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 REPLY IN SUPPORT OF MOTION TO INTERVENE

Oncor is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). *See* Oncor's Mot. 3–8, ECF No. 49. Plaintiffs NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest, LLC (collectively "NextEra") do not challenge Oncor's right to intervene; instead, NextEra asks the Court to impose two unreasonable and unnecessary conditions on Oncor's intervention.[1] *See* NextEra's Opp'n 3–5,

[1] Apparently, however, NextEra's concern that intervention by utilities may "delay[] this litigation" and impede the "efficient resolution of NextEra's claims" (NextEra's Opp'n 1–2) does

ECF No. 70. The Court should reject NextEra's proposed conditions, which are designed to limit Oncor's ability to protect its interests. The Court should grant Oncor's motion and allow it to participate fully.

ARGUMENT

Although "[a]n intervenor is generally treated as an original party to an action," *Beauregard, Inc. v. Sword Servs., L.L.C.*, 107 F.3d 351, 354 n.9 (5th Cir. 1997), a court may impose "reasonable conditions" on an intervenor of right, *id.* at 352–53. Importantly, this power is limited to "reasonable conditions . . . of a housekeeping nature."[2] Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1922 (3rd ed. 2019); *see also United States v. Texas*, No. 6:17-cv-5281, 2006 WL 8441615, at *2 (E.D. Tex. May 30, 2006) ("It is well-settled that an intervenor of right . . . has all of the privileges of an original party, subject only to such reasonable restrictions as needed to ensure the 'efficient conduct of the proceedings[.]'" (quoting Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1922)). Courts within the Fifth Circuit generally have used the power to impose reasonable conditions on intervenors of right to limit an intervenor's ability to raise new issues that would add unnecessary complexity to the case. *See Walker v. Williamson*, No. 1:14-cv-381, 2015 WL 10963982, at *1 (S.D. Miss. 2015) ("One of the most usual procedural rules is that an intervenor is admitted to the proceedings as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the

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not extend to proposed intervenor-plaintiff LSP Transmission Holdings II, LLC, NextEra's Notice 1, ECF No. 41—a putative party wholly aligned with NextEra that does not offer any unique insights that will assist the Court in adjudicating this matter. Texas's Opp'n, ECF Nos, 40, 40-1.

[2] Consistent with this widely accepted view, the cases cited by NextEra show that courts may impose discovery-related conditions on intervenors of right. *See United States v. Albert Inv. Co.*, 585 F.3d 1386, 1396 (10th Cir. 2009); *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 710 n.9 (11th Cir. 1991); *Bibles v. City of Irving*, 3:08-cv-1795, 2009 WL 2252510, at *5 (N.D. Tex. 2009); *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001).

proceeding." (citing *Vinson v. Washington Gas. Light Co.*, 321 U.S. 489, 498 (1944))); *see also, e.g., John's Lone Star Distribution, Inc. v. Juice Bar Concepts, Inc.*, No. 3:03-cv-2670, 2004 WL 632840, at *2 (N.D. Tex. 2004) (restricting intervenor to issues raised by the original parties). Indeed, in *Beauregard*, the Fifth Circuit allowed the intervenor's "full participation in the case," which meant requiring the intervenor to abide by the same rules as the original parties. *See* 107 F.3d at 354 n.9.

Here, Oncor seeks to participate in "the proceeding as it stands," *Walker*, 2015 WL 10963982, at *1, and agrees to "abide[] by the same rules as every other party to the action," *Beauregard*, 107 F.3d at 354 n.9. Oncor already has committed to comply with the Court's briefing schedule. Oncor's Mot. 1–2. Further, to promote efficiency and to avoid duplicative briefing, Oncor intends to confer with the other utility-intervenors regarding common arguments for briefing and court proceedings.

NextEra, however, asks the Court to impose unreasonable and unnecessary conditions on Oncor's intervention that will jeopardize Oncor's ability to defend its unique interests in this litigation as the only intervenor utility operating solely within the limits of the Electric Reliability Council of Texas ("ERCOT"), the "wholly intrastate power grid" that serves a majority of the State of Texas and is not subject to the Federal Energy Regulatory Commission's plenary jurisdiction. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 312 (Tex. 2001); *see also* Compl. ¶¶ 18–19, ECF No. 1. More specifically, NextEra asks the Court to exclude Oncor from participating in the preliminary injunction hearing and to force Oncor to submit only joint briefing with other utility-intervenors. NextEra's Opp'n 2–5. Neither of these conditions is necessary or appropriate.

Oncor has a direct, concrete, and significant interest in this litigation—an interest NextEra does not dispute. Aside from plaintiff Lone Star Transmission, LLC ("Lone Star"), Oncor is the only proposed intervenor-defendant that operates within ERCOT. Accordingly, Oncor is in a unique position to inform the Court about ERCOT's decades' long policy of designating new transmission development rights based on existing endpoint ownership.[3] This longstanding practice is exactly what S.B. 1938 codifies as law and now applies uniformly across the State.

In light of that interest, it is not reasonable to place a blanket prohibition on Oncor's right to participate in the preliminary injunction proceedings,[4] nor is it reasonable to require Oncor to submit only joint briefing with the other utility-intervenors. The Court has the tools necessary to ensure an efficient resolution of this case in a manner that protects the rights of *all* parties, including the utility-intervenors; imposing undue burdens on Oncor's opportunity to be heard on critical issues that go to the core of this litigation is not the way to do it. *See Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) ("While the efficient administration of justice is always an important consideration, fundamental fairness to every litigant is an even greater concern."); *see also Texas*, 2006 WL 8441615, at *2 (courts may not "restrict the legal arguments" an intervenor may advance).

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[3] NextEra acknowledges that, even after FERC Order 1000, *see Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, 136 FERC ¶ 61051 (2011), ERCOT continues its longstanding practice of using endpoint ownership to guide new transmission projects. Compl. ¶ 31.

[4] Citing *Bibles v. City of Irving*, NextEra claims that "it is reasonable to prevent intervenors from participating in the preliminary injunction hearing." NextEra's Opp'n 3. *Bibles*, however, provides no support for NextEra's position. As an initial matter, *Bibles* did not involve a preliminary injunction. Further, the intervenors in *Bibles* had no interest in the merits of the litigation; their sole interest was their lien interest in any potential judgment in favor of the plaintiffs. *See* 2009 WL 225210, at *1, *5. Given their limited and tangential interest in the litigation, it was reasonable for the court to limit their participation. Here, by contrast, Oncor has a direct and significant interest in the merits, and forcing Oncor to sit on the sidelines at the preliminary injunction hearing is not a reasonable condition.

By claiming that the utility-intervenors have "substantially overlapping interests" solely because they are incumbent utilities (NextEra's Opp'n 4), NextEra (which is also an incumbent, *see* Compl. ¶¶ 9, 22, 89, ECF No. 1) oversimplifies the complex regulatory regime governing Texas transmission facilities and ignores the crucial distinctions between the utility-intervenors. The utility-intervenors are divided into three distinct groups by the independent system operator ("ISO") overseeing the operations of each: (1) Oncor operates in the ERCOT region; (2) Entergy Texas, Inc. ("Entergy") operates in the Midwest Independent System Operator ("MISO") region; and (3) Southwestern Public Service Company ("SPS") operates in the Southwest Power Pool ("SPP") region.[5] ERCOT, MISO, and SPP are different independent system operators that each cover distinct geographic footprints, with different entities operating within each distinct regulatory environment.

NextEra admits these distinctions have significance, as it structured its subsidiaries to operate within each separate ISO region: Lone Star operates in ERCOT (like Oncor); NextEra Energy Transmission Midwest, LLC engages in business in MISO (like Entergy); and NextEra Energy Transmission Southwest, LLC engages in business in SPP (like SPS). Compl. ¶¶ 8–10. The proposed intervenors-defendants simply mirror the operating subsidiaries of the NextEra plaintiffs that initiated this action and claim distinct legal interests from each other. Given the different electric grids in which the utility-intervenors operate, the transmission projects planned and pursued by each entity are completely separate and distinct, and the impact of any injunction will affect each utility-intervenor and the relevant ISO differently. Oncor, Entergy, and SPS are uniquely positioned to provide the factual and legal background applicable to each separate ISO, as well as how S.B. 1938 will affect operations in each ISO. Moreover, Entergy and SPS are

[5] SPS's Mot. 3; Entergy's Mot. 3, ECF No. 50; *see also* Compl. ¶¶ 18–19.

vertically integrated utilities that generate, transmit, distribute, and sell electric power. Oncor, on the other hand, is a transmission and distribution company only, with no power generation or retail sales operations. This difference is important here because it impacts the bundled rate exemption, which affects the retail rate jurisdiction of the Public Utility Commission of Texas and, consequently, the scope of S.B. 1938. *See New York v. FERC*, 535 U.S. 1, 12 (2002); *see also* TEX. UTIL. CODE § 37.154(a) (allowing incumbents to "sell, assign, or lease a certificate or a right obtained under a certificate" through a transaction approved by the PUCT, even if the incumbent seeks to transfer the CCN "to an entity that has not been previously certificated," so long as the transaction does "not diminish the retail rate jurisdiction of this state"). Thus, "[i]n the spirit of allowing the [utility-intervenors] to adequately represent their interest[s] in this case," which are distinct from the State's and each other's, the Court should not require them to submit joint briefing. *See Am. Great Lakes Ports Ass'n v. Zukunft*, No. 16-1019, 2016 WL 8608457, at *6 (D.D.C. Aug. 26, 2016); *see also Dacotah Chapter of Sierra Club v. Salazar*, No. 1:12-cv-65, 2012 WL 3686742, at *3 (D.N.D. Aug. 27, 2012) (declining to require intervenor with "unique interests" to file joint briefs).

CONCLUSION

For the foregoing reasons, Oncor requests that the Court grant its motion to intervene without conditions and treat it as "an original party to [the] action." *Beauregard*, 107 F.3d at 354 n.9.

Dated: August 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 20, 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 and mailed the foregoing document to the following non-CM/ECF participants via U.S. Mail:

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So certified on this 20th day of August, 2019.

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