

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

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**UNOPPOSED MOTION OF BASIN ELECTRIC POWER COOPERATIVE  
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, Basin Electric Power Cooperative (“Basin Electric”) respectfully moves for leave to intervene in support of Respondents the United States Environmental Protection Agency and Andrew R. Wheeler, Administrator of the United States Environmental Protection Agency (collectively, “EPA”) in *Consolidated Edison, Inc. v. EPA*, No. 19-1188 and the other cases with which it has been consolidated. Basin Electric owns and/or operates several coal-fired

electric generating units that are subject to regulation under the Final Rule at issue in this case. Therefore, it has a substantial interest in the outcome of the case.

This motion is timely because it is filed within 30 days of the Petition for Review filed on September 6, 2019 in *Consolidated Edison, Inc. v. EPA*, No. 19-1188. *See* Fed. R. App. P. 15(d); Cir. R. 15(b). The *Consolidated Edison* case has now been consolidated with *American Lung Ass'n v. EPA*, No 19-1140 and several other cases: Nos. 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, and 19-1189.

The undersigned counsel for Basin Electric contacted counsel for Petitioners and Respondents in the *Consolidated Edison* case, and is authorized to state that neither the Petitioners in that case nor EPA takes any position on this motion.

### **PROCEDURAL BACKGROUND**

The Petition for Review in this case (and in each of the consolidated cases) seeks 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," 84 Fed. Reg. 32520 (July 8, 2019). Section 111 of the Clean Air Act ("CAA") authorizes EPA to promulgate "standards of performance" for new and existing stationary sources of air pollutants in certain categories. 42 U.S.C. § 7411.

The Final Rule concerns existing stationary sources under Section 111(d) and involves three separate and distinct rulemakings: (1) repeal of the previous administration's Clean Power Plan ("CPP"), *see* 80 Fed. Reg. 64662 (Oct. 23, 2015); (2) implementation of the Affordable Clean Energy Rule (the "ACE Rule"), which promulgates emission guidelines for reducing carbon dioxide emissions from existing coal-fired power plants; and (3) changes to EPA's implementing regulations for Section 111(d) emission guidelines. 84 Fed. Reg. at 32,520.

Proposed intervenor Basin Electric is a not-for-profit regional wholesale electric generation and transmission cooperative owned by more than 140 member cooperatives. It provides wholesale power to rural electric systems in nine states, with electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa. It has a diverse energy portfolio consisting of coal, gas, oil, nuclear, distributed, generation, and renewable energy. Most of its baseload capacity comes from coal, while its peaking facilities are oil- or natural gas-based. Its coal fleet includes Antelope Valley Station (two units) and Leland Olds Station (two units) in North Dakota, and Dry Fork Station (one unit) and Laramie River Station (three units) in Wyoming. These units vary widely in capacity, age, geography, and other factors.

Basin Electric submitted timely comments on the proposals that led to the Final Rule, is subject to regulation under the Final Rule, and has a substantial

interest in the outcome of this case. Additionally, intervention is necessary to ensure that Basin Electric is afforded an opportunity to assert and protect its own interest as it relates to the Final Rule.

## **ARGUMENT**

The Court should grant Basin Electric leave to intervene in this case because it meets the standard for intervention in petition for review proceedings before this Court. Specifically, Basin Electric is subject to regulation under the ACE rule and therefore has standing to intervene. Moreover, Basin Electric's interest is not fully aligned with any party to this litigation, is not adequately represented by EPA, and may be harmed by a favorable ruling for Petitioners.

### **I. Standard for Intervention.**

Intervention in petition for review proceedings is governed by Fed. R. App. P. 15(d). Rule 15(d) requires that a party seeking to intervene must file a motion for leave "within 30 days after a petition for review is filed" and requires that the motion "contain a concise statement of the interest of the moving party and the grounds for intervention." Fed. R. App. P. 15(d).

This Court has held that "Rule 15(d) simply requires the intervenor to file a motion setting forth its interest and the grounds on which intervention is sought[.]" *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991). The rules indicate that another method may apply if provided by statute, Fed. R. App.

P. 15(d); but the CAA sections governing judicial review are silent about motions to intervene by third parties. *See* 42 U.S.C. § 7607(b)(1), (d)(8). Accordingly, the ordinary rules apply. *See also U.S. Steel Corp. v. EPA*, 614 F.2d 843, 844-45 (3d Cir. 1979) (applying Rule 15(d) to a motion to intervene, as the CAA is “silent with regard to intervention”).

Motions to intervene in appellate proceedings are generally governed by the standard set forth in Federal Rule of Civil Procedure 24(a) and (b). *See, e.g., Int’l Union v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (stating that while “[t]he Federal Rules of Civil Procedure . . . apply only in the federal district courts,” “the policies underlying intervention may be applicable in appellate courts,” and citing Rule 24(a) and Rule 24(b) as supporting intervention in the subject administrative review proceeding); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004) (“Rule 15(d) does not provide standards for intervention, so appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24.”); *Texas v. U.S. Dep’t of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (“Rule 15(d) . . . provides no standard for resolving intervention questions, but the Court has identified two considerations: first, the statutory design of the act and second, the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24.”). Under Federal Rule of Civil Procedure 24(a), which governs intervention as of right, a court must grant a timely motion to intervene if the movant “claims an

interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

Rule 24(a)(2) therefore requires a showing of (1) timeliness; (2) an interest relating to the transaction that is the subject of the action; (3) whether disposition of the matter would impair that interest; and (4) lack of adequate representation by the existing parties to the case. Fed. R. Civ. P. 24(a)(2); *see also Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003).

This Court has expressed that "in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003). Basin Electric has standing in its own right, as the ACE Rule directly subjects its facilities to regulation under the rule. Nonetheless, this Court has also 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). As discussed below, Basin Electric satisfies the requirements of Rule 24(a) and any standing testing necessary to intervene.

## **II. Basin Electric Meets the Criteria for Intervention.**

Basin Electric is entitled to intervene as a matter of right under Rule 24(a) because its motion is timely, it has a direct and significantly protectable interest, disposition without its presence could impair this interest, and its interest is not adequately represented by the existing parties.

### **A. Basin Electric's Motion is Timely.**

Fed. R. App. P. 15(d) provides a 30-day deadline for filing motions to intervene in agency review proceedings. Under the CAA, petitions for review of the Final Rule had to be filed within 60 days of its July 8, 2019 publication date, or by September 6, 2019. *See* 42 U.S.C. § 7607(b). Petitioners American Lung Association and American Public Health Association filed their petition for review in the lead case on July 8, 2019. Prior to the statutory deadline, a dozen additional petitions were filed and consolidated with the lead case. The petition in this case, *Consolidated Edison v. EPA*, was timely filed on September 6, 2019, and so the deadline for intervention is October 7, 2019.

Accordingly, this motion is timely. And under Circuit Rule 15(b), this motion to intervene in the *Consolidated Edison* case is deemed as a motion to intervene in all the consolidated cases concerning the same agency action.

**B. Basin Electric Has an Interest Relating to the Final Rule that May be Impaired or Impeded By the Disposition of This Appeal.**

Basin Electric has an interest in preventing an economic injury related to the rule that is the subject of this appeal. Basin Electric owns and/or operates several units that are subject to regulation under the ACE Rule. Additionally, Basin Electric has a substantial interest in the Final Rule's repeal of the former CPP—which would have imposed significant compliance burdens on it and would have forced it to prematurely shut down some of its units.

Moreover, the Court's disposition of this appeal could impair or impede Basin Electric's substantial interest. Any change to the Final Rule as a result of this case could impose additional compliance requirements and costs on Basin Electric. If the Final Rule were to be vacated or modified, or the CPP reinstated, that would substantially impair Basin Electric's interest. Its ability to protect this interest may be significantly impaired if it is not permitted to intervene in the appeal.

Accordingly, Basin Electric has a direct and significant interest in the Final Rule that could potentially be impaired or impeded through this appeal.

**C. The Existing Parties Cannot Adequately Protect Basin Electric's Interest.**

The existing parties cannot adequately represent Basin Electric's interest in the Final Rule. Certainly, Petitioners cannot do so, as their positions and interests are not aligned with Basin Electric's. Nor can EPA adequately protect Basin



Electric's interest. EPA's interest as the government defending its own Final Rule obviously differs from that of Basin Electric, as the owner and operator of facilities subject to regulation under the rule. Accordingly, Basin Electric must be permitted to intervene in this action to fully protect its own interest.

### CONCLUSION

For the foregoing reasons, Basin Electric respectfully requests that it be permitted to intervene in this proceeding.

Dated: October 4, 2019.

Respectfully submitted,  
s/Christina F. Gomez  
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**CERTIFICATE OF COMPLIANCE**

This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because it contains 1,782 words, excluding those parts of the document exempted by Fed. R. App. P. 32(f).

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 a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point, Times New Roman font.

Dated: October 4, 2019.

*s/Christina F. Gomez* \_\_\_\_\_

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WHEELER, Administrator, United States	)	
Environmental Protection Agency,	)	
	)	
Respondents.	)	

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Basin Electric Power Cooperative (“Basin Electric”) makes the following disclosure:

Basin Electric is a not-for-profit regional wholesale electric generation and transmission cooperative owned by more than 140 member cooperatives. It provides wholesale power to member rural electric systems in nine states, with electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa serving approximately 3 million consumers.

Basin Electric has no parent companies, and no publicly held corporation owns 10% or more of its stock.

Dated: October 4, 2019.

*s/Christina F. Gomez*

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 4, 2019, a copy of the foregoing UNOPPOSED MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS was served electronically on all counsel of record through the Court's CM/ECF system.

*s/Christina F. Gomez* \_\_\_\_\_

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