

ORAL ARGUMENT NOT YET SCHEDULED

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

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American Lung Association, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	No. 19-1140
)	(and consolidated cases)
)	
United States Environmental Protection Agency,)	
Andrew Wheeler, Administrator,)	
)	
Respondents.)	
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**UNOPPOSED MOTION OF GEORGIA POWER COMPANY TO
INTERVENE IN SUPPORT OF RESPONDENTS**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Georgia Power Company (“Georgia Power”) respectfully moves to intervene in support of the United States Environmental Protection Agency (“EPA”) and its Administrator, Andrew Wheeler (collectively, “Respondents”) in the above-captioned petition for review of 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” (the “Final Rule”). *See* 84 Fed. Reg. 32,520 (July 8, 2019), Docket No. EPA-HQ-OAR-2017-0355. Pursuant to D.C. Circuit Rule 15(b), this motion constitutes a request to intervene in all

petitions for review of the Final Rule. Counsel is authorized to state that Petitioners and Respondents take no position on this motion.

BACKGROUND

Georgia Power Company is a vertically integrated electric utility regulated by the Georgia Public Service Commission (“PSC”) serving 2.6 million retail customers across Georgia. Georgia Power relies on a diverse mix of electric power generating resources, including nuclear, natural gas, oil, coal, hydro, solar, wind, landfill gas, and biomass. Georgia Power and its parent company, Southern Company, continue to be leaders in the adoption and advancement of carbon reduction strategies that will not only reduce carbon dioxide (CO₂) emissions but also continue to serve our customers in a reliable and affordable manner. Georgia Power has achieved CO₂ reductions of more than 50 percent since 2007 without state or federal mandates, while making decisions in the best interests of its customers. That said, Georgia Power supports CO₂ regulation consistent with federal and state authority under the Clean Air Act. To comply with other federal and state requirements, Georgia Power has invested approximately \$6 billion in environmental controls. As a result, Georgia Power has reduced nitrogen oxides (NO_x) emissions by 93 percent and sulfur dioxide (SO₂) by 99 percent since 1990 and has reduced mercury emissions by 95% since 2005. Georgia Power actively works within the PSC regulatory framework to ensure that the Company’s carbon

reduction efforts serve our customers' interests. As demonstrated below, Georgia Power has significant interests in the EPA rulemaking that is the subject of the *American Lung Association* petition and other consolidated petitions for review.

The Final Rule being challenged in this litigation includes three separate regulatory actions. First, it repeals EPA's 2015 Clean Power Plan ("CPP") issued pursuant to Section 111(d) of the Clean Air Act ("CAA" or "Act"). See "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" 80 Fed. Reg. 64,662 (Oct. 23, 2015). Second, the rule replaces the CPP with the "Affordable Clean Energy" ("ACE") rule, which sets emission guidelines for greenhouse gas emissions from existing coal-fired electric utility generating units under Section 111(d). Finally, the rule contains revisions to the general implementing regulations governing emission guidelines under Section 111(d).

Georgia Power actively participated in the rulemaking process for both the CPP and the Final Rule. Through its parent company, Southern Company, Georgia Power submitted public comments on the proposed version of the Final Rule¹ and

¹ Southern Company Comments on "Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program," 83 Fed. Reg. 44,746 (Aug. 31, 2018), Docket No. EPA-HQ-OAR-2017-0355 (Oct. 31, 2018).

also participated in the rulemaking process for the CPP, submitting comments on both the CPP proposed rule² and the advance notice of proposed rulemaking assessing the potential replacement of the CPP.³ Georgia Power was also a petitioner in the CPP litigation⁴ and petitioned for a stay of the CPP as a party to that litigation.⁵ Through Southern Company, Georgia Power also filed a petition for reconsideration of the CPP with EPA.⁶

Georgia Power supports the Final Rule as consistent with decades of EPA practice and precedent under Section 111 of the Clean Air Act and a lawful exercise of EPA's authority to regulate greenhouse gas emissions from existing electric utilities under Section 111(d). In comments on both EPA's advance notice

² Southern Company Comments on "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 79 Fed. Reg. 34,830 (June 18, 2014), Docket No. EPA-HQ-OAR-2013-0602 (Dec. 1, 2014).

³ Southern Company Comments on "State Guidelines for Greenhouse Gas Emissions from Existing Utility Generating Units, Advance Notice of Proposed Rulemaking," 82 Fed. Reg. 61,507 (Dec. 28, 2017), Docket No. EPA-HQ-OAR-2017-0355 (Apr. 26, 2018).

⁴ *Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company v. EPA*, No. 15-1371 (D.C. Cir. 2015), consolidated with *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. 2015).

⁵ Motion of Utility and Allied Petitioners for Stay of Rule, No. 15-1371 (D.C. Cir. Oct. 23, 2015).

⁶ Southern Company Petition for Reconsideration Re: "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule," 80 Fed. Reg. 64,661, (Oct. 23, 2015), Docket No. EPA-HQ-OAR-2013-0602 (Dec. 22, 2015).

of proposed rulemaking to replace the CPP and EPA's proposed version of the Final Rule, Georgia Power urged EPA to finalize a greenhouse gas emission rule under Section 111(d) that: (1) respects the statutory roles of states and the federal government in the development of emission guidelines and subsequent state plans and standards of performance and (2) defines the best system of emission reduction ("BSER") under Section 111(d) as applicable measures that can be applied to and at an individual affected source. Georgia Power has a significant interest in seeing the Final Rule upheld because it replaces the CPP with a rule that does exactly that—it preserves the principles of cooperative federalism embodied in Section 111(d) and establishes a BSER that can be applied to or at regulated sources. Specifically, the Final Rule recognizes EPA's role in setting national emission guidelines, including the BSER, for existing coal-fired electric generating units and tasks the Georgia Environmental Protection Division ("EPD") with the responsibility for applying those guidelines in determining the standards of performance that should be applied to affected sources within the state of Georgia. The Final Rule lawfully calls for unit-level standards of performance based on heat rate improvement measures that can be applied to or at individual affected sources, thus preserving the authority of the Georgia PSC to regulate the mix of intrastate electric generation in the manner that best serves the citizens of Georgia consistent with state and federal law.

GROUNDS FOR INTERVENTION

Federal Rule of Appellate Procedure 15(d) provides that a motion to intervene in a proceeding for review of an agency order must be filed within 30 days after the petition for review is filed and contain a “concise statement of the interest of the moving party and the grounds for intervention.” While Federal Rule of Civil Procedure 24(a)(2)’s requirements are not binding on this Court, those requirements help inform this Court’s intervention analysis. *Int’l Union v. Scofield*, 382 U.S. 205, 216, n. 10 (1965). Federal Rule of Civil Procedure 24(a), addressing intervention of right, requires a court to consider whether: (1) the applicant has an interest in the subject of the action; (2) the applicant “is so situated that disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest;” (3) the applicant’s interest is adequately represented by existing parties; and (4) the application is timely. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). Federal Rule of Civil Procedure 24(b)(1)(B) provides for permissive intervention by any party that “has a claim or defense that shares with the main action a common question of law or fact.”

Intervention would not delay resolution of this litigation. Georgia Power supports Respondents’ request to expedite consideration of this case and is prepared to comply with the proposed briefing schedule outlined in Respondents’

motion. See Respondents' Motion to Expedite, *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir. Aug. 28, 2019).

Georgia Power need not demonstrate standing on its own behalf in this case because it seeks the same disposition as Respondents—denial of the Petition. See *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (stating that “an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests”). If Georgia Power were required to show standing to intervene, Georgia Power has standing for the same reasons that it satisfies the requirements for intervention under Federal Rule of Civil Procedure 24(a), as demonstrated below. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

I. Georgia Power Has an Interest in the Outcome of These Proceedings That Would Be Impaired by an Adverse Ruling Against Respondents.

“The ‘threatened loss’ of [a] favorable action [by an agency] constitutes a ‘concrete and imminent injury’” justifying intervention of right. Order, *New York v. EPA*, No. 17-1273 (D.C. Cir. Mar. 14, 2018) (ECF No. 1722115) (quoting *Fund for Animals*, 322 F.3d at 733). The same rationale establishes an intervenor’s Article III standing. See *Fund for Animals*, 322 F.3d at 733.

Georgia Power owns and operates electric generating facilities that would have been subject to the CPP and are directly regulated by the Final Rule. Specifically, Georgia Power owns or co-owns nine electric generating units subject

to the Final Rule. Of the energy generated to meet Georgia Power's retail customers' needs in 2018, approximately 25% was generated by units regulated by the Final Rule. Georgia Power thus has a significant interest in the outcome of the challenges to the Final Rule.

Georgia Power actively participated in EPA's rulemaking process to develop a regulation targeting greenhouse gas emissions under Section 111(d) of the Clean Air Act, filing both administrative and judicial challenges to the CPP. Georgia Power also submitted comments on both the advance notice of proposed rulemaking and proposed version of the Final Rule. Georgia Power supports the Final Rule as a lawful exercise of EPA's authority to regulate greenhouse gases from existing electric generating units under Section 111(d) because the Final Rule generally respects state and federal roles in the development of emission standards for affected units and in the regulation of electric generation. Georgia Power recently completed its 20-year supply-side and demand-side integrated resource plan proceeding with the Georgia PSC, a process that state law requires at least every three years. In Georgia Power's most recent plan, the Georgia PSC approved, in the best interest of Georgia Power customers, the retirement of approximately 1,000 MWs of existing coal-fired generation and the addition of 2,260 MWs of new renewable generation. The Final Rule contemplates and allows state PSC resource planning efforts to continue, while allowing Georgia EPD to

implement EPA's emission guidelines by developing standards of performance for affected sources in Georgia. Georgia Power also supports the Final Rule because it is based on a BSER—certain heat rate improvement projects—that can be applied to or at an individual affected source.

For these reasons, Georgia Power has a significant interest in the Final Rule, and disposition of this Petition may impair its ability to protect that interest.

II. Georgia Power's Interests Are Not Adequately Represented by the Existing Parties

Unlike Federal Rule of Civil Procedure 24(a), the Federal Rules of Appellate Procedure do not require a prospective intervenor to show that it is not adequately represented by existing parties. Georgia Power nonetheless meets the “minimal” showing required under Rule 24(a)(2) to assert inadequate representation. *See Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Georgia Power is clearly not represented by Petitioners, who seek to overturn the Final Rule that Georgia Power supports. Additionally, Georgia Power's interests are unique and distinct from those of Respondents EPA and Administrator Wheeler. Although Georgia Power shares with Respondents the ultimate objective of a decision upholding the Final Rule, this Court has recognized that EPA is a governmental entity whose duty it is to represent the public interest. As such, EPA is not the appropriate party to advance the more specific interests of companies, like Georgia Power, that are impacted by

EPA's regulations. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (“A government entity...is charged by law with representing the public interest of its citizens.”); *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (The court “looks skeptically on government entities serving as adequate advocates for private parties.”). Georgia Power has a business interest in this case that Respondents do not share or represent, as a matter of law. Furthermore, Georgia Power, whose interests in the Final Rule are more “narrow and focused” than EPA's, “may also be likely to serve as a vigorous and helpful supplement to EPA's defense” of the Final Rule. *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 912-913(D.C. Cir. 1977).

III. Georgia Power's Motion to Intervene is Timely

The most recent petitions in these consolidated cases were filed on September 6, 2019.⁷ Georgia Power's Motion to Intervene is thus timely filed within 30 days of that date.

CONCLUSION

Georgia Power meets the requirements for intervention of right because the Petition threatens its interests, no party adequately represents Georgia Power's

⁷ *Advanced Energy Economy v. EPA*, No. 19-1186 (D.C. Cir. filed Sept. 6, 2019); *American Wind Energy Association, et al. v. EPA*, No. 119-1187 (filed Sept. 6, 2019); *Consolidated Edison, et al. v. EPA*, No. 19-1188 (D.C. Cir. filed Sept. 6, 2019).

interests in this case, and this Petition is timely. Georgia Power similarly qualifies for permissive intervention because it would defend the Final Rule without interfering with other parties' litigation and has sought timely intervention. Georgia Power thus respectfully requests this Court to grant this motion and designate Georgia Power as an intervenor-respondent in the above-captioned proceedings.

For the foregoing reasons, this Court should grant Georgia Power's motion to intervene.

Dated: October 7, 2019

Respectfully submitted,

/s/ Margaret Claiborne Campbell

Margaret Claiborne Campbell

Melissa J. Horne

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Counsel for Georgia Power Company

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the word limit in Fed. R. App. P. 27(d)(2)(A) because it contains 2,587 words, excluding those parts exempted by Fed. R. App. P. 32(f) and those accompanying documents excepted by Rule 27(a)(2)(B) and 27(d)(2).

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced 14-point Times New Roman type.

/s/ Margaret Claiborne Campbell
Margaret Claiborne Campbell

Dated: October 7, 2019

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 consolidated cases are:

19-1140 – American Lung Association, American Public Health Association

19-1165 – the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, and the Cities of Boulder (CO), Chicago, Los Angeles, New York, Philadelphia, South Miami (FL), and the District of Columbia

19-1166 – Center for Biodiversity, Appalachian Mountain Club, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club

19-1173 – Chesapeake Bay Foundation, Inc.

19-1175 – Robinson Enterprises, Inc., Nuckles Oil Company, Inc., dba Merit Oil Company, Construction Industry Air Quality Coalition, Liberty Packing Company LLC, Dalton Trucking, Inc., Norman R. “Skip” Brown, Joanne Brown, Competitive Enterprise Institute, Texas Public Policy Foundation

19-1176 – Westmoreland Mining Holdings, LLC

19-1177 – City and County of Denver, Colorado

19-1179 – North American Coal Corporation

19-1185 – Biogenic CO₂ Coalition

19-1186 – Advanced Energy Economy

19-1187 – American Wind Energy Association, Solar Energy Industries

Association

19-1188 – Consolidated Edison, Exelon, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Inc., Sacramento Municipal Utility District

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

Respondent-Intervenors in the above-captioned consolidated cases are National Rural Electric Cooperative Association, Chamber of Commerce for the United States of America, National Mining Association, America's Power, Appalachian Power Company, AEP Generating Company, AEP Generation Resources Inc., Indiana Michigan Power Company, Kentucky Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company,

Wheeling Power Company, Westmoreland Mining Holdings, LLC, and Murray Energy.

Movant Respondent-Intervenors in the above-captioned consolidated cases are the State of North Dakota, Indiana Energy Association, Indiana Utility Association, the States of West Virginia, Alabama, Arkansas, Arizona, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming, Governor Phil Bryant of the State of Mississippi, the Mississippi Public Service Commission, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, ALF-CIO, International Brotherhood of Electrical Workers, United Mine Workers, Basin Electric Power Cooperative, and the State of Nevada.

We believe that no entity has been admitted as an *amicus* at this time.

Dated: October 7, 2019

Respectfully submitted,

/s/ Margaret Claiborne Campbell

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Melissa J. Horne

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Counsel for Georgia Power Company

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**RULE 26.1 CERTIFICATE OF CORPORATE DISCLOSURE OF
GEORGIA POWER COMPANY**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Georgia Power Company (“Georgia Power”) certifies that it is a vertically integrated electric utility generating and delivering electric services to customers in Georgia. Georgia Power operates a diverse mix of electric power generating resources, including nuclear, natural gas, oil, coal, hydro, solar, wind, landfill gas, and biomass. Georgia Power is a wholly owned subsidiary of Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Georgia Power’s stock. No publicly-held company holds 10% or more of Southern Company’s stock.

Dated: October 7, 2019

Respectfully submitted,

/s/ Margaret Claiborne Campbell

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Counsel for Georgia Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Margaret Claiborne Campbell
Margaret Claiborne Campbell

APPENDIX A

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DECLARATION OF MARK S. BERRY

I, Mark S. Berry, do hereby declare that the following statements made by me under oath are true and accurate to the best of my knowledge, information and belief:

1. I am Vice President of Environmental and Natural Resources for Georgia Power Company (“Georgia Power”).
2. Georgia Power is a vertically integrated electric utility regulated by the Georgia Public Service Commission (“PSC”).

3. Georgia Power serves 2.6 million retail customers across Georgia through a diverse mix of electric power generating resources, including nuclear, natural gas, oil, coal, hydro, solar, wind, landfill gas, and biomass.

4. Georgia Power has achieved carbon dioxide (CO₂) reductions of more than 50 percent since 2007 without state or federal mandates, while making decisions in the best interests of its customers. Georgia Power supports CO₂ regulation consistent with federal and state authority under the Clean Air Act.

5. To comply with federal and state requirements, Georgia Power has invested approximately \$6 billion in environmental controls and as a result, has reduced emissions of nitrogen oxides (NO_x) by 93 percent and sulfur dioxide (SO₂) by 99 percent since 1990 and has reduced mercury emissions by 95% since 2005.

6. Georgia Power owns or co-owns nine electric generating units subject to the Final Rule. Of the energy generated to meet Georgia Power's retail customers' needs in 2018, approximately 25% was generated by units that would be subject to the Final Rule.

7. Georgia Power recently completed its 20-year supply-side and demand-side integrated resource plan proceeding with the Georgia PSC, a process that state law requires at least every three years. In Georgia Power's most recent plan, the Georgia PSC approved, in the best interest of Georgia Power customers, the

retirement of approximately 1,000 MWs of existing coal-fired generation and the addition of 2,260 MWs of new renewable generation.

8. Georgia Power supports EPA's effort to regulate greenhouse gas emissions from electric generating units through its 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" (the "Final Rule"), which is the subject of this litigation.

9. Through its parent company, Southern Company, Georgia Power submitted public comments on the proposed version of the Final Rule and also participated in the rulemaking process for the Clean Power Plan ("CPP"), submitting comments on both the CPP proposed rule and the advance notice of proposed rulemaking assessing the potential replacement of the CPP. Georgia Power was also a petitioner in the CPP litigation and petitioned for a stay of the CPP as a party to that litigation. Through Southern Company, Georgia Power also filed a petition for reconsideration of the CPP with EPA.

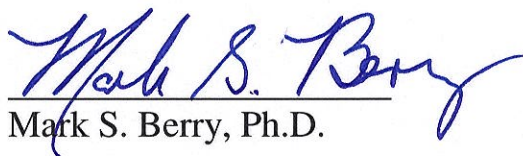
10. Georgia Power supports the Final Rule as a lawful exercise of EPA's authority to regulate greenhouse gas emissions from existing electric utilities under Section 111(d) of the Clean Air Act.

11. Georgia Power also supports the Final Rule because it contemplates and allows state PSC resource planning efforts to continue, while allowing Georgia

EPD to implement EPA's emission guidelines by developing standards of performance for affected sources in Georgia.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on October 7, 2019.


Mark S. Berry, Ph.D.

Vice President of Environmental and Natural Resources
Georgia Power Company