ORAL ARGUMENT NOT YET SCHEDULED

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.	No. 15-1381 (consolidated with 15-1396, 15-1397, 15-1399)

UNOPPOSED MOTION TO INTERVENE IN SUPPORT OF RESPONDENT BY NEXTERA ENERGY, INC.

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and D.C. Circuit Rules 15(b) and 27, NextEra Energy, Inc. ("NextEra") 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" (the "Final Rule"). *See* 80 Fed. Reg. 64510 (Oct. 23, 2015), Docket Nos. EPA-HQ-OAR-2013-0495; EPA-HQ-OAR-2013-0603; FRL-9930-66-OAR. Pursuant to D.C. Circuit Rule 15(b), this motion constitutes a request to intervene in all petitions for review of the Final Rule.

Petitioners in cases 15-1381, 15-1397 and 15-1399 have authorized NextEra to state that they take no position on this motion. Petitioner in case 15-1396 had not responded to undersigned counsel's request for its position as of time of filing. Counsel for Respondent states that Respondent consents to the motion. Counsel for proposed Petitioners-Intervenors Lignite Energy Council and Gulf Coast Lignite Coalition has indicated they take no position on this motion. Counsel for proposed Respondents-Intervenor States and Golden Spread Electric Cooperative, Inc. each do not oppose the motion. Counsel for proposed Respondents-Intervenors public health and environmental organizations consent to this motion.

INTRODUCTION AND BACKGROUND

The Final Rule establishes new source performance standards for greenhouse gas emissions from new, modified, and reconstructed fossil fuel-fired electric utility steam generating units and stationary combustion turbines pursuant to section 111(b) of the Clean Air Act, 42 U.S.C. § 7411(b). Section 111(b) requires EPA to publish a list of categories of stationary sources that, in EPA's judgment, "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). EPA is then required to issue "standards of performance" for "new sources" within those categories. 42 U.S.C. § 7411(b)(1)(B). The standard of performance must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

This case concerns petitions for review of the Final Rule published on October 23, 2015 pursuant to section 111(b), establishing new source performance standards limiting greenhouse gas emissions from new, modified, and reconstructed fossil fuel-fired electric utility steam generating units and stationary combustion turbines. *See* 80 Fed. Reg. at 64510.

NextEra's subsidiaries, NextEra Energy Resources, LLC, and Florida Power and Light Company, develop, construct, and operate a diverse array of power plants to produce electricity for their respective customers. LaBauve Decl. ¶¶ 5-7, Ex. 1. Florida Power and Light Company, the largest investor-owned electric utility in the State of Florida, has been transitioning to the use of more efficient, lower-emitting and zero-emitting technologies over the past 15 years. *Id.* ¶ 7. NextEra Energy Resources, LLC, is the world's largest generator of wind and solar electricity. *Id.*

NextEra has a substantial interest in defending the Final Rule. If upheld, the Final Rule will require, for the first time, fossil fuel-fired electric generating units to meet greenhouse gas emission standards. NextEra supports such standards to the extent they drive increased new renewable generation. NextEra's business includes developing generation of electricity from renewable sources, and, to the extent that the Final Rule drives investment in renewable energy, then NextEra's business will be directly impacted by the increased demand for existing and new renewable generation. LaBauve Decl. ¶¶ 9-10. A decision in favor of petitioners in this case would therefore adversely impact the interests of NextEra. *Id.*

Moreover, implementation of the Final Rule will provide certainty and predictability regarding regulation of carbon dioxide emissions from fossil fuel-fired

power plants for the foreseeable future. NextEra requires such predictability in order to appropriately plan its development, capital, and maintenance costs over the coming years. LaBauve Decl. ¶ 11. In view of these substantial interests, the Court should grant NextEra's motion to intervene in support of Respondent.

ARGUMENT

I. NextEra Is Entitled To Intervention

Federal Rule of Appellate Procedure 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." This Court has held that this rule "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).

This Court has also recognized that policies supporting district court intervention under Federal Rule of Civil Procedure 24, while not binding in matters concerning review of an agency order in the courts of appeals, "may" nonetheless inform the intervention inquiry on appeal. *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985). The requirements for intervention as of right under Rule 24(a)(2) are: (1) the application is timely; (2) the applicant claims an interest relating to the subject of the action; (3) disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) existing parties may not adequately represent the applicant's interest. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

Some cases have suggested that Article III standing need not be established by a party seeking to intervene as a defendant or respondent. *See Roeder*, 333 F.3d at 233. Indeed, "Article III standing is not a threshold determination that courts normally make before allowing a defendant to enter a case." *Crossroads Grassroots Policy Strategies v. Federal Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015). But where a party seeks to intervene as a defendant—or by extension, a respondent—this Court has on occasion "required it to demonstrate Article III standing, reasoning that otherwise 'any organization or individual with only a philosophic identification with a defendant—or a concern with a possible unfavorable precedent—could attempt to intervene and influence the course of litigation.'" *Id.* (quoting *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 195 (D.C. Cir. 2013) (Silberman, *J.*, concurring)).

For the reasons explained below, NextEra's interest in regulatory certainty and in developing renewable energy generation facilities would be significantly affected if there were an adverse decision in this matter. NextEra has standing to intervene as a respondent, and thus satisfies the requirements to intervene in this matter.

A. NextEra's interests will be impaired if petitioners prevail in this litigation.

NextEra's business will likely be directly impacted when the Final Rule is implemented. LaBauve Decl. ¶¶ 10-12. By establishing emission guidelines, NextEra will be able to rely on the certainty and predictability afforded by a clear regulatory structure regarding greenhouse gas emissions from fossil fuel-fired power plants. This certainty will allow NextEra to make more informed decisions to allocate capital and develop priorities for the operation and maintenance of all of its electricity generating

facilities nationwide. If petitioners prevail, NextEra's ability to make such decisions will be impaired.

To the extent the Final Rule drives companies to construct new lower-emitting generation rather than meet the standards for new coal-fired power plants, NextEra—as a developer and operator of renewable generation projects—has an interest in upholding the Final Rule. NextEra's portfolio of assets, which includes low- and zero-emitting electricity generation from natural gas, wind, and solar, could benefit if other companies that develop and operate fossil fuel-fired units are subjected to the Final Rule's emission standards.

An adverse decision by this Court could require EPA to revise the Final Rule, harming the interests of NextEra. LaBauve Decl. ¶ 10. Vacatur or remand of the Final Rule would at the very least delay its implementation, reducing or at least delaying the benefits of the rule to NextEra. *Id.*

B. NextEra's interests are not adequately represented by any of the existing parties or prospective intervenors.

A party seeking intervenor status under Rule 24(a)(2) must show that the prospective intervenor's interests are not adequately represented. "This burden, however, is not onerous." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). A proposed intervenor "need only show that representation of his interest may be inadequate." *Id.* (internal quotation marks omitted).

No existing party to this litigation adequately represents the interests of NextEra. None of the three movant-intervenors seeking to support Respondent—a

group of 17 states, along with the District of Columbia and the City of New York,[1] a group of public health and environmental organizations,[2] and Golden Spread Electric Cooperative, Inc.[3]—can assert the unique interests of NextEra in this litigation. Movant-intervenors states seek to intervene to assert their "compelling interest in defending the Final Rule as a means to achieve their goal of preventing and mitigating climate change harms in their states and municipalities." States Mtn. at 2. These interests are different from and do not entirely overlap with NextEra's interests as described above. Similarly, movant-intervenors nonprofit public health and environmental advocacy organizations seek to protect their members from the impacts of air pollution—interests that do not necessarily overlap with NextEra's interests as an electricity generator and generation developer. Public Health and Environmental Orgs. Mtn. at 3. Golden Spread Electric Cooperative, Inc., a nonprofit electric generation and transmission cooperative headquartered in Amarillo, Texas, seeks to intervene to protect its investment in a "capital extension program to

[1] Unopposed Motion of the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York for Leave to Intervene As Respondents (Nov. 4, 2015); Motion of the State of Minnesota, By and Through the Minnesota Pollution Control Agency, to Join in the Unopposed Motion of the States for Leave to Intervene As Respondents (Nov. 20, 2015).

[2] Unopposed Motion of 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, and Sierra Club for Leave to Intervene in Support of Respondent (Oct. 27, 2015).

[3] Unopposed Motion to Intervene in Support of Respondent by Golden Spread Electric Cooperative, Inc. (Nov. 18, 2015).

build sufficient generating capacity to meet its Members' load requirements." Golden Spread Mtn. at 3. These interests are unique to Golden Spread and do not necessarily overlap with NextEra's interests.

Nor does EPA adequately represent NextEra's interests. Although EPA and NextEra share the objective of upholding the Final Rule, this Court has generally held that EPA is not an appropriate party to advance the "narrow interest" of businesses "at the expense of its representation of the general public interest." *Dimond*, 792 F.2d at 192-93. Indeed, this Court has "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Crossroads Grassroots*, 788 F.3d at 314 (internal quotation marks omitted). EPA has broader interests at stake, such as emphasizing fairness across categories of sources, ensuring significant environmental benefits at a reasonable cost, and other interests that do not necessarily converge with NextEra's interests, as well as pursuing arguments to ensure that courts provide it with as much deference and flexibility in carrying out its statutory duties as possible. Given that the interests of NextEra are both narrower and differently focused than EPA's interests, NextEra's participation in this case would "serve as a vigorous and helpful supplement to EPA's defense." *NRDC v. Costle*, 561 F.2d 904, 912 (D.C Cir. 1977); *see also Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value submissions … to learn about facts and legal perspectives that the litigants have not adequately developed.").

C. NextEra has standing to intervene as a respondent.

Although this Court generally requires a party seeking to intervene as a defendant to demonstrate Article III standing, *Crossroads Grassroots*, 788 F.3d at 316,

the Court has noted that any party that satisfies Federal Rule of Civil Procedure 24(a)—regarding intervention as of right in the district court—will also meet Article III's standing requirement. *Roeder*, 333 F.3d at 233. As noted above, NextEra has satisfied the standing for district court intervention as of right and, thus, has Article III standing to intervene in this matter. *See also Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (harm to economic interests constitutes standing).

D. This motion is timely.

Federal Rule of Appellate Procedure 15(d) requires a motion to intervene in a proceeding to be filed within 30 days after the petition for review is filed. In this case, the petition was filed on November 3, 2015. This motion is thus timely filed within 30 days of that date.

CONCLUSION

For the foregoing reasons, NextEra respectfully requests that this motion be granted and that NextEra be designated as an intervenor-respondent in the above-captioned proceedings and, pursuant to D.C. Circuit Rule 15(b), in any future petitions for review challenging the Final Rule.

Dated: Dec. 3, 2015

Respectfully submitted,

/s/ Richard Ayres
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Counsel for NextEra Energy, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, movant-intervenor NextEra Energy, Inc. states that it has neither a parent corporation, nor is any publicly held corporation the owner of 10% or more of NextEra Energy, Inc. stock. NextEra Energy, Inc. is a publicly-traded company on the New York Stock Exchange under the symbol "NEE."

CERTIFICATE OF PARTIES

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the Petitioners in the above-captioned case are:

- 15-1381: State of North Dakota
- 15-1396: Murray Energy Corp.
- 15-1397: Energy and Environmental Legal Institute
- 15-1399: States of West Virginia, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan

Respondent is the U.S. Environmental Protection Agency. Movant-intervenors in support of petitioners are Lignite Energy Council and Gulf Coast Lignite Coalition. Movant-intervenors in support of respondent are 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, State of California, State of Connecticut,

State of Delaware, State of Hawaii, State of Illinois, State of Iowa, State of Maine, State of Maryland, State of New Hampshire, State of New Mexico, State of New York, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, Commonwealth of Massachusetts, District of Columbia, City of New York, Golden Spread Electric Cooperative, Inc., State of Minnesota, By and Through the Minnesota Pollution Control Agency.

MOTION TO INTERVENE BY NEXTERA ENERGY, INC.

15-1381

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
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State of North Dakota, Petitioner, v. United States Environmental Protection Agency, Respondent.	No. 15-1381 (consolidated with 15-1396, 15-1397, 15-1399)

DECLARATION OF RANDALL R. LABAUVE IN SUPPORT OF MOTION TO INTERVENE BY NEXTERA ENERGY, INC.

I, Randall R. LaBauve, hereby declare under penalty of perjury as follows:

1. I submit this declaration in support of this Motion to Intervene as Respondent by NextEra Energy, Inc. ("NextEra").

2. I am Vice President of Environmental Services for NextEra. I have served in that position since July 10, 2002.

3. As Vice President of Environmental Services, I am responsible for leading the environmental strategy, licensing, compliance and environmental relations efforts for the company, including its two principal subsidiaries, Florida Power & Light Company and NextEra Energy Resources, LLC.

4. NextEra is a leading clean-energy company with consolidated revenues of approximately $17 billion, and possesses approximately 44,900 megawatts of generating capacity, which includes megawatts associated with non-controlling interests related to NexEra Energy Partners, LP (NEP), and approximately 13,800

employees as of year-end 2014. NextEra is headquartered in Juno Beach, Florida.

5. NextEra's principal subsidiaries are Florida Power & Light Company, which serves approximately 4.8 million customer accounts in Florida, and is one of the largest rate-regulated electric utilities in the United States; and NextEra Energy Resources, LLC, which is the world's largest generator of renewable energy, doing business and operating renewable energy generation facilities in over twenty-five states throughout the U.S.

6. By the end of 2016, NextEra's generation portfolio will include over 15,000 MW of wind and solar generation throughout the U.S. and Canada, more than any other company in North America.

7. For more than 15 years, NextEra generating companies—NextEra Energy Resources, the world's largest generator of wind and solar electricity, and Florida Power & Light Company, the largest investor-owned electric utility in the State of Florida—have been transitioning their generation profile to more efficient, lower-emitting and zero-emitting technologies.

8. NextEra supports the overall objectives of achieving meaningful CO_2 emission reductions from the electricity generation sector and encouraging investment in a clean energy future, while maintaining electric system reliability. One of NextEra's priorities is supporting the EPA in implementation of the "Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units" (the "Final Rule"), the subject of this litigation. NextEra filed public comments on the proposed rule.

9. EPA's Final Rule recognizes and increases the current opportunity to reduce carbon emissions by establishing greenhouse gas emission standards from new, modified, and reconstructed fossil fuel-fired electric generating units ("EGUs"). To the extent project developers choose to construct new zero-emittting renewable generation rather than construct new fossil fuel-fired EGUs as a result of the Final Rule's emission standards, the Final Rule will help transition the United States electric grid from a fossil fuel-dominant fuel mix to a balanced energy portfolio that includes a higher penetration of zero-emitting renewable generation and low-emitting natural gas generation. The Final Rule thus presents the opportunity for utilities either to build new fossil fuel-fired generation while meeting the Final Rule's emissions standards or, alternatively, to choose policies that will shift electricity generation towards sources such as wind and solar energy, which generate no carbon emissions, or natural gas, which generates lower carbon dioxide emissions than coal steam generation.

10. The Final Rule will even the playing field for companies, such as NextEra, that have already made substantial reductions in their fleets' greenhouse gas emissions and for other companies that have not made such reductions. If the Final Rule is vacated or remanded, the advantages to NextEra from these outcomes will be delayed or eliminated entirely.

11. The Final Rule will require affected EGUs to meet source category-specific greenhouse gas emission standards, thus providing market participants with certainty regarding regulation of greenhouse gas emissions from power plants. NextEra has made and continues to make substantial investments in developing clean

or renewable energy projects in electricity markets across the United States. In order for NextEra to plan its development, capital, and maintenance spending, to prepare all of its existing facilities, and to develop new facilities in response to markets affected by new greenhouse gas regulations it is of critical importance that EPA provide a clear, dependable regulatory pathway for regulation of greenhouse gases. The value of the investments now being planned would be jeopardized by a decision remanding or vacating the Final Rule challenged here.

12. NextEra is deeply concerned about the impact that a negative ruling on the Final Rule could have on the company. If petitioner were to prevail in this case the benefits to NextEra likely to follow from the Final Rule will be reduced or eliminated.

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

Executed at Juno Beach, Florida on December 3, 2015.

Randall R. LaBauve

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon counsel of record via the Court's ECF system this 3rd day of December, 2015.

/s/ John H. Bernetich
John H. Bernetich
Ayres Law Group LLP