Hearing on the Implications of the Supreme Court Stay on the Clean Power Plan

Testimony of Allison Wood, Partner, Hunton & Williams LLP

United States Senate
Committee on Environment and Public Works

June 9, 2016

Summary

On February 9, 2016, the Supreme Court granted without any qualification five applications to stay EPA's Clean Power Plan. The stay remains in effect until the legality of the rule is finally determined, including through any Supreme Court review. As of now, the Power Plan has no legal effect, and its deadlines have no consequence.

Questions have arisen, however, about what will happen to the deadlines in the Power Plan in the event it is ultimately upheld. Should that occur, *all* of the deadlines must be reset by extending every deadline in the rule by at least the same amount of time that the stay remained in place. This is how deadlines in other EPA rules have been adjusted following a stay. The stay applicants specifically sought such relief here, as the Solicitor General of the United States expressly acknowledged in EPA's opposition to the stay motion. Regardless, EPA now claims the stay applicants had differing views on the tolling of the deadlines. This is untrue.

Failing to toll all of the rule's deadlines would deprive the States and regulated parties of the time EPA itself decided they needed to needed to prepare and to comply in a manner that ensures electric reliability. When EPA continues to work to implement the rule—as it has admitted it is doing—its actions disregard the Supreme Court's order and force States and regulated parties to expend resources to consider or respond to EPA's implementation actions or suffer the consequences of failing to do so. By continuing to work on a rule that the Supreme Court has indicated is likely to be overturned, EPA's actions flagrantly disrespect the Supreme Court's order, defeat the entire purpose of the stay, and waste the agency's limited resources.

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I. Introduction

It is an honor to appear before this Committee to offer testimony on the Supreme Court's stay of the EPA rule regulating existing electric generating units under section 111(d) of the Clean Air Act, which it calls the "Clean Power Plan." My name is Allison Wood, and I am a partner in the law firm of Hunton & Williams LLP. I have practiced environmental law for almost 18 years, and for over the past decade my practice has focused almost exclusively on climate change. I have represented clients in every major rulemaking and case involving the regulation of greenhouse gases under the Clean Air Act. I represent several electric utility clients in the pending litigation before the U.S. Court of Appeals for the District of Columbia Circuit involving the Power Plan. I also represented these clients before the Supreme Court in connection with the electric utility industry's application for a stay of the Power Plan, which the Supreme Court granted, along with four other applications, and that is the subject of this hearing. I am not representing anyone with regard to this testimony, however. I am testifying in my own personal capacity.

I. Background

A. The D.C. Circuit Litigation and the Denial of the Initial Stay Motions

The Power Plan was published in the Federal Register on October 23, 2015, and 19 petitions for review were filed that day in the D.C. Circuit challenging the rule. Ultimately, 42

petitions were filed in the D.C. Circuit by 159 different petitioners.[1] More than half of the States oppose the rule. On the day that the Power Plan was published in the Federal Register, four stay motions, each joined by multiple parties, were filed with the court. It is exceptionally unusual for stay motions to be filed on the day a rule appears in the Federal Register, and the rapid filing of the stay motions emphasizes the importance to the parties of obtaining relief from the onerous burdens of the Power Plan.

The court established a deadline of November 5, 2015, for any additional stay motions to be filed,[2] and ultimately a total of 9 stay motions and 2 supporting statements were filed with the D.C. Circuit by a total of 109 parties. A total of 84 declarations were filed in support of the stay—33 from States, 22 from electric utilities, 15 from coal producers, and 12 from other business interests—discussing in detail how the Power Plan would cause imminent harm if a stay was not granted. Briefing on the stay motions was completed on December 23, 2015,[3] which was only one day after the period for filing for judicial review expired.[4]

On January 21, 2016, the D.C. Circuit denied the stay motions in an order that provided no explanation beyond boilerplate language that noted "Petitioners have not satisfied the stringent requirements for a stay pending court review."[5] The court did grant expedited briefing in the case and set the case for oral argument before a three-judge panel on June 2, 2016, with

[1] *State of West Virginia, et al. v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir.).

[2] Order, *West Virginia v. EPA*, No. 15-1363, ECF No. 1580781 (D.C. Cir. Oct. 29, 2015).

[3] *Id.*

[4] *See* 42 U.S.C. § 7607(b)(1).

[5] Order, *West Virginia v. EPA*, No. 15-1363, ECF No. 1594951 (D.C. Cir. Jan. 21, 2016).

the possibility for argument to continue on June 3, 2016.[6] The D.C. Circuit has since rescheduled oral argument on its own motion for September 27, 2016, before the en banc court.[7]

B. The Supreme Court Stay Applications and the Grant of the Stay

On January 26, 2016, three business days after the D.C. Circuit denied the stay motions, 29 States and State agencies filed an application with Supreme Court Chief Justice John Roberts seeking an immediate stay of the Power Plan under the Administrative Procedure Act and the All Writs Act.[8] Four additional stay applications were filed with the Chief Justice shortly thereafter by (1) electric utilities and unions; (2) coal producers; (3) business interest groups; and (4) the State of North Dakota.[9] The stay applicants were clear that they sought to toll all of the deadlines in the Power Plan. The utility applicants stated that they were "request[ing] an immediate stay of EPA's rule, extending all compliance dates by the number of days between publication of the rule and a final decision by the courts. . . ,"[10] and the coal applicants stated that

[6] *Id.*

[7] Order, *West Virginia v. EPA*, No. 13-1363, ECF No. 1613489 (D.C. Cir. May 16, 2016).

[8] Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review, *State of West Virginia, et al. v. EPA*, No. 15A773 (S. Ct. Jan. 26, 2016) ("State Stay Application").

[9] Application of Utility and Allied Parties for Immediate State of Final Agency Action Pending Appellate Review, *Basin Electric Power Cooperative, et al. v. EPA*, No. 15A776 (S. Ct. Jan. 27, 2016) ("Utility Stay Application"); Coal Industry Application for Immediate Stay of Final Agency Action Pending Judicial Review, *Murray Energy Corporation, et al. v. EPA*, No. 15A778 (S. Ct. Jan. 27, 2016) ("Coal Stay Application"); Application of Business Associations for Immediate Stay of Final Agency Action Pending Appellate Review, *Chamber of Commerce of the United States of America, et al. v. EPA*, No. 15A787 (S. Ct. Jan. 27, 2016); Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, *State of North Dakota v. EPA*, No. 15A793 (Jan. 29, 2016).

[10] Utility Stay Application at 22.

the Power Plan "should be stayed, and all deadlines in it suspended, pending the completion of all judicial review."[11]

Chief Justice Roberts referred the stay applications to the full Court, which granted all five stay applications, without any qualification, on February 9, 2016.[12] The Court's orders explicitly provide that the stay remains in effect until the earliest of the following events occurs: (1) the D.C. Circuit issues its opinion and no party files a petition for a writ of certiorari by the deadline seeking Supreme Court review; (2) the Supreme Court denies any petitions for writs of certiorari that are filed; or (3) the Supreme Court grants a petition for certiorari and issues its opinion on the merits.[13]

II. Legal Effect and Implications of the Stay

A stay of an administrative action such as the Power Plan "suspend[s] administrative alteration of the status quo."[14] The Administrative Procedure Act, which was the basis for the stay applications, grants the Supreme Court authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[15] The Power Plan has no legal effect during the period of the stay; the status quo is preserved for that period of time. Any and all obligations of the Power Plan are effectively void during the stay, and neither States nor regulated entities can be penalized for refusing to comply with any requirement or deadline in the Power Plan.

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[11] Coal Stay Application at 36.

[12] *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

[13] *Id.*

[14] *Nken v. Holder*, 556 U.S. 418, 428 n.1 (2009); *see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (The purpose of a stay is "to maintain the status quo pending a final determination of the merits of the suit.").

[15] 5 U.S.C. § 705.

The Supreme Court rarely grants a stay, and it does so only when there is:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse [a] judgment below [upholding the Power Plan]; and (3) a likelihood that irreparable harm will result from the denial of a stay.[16]

Therefore, to grant the stay, five Justices found that all three of these elements were satisfied, including finding "a fair prospect" that the Power Plan's legality is in doubt.

If the Power Plan is ultimately found to be unlawful—which a majority of the Supreme Court has indicated it believes is likely—then the rule ceases to exist and has no legal effect whatsoever. Questions have arisen, however, regarding what happens with the deadlines and obligations in the Power Plan if it is found to be lawful. In that event, all of the deadlines in the Power Plan should be reset by extending every deadline in the rule by at least the same amount of time that the stay remained in place. So, for example, if the stay was in place for 500 days, then each deadline in the rule should be adjusted by adding at least 500 days. This preserves the status quo as required.

Indeed, this is exactly how the deadlines in other EPA rules have been adjusted following a judicial stay. EPA's Cross-State Air Pollution Rule was stayed for almost three years. When the stay was lifted, three years were added on to all of the rule's deadlines *at the request of EPA*.[17] EPA recognized in the Cross-State Air Pollution Rule that tolling a rule's deadlines for at least as long as a stay is in place "is equitable and consistent with this Court's precedent" and "restore[s] the status quo preserved by the stay."[18] Similarly, when the stay of EPA's NOx SIP

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[16] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

[17] *See* Order, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, ECF No. 1518738 (D.C. Cir. Oct. 23, 2014).

[18] Respondents' Motion to Lift the Stay Entered on December 30, 2011, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, ECF No. 1499505 at 15; *see also* Rulemaking To Amend Dates in Federal Implementation Plans Addressing Interstate Transport of Ozone and

Call rule was lifted, all of the deadlines in that rule were extended by the number of days the stay had been in place to ensure that the status quo was maintained.[19]

Tolling of all of the deadlines in the Power Plan was explicitly sought in the stay applications here. The utility applicants asked the Supreme Court to "extend[] all compliance dates by the number of days between the publication of the rule and a final decision by the courts,"[20] and the coal applicants asked that the Power Plan "be stayed, and all deadlines in it suspended."[21] The States and State Agency applicants also clearly noted that "tolling [of the deadlines] would be appropriate as a matter of basic fairness."[22] The Supreme Court granted these applications without any qualification, meaning that the Court gave these applicants the relief that they sought.

It is clear that EPA understood that the applicants were seeking a day-to-day tolling of all of the deadlines in the Power Plan. In his opposition to the stay applications, the Solicitor General of the United States, on behalf of EPA, noted that the stay applicants:

> explicitly or implicitly ask this Court to toll *all* of the relevant deadlines set forth in the Rule, even those that would come due many years *after* the resolution of their challenge, for the period between the Rule's publication and the final disposition of their lawsuits. . . . Entry of such a 'stay' would mean that, even if the government ultimately prevails on the merits and the Rule is sustained, implementation of each sequential step mandated by the Rule would be substantially delayed. A request for such tolling is inherent even in the

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Fine Particulate Matter, 79 Fed. Reg. 71,663, 71,666 ("tolling these deadlines by three years returns the rule and parties to the status quo that would have existed but for the stay") (Dec. 3, 2014).

[19] Orders, *Michigan v. EPA*, No. 98-1497, ECF Nos. 524995, 540209 (D.C. Cir. June 22, 2000).

[20] Utility Stay Application at 22.

[21] Coal Stay Application at 36.

[22] Reply of 29 States and State Agencies in Support of Application for Immediate Stay, *State of West Virginia, et al. v. EPA*, No. 15A773 at 30 (Feb. 5, 2016) ("States Reply").

> applications that do not explicitly address that subject, as all of them rest on the premise that a stay would forestall harms alleged to arise from future deadlines.[23]

Therefore, EPA clearly understood that the relief being sought was the tolling of all of the deadlines in the Power Plan, including ones that would occur after the stay was lifted, and it opposed the stay applications before the Supreme Court on this basis. EPA cannot now change its position.

In response to a letter from Senator Inhofe,[24] however, Janet McCabe, EPA's Acting Administrator for Air and Radiation, attempts to characterize the effect of the stay as "ambiguous" by claiming that the States "clarified" in their reply in support of their stay application that they were seeking a stay only of the "deadlines during the litigation and that the stay would not necessarily provide for day-for-day tolling of the deadlines."[25] To the contrary, the States' reply specifically stated that "[i]n the unlikely event the Plan survives judicial review . . . , tolling would be appropriate as a matter of basic fairness."[26] The States then specifically cited *Michigan v. EPA*, which, as discussed above, is a case where all of the deadlines in an EPA rule were tolled on a day-for-day basis after a stay was lifted.[27]

Administrator McCabe claims that the stay applicants had differing views on whether all of the deadlines should be tolled. This is untrue. While some stay applicants explicitly asked for

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[23] Memorandum for the Federal Respondents in Opposition, *West Virginia, et al. v. EPA*, Nos. 15A773, 15A776, 15A778, 15A787, 15A793, at 2-3 (Feb. 4, 2016) (emphasis in original); *see also id.* at 5, 6, 71, 72, 73 (statements acknowledging that applicants sought tolling of all deadlines in the Power Plan).

[24] Letter from Senator Jim Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works, to the Honorable Gina McCarthy, Administrator, EPA (March 10, 2016) ("Senator Inhofe Letter").

[25] Letter from Janet G. McCabe, Acting Assistant Administrator, EPA, to the Honorable Jim Inhofe, U.S. Senate at 1 (Apr. 18, 2016) ("McCabe Letter").

[26] States Reply at 30.

[27] *Id.*

the tolling of all of the deadlines, as the Solicitor General recognized, it was "inherent even in the applications that [did] not explicitly address that subject" that this was the relief requested. The States' reply brief is the only example cited by Administrator McCabe for a supposedly differing view. But as discussed above, the States were clear in their reply that "tolling would be appropriate." Moreover, the States recently confirmed their position in a letter to Administrator McCabe, stating that "[y]our recent assertion in a letter to Senator Jim Inhofe that the States who sought the stay conceded that the stay would not toll all deadlines . . . is incorrect."[28] Tellingly, Administrator McCabe says nothing about the fact that the utility and coal stay applications were abundantly clear about the relief being requested and that the Supreme Court granted those applications. Indeed, it was the utility stay application—not the States' reply—on which Senator Inhofe specifically asked EPA to comment.[29]

Tolling only some of the deadlines in the Power Plan would deprive the States and the regulated parties of the time needed to prepare and comply with the rule. When EPA issued the Power Plan, it specifically extended some of the deadlines in the rule from what had been proposed in response to comments that it received that the proposed rule did not provide sufficient time. For example, the first year in which electric generating units would need to begin reducing emissions was moved from 2020 in the proposed rule to 2022 in the final rule because of a "compelling" record that providing less time to prepare for the rule would "compromis[e] electric system reliability, impos[e] unnecessary costs on ratepayers, and requir[e] investments in more carbon-intensive generation, while diverting investment in cleaner

[28] Letter from Patrick Morrisey, West Virginia Attorney General, and Ken Paxton, Texas Attorney General, to Janet McCabe, Acting Assistant Administrator, EPA at 2, n.2 (May 16, 2016).

[29] Senator Inhofe Letter at 3.

technologies."[30] EPA also noted that this postponement was necessary to give States enough time to develop their plans.[31]

> EPA noted "the paramount importance of ensuring electric system reliability" and
>
> address[ed] these concerns in large part by moving the beginning of the period for mandatory reductions under the program from 2020 to 2022 and significantly adjusting the interim goals so that they provide a less abrupt initial reduction expectation . . . [with] more time for planning, consultation and decision making in the formulation of state plans and in [electric generating units'] choice of compliance strategies. . . .[32]

Tolling only some of the deadlines—and not all of them as EPA seems to suggest it would like to do—would contradict what EPA earlier said was necessary to ensure electric reliability and for proper planning.

Statements like EPA's that insinuate that not all of the deadlines will be tolled have a deleterious effect on States and regulated entities who become fearful that if they do not continue to plan and work toward compliance with the Power Plan that they will not have enough time to do so if the Plan is ultimately upheld by the courts. This fear effectively negates the relief provided by the stay. States and regulated entities should be able to rest secure in the knowledge that if the Power Plan is ultimately upheld that *all* of the deadlines will reset and that they will not have any less time to prepare than they would have had in the absence of the stay. That is what "status quo" means.[33] EPA's creation of public confusion on this point is harmful.

Some States have decided to continue to work on the Power Plan for a variety of reasons. While this work may likely prove to be for naught when the Plan is found to be unlawful (as is "a fair prospect" based on the issuance of the stay), the States are free to continue to do this if they

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[30] 80 Fed. Reg. 64,662, 64,669 (Oct. 23, 2015).

[31] *Id.*

[32] *Id.* at 64,671.

[33] *See Nken v. Holder*, 556 U.S. at 428 n.1; *Holiday Tours*, 559 F.2d at 844.

choose. States that do not want to work on the Power Plan should not be forced to do so, however. A problem has arisen where some States have asked for EPA's guidance on certain aspects of the program, including the Clean Energy Incentive Program, the proposed model rules, and the proposed evaluation, measurement, and verification guidance for the rule.[34] In fact, a proposed rule for the design and implementation of the Clean Energy Incentive Program is currently undergoing final review at the Office of Management and Budget.[35]

Although EPA may characterize this rulemaking as "consistent with the stay" and merely "providing states the tools they have asked for,"[36] it violates the stay in that it presents States and regulated entities with a Hobson's choice: either (1) work on the Power Plan by reviewing the proposed rule and preparing comments on it despite the fact that the stay is in place and that this may ultimately wind up being a waste of the State's resources if the rule is found unlawful; or (2) forgo reviewing and commenting on an important aspect of the Power Plan and run the risk that if the rule is ultimately upheld that you will have not had any say in the design and implementation of the Clean Energy Incentive Program.

The Clean Energy Incentive Program would not exist but for the Power Plan. If the Power Plan is found unlawful, the Clean Energy Incentive Program has no purpose. As a public policy matter, expending funds on the creation of a program to support a rule that the Supreme Court has found has "a fair prospect" of being overturned is a poor use of limited resources. And forcing States and regulated entities to expend their limited resources on the creation of tools that may end up being for nothing—or run the risk of having no input into those tools—when the

[34] *See* McCabe Letter at 1.

[35] *See* http://www.reginfo.gov/public/ (regulations under EO 12866 review).

[36] McCabe Letter at 1.

Supreme Court has given them relief in the form of a stay at a minimum violates the spirit of the stay if not the stay itself.

In addition, once EPA finalizes the rule, States and regulated entities will have yet another occasion in which they will be required to act despite the stay as this will trigger the Clean Air Act's judicial review provisions. If the States and regulated entities decide to challenge the Clean Energy Incentive Program (or another final agency action on one of EPA's Power Plan "tools"), they must do so within 60 days or waive their right to judicial review. Thus, States and other interested parties that should be protected by the stay could find themselves needing to file petitions for review in the D.C. Circuit and expending additional resources in litigation.

III. Conclusion

The stay applications that were filed with the Supreme Court asked that all of the deadlines in the Power Plan be tolled, and the Court granted those applications without any qualification. As a result, all of the deadlines in the rule have been tolled and have no legal effect. This is consistent with Supreme Court and D.C. Circuit case law and with how EPA has handled stays in the past. EPA's attempts to obfuscate the meaning of the Supreme Court's stay should be resisted. The agency's continued work on the Power Plan violates the stay and is a waste of public resources.

Thank you again for the opportunity to testify today.