ORAL ARGUMENT HEARD 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.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

RESPONDENT-INTERVENORS THE AMERICAN WIND ENERGY ASSOCIATION AND THE SOLAR ENERGY INDUSTRIES ASSOCIATIONS' OPPOSITION TO MOTION TO HOLD PROCEEDING IN ABEYANCE

Even though it has been more than six months since an *en banc* panel of the Court heard oral argument in this case, the U.S. Environmental Protection Agency and Administrator Scott Pruitt (collectively, "EPA") now undertake a last-minute effort to circumvent a decision of this Court affirming the legality of the Clean Power Plan ("Rule") by requesting an order placing the case in abeyance. The American Wind Energy Association ("AWEA") and the Solar Energy Industries Association ("SEIA") strongly oppose EPA's extraordinary motion to in effect extend

indefinitely the existing stay of the Rule and thereby avoid judicial review of the merits of this case.

The basis offered by the EPA for an abeyance is an Executive Order that merely directs the agency to review and, if appropriate, initiate a new rulemaking to reconsider—suspend, revise or rescind—the Rule. Mot. to Hold Cases in Abeyance at 5; Executive Order §§ 1, 4 (Mar. 28, 2017), Attachment 1 to Motion. While EPA has stated that it will commence a review in response to the Executive Order, whether EPA may ultimately revoke or change the Rule is wholly speculative at this point.[1] Moreover, the result of any rulemaking process required to revise or rescind the Rule cannot lawfully be determined until the conclusion of that process. *See Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency to prejudge irrevocably the outcome of a rulemaking). The possibility of unknown future changes to the Rule, at an indefinite time, certainly does not outweigh the need for a decision from the Court on the merits of this case, resolving important questions regarding the scope of EPA's authority under Section 111 of the Clean Air Act.

[1] Pursuant to the Executive Order, EPA published a "Notice of Review of the Clean Power Plan" in the Federal Register indicating that it was "reviewing" the Rule and would "if appropriate . . . initiate proceedings to suspend, revise or rescind" it. Notice of Review of Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017).

By asking the Court to place these cases in abeyance pending conclusion of the review ordered by the Executive Order, EPA seeks to avoid a decision on the merits, thereby leaving the stay in place indefinitely and, in turn, nullifying the Rule without having to satisfy any of the procedural requirements of the Clean Air Act and Administrative Procedure Act for suspending a duly promulgated rule.[2] EPA cannot be allowed to do indirectly through an abeyance something that it cannot do directly on its own: suspend the Rule without providing a reasoned explanation for the action in a notice-and-comment rulemaking proceeding and allowing for judicial review of its basis for doing so.

If abeyance is granted, the planned regulatory review and possible new rulemaking proceedings related to the Rule will also signal an indefinite delay to any limits to power plants' carbon dioxide emissions, which incentivize the deployment of zero-emitting renewable energy resources, such as wind and solar. This concern is especially critical in this case, because the more time the Court defers ruling in this proceeding, the greater the period in which the Rule will not be in effect (due to the Supreme Court's stay) or undergo judicial review.

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[2] Although stayed by the Supreme Court pending judicial review, the Rule remains the law of the land until such time as EPA withdraws or replaces the Rule. Indeed, the Supreme Court explicitly contemplated that the stay would last only until this Court's decision on the merits of the Rule and an opportunity for Supreme Court review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (enforcement stayed "pending disposition of the applicants' petitions for review" in this Court and "disposition of" any petition for certiorari).

Investors rely significantly on policy certainty in deciding whether to finance wind and solar energy projects, as do utilities and grid operators when conducting generation and transmission planning. Placing the case in abeyance and thereby leaving the Supreme Court's stay in effect indefinitely, while EPA reconsiders the Rule, would unduly prolong the uncertainty with respect to the validity of the Rule and, in turn, cause severe tangible harm to the more than 3,000 companies and organizations that AWEA and SEIA collectively represent, as well as others within the power sector. This would also place in jeopardy the future security of many of the nearly half a million jobs in wind and solar generation in the United States; by way of comparison, there are currently only 86 thousand employees in coal electric generation. *See* U.S. DEP'T OF ENERGY, U.S. ENERGY AND EMPLOYMENT REPORT 8, 40 (Jan. 2017).

Finally, granting abeyance at this late stage, while leaving critical questions unresolved regarding the legal and factual basis for the Rule, would not serve judicial economy. Indeed, it would undercut the substantial amount of time and resources already devoted by both the Court and the parties to this case. If the issues presented by this case are not decided now, the Court will surely face them again in the future, but only after further expenditure of judicial resources and harm to the wind and solar industries, as well as other interests, in addition to a loss of time in curtailing sources of carbon pollution through the deployment of zero-emitting renewable

energy resources. Moreover, a decision on the merits of this case would help inform any reconsideration of the Rule, as there are a number of core legal issues in this proceeding that will undoubtedly be front and center in any potential subsequent EPA action to rescind or revise the Rule (and any litigation challenging such action).

For all these reasons, the Court should reject attempts to further delay adjudicating the validity of EPA's Rule, while EPA resolves what, if anything, to do next with respect to the Rule, and should instead decide this case based on the record, briefing, and argument already before the Court.

CONCLUSION

The Court should deny EPA's motion.

Dated: April 6, 2017

Respectfully submitted,

/s/ Gene Grace
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CERTIFICATE OF COMPLIANCE

I hereby certify that certify that Respondent-Intervenor AWEA and SEIA's Opposition to Motion for Abeyance complies with the requirements of Fed. R. App. P. Rule 27(d)(2) because it contains 1233 words as counted by the word-processing system used to prepare it.

Dated: April 6, 2017

/s/ Gene Grace
Gene Grace

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will serve electronic copies of such filing on all registered CM/ECF users.

/s/ Gene Grace
Gene Grace