening briefs (currently August 21, 2017), to allow additional time for Respondent United States Environmental Protection Agency ("EPA") to review and consider, and make determinations regarding, petitions for administrative reconsideration of the EPA rule that is the subject of the petitions for review in these cases. Specifically, this motion requests that the Court: (a) defer by 120 days the dates in the briefing schedule established in the Order dated May 15, 2017 (ECF No. 1675267); and (b) direct EPA to submit to the Court, within 60 days after issuance of an order modifying the briefing schedule, a status report regarding EPA's review and consideration of the petitions for reconsideration and EPA's anticipated timetable for completing its review. This is the first request made by any party to modify the schedule for briefing these cases. The Court has not scheduled oral argument in these cases. Respective counsel for other parties have informed undersigned counsel for Movant UARG that: Respondent EPA is unable to provide a position on the motion by the time of the filing of the motion and plans to file a response after reviewing the motion; Petitioner Western Farmers Electric Cooperative supports the motion; Petitioner Cedar Falls Utilities concurs in the motion; Petitioner City of Ames, Iowa, concurs in the motion; Petitioner Oklahoma Gas and Electric Company concurs in the motion; Petitioner

Electric Corporation); and Petitioners Wisconsin Paper Council, Wisconsin Manufacturers and Commerce, Wisconsin Industrial Energy Group, and Wisconsin Cast Metals Association.

Prairie State Generating Company concurs in the motion; Petitioners States of Wisconsin, Alabama, Arkansas, Ohio, Texas, and Wyoming and the Texas Commission on Environmental Quality take no position on the motion; Intervenor-Respondent the Environmental Committee of the Florida Electric Power Coordinating Group, Inc., does not oppose the motion; Intervenor-Respondents Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC, do not oppose the motion; Petitioner State of Delaware Department of Natural Resources & Environmental Control opposes the motion and reserves the right to respond; Petitioners and Intervenor-Respondents Sierra Club and Appalachian Mountain Club and Intervenor-Respondents American Lung Association and Environmental Defense Fund oppose the motion and intend to file a response or responses; and Intervenor-Respondents States of New York, Maryland, New Hampshire, Rhode Island, and Vermont and Commonwealth of Massachusetts are considering whether to oppose the motion and reserve the right to file an opposition after reviewing the filing.

In support of this motion, Movants state as follows:

1. The petitions for review in these cases raise myriad challenges to a range of key provisions of EPA's complex rule entitled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" (the "Rule"). 81 Fed. Reg. 74,504 (Oct. 26, 2016). The Rule requires reductions in, and establishes numerical limits on, ozone-

season emissions of nitrogen oxides² from electric generating units in each of 22 States that, according to EPA's determinations in the Rule, contribute significantly to nonattainment or interfere with maintenance of the 2008 national ambient air quality standard for ozone in other States. *Id.* at 74,506.

2. Nine petitions for administrative reconsideration of numerous significant elements of the Rule were filed with, and currently remain pending at, EPA. *See* <https://www.epa.gov/airmarkets/petitions-reconsideration-received-csapr-update> (last accessed Aug. 7, 2017). Petitions for reconsideration were filed by seven of the Petitioners in the present consolidated cases: the Indiana Utility Group and the Indiana Energy Association, the Midwest Ozone Group, Oklahoma Gas and Electric Company, Prairie State Generating Company LLC, UARG, and Western Farmers Electric Cooperative. *See id.* Additional petitions for reconsideration were filed by the Grand River Dam Authority and the Oklahoma Department of Environmental Quality, Oklahoma Cogeneration, LLC, and White Stallion Energy. *See id.* All but one of the nine petitions for reconsideration were submitted to EPA in December 2016; the remaining petition was submitted to EPA on March 1, 2017. *See id.* The petitions for reconsideration address a range of legal and technical issues that, in many respects, are implicated by the present cases.

² The ozone season extends from May 1 through September 30 each year. 81 Fed. Reg. at 74,504. The Rule's emission-reduction requirements took effect beginning May 1, 2017, *id.*, and apply to the current ozone season and all future ozone seasons.

3. At this time, to the best of Movants' knowledge, EPA has not granted or denied any of the petitions for reconsideration. Movants' understanding is that all of the petitions for reconsideration have been, and remain, under review at EPA.

4. On February 17, 2017, four weeks after the current Administration took office, the Senate confirmed Scott Pruitt as Administrator of EPA. Other EPA officials whose positions require Senate confirmation have not yet been nominated and confirmed.

5. The briefing schedule established by the May 15, 2017 Order provides that Petitioners' opening briefs are due to be filed by August 21, 2017. Under that Order, EPA's response brief is due about 90 days later, on November 20, 2017; Intervenor-Respondents' briefs are due 30 days thereafter, on December 20, 2017; reply briefs are due 30 days after that, on January 19, 2018; the Joint Appendix is due on January 31, 2018; and final briefs are due on February 7, 2018.

6. Many issues addressed by the petitions for administrative reconsideration pending before EPA relate to issues that one or more Petitioners currently intend to brief in the present cases. Consideration and resolution of petitions for reconsideration therefore may well narrow, and in some respects may moot, issues that currently are expected to be briefed in these cases. If EPA grants one or more pending petitions for reconsideration, in whole or in part, it may become unnecessary for parties to brief, and unnecessary for the Court to adjudicate, certain issues raised by the petitions for review.

7. At the time Movants and the other parties submitted their briefing-schedule proposals to the Court on March 20, 2017,³ and when the Court thereafter issued its briefing order, Movants believed that EPA likely would have time to make determinations regarding the pending petitions for reconsideration in advance of the deadline for filing opening briefs. At this time, however, it appears that EPA has not yet made such determinations and that its review of the petitions for reconsideration is continuing. Under these circumstances, Movants respectfully submit that deferring briefing for the limited period requested herein will provide a reasonable opportunity for EPA to make such determinations, which, as noted, may narrow or moot issues to be briefed to and adjudicated by the Court, thereby promoting conservation of the Court's time and resources, as well as those of the parties. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”) Conversely, if, for example, opening briefs are submitted on August 21, 2017, and EPA thereafter grants, in whole or in part, one or more petitions for reconsideration, re-briefing of these cases might well become necessary.

8. Movants therefore respectfully request that the Court defer the deadline for the filing of opening briefs by 120 days, to December 19, 2017, and adjust the due

³ The proposals were submitted pursuant to the Court's Order of February 16, 2017 (ECF No. 1661795).

dates for the filing of the remaining briefs accordingly, applying the time intervals reflected in the existing schedule (*see supra* ¶ 5). Movants further request that the Court direct EPA to submit to the Court, within 60 days after issuance of an order modifying the briefing schedule, a status report regarding EPA's review and consideration of the petitions for reconsideration and EPA's anticipated timetable for completing its review.

9. As noted above, the Court has not scheduled oral argument in these cases, and granting this limited modification of the briefing schedule will not unreasonably delay the proceedings or prejudice other parties' interests.⁴

Dated: August 7, 2017

Respectfully submitted,

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⁴ The Rule and its emission-reduction requirements have not been stayed and, as noted, *see supra* note 2, are in effect and remain in effect for the current ozone season and ozone seasons in future years.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and (6) because it has been prepared in 14-point proportionally-spaced Garamond typeface.

Pursuant to Fed. R. App. P. 32(f) and (g), I further certify that the motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,489 words, excluding exempted parts, according to the count of Microsoft Word 2010.

/s/ Norman W. Fichthorn
Norman W. Fichthorn

Dated: August 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2017, I caused the foregoing motion to be served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Norman W. Fichthorn
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