ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION and AMERICAN PUBLIC HEALTH ASSOCIATION,	)	
Petitioners,	)	
v.	)	Case No. 19-1140
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW R. WHEELER, Administrator, United States Environmental Protection Agency,	)	
Respondents.	)	

MOTION OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, the National Rural Electric Cooperative Association ("NRECA") respectfully moves for leave to intervene in support of Respondents United States Environmental Protection Agency and Administrator Andrew R. Wheeler (collectively, "EPA"). The petition for review in this case concerns EPA's final rule entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," 84 Fed. Reg. 32,520 (July 8, 2019) (the

"Affordable Clean Energy Rule" or "ACE Rule"). NRECA's members are regulated entities under the ACE Rule and thus have a substantial interest in the outcome of this matter.

This motion is timely because it is filed within 30 days of Petitioners American Lung Association and American Public Health Association's filing of their petition for review. Fed. R. App. P. 15(d); Cir. R. 15(b). Counsel for NRECA is authorized to state that Petitioners take no position on this motion and that Respondent EPA does not oppose this motion.

BACKGROUND

I. The Clean Air Act and the Petition for Review

Clean Air Act section 111 directs the establishment of "standards of performance" for both new and existing stationary sources of air pollutants. EPA is to identify "a list of categories of stationary sources" that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). Once EPA "lists" a source category for regulation under section 111, it must establish "standards of performance" for "new" stationary sources (defined to include new, modified, and reconstructed sources) within that category. *Id.* § 7411(b)(1)(B); *see also id.* § 7411(a)(2) (defining "new" source to include a "modified" existing source).

Where EPA has established a standard of performance for a particular pollutant emitted by *new* sources in a source category, it may also call upon States to submit plans containing State-established standards of performance for *existing* sources of that pollutant within that category. *Id.* § 7411(d). EPA develops the *procedure* for State plan submission and issues guidelines to assist States in developing standards of performance. These guidelines identify what EPA considers to be the "best system of emission reduction" for that category of sources, and the States must then set their standards of performance based on this "system." *See id.* § 7411(a)(1).

This case involves a petition for review of a final action of Respondent EPA involving its section 111(d) existing-source authority and containing three independent agency actions: (1) repeal of the Obama Administration's Clean Power Plan (CPP), which had sought to reduce greenhouse-gas emissions from fossil fuel-fired power plants under section 111(d) primarily through shifting of electricity generation from higher-emitting sources to lower-emitting or zero-emissions sources; (2) promulgation of emission guidelines for carbon dioxide-reduction for existing coal-fired units in the power sector, in which EPA determines that heat-rate improvements implemented at the unit are the "best system of emission reduction"; and

(3) promulgation of new implementing regulations to align deadlines for submission of State plans and EPA review of those plans with other CAA deadlines. 84 Fed. Reg. at 32,520.

II. NRECA and Its Interests

NRECA is the national association of rural electric cooperatives, representing more than 900 consumer-owned, not-for-profit electric cooperatives, public power districts, and public utility districts in the United States. NRECA's members operate power plants and other facilities that generate electricity for residential, commercial, industrial, institutional, and governmental customers. NRECA's member utilities, directly regulated by the ACE Rule challenged here, have the responsibility for "keeping the lights on" for more than 42 million people across 48 States and over 65% of the United States land mass in the lower 48 States. The electric cooperatives collectively serve all or part of 88% of the nation's counties and 13% of the nation's electric customers while distributing approximately 12% of all electricity sold in the United States.

ARGUMENT

NRECA has a significant, direct interest in this litigation to protect its members' operations. Most of NRECA's members are directly regulated by the ACE Rule, and thus, they have standing to intervene in this litigation.

However, NRECA's interests in this case are not fully aligned with any party to the litigation, are not adequately represented by EPA, and may be harmed by a favorable ruling for Petitioners. The Court should grant NRECA's motion for leave to intervene as a Respondent in this case because NRECA meets the standard for intervention in petition-for-review proceedings in this Court.

I. Petition for Review Intervention Standard

Under Federal Rule of Appellate Procedure 15(d), a party moving for intervention must do so "within 30 days after the petition for review is filed" and need only provide a "concise statement of interest . . . and the grounds for intervention." Fed. R. App. 15(d). Although Rule 15(d) does not provide clear criteria for intervention, Federal Rule of Civil Procedure 24(a) and the "policies underlying intervention" in federal district courts provide guidance. *See Int'l Union U.A.W. v. Scofield,* 382 U.S. 205, 216 n.10 (1965).

A party may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a) if: (1) the intervention motion is timely, (2) the movant has a cognizable interest in the case, (3) the movant's absence from the case will impair its ability to protect its interests, and (4) the movant's interests are inadequately represented by the existing parties. *See Williams & Humbert, Ltd. v. W&H Trade Marks (Jersey)*, 840 F.2d 72, 74 (D.C. Cir. 1988).

This Court has, at times, indicated that Article III standing is a prerequisite to intervention, even by parties seeking to intervene as respondents. *See, e.g.*, *Deutsche Bank Nat. Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *Military Toxics Project v. EPA*, 146 F.3d 948, 953-54 (D.C. Cir. 1998). Nonetheless, this Court has held that "any person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003); *accord Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003). As discussed below, NRECA satisfies the requirements of Federal Rule of Civil Procedure 24(a) and meets any standing test that applies to intervention.

II. NRECA Meets the Criteria for Intervention.

The ACE Rule contains EPA's determination that heat-rate improvements are the section 111(d) best system of emission reduction to control greenhouse-gas emissions from existing coal-fired electric generating units. NRECA's members will be working with States to develop plans that comport with EPA's determination in the ACE Rule, within a defined timeframe, and they must then comply with the standards of performance specified in those plans. As a result, NRECA members would be adversely affected if this Court vacated and/or remanded the ACE Rule,

which sets achievable goals for the reduction of greenhouse-gas emissions. Accordingly, the Court should grant NRECA's motion to intervene.

A. NRECA's motion is timely.

When evaluating the timeliness of a motion to intervene, this Court will consider the amount of time that has passed since the filing of the case, the likelihood of prejudice to the existing parties, the purpose for which intervention is sought, and the need for intervention to preserve the proposed intervenor's rights. *See United States v. British Am. Tobacco Australian Servs.*, 437 F.3d 1235, 1238 (D.C. Cir. 2006).

NRECA's motion to intervene is timely. Petitioners American Lung Association and American Public Health Association filed their petition for review on July 8, 2019. More petitions may well be filed before the 60-day statutory window established by CAA section 307(b), 42 U.S.C. § 7607(b), closes on September 6, 2019. The case is therefore in its infancy, and the Court has not yet even set a schedule for the filing of procedural motions, much less for the filing of merits briefs. Thus, granting this motion will not delay the proceedings in this case and will not cause any undue prejudice to the parties.

B. NRECA has direct and significantly protectable interests in this case, and disposition of the petitions without its presence may impair these interests.[1]

This Court has held that a "significantly protectable" interest is required for intervention, *see S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (citation omitted), but it has instructed that the interest test is flexible and serves as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). A party seeking to intervene can demonstrate it has a "legally protectable" interest upon a showing that it stands to "gain or lose by the direct legal operation and effect of the judgment." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (citation omitted). With respect to impairment, Federal Rule of Civil Procedure 24(a) requires only that a party seeking intervention be "so situated that disposing of the action *may* as a practical matter impair or impede the movant's ability to protect its interest." NRECA meets both the interest and impairment requirements.

Courts have routinely recognized that when objects of governmental regulation are involved, "there is ordinarily little question that the action or

[1] The second and third criteria for intervention are related, thus NRECA discusses them together.

inaction has caused [them] injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (if there is "no doubt" a rule causes injury to a regulated party, standing is "clear"); *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (trade association had standing in challenge to EPA regulation where some of its members were subject to the regulation). In cases involving petitions for review of EPA regulations, this Circuit has consistently granted requests by regulated entities to intervene as Respondents. *See, e.g.*, *Sierra Club v. EPA*, No. 13-1112 (Doc.# 1436907) (D.C. Cir. May 20, 2013) (order granting trade association's motion to intervene in a petition to review a Clean Air Act rulemaking governing Portland cement manufacturing).

Here, NRECA's members will be regulated under the ACE Rule, and thus are objects of the very governmental regulation at issue. NRECA is the national service organization for America's electric cooperatives. The nation's member-owned, not-for-profit electric cooperatives comprise a unique sector of the electric utility industry. Due to their size and structure, rural electric cooperatives face special challenges in adapting their operations to meet federal and State emissions restrictions. Those circumstances present a unique and valuable perspective on the nature,

scope, and compliance challenges cooperatives will face with any new guidelines that EPA might adopt concerning greenhouse gas emissions from existing electric generating units if this Court grants Petitioners' petition for review.

For these reasons, NRECA members also meet the Article III standing requirements in this Circuit.[2] *See, e.g.*, *Roeder*, 333 F.3d at 233; *Fund for Animals, Inc.*, 322 F.3d at 735 (recognizing that the interest requirement under Federal Rule of Civil Procedure 24(a) is met when the proposed intervenor has Article III standing). NRECA members are the objects of the ACE Rule under review. Any changes to the ACE Rule as a result of this litigation, including the imposition of more stringent limitations on NRECA members' operations, would impose significant additional compliance burdens on NRECA members.

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[2] Associations such as NRECA have associational standing to litigate on behalf of their members when: (i) their members would have standing to sue individually; (ii) the interests they seek to protect are germane to their purpose; and (iii) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). The interests of NRECA's members, who operate electric generating units covered by the ACE Rule, will be harmed should Petitioners prevail in their challenge. NRECA members thus would have standing to intervene in their own right. Moreover, the interests NRECA seeks to protect are germane to its purposes, and individual member participation is not required because Petitioners are seeking equitable relief, not money damages. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553-54 (1996).

NRECA commented extensively on the ACE Rule, just as it did on the previous rule now repealed, the Clean Power Plan. In particular, NRECA's comments explained why NRECA believes the ACE Rule is consistent with the statutory provisions in section 111 of the Clean Air Act including the limitations on EPA's authority to regulate existing coal-fired electric generating units. Unlike the Clean Power Plan, which would have required many of these units to significantly reduce generation or shut down, the ACE Rule appropriately confines the regulatory requirements to what can be achieved "inside the fence line" of the regulated unit. The rule also appropriately recognizes the important statutory role the States have in ultimately determining the standards of performance applicable to each individual unit considering EPA's determination of the best system of emission reduction.[3] The resolution of these and other issues presented by the ACE Rule will directly impact NRECA members' interests, and NRECA's ability to protect those interests will be impaired as a practical matter if it is not allowed to participate in this litigation.

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[3] NRECA Comments on Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations; Revisions to New Source Review Program (Oct. 31, 2018), EPA-HQ-OAR-2017-0355-24031, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24031.

C. The interests of NRECA are not adequately represented by any existing party.

To the extent inadequate representation by existing parties is a requirement for intervention under Federal Rule of Appellate Procedure 15(d), NRECA easily meets that requirement. The burden of demonstrating inadequate representation "is not onerous," and NRECA "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

Here, none of the existing parties can adequately represent NRECA's interests. NRECA expects Petitioners to challenge EPA's interpretation of its authority under the Clean Air Act and its conclusions regarding the best system of emission reduction achievable under the statute. Petitioners' interests are thus diametrically opposed to those of NRECA. EPA is not regulated by the rule and therefore does not share the same interests as NRECA. As a governmental entity "charged by law with representing the public interest of its citizens," EPA must avoid advancing the "narrower interest" of certain businesses "at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93; *see also Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1117 (10th Cir. 2002)

("[T]he government's prospective task of protecting not only the interest of the public but also the private interest of the petitioners in intervention is on its face impossible and creates the kind of conflict that satisfies the minimal burden of showing inadequacy of representation." (internal quotation marks and citation omitted)); *County of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 48 (D.D.C. 2007) ("The District of Columbia Circuit has 'often concluded that government entities do not adequately represent the interests of aspiring intervenors.'" (quoting *Fund for Animals*, 322 F.3d at 736)). EPA is singularly unsuited to represent the interests of NRECA's members in this litigation, which are focused on avoiding the unsupported or unjustified addition of costly and burdensome regulatory requirements. Indeed, the interests of EPA and NRECA members are often adversarial, since EPA has regulatory authority under the Clean Air Act, and NRECA members are often targets of that regulation.

Even if NRECA's interests and EPA's interests were more closely aligned, "that [would] not necessarily mean that adequacy of representation is ensured." *NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (concluding that the interests of companies seeking to intervene on EPA's behalf were "concerned primarily with the regulation that affects their industries" and that the companies' "participation in defense of EPA decisions that accord

with their interest may also be likely to serve as a vigorous and helpful supplement to EPA's defense"); *see also Trbovich*, 404 U.S. at 538 & n.10 (finding a prospective intervenor met his "minimal" burden of showing possible inadequate representation of his interests by the government even where a statute expressly obligated the Secretary of Labor to serve his interests). Here, the unique perspectives that NRECA brings to this case will supplement EPA's defense of the 2019 Rule and provide an invaluable perspective to the Court in resolving this case.

CONCLUSION

Because NRECA satisfies the requirements for intervention, NRECA respectfully requests that the Court grant NRECA leave to intervene in support of Respondent EPA.

DATED: August 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,809 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point, Georgia font.

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

DATED: August 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

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RULE 26.1 DISCLOSURE STATEMENT OF
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Rural Electric Cooperative Association ("NRECA") declares as follows: NRECA is the national association of rural electric cooperatives. NRECA does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. NRECA is a "trade association" within the meaning of Circuit Rule 26.1(b).

DATED: August 1, 2019

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