

ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2015

No. 14-1112 & No. 14-1151

**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 14-1112: IN RE MURRAY ENERGY CORPORATION
Petitioner.

No. 14-1151: MURRAY ENERGY CORPORATION
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and REGINA A.
MCCARTHY, Administrator, United States Environmental Protection Agency
Respondents.

On Petition for Writ of Prohibition & On Petition for Judicial Review

**JOINT REPLY OF PETITIONER AND INTERVENOR-PETITIONERS IN
SUPPORT OF MOTION REGARDING ORAL ARGUMENT FORMAT
AND OPPOSITION TO RESPONDENTS' CROSS-MOTION**

[*Counsel for the intervenor-petitioners are
listed in their respective signature blocks.*]

March 12, 2015

Geoffrey K. Barnes
J. Van Carson
Wendlene M. Lavey
John D. Lazzaretti
Robert D. Cheren
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8646
geoffrey.barnes@squirepb.com
Counsel for Murray Energy Corporation

INTRODUCTION

The United States Environmental Protection Agency (“EPA”) does not deny that the two consolidated original actions brought by petitioner Murray Energy Corporation present issues of great economic and regulatory importance and involve foundational separation-of-powers, federalism, and statutory issues. Nor does EPA deny that the consolidated *Murray Energy* cases, Nos. 14-1112 and 14-1151, have been briefed separately from a related case, No. 14-1146, brought by West Virginia and eleven other states. Perhaps most importantly, this Court previously determined that the *Murray Energy* cases should be briefed and argued separately from, albeit in tandem with, the related *West Virginia* case (No. 14-1146).

Now, with briefing complete, EPA asks the Court to change course and consolidate the *Murray Energy* cases with the *West Virginia* case just six weeks prior to oral argument. And absent such a consolidation, EPA asks in the alternative that each side in the complex *Murray Energy* cases be allotted a mere 15 minutes of argument. These requests are manifestly self-serving. If adopted, EPA’s preferred argument format would prove prejudicial to the petitioner side’s ability to present and fully explain its case and the Court’s ability to fairly consider it. EPA’s request is especially puzzling given that the *Murray Energy* and *West Virginia* cases are the only matters scheduled for oral argument that day.

BACKGROUND

On June 18, 2014, and August 15, 2014, respectively, Murray Energy Corporation brought the two above-captioned original actions. In No. 14-1112, Murray Energy Corporation seeks a writ of prohibition against EPA's *ultra vires* rulemaking efforts to regulate existing electric generating units under Section 111(d) of the Clean Air Act when those sources are already regulated under Section 112 of the Act. In No. 14-1151, Murray Energy Corporation challenges EPA's final legal conclusion that it has the authority to do so. On August 1, 2014, West Virginia and other states petitioned for review of EPA's settlement agreement that prompted the section 111(d) rulemaking.

On November 13, 2014, the Court ordered that the two *Murray Energy* cases "be consolidated" and that they be briefed and argued separately from, but before the same panel as, the related *West Virginia* case, No. 14-1146. *See* Order at 2, as amended Nov. 13, 2014, ECF No. 1522086. On January 27, 2015, the Court further ordered that the consolidated *Murray Energy* arguments and the *West Virginia* argument take place on April 16, 2015. Order, ECF No. 1534467. That January 27 order made no mention of revisiting the November 13 order, which consolidated the *Murray Energy* cases and left separate the *West Virginia* case, for purposes of both briefing (then well underway) and oral argument.

ARGUMENT

As explained in our motion, the two *Murray Energy* cases involve distinct sets of parties and issues and, given its complexity and importance, an allotment of 35 minutes per side is reasonable. The Court has previously allowed similarly lengthy arguments in far less complex cases, and it has heard argument in related but unconsolidated cases sequentially, without combining the matters into one big argument. Tellingly, EPA's opposition and cross-motion cites no prior arguments before this Court as precedent favoring its preferred format.

In *Virginia v. EPA*, for example, the Court ordered a 30-minute-per-side argument, and allowed three arguing counsel on petitioners' side, in a case involving far less important issues. *Virginia* presented successful constitutional and statutory challenges under the Clean Air Act to an EPA regulatory program limited to requiring "California cars" in the northeast region. *See Virginia v. EPA*, 108 F.3d 1397 (1997). The Court allowed three arguing counsel a total of 30 minutes of argument time in that much less consequential case. Case No. 95-1163, Order October 2, 1996. In this case, petitioners reasonably request 35 minutes per side in order to allow for argument not only by one attorney on behalf of petitioner Murray Energy Corporation and one attorney on behalf of all intervenors, but also one attorney limited to only five minutes on a specific constitutional law argument to be presented by Professor Laurence Tribe, an expert in that field.

Nor is there merit to EPA's belated contention that the states' *West Virginia* argument should now be consolidated into *Murray Energy*. States enjoy a "special solicitude" not only in a standing analysis, see *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007), but also under the Court's procedural rules. See, e.g., Circuit Rule 29(a) (providing that states, unlike private parties, need not seek consent before filing amicus briefs). Here, not just one state but twelve seek to come to the Court's podium and explain the merits of their unique, albeit related, case.

Simply put, the fact that cases are related does not mean they should be consolidated. All parties to both the *Murray Energy* and *West Virginia* matters submitted their briefing under an expectation that the Court's November 13 order had decided in favor of separate arguments and would be adhered to at the April 16, 2015 argument session. In issuing its November order, the Court considered the degree of "relatedness" between the two matters and concluded that they should be heard on the same day before the same panel, but not consolidated. And the parties who filed these three cases — *Murray Energy*, *West Virginia*, and eleven other states — fully agree. See Reply in Support of Petitioners' Motion Regarding Oral Argument and Opposition to EPA's Cross-Motion, *West Virginia v. EPA*, No. 14-1146 (D.C. Cir. filed Mar. 11, 2015), ECF No. 1541781.

Finally, Petitioner and intervenor-petitioners respectfully renew their request that argument in the two *Murray Energy* cases proceed before argument in *West Virginia*, a sequencing to which EPA has now waived any objection.

CONCLUSION

The two *Murray Energy* cases and the *West Virginia* case were briefed separately by order of the Court. They should now be argued separately, as the Court's January 27 Order contemplates, and the *Murray Energy* cases should be heard first with each side allotted 35 minutes of argument.

Dated: March 12, 2015

Respectfully submitted,

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes

J. Van Carson

Wendlene M. Lavey

John D. Lazzaretti

Robert D. Cheren

SQUIRE PATTON BOGGS (US) LLP

4900 Key Tower

127 Public Square

Cleveland, Ohio 44114

(216) 479-8646

geoffrey.barnes@squirepb.com

Counsel for Murray Energy Corporation

/s/ Robert R. Gasaway

Robert R. Gasaway
Dominic E. Draye
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200
robert.gasaway@kirkland.com

C. Boyden Gray
Adam R.F. Gustafson
BOYDEN GRAY & ASSOCIATES, PLLC
1627 I St NW #950
Washington, DC 20006
Telephone: (202) 955-0620
gustafson@boydengrayassociates.com

*Counsel for National Federation of
Independent Business*

/s/ Allison D. Wood

Allison D. Wood
Tauna M. Szymanski
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037
Telephone: (202) 955-1500
Facsimile: (202) 778-2201
awood@hunton.com

Counsel for Utility Air Regulatory Group

/s/ Laurence H. Tribe

Laurence H. Tribe
1575 Mass. Ave.
Cambridge, MA 02138
617-495-1767
tribe@law.harvard.edu

Tristan L. Duncan
Thomas J. Grever
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
TEL: (816) 474-6550
FAX: (816) 421-5547
tlduncan@shb.com
tgrever@shb.com

Jonathan S. Massey
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
202-652-4511
jmassey@masseygail.com

Counsel for Peabody Energy Corporation

/s/ Elbert Lin

Patrick Morrissey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
Misha Tseytlin
General Counsel
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for State of West Virginia

/s/ Andrew Brasher

Luther Strange
Attorney General of Alabama
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Ave.
Montgomery, AL 36130
Tel. (334) 590-1029
Email: abrasher@ago.state.al.us
Counsel for State of Alabama

/s/ Steven E. Mulder

Craig W. Richards
Attorney General of Alaska
Steven E. Mulder
Senior Assistant Attorney General
Counsel of Record
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3600
Counsel for State of Alaska

/s/ C. Joseph Cordi, Jr.

Leslie Rutledge
Attorney General of Arkansas
C. Joseph Cordi, Jr.
Senior Assistant Attorney General
Counsel of Record
Jamie L. Ewing
Assistant Attorney General
323 Center Street, Ste. 400
Little Rock, AR 72201
Tel. (501) 682-5310
Email: joe.cordi@arkansasag.gov
Counsel for State of Arkansas

/s/ Timothy Junk

Gregory F. Zoeller
Attorney General of Indiana
Timothy Junk
Deputy Attorney General
Counsel of Record
Indiana Government Ctr. South, Fifth
Floor
302 West Washington Street
Indianapolis, IN 46205
Tel. (317) 232-6247
Email: tom.fisher@atg.in.gov
Counsel for State of Indiana

/s/ Jeffrey A. Chanay

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Counsel of Record
120 SW 10th Avenue, 3d Floor
Topeka, KS 66612
Tel. (785) 368-8435
Fax (785) 291-3767
Email: jeff.chanay@ag.ks.gov
Counsel for State of Kansas

/s/ Jack Conway

Jack Conway
Attorney General of Kentucky
Counsel of Record
700 Capital Avenue
Suite 118
Frankfort, KY 40601
Tel: (502) 696-5650
Email: Sean.Riley@ag.ky.gov
Counsel for Commonwealth of Kentucky

/s/ Megan K. Terrell

James D. "Buddy" Caldwell
Attorney General of Louisiana
Megan K. Terrell
Deputy Director, Civil Division
Counsel of Record
1885 N. Third Street
Baton Rouge, LS 70804
Tel. (225) 326-6705
Email: TerrellM@ag.state.la.us
Counsel for State of Louisiana

/s/ Blake E. Johnson

Doug Peterson
Attorney General of Nebraska
Dave Bydlaek
Chief Deputy Attorney General
Blake E. Johnson
Assistant Attorney General
Counsel of Record
2115 State Capitol
Lincoln, NE 68509
Tel. (402) 471-2834
Email: blake.johnson@nebraska.gov
Counsel for State of Nebraska

/s/ Eric E. Murphy

Michael DeWine
Attorney General of Ohio
Eric E. Murphy
State Solicitor
Counsel of Record
30 E. Broad St., 17th Floor
Columbus, OH 43215
Tel. (614) 466-8980
Email:
eric.murphy@ohioattorneygeneral.gov
Counsel for State of Ohio

/s/ Patrick R. Wyrick

E. Scott Pruitt
Attorney General of Oklahoma
Patrick R. Wyrick
Solicitor General
Counsel of Record
P. Clayton Eubanks
Deputy Solicitor General
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel. (405) 521-3921
Email: Clayton.Eubanks@oag.ok.gov
Counsel for State of Oklahoma

/s/ Roxanne Giedd

Marty J. Jackley

Attorney General of South Dakota

Roxanne Giedd

Deputy Attorney General

Counsel of Record

1302 E. Highway 14, Suite 1

Pierre, SD 57501

Tel. (605) 773-3215

Email: roxanne.giedd@state.sd.us

Counsel for State of South Dakota

/s/ Jeremiah I. Williamson

Peter K. Michael

Attorney General of Wyoming

James Kaste

Deputy Attorney General

Michael J. McGrady

Senior Assistant Attorney General

Jeremiah I. Williamson

Assistant Attorney General

Counsel of Record

123 State Capitol

Cheyenne, WY 82002

Tel. (307) 777-6946

Fax (307) 777-3542

Email: jeremiah.williamson@wyo.gov

Counsel for State of Wyoming

CERTIFICATE OF SERVICE

I hereby certify that the foregoing JOINT REPLY OF PETITIONER AND INTERVENOR-PETITIONERS IN SUPPORT OF MOTION REGARDING ORAL ARGUMENT FORMAT AND OPPOSITION TO RESPONDENTS' CROSS- MOTION has been served electronically by Petitioner, Murray Energy Corporation, through the Court's CM/ECF system on all ECF registered counsel.

Dated: March 12, 2015

/s/ Geoffrey K. Barnes

Geoffrey K. Barnes