

**ORAL ARGUMENT NOT YET SCHEDULED****UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

State of West Virginia, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Case No. 15-1363 and
	)	consolidated cases
U. S. Environmental Protection	)	
Agency, et al.,	)	
	)	
Respondents.	)	
_____	)	

**MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA'S  
MOTION TO PARTICIPATE AS AMICUS CURIAE**

The Municipal Electric Authority of Georgia (“MEAG”) respectfully moves, pursuant to Fed. R. App. P. 29(b) and D.C. Cir. Rule 29(b), for leave to participate as amicus curiae in support of the Petitioners State of West Virginia, *et al.*, in the above-captioned action for review of the final rule promulgated by the U.S. Environmental Protection Agency (“EPA”) entitled Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the “Rule”).

MEAG is an instrumentality of the State of Georgia, created as a public corporation by the Georgia General Assembly. *See* O.C.G.A. §§ 46-3-110 to -155. The statutory purpose of MEAG is to provide an “adequate, dependable, and

economical” wholesale supply of electricity to certain Georgia communities. *See id.* § 46-3-125. The Rule will challenge MEAG’s ability to perform its statutory function and will unfairly burden communities who are contractually bound to specific power plant units. To comply with the Rule, MEAG will be required to dismantle or curtail the primary power supply of numerous communities and saddle those communities with the cumulative cost of an alternate power supply.

MEAG wishes to participate in this litigation to advocate for its communities and to correct EPA’s incorrect assumptions about the fungibility of the power grid and the useful lives and operation of MEAG’s power plant units affected by the Rule. MEAG respectfully requests this Court grant its motion to participate as *amicus curiae*.

### **I. Legal Standard**

Under the D.C. Circuit Court of Appeals rules, “[a]ny individual or non-governmental entity intending to participate as *amicus curiae* must file either a written representation that all parties consent to such participation, or, in the absence of such consent, a motion for leave to participate as *amicus curiae*.” D.C. Cir. R. 29(b). A motion for leave to participate must state “the movant’s interest, ... the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(b). Although the motion is not due until seven days after the principal brief being supported is filed (Fed. R. App. P. 29(e)),

“the court encourages ... entities ... to file ... as promptly as practicable.” D.C. Cir. R. 29(b).

As a government entity, MEAG is entitled to participate in this litigation without a motion, but MEAG seeks leave in deference to this Court and out of an abundance of caution. *See* D.C. Cir. R. 29(b). MEAG and the communities it serves have a significant interest in this litigation. The unique contractual arrangements that tie each community to one or more specific power plant units create particular burdens not shared by the other participants in this litigation. MEAG’s participation will be relevant and helpful to the Court’s understanding of the flaws in the Rule’s foundation and the Rule’s effect on Georgia communities. MEAG is filing this motion in a timely manner, well before the Court has set a briefing schedule on the merits, and as soon as practicable.

## **II. MEAG has a significant interest in this litigation.**

MEAG was formed by the Georgia legislature in 1975 as a not-for-profit public authority and instrumentality of the state for the sole purpose of providing “adequate, dependable, and economical” wholesale electric power to public power communities in Georgia – i.e. cities, towns and counties in the state that own and operate their own electricity distribution systems. *See* O.C.G.A. § 46-3-125. MEAG provides electricity to forty-nine Georgia public power communities, which represent approximately 700,000 Georgia citizens, making MEAG the third largest electricity supplier in the

state of Georgia. By their local authority and decision making processes, these communities have the ability to provide for their local electric system needs through MEAG by purchasing the output and services from one or more electric generating units, which commits the communities to long-term contracts to pay their respective obligation share of the units' costs. The costs include debt service along with operation and maintenance costs, including the debt service, operation, and maintenance costs MEAG has incurred to retrofit the units to meet EPA's compounding stringent environmental requirements. MEAG's current contracts with its communities extend at least through 2054.

The electricity delivered by MEAG to its communities in 2014 was produced from a diverse set of resources: 48% from nuclear sources, 26% from coal, 15% from natural gas, 7% from hydroelectric power, and 4% purchased. *See* MEAG's 2014 Annual Report, available at <http://www.meagpower.org/file/680c1f1b-fcf9-4d70-8460-0f0975d9be76.aspx>. Between the nuclear and hydroelectric resources, 55% of the electricity delivered by MEAG to the communities was completely emissions free. Only 41% of the electricity was from coal or natural gas sources. These ratios are exceptional in the industry. Nevertheless, the Rule will require MEAG to eliminate or significantly underutilize its coal-fired power plant capacity to meet its future emissions limits.

The entire foundation of the Rule is EPA's perspective that utilities have an unfettered "ability to shift generation among various EGUs." Rule, 80 Fed. Reg. at 64,665. This position is incorrect. Even if MEAG eliminates its coal-fired plant capacity, MEAG's communities will remain contractually obligated for the debt and costs associated with these plants for the next forty years, including significant costs incurred in adding state-of-the-art pollution controls over the past several years. But because some of these plants will be prohibited or severely restricted from producing power, the communities will also be required to pay for the costs of alternate electricity, essentially paying twice for their electricity supply.

And even then, the reliability of the communities' electric service could suffer. For the last forty years, MEAG has endeavored to provide its communities with the most stable and economical balance of various power sources. EPA has not performed an analysis of whether the existing transmission system can accommodate the dramatic changes the Rule will necessitate. EPA simply describes the power grid as 'fungible' which is a gross understatement of the complexity of the grid, grid planning, and continuous grid operations and monitoring to ensure reliable power supply.

MEAG's real-world perspective on this complexity directly contradicts the Rule's foundations and EPA's assertion that the Rule's benefits far outweigh the costs. MEAG wishes to participate in this litigation both as a utility affected by the

Rule's mandates and to advocate for its member communities and their citizens who deserve reliable electricity at an affordable price.

**III. An amicus curiae brief from MEAG will be highly relevant and useful to this Court's consideration of the merits.**

MEAG and its communities are not only interested in and affected by the Rule, but MEAG also has unique insights into the legal and factual issues this Court must consider. As the full or part-owner of several power plant units EPA evaluated in drafting the Rule, MEAG can show how EPA made incorrect assumptions about the plants' useful lives and operation that fundamentally underpin the Rule. Because MEAG interacts directly with its member communities, MEAG can also contribute to the environmental justice issues this Court must evaluate. Specifically, MEAG can show the Court how the Rule will disproportionately impact many economically challenged citizens who can least afford increased costs for and decreased reliability of their electricity service.

For example, EPA's analysis shows that a significant amount of coal-fired capacity in Georgia would be prematurely retiring or significantly reducing electricity output before or shortly after the Rule's requirements take effect. MEAG has recently expended significant costs to upgrade its affected units with state-of-the-art emissions control systems and other improvements in order to maintain their usefulness and compliance with the ever-changing regulatory landscape (*e.g.*, EPA's

Mercury and Air Toxics Standards). But retirement or curtailment of these power plant units will now be necessary to comply with the Rule's requirements, resulting in excessive stranded assets. MEAG's participation in this litigation will aid this Court's understanding of what emissions reductions are actually achievable and why EPA's assumptions about useful and economic lives of generating units are inappropriate.

Additionally, EPA's evaluation of the Rule's impacts on lower income communities was at best cursory and arguably insulting. EPA is required to consider environmental justice in its rulemaking process. *See* Exec. Order No. 12,898 (Feb. 11, 1994). But all EPA promised was “a catalog of current or recent state and local programs that have successfully helped communities adopt [energy efficiency/renewable energy] measures,” and it then pointed to its measures to expand access to solar panel installation. *See* Rule, 80 Fed. Reg. at 64,917. The lower income, higher poverty level communities MEAG serves—who will now have to pay double for their electricity through at least year 2054—are unlikely to benefit from a pamphlet extolling the benefits of solar panels and the low-income assistance programs offered in New York and Maryland. *See id.* MEAG has worked to provide cost-effective electricity to Georgia communities with a range of income levels. The Rule undermines these contracts under the auspices that EPA is better positioned to decide those communities' best interests. But instead the Rule will increase the costs of electricity and require shifting to potentially less reliable and more price-volatile

sources of electricity. MEAG can assist this Court's environmental justice analysis by providing actual data on how the Rule will impact the communities and in particular their citizens who can least afford an increase in energy costs.

#### **IV. Conclusion**

MEAG has a unique perspective in this litigation because of its method of supplying wholesale electricity through contracts that bind individual communities directly to specific power plant capacities and production. This longstanding contractual process pursuant to state law directly conflicts with EPA's position that electricity generating units are completely fungible. MEAG can help this Court understand the true consequences of the Rule and the ways in which EPA's underlying assumptions are false. Moreover, MEAG wishes to advocate for the rights of its member communities to maintain a stable, economical supply of power. MEAG respectfully requests this Court grant its motion to participate as amicus curiae in this matter.



This 11th day of January, 2016.

Respectfully Submitted,

/s/ Jennifer A. Simon

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**CERTIFICATE AS TO PARTIES AND AMICI CURIAE**

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), counsel certifies as follows: Except for the Municipal Electric Authority of Georgia, all parties, intervenors, and amici appearing in this court are, to the best of my knowledge, listed in the Joint Petitioners' Certificate as to Parties and Amici Curiae (Dec. 18, 2015, Doc. #1589420) and in the National League of Cities, et al.'s Certificate (Dec. 22, 2015, Doc. # 1589943).

This 11th day of January, 2016.

/s/ Jennifer A. Simon

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## RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rules 26.1 and 27(a)(4), the Municipal Electric Authority of Georgia (“MEAG”) declares as follows: MEAG is an instrumentality of the State of Georgia, created as a public corporation by the Georgia General Assembly. *See* O.C.G.A. §§ 46-3-110 to -155. The statutory purpose of MEAG is to provide an “adequate, dependable, and economical” wholesale supply of electricity to certain Georgia communities. *See id.* § 46-3-125. MEAG does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

This 11th day of January, 2016.

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**CERTIFICATE OF SERVICE**

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25(c), I hereby certify that, on this 11th day of January 2016, I caused the foregoing document to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

/s/ Jennifer A. Simon

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