UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	Case No. 15-1363
	)	(and consolidated cases)
U.S. ENVIRONMENTAL PROTECTION AGENCY *et al.*,	)	
	)	
	)	
Respondents.	)	

REQUEST FOR RECONSIDERATION OF THE COURT'S OCTOBER 29, 2015 SCHEDULING ORDER AND RESPONSE IN OPPOSITION TO EPA's MOTION TO ESTABLISH CONSOLIDATED BRIEFING SCHEDULE ENCOMPASSING ALL MOTIONS FOR STAY OF AGENCY RULE

Petitioner Basin Electric Power Cooperative ("Basin Electric") submits this Combined Request for Reconsideration of the Court's October 29, 2015 Scheduling Order and Response in Opposition to the Motion to Establish Consolidated Briefing Schedule Encompassing All Motions for Stay of Agency Rule in Case No. 15-1363 and consolidated cases, filed by Respondents United States Environmental Protection Agency and Gina McCarthy (collectively "EPA").

INTRODUCTION

EPA's Motion asked the Court to limit its consideration of motions for stay of EPA's Final Rule to motions that are filed no later than November 5, 2015—a mere 13 days after the Final Rule was published in the Federal Register and 47

days before the deadline interested parties have to file Petitions for Review of the Final Rule pursuant to Clean Air Act Section 307(b)(1), 42 U.S.C. § 7607(b)(1). The Court subsequently issued an Order on October 29, 2015, accepting EPA's scheduling proposal, but without any opportunity to hear from interested parties who had not yet filed Petitions for Review (and were not given any prior notice of EPA's Motion) regarding potential prejudice from that schedule. Basin Electric respectfully requests that the Court reconsider its Order and deny EPA's Motion.

EPA argues that its Motion is appropriate in order "to avoid the chaotic and duplicative briefing of stay motions," but it offers no meaningful rationale for why the deadline for filing such motions should be established so soon after publication of the Final Rule in the Federal Register and so long before parties are entitled to file their Petitions for Review. Basin Electric has no objection to establishing a consolidated briefing schedule for stay motions in order to facilitate a more orderly process and ensure that the Court can consider these motions in a thoughtful and efficient manner. Basin Electric submits, however, that all interested parties should first be afforded the opportunity to submit their Petitions for Review within the statutorily established 60-day period, and that any deadline for submitting motions for stay be set after expiration of that period. Establishment of an earlier deadline will effectively deny other parties—who also have important issues to raise—the right to meaningfully participate in a significant part of this case.

BACKGROUND

Basin Electric is a not-for-profit regional wholesale electric generation and transmission cooperative owned by over 100 member cooperatives. Basin Electric provides wholesale power to member rural electric systems in nine states, with electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa serving approximately 2.8 million consumers. A number of these electric generation facilities are affected facilities under the Final Rule and will be required to comply with the Rule's stringent emission requirements.

Because of the areas in which it operates, its mix of generation facilities, and the long remaining useful life of its current coal and natural gas based generation resources, Basin Electric will incur significant financial costs in order to comply with the Rule. Based on a preliminary assessment of the Rule's impact, these costs could run into the billions of dollars. And because of the magnitude of the Rule's impact, Basin Electric will require an extended period of time to make the necessary changes to its generation system in order to comply with the Rule by its current 2022 deadline.

Basin Electric is committed to the use of renewable energy and has already invested over a billion dollars in developing new renewable energy resources. These resources must be developed in a thoughtful and coordinated fashion, with due consideration to costs, grid reliability, and the established framework for

planning, building, and integrating these resources. Basin Electric has filed its Petition for Review because it believes that the Final Rule fails to meet these basic common-sense requirements. Basin Electric had intended to take more time considering these issues before filing a Petition for Review, but was forced to file its Petition and this Request/Response today due to EPA's request and the Court's Order setting an early deadline for motions to stay.

ARGUMENT

I. EPA's Proposed Early Deadline for Motions to Stay Denies Interested Parties the Opportunity to Meaningfully Participate in Arguments on the Appropriateness of Staying the Effectiveness of the Rule.

While styled as a measure to avoid chaos and promote judicial efficiency, EPA's Motion is in reality just an attempt to restrict interested parties from participating in the Court's consideration of whether the Final Rule should be stayed pending the outcome of the appeal. Under EPA's proposal, only those parties who have already filed motions or are prepared to file motions within the next week will be allowed to advance arguments as to why a stay is appropriate prior to the Court's determination of this issue. There is nothing in either the Clean Air Act or the rules of this Court that warrants such a restriction. Indeed, the Act expressly provides that parties have 60 days to seek judicial review of the Final Rule, 42 U.S.C. § 7607(b)(1), and the Handbook for Practice for this Court indicates that motions for stay generally should be filed no later than 30 days after

docketing. *Handbook of Practice and Internal Procedures United States Court of Appeals for the District of Columbia Circuit*§ VIII.A. Nor is there any reason why in this particular case the stay motions must be filed on an expedited basis; indeed, none of the earlier-filed motions is styled as an "emergency" motion or suggests that the stay issue needs to be resolved within the Petition for Review period.

EPA argues that the November 5 deadline is reasonable because the Rule was publicly available on August 3 and because four Petitioners filed stay motions the day the Rule was published in the Federal Register. But the fact that some Petitioners chose to file stay motions early does not mean that all Petitioners should be so compelled when the statute provides them 60 days to file Petitions for Review. Nor did EPA make any effort to provide notice to those interested parties like Basin Electric, who had filed comments or otherwise participated in the rulemaking process but had not yet filed Petitions for Review, that they might be precluded from participating in the stay portion of the proceedings.[1]

EPA also suggests that the Court already has before it the arguments of a broad cross-section of interested parties. However, the specific impacts of the Rule on Basin Electric (and other interested parties who may not even be aware of EPA's Motion or the Court's Scheduling Order) during the pendency of appeal are

[1] Basin Electric (who did file comments and participate actively in the rulemaking process) became aware of EPA's proposal only by checking the docket in this case. Basin Electric only today filed a Petition for Review and was joined in the case.

exceptionally fact-specific and are not adequately represented by the parties who have currently moved to stay the effectiveness of the Rule. Fully assessing these impacts and adequately explaining them to the Court takes time, and Basin Electric and other parties ought to be afforded that time, so long as they act within the time frame granted under the statute to file a Petition for Review.

II. EPA'S Proposed Deadline Does Not Avoid Chaos or Promote Judicial Economy.

Contrary to the stated goal, EPA's proposed schedule does not avoid chaos or promote judicial economy. To the contrary, by establishing a separate briefing schedule for motions to stay filed on or before November 5, 2015, and holding the motions filed after that date in abeyance and requiring a special showing that the motions raise new issues, EPA's suggested approach creates confusion and invites endless debates over whether subsequently filed motions raise new issues (or even can be considered by the Court after it has already ruled on the initial motions).

The better approach is to establish a single schedule that allows any and all parties who file timely Petitions for Review to participate in arguments on the appropriateness of staying the effectiveness of the Final Rule. Accordingly, Basin Electric suggests that motions for stay be due on January 21, 2016, 30 days after the December 22, 2015 deadline for filing Petitions for Review, and that the response and reply deadlines be similarly extended to allow full participation by all interested parties.

CONCLUSION

EPA's Motion seeks to create two classes of Petitioners: those who file early, who are entitled to fully participate in these proceedings; and those who file later but still within the time allotted under the statute, who are precluded from meaningfully participating in an important aspect of the case. While Basin Electric agrees that time limits are appropriate for procedural motions, these limits must be established so that all parties who wish to participate in the consideration of such important issues are afforded that opportunity. Therefore, Basin Electric suggests that the deadline for stay motions be extended to January 21, 2016, with all response and reply brief deadlines similarly extended.

Dated: October 29, 2015.

Respectfully submitted,

s/ Christina F. Gomez

Christina F. Gomez
Lawrence E. Volmert
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202
Ph. 303-295-8000 / Fx.: 303-295-8261
cgomez@hollandhart.com
lvolmert@hollandhart.com

Patrick R. Day
HOLLAND & HART LLP
2515 Warren Avenue, Suite 450
Cheyenne, WY 82001
Ph.: 307-778-4200 / Fx.: 307) 778-8175
pday@hollandhart.com

Emily C. Schilling
HOLLAND & HART LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Ph. 801-799-5800/ Fx. 801-799-5700
ecschilling@hollandhart.com

Attorneys for Petitioner Basin Electric Power Cooperative

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REQUEST FOR RECONSIDERATION OF THE COURT'S OCTOBER 29, 2015 SCHEDULING ORDER AND RESPONSE IN OPPOSITION TO EPA's MOTION TO ESTABLISH CONSOLIDATED BRIEFING SCHEDULE ENCOMPASSING ALL MOTIONS FOR STAY OF AGENCY RULE was electronically filed today through the Court's CM/ECF system, which will electronically serve all registered counsel for the parties to this case.

Dated: October 29, 2015

s/ Christina F. Gomez
Christina F. Gomez
Counsel for Petitioner Basin Electric Power Cooperative

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