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 No. 1:19-cv-00626

PLAINTIFFS' OMNIBUS OPPOSITION TO ENTERGY TEXAS, INC.'S, ONCOR ELECTRIC DELIVERY COMPANY LLC'S, AND SOUTHWESTERN PUBLIC SERVICE COMPANY'S MOTIONS TO INTERVENE

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COMES NOW 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") and files this, its Omnibus Opposition to the Motions to Intervene of Entergy Texas, Inc. [ECF 50]; Oncor Electric Delivery Company, LLC [EFC 49]; and Southwest Public Service Company [ECF 54] and, in support thereof, would show as follows:

INTRODUCTION AND SUMMARY

Plaintiff NextEra Energy Transmission Midwest, LLC was selected in a competitive bidding process by the Midcontinent Independent System Operator ("MISO")—the independent transmission planning organization tasked with monitoring and managing the electric transmission grid running from Canada to Texas—to build a multi-million dollar transmission line in East Texas. Texas, and its incumbent utilities, have sought to frustrate that bidding process—and the rights of all non-Texas companies, such as the NextEra plaintiffs—by passing Senate Bill 1938 ("S.B. 1938"), which prohibits out-of-state transmission companies from building, owning, or operating transmission lines in the State. In this action, NextEra seeks to enjoin the enforcement of S.B. 1938 because, in light of its purely protectionist text, effects, and purpose, it violates the Dormant Commerce and Contracts Clauses of the Constitution.

A preliminary injunction is required to protect NextEra because MISO or the Public Utility Commission of Texas could—relying on S.B. 1938—deprive NextEra of its right to build, own, and operate transmission projects on the basis of the new Texas law, which changes the status quo.

Intervention by other utilities, if allowed, should be subject to conditions that prevent delaying this litigation (including NextEra's request for a preliminary injunction) and ensure

efficient resolution of NextEra's claims.[1] Accordingly, NextEra requests that as a condition of allowing intervention, the Court require that: (1) intervenors comply with the briefing schedule set for NextEra's motion for a preliminary injunction and not seek to delay or extend it; (2) intervenors not be allowed to participate in the preliminary injunction hearing beyond filing briefing; and (3) intervenors must submit joint briefs on all issues where their interests align. These conditions will allow proposed intervenors to fully protect their interests in this suit while at the same time ensuring that NextEra receives prompt review of its request for a preliminary injunction without the case becoming "fruitlessly complex or unending." *See Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969).

ARGUMENT

"[I]t is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right." *Beauregard, Inc. v. Sword Services L.L.C.*, 107 F.3d 351, 352–53 (5th Cir. 1997); *accord McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1073 n.7 (5th Cir. 1970); *Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 963 n.1 (6th Cir. 2009); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 738 n.11 (D.C. Cir. 2003). Setting conditions on intervention "is necessarily context-specific, and the conditions should be tailored to fit the needs of the particular litigation, the parties, and the district court." *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 283 (D.D.C. 2018). In the end, a district court may condition intervention "on such terms as will be consistent with the fair, prompt conduct of th[e] litigation." *United States v. S. Florida Water Mgmt. Dist.*, 922 F.2d 704, 710 (11th Cir. 1991). Here, each of NextEra's proposed

[1] Oncor claims that NextEra initially consented to its intervention, but later added additional conditions to that request. But as NextEra explained to Oncor, the concern that a substantial number of intervenors could delay and complicate the proceedings arose after Oncor's initial request to intervene and fully justifies additional reasonable conditions.

conditions does just that—each is tailored to promote prompt, efficient, and fair resolution of the claims in this litigation and for those reasons each condition has received substantial favorable treatment from courts around the country.

First, it is reasonable to require all intervenors to follow the deadlines and briefing schedule established by the Court. *See Corrigan v. Bernhardt*, 1:18-CV-512-BLW, 2019 WL 2717970, at *2 (D. Idaho June 27, 2019) (allowing intervention on the condition that the intervenor "comply with the same deadlines").

Second, it is reasonable to prevent intervenors from participating in the preliminary injunction hearing. *See Bibles v. City of Irving*, CIV.A.308-CV-1795-M, 2009 WL 2252510, at *5 (N.D. Tex. July 28, 2009) (intervenors can be limited to a "single issue"). Indeed, the Court has already said as much, explaining that:

> [T]he intervenors may not get to participate in the preliminary injunction hearing. The preliminary injunction hearing is between the parties that are before me. The plaintiffs that claim they are aggrieved and the State of Texas, the Attorney General that represents the entities affected by the new statute, are the ones I am most interested in for purposes of preliminary relief. And when we get past that one way or the other, then I'm going to worry about what I'm going to do with intervenors. So don't believe that I'm going to allow testimony or participation by intervenors at this stage. And whatever they do or whatever interventions they make, they can go ahead and make, but I'm dealing with you-all at this point.

(Tr. of July 9, 2019 Status Conference at 16:17-17:5.)

That approach makes good sense. For one, as the Court has emphasized, "[t]ime is at a premium" in presenting at the preliminary injunction hearing. (*Id.* at 11:15-16.) *See United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001) (noting that courts can impose "reasonable limitations on . . . participation to ensure the efficient adjudication of the litigation"). No intervenor has justified the Court changing what it said about the participation of intervenors

in a preliminary injunction proceeding.[2] Intervenors' silence on this point is sensible because all the preliminary injunction seeks is to preserve the status quo during the pendency of the dispute.[3] To the extent intervenors have any interests in the preliminary injunction hearing, they can fully protect those interests with written submissions, especially because the State will no doubt adequately represent intervenors' interests at the preliminary injunction hearing. *See United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002) (no error in denying evidentiary hearing when party still had "meaningful and sufficient opportunity" to present); *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1396 (10th Cir. 2009) (courts can lessen delays caused by intervenors by denying evidentiary hearings).

Third, it is reasonable to ask intervenors to submit joint briefs when their interests are aligned. When, as here, there are many similarly-situated intervenors, "excessive briefing" is a cogent risk to efficient case management. *Earthworks v. U.S. Dept. of Interior*, CIV.A. 09-01972 HHK, 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010). More specifically, "redundant briefing on

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[2] SPS asserts an interest in the preliminary injunction hearing but SPS does not allege that is has any current projects that are impacted by enforcement of S.B. 1938.

[3] Entergy Texas, Inc. ("Entergy") is mistaken when it claims that NextEra seeks to disrupt Texas' historical scheme for regulating utilities. Entergy argues that before S. B. 1938, Texas utilities outside of ERCOT had an absolute right to build new transmission facilities in their service areas. (Entergy's Mot. to Intervene at 4-5.) Although Entergy has articulated that view for some time, it has been rejected each time it was presented, including by:

- Courts; *see Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, No. D-1-GN-18-000208 (459th Dist. Ct., Travis County, Tex. Sept. 27, 2018) (dismissed as moot on other grounds); *Public Utility Commission of Texas v. Cities of Harlingen*, 311 S.W.3d 610 (Tex. App.—Austin 2010, no pet.);
- The Public Utility Commission of Texas; *see Tex. Pub. Util. Comm'n, Joint Petition of Southwestern Public Service Company and Southwest Power Pool, Inc. for Declaratory Order*, Docket No. 46901 (Oct. 26, 2017);
- The Attorney General's Office; *see* Br. of the Public Utility Commission of Texas, *Entergy Texas, Inc. v. Public Utility Commission of Texas*, No. 03-18-0666-CV (Mar. 28, 2019); and
- The Midcontinent Independent System Operator, Inc., which would not have held a competitive bid for the Hartburg-Sabine line if Entergy had the absolute rights it claims.

substantially overlapping issues" can cause "undue delay and confusion." *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 10 (D.D.C. 2018). In these circumstances "courts have used their discretion to impose conditions that help to promote the fair and expeditious resolution of the action[,]" *id.*, often by requiring aligned intervening parties to file joint briefs. *See, e.g.*, *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1113 (N.D. Cal. 2017); *Planned Parenthood Minn., N. Dakota, S. Dakota v. Daugaard*, 836 F. Supp. 2d 933, 943 (D.S.D. 2011); *Earthworks v. U.S. Dept. of Interior*, CIV.A. 09-01972 (HHK), 2010 WL 3063139, at *2 (D.D.C. Aug. 3, 2010); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, CV-07-8164PCT-DGC, 2008 WL 2275562, at *2 (D. Ariz. June 3, 2008).

The proposed intervenors are all incumbent Texas utilities with similar, if not identical, interests in preserving their share of the protectionist pie. True, each intervenor claims a unique interest in defending their specific piece of the grand-protectionist bargain S.B. 1938 strikes, but that does not justify separate briefing.[4] Because each intervenor has substantially overlapping interests, it is reasonable to require the proposed intervenors to submit joint briefs.

CONCLUSION

For the foregoing reasons, NextEra requests that as a condition of intervention, the Court require Entergy, Oncor, and SPS to: (1) comply with the briefing schedule on NextEra's motion for a preliminary injunction; (2) not participate in the preliminary injunction hearing; and (3) submit joint briefs on all issues where their interests align.

[4] SPS claims that its interests differ from other intervenors because it has a different service area. But SPS' service area affects where it operates, not the interests or arguments that will be presented in this suit. Moreover, to the extent SPS's claimed need to explain the transmission planning rules in the Southwest region become relevant, there is no reason that cannot be included in a joint brief.

Dated: August 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being served on all counsel of record via the Court's ECF filing system on this 13th day of August, 2019.

s/Jeffrey M. Tillotson
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