UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL WILDLIFE REFUGE ASSOCIATION, DRIFTLESS AREA LAND CONSERVANCY, WISCONSIN WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE, Plaintiffs, v. RURAL UTILITIES SERVICE, CHRISTOPHER MCLEAN, Acting Administrator, Rural Utilities Service, UNITED STATES FISH AND WILDLIFE SERVICE, CHARLES WOOLEY, Midwest Regional Director, and SABRINA CHANDLER, Manager, Upper Mississippi River National Wildlife and Fish Refuge, Defendants.	No. 3:21-cv-00096-wmc

MEMORANDUM IN SUPPORT OF AMERICAN TRANSMISSION COMPANY LLC BY ITS CORPORATE MANAGER ATC MANAGEMENT INC., ITC MIDWEST LLC AND DAIRYLAND POWER COOPERATIVE'S MOTION TO INTERVENE AS DEFENDANTS UNDER FEDERAL RULE OF CIVIL PROCEDURE 24

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INTRODUCTION

American Transmission Company LLC ("ATC") by its corporate manager ATC Management Inc., ITC Midwest LLC ("ITC Midwest") and Dairyland Power Cooperative ("Dairyland") (collectively, the "Co-owners") move under Federal Rule of Civil Procedure 24 to intervene as defendants in the above-captioned case.[1] The relief the Plaintiffs seek would delay or frustrate the Co-owners' ability to construct the proposed Cardinal-Hickory Creek 345 kilovolt ("kV") transmission line project ("Cardinal-Hickory Creek Project" or "Project"), a $492 million project in which they have already invested $66 million. *See* Declaration of Thomas Dagenais in Support of American Transmission Company LLC, ITC Midwest LLC and Dairyland Power Cooperative's Motion to Intervene ("Dagenais Decl.") ¶ 25. The Co-owners' substantial investment in the Project undeniably gives the Co-owners a significant interest in this case, which could be impaired by the disposition of the case.[2] The federal agencies named as defendants, in contrast, do not stand to benefit from the transmission line when it is built or to suffer financial losses if it is enjoined; they cannot adequately represent the Co-owners' stake. The Co-owners are therefore "not content to rely on governmental regulators to protect their

[1] On February 10, 2021, Plaintiffs National Wildlife Refuge Association, Driftless Area Land Conservancy, Wisconsin Wildlife Federation, and Defenders of Wildlife (collectively, "Plaintiffs") filed a complaint in this Court against the Rural Utilities Service, Christopher McLean as Acting Director of RUS, the U.S. Fish and Wildlife Service, Charles Wooley as Midwest Regional Director, and Sabrina Chandler as Manager of the Upper Mississippi River National Wildlife and Fish Refuge (collectively, "Defendants") alleging that the Rural Utilities Service's environmental impact statement did not comply with the requirements of the National Environmental Policy Act. Compl. ¶ 1, and that the USFWS's grant of a right-of-way authorization for the Cardinal-Hickory Creek Project transmission line to cross the Upper Mississippi Refuge was not a "compatible use" of the Refuge under the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee.

[2] ATC and ITC Midwest will each own 45.5 percent of the Project, and Dairyland will own the remaining nine percent. Declaration of Amy Lee in Support of ATC's Motion to Intervene ¶ 7. ATC's owns the Hill Valley Substation, the Cardinal Substation, and the 345 kV transmission line and associated facilities between the Hill Valley and Cardinal substations. *Id*. ¶ 8. ATC will construct this portion of the Project and share ownership in this portion of the transmission line with Dairyland. *Id*. ATC is acquiring easements for the portion of the Project that it will own. *Id*. at ¶ 9. ITC Midwest will own the Hickory Creek substation and share ownership with DPC of the portion of the transmission line from the Hill Valley substation west to the Hickory Creek substation in Iowa. Declaration of Mark Rothfork in Support of ITC's Motion to Intervene ¶ 8. ITC Midwest has acquired easements for the portion of the Project that it will own in Iowa. *Id*. at ¶ 10.

$500 million private investment." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 745 (7th Cir. 2020) ("*DALC*").[3]

In *DALC*, the Seventh Circuit considered the question of the Co-owners' right to intervene in a related case brought by some of the same parties who are plaintiffs here and that challenged other agency approvals of the Cardinal-Hickory Creek Project. The court found that the Co-owners presented a "paradigmatic case for intervention as of right." *Id.* at 744. The court explained that "a proposed intervenor who satisfies the[] three elements is *entitled* to intervene *unless* existing parties adequately represent his interests." *Id*. at 744, 746.

The Project, its economic and other benefits, and the Co-owners' investment are all threatened by the sweeping relief Plaintiffs seek in this case. The Co-owners demonstrably meet the well-established threshold under Federal Rule of Civil Procedure 24(a) required to intervene as of right—(1) this Motion is timely; (2) the Co-owners have an interest relating to the issue in this litigation; and (3) that interest may be impaired or impeded by this case. The Co-owners move under Federal Rule of Civil Procedure 24(a)(2) to intervene as of right and move alternatively under Rule 24(b)(1)(B) for permissive intervention to protect their significant interests.

BACKGROUND

The Cardinal-Hickory Creek Project is a 101-mile, 345-kV transmission line from the Cardinal Substation in Dane County, Wisconsin through the new Hill Valley Substation near Montfort, Wisconsin, and terminating at the existing Hickory Creek Substation in Dubuque County, Iowa. Dagenais Decl. ¶ 5. The Cardinal-Hickory Creek Project will provide extensive

[3] The *DALC* case was brought by two of the same plaintiffs, who were also represented by Plaintiffs' counsel in this case. Although the causes of action differ, the proceeding involves exactly the same project—the Cardinal-Hickory Creek transmission line—challenged in this case. And the three companies, the Co-owners, that intervened in that case are the same companies who now move to intervene in this case.

benefits to local consumers of energy. The new transmission line, if built, will lead to lower interstate energy costs by reducing congestion on the system, enhancing system reliability and improving access to 42 renewable generators of low-cost wind and solar generation in development in Wisconsin, Iowa, Missouri, North Dakota, South Dakota, and Minnesota. Dagenais Decl. ¶¶ 20, 23. The Midcontinent Independent System Operator, Inc. ("MISO"), a not-for-profit entity created under federal law that is responsible for planning and operating the transmission system and energy markets across fifteen states, determined in 2011 that this was one of the top priority regional transmission lines (also known as Multi-Value Projects ("MVPs")) that are particularly critical to meeting local energy and reliability needs. *See Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 770–72 (7th Cir. 2013) (describing the MVP portfolio); *see also* Dagenais Decl. ¶¶ 8, 9.

The federal government does not have general electric transmission siting or construction authority. MISO is not a federal agency. The Cardinal-Hickory Creek Project is not a federal initiative or project. The Co-owners are not government agencies. The great majority of the Project is entirely on private land, relies on private investment, requires no federal approval, and is governed by state utility regulatory jurisdiction. But certain limited aspects of the Project do involve decisions by three federal agencies. Those specific decisions triggered the provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.,* which requires federal agencies to identify, evaluate and solicit public comment on the potential environmental impacts of their actions. MISO and state utility regulators, not the federal agencies, bear the responsibility to decide whether the Project is necessary and appropriate to protect the reliability of the electric grid, provide safe and affordable power to consumers, and support society's transition to carbon-free generation.

The Rural Utilities Service ("RUS"), an operating unit of the U.S. Department of Agriculture ("USDA"), served as the lead federal agency for developing an environmental impact statement ("EIS") to analyze the Project proposal under NEPA. The U.S. Fish and Wildlife Service ("USFWS") and U.S. Army Corps of Engineers ("USACE" or "Corps") participated in the EIS as "cooperating" agencies.

Throughout the federal environmental review and decision-making process, the public and various government agencies have had the opportunity to provide input and comment on the Cardinal-Hickory Creek Project proposal and alternatives. On October 18, 2016, RUS initiated the 30-day public "scoping" period, which it ultimately extended to 81 days ending on January 6, 2017. RUS summarized the public comments received, organized by concern, issue, or resource topic,[4] and published a draft EIS ("DEIS") for public comment on December 7, 2018. RUS held six public meetings on the DEIS during which interested parties made oral comments in a formal setting and/or submitted written comments. RUS coordinated the development of a final EIS and made it available for a 30-day public review period that began on October 25, 2019. This EIS formed the foundation for decisions by USFWS, USACE, and RUS on those aspects of the Project that implicate specific federal responsibilities. The three agencies' decisions are included in a single, comprehensive Record of Decision ("ROD"), *Cardinal-Hickory Creek 345-kV Transmission Line Project* Record of Decision (attached hereto as "Exhibit A").

RUS is authorized by the Rural Electrification Act of 1936, 7 U.S.C. § 901 *et seq.*, to make loans and loan guarantees to finance construction of electric distribution, transmission and generation facilities. Dairyland's present intention is to seek financial assistance from the RUS in

[4] Presented in the Final EIS Section 1.7 and the scoping report available on the RUS website: https://www.rd.usda.gov/resources/environmental-studies/impact-statements/cardinal-%E2%80%93-hickory-creek-transmission-line.

2022 or 2023. Declaration of Jesse Beckendorf in Support of Dairyland Power Cooperative's Motion to Intervene ("Beckendorf Decl.") ¶ 10. The potential financial assistance from RUS would support Dairyland's participation in the Project. Before financial assistance could be granted, however—assuming that Dairyland does ultimately apply for it—RUS must assess the technical and financial characteristics of the project for which federal financial assistance is sought. ROD at 46. RUS led preparation of the EIS to discharge its obligations under NEPA. RUS determined that the Project meets RUS's environmental requirements for providing financing assistance to Dairyland.

The USFWS is required by the National Wildlife Refuge System Administration Act to decide whether a project's use of land managed by the USFWS is "compatible" with the purposes for which the land was placed under USFWS's jurisdiction as a wildlife refuge. The Cardinal-Hickory Creek Project crosses the Upper Mississippi National Wildlife and Fish Refuge ("Refuge").

The Refuge extends for 261 river miles along the Mississippi River in Minnesota, Wisconsin, Iowa, and Illinois. The Co-owners began their route analysis for the Cardinal-Hickory Creek Project by focusing on the crossing of the Mississippi River. Given the four-state extent of the Refuge, the Co-owners have been meeting with USFWS since April 2012 to discuss potential crossings, including crossings of the Refuge. ROD at 11. The USFWS participated as a cooperating agency in the EIS, because NEPA analysis as well as a compatibility determination are necessary for the agency to authorize a crossing in the Refuge. *See id*. at 5.

In developing the EIS, USFWS considered six alternative transmission line routes for the Project, as well as data and analyses which revealed that alternative alignments routed entirely outside the Refuge would have greater overall environmental and human impacts, compared with

the Refuge crossing locations, and were not economically or technically feasible. *Id*. at 11 (citing Burns and McDonnell 2016) and 16. On December 19, 2019, USFWS issued its "compatibility determination," affirming that the Project's use of roughly a mile of the Refuge, subject to numerous environmental conditions, including removal of existing transmission lines located nearby in the Refuge, is compatible with the Refuge purposes. On January 8, 2020, USFWS signed the ROD selecting the preferred alternative for crossing the Refuge. This ROD and its compatibility determination allowed the USFWS to issue a special use permit and an easement to cross the Refuge, which the USFWS issued on September 8, 2020.

The USACE participated as a cooperating agency in preparation of the EIS because certain locations along the Project route cross Corps' owned/managed lands, are subject to the Corps' regulatory jurisdiction under the Clean Water Act and the Rivers and Harbors Act, ROD at 5–6, or are subject to easements held by the Corps for Mississippi River Project[5] navigation purposes. The USACE reviewed the alternatives analysis in the EIS, including the agencies' preferred alternative for the Project, and determined that the Project is consistent with Mississippi River Project purposes, the agency's 1989 Land Use Allocations Plan for the Mississippi River Project, and other applicable laws and guidance. ROD at 6. USACE signed the ROD for the Cardinal-Hickory Creek Project with RUS on January 16, 2020. Plaintiffs have not challenged actions by the Corps in this case but have indicated their intent to do so in the future. Compl. ¶ 74.

The Co-owners actively engaged with RUS, USFWS, and the USACE throughout the process of preparing the NEPA analysis for the Project. *See* Beckendorf Decl. ¶ 11; Declaration of Amy Lee in Support of ATC's Motion to Intervene ("Lee Decl.") ¶ 11; Declaration of Mark

[5] The Mississippi River Project is a system of public works within the upper Mississippi Valley designed to manage flood risk and navigation, and serves other public purposes within the channel.

Rothfork in Support of ITC's Motion to Intervene ("Rothfork Decl.) ¶ 12. As part of this effort, the Co-owners extensively studied the costs and benefits of the Project and studied whether any alternatives could meet the purpose and need of the Project. Dagenais Decl. ¶ 13. This alternatives analysis evaluated and compared the following four options: (1) the Project; (2) a lower-voltage alternative (138 kV); (3) a non-transmission alternative that included a mix of local energy, demand response, residential solar and utility-scale solar utilities; and (4) a no-action alternative. Dagenais Decl. ¶ 14. The conclusion of this alternatives analysis reflected that none of the alternatives to the Project would meet the purpose and need as defined by MISO. Dagenais Decl. ¶ 16.

In addition to the NEPA analysis the federal agencies conducted, the states of Wisconsin and Iowa also reviewed and approved the construction of this Project under their own standards. On September 26, 2019, the Co-owners were granted a certificate of public convenience and necessity ("CPCN") to construct the Project from the Public Service Commission of Wisconsin ("Commission"). *See* Rothfork Decl. ¶ 11. The CPCN confirmed that the Project "provide[s] usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state, and the benefits of the facilities are reasonable in relation to their cost." Public Service Commission of Wisconsin, Docket No. 5-CE-146, Ref No. 376391 at 6–7 (Sept. 26, 2019). On May 28, 2020, the Iowa Utilities Board granted ITC Midwest and Dairyland a franchise to construct, operate and maintain the Project in Dubuque and Clayton Counties in Iowa. *Id.* ¶ 9. This franchise affirms that the Project in Iowa represents a "reasonable relationship to an overall plan of transmitting electricity in the public interest." Iowa Utilities Board, Docket No. E-22386 (May 27, 2020).

Plaintiffs challenge the RUS's conclusion that the final EIS is adequate under NEPA and the USFWS' compatibility determination and grant of a right-of-way ("federal actions"). Plaintiffs ask the Court to vacate the decisions by RUS and USFWS and to enjoin RUS from providing any financial assistance. The relief sought by the Plaintiffs, if granted, would inflict severe economic harm on the Co-owners by, among other things, eliminating much, perhaps all, of the value of the considerable investment by the Co-owners in planning, environmental analysis, and coordination with the federal and state agencies. Lee Decl. ¶¶ 11–16; Rothfork Decl. ¶ 14; Beckendorf Decl. ¶ 13. The remedies Plaintiffs seek would also further delay the Co-owners' construction of infrastructure that is critical to address grid reliability needs identified by MISO ten years ago, and would strand clean, renewable wind energy. Because Co-owners—not the federal government—stand to lose most from further delays of a Project that is already long overdue, the Court should allow them to intervene.

ARGUMENT

I. THE CO-OWNERS SHOULD BE ALLOWED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24(a) governs intervention as of right and provides, in relevant part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) 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.

As the Seventh Circuit explained in *DALC,* "The rule is straightforward: the court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest

relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case." 969 F.3d at 746. "A proposed intervenor who satisfies these three elements," the court found, "is *entitled* to intervene *unless* existing parties adequately represent his interests." *Id.*; *Wis. Educ. Ass'n Council v. Walker ("WEAC")*, 705 F.3d 640, 657–58 (7th Cir. 2013) (citing *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007)). As set forth below, the Co-owners satisfy this standard and should be permitted to intervene as a matter of right.

A. The Co-owners' Motion is timely.

Determining whether a motion to intervene is timely is a question "committed to the sound discretion of the district court" and depends on an evaluation of the following factors: (1) the length of time the movant knew or reasonably should have known of its interest in the case; (2) whether any delay in moving to intervene causes prejudice to existing parties; (3) whether the movant would be prejudiced if the motion is denied; and (4) any other unusual circumstances. *Shea v. Angulo*, 19 F.3d 343, 349 (7th Cir. 1994) (citing *United States v. City of Chicago*, 908 F.2d 197, 199 (7th Cir. 1990)); *South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985).

The Co-owners did not delay in filing this Motion. The Co-owners became aware of this action around the time the case was filed on February 10, 2021. The proceedings in this litigation are still in their early stages, and the Co-owners are filing this Motion before the Defendants have answered the Complaint. The Motion is therefore timely.

Moreover, because the Co-owners have not delayed in filing this Motion, there will be no undue prejudice to existing parties from the Co-owners' participation in this case. Finally, as demonstrated below, the Co-owners, as the project proponents most directly affected by the challenged federal actions, have a substantial interest in defending and preserving the benefits

provided by these federal actions and, as described in more detail below, will be prejudiced if not allowed to intervene.

B. The Co-owners have a direct, significant, and legally protected interest related to the subject matter of this case.

The Co-owners' interest in intervening collectively as an intervenor-defendant in support of the federal actions arises from their direct, significant, and legally protectable interest in the federal permits and approvals and in building and operating the Project to provide adequate, reliable, and cost-effective electric transmission service to the public. This interest is two-fold. First, the Co-owners are the direct beneficiaries of the challenged federal actions. The Co-owners are the applicants that proposed the Cardinal-Hickory Creek Project and have obtained the permits and a right-of-way that Plaintiffs seek to overturn and/or enjoin as part of this proceeding. Rothfork Decl. ¶ 12 ("ITC Midwest has participated in the federal permitting process by operating as the lead entity for permitting to cross the Upper Mississippi National Wildlife Refuge."); Beckendorf Decl. ¶ 11 ("Dairyland is a direct recipient of permits and a direct owner of right of way that are threatened by this litigation."). In addition, although Dairyland will likely apply for financial assistance from RUS, the Complaint asks the Court to "[e]njoin Defendant RUS from providing any financial assistance." Compl., Relief ¶ 6.

In *DALC*, the Seventh Circuit affirmed that the Co-owners have a direct, significant, and legally protected interest in the same Project that is at issue in this case. *DALC,* 969 F.3d at 748 (reversing denial of intervention based on divergence of interests between utility commission and transmission line applicants who "own, finance, and will operate" line; "have obligations to their investors in connection with its construction and operation"; and have "substantial sunk and anticipated future investments in the power line, and a valid expectation of a return on their investment.").

The second interest the Co-owners have in the lawsuit is that the disposition of the Complaint could result in vacatur of the ROD, which would prevent or at least delay the Co-owners' ability to realize any value on the significant investments they have made to develop the Project. *See id.* ("[I]t quickly becomes clear that the transmission companies are entitled to participate as parties to this litigation to protect their private investment in this massive energy project. Their interests are independent of and different from the [public] Commission's"); *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 709 (11th Cir. 1991); *United States, ex rel. McGough v. Covington Techs. Co*., 967 F.2d 1391, 1396 (9th Cir. 1992); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967). These investments are crucial to the success of the Project as a whole, and each Co-owner has individually invested significant time and resources into moving the Project towards completion. *See* Beckendorf Decl. ¶ 13 ("Dairyland has expended several million dollars to date on project development activities such as environmental studies, obtaining required permits, land acquisition, and analysis of the Project's impact to Dairyland's transmission system."); Lee Decl. ¶¶ 13, 14 (describing ATC's contractual investments to initiate tribal outreach and prepare a Biological Assessment for the Project); Rothfork Decl. ¶ 14 ("$25 million was invested in Iowa where ITC Midwest is constructing and will operate the transmission line").

The facts are effectively the same as those considered in *DALC*; since it is the same Project at issue, the "power-line project itself, and the permit[s] necessary to construct it, belong to the transmission companies." *DALC*, 969 F.3d at 749. In similar circumstances, courts have granted motions to intervene, typically as a matter of course. *See, e.g.*, *Sierra Club, Inc. v. Envtl. Protection Agency*, 358 F.3d 516, 517–18 (7th Cir. 2004) (electric company proposing power plant permitted to intervene as of right in lawsuit challenging permit issued for power plant);

WildEarth Guardians v. U.S. Forest Serv., 573 F.3d 992, 995–96 (10th Cir. 2009) (mining permit-holder permitted to intervene as of right in lawsuit challenging mining permit) (cited with approval in *DALC*, 969 F.3d at 749).

C. Disposition of this case threatens to impair the Co-owners' interests.

As set forth above, the Co-owners have an interest in the Project and the validity of the federal actions challenged in this case. The Complaint threatens this interest by seeking to bar the right-of-way approval granted by the USFWS, the Corps' permits that cover its lands within the Refuge, and any future (potential) approval of financial assistance by RUS. Compl., Relief ¶ 3. The Co-owners cannot complete the Project without the approvals granted by the USFWS and the Corps to cross the Refuge. Dairyland cannot secure financial assistance from the RUS for its participation in the Project without the benefit of the determinations reflected in the ROD.

If Plaintiffs prevailed on any of their claims in this litigation and the Court were to remand the decision, the Co-owners would at least be delayed, and possibly prevented, from proceeding with the construction and operation of the Project. The costs of the Project could increase, and/or the acquisition of easements for portions of the Project could be delayed or not occur. Lee Decl. ¶¶ 18–21; Beckendorf Decl. ¶ 16. For instance, ATC could be subjected to actions for contractual damages of $12,000,000 by steel supply companies with whom it has contracted to build the line, and up to $14,000,000 by companies who are moving their infrastructure in anticipation of the line. Lee Decl. ¶¶ 19, 20. And because construction is subject to seasonal restraints based on the needs of federally listed species, even temporary injunctive relief that would cause the companies to miss the window for construction would extend the schedule for a full year, causing additional delay and expense. *Id.* at ¶ 21. If the Project were enjoined, Dairyland, a not-for-profit cooperative, "will not be able to remove its existing transmission lines crossing the river, may not receive the full expected benefit of its commercial

arrangements with renewable developers in the area, and may need to upgrade existing facilities that otherwise would not require upgrades." Beckendorf Decl. ¶ 16. Therefore, denying intervention would impair or impede the Co-owners' ability to protect their interests. *See, e.g., Sierra Club v. Jackson*, No. 09-CV-751-SLC, 2010 WL 547335, at *1 (W.D. Wis. Feb. 11, 2010) (recognizing that permit holder's interest could be impaired through resolution of case because operational requirements of permit could be affected); *WildEarth*, 573 F.3d at 995–96 ("If WildEarth is successful in this litigation, operation of the West Elk Mine will be impaired, or even halted.").

D. The named parties do not adequately represent the Co-owners' interests.

The default rule for intervention as of right is a liberal one, which is satisfied if the prospective intervenor "shows that representation of its interest 'may be' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) *see also DALC*, 969 F.3d at 749 ("Under the lenient default standard, they need only show that the Commission's representation 'may be' inadequate, 'and the burden of making that showing should be treated as minimal'" (quoting *Trbovich*, 404 U.S. at 538 n.10)). That standard is easily met here. For the same reasons addressed by the Seventh Circuit in *DALC*, the federal defendants cannot adequately represent the Co-owners' interests. Although intervenor-movant and defendants have a shared goal of defending the validity of the permits, "it's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed." *DALC*, 969 F.3d at 748. As the court found in *DALC*, analyzing a motion that way "operates at too high a level of generality." *Id.*

The Seventh Circuit in *DALC* concluded that in light of the putative intervenors' "private investment in this massive energy project . . . [t]heir interests are independent of and different

from the [public] Commission's." *Id*. Contrasting the interests of the defendants and those of the would-be intervenors—which it found to be "materially different"—the court explained:

> Their interests are independent of and different from the Commission's in several important respects. To name a few: They own, finance, and will operate the transmission line in question, and have obligations to their investors in connection with its construction and operation. They have substantial sunk and anticipated future investments in the power line, and a valid expectation of a return on their investment pursuant to the ratemaking regulatory regime administered by the Federal Energy Regulatory Commission. . . . As public utilities, they have a legal obligation to maintain the power grid and provide adequate and reliable electricity services to the public.

Id. at 748. More generally, the court explained why the governmental party in that case (the state public utilities commission) could not adequately represent the defendant-intervenor's interests, despite their mutual interests in having the challenged decision upheld: "[t]he Commission is a regulatory body, and its obligations are to the general public, not to the transmission companies or their investors." *Id.*; *see also id*. ("the Commission *regulates* the transmission companies, it does not *advocate* for them or represent their interests."); *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'") (quoting *WildEarth*, 573 F.3d at 996). Similarly, the federal agencies here are not charged with protecting the interests of utilities; instead, their obligations run to the general public. *Cf. Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (there is a strong presumption of adequacy where "the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors") (internal quotation marks and citations omitted). RUS is "assigned responsibility for administering electric and telecommunications loan and loan guarantee programs . . . along with other functions as the Secretary determined appropriate." 7 C.F.R. §

1700.1(b). And, the USFWS is authorized to "permit the use of, or grant easements in, over, across, upon, through or under any areas within the System for purposes such as but not necessarily limited to, powerlines . . . including the construction, operation, and maintenance thereof." 16 U.S.C. § 668dd(d)(1)(b). Neither RUS nor USFWS is charged with ensuring reliability of the grid, or with protecting a private party's financial interests.

The Co-owners do not doubt the ability of counsel for the federal agencies to defend the federal actions. But that representation will not be adequate because the federal agencies have different rights, interests, and obligations than the utility companies—just as in *DALC*, "materially different" interests. *DALC*, 969 F.3d at 748. *See Sierra Club*, 358 F.3d at 518 (allowing private permit-holders to intervene despite participation as defendant by government agency because of potential competing interests and policies); *see also WildEarth*, 573 F.3d at 996 (stating that "the intervenor's showing is easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest").

In addition to the lack of identity between the agencies' and the Co-owners' respective stakes in the Project, the federal agencies may choose different litigation tactics that do not advance the Co-owners' interests. Of critical importance to the Co-owners, the government simply does not have the same incentives in avoiding delay from the ongoing proceedings. *DALC*, 969 F.3d at 744 ("[T]he Commission may be content to move slowly in this litigation; but the transmission companies want to move quickly, begin using eminent domain as soon as possible, and otherwise keep the construction project on schedule."). As demonstrated by the attached declarations, any delay would result in significant costs to the Co-owners. *See, e.g.,* Lee

Decl. ¶ 21 (describing delay costs of failure to meet in-service date, including inflation and costs of steel storage). It would also impair the Co-owners' ability to increase competition, improve reliability, and lower costs for end users. Dagenais Decl. ¶¶ 20–21. The federal agencies may be unwilling to make arguments that the Co-owners would present, such as arguments based on limits to an agency's statutory or regulatory authority. Finally, the federal government might be less likely to appeal an adverse ruling for reasons unrelated to the merits of an appeal. Courts have also recognized that private party intervention may be particularly important where the federal government's resolve to defend its decisions through successive levels of judicial review is questionable. *See U.S. House of Representatives v. Price*, No. 1:14-cv-01967-RMC, 2017 WL 3271445 at *2 (D.C. Cir. Aug. 1, 2017); *see also Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001).

Because no party to the litigation adequately represents the multiple and varied interests of the Co-owners in this action, the Co-owners have made far more than the "minimal showing" necessary to establish their entitlement to intervention as of right.

II. IN THE ALTERNATIVE, THE CO-OWNERS MOVE TO PERMISSIVE INTERVENTION.

Alternatively, a person may seek permissive intervention upon filing a timely motion showing a shared claim or defense with the main action. FED. R. CIV. P. 24(b)(1)(B). In determining whether to grant permissive intervention, the court considers the prejudice to the original parties and the potential for slowing down the case. *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986–87 (7th Cir. 2001).

As set forth above, the Co-owners have satisfied the requirements for intervention as of right. In the alternative, however, the Co-owners move to permissively intervene because they have a defense that shares a common question of law or fact with Plaintiffs' claims and because

the Co-owners' intervention will not unduly delay the case or prejudice the existing parties. *See* FED. R. CIV. P. 24(b); *see also Security Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995); *Emerson Hall Assoc., L.P. v. Travelers Casualty Ins. Co. of America*, No. 15-cv-447, 2016 WL 223794, at *1 (W.D. Wis. Jan. 19, 2016). This is evident based on the Co-owners' proposed answer, which responds to the same claims and allegations that defendants will need to address in their responsive pleading. Further, as discussed in Section I(A), the Co-owners' Motion is timely and this case is in its early stages; as such, the Co-owners' intervention will not unduly delay the case. With respect to prejudice to existing parties, the Co-owners' participation would have no such prejudice because their intervention adds no new claims to the action. *See Emerson Hall*, 2016 WL 223794, at *2 (allowing a third party to intervene where its stated interests were "already at issue in this case").

There are also practical reasons to allow the Co-owners to intervene. As the recipients of the federal permits, the Co-owners are in the best position to explain, among other things, details related to the specifics of the Project, and how the present action could impact the general public and the Co-owners' business and other legally protectable interests. The Co-owners have the best information concerning the details of the Project and the most up to date information concerning construction and jobs associated with the Project. The Co-owners will also likely "bring[] to the court's attention valuable information not available to or provided by [existing] parties." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1497 n.9 (9th Cir. 1995). The Co-owners thus possess unique knowledge that will contribute to the resolution of the issues before the Court.

CONCLUSION

For the reasons stated above, the Co-owners respectfully request that this Court grant its Motion to intervene as of right. In the alternative, and at a minimum, the Co-owners request to be allowed to permissively intervene.

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Respectfully submitted,

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