UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, LLC, 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 Action No. 1:19-cv-00626-LY

ONCOR ELECTRIC DELIVERY COMPANY LLC'S MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24, Oncor Electric Delivery Company LLC ("Oncor") moves to intervene. Whether this motion is opposed is not clear. On July 3, 2019, NextEra (defined below) agreed that Oncor is a proper defendant to this lawsuit, and agreed not to "oppose Oncor's intervention so long as Oncor does not seek to extend or otherwise delay the briefing schedule ordered by the Court."[1] This is the same condition NextEra imposed on its

[1] Ex. 1.

agreement to LSP Transmission Holdings II, LLC's ("LSP") intervention[2]—squarely on NextEra's side of the issues.[3] Oncor agreed to this condition, and said so on July 3. The agreement has now been stymied by two new conditions that would render Oncor a mute observer to these proceedings, yet bind it to the outcome as a party. Today, NextEra wants Oncor to agree not to file its own briefs on contested legal issues or participate in any fashion in the pending injunction proceedings.[4] Oncor cannot agree to these new conditions from NextEra, which is, of course, protected from burden by the Court's inherent power to manage its docket and the presentation of the case.

Regardless of NextEra's shifting target for an agreed intervention, Oncor is entitled to intervene in this case as of right under Rule 24(a)(2) or, in the alternative, permissively under Rule 24(b). Accordingly, Oncor presents this as a contested motion.

INTRODUCTION

In May 2019, the State of Texas enacted Senate Bill 1938 ("S.B. 1938"), codifying longstanding practices governing electricity transmission development in Texas. Consistent with existing protocols, S.B. 1938 provides that new transmission facilities should be built, owned, and operated by the entity that owns the existing endpoint of the to-be-built transmission facility.[5] This process of using endpoint ownership to determine the proper party to build new facilities helps ensure an orderly and timely build-out of critical energy infrastructure, so that customers receive timely, reliable, efficient, and cost-effective service regulated by the State of Texas.

---

[2] *See* Pls.' Notice, ECF No. 41 ("Plaintiffs do not oppose the Motion to Intervene filed by LSP . . . so long as it does not affect, alter or delay the Court's scheduling order entered with respect to Plaintiffs' Motion for a Preliminary Injunction . . . .").

[3] *See* Texas's Opp'n to Intervention by LSP, ECF No. 40.

[4] Ex. 2.

[5] *See* TEX. UTIL. CODE § 37.056(e)–(g).

Oncor is an electric utility regulated by the Public Utility Commission of Texas ("PUCT") and an owner of transmission facilities, including over 16,000 circuit miles of transmission lines and over 1,000 electric stations. Oncor's business is directly regulated by S.B. 1938.

On June 17, 2019, NextEra Energy Capital Holdings, Inc. and its subsidiaries (collectively, "NextEra") initiated this action, alleging that S.B. 1938 violates the dormant Commerce Clause and the Contract Clause of the United States Constitution. Through this litigation, NextEra seeks to alter the Texas regulatory framework governing transmission facilities by eliminating endpoint ownership as the critical factor in awarding new projects. Because NextEra's lawsuit turns on its contention that incumbent utilities, such as Oncor, are the beneficiaries of S.B. 1938, and because Oncor's interest is not adequately represented by the State of Texas, Oncor is entitled to intervene under Rule 24(a)(2). Alternatively, the Court should allow Oncor to intervene under Rule 24(b).

ARGUMENT AND AUTHORITIES

Oncor's intervention is proper under both avenues set forth in Rule 24: intervention as of right, FED. R. CIV. P. 24(a), and permissive intervention, FED. R. CIV. P. 24(b). The Fifth Circuit has instructed courts "to construe Rule 24 liberally and resolve all doubts in favor of the proposed intervenor." *Darwin Select Ins. Co. v. Baker Surveying, Inc.*, No. 1:14-cv-900, 2015 WL 11601138, at *1 (W.D. Tex. Apr. 1, 2015) (Yeakel, J.) (citation omitted). "Federal courts should allow intervention when no one would be hurt and the greater justice could be attained." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)).

A. Oncor is Entitled to Intervene Under Rule 24(a)(2).

Oncor is entitled to intervene to defend its interests from NextEra's sweeping challenge. A four-prong standard governs motions to intervene as of right:

> (1) the application must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Wal-Mart, 834 F.3d at 565 (citations and alterations omitted). The Rule 24(a)(2) inquiry is "'a flexible one,' and 'intervention of right must be measured by a practical rather than technical yardstick.'" *Darwin Select*, 2015 WL 11601138, at *1 (quoting *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005)). Oncor meets each requirement.

Oncor's Motion is Timely. NextEra filed its complaint on June 17, 2019, and served the defendants on June 19, 2019. Given that Oncor files this motion before discovery and dispositive motion practice has begun, Oncor's motion is timely. *See Wal-Mart*, 834 F.3d at 565–66; *see also Edwards v. City of Houston*, 78 F.3d 983, 1000–01 (5th Cir. 1996) (en banc) (motions to intervene filed before entry of judgment generally are timely). And while NextEra will not be prejudiced by Oncor's intervention,[6] Oncor will be severely prejudiced if its motion is denied, as there appears to be "no other possible procedural vehicle" for ensuring that Oncor has an adequate opportunity to press its arguments concerning the constitutionality of S.B. 1938. *League of United Latin Am. Citizens v. City of Boerne*, 659 F.3d 421, 434 (5th Cir. 2011). Given the speed with which Oncor sought to intervene and the current state of the proceedings, as well as the significant prejudice that Oncor would suffer if its motion were denied, Oncor's motion is timely.

[6] Inconveniences commonly associated with litigation are insufficient to show prejudice. *See Ross*, 426 F.3d at 756; *Espy*, 18 F.3d at 1206; *accord John Doe v. Glickman*, 256 F.3d 371, 378 (5th Cir. 2001) ("[C]ourts should ignore the likelihood that intervention may interfere with orderly judicial processes." (citation omitted)). Instead, NextEra must identify "results that would not have obtained but-for [Oncor's] failure to file [its] motion to intervene *earlier*." *Ross*, 426 F.3d at 756 (citation omitted). Because this litigation is in its preliminary stages, Oncor's intervention will cause "no prejudice whatever" to NextEra. *See Edwards*, 78 F.3d at 1002.

Oncor Has an Interest Relating to S.B. 1938. As an entity that is directly subject to S.B. 1938—as well as one of the primary targets of NextEra's challenge—Oncor has a concrete interest in this case. "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]" *Espy*, 18 F.3d at 1207 (citation and internal quotation marks omitted). An intervenor satisfies the interest requirement if it has "a direct, substantial, legally protectable interest in the proceedings"—*i.e.*, "a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015) (citations and internal quotation marks omitted). The question here is whether Oncor has an interest in S.B. 1938. *See Texas*, 805 F.3d at 657; *League of United Latin Am. Citizens*, 659 F.3d at 434. Oncor easily satisfies this standard.

"[I]n cases challenging various statutory schemes as unconstitutional . . . , the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." 7C Charles Alan Wright, et al., *Federal Practice & Procedure* § 1908.1 (3d ed. 2019). More specifically, the Fifth Circuit has held that a movant has a legally protected interest if it is subject to the regulation at issue or if it is a beneficiary of the regulation. *See Wal-Mart*, 834 F.3d at 566–69; *Texas*, 805 F.3d at 660. As an existing owner of "electric utility facilit[ies]," Oncor has a direct interest in which entity has the right "to build, own, or operate a new transmission facility that directly interconnects with [Oncor's] existing electric utility facilit[ies]." *See* TEX. UTIL. CODE § 37.056(e)–(g). Moreover, NextEra's argument turns on its contention that S.B. 1938 exists for the benefit of Oncor and other incumbent utilities.[7] Thus, far from asserting "a mere generalized interest" in S.B. 1938, Oncor has "a concrete, personalized interest that is legally protected." *Texas*, 805 F.3d at 660; *see also Wal-Mart*, 834 F.3d at 566–67.

[7] *See* Compl. ¶¶ 1, 3, 61–77, ECF No. 1.

This Action May Impair Oncor's Interest. Because intervention is designed "to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions," *Brumfield v. Dodd*, 749 F.3d 339, 344–45 (5th Cir. 2014), an intervenor need only show that, without intervention, "its interests may be impaired by an unfavorable disposition of the case," *Darwin Select*, 2015 WL 11601138, at *1 (citation omitted). Where, as here, a beneficiary of the challenged statute seeks to intervene, the third requirement generally collapses into the second requirement. *See Wal-Mart*, 834 F.3d at 566–69; *see also City of Houston v. Am. Traffic Solutions, Inc.*, 668 F.3d 291, 294 (5th Cir. 2012); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

NextEra seeks a declaration that S.B. 1938 is unconstitutional and an injunction prohibiting the State from enforcing S.B. 1938. But NextEra does not mention that existing ERCOT protocols already dictate that the endpoint owner will construct new transmission line projects in Texas, and the State of Texas has for decades maintained this endpoint-driven paradigm. The policy is now law under S.B. 1938. Oncor is a fully regulated monopoly utility, and its legal obligation to provide service is not optional, but rather, mandatory. In fulfilling this obligation, Oncor believes the endpoint-driven paradigm facilitates its ability to serve customers, and therefore satisfies its legal responsibilities—more timely, more reliably, more cheaply, and more efficiently, than other potential paradigms, while also promoting more efficient and safe operation. The state legislature clearly agrees, evidenced by its passing of S.B. 1938. If NextEra's challenge is successful, S.B. 1938 will be invalidated, directly impairing Oncor's interest in best meeting its legal obligations as a regulated utility.

Oncor's Interest Is Not Adequately Represented. Under Rule 24(a)(2)'s fourth prong, the relevant test is whether the State's representation of Oncor's interest *may be* inadequate.

Wal-Mart, 834 F.3d at 569; *Espy*, 18 F.3d at 1207. Intervention turns on "a practical rather than technical yardstick," *Edwards*, 78 F.3d at 999, and whether Oncor's interest is adequately represented must be considered in light of "the totality of the circumstances," *Am. Traffic Solutions*, 668 F.3d at 294. Although Oncor and the State both seek to defend S.B. 1938, the fact that they "share common ground" in the early stages of the litigation does not mean that their interests "necessarily coincide." *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996); *see also Texas*, 805 F.3d at 663. The Fifth Circuit consistently and repeatedly has held that intervention may be warranted even when the government and the intervenor desire the same outcome. *See, e.g.*, *Wal-Mart*, 834 F.3d at 569 & n.9; *Texas*, 805 F.3d at 663; *John Doe*, 256 F.3d at 381; *Glickman*, 82 F.3d at 110; *Espy*, 18 F.3d at 1207–08.

In *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, for example, the Fifth Circuit reversed the district court's denial of a trade group's motion to intervene to defend regulations against a dormant Commerce Clause challenge. 834 F.3d at 564–65. Citing "the broad policy favoring intervention," the Fifth Circuit explained that the group's interest in protecting its members' businesses was "narrower" than the State's "broad public mission." *Id.* at 569; *see also Pub. Serv. Co. of N.H. v. Patch*, 173 F.R.D. 17, 28 (D.N.H. 1997) (allowing utilities to intervene to defend public utilities commission's decision, explaining that the commission's role as regulator and the utilities' status as regulated parties created a relationship that was "sufficiently adverse" for purposes of Rule 24(a)(2)).

In this case, Oncor's interest diverges from the State's "in a manner germane to the case." *Texas*, 805 F.3d at 662. To begin, as the largest electric utility in Texas, Oncor builds, owns, and operates a substantial number of existing facilities; the State does not build, own, or operate such facilities, and instead must defend the broader public interest. Further, the State is not under the

same regulatory duty or obligation to provide electric service to customers as required of Oncor. Oncor's "narrower" interest in meeting its obligations to customers as a regulated utility is not subsumed within the State's "broad public mission." *Wal-Mart*, 834 F.3d at 569 & n.9; *accord Utah Ass'n of Counties*, 255 F.3d at 1255–56 ("[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of the particular member of the public merely because both entities occupy the same posture in the litigation.").

Moreover, as a practical matter, Oncor can provide "expertise to the issues in this dispute." *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 977 (8th Cir. 2014) (citation and internal quotation marks omitted); *see also Utah Ass'n of Counties*, 255 F.3d at 1255 (intervenor may show inadequacy of representation if it has "expertise the government may not have"). This expertise will include, among other things, first-hand knowledge of the practical consequences of fragmented ownership of transmission facilities that could result without implementation of S.B. 1938 and the delay of critical projects that would inevitably occur if S.B. 1938 was enjoined. Of course, Oncor is the actual owner of the facilities and real property rights that constitute the end points defined in S.B. 1938, whereas the State has no ownership interest in any of these end points, and Oncor has no assurance that the State's "current position will remain static or unaffected by unanticipated policy shifts." *Nat'l Parks Conservation Ass'n*, 759 F.3d at 977 (citation and internal quotation marks omitted).

In short, it remains to be seen whether "the state's more extensive interests will *in fact* result in inadequate representation, but surely they might, which is all that the rule requires." *Brumfield*, 749 F.3d at 346.

B. The Court Should Allow Oncor to Intervene Under Rule 24(b).

Alternatively, the Court should permit Oncor to intervene under Rule 24(b). Because Oncor's motion is timely, permissive intervention is appropriate if Oncor's claims and defenses share a common question of law or fact with the main action and intervention will not "unduly delay or prejudice" the parties' rights. *Gilyard v. Texas Laurel Ridge Hosp. LP*, No. 07-cv-650, 2009 WL 10670038, at *3 (W.D. Tex. Feb. 18, 2009) (citation omitted). District courts have broad discretion in allowing permissive intervention, *id.*, which is generally appropriate "where no one would be hurt and the greater justice could be attained," *DeMoss v. Crain*, No. 06-cv-862, 2008 WL 11355428, at *11 (W.D. Tex. Mar. 10, 2008) (quoting *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 422 (5th Cir. 2002)).

Oncor has demonstrated that permissive intervention is warranted. Oncor's claims and defenses share common questions of law and fact with the main action—namely, the constitutionality of S.B. 1938. *See Siesta Vill. Market, LLC v. Perry*, Nos. 3:06-cv-585, 4:06-cv-232, 2006 WL 1880524, at *1 (N.D. Tex. July 7, 2006) (companies seeking to defend regulatory scheme against constitutional challenges raised "common questions of law or fact"). Oncor's expertise will also "contribute significantly" to the development of the factual and legal issues. *Cf. Am. Stewards of Liberty v. Dep't of the Interior*, No. 1:15-cv-1174, 2016 WL 11272149, at *3 (W.D. Tex. Apr. 26, 2016) (Yeakel, J.). And because this case is in its "preliminary stages . . .[,] any delay will not be great and is outweighed by the fact that it is in the interest of the parties to grant the intervention." *Alamo Brewing Co. v. Old 300 Brewing, LLC*, No. 14-cv-285, 2014 WL 12876370, at *5 (W.D. Tex. May 21, 2014). Permissive intervention is appropriate.

C. Oncor's Motion Satisfies Rule 24(c)'s Requirements.

If Oncor's motion to intervene is granted, Oncor intends to move to dismiss NextEra's complaint for failure to state a claim. *See* FED. R. CIV. P. 12(b)(6). Consistent with the "lenient" approach the Fifth Circuit takes to intervention, *see Int'l Marine Towing, Inc. v. S. Leasing Partners, Ltd.*, 722 F.2d 126, 128–29 (5th Cir. 1983), Oncor's motion is accompanied by a conditional proposed answer. Ex. 3. Once the Court grants Oncor's intervention, Oncor will file its motion to dismiss on or before August 23, 2019. *See* Order, ECF No. 31.

CONCLUSION

In the best interest of the State and its consumers of electricity, the State of Texas has, for years, selected new transmission ownership using existing endpoint ownership as the critical factor. That policy, now law under S.B. 1938, enhances Oncor's, and every other owner of transmission infrastructure in Texas including NextEra's, ability to meet customer requirements timely, simplifies the development process, allows for avoided costs from duplicated transmission facilities, and provides an orderly and common sense build-out of the grid, thus supporting operational control, safety, reliability, and continued regulated by the State of Texas. NextEra wants to disregard the policy and invoke federal, not state, regulation. Oncor has a deep interest in each of these points. Accordingly, Oncor respectfully requests that the Court grant its motion to intervene.

Dated: August 7, 2019

Respectfully submitted,

By: */s/ John C. Wander*

John C. Wander
State Bar No. 00791877
Thomas S. Leatherbury
State Bar No. 12095275
Winston P. Skinner
State Bar No. 24079348
Kevin W. Brooks
State Bar No. 24087214
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, TX 75201-2975
Tel: (214) 220-7700
Fax: (214) 220-7716
jwander@velaw.com
tleatherbury@velaw.com
wskinner@velaw.com
kbrooks@velaw.com

Counsel for Oncor Electric Delivery Company LLC

CERTIFICATE OF CONFERENCE

On July 3, 2019, counsel for NextEra agreed that it does not oppose this motion, on the condition that Oncor would not seek to move the preliminary injunction hearing set for September 10, 2019. On July 26, 2019, NextEra added new conditions to this agreement, requiring that any briefs by defendant-intervenor utilities be filed as joint submissions and that Oncor not participate in any fashion in the preliminary injunctions hearing. Oncor does not agree to these new conditions and, therefore, submits this motion as opposed by NextEra. The State of Texas defendants do not oppose Oncor's motion.

So certified on this 7th day of August, 2019.

/s/ John C. Wander
John C. Wander
Counsel for Oncor Electric Delivery Company LLC

CERTIFICATE OF SERVICE

On August 7, 2019, I filed the foregoing document with the Clerk of Court for the U.S. District Court for the Western District of Texas by using the Court's CM/ECF system, which will send notification of such filing to all counsel and parties of record.

So certified on this 7th day of August, 2019.

/s/ Kevin W. Brooks
Kevin W. Brooks
Counsel for Oncor Electric Delivery Company LLC

US 6504989