

No. 15-1381 (and consolidated cases)

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

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STATE OF NORTH DAKOTA, *et al.*,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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**PETITIONERS' AND PETITIONER-INTERVENORS'  
MOTION TO EXTEND THE BRIEFING SCHEDULE**

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The undersigned Petitioners and Petitioner-Intervenors respectfully move to extend the deadline to file their reply briefs in this petition for review from January 19, 2017 to February 24, 2017, with concomitant extensions in the ensuing dates for filing the deferred joint appendix and final briefs.<sup>1</sup> Movants do not at this time seek to modify the April 17, 2017 date for oral argument and believe that the extension requested does not preclude argument on that date. This modest extension is requested for good cause because the change in administrations may significantly impact this case. A short extension of time will allow the parties the opportunity to

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<sup>1</sup> Undersigned Petitioners and Petitioner-Intervenors propose deadlines of March 3, 2017 for the deferred appendix, and March 10, 2017, for final briefs.

determine whether an alternative resolution of the petition can be achieved in the new administration, potentially obviating the need to file reply briefs altogether, and conserving both party and judicial resources. Petitioners contacted counsel for Respondents and State Respondent-Intervenors, and Environmental and Health Respondent-Intervenors on December 9, 2016, well before their briefs were due, to inquire as to whether they would be interested in filing a joint motion to extend the time to file all remaining briefs in this case, and were informed that they intend to oppose this motion. On December 16, 2016, Petitioners consulted similarly with counsel for Power Companies Respondent-Intervenors, who could not take a position because it was after close of business.

This case concerns Petitioners' challenge to the Environmental Protection Agency's ("EPA") rule setting standards of performance for carbon dioxide emissions from new electric generating units under Section 111(b) of the Clean Air Act ("CAA") (the "Rule"). The Rule is a critical component of President Obama's "Climate Action Plan," a policy that seeks to alter the nation's mix of electricity generation away from fossil-fuel fired plants in favor of other energy sources.<sup>2</sup> On June 25, 2013, the same day the Climate Action Plan was issued, President Obama issued a presidential memorandum "direct[ing]" EPA "to issue a new [Rule] proposal by no later than

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<sup>2</sup> See Executive Office of the President, The President's Climate Action Plan, June 2013 at 6, available at <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

September 20, 2013[.] . . . [and] to issue a final rule in a timely fashion after considering all public comments, as appropriate.”<sup>3</sup>

The incoming presidential administration and its transition team have repeatedly indicated their intent to reconsider the Climate Action Plan and its associated measures after taking office. In this regard, the president-elect’s transition team has announced that the new administration will “conduct a top-down review of all anti-coal regulations issued by the Obama Administration.”<sup>4</sup>

Given these announcements, the new administration is likely to consider adopting policy changes that could significantly alter the scope of this litigation and potentially even affect whether further proceedings are warranted. A short delay in litigation, from January 19, 2017, to February 24, 2017, would allow time for the new administration to assess its position on this litigation and to file any motions to reflect a change of position—for example, to request that the Court hold the case in abeyance while it undertakes a new rulemaking to withdraw or revise the present Rule. If the new administration does decide to change its position in this litigation, there would be no need for briefing to continue at this time. If the new administration decides to maintain its litigating position in this case, Petitioners and Petitioner-Intervenors will file their reply briefs on February 24, 2017, and oral argument can

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<sup>3</sup> See The President, Memorandum of June 25, 2013—Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535, 39,535 (July 1, 2013).

<sup>4</sup> Energy Independence, Making America Great Again (last visited Dec. 8, 2016), <https://www.greatagain.gov/policy/energy-independence.html>.

proceed as scheduled on April 17, 2017. Given that the proposed extension will affect no other party's briefing schedule or the April 17 argument date, there can be no prejudice to any other party from a grant of the requested extension.

The Court has “inherent [authority] . . . to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1888–89 (2016) (The Court has “inherent power[] . . . to manage its docket and courtroom.”). Granting the requested extension of time would conserve both party and judicial resources, potentially completely obviating the need for four reply briefs to be prepared and filed. Two of the reply briefs that are currently due to be filed on January 19, 2017, are from the States, which possess limited resources.

This Court recently granted a motion for abeyance—far more significant relief than the short extension of the briefing schedule requested here—in a case with nearly identical circumstances. In *United States House of Representatives v. Burwell*, No. 16-5202 (D.C. Cir. Dec. 5, 2016), this Court granted a motion to hold in abeyance all briefing in a constitutional challenge to certain provisions of the Affordable Care Act. No. 16-5202, ECF 1649251, at 1 (D.C. Cir. Dec. 5, 2016) (per curiam). As in this case, that challenge had not been expedited and the parties were still in the briefing process. App. Mot. to Hold Briefing In Abeyance or, In the Alternative, to Extend the Briefing Schedule, *U.S. House of Reps. v. Burwell*, No. 16-5202, ECF 1647228, at 3 (D.C. Cir. filed Nov. 21, 2016). In fact, the briefing schedule in *Burwell* was similar to the

schedule in this case.<sup>5</sup> This Court ordered the case held in abeyance pending further order of the Court. ECF 1649251, at 1.

This Court and others have regularly granted extensions of time (and stays) in litigation spanning presidential transitions. *See, e.g., EPA v. New Jersey*, No. 08-512 (S. Ct. 2009) (obtaining numerous extensions from the United States Supreme Court before voluntarily dismissing case following the start of the new administration); *see also New Jersey v. EPA*, No. 08-1065 (D.C. Cir. Aug. 5, 2009) (case held in abeyance for seven years after the inauguration of the new president to allow review of the prior administration's regulations); *California et al. v. EPA*, No. 08-1178 (D.C. Cir. May 8, 2008) (staying briefing for several months during president-elect's transition into office and subsequently dismissing the case after the new administration's EPA reversed its position); *Mississippi v. EPA*, No. 08-1200 (D.C. Cir. Mar. 19, 2009) (clerk's order) (granting abeyance motion after election to permit agency to review and reconsider the rule under the new administration).

Notwithstanding EPA's position in this case, the Obama administration has recently recognized the importance of allowing the incoming administration time to consider what actions it plans to take with respect to pending litigation. In the legal challenge to the administration's program of deferred action for certain

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<sup>5</sup> Appellants in *Burnwell* had filed their opening brief on October 24, 2016. Appellee's responsive brief would have been due on December 23, 2016, and Appellant's reply brief on January 19, 2017. Here, Petitioners filed their opening briefs on October 13, 2016. Respondents' brief was filed December 14, 2016, and reply briefs are due January 19, 2017.

undocumented aliens, the Department of Justice joined a joint motion to stay further proceedings based on the upcoming change in administration and the potential effects of that change on the parties. The joint motion, which remains pending, stated: “Given the change in Administration, the parties jointly submit that a brief stay of any further litigation in this Court . . . would serve judicial efficiency and economy so that the parties have a better understanding of how they might choose to move forward.” Joint Mot. to Stay Merits Proceedings, *Texas et al., v. United States et al.*, No. 1:14-cv-254, ECF No. 430 at 1 (S. D. Tex. filed Nov. 18, 2016). The same policies of judicial efficiency and economy advise in favor of a short extension of time to file the remaining briefs in this case.

The requested extension will not prejudice Respondents, as the Rule has not been stayed and is presently in effect. Nor would an extension cause undue delay. Assuming litigation proceeds, Petitioners’ requested extension would not interfere with the Court’s previously established April 17, 2017 argument date. To the contrary, because of the potential that the new administration’s position on this litigation will change and obviate the need for further briefing, the modest requested extension accords with recent and historical precedent in litigation spanning presidential transitions and with a policy to conserve party and judicial resources.

## CONCLUSION

For the foregoing reasons, the undersigned Petitioners and Petitioner-Intervenors request that this Court extend the deadline to file reply briefs in this case February 24, 2017 and propose deadlines of March 3, 2017 for the deferred appendix, and March 10, 2017, for final briefs.

Dated: December 16, 2016

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(g) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(e)(1), I hereby certify that the foregoing Petitioners' and Petitioner-Intervenors' Motion To Extend The Briefing Schedule contains 1,480 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: December 16, 2016

/s/ Elbert Lin

Elbert Lin

## CERTIFICATE OF SERVICE

I hereby certify that, on this 16 day of December 2016, a copy of the foregoing Petitioners' and Petitioner-Intervenors' Motion To Extend The Briefing Schedule, was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Elbert Lin  
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