IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC, Plaintiffs, v. KEN PAXTON, Attorney General of the State of Texas, DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity, Defendants.	Civil No. 1:19-cv-00626 (LY) Hon. Judge Lee Yeakel **REPLY IN SUPPORT OF LSP TRANSMISSION HOLDINGS II, LLC'S MOTION TO INTERVENE**

The state's opposition to LSP Transmission Holdings II, LLC's ("LSP") motion to intervene provides no good reason for this Court to deny LSP intervention in this case. *See* Fed. R. Civ. P. 24(a)(2), (b)(1). The state does not dispute that LSP's motion is timely, *see* R.33 at 3-4, or that the disposition of this action could impair or impede LSP's ability to protect its interests, *see* R.33 at 7. The state instead argues only that LSP's affiliates and subsidiaries should have individually intervened instead of LSP, and that NextEra will adequately represent LSP's interests. *See* R.40 at 1-2. The state additionally contends that LSP should be excluded from this suit because the state has been unable to reach an agreement with NextEra to allow several anticipated intervenors on its own side of the case. *Id.* None of those arguments calls into question that LSP

has satisfied the standard for intervention as of right—or at a minimum permissive intervention—in this case.

First, the state takes the curious position that all of LSP's affiliates and subsidiaries, instead of LSP itself, should have individually intervened in this lawsuit. It is hard to understand why the state favors *more* intervenors on the side of NextEra rather than *fewer*, but in all events nothing about LSP's affiliates' and subsidiaries' interests in invalidating the amendments to the Utilities Code undermines LSP's own interests in the same. In its proposed complaint in intervention, LSP expressly identified its relationship with various subsidiaries and affiliates that are qualified under FERC Order No. 1000 and that have competed or seek to compete for transmission projects in Texas. R.33 at 25-27 (LSP Complaint); *see also* R.33 at 4-6 (LSP Motion to Intervene). For example, LSP explained that its "subsidiary Western Energy Connection, LLC is qualified in WestConnect" and thus is "eligible to bid on and be assigned FERC Order No. 1000 projects in the WestConnect or WECC portions of Texas," R.33 at 26 (LSP Complaint ¶46), and that its "subsidiary Southwest Transmission, LLC" is "a qualified SPP development company and therefore is eligible to bid on and be assigned FERC Order No. 1000 projects in the SPP portions of Texas." *Id.* (LSP Compl. ¶47). The state disputes none of those claims.

LSP's motion and complaint also make clear that LSP has a direct and substantial interest in invalidating the unconstitutional amendments to the Utilities Code so that its subsidiaries and affiliates may pursue transmission development opportunities in Texas. *See* R.33 at 4-6, 25-27, 30-31, 38-41. LSP intervened in its own right in an effort to streamline the parties moving for intervention in this Court. Indeed, the state does not even suggest that LSP could not bring its own

suit to enjoin the amendments to the Utilities Code.[1] It makes no difference for purposes of intervention analysis that LSP's subsidiaries *too* could properly intervene here. But in all events, to the extent the Court believes that LSP's subsidiaries would be more appropriate intervenors, LSP can certainly amend its intervention papers naming a subsidiary as an intervenor-plaintiff too.

Second, the state's cursory statement that "LSP has nothing to add to this lawsuit" because its "argument[]" and "pleadings" are "substantially identical to NextEra's" misapplies the standard for intervention. R.40 at 1-2. The Rule 24(b) standard for permissive intervention actually *requires* an intervening party to have a claim or defense that shares "a common question of law or fact" with the existing parties to the lawsuit. Fed. R. Civ. P. 24(b)(1)(B); *see also Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006) ("The decision to permit intervention … requires a threshold determination that the [intervenor's] claim or defense and the main action have a question of law or fact in common." (internal quotation marks omitted)). Thus, the fact that the portions of LSP's proposed complaint that set forth the background facts and legal claims largely track those sections of NextEra's complaint, *see* R.40 at1, actually *supports* rather than undermines LSP's efforts to intervene.

Moreover, while LSP's complaint understandably has significant overlap with respect to the factual predicate and legal issues in this case, there is no overlap at all between LSP's and NextEra's *interests*, which is the relevant question for purposes of intervention as of right. As Rule 24(a)(2) provides, the Court must grant intervention if, among other things, the movant "claims an *interest*" relating to the subject matter of the litigation, the disposition of the case "may

[1] The state makes the puzzling contention that LSP's "arguments belong in the Eighth Circuit, not this lawsuit." R.40 at 1. But while Texas's law may suffer from the same constitutional flaws as Minnesota's, an appeal in a lawsuit challenging *Minnesota*'s right-of-first-refusal law is hardly the appropriate place to challenge *Texas*'s distinct barriers to competition *in Texas*.

as a practical matter impair or impede the movant's ability to protect its *interest*," and the existing parties do not "adequately represent that *interest*." Fed. R. Civ. P. 24(a)(2) (emphases added); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) ("The second requirement for intervention as a matter of right under rule 24(a) is that the applicant have an 'interest' in the subject matter of the action."). Indeed, the Fifth Circuit has squarely rejected the state's suggestion that an existing party necessarily adequately represents another party simply because they raise the same substantive legal challenge, recognizing instead that the existing parties' representation may be inadequate even if the intervenor and an existing party "agree[] on the merits of the substantive issues to be litigated." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002).

For all its argument about the overlap between LSP's and NextEra's complaints, the state does not even try to argue that LSP and NextEra somehow have identical business interests. And it is hard to see how they could since LSP and NextEra are *competitors*. Nor does the state acknowledge that NextEra may not be able to adequately represent LSP's interests because, among other reasons, NextEra has actually been awarded a transmission project that was thwarted by the amendments to the Utilities Code, giving LSP and NextEra distinct as-applied arguments. *See* R.33 at 7. All of this is more than sufficient to satisfy the "minimal" showing needed to establish that the existing parties may not adequately represent LSP's interests. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

Ultimately, the real basis for the state's objection appears to be its frustration with NextEra's unwillingness to provide blanket consent to any and all anticipated intervenors on *the state*'s side of the case. *See* R.40 at 1-2. But the fact that the state believes that *other* parties should be permitted to intervene *as well* is hardly a reason to preclude LSP from intervening; if

anything, that just underscores that NextEra may not be able to adequately protect the interests of all entities that share its interest in seeing the challenged provisions invalidated. Indeed, the state's insistence that NextEra alone will suffice to protect all interests on NextEra's side is difficult to square with it seeming concession that the state cannot be expected to do the same when it comes to potential intervenors on *its* side of the case. In all events, whatever agreement the existing parties may or may not be able to reach regarding other parties' intervention, this Court's obligation is simply to determine whether each proposed intevenor that comes before it satisfies the standards for intervention.[2] Because LSP readily satisfies the standards for both mandatory and permissive intervention, its motion should be granted.

[2] Although LSP does not believe oral argument is necessary, it would certainly be willing to present argument on this motion if the Court would find it helpful to its resolution of whether LSP satisfies those standards.

CONCLUSION

For the foregoing reasons, LSP respectfully requests that this Court permit its intervention through the filing of the Complaint for Declaratory and Injunctive Relief attached as Exhibit 1 to its Motion to Intervene.

Dated: July 26, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019, a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

/s/ Kenneth A. Young
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