

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1381 and Consolidated Cases
(15-1396, 15-1397, 15-1399)

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

STATE OF NORTH DAKOTA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**UNOPPOSED MOTION TO INTERVENE
IN SUPPORT OF RESPONDENT
BY GOLDEN SPREAD ELECTRIC COOPERATIVE, INC.**

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, Golden Spread Electric Cooperative, Inc. (“Golden Spread”) respectfully moves to intervene on behalf of Respondent Environmental Protection Agency (“EPA”) in the above-captioned petition for review of EPA’s final rule entitled “Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units; Final Rule,” 80 Fed. Reg. 64510 (Oct. 23, 2015) (“Final Rule”). Pursuant to

D.C. Circuit Rule 15(b), this motion constitutes a request to intervene in all petitions for review of the Final Rule.

Golden Spread has notified counsel for Petitioners and Respondents regarding its intent to file this motion. Respondent EPA has consented to this motion, and the Petitioners in Case No. 15-1399 take no position on the motion. Counsel for other Petitioners have not responded to counsel's consultation at the time of this filing.

INTRODUCTION

The Final Rule regulates the emission of greenhouse gases, specifically carbon dioxide, from new and modified energy generating units ("EGUs") pursuant to the authority granted EPA under Section 111(b) of the Clean Air Act. 42 U.S.C. § 7411(b). Included in the scope of the rule are requirements applicable to natural gas-powered simple cycle combustion turbines ("NGSC"), which are used to back up electric generating capacity that relies on renewable sources of energy such as wind or solar power.

Golden Spread is a non-profit electric generation and transmission cooperative headquartered in Amarillo, Texas. Its purpose is to supply reliable wholesale electric power at the lowest optimal cost to its 16 member non-profit distribution cooperatives (Members) while complying with all applicable regulatory requirements. Golden Spread's Members serve about 223,000 retail

electric meters serving their Member-Consumers located over an expansive area, including the South Plains, Edwards Plateau, and Panhandle regions of Texas (covering 24 percent of the state), portions of Southwestern Kansas and Southeastern Colorado, and the Oklahoma Panhandle. Golden Spread's generation capacity includes NGSCs that are subject to the Final Rule and are used to back up significant wind-powered generation capacity in the regional wholesale power market in which Golden Spread operates. Golden Spread has particular experience with operations within this regional wholesale power market, including how NGSC units are dispatched (i.e., used) in the market to support sources of renewable energy.

Golden Spread has a significant interest in the outcome of this litigation regarding the Final Rule, as it is engaged in a \$750 million capital expansion program to build sufficient generating capacity to meet its Members' load requirements. The construction of new generating capacity is necessary due to the termination of third-party purchase power agreements and load growth of Members' systems. Golden Spread operates within a regional wholesale power market with significant wind and solar resources and potential for significant growth of such resources and has pursued a strategy to combine its "fast-start" and "fast ramping" NGSC units with the abundant wind generation in its region. The Final Rule regulates the operation of NGSCs and thus will have a direct effect on

Golden Spread's resource plan, as well as the reliability and cost of electric service Golden Spread provides to its Members.

Therefore, Golden Spread has a substantial interest in the Final Rule that may be impaired by the outcome of this litigation, and this timely and unopposed motion to intervene in this litigation should be granted.

ARGUMENT

I. Standard For Intervention

FED. R. APP. P. 15(d) requires that a motion for leave to intervene in a proceeding seeking review of an agency order "must contain a concise statement of the interest of the moving party and the grounds for intervention." *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 433 (D.C. Cir. 1991). Intervention in the appellate courts may be informed by the factors considered for intervention as of right in the district courts under FED. R. CIV. P. 24, which include: 1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest. *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

II. Golden Spread Meets The Criteria For Intervention

A. Golden Spread's Motion For Intervention Is Timely

This motion is being filed within 30 days of the date first petition for review of the Final Rule was filed, consistent with FED. R. APP. P. 15(d), and well within the 60-day period for judicial review prescribed by Section 307(b)(1) of the Clean Air Act (42 U.S.C. § 7607(b)(1)). There is no briefing schedule and no substantive motions have been filed in this case, so granting intervention will not delay these proceedings or otherwise prejudice any party. Therefore, Golden Spread's motion for intervention is timely.

B. Golden Spread Has A Substantial Interest In The Outcome Of This Litigation

Golden Spread's NGSC units currently used to support existing wind-powered capacity are regulated under the Final Rule. As renewable energy in the region continues to grow and assumes a larger role in the nation's energy balance, so will reliance on NGSC units. In particular, the need to integrate an increasing volume of renewable sources of energy into the mix of generation resources depends on the responsiveness and availability of "fast start" and "fast ramping" back-up sources of energy, such as NGSC units, to ensure that the twin goals of reliability and environmentally responsible energy generation can be met. The Final Rule includes requirements applicable to the use of NGSCs which will

directly affect the ability to efficiently and reliably integrate energy delivered from renewable sources such as wind or solar.

When a third-party challenges an agency final action or other regulatory direction, the members of the regulated industry that are directly affected by that government action have a significant, protectable interest that supports intervention. *See e.g., Fund for Animals*, 322 F.3d at 735; *NRDC v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) (holding that pesticide manufacturers subject to regulation under challenge had a legally protected interest); *Military Toxins Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (holding that companies that produce military munitions and operate military firing ranges had standing to challenge EPA's Military Munitions Rule); *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41-44 (1st Cir. 1992) (holding that commercial fishermen impacted by regulatory plan to address overfishing had a recognizable interest in the timetable for implementing that plan).

Therefore, since Golden Spread's operations, particularly those associated with generating electricity from renewable resources combined with NGSCs, will be directly affected by the Final Rule, Golden Spread has a protectable interest in this litigation.

C. The Outcome Of This Litigation May Impair Golden Spread's Interests

This litigation could result in revisions to the requirements of the Final Rule relevant to the use of NGSCs used to back up energy generated by renewable resources. This could adversely affect Golden Spread's ability to deliver to its Members reliable, cost effective power based on renewable sources of energy. This would have a knock-on adverse effect on Golden Spread's Members and their customers.

This satisfies the consideration that Golden Spread must have a protected interest that the underlying litigation may impair or impede, since this “inquiry is not a rigid one: consistent with the Rule’s reference to dispositions that may ‘as a practical matter’ impair the putative intervenor’s interest, Fed. R. Civ. P. 24(a)(2), courts look to the ‘practical consequences’ of denying intervention.” *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010) (quoting *Fund for Animals*, 322 F.3d at 735). This Court has held that proposed intervenors need only an interest in the litigation – not a cause of action or permission to sue: “the lack of a cause of action does not, in and of itself, bar a party from intervening.” *Jones v. Prince George’s County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). *See, Fund for Animals*, 322 F.3d 728 (allowing the Department of the Ministry of Nature and Environment of Mongolia (“NRD”) to intervene in a suit challenging a decision by the Fish and Wildlife Service under the Endangered Species Act regarding a

particular breed of sheep that NRD alleged could adversely impact its tourist hunting business and the conservation programs funded by that tourism).

Therefore, Golden Spread has a substantial interest in this litigation that could be adversely affected by the outcome of the litigation.

D. Golden Spread's Interests May Not Be Adequately Represented By Other Parties In This Matter

Golden Spread's interests in this specific issue may not be adequately represented by other parties in this matter. The obligation to show inadequate representation "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). This burden is "not onerous," and the intervenor "need only show that representation of his interest may be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986); *U.S. v. American Tel. & Telegraph Co.*, 642 F.2d 1285, 1293 (D.C. Cir. 1980) (a petitioner "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee").

Golden Spread cannot rely on EPA to fully protect its interests. Courts have frequently found "inadequacy of governmental representation" when the government has no financial stake in the outcome of the suit, whereas a private intervenor does. *See e.g., Dimond*, 792 F.2d at 192; *Fund for Animals*, 322 F.3d at

736; *NRDC v. Costle*, 561 F.2d 904, 912, n.41 (D.C. Cir. 1977); *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) (nothing that a government agency was “required to represent a broader view than the more narrow, parochial interests of” the intervenors); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994).

In this matter, Golden Spread is protecting its interests in very specific portions of the Final Rule related to the regulation of NGSC units with which Golden Spread has extensive experience. Golden Spread is also very familiar with the relevant data in the extensive record supporting this Final Rule. Given the breadth and complexity of this Final Rule, and the broad interests of EPA in defending it, EPA cannot be expected to be as familiar with Golden Spread’s specific issues nor have the same interests as Golden Spread in defending them. Even if Golden Spread’s interests and EPA’s interests were more closely aligned, “that [would] not necessarily mean that adequacy of representation is ensured.” *NRDC v. Costle*, 561 F.2d at 912. Precisely because Golden Spread’s interests are “more narrow and focused than EPA’s,” Golden Spread’s participation is “likely to serve as a vigorous and helpful supplement to EPA’s defense.” *Id.* Further, the other Movant-Intervenors, comprised of States and public interest groups, also do not have the same specific interests as Golden Spread in this litigation and thus may not adequately represent Golden Spread’s interests.

Therefore, Golden Spread's interests in this litigation may not be adequately represented by the other parties in this litigation.

CONCLUSION

For the reasons set forth above, Golden Spread's motion to intervene has been timely filed, it has a protected interest that may be adversely affected by this proceeding, and the current parties in this matter may not adequately represent its interests.¹ Accordingly, Golden Spread respectfully asks this Court to grant this motion to intervene.

Dated: November 18, 2015

Respectfully submitted,

/s/Christopher L. Bell

Christopher L. Bell
Greenberg Traurig LLP
1000 Louisiana Street Suite 1700
Houston, TX 77002
(713) 374-3699
cbell@gtlaw.com
D.C. Bar No. 412857

*Counsel for Golden Spread Electric
Cooperative, Inc.*

¹ Though this Court has stated that Article III standing is not normally a prerequisite for a party to intervene as a defendant, it may occasionally require such a showing. *Crossroads Grassroots*, 788 F.3d 312. This showing may be accomplished by satisfying the four considerations under FED. R. CIV. P. 24(a) for intervention as of right in the district court. *Roeder*, 333 F.3d at 233. Golden Spread has satisfied these four criteria and thus has Article III standing to intervene in this matter.

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Respondent.

**RULE 26.1 DISCLOSURE STATEMENT OF
GOLDEN SPREAD ELECTRIC COOPERATIVE, INC.**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the Golden Spread Electric Cooperative, Inc. (Golden Spread) states:

Golden Spread is a tax-exempt, consumer-owned wholesale generation and transmission electric cooperative that provides wholesale power to its sixteen member cooperatives. Golden Spread supplies its members with power from both gas-fueled turbines and wind facilities, as well as, in part, through wholesale power purchased from coal-based power plants. These sixteen member cooperatives, in turn, supply wholesale power to approximately 282,000 member-

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CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D. C. Circuit Rules 15, 27(a)(4) and 28(a)(1)(A), proposed Intervenor-Respondent submits the following Certificate as to Parties and *Amici Curiae*.

Petitioners:**15-1381** – State of North Dakota**15-1396** – Murray Energy Corporation**15-1397** – Energy & Environment Legal Institute**15-1399** – States of West Virginia, Texas, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska,

Ohio, Oklahoma, Ohio, South Carolina, Utah, Wisconsin, Wyoming, South Dakota, Commonwealth of Kentucky, Arizona Corporation Commission, State of Louisiana Department of Environmental Quality, State of North Carolina Department of Environmental Quality,

Respondents

15-1381 – United States Environmental Protection Agency

15-1396 – United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency

15-1397 – United States Environmental Protection Agency

15-1399 – United States Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency

Movant-Intervenors for Respondent

15-1381 – American Lung Association, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, Ohio Environmental Council, Sierra Club, States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, Commonwealth of Massachusetts, District of Columbia, and City of New York

15-1396 – States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, Commonwealth of Massachusetts, District of Columbia and City of New York

15-1397 – States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, Commonwealth of Massachusetts, District of Columbia and City of New York

/s/Christopher L. Bell
Christopher L. Bell

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that the participants in the case are registered CM/ECF users and will be served via the CM/ECF system.

/s/Christopher L. Bell
Christopher L. Bell