



## Federal appeals court hears arguments in Clean Power Plan case

By Paul Ciampoli

Marking the latest chapter in legal wrangling over the Environmental Protection Agency's Clean Power Plan, a federal appeals court in late September heard oral arguments in a court case that challenges the Clean Power Plan, the EPA's final rule that seeks to curb carbon dioxide emissions from existing power plants.

Hundreds of people lined up at sunrise on Sept. 27 at the U.S. Court of Appeals for the District of Columbia Circuit in Washington, D.C., to witness the oral arguments, which got under way at 9:30 a.m. and lasted for just under seven hours.

The case, *State of West Virginia, et al., v. Environmental Protection Agency*, was heard "en banc," or by the full bench of active judges that serve on the D.C. Circuit court, rather than by the usual panel of three judges. Ten judges heard the oral arguments.

The chief judge, Merrick Garland, recused himself and did not take part. Garland was nominated by President Obama earlier this year to fill the vacancy on the Supreme Court left by the death of Justice Antonin Scalia. Once the Clean Power Plan case makes its way through the D.C. Circuit court, the losing side is expected to appeal to the Supreme Court.

### **More than two dozen states taking part in litigation**

More than two dozen states, led by West Virginia Attorney General Patrick Morrisey, are taking part in the litigation against the EPA's Clean Power Plan.

In early February, the Supreme Court voted 5-4 to grant motions filed by 27 states and various industry groups — including the American Public Power Association — that sought to put the EPA's final rule on hold while the D.C. Circuit court hears legal challenges to it.

The states and industry groups challenging the EPA rule have argued that the agency's power to regulate applies only "within the fence line" of coal-fired power plants, and does not include the authority to require utilities to switch from one type of generation to another.

Those challenging the EPA rule also have argued that because the EPA already regulates electric utilities under Section 112 of the Clean Air Act under the Mercury and Air Toxics Standard, it cannot also regulate utilities under Section 111, the section of law that the EPA cited in writing its rule on CO<sub>2</sub>.

### **EPA rule is creating 'a new energy economy'**

During the Sept. 27 oral arguments, West Virginia Solicitor General Elbert Lin told the court that, in the Clean Power Plan, the EPA is going beyond its authority to regulate pollutants and is, in effect, "requiring the restructuring of the electricity industry."

“Your honors, the EPA has invoked a little-used provision of the Clean Air Act that concerns performance standards for existing sources, and used it for the creation of a new energy economy,” Lin said, referring to Section 111(d) of the Clean Air Act — the provision the EPA cited in drafting its final rule on CO2 emissions from power plants.

“This rule is not about improving the performance of existing fossil fuel power plants,” he said. “It is about shutting them down and replacing them with newly constructed renewable generation.”

In West Virginia, “We get 96 percent of our power from coal,” Lin pointed out. Under the Clean Power Plan, he asserted, “coal plants have two options: shut down, or buy credits from renewable plants that haven’t been built yet.”

By setting emissions standards for CO2 that cannot be met without shifting generation to lower-carbon forms of producing electricity, the Clean Power Plan usurps states’ rights, Lin and other lawyers for the petitioners argued.

They described the EPA rule as “transformative” and therefore a matter that should have been taken up by Congress. The rule asserts a “novel and vast authority over the states’ energy grid without clear congressional authorization,” as one attorney put it.

#### **DOJ attorney says rule is not transformative**

Speaking for the EPA, Department of Justice lawyer Eric Hostetler argued that the rule was not transformative. Rather, he said, the Clean Power Plan’s requirements reflect what is already going on in the electricity industry.

Demand for coal has plunged as utilities shift to cleaner-burning natural gas, which has become plentiful and inexpensive in the U.S. because of hydraulic fracturing, Hostetler said, and utilities also are using more wind and solar power as the cost of these methods of generating electricity has declined.

He said the Clean Power Plan “addresses the key environmental challenge of our time” — global warming — “and does so cost effectively.”

“The only thing that seems transformative here is that [the EPA Clean Power Plan] is regulating CO2 for the first time,” said Judge David Tatel. He cited the Supreme Court’s 2007 ruling, in *Massachusetts v. EPA*, that found that the EPA has the authority to regulate carbon as a pollutant and also has the obligation to do so.

The arguments were divided into five segments. The first segment focused on whether the EPA exceeded its authority under the Clean Air Act by requiring generation shifting, while the second segment focused on the question of whether the existing regulation of electric

generating units under Section 112 of the Clean Air Act precludes EPA regulation of these units under Section 111(d).

The third segment focused on constitutional questions, including whether the EPA rule infringes on the constitutional authority of the states.

The fourth segment focused on whether the rule was properly noticed, given the major changes made to it that were not raised when the rule was proposed.

The fifth segment focused on the questions of whether the rule's "best system of emissions reduction," or BSER, was "adequately demonstrated" and whether its emissions guidelines are achievable.

A decision from the court is not expected until 2017, most likely in the March-April 2017 timeframe.