ORAL ARGUMENT NOT YET SCHEDULED

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

White Stallion Energy Center, LLC, et al. Petitioners, v. United States Environmental Protection Agency, Respondent.	)	No. 12-1272 Motion to Hold Case in Abeyance

MOTION TO HOLD CASE IN ABEYANCE

Respondent United States Environmental Protection Agency ("EPA") moves the Court to hold this case in abeyance, lifting the briefing schedule set forth in its June 28, 2012 Order. EPA has determined that it will reconsider the new source standards challenged by Petitioners ("New Unit Developers") in this case, and that it will stay those standards for three months pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). Therefore, briefing challenges to those standards now would be an inefficient use of the Court's and the parties' resources.

New Unit Developers (White Stallion Energy Center; Deseret Power Electric Cooperative; Sunflower Electric Power Corp.; Tri-State Generation and Transmission Association; Tenaska Trailblazer Partners; and Power4Georgians) have represented through counsel that they have not yet determined their positions

in regard to this motion. The following Intervenors have also so represented: California, Kansas, Michigan, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Wyoming, the District of Columbia, Terry E. Branstad (Governor of Iowa), Calpine Corp., Exelon Corp., Public Services Enterprises Group, National Grid Generation, Wolverine Power Supply Cooperative, The Gulf Coast Lignite Coalition, Edgecombe Genco, Spruance Genco, and the Environmental and Health Group Intervenors (American Academy of Pediatrics; American Lung Association; American Nurses Association; American Public Health Association; Chesapeake Bay Foundation; Clean Air Council; Citizens for Pennsylvania's Future; Conservation Law Foundation; Environment America; Environmental Defense Fund; Izaak Walton League of America; National Association for the Advancement of Colored People; Natural Resources Defense Council; Ohio Environmental Council; Sierra Club; Physicians for Social Responsibility; Natural Resources Council of Maine; and Waterkeeper Alliance).

The following Intervenors have represented through counsel that they do not oppose this motion: Massachusetts, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, Baltimore City, New York City, and Erie County, New York. The remaining Intervenors have not informed EPA of their position in regard to this motion as of the time of filing.

BACKGROUND

On February 16, 2012, EPA promulgated final emission standards for hazardous air pollutants emitted from coal and oil-fired electric utility steam generating units ("EGUs") under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. 77 Fed. Reg. 9304 (Feb. 16, 2012) (the "Mercury and Air Toxics Standards," or "MATS," Rule). The MATS Rule included emission standards applicable to new EGUs (*i.e.*, EGUs that commence construction or reconstruction after the publication of the proposed rule), known as the "new source standards," as well as emission standards applicable to existing EGUs, known as the "existing source standards." 77 Fed. Reg. at 9487-93. A number of cases were subsequently filed challenging the new and/or existing source standards, EPA's threshold finding that it is "appropriate and necessary" to regulate EGUs under 42 U.S.C. § 7412, and/or other aspects of the MATS Rule. Those cases were consolidated under lead case No. 12-1100. Many of the petitioners, including one of the New Unit Developers, also filed administrative petitions for reconsideration of the Rule pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B).

On April 27, 2012, New Unit Developers moved to sever three issues concerning the new source standards from the consolidated case and to expedite briefing on those issues. No. 12-1177, Doc. #1371309. They subsequently reduced the number of issues subject to their motion to two. Notice of Further

Clarification and Modification of Relief Requested (May 9, 2012), No. 12-1100, Doc. #1373043. On June 28, 2012, the Court granted the motion to sever and expedite, assigned the two issues subject to the motion a new docket number, and set an expedited briefing schedule for the new case. No. 12-1100, Doc. #1381112.[1] Under that schedule, New Unit Developers' opening brief is due on July 27, 2012.

EPA has since determined that it will grant reconsideration in regard to the new source standards that are challenged by New Unit Developers in this action. Specifically, EPA will reconsider new source issues including measurement issues related to the mercury standard and the data set to which the variability calculation was applied when establishing the new source standards for particulate matter and hydrochloric acid, and it has indicated that reconsideration of those issues may affect the new source standards. Attach. A (letter notifying petitioners of grant of reconsideration). EPA expects that the reconsideration process will result in the issuance of a final reconsideration rule by March, 2013. *Id*. EPA has also indicated that, in the interim, it intends to stay the effectiveness of the current new source standards for three months (which is the limit of EPA's stay authority under 42 U.S.C. § 7607(d)(7)(B)). *Id.* Given these developments, EPA believes that holding this case in abeyance for the limited time that is needed for EPA to complete reconsideration is warranted.

[1] As permitted by the June 28, 2012 Order, a number of other parties from the main consolidated cases have since intervened in the new case.

ARGUMENT

The Clean Air Act recognizes EPA's authority to reconsider its rulemakings. 42 U.S.C. § 7607(b)(1), (d)(7)(B); *see also Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("the power to decide in the first instance carries with it the power to reconsider"). Given that EPA has decided to exercise that authority in regard to the new source standards that New Unit Developers challenge in this case, this Court should exercise its discretion to hold this case in abeyance and lift the briefing schedule pending the completion of the reconsideration process. *See American Trucking Ass'ns, Inc. v. EPA*, No. 97-1440, 1998 WL 65651 (D.C. Cir. Jan. 21, 1998) (granting petitioner's motion to hold an issue in abeyance pending the disposition of its petition for administrative reconsideration); *see also American Petroleum Institute v. EPA*, No. 09-1038, 2012 WL 2053572 (D.C. Cir. June 8, 2012) (Court held case in abeyance on its own initiative pending resolution of proposed rulemaking).

Absent relief from the briefing schedule put in place by the Court's June 28, 2012 Order (under which opening briefs must be filed on July 27), the parties will be forced to litigate, and this Court to adjudicate, issues that EPA has stated will be subject to administrative reconsideration. Such parallel proceedings would be a waste of the Court's resources, and could create a risk of regulatory confusion if the Court were to rule on aspects of the MATS Rule that are actively under

reconsideration by EPA. *See B.J. Alan Co. v. ICC*, 897 F.2d 561, 562 n.1 (D.C. Cir. 1990) ("Administrative reconsideration is a more expeditious and efficient means of achieving adjustment of agency policy than is resort to the federal courts.") (internal quotation omitted).

EPA has indicated that it will stay the new source standards for a period of three months – the maximum amount of time that the Administrator is permitted to stay the standards under Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B) – while the reconsideration process is underway. *See* Attach. A. During that time period, New Unit Developers will not have to comply with the current new source standards. To the extent New Unit Developers or the Court do not consider a three-month stay sufficient, EPA would not oppose the imposition of a judicial stay of the new source standards promulgated on February 16, 2012, pending judicial review of those standards, which would be limited in duration until EPA issues new standards in its final reconsideration rule. *See* Fed. R. App. P. 18 (authorizing stay of administrative action pending judicial review); 5 U.S.C. § 705 (authorizing courts to take "all necessary process to postpone the effective date of an agency action" pending judicial review). Either way, staying the current new source standards should address the concerns that motivated New Unit Developers' request for expedited briefing of their challenges. If their concern is the desire to obtain relief from the current new source standards in the short term, a

stay of the standards will accomplish that.[2] *See* New Unit Developers Consolidated Reply in Support of Joint Motion … To Sever and Expedite, No. 12-1100, Doc. 1376581, at 4 ("Absent the MATS rule new-unit standards, New Unit Developers would be able to . . . finance their projects and commence construction") and 2 ("New Unit Developers must obtain relief from the new-unit standards in time to commence construction before [April 13, 2013]"). If New Unit Developers' concern is with the merits of the MATS Rule as promulgated, EPA's reconsideration process may address that concern, and New Unit Developers will have a timely opportunity to seek review of EPA's ultimate determination on reconsideration.

Holding this case in abeyance pending completion of the reconsideration process, which is expected to conclude by March 2013, is the efficient and logical course of action here. It will allow EPA to address, in the first instance, New Unit Developers' concerns that the new source standards are overly stringent and cannot be achieved in practice, *see id.* at 13-15, and may thereby obviate the need for the Court to adjudicate any challenge to the new source standards. Any revised standards that result from the reconsideration process will be subject to judicial

[2] While a stay remains in place, New Unit Developers will remain subject to applicable permit requirements, including case-by-case maximum achievable control technology ("MACT") determinations. *See* 42 U.S.C. § 7412(g). States have the authority to provide sources subject to case-by-case MACT determinations with additional flexibility by giving them up to eight years to comply with the final hazardous air pollutants standards. 40 C.F.R. § 63.44(b)(2).

review based on a new administrative record, which would render the litigation of New Unit Developers' challenges to the current standards a waste of time and resources for both the parties and the Court.

CONCLUSION

For the foregoing reasons, EPA respectfully requests that the Court hold this case in abeyance, lifting the briefing schedule set forth in the Court's June 28, 2012 Order.

Respectfully submitted,

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Attorneys for Respondent

DATED: July 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion have been served through the Court's CM/ECF system on all registered counsel this 20th day of July, 2012.

DATED: July 20, 2012

/s/ Amanda Shafer Berman
Counsel for Respondent

ATTACHMENT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 20, 2012

OFFICE OF
AIR AND RADIATION

Patricia T. Barmeyer
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Dear Ms. Barmeyer:

On February 16, 2012, the final rule titled "National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units" was published in the Federal Register. (77 Fed. Reg. 9304). Thereafter, the Environmental Protection Agency (EPA) received several petitions for administrative reconsideration of the rule pursuant to section 307(d)(7)(B) of the Clean Air Act.

Some of those petitions raise issues associated with the new source emission standards contained in the final rule. I am writing to notify you that we intend to grant reconsideration of certain new source issues, including measurement issues related to mercury and the data set to which the variability calculation was applied when establishing the new source standards for particulate matter and hydrochloric acid, that may affect the new source standards. The EPA plans to issue a Federal Register notice shortly, initiating notice and comment rulemaking on the new source issues for which the Agency is granting reconsideration.

We anticipate that the focus of the reconsideration rulemaking will be a review of issues that are largely technical in nature. Our expectation is that under the reconsideration rule new sources will be required to install the latest and most effective pollution controls and will be able to monitor compliance with the new standards with proven monitoring methods. As a result, the final reconsideration rule will maintain the significant progress in protecting public health and the environment that was achieved through the rule published in February, while ensuring that the standards for new sources are achievable and measurable.

We intend to expedite this reconsideration rulemaking and complete the rulemaking by March of 2013. In this case, EPA also intends to exercise its discretion under section 307(d)(7)(B) of the Clean Air Act and will issue a notice in the Federal Register shortly that stays the effectiveness of the new source emission standards for three months.

Sincerely,

Gina McCarthy
Assistant Administrator

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