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, 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) Hon. Judge Lee Yeakel

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INTERVENOR-PLAINTIFF EAST TEXAS ELECTRIC COOPERATIVE, INC.'S PARTIALLY OPPOSED MOTION TO INTERVENE

COMES NOW, Intervenor-Plaintiff East Texas Electric Cooperative, Inc. ("ETEC") and hereby submits its Motion to Intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure respectfully requesting that this Honorable Court permit ETEC to intervene as a plaintiff in this action. In support, ETEC respectfully shows the Court as follows:

INTRODUCTION

This Court should grant intervention to ETEC as of right because ETEC's Motion is timely, and ETEC has a direct, substantial, and legally-protected interest in the outcome of this litigation,

which seeks to nullify Texas Senate Bill 1938, codified as amendments to Texas Utilities Code §§ 37.051, 37.056, 37.067, 37.151, and 37.154 (the "Amended Utilities Code"). The Amended Utilities Code implicates ETEC's cognizable interests as a transmission-owning utility and transmission-service customer within Texas, both by inhibiting its ability to build new transmission lines within the State and by foreseeably inflating the costs it will have to pay for transmission services from the incumbent Texas utilities that the Amended Utilities Code illicitly privileges. Moreover, due to the precedential effect that this Court's potential judgment affirming the Amended Utilities Code's constitutionality would have, ETEC's interests in this action could be irrevocably impaired if it is not permitted to intervene. Finally, given ETEC's identity as a non-profit electric cooperative owning generation and serving electric load to consumers, no party to this litigation can adequately represent ETEC's unique interests here. This Court should therefore grant ETEC's intervention as of right. *See* Fed. R. Civ. P. 24(a)(2). Alternatively, the Court should allow ETEC to permissively intervene because its claims against Defendants share common questions of law and fact with this action and will not prejudice or delay the litigation proceedings. *See* Fed. R. Civ. P. 24(b)(1), (2).

Before filing this Motion, counsel for ETEC conferred in good faith with counsel for all parties in accordance with Local Rule CV-7(i). Defendants indicated they do not oppose ETEC's intervention. Plaintiffs reiterated their position that intervenors be subject to the three conditions listed in their omnibus opposition to certain intervenors [ECF 70]. ETEC agrees to comply with the briefing schedule set for NextEra's motion for a preliminary injunction, but ETEC cannot, at this time, agree to the remaining two conditions. For the reasons discussed herein, ETEC respectfully requests that the Court grant its Motion to Intervene and permit ETEC to intervene by filing the proposed Complaint in Intervention attached hereto as Exhibit A.

STANDARD OF REVIEW

A party may intervene in a pending federal civil action either as of right or by permission. Federal Rule of Civil Procedure 24(a) governs intervention as of right. In the Fifth Circuit, to obtain intervention under this provision, an intervenor must satisfy a four-prong test: (i) the application must be timely; (ii) the applicant must have an interest relating to the property or transaction which is the subject of the action; (iii) 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; and (iv) the applicant's interest must be inadequately represented by the existing parties to the suit. *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (citation omitted).

Rule 24(b) governs permissive intervention. In the Fifth Circuit, a party may be allowed to permissively intervene if: (i) the application is timely; (ii) the party has a claim or defense that shares with the main action a common question of law or fact; and (iii) the Court determines that allowing the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." *Harbour v. Sirico*, No. 18-1055-JWD-EWD, 2019 U.S. Dist. LEXIS 92060, at *14 (M.D. La. June 3, 2019) (citations omitted).

ARGUMENT AND AUTHORITIES

I. The Court Should Grant ETEC's Timely Motion to Intervene as of Right Because the Action Directly Implicates ETEC's Substantial Interests, the Court's Judgment May Be Precedential, and No Other Party Represents ETEC's Unique Interests.

ETEC satisfies the requirements for intervention as of right in this case.

Timeliness. First, ETEC's Motion is timely. The timeliness of a motion to intervene is a matter committed to the sound discretion of the trial court. *McDonald v. E.J. Lavino*, 430 F.2d 1065, 1071 (5th Cir. 1970) (citations omitted). "The analysis is contextual; absolute measures of timeliness should be ignored." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (citation

omitted). Indeed, timeliness "is not limited to chronological considerations but 'is to be determined from all the circumstances.'" *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-64 (5th Cir. 1977) (citation omitted). The Fifth Circuit has set forth four factors to consider when evaluating whether a motion to intervene is timely: (i) the length of time during which the proposed intervenor should have known of his interest in the case before he petitioned to intervene; (ii) the extent of prejudice that those parties already in the litigation would suffer "as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case"; (iii) the extent of prejudice to the proposed intervenor if he is not allowed to intervene; and (iv) the existence of "unusual circumstances militating either for or against a determination that the application is timely." *Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (quoting *Stallworth*, 558 F.2d at 264-266).

Under this standard, ETEC's Motion to Intervene is indisputably timely. ETEC first became aware of its interest in this case when the Plaintiffs filed their Complaint on June 17, 2019, only about eight weeks prior to this filing. LS Power Transmission Holdings II LLC ("LS Power"), filed its Motion to Intervene on July 12, only five weeks prior to this filing, and the various other parties who have moved to intervene – Oncor Electric Service Company, LLC ("Oncor"); Southwestern Public Service Company ("SWEPCO"); Entergy Services, LLC/Entergy Texas, Inc. ("Entergy"); and Texas Industrial Energy Consumers ("TIEC") – have only done so in the last two weeks. This window is more than adequately brief for the Court to consider ETEC's Motion as timely. *See Harbour*, 2019 U.S. Dist. LEXIS 92060, at *13 (holding that intervenor's intervention motion was timely where intervenor had filed motion four months after suit was filed and no scheduling conference had been set). Moreover, given this brief window, the existing litigants would not suffer any prejudice from ETEC's timely intervention. ETEC has moved to intervene

prior to the Defendants filing an Answer, the commencement of discovery, or any party filing dispositive briefing. Although the Plaintiffs have moved for a preliminary injunction – which ETEC intends to support, if allowed to intervene – ETEC has filed its Motion to Intervene before the Court has conducted a hearing on the preliminary injunction motion, much less disposed of it.

Conversely, ETEC would suffer severe prejudice if the Court did not allow it to intervene. As it elaborates on below, ETEC has a direct, substantial, and legally-protected interest in the outcome of this litigation. Should the Amended Utilities Code be found constitutional and thereafter enforced, it would immediately jeopardize ETEC's cognizable interest in constructing new transmission projects in Texas. The Amended Utilities Code would also impair ETEC's interest in purchasing low-cost, wholesale power, as well as in self-supplying that power and in selling what it generates on the market. ETEC's injury in this respect manifests itself most acutely as a potential transmission customer served by the proposed 500 kV competitive transmission project in East Texas known as the Hartburg-Sabine Junction Transmission Project (the "Hartburg-Sabine Project"), which is discussed further below. If Entergy, which would assume control over this Project due to the Amended Utilities Code's restrictions, either did not build this Project or built it at higher cost, this would likely aggravate the ongoing congestion problems that ETEC already confronts in East Texas or cause it to pay more for transmission in MISO. ETEC would therefore suffer extensive prejudice from not intervening in this litigation in order to assert its substantial interests in its outcome. This fact further buttresses its timeliness arguments.

Finally, there are no unusual circumstances militating against the timeliness of ETEC's Motion. Consequently, the Court should find it timely.

Interest. As noted above, ETEC's intervention is also warranted here as of right because it has a cognizable interest in the subject matter of the action. In the Fifth Circuit, this interest must

be "direct, substantial, [and] legally protectable." *Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980) (citations omitted). Future interests are protectable, such as an interest in a legislative decree's "prospective interference with promotion opportunities." *Black Fire Fighters Ass'n v. City of Dallas*, 19 F.3d 992, 994 (5th Cir. 1994) (citations omitted). Intervention is especially justified if the case "involves a public interest question," including one implicating constitutional interests. *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014) (citation omitted).

ETEC has such an interest in this litigation because the Amended Utilities Code directly and unconstitutionally injures ETEC as a transmission-owning entity and transmission customer within Texas, in several distinct ways. First, the Amended Utilities Code seriously compromises ETEC's participation in the transmission construction market. ETEC is a modest transmission-owning member of the Midcontinent Independent System Operator ("MISO") and the Southwest Power Pool, regional transmission organizations whose footprints extend into Texas. ETEC thus has a direct and substantial interest in constructing transmission projects in those footprints. By limiting such construction within Texas to incumbent utilities that already own the end points on such projects, the Amended Utilities Code impedes ETEC's fundamental interest in financing, owning, and promoting transmission.

More specifically, ETEC is only one of two load-serving entities inside MISO's Texas footprint that is also a transmission owner – the other being Entergy, which owns a plethora of end points throughout the Texas/MISO transmission zone in which ETEC operates. By restricting transmission expansion to incumbent utilities already owning the end points on such transmission lines, the Amended Utilities Code directly and effectively precludes ETEC from pursuing most of its transmission options within its MISO transmission zone while favoring Entergy's.

The Amended Utilities Code implicates ETEC's substantial transmission interests in yet

another away. As a non-profit electric cooperative, ETEC is frequently unable to embark on large-scale, capital-intensive transmission projects without partnering with other entities with whom it can divide the funding for such enterprises, thus mitigating its investment risk. ETEC often does so with independent, stand-alone transmission companies ("Transcos"), who do not own any end points in Texas. By limiting ETEC's partnership choice within Texas to the local incumbent utility in any given transmission footprint, the Amended Utilities Code prevents ETEC from partnering with otherwise qualified and cost-friendly Transcos, thereby inhibiting ETEC's business discretion and its ability to build new transmission. Additionally, the Amended Utilities Code prevents ETEC from enhancing the reliability of its own electric service through transmission construction. ETEC owns several transmission facilities in its shared territory with Entergy Texas that are "radial" in nature – i.e., they terminate at an electric load. These radial lines are located behind Entergy's end points. In restricting non-end point owners from owning the transmission lines in their footprint, the Amended Utilities Code precludes ETEC from converting these radial facilities to "looped" ones – ones that can receive power from any direction – in order to better serve its customers through improved reliability. In this way, the Amended Utilities Code empowers Entergy to prevent ETEC from looping its own lines.

Second, ETEC has a direct, substantial, and legally-protected interest in this litigation as a transmission customer within Texas, both concerning its acquisition of power for its electrical loads from others and for its self-service and the market participation of its generation resources. This point is most evident regarding the Hartburg-Sabine Project.

As Plaintiffs explain in their Complaint, the Hartburg-Sabine Project is a Federal Energy Regulatory Commission Order No. 1000 competitive-bidding project. MISO awarded construction rights on the Project to Plaintiff NextEra Energy Transmission Midwest ("NEET Midwest"), given

its winning low-cost bid in MISO's competitive transmission-building selection process. NEET Midwest is a non-incumbent transmission developer and does not own any end points within Texas. Now, under the Amended Utilities Code, NEET Midwest will have to forfeit its ownership of the Hartburg-Sabine Project. Because Entergy Texas owns the end points on the Project, it is the only entity that qualifies to construct the Project. ETEC consequently will face one of two unfavorable outcomes. One possibility is that Entergy will not construct the Project at all, which would allow the congestion problems that engendered the Hartburg-Sabine bidding process to remain in place – to ETEC's detriment. The other possibility is that Entergy does construct the Project, and ETEC will thus pay more for transmission in MISO because (1) Entergy's losing bid for the Project was higher and (2) Entergy's bid lacked the cost caps that were included in NEET Midwest's bid. By authorizing these developments, the Amended Utilities Code further – and significantly – damages ETEC's interests.

This litigation is therefore pivotal to ETEC, and its intervention is warranted. *See Sierra Club*, 18 F.3d at 1207 ("[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[.]") (citation omitted).

Impairment. For related reasons, this action's resolution would impair ETEC's ability to protect its interests. An intervenor's interest may be impaired "by the *stare decisis* effect of the district court's judgment." *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992) (citation omitted). Such a concern is manifest here. Should this Court affirm the Amended Utilities Code's constitutionality, then that decision would potentially foreclose ETEC's ability to build new transmission in Texas, enhance ETEC's own transmission reliability, lower the cost of transmission to its own loads and to energy markets, and reduce Entergy's price-inflating market

dominance in the MISO area within Texas. *See supra* at 6-8. This contingency adequately demonstrates that this action may impair or impede ETEC's interests. *See Inclusive Communities Project, Inc. v. Tex. Dep't of Housing & Community Affairs*, No. 3:08-CV-0546-D, 2012 U.S. Dist. LEXIS 81794, at *7-8, 2012 WL 2133667 (N.D. Tex. June 12, 2012) (finding that case would adequately impair intervenor's interests where it would be bound by court-ordered remedy, which would in turn undermine intervenor's ability to obtain tax credits).

Representation. Finally, ETEC is not adequately represented by the existing parties to this litigation. The applicant has the burden of demonstrating inadequate representation, but this burden is "minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (citation omitted). The applicant need only show that representation "may be" inadequate. *Id*.

ETEC has made such a showing here. The Defendants and prospective intervenors Oncor, Entergy, SWEPCO, and TIEC will uphold the Amended Utilities Code's constitutionality and are thus evidently not aligned with ETEC's interests. Neither, though, are the Plaintiffs or prospective intervenor LS Power. These latter entities are foreign, investor-owned, transmission-only utilities with a different array of interests and motivations for challenging the Amended Utilities Code. As a load-serving, generation-owning non-profit electric cooperative based in Texas, ETEC differs from these entities in material ways here. For instance, unlike Plaintiffs and LS Power, ETEC must deliver reliable power at retail to its member-customers and would be uniquely affected by the aforementioned congestion problems that the Amended Utilities Code would aggravate in East Texas. Moreover, ETEC, Plaintiffs, and LS Power are frequently direct competitors for transmission construction within Texas. These facts sufficiently illustrate that these other parties do not adequately represent ETEC's interests. *See Inclusive Communities*, 2012 U.S. Dist. LEXIS at *8 (finding that plaintiff did not adequately represent intervenor's interests in litigation where

they were asserting competing claims to tax credit distribution at heart of litigation).

II. Alternatively, This Court Should Allow ETEC to Permissively Intervene Because Its Claims Share Common Legal and Factual Questions with This Action, and Doing So Would Not Unduly Prejudice or Delay the Action.

Should this Court find that ETEC cannot intervene as of right – which it should not find – then it should alternatively allow ETEC to permissively intervene because ETEC easily satisfies Federal Rule of Civil Procedure 24(b).

***Timeliness*.** The standards for evaluating timeliness under Rule 24(b) are identical as those identified above under Rule 24(a). *See Harbour*, 2019 U.S. Dist. LEXIS 92060, at *12 ("Whether leave to intervene is sought under section (a) or (b) of Rule 24, the application must be timely.") (quoting *Stallworth*, 558 F.2d at 263). And, for the reasons identified above, ETEC's Motion to Intervene is timely. ETEC has filed it within a reasonably brief window after the Plaintiffs' Complaint and the various motions to intervene. The case has not substantially progressed, so ETEC's Motion will not prejudice the existing parties. Conversely, due to the critical interests ETEC has at stake in this litigation over the Amended Utilities Code's constitutionality, ETEC would be prejudiced if the Court did not permit it to intervene. Finally, there are no unusual circumstances or considerations that weigh against allowing ETEC to intervene. Its Motion is therefore adequately timely to warrant permissive intervention.

Shared Legal/Factual Questions. As seen in the attached proposed Complaint in Intervention, ETEC's claims against the Defendants evidently share common legal and factual similarities with Plaintiffs' Complaint. Like Plaintiffs, ETEC claims that the Amended Utilities Code violates the dormant Commerce Clause of the United States Constitution. Moreover, as in Plaintiffs' Complaint, ETEC's gravamen against the Amended Utilities Code is based in part on concerns arising from the Amended Utilities Code's ramifications for the Hartburg-Sabine Project.

These similarities adequately demonstrate the necessary overlap between ETEC's Complaint and the main action here required to warrant permissive intervention. *See Harbour*, 2019 U.S. Dist. LEXIS 92060, at *9, 13-15 (finding that intervenor's proposed claims adequately shared common legal and factual questions for permissive intervention purposes where proposed claims "concern the same core factual issue" as raised in main litigation).

Prejudice/Delay. Finally, allowing ETEC to permissively intervene here will not unduly delay or prejudice the Court's adjudication of this case. Again, the case is "in its early procedural stages," so there are no concerns over delay or prejudice due to any need to reproduce proceedings or backtrack on any given case-related issue. *Id*. at *15. Moreover, ETEC is raising substantially similar claims as Plaintiffs raise (as well as LS Power) over the same underlying legislation, so no conceivable prejudice or delay would arise from having to arbitrate a multiplicity of diverse issues. Given these considerations, the Court should allow ETEC to intervene. *Id.* (allowing permissive intervention given "related nature" of intervenor and defendants' assertions and similar underlying challenge).

CONCLUSION

WHEREFORE, for the foregoing reasons, ETEC respectfully requests that this Honorable Court grant its Motion to Intervene, permit ETEC to intervene in this case through the filing of Exhibit A, ETEC's Complaint in Intervention for Declaratory and Injunctive Relief, and for such other relief that the Court deems necessary or appropriate.

Dated: August 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents was served by the Court's CM/ECF system to all counsel of record on this 19th day of August, 2019.

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