

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 CERTAIN AMERICAN ELECTRIC POWER
COMPANIES FOR LEAVE
TO INTERVENE IN SUPPORT OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and
Circuit Rules 15(b)¹ and 27, Appalachian Power Company, Indiana Michigan

¹ Circuit Rule 15(b) provides: “A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.” Consistent with that rule, this motion seeks leave for AEP to intervene as a respondent with respect to all petitions for review of the Final Rule, including any that may be filed hereafter.

Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Generating Company, AEP Generation Resources Inc., and Wheeling Power Company (collectively these AEP companies are referred to herein as “AEP”), respectfully move 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 “Affordable Clean Energy Rule” or “ACE 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. 32520 (July 8, 2019). The AEP companies named above are directly under the ACE Rule and have a substantial interest in the outcome of this matter.

This motion is timely because it is filed within 30 days of the date Petitioners American Lung Association and American Public Health Association filed their Petition for Review. Federal Rule of Appellate Procedure 15(d); Cir. R. 15(b). Counsel for AEP is authorized to state that Petitioners take no position on this motion and that Respondents do not oppose this motion.

BACKGROUND

The Final Rule and the Petition for Review

Clean Air Act Section 111 directs EPA to establish “standards of performance” for “new” stationary sources including new, modified, and reconstructed sources within 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) and (B)

The Clean Air Act goes on to authorize EPA to issue guidelines calling on States to submit plans containing State-established standards of performance for existing sources of that pollutant within a category for which EPA has established standards of performance for new sources. *Id.* § 7411(d). These guidelines for existing sources are to include information identifying what EPA considers to be the “best system of emission reduction” for that category of sources. Based upon that information, the States are then obligated to submit a plan which establishes standards of performance for such existing sources within their jurisdictions. *See id.* § 7411(a)(1).

In this case, the petition for review is directed at the following three independent final actions by EPA: (1) repeal of the Clean Power Plan (“CPP”); (2) establishment of emission guidelines to inform states in the

development of plans to establish standards of performance for carbon dioxide-emissions from existing coal-fired units in the power sector, in reflecting the “best system of emission reduction” based on heat rate improvement measures that can be applied to a designated facility; and (3) finalization of new implementing regulations that detail how the program will be implemented by EPA and the States. 84 Fed. Reg. at 32,520.

AEP’s Interests

AEP is one of the nation’s largest electricity producers with approximately 32,000 megawatts of diverse generating capacity, including 5,000 megawatts of renewable energy. AEP’s family of companies include Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and Wheeling Power Company, each of which has interests in one or more coal-fired generating facilities that will be subject to the requirements of the ACE Rule. See Attachment A.

The ACE Rule at issue in this case represents a return to the traditional practice of setting emission guidelines based on technologies that can be implemented at the regulated units. It is based on a reading of the statute

that is supported by its literal language, legislative history, and the agency's own past practice.

AEP generally concurs that the suite of efficiency improvement projects identified in the Rule can be used by states to identify heat rate improvements that are achievable at existing coal-fired steam electric generating units. AEP agrees that any analysis of potential heat rate improvement measures must be done on a unit specific basis and completed at the state level, where States should consider the myriad of factors that can impact a unit's heat rate in setting a standard of performance for each unit.

AEP supports the changes proposed to the general implementing regulations for Section 111(d) standards, including extending the time for states to submit their plans and for EPA to review such plans to make them consistent with general state implementation plan requirements under Section 110.

ARGUMENT

AEP is directly regulated by the ACE Rule and, therefore, has a significant interest in this litigation and its outcome. Thus, it has standing to intervene in this litigation. Additionally, AEP's interests in this case are not fully aligned with any party to the litigation and could be adversely affected by rulings in favor of issues that may be raised by the Petitioners.

AEP's motion for leave to intervene as a Respondent in this case should be granted by the Court because AEP meets the standard for intervention in such proceedings before this Court.

I. The Standard for Intervention

Intervention in petition for review proceedings in this Court is governed by Federal Rule of Appellate Procedure 15(d), which requires that 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.” *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991).

The criteria applicable to intervention of right under Federal Rule of Civil Procedure 24(a)(2) have been used to provide guidance for intervention under Federal Rule of Appellate Procedure Rule 15(d) and require that: (1) the motion to intervene is timely; (2) the movant claims an interest relating to the subject of the action; (3) disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest; and (4) existing parties may not adequately represent the movant's interest. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (citing *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir.

1998)); *see also, e.g., Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320-21 (D.C. Cir. 2015).

This Court has stated that an applicant for intervention that meets the test for intervention of right also thereby demonstrates Article III standing. *See Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (“any person who satisfies Rule 24(a) will also meet Article III’s standing requirement”) (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)).

As discussed below, AEP satisfies the requirements of Rule 24(a) and meets any standing test that applies to intervention.

II. AEP Meets the Criteria for Intervention.

EPA has determined in the ACE Rule that the best system of emission reduction to control greenhouse-gas emissions from existing coal-fired electric generating units under the Clean Air Act section 111(d) is through a set of broadly applicable heat rate improvement measures. States will evaluate the applicability of and extent of heat rate improvement achievable through these measures at individual units, and based on other factors including remaining useful life set the performance standards applicable to AEP’s facilities. AEP would, therefore, be adversely affected if this Court were to vacate or remand the framework set by the ACE Rule.

Accordingly, the Court should grant AEP's motion to intervene.

A. AEP's Motion is Timely.

Inasmuch as Petitioners American Lung Association and American Public Health Association filed their petition for review on July 8, 2019, AEP's motion to intervene is timely. Moreover, no action has yet been taken by the Court with respect to either procedural motions or the filing of briefs on the merits. In addition, it is quite likely that additional petitions for review will be filed before the September 6, 2019 filing deadline. Accordingly, granting this motion will not delay the proceedings in this case and will not cause any undue prejudice to the parties.

B. AEP Has Significant Interests in this Case That May be Impaired by the Outcome.

Federal Rule of Civil Procedure 24(a)(2) requires that a movant for intervention claim an interest relating to the subject of the action.

The AEP companies own fossil fuel-fired electric generating units that will be regulated under the ACE Rule. AEP facilities will be required to make additional investments and/or adapt their operations to satisfy the requirements of those rules and the plans that will be adopted by States to implement the ACE Rule. Any change in those requirements that might result from action by the Court in response to the petition for review that has been filed in this case, will therefore have a direct and practical impact on

AEP's facilities, and could expose them to significant additional compliance obligations. AEP commented extensively on the ACE Rule, just as it did on the previous rule now repealed, the Clean Power Plan, and submitted separate comments on the proposed repeal of the Clean Power Plan.

AEP's comments explained why it 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 units² and why it supports repeal of the Clean Power Plan.³

The ACE Rule directs States to evaluate heat rate improvements at existing coal-fired steam electric generating units as the basis for establishing performance standards. AEP agrees that any such analysis of potential heat rate improvement measures must be done on a unit specific

² AEP's Comments on EPA's Proposed Rule: Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; and Revisions to New Source Review Program Commonly Called the Affordable Clean Energy Rule or ACE Rule 83 Fed. Reg. 44,746 (Aug. 31, 2018) (Oct. 31, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24822>.

³ AEP's Comments on U.S. EPA's Proposed Repeal of "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 82 Fed. Reg. 48035 (October 16, 2017), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-20346>.

basis. In addition, AEP agrees that any such analysis should be completed at the state level, and states should consider the myriad of factors that can impact a unit's heat rate in setting a standard of performance for each unit. Such measures will assure that incremental progress in reducing CO2 emissions from the regulated facilities will continue to be made, consistent with the statutory requirements of Section 111(d). AEP also supports the changes to the general implementing regulations for Section 111(d) standards, including extending the time for states to submit their plans and for EPA to review such plans to make them consistent with general state implementation plan requirements under Section 110. These common-sense revisions will allow adequate time to perform the technical analyses required by the rule, and for the resulting standards to be established by the states and reviewed by EPA.

Accordingly, AEP has significant, legally protectable interests in this litigation and in defending the Final Rule that the Petitioners challenge. *Cf. Crossroads Grassroots*, 788 F.3d at 318 (“Losing the favorable [agency] order would be a significant injury in fact.”).

C. The Interests of AEP are Not Adequately Represented by Any Existing Party.

Assuming *arguendo* that inadequate representation by existing parties is a relevant criterion for intervention under Federal Rule of

Appellate Procedure 15(d),⁴ AEP has met that criterion here. The burden of showing inadequate representation in a Rule 24(a)(2) motion to intervene is “minimal.” *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *id.* at 736 n.7 (“*Trbovich* makes clear that the standard for measuring inadequacy of representation is low”); *Crossroads Grassroots*, 788 F.3d at 321. A movant for leave to intervene “need only show that representation of his interest ‘may be’ inadequate, not that representation will in fact be inadequate.” *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (quoting *Trbovich*, 404 U.S. at 538 n.10). No party to these cases can represent AEP’s interests in opposing the arguments of the Petitioners.

Petitioners manifestly cannot represent AEP’s interests since they are challenging the final agency action that contains many elements that AEP supports.

In addition, EPA cannot, and does not, adequately represent AEP’s interests. As a governmental entity, EPA necessarily represents the broader “general public interest.” *Id.* at 192-93 (“A government entity ... is charged by law with representing the public interest of its citizens.... The District [of

⁴ Federal Rule of Civil Procedure 24(a)(2)’s “adequate representation” prong has no parallel in Federal Rule of Appellate Procedure 15(d).

Columbia government] would be shirking its duty were it to advance th[e] narrower interest [of a business concern] at the expense of its representation of the general public interest.”); *Fund for Animals*, 322 F.3d at 736 (observing that this Court “ha[s] often concluded that governmental entities do not adequately represent the interests of aspiring intervenors”) (footnote omitted); accord *Crossroads Grassroots*, 788 F.3d at 321; see, e.g., *id.* (noting that, in applying the intervention-of-right test, “we look skeptically on government entities serving as adequate advocates for private parties”) (citing *Fund for Animals*, 322 F.3d at 736; *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977)). Unlike EPA, AEP has the comparatively focused interest of assuring that any required reductions under the Clean Air Act adequately consider all of the other factors authorized by the statute to be taken into account, and do not result in unnecessarily costly and burdensome regulatory obligations on their facilities. In any event, “[e]ven when the interests of EPA and [intervenors] can be expected to coincide, ... that does not necessarily mean that adequacy of representation is ensured.” *Costle*, 561 F.2d at 912; see also *Crossroads Grassroots*, 788 F.3d at 321.

Furthermore, the conclusion that EPA does not and cannot adequately represent AEP’s interests is reinforced by the often-adversarial nature of the

relationship between EPA, as the federal agency with regulatory responsibility under the Clean Air Act, and AEP, as a frequent target of EPA regulation under the Clean Air Act. Accordingly, no party is positioned to represent AEP's interests in defending against Petitioners' challenge to aspects of the ACE Rule.

CONCLUSION

For the foregoing reasons, this Court should grant AEP's for leave to intervene in support of EPA.

DATED: August 7, 2019

Respectfully submitted,

/s/ David M. Flannery

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CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2473 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

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

/s/ David M. Flannery
David M. Flannery

CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), Proposed Intervenor-Respondent submits the following Certificate of Parties:

The Petitioners in the above-captioned case are the American Lung Association and the American Public Health Association.

The Respondents in the above-captioned case are the United States Environmental Protection Agency and Andrew Wheeler, Administrator of the United States Environmental Protection Agency.

Movant Respondent-Intervenors are the National Rural Electric Cooperative Association, the Chamber of Commerce for the United States of America, and the National Mining Association.

We are unaware that this Court has granted any interventions or that any entity has been admitted as an *amicus* at this time.

DATED: August 7, 2019

Respectfully submitted,
/s/ David M. Flannery

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

AMERICAN LUNG ASSOCIATION and
AMERICAN PUBLIC HEALTH
ASSOCIATION,

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v.

UNITED STATES ENVIRON- MENTAL
PROTECTION AGENCY, and ANDREW
R. WHEELER, Administrator, United
States Environmental Protection
Agency,

Respondents.

Case No. 19-1140

**RULE 26.1 DISCLOSURE STATEMENT OF
AMERICAN ELECTRIC POWER**

The following statements are submitted pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1:

Appalachian Power Company provides wholesale and retail electric services to customers and owns fossil fuel-fired generating facilities in Virginia and West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

AEP Generating Company (“AEP Generating”) owns a portion of fossil fuel-fired electric generating facilities located in Indiana. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

AEP Generation Resources Inc. (“AEP Generation”) owns fossil fuel-fired electric generating facilities located in Ohio. It is a wholly owned subsidiary of AEP Energy Supply, LLC, which is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

Indiana Michigan Power Company (“I&M Power”) provides wholesale and retail electric service in Indiana and Michigan and owns a fossil fuel-fired generating facility in Indiana. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

Kentucky Power Company (“Kentucky Power”) provides wholesale and retail electric service in Kentucky and owns fossil fuel-fired electric generating facilities in Kentucky and West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

Public Service Company of Oklahoma (“AEP Oklahoma”) provides wholesale and retail electric service and owns fossil fuel-fired generating facilities in Oklahoma. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

Southwestern Electric Power Company (“SW Power”) provides wholesale and retail electric service and owns fossil fuel-fired generating facilities in Texas, Arkansas, and Louisiana. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

Wheeling Power Company (“Wheeling Power”) provides wholesale and retail electric service and owns a fossil fuel-fired generating facility in West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

DATED: August 7, 2019

Respectfully submitted,

/s/ David M. Flannery

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Company, AEP Generation
Resources Inc., Indiana Michigan
Power Company, Kentucky Power
Company, Public Service Company
of Oklahoma, Southwestern Electric
Power Company, and Wheeling Power
Company.*

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I am causing the foregoing motion and accompanying documents to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

DATED: August 7, 2019

/s/ Amy M. Smith

Amy M. Smith

ATTACHMENT A

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

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

No. 19-1140

UNITED STATES ENVIRONMENTAL

PROTECTION AGENCY, et al.,

Respondents.

DECLARATION OF SCOTT A. WEAVER

I, Scott A. Weaver, declare that the following statements made by me are true and correct to the best of my knowledge, information and belief:

1. I am the Director of Air Quality Services in the Environmental Services Division of the American Electric Power Service Corporation (AEPSC). I am submitting this declaration in support of the Motion of American Electric Power for Leave To Intervene in Support of Respondents that is being filed in this case. AEPSC is a services company that provides accounting, engineering, legal, regulatory, environmental, human resources, and other services to the operating subsidiaries of the American Electric Power System (AEP).

2. AEP's more than 17,000 employees operate and maintain one of the nation's largest electricity production systems with approximately 32,000 megawatts of diverse generating capacity, including 5,000 megawatts of renewable energy. AEP also operates and maintains the nation's largest electricity transmission system and more than 220,000 miles of distribution lines to efficient deliver safe, reliable power to nearly 5.4 million regulated customers in 11 states. AEP's family of companies includes utilities AEP Ohio, AEP Texas, Appalachian Power Company, AEP Appalachian Power, Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and Wheeling Power Company. AEP also owns AEP Energy, AEP Energy Partners, AEP OnSite Partners and AEP Renewables, which provide innovative competitive energy solutions nationwide.
3. AEP has a keen and substantial interest in the current rulemaking, which replaced the Clean Power Plan with a program that is consistent with the literal terms of the statute, its legislative history, and the agency's own past practice implementing such programs over the past 48 years.

4. Appalachian Power Company (“APCO”) provides wholesale and retail electric services to customers and owns fossil fuel-fired generating facilities in Virginia and West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
5. AEP Generating Company (“AEP Generating”) owns a portion of fossil fuel-fired electric generating facilities located in Indiana. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
6. AEP Generation Resources Inc. (“AEP Generation”) owns fossil fuel-fired electric generating facilities located in Ohio. It is a wholly owned subsidiary of AEP Energy Supply, LLC, which is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
7. Indiana Michigan Power Company (“I&M Power”) provides wholesale and retail electric service in Indiana and Michigan and owns a fossil fuel-fired generating facility in Indiana. It is a wholly owned subsidiary

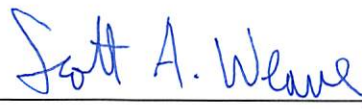
of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

8. Kentucky Power Company (“Kentucky Power”) provides wholesale and retail electric service in Kentucky and owns fossil fuel-fired electric generating facilities in Kentucky and West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
9. Public Service Company of Oklahoma (“AEP Oklahoma”) provides wholesale and retail electric service and owns fossil fuel-fired generating facilities in Oklahoma. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
10. Southwestern Electric Power Company (“SW Power”) provides wholesale and retail electric service, and owns fossil fuel-fired generating facilities in Texas, Arkansas, and Louisiana. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.

11. Wheeling Power Company (“Wheeling Power”) provides wholesale and retail electric service and owns a fossil fuel-fired generating facility in West Virginia. It is a wholly owned subsidiary of American Electric Power Company, Inc. There is no parent and no 10-percent-or-greater owner of American Electric Power Company, Inc.
12. The AEP companies submitted comments on the proposed repeal of the Clean Power Plan on April 26, 2018.
13. The AEP companies submitted comments on the proposed Affordable Clean Energy Rule on October 31, 2018.

I make this declaration under penalty of perjury, and I state the facts set forth herein are true.

August 7, 2019



Scott A. Weaver, Director Air Quality Services