

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

FILED

2019 AUG -6 PM 4:43

CLERK IN DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY _____

DEPUTY

NEXTERA ENERGY CAPITAL
HOLDINGS, INC.,
NEXTERA ENERGY TRANSMISSION, LLC,
NEXTERA ENERGY TRANSMISSION
MIDWEST, LLC,
LONE STAR TRANSMISSION, LLC, and
NEXTERA ENERGY TRANSMISSION
SOUTHWEST, LLC,

Civil No. 1:19-cv-00626-LY

Plaintiffs,

v.

**ENTERGY TEXAS, INC.'S
OPPOSED MOTION TO
INTERVENE**

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.

Entergy Texas, Inc. ("Entergy") moves to intervene in the above-captioned cause as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, Entergy seeks permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). NextEra's suit is a direct attack on Entergy's long-standing right under Texas law to build transmission infrastructure within its service territory. If NextEra prevails, Entergy will be deprived of one of the key benefits of the regulatory compact it entered into with the State of Texas when it was certified to provide electric utility service to the citizens of southeast Texas. The harm arising from NextEra's claims herein is especially significant to Entergy because, as explained below, if NextEra prevails, NextEra will seek to

construct the Hartburg-Sabine Junction 500 kV Project, which sits within Entergy's service territory, and which Texas law gives Entergy the right to build.

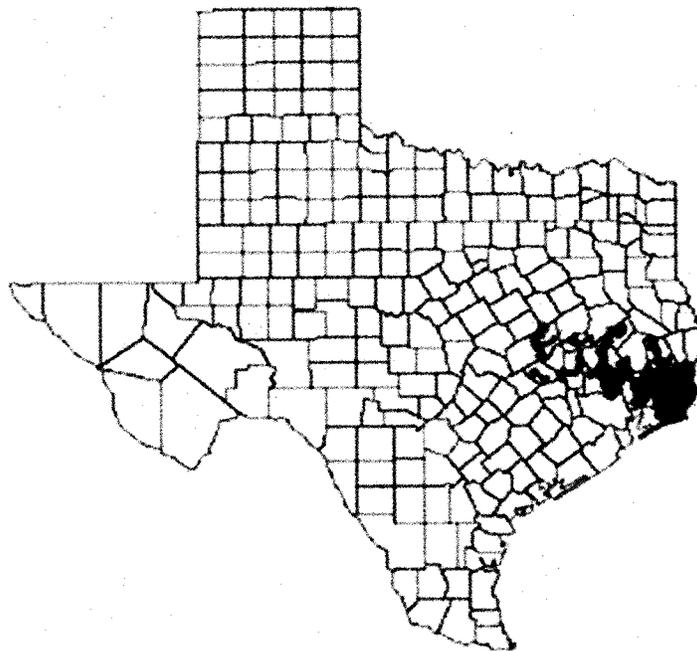
Pursuant to Local Court Rule CV-7(i), Entergy certifies that it has conferred with the parties in a good faith attempt to resolve this matter by agreement. Defendants are unopposed to this motion. Counsel for NextEra indicated that it is not opposed to Entergy's intervention *if* it does not seek to alter the current schedule, does not seek to participate in the preliminary injunction hearing, and agrees that "aligned" parties will file joint briefs. Entergy will abide by the Court-ordered schedule and will endeavor to limit the duplication of arguments presented to the Court, but for the reasons discussed below, it is neither appropriate nor reasonable to require Entergy to waive the right to participate in the preliminary injunction hearing or to file joint briefs.

Background

In 1975, the Texas Legislature enacted the Public Utility Regulatory Act ("PURA"), creating a statewide regulatory regime governing the provision of electric utility service to Texas citizens. Though previously electric utilities were governed by a combination of city ordinances and judicial decisions, PURA created a comprehensive statewide regulatory system governing utilities' rates, services, and operations. Under this fully regulated system, "an electricity utility enters into a 'regulatory compact' with the public: in return for a monopoly over electricity service in a given area, the utility agrees to provide service to all requesting customers and to charge only the retail rates set by the Commission." *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Texas*, 104 S.W.3d 225, 227–28 (Tex.App.—Austin 2003, no pet.). Unlike an ordinary business operating in a competitive market, an electric utility may not determine the price to charge for its service or whether to serve a particular customer or segment of customers; in return for submitting to regulation, the utility is granted a monopoly over retail electric service within its service territory.

PURA created the Public Utility Commission of Texas (“PUCT”) to implement and oversee this regulatory regime. The PUCT thus “began licensing utilities to serve power to a particular area. In other words, generally speaking, a single utility was given the authority to provide all of the electricity to customers located inside a specific geographical region. This region was called a service area.” *Lamb Cty. Elec. Co-op., Inc. v. Pub. Util. Comm’n*, 269 S.W.3d 260, 265 (Tex.App.—Austin 2008, pet. denied).

In 1976, Entergy, formerly Gulf States Utilities, received a Certificate of Convenience and Necessity (“CCN”) from the PUCT to provide electric utility service to the region of southeast Texas it had historically served. Today, Entergy serves approximately 450,000 customers in 27 counties in southeast Texas. Entergy’s transmission and distribution systems cover approximately 15,000 square miles; its service territory is depicted below:



Entergy is a wholly-owned subsidiary of Entergy Corporation, which is headquartered in New Orleans, Louisiana. The utility subsidiaries of Entergy Corporation, which own generation,

transmission, and distribution facilities, provide retail electric service to approximately 2.9 million customers in Arkansas, Louisiana, Mississippi, and Texas.

Entergy is a vertically integrated utility providing fully-bundled electric service to its customers; that is, the retail customer pays a bundled retail rate that includes the generation, transmission, and distribution of electricity. Entergy is a member of, and its service territory lies within, the Midcontinent Independent System Operator, Inc. (“MISO”) regional transmission organization (“RTO”)—a non-profit, non-governmental organization that manages the transmission network to which Entergy is connected. Although the Texas Legislature authorized the unbundling of electric utility service within the Electric Reliability Council of Texas (“ERCOT”) region—which is located solely within Texas and *not* subject to federal regulation—the Legislature has prohibited unbundling in areas of the state outside ERCOT (*e.g.* MISO). *See e.g.*, Tex. Util. Code § 39.452(a). And although the Texas legislature previously permitted utilities providing only transmission service to operate within ERCOT, it has never authorized their operation in the areas of Texas outside ERCOT.

The Texas regulatory framework, in which investor-owned utilities operating outside ERCOT provide fully-bundled service, enables the state to retain jurisdiction over the rates charged by those utilities. *See New York v. FERC*, 535 U.S. 1, 11-12, 25-28 (2002). This retention of jurisdiction is within the state’s police power. “[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.” *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)).

The Texas Legislature's enactment of Senate Bill 1938 ("SB 1938")¹ reaffirms and clarifies that utilities in Texas have a defined service territory and that they have a right to build new facilities in that service territory. This is the way things have always been outside ERCOT, including where Entergy's service area is located. However, PURA was amended in 2009 to permit the certification of transmission-only utilities serving the ERCOT power region. This revision fostered the expansion of transmission facilities necessary to bring wind power from the Competitive Renewable Energy Zone ("CREZ") of West Texas to the urban centers of the state. Because the CREZ expansion is complete, the policy objective that led the Texas Legislature to permit transmission-only utilities in ERCOT has been fulfilled. Accordingly, SB 1938 reinstated the traditional service territory model in ERCOT and repealed the provision permitting the certification of transmission-only utilities.² As the bill history makes clear:

S.B. 1938 will **codify the existing process** in Texas for determining the proper party to construct critical energy infrastructure, **maintain Texas rate jurisdiction** over transmission in the non-ERCOT areas of Texas, and **clean-up statutory remnants of the Competitive Renewable Energy Zone (CREZ) buildout**.

Senate Bus. & Commerce Comm., Bill Analysis, Tex. S.B. 1938, 86th Leg., R.S. (2019) (emphases added).³

Plaintiff NextEra Energy Transmission Midwest, LLC ("NEET Midwest") is a "transmission-only" utility that seeks, through this lawsuit, to **require** the State of Texas to allow it to build, own, and operate transmission facilities in Entergy's service territory. (See Compl. ¶¶ 87, 104, 118, 121.) NEET Midwest, through an ill-conceived solicitation process that

¹ Acts 2019, 86th Leg., ch. 44 (S.B. 1938), § 4, eff. May 16, 2019 (now codified at Tex. Util. Code Ann. § 37.051(a), 37.053(a), 37.055, 37.056, 37.057, 37.154(a) (West)).

² See SB 1938 at Sections 6, 8, available at: <https://webservices.sos.state.tx.us/legbills/files/RS86/SB1938.pdf>

³ Available at: <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB01938F.pdf#navpanes=0>.

misapprehended PURA's certification requirements, entered into an agreement with MISO to develop the Hartburg-Sabine Junction 500 kV transmission line, which will interconnect with Entergy's electric infrastructure and be located in Entergy's service territory. SB 1938 clarifies that Entergy has the right to build new transmission facilities in its service territory, as it always has, including the Hartburg-Sabine Junction 500 kV Project. NextEra's attempt to enjoin and ultimately invalidate SB 1938 threatens to strip Entergy of its valuable CCN rights and to deprive the State of Texas of its authority to regulate the rates, services, and operations of Texas utilities.

Argument

Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as of right; Rule 24(b) governs permissive intervention. Fed. R. Civ. P. 24. Entergy seeks intervention as of right or, in the alternative, permissive intervention.

I. Entergy Has a Right to Intervene in this Lawsuit.

To be entitled to intervene as of right, a movant must demonstrate that: (1) its application is timely; (2) it has an interest relating to the property or transaction that is the subject of the case; (3) disposition of the case may practically impair or impede its ability to protect its interest; and (4) its interest is inadequately represented by the existing parties. *Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019) (citing Fed. R. Civ. P. 24(a)). Courts are to construe Rule 24 liberally and resolve doubts in favor of the proposed intervenor. *In re Lease Oil Antitrust Litigation*, 570 F.3d 244, 248 (5th Cir. 2009).

A. Entergy's motion to intervene is timely.

Entergy's motion is timely because it does not impede the progress of the litigation. When the intervenor "does not delay or reconsider phases of the litigation that [have] already concluded," intervention is timely. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562,

564 (5th Cir. 2016). Here, Entergy seeks to intervene at the earliest possible opportunity, the onset of litigation. There are no past phases of litigation to delay or reconsider; no discovery has commenced, and indeed, the State Defendants have not answered or otherwise responded to Plaintiffs' complaint. Entergy will abide by the Court's orders setting a briefing schedule and setting the hearing on Plaintiffs' motion for a preliminary injunction for September 10, 2019. Therefore, Entergy meets the first prong of the test for intervention as of right. *See id.*

B. Entergy has an interest in the subject of the action.

To show an interest sufficient for intervention, an intervenor must demonstrate a "direct, substantial, legally protectable interest in the proceedings." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). This inquiry "turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way." *Id.* Stated another way, "the '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." *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (emphasis added).

Entergy's direct, substantial, legally protectable interest in this suit is obvious. NextEra's suit is, among other things, an attempt to invalidate SB 1938 and thereby obtain the right to build the proposed Hartburg-Sabine transmission line,⁴ which NextEra acknowledges will be constructed in Entergy's service territory, and which Texas law gives Entergy the right to build:

However, because of the amendments to § 37.051, § 37.056, § 37.057, and § 37.151, the incumbent transmission utility, **Entergy will now appear to have the exclusive right to build the facilities under Texas law because the project as designed will interconnect with two existing Entergy lines and an Entergy substation.** (Compl. ¶ 87.) (emphases added).

⁴ Entergy contends that PURA has always afforded Entergy this right, which SB 1938 clarifies and reaffirms.

The proposed 500 kV line will be worth in excess of \$100 million, and its owner will be entitled to collect rates that provide an opportunity to recover the cost of the line, plus a return on investment. If NextEra prevails, Entergy may lose the right to build this line and potentially other transmission projects that Entergy is entitled to build under Texas law. Entergy also has an interest in protecting the regulatory compact that provides it a defined service territory and the opportunity to grow within that service territory in exchange for state regulation of its rates, operations, and service. *See Wal-Mart Stores, Inc.*, 834 F.3d at 567.

C. The disposition of the matter may impair Entergy’s ability to protect its interest.

Given the overlap between the “interest” and “disposition of the matter” elements, recent Fifth Circuit decisions dispense with any separate discussion of the latter. *See, e.g., Wal-Mart Stores, Inc.*, 834 F.3d at 569; *Texas*, 805 F.3d at 661. As discussed above, if NextEra obtains the relief it seeks, Entergy may be prohibited from pursuing the Hartburg-Sabine Junction 500 kV transmission project and the right to build other transmission projects in its service territory. Thus, Entergy satisfies this element.

D. Entergy’s interest is inadequately represented by the existing parties.

An intervenor’s burden of demonstrating inadequate representation is “minimal.” *Texas*, 805 F.3d at 661. Because Entergy seeks to intervene before the suit has been resolved, it need only show that the representation by the current defendant, the State of Texas, “may be inadequate.” *Id.* at 662. “The lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, is sufficient to demonstrate that the representation *may* be inadequate” *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014).

Entergy and the Defendant PUCT Commissioners have differing objectives. While Entergy is sympathetic to the PUCT’s public mission, Entergy seeks to protect its business interests—namely the integrity of its traditional service territory and corresponding right to build

new transmission facilities, including the Hartburg-Sabine Junction 500 kV Project. And while Entergy believes SB 1938 is valid statewide, Entergy's objective is to ensure that its application within the portions of Texas that lie within the MISO RTO, including the Entergy service territory, is vindicated. The PUCT Commissioners are tasked with defending the public interest inherent in regulating monopoly electric utility providers that operate within the state, and are concerned with the statewide application of SB 1938, as applicable.

Entergy and the Attorney General's office defending this suit may advance different arguments in defense of SB 1938. As mentioned, one of the primary reasons the Texas Legislature adopted SB 1938 was to preserve the state's continued ratemaking jurisdiction. NextEra's complaint alleges that this justification is pretextual, and in support quotes a brief filed by the Texas Attorney General in a state court appeal brought by Entergy and others challenging a PUCT advisory opinion—a proceeding in which Entergy and the Texas Attorney General were adverse to each other. (Compl. ¶ 76.) While the Texas Attorney General in that proceeding contended there was no loss of jurisdiction, Entergy's appeal in that matter vigorously disputed that point, citing the U.S. Supreme Court's decision in *New York v. FERC*, 535 U.S. 1 (2002). Regardless of the Attorney General's position in this case, Entergy is in a different position, per NextEra's own allegations, to defend SB 1938.

II. Alternatively, Entergy Seeks Permissive Intervention.

In the alternative, if Entergy's motion for intervention as of right is denied, it seeks permissive intervention under Fed. R. Civ. P. 24(b), which provides in relevant part:

On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

A. Entergy's motion is timely.

For the reasons explained in Section I.A., Entergy's motion to intervene is timely and will not delay or prejudice the adjudication of the original parties' rights.

B. Entergy's defense and the main action have common questions of law and fact.

Entergy's defense is directly opposed to the relief Plaintiffs seek. As discussed above and in NextEra's complaint, Plaintiffs are seeking to construct, own, and operate new transmission facilities in Entergy's service territory by disputing the constitutionality of SB 1938. Entergy's defense, which will be set forth in its Rule 12(b)(6) motion to dismiss on August 23, 2019, and which is also reflected in the attached Proposed Answer,⁵ is that SB 1938 is a valid exercise of the State's police power, is consistent with applicable federal regulations, and does not violate the Dormant Commerce Clause or the Contract Clause of the US Constitution.

Conclusion and Prayer

For the foregoing reasons, Entergy moves to intervene as of right, or alternatively, should be permitted to intervene. Entergy respectfully requests that upon granting this motion, the Court refrain from filing the attached Proposed Answer, and instead file and consider Entergy's Rule 12(b)(6) Motion to Dismiss, which will be submitted on August 23, 2019. Entergy also prays for any other relief to which it is entitled.

⁵ Entergy includes the attached Conditional Proposed Answer as Exhibit 1 in order to meet the requirements of Fed. R. Civ. P. 24(c), which requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought."

Dated: August 6, 2019

Respectfully submitted,



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ATTORNEYS FOR ENTERGY TEXAS, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that on August 6, 2019, the foregoing instrument was filed with the Clerk of Court by hand-delivery and upon the following parties via U.S. first class mail, with courtesy copies via e-mail:

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Michael Boldt

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official capacity,

Defendants.

ORDER GRANTING ENTERGY TEXAS, INC.'S MOTION TO INTERVENE

BEFORE THE COURT is the motion filed by Entergy Texas, Inc. ("Entergy") to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, by permission under Federal Rule of Civil Procedure 24(b). The Court having reviewed the motion and any responses thereto, the Court orders that Entergy's Motion to Intervene is GRANTED. Entergy is a party for all purposes.

The Clerk is directed NOT to file the Proposed Answer attached to Entergy's motion.

SIGNED this the ____ day of _____ 2019.

Honorable Judge Lee Yeakel