

ORAL ARGUMENT SCHEDULED FOR JUNE 2 AND 3, 2016

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

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State of West Virginia, et al.,		)	
		)	
<i>Petitioners,</i>		)	
		)	
v.		)	No. 15-1363 (and
		)	consolidated cases)
		)	
U.S. Environmental Protection Agency, et al.,		)	
		)	
		)	
<i>Respondents.</i>		)	
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**JOINT PROPOSAL OF PETITIONERS AND PETITIONER-  
INTERVENORS REGARDING ORAL ARGUMENT FORMAT**

In response to this Court’s letter of March 28, 2016, ECF 1605918, Petitioners and Petitioner-Intervenors<sup>1</sup> (collectively, “Petitioners”) respectfully submit the following joint proposal regarding the structure and length of oral argument beginning June 2, 2016, in these 39 consolidated cases involving review of the U.S. Environmental Protection Agency’s (“EPA”) Clean Power Plan rule (“Rule”).<sup>2</sup> Petitioners believe that a full morning session is warranted on each of the two consecutive days the Court has set aside due to the myriad issues presented, their

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<sup>1</sup> Counsel or representative counsel for Petitioners and Petitioner-Intervenors have reviewed this proposal and have authorized the undersigned counsel to represent that they have reviewed and join in this proposal.

<sup>2</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

complexity, and their importance. The following describes Petitioners' suggested division of issues and allocation of argument time and otherwise responds to the items raised in the Court's March 28, 2016 letter. Petitioners' proposal requests a total amount of time for each issue per side. Petitioners respectfully request that they be allowed to allocate the total time given by the Court on an issue between the advocates on their side so as to avoid repetitive argument and that Respondents be permitted to do the same. Petitioners expect that in many cases the allocation of time between advocates on their side on an issue may not be equal. Summary tables—one for each day of argument—follow the proposal.

As discussed further below, Petitioners propose that oral argument in these consolidated cases proceed in three phases on Day One (June 2, 2016), with a total of two hours and twenty minutes allotted, and in three phases on Day Two (June 3, 2016), with a total of two hours and forty minutes allotted.

## **DAY ONE – JUNE 2, 2016**

### **I.A. Issues Relating to Generation Shifting Arguments**

**Issues and Time Allocation.** This portion of the argument would address issues relating to whether the CAA authorizes the Rule as raised in Petitioners' Core Legal Issues Opening Brief (ECF 1610010), Argument § I; Petitioners' Core Legal Issues Reply Brief (ECF 1610012), Argument §§ I, II; and addressed in the Brief for Respondents (ECF 1609995), Argument § I (with the exception of § I.C, which would

be addressed in the set of Issues Relating to State Authority). For this portion of the argument, Petitioners propose that the Court allocate 30 minutes per side.

**Counsel Presenting Argument.** Elbert Lin, Solicitor General of the State of West Virginia,<sup>3</sup> would present argument on behalf of State Petitioners. Peter D. Keisler<sup>4</sup> would present argument on behalf of Non-State Petitioners.

### **I.B. Issues Relating to Section 112 Exclusion Argument**

**Issues and Time Allocation.** This portion of the argument would address the issues relating to whether the Rule is prohibited by section 112 of the Clean Air Act (“CAA”) (“Section 112 Exclusion”) as raised in Petitioners’ Core Legal Issues Opening Brief (ECF 1610010), Argument § II; Petitioners’ Core Legal Issues Reply Brief (ECF 1610012), Argument § III; Petitioner-Intervenors’ Opening Brief (ECF 1609820), Argument §§ I, II (portions); Petitioner-Intervenors’ Reply Brief (ECF 1609821), Argument § I; and addressed in the Brief for Respondents (ECF 1609995), Argument § II. For this portion of the argument, Petitioners propose that the Court allocate 25 minutes per side.

**Counsel Presenting Argument.** Elbert Lin, Solicitor General of the State of West Virginia, would present argument on behalf of State Petitioners. Allison D. Wood<sup>5</sup> would present argument on behalf of Non-State Petitioners.

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<sup>3</sup> Mr. Lin represents the State of West Virginia (No. 15-1363).

<sup>4</sup> Mr. Keisler represents the Chamber of Commerce of the United States of America, et al. (No. 15-1382).

## **I.C. Issues Relating to State Authority**

**Issues and Time Allocation.** This portion of the argument would address the issues relating to whether the Rule infringes on the statutory authority of the States as raised in Petitioners' Core Legal Issues Opening Brief (ECF 1610010), Argument § III; Petitioners' Core Legal Issues Reply Brief (ECF 1610012), Argument § IV; and addressed in the Brief for Respondents (ECF 1609995), Argument § I.C. For this portion of the argument, Petitioners propose that the Court allocate 15 minutes per side.

**Counsel Presenting Argument.** Paul M. Seby, Special Assistant Attorney General for the State of North Dakota,<sup>6</sup> would present argument on behalf of State Petitioners. Peter D. Keisler would present argument on behalf of Non-State Petitioners.

## **DAY TWO – JUNE 3, 2016**

### **II.A. Issues Relating to Notice Argument**

**Issues and Time Allocation.** This portion of the argument would address the issues relating to whether the Rule was properly noticed as raised in Petitioners' Procedural and Record-Based Issues Opening Brief (ECF 1610031), Argument § I; Petitioners' Procedural and Record-Based Issues Reply Brief (ECF 1610062),

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<sup>5</sup> Ms. Wood represents the Utility Air Regulatory Group, et al. (No. 15-1370), Montana-Dakota Utilities Co. (No. 15-1373), and Tri-State Generation and Transmission Association, Inc. (No. 15-1374).

<sup>6</sup> Mr. Seby represents the State of North Dakota (No. 15-1380).

Argument § I; and addressed in the Brief for Respondents (ECF 1609995), Argument § IV. For this portion of the argument, Petitioners propose that the Court allocate 20 minutes per side.

**Counsel presenting argument.** Matthew H. Frederick, Deputy Solicitor General of the State of Texas,<sup>7</sup> would present argument on behalf of State Petitioners. Thomas A. Lorenzen<sup>8</sup> would present argument on behalf of Non-State Petitioners.

## **II.B. Issues Relating to “Adequately Demonstrated” and “Achievability” Arguments**

**Issues and Time Allocation.** This portion of the argument would address the issues relating to whether the Rule’s “best system of emission reduction” is “adequately demonstrated” and whether its emission guidelines are “achievable” as raised in Petitioners’ Procedural and Record-Based Issues Opening Brief (ECF 1610031), Argument §§ II, IV.C, V; Petitioners’ Procedural and Record-Based Issues Reply Brief (ECF 1610062), Argument §§ II, IV; and addressed in the Brief for Respondents (ECF 1609995), Argument §§ V, VII. For this portion of the argument, Petitioners propose that the Court allocate 40 minutes per side.

**Counsel Presenting Argument.** Misha Tseytlin, Solicitor General of the State of Wisconsin,<sup>9</sup> would present argument on behalf of State Petitioners. F. William Brownell<sup>10</sup> would present argument on behalf of Non-State Petitioners.

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<sup>7</sup> Mr. Frederick represents the State of Texas (No. 15-1363).

<sup>8</sup> Mr. Lorenzen represents the National Rural Electric Cooperative Association, et al. (No. 15-1376).

## II.C. Issues Relating to Constitutional Arguments

**Issues and Time Allocation.** This portion of the argument would address the constitutional issues, including whether the Rule infringes on the constitutional authority of the States as raised in Petitioners' Core Legal Issues Opening Brief (ECF 1610010), Argument § IV; Petitioners' Core Legal Issues Reply Brief (ECF 1610012), Argument § V; Petitioner-Intervenors' Opening Brief (ECF 1609820), Argument §§ II (portions), III, IV; Petitioner-Intervenors' Reply Brief (ECF 1609821), Argument §§ I (portions), II, III; and addressed in the Brief for Respondents (ECF 1609995), Argument § III. For this portion of the argument, Petitioners propose that the Court allocate 20 minutes per side.

**Counsel Presenting Argument.** David B. Rivkin, Jr.<sup>11</sup> would present argument on behalf of State Petitioners. Laurence H. Tribe<sup>12</sup> would present argument on behalf of Non-State Petitioners.

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<sup>9</sup> Mr. Tseytlin represents the State of Wisconsin (No. 15-1363).

<sup>10</sup> Mr. Brownell represents the Utility Air Regulatory Group, et al. (No. 15-1370) and LG&E and KU Energy LLC (No. 15-1418).

<sup>11</sup> Mr. Rivkin represents the State of Oklahoma, et al. (No. 15-1364).

<sup>12</sup> Professor Tribe represents Petitioner-Intervenors Dixon Bros., Inc., et al.

<b>Day 1: June 2, 2016</b> <b>Clean Air Act Statutory Authority Arguments</b>		
<b>#</b>	<b>Issue</b>	<b>Minutes Per Side and Counsel</b>
<b>IA</b>	<ul style="list-style-type: none"> <li>• <b>Generation Shifting Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § I</li> <li>○ Petitioners' Core Legal Issues Reply Br. §§ I, II</li> <li>○ EPA Br. § I (excluding § I.C)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 30 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Elbert Lin, Solicitor General of the State of West Virginia</li> <li>○ <u>For Non-State Petitioners:</u> Peter D. Keisler</li> </ul> </li> <li>• 30 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 60 minutes</b>
<b>IB</b>	<ul style="list-style-type: none"> <li>• <b>Section 112 Exclusion Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § II</li> <li>○ Petitioners' Core Legal Issues Reply Br. § III</li> <li>○ Petitioner-Intervenors' Opening Br. §§ I, II (portions)</li> <li>○ Petitioner-Intervenors' Reply Br. § I</li> <li>○ EPA Br. § II</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 25 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Elbert Lin, Solicitor General of the State of West Virginia</li> <li>○ <u>For Non-State Petitioners:</u> Allison D. Wood</li> </ul> </li> <li>• 25 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 50 minutes</b>
<b>IC</b>	<ul style="list-style-type: none"> <li>• <b>State Authority Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § III</li> <li>○ Petitioners' Core Legal Issues Reply Br. § IV</li> <li>○ EPA Br. § I.C</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 15 minutes for Petitioners:               <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Paul M. Seby, Special Assistant Attorney General for the State of North Dakota</li> <li>○ <u>For Non-State Petitioners:</u> Peter D. Keisler</li> </ul> </li> <li>• 15 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 30 minutes</b>
<b>Total Time Day One: Two Hours and Twenty Minutes</b>		

<b>Day 2: June 3, 2016</b> <b>Procedural, Record-Based, and Constitutional Issues</b>		
<b>#</b>	<b>Issue</b>	<b>Minutes Per Side and Counsel</b>
<b>IIA</b>	<ul style="list-style-type: none"> <li>• <b>Notice Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Procedural and Record-Based Issues Opening Br. § I</li> <li>○ Petitioners' Procedural and Record-Based Issues Reply Br. § I</li> <li>○ EPA Br. § IV</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 20 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Matthew H. Frederick, Deputy Solicitor General of the State of Texas</li> <li>○ <u>For Non-State Petitioners:</u> Thomas A. Lorenzen</li> </ul> </li> <li>• 20 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 40 minutes</b>
<b>IIB</b>	<ul style="list-style-type: none"> <li>• <b>“Adequately Demonstrated” and “Achievability” Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Procedural and Record-Based Issues Opening Br. §§ II, IV.C, V</li> <li>○ Petitioners' Procedural and Record-Based Issues Reply Br. §§ II, IV</li> <li>○ EPA Br. §§ V, VII</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 40 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> Misha Tseytlin, Solicitor General of the State of Wisconsin</li> <li>○ <u>For Non-State Petitioners:</u> F. William Brownell</li> </ul> </li> <li>• 40 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 80 minutes</b>
<b>IIC</b>	<ul style="list-style-type: none"> <li>• <b>Constitutional Issues</b> <ul style="list-style-type: none"> <li>○ Petitioners' Core Legal Issues Opening Br. § IV</li> <li>○ Petitioners' Core Legal Issues Reply Br. § V</li> <li>○ Petitioner-Intervenors' Opening Br. §§ II (portions), III, IV</li> <li>○ Petitioner-Intervenors' Reply Br. §§ I (portions), II, III</li> <li>○ EPA Br. § III</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 20 minutes for Petitioners: <ul style="list-style-type: none"> <li>○ <u>For State Petitioners:</u> David B. Rivkin, Jr.</li> <li>○ <u>For Non-State Petitioners:</u> Laurence H. Tribe</li> </ul> </li> <li>• 20 minutes for Respondents and Respondent-Intervenors</li> </ul>
		<b>TOTAL TIME = 40 minutes</b>
<b>Total Time Day Two: Two Hours and Forty Minutes</b>		



Petitioners propose to present the issues in the order listed above because it represents a logical sequencing of the multiple legal and factual issues these consolidated cases represent.

Petitioners have raised several other issues in their Procedural and Record-Based Briefs. To avoid overburdening the Court, Petitioners are willing to forgo oral argument on these issues, though Petitioners' willingness to rest on the briefing should not be construed as signifying that these arguments are of lesser importance or merit. These issues involve:

- The Rule's treatment of low- and zero-emitting sources (Petitioners' Procedural and Record-Based Issues Opening Br. § III.A, B; Petitioners' Procedural and Record-Based Issues Reply Br. § III.A);
- The Rule's treatment of enhanced oil recovery (Petitioners' Procedural and Record-Based Issues Opening Br. § III.C; Petitioners' Procedural and Record-Based Issues Reply Br. § III.B);
- The Rule's treatment of new units (Petitioners' Procedural and Record-Based Issues Opening Br. § IV.A);
- The Rule's failure to establish subcategories (Petitioners' Procedural and Record-Based Issues Opening Br. § IV.B; Petitioners' Procedural and Record-Based Issues Reply Br. § III.C);

- The Rule’s cost-benefit analysis (Petitioners’ Procedural and Record-Based Issues Opening Br. § IV.D; Petitioners’ Procedural and Record-Based Issues Reply Br. § III.D);<sup>13</sup> and
- The Rule’s failure to take the individual circumstances of the State of Wyoming into account (Petitioners’ Procedural and Record-Based Issues Opening Br. § V.C; Petitioners’ Procedural and Record-Based Issues Reply Br. § IV(portion addressing Wyoming)).

In the event, however, that the Court believes that oral argument would be helpful on these additional issues, Petitioners will have counsel available on Day 2 of the argument who will be prepared to answer questions the Court may have on these issues. One exception involves issues affecting waste-to-energy facilities, which are discussed in Section III.B of Petitioners’ Procedural and Record-Based Issues Opening Brief and in Section III.A of Petitioners’ Procedural and Record-Based Issues Reply Brief. Counsel for those issues will be available only on Day 1 of argument due to a previously scheduled military ceremony.

The total time for argument and allocation between the issues is appropriate given the large number of issues raised in this litigation and their scope, the increased word allotment for merits briefing, and the technical complexity of the rulemaking. As

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<sup>13</sup> Competitive Enterprise Institute and its co-petitioners in No. 15-1488 believe the cost-benefit issue merits oral argument, and they are submitting their own proposal reflecting that position.

discussed in the briefs, the Rule being challenged is perhaps the most costly, complex, and far-reaching regulatory program in American history. There are 157 Petitioners in these consolidated cases, including 27 States, and multiple companies, trade associations, and public interest organizations. There are also 59 total intervenors on both sides of the case, including companies, trade associations, and public interest organizations. Petitioners respectfully submit that the argument time proposed above is warranted in this extraordinary case.

### CONCLUSION

For the foregoing reasons, Petitioners and Petitioner-Intervenors respectfully request that the Court allocate oral argument time on June 2 and 3, 2016, in the manner set forth above.

Dated: April 28, 2016

Respectfully submitted,

/s/ Elbert Lin

Patrick Morrissey

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*Counsel for Petitioner State of West Virginia*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the Clerk of the Court on April 28, 2016, using the CM/ECF system, which will send notification of said filing to the attorneys of record that have, as required, registered with the Court's CM/ECF system.

/s/ Elbert Lin

Elbert Lin