

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 §
and NEXTERA ENERGY §
TRANSMISSION SOUTHWEST, LLC, §
Plaintiff, §

v. §

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

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. §

**TEXAS INDUSTRIAL ENERGY CONSUMERS’
MOTION FOR LEAVE TO INTERVENE**

Texas Industrial Energy Consumers (TIEC) files this Motion for Leave to Intervene in the above captioned case, as a matter of right under Federal Rule of Civil Procedure (FRCP) 24(a)(2) or, in the alternative, by permission under FRCP 24(b)(1). TIEC certifies that it has conferred in good faith with the parties to the case.¹ Defendants Ken Paxton, DeAnn T. Walker, Arthur C. D’Andrea, and Shelly Botkin are unopposed to this motion. Plaintiffs NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission, LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest,

¹ Pursuant to Local Rule CV-7(i).

LLC (collectively, “NextEra”) offered to not oppose TIEC’s intervention if TIEC agreed not to file separate briefs on contested legal issues or participate in the pending injunction proceedings. Because TIEC could not agree to those conditions, this motion is opposed.

I. INTRODUCTION

NextEra has challenged the constitutionality of Texas Public Utility Regulatory Act (PURA) §§ 37.051, 37.056, 37.151, and 37.154, as recently amended by the Texas Legislature through its enactment of SB 1938. Collectively, those provisions delineate the Public Utility Commission of Texas’s (PUCT’s) authority to issue certificates of convenience and necessity (CCNs) for public utilities to construct, own, and operate electric transmission lines. These transmission facilities will be used to provide regulated public utility service to Texas customers. Specifically, NextEra claims that the statutory amendments resulting from SB 1938 violate the dormant Commerce Clause by requiring the PUCT to issue new CCNs to the owners of the endpoints where a new transmission facility will interconnect.

TIEC is an unincorporated trade association of large industrial companies that own and operate industrial facilities throughout the state of Texas. TIEC regularly intervenes and participates in legal proceedings in front of courts and regulatory bodies such as the PUCT to protect the interests of its members. In that role, TIEC has been deeply involved in the issues raised in this proceeding. In fact, TIEC intervened and participated in several of the state court and PUCT proceedings that NextEra discusses in its complaint.²

² See NextEra Complaint at 19. TIEC has intervened and participated in the following proceedings related to the issues discussed in this case: *Sw. Pub. Serv. Co. v. Pub. Util. Comm’n of Texas*, No. D-1-GN-18-000208 (459th Dist. Ct., Travis County, Tex. Sept. 27, 2018); *Entergy Texas, Inc. et al. v. Pub. Util. Comm’n of Texas*, No. 03-18-00666-CV (Tex. App.— Austin); *Joint Petition of Southwestern Public Service Co. and Southwest Power Pool, Inc. for Declaratory Order*, PUCT Docket No. 46901, Declaratory Order at 3 (Oct. 26, 2017); *Joint Application of NextEra Energy Transmission Southwest, LLC and Rayburn Country Electric*

TIEC should be allowed to intervene in this proceeding because its members will be significantly and directly impacted by the outcome. The statutory provisions at issue provide the framework for issuing licenses for public facilities that are used to provide service to TIEC's members. As large consumers of electricity, TIEC members bear a significant portion of the cost of each new transmission line that is built in the state and have a direct interest in maintaining the PUCT's ratemaking jurisdiction over those facilities. Also, unlike most other electric customers, TIEC members operate energy-intensive industrial sites that connect directly to the electric grid at transmission voltage, which requires close coordination with transmission providers to establish interconnections and maintain appropriate service quality. Accordingly, TIEC's members have a unique interest in the regulatory scheme that determines whether new transmission lines are necessary and, if so, which entity will be selected to construct and operate those lines. TIEC should be allowed to protect that interest by participating in this proceeding.

II. ARGUMENT

The Fifth Circuit has found that “[f]ederal courts should allow intervention when no one would be hurt and the greater justice could be attained.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (internal quotation marks omitted). This proceeding is still in its earliest stages, so allowing TIEC to intervene will not prejudice any party's rights or delay litigation. As a trade association whose sole purpose is to participate in electric regulatory matters in Texas, TIEC has extensive knowledge and background on the issues presented in this dispute. TIEC's

Cooperative, Inc. to Transfer Certificate Rights to Facilities in Cherokee, Smith, and Rusk Counties, PUCT Docket No. 48071, SOAH Order No. 2 (Mar. 5, 2018); *Cities of Harlingen v. Public Utility Commission of Texas*, 2008 WL 8089334 (State District Court, Travis County); *Public Utility Commission of Texas v. Cities of Harlingen*, 311 S.W.3d 610 (Tex. App.—Austin, no pet. 2010); *Application of Electric Transmission Texas, LLC for a Certificate of Convenience and Necessity, for Regulatory Approvals, and Initial Rates*, PUCT Docket No. 33734, Order on Rehearing at 3 (Dec. 21, 2007) (PUCT proceeding underlying the *Cities of Harlingen* case).

unique perspective will assist the Court in evaluating how the statutory provisions NextEra is challenging will protect and benefit large businesses and employers in Texas who will be served by the facilities at issue. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 977 (8th Cir. 2014) (allowing a party to intervene in part because it could provide “expertise to the issues in this dispute”); *see also Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (intervenor may show inadequacy of representation if it has “expertise the government may not have”). Indeed, “[t]he very purpose of intervention is 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, 345 (5th Cir. 2014). Accordingly, TIEC’s intervention should be granted because its participation will not harm any party and will assist the Court in deciding this matter.

A. TIEC should be allowed to intervene as a matter of right under FRCP 24(a).

Under FRCP 24(a), to intervene as a matter of right:

(1) [the applicant must] timely [apply for intervention]; (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.

Texas v. United States, 805 F.3d 653, 657 (5th Cir. 2015) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co. (NOPSI)*, 732 F.2d 452, 463 (5th Cir. 1984)). “Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed.” *Id.* at 656 (quoting *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996)). “The inquiry is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate.” *Brumfield*, 749 F.3d at 342.

1. TIEC's motion to intervene is timely.

This case is in the preliminary stage, so TIEC's motion to intervene is timely. The Fifth Circuit has previously found that a request for intervention was timely because the movant "sought intervention before discovery progressed and because it did not seek to delay or reconsider phases of the litigation that had already concluded." *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 565-566 (5th Cir. 2016). That is the case here. TIEC has not delayed in requesting intervention. NextEra filed its complaint and motion for a preliminary injunction on June 17, 2019, and the deadline for the Defendants to file responsive pleadings is not until August 23, 2019. No discovery has been conducted, no briefs have been filed, and TIEC is not requesting that the Court reconsider any phase of the litigation that has already passed. Therefore, TIEC's motion is timely, and granting intervention will not delay this litigation or prejudice NextEra's claims.

2. TIEC has an "interest relating to the property or transaction that is the subject of the action."

TIEC has an interest in the outcome of this litigation because its members will take service directly from the providers that are authorized to build transmission facilities in Texas. TIEC's members rely on the regulatory scheme that NextEra is challenging to ensure that they receive safe and reliable electric service at reasonable rates, from utilities that are under the PUCT's regulatory jurisdiction. Importantly, the "interest" test is not meant to be an overly restrictive hurdle for intervention, but "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 citing *Ceres Gulf*, 957 F.2d at 1203 n. 10 (internal citation omitted) (emphasis added). Additionally, the Fifth Circuit has held that "[t]he interest requirement may be judged by a more lenient standard if the case involves a public interest

question or is brought by a public interest group.” *Brumfield*, 749 F.3d at 344. That is the case here because NextEra is challenging the Legislature’s ability to impose common-sense restrictions on who can receive a CCN to construct a new transmission facility in Texas, and TIEC broadly represents the interests of large industrial electric consumers who will be served directly by the CCN owner(s).

For purposes of intervention, the Fifth Circuit has determined that a prospective litigant’s “interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim.” *Wal-Mart Stores, Inc.*, 834 F.3d at 566 citing *Texas*, 805 F.3d at 659. Further, a party’s intervention can be supported by purely economic interests that are directly related to the pending litigation. *Id.* at 568, citing *Espy*, 18 F.3d at 1207. TIEC’s interest in this matter is similar to the interests presented by the Texas Forestry Association and the Southern Timber Purchasers Council—two trade associations representing timber purchasers—in *Sierra Club v. Espy*, where the Sierra Club was challenging the forestry practices being applied by the Texas Forestry Service. *Espy*, 18 F.3d at 1202. In that case, the members of the trade associations that were attempting to intervene were not directly regulated by the forestry practices being challenged, but they did have “a financial interest in the ability [of the Forest Service] to use the less expensive even-aged harvesting methods, and [had the] prospect of injury if the Forest Service [could not] deliver consistent volumes of timber.” *Id.* at 1207.

Similarly, TIEC and its members are not regulated by the statutory provisions that are being challenged in this case, but they will receive regulated utility service from the entities that will be subject to these regulations. As a result, the regulations will directly impact both pricing and service characteristics for TIEC members. As noted above, TIEC’s members bear a large

portion of the cost of each new transmission line built in Texas. If merchant transmission providers such as NextEra are allowed to construct transmission without providing retail service to customers in certain areas of the state, their rates will be regulated solely by the Federal Energy Regulatory Commission (FERC) and not the PUCT. Traditionally, FERC has granted transmission utilities regulated returns on equity (ROEs) that far exceed those approved by the PUCT. Further, as customers of utilities that provide bundled transmission and distribution service, TIEC members receive a portion any the revenues that other entities pay to use transmission lines in Texas as a credit to their rates. If transmission-only entities such as NextEra are authorized to build new transmission facilities, they would keep these payments to the detriment of TIEC members and other Texas retail customers.

Additionally, because TIEC members' facilities are often directly connected to the electric grid at transmission voltage, TIEC has a unique interest in preserving a regulatory scheme that, according to the Texas Legislature, is designed to ensure the "geographic continuity of the [electric transmission] system in a way that further facilitates reliability."³ As large customers operating complex industrial sites that require a high level of reliability, TIEC members have a unique interest in ensuring that transmission service providers are under PUCT jurisdiction and appropriately obligated to Texas customers. Operationally, TIEC believes that requiring the endpoint owners to construct a new transmission line fosters a high level of reliability by maintaining a contiguous transmission system and avoiding undue balkanization.

TIEC has an interest in this litigation because its members will be directly impacted by any cost and reliability consequences if merchant transmission utilities receive CCNs to

³ SB 1938 Enrolled Bill Analysis (May 29, 2019), available at: <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB01938F.pdf>.

interconnect to existing endpoints. Accordingly, TIEC should be allowed to intervene in this proceeding to protect its members' interests.

3. The disposition of this case will impair TIEC's ability to protect its members' interests.

This proceeding is TIEC's only opportunity to protect its members' interests in preserving the regulatory system NextEra is challenging. If NextEra succeeds in having PURA's CCN provisions declared unconstitutional, TIEC would lack any recourse to obtain reasonable restrictions on who may provide transmission service. As the Fifth Circuit has previously found, a prospective intervenor can satisfy the requirements of FRCP 24(a)(3) by showing that the *stare decisis* effects of a proceeding would prevent that intervenor from protecting its interests in the future. *Id.* citing *Ceres Gulf*, 957 F.2d at 1204 (“[A]n intervenor’s interest ‘is impaired by the *stare decisis* effect of the district court’s judgment.”). Additionally, it is clear from NextEra’s complaint that if it is successful in this proceeding, it intends to pursue its claims at the PUCT and attempt to (1) take ownership of the Jacksonville-Overton transmission line (Complaint at ¶ 88) and (2) obtain a CCN to construct the Hartford to Sabine Junction Transmission Project transmission line (Complaint at ¶ 87). If NextEra succeeds in this proceeding, TIEC’s ability to contest NextEra’s ownership of those facilities would be effectively eliminated. As such, it is clear that the disposition of this case will impair TIEC’s ability to protect its members’ interests.

4. TIEC’s interests are not adequately represented by the other parties to the case.

FRCP 24(a)(4) requires prospective intervenors to show that existing parties “*may* be inadequate” to vindicate their interests. *Texas*, 805 F.3d at 662. This is a “minimal” burden. *Edwards*, 78 F.3d at 1005.

In this case, neither the Attorney General nor the PUCT commissioners can adequately represent the interests of TIEC’s members. First, TIEC’s interest in protecting its members’

businesses is much more specific than the general public interest objectives of either the Attorney General or the PUCT commissioners. The “public interest” does not necessarily align with the specific interests of large industrial customers, as the interests of utilities, other customer classes, and other industry stakeholders must be considered as part of the “public” interest. The Fifth Circuit has repeatedly found that a prospective litigant’s interests may not be represented in a case if the interests of the existing litigants (including public agencies) are broader than the interests of the party attempting to intervene. *Wal-Mart Stores, Inc.*, 834 F.3d at 569 (“The Association argues that its interests—protecting its members’ businesses—are narrower than the Commission’s broad public mission. . . . Given the broad policy favoring intervention in our precedent, we are satisfied that the Association has demonstrated that it may be inadequately represented in the lawsuit.”). This Court should reach the same conclusion here.

Further, the government’s ability to fully present the types of arguments that TIEC intends to raise may already be impaired. For instance, in Texas State Court Case No. 03-18-00666-CV, the PUCT filed briefing defending a declaratory order it issued in PUCT Docket No. 46901. In that declaratory order, the Commission found that Texas state law did not contain a right of first refusal (ROFR) that would preclude issuing CCNs to merchant transmission providers in the non-ERCOT areas of the state. *See* PUCT Docket No. 46901, Order at 17-20 (Oct. 26, 2017). TIEC also participated in those proceedings, but took the position that Texas state law *did* prohibit new merchant transmission providers in certain areas of the state. *See* PUCT Docket No. 46901, TIEC Initial Brief at 7-8 (June 21, 2017). While the current PUCT commissioners recently reconsidered that position in Docket No. 48071 (the proceeding to address NextEra’s proposed purchase of the Jacksonville-Overton transmission line), the PUCT has not formally rescinded its Order in Docket No. 46901. As a result, the PUCT’s position on

certain issues presented in NextEra's complaint could be impacted by the positions that it took in the appeal of Docket No. 46901 in ways that TIEC's is not. In fact, NextEra is already attempting to use the PUCT's prior position on this issue against it in this lawsuit. *See* Complaint at ¶ 76. While TIEC believes that NextEra's Complaint mischaracterizes the PUCT's prior position, it is clear that the government's prior orders and litigation positions could affect its positions in this case. In contrast, TIEC has consistently made the same legal arguments (including PUCT Docket No. 46901 and the related appeal) over the last few years. This alone is enough to meet TIEC's minimal burden to show that representation by existing parties "may be inadequate" to vindicate TIEC's interests. *Texas*, 805 F.3d at 662. Because TIEC has satisfied that burden, as well as the other aspects of FRCP 24(a), it should be allowed to intervene as a matter of right.

B. Alternatively, the Court should allow TIEC to intervene by permission under FRCP 24(b).

FRCP 24(b) gives the Court discretion to grant permissive intervention to any party that "has a claim or defense that shares with the main action a common question of law or fact," FRCP 24(b)(1)(B), provided that the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights. FRCP 24(b)(3). TIEC clearly meets these requirements, and should be granted permissive intervention if the Court does not allow it to intervene as a matter of right.

1. TIEC will present a claim or defense that shares questions of law and fact in common with the underlying case.

This case hinges on whether the provisions of PURA that NextEra is challenging are constitutional. As described above, TIEC has an interest in protecting the existing regulatory

system that governs electric transmission CCNs in Texas, so it will clearly present a defense that shares questions of law and fact in common with NextEra's Complaint.

That said, TIEC will do more than simply reiterate the arguments made by the Defendants in this case. The Fifth Circuit has found that "[i]n acting on a request for permissive intervention, it is proper to consider, among other things, whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit." *NOPSI*, 732 F.2d at 472 (internal citations omitted). As described above, TIEC's position as a representative of large industrial customers will allow it to present a unique perspective that is not adequately represented by either the Attorney General or the PUCT. *See Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d at 977; *see also Utah Ass'n of Counties*, 255 F.3d at 1255. TIEC's participation will assist the Court in developing a full factual record surrounding a variety of issues, including whether and how the interests of TIEC's members (and other electric consumers) would be impacted by NextEra's requested preliminary injunction. Similarly, TIEC's presentation will help the Court to understand the legitimate local interests that are served by the PURA provisions that NextEra is hoping to invalidate. Accordingly, TIEC should be allowed to intervene because it will present relevant, but not duplicative, factual and legal arguments to inform the court's decision.

2. Allowing TIEC to intervene will not unduly delay this proceeding or prejudice the existing parties.

As described in detail above, this case is still in its earliest stages, and TIEC's intervention will not delay litigation or prejudice the existing parties. Therefore, the Court should allow TIEC to intervene in this proceeding because it will not harm any party and will assist the Court in fully evaluating the factual and legal issues presented in NextEra's complaint.

C. TIEC's Proposed Answer is attached to this motion, as required by FRCP 24(c).

FRCP 24(c) requires that every motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Pursuant to this Court's prior order, Defendants are not required to file responsive pleadings until August 23, 2019. Nevertheless, TIEC has attached its proposed Answer to this pleading, and if the Court grants TIEC's Motion to Intervene, TIEC requests that it consider TIEC's Answer to have been filed on August 23, 2019.

III. CONCLUSION

For the foregoing reasons, TIEC respectfully requests that the Court allow TIEC to intervene in this proceeding by right under FRCP 24(a), or, alternatively, by permission under FRCP 24(b). TIEC has attached a Proposed Order to that effect.

Respectfully submitted,

/s/ Michael McMillin

Katherine L. Coleman (*pro hac vice to be filed*)

State Bar No. 24059596

katie.coleman@tklaw.com

Michael McMillin

State Bar No. 24088034

michael.mcmillin@tklaw.com

Thompson & Knight LLP

98 San Jacinto Blvd., Suite 1900

Austin, Texas 78701

(512) 469.6100

(512) 469.6180 (Facsimile)

ATTORNEYS FOR
TEXAS INDUSTRIAL ENERGY CONSUMERS

CERTIFICATE OF SERVICE

I, hereby certify that on August 13, 2019, a true copy of the foregoing Motion for Leave to Intervene of Texas Industrial Energy Consumers and proposed Order Granting Motion to Intervene were served on the parties of record listed below:

Counsel for Plaintiffs

Carlos M. Sires
csires@bsflp.com
Evan M. Ezray
eezray@bsflp.com
Stuart Harold Singer
ssinger@bsflp.com
Boles Schiller Flexner LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, Florida 33312

Counsel for Plaintiffs

Jeffrey Mark Tillotson
jtillotson@tillotsonlaw.com
Tillotson Law
1807 Ross Avenue, Suite 325
Dallas, Texas 75201-3242

Counsel for Defendant

Attorney General and PUC Commissioners
John R. Hulme
John.Hulme@oag.texas.gov
H. Carl Myers
Carl.Myers@oag.texas.gov
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Counsel for Movant LSP Transmission

Kenneth A. Young
Kenneth.Young@kirkland.com
Anna G. Rotman
Anna.Rotman@kirkland.com
Sarah E. Williams
Sarah.Williams@kirkland.com
Tabitha J. De Paulo
Tabitha.DePaulo@kirkland.com
Kirkland & Ellis LLP
609 Main Street, Suite 4500
Houston, Texas 77002

Counsel for Movant LSP Transmission

Paul D. Clement
Paul.Clement@kirkland.com
Erin E. Murphy
Erin.Murphy@kirkland.com
Applicants for Admission Pro Hac Vice
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for Movant Oncor Electric

John C. Wander
jwander@velaw.com
Thomas S. Leatherbury
tleatherbury@velaw.com
Winston P. Skinner
wskinner@velaw.com
Kevin W. Brooks
kbrooks@velaw.com
Vinson & Elkins LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201-2975

/s/ Michael McMillin

Michael McMillin

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TEXAS INDUSTRIAL ENERGY CONSUMERS’ ANSWER

Defendant-Intervenor Texas Industrial Energy Consumers (TIEC) files this answer and affirmative defenses to the Complaint filed by 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’s (collectively, “NextEra”). TIEC denies all allegations made in the Complaint that are not specifically admitted below and denies that NextEra is entitled to any relief whatsoever. The paragraphs of this Answer correspond to those in the Complaint.

INTRODUCTION

1. This paragraph states legal conclusions to which no response is required.

2. This paragraph states legal conclusions to which no response is required.

3. This paragraph states legal conclusions to which no response is required.

4. TIEC admits that the Complaint correctly names both the Plaintiffs and the Defendants, and challenges the constitutionality of the amendments to the Texas Utilities Code § 37.051, § 37.056, § 37.057, § 37.151, and § 37.154.

5. TIEC admits that the Complaint seeks declaratory and injunctive relief. Otherwise, this paragraph states legal conclusions to which no response is required.

PARTIES

6. TIEC lacks knowledge or information sufficient to admit or deny the statements contained in this paragraph.

7. TIEC lacks knowledge or information sufficient to admit or deny the statements contained in this paragraph.

8. TIEC admits that MISO selected NEET Midwest as part of its competitive transmission planning process for the Hartburg-Sabine Junction Transmission Project. Otherwise, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph. The final sentence of this paragraph states legal conclusions to which no response is required.

9. TIEC admits that Lone Star Transmission has operated as a transmission-only utility in the ERCOT power region since 2013. Otherwise, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph. The final sentence of this paragraph states legal conclusions to which no response is required.

10. TIEC admits that NEET Southwest filed an application for a transfer of the CCN rights associated with the Jacksonville-Overton Line, and that that application is currently pending

before the PUCT in PUCT Docket No. 48071. Otherwise, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph. The final sentence of this paragraph states legal conclusions to which no response is required.

11. Admit.

12. TIEC admits that Defendants DeAnn T. Walker, Arthur C. D'Andrea, and Shelly Botkin are Commissioners of the PUCT. Among other functions, these Defendants are charged with regulating electric utilities doing business in Texas, including issuing certificates of convenience and necessity for new transmission facilities. The remaining statements in this paragraph contain legal conclusions to which no response is required.

JURISDICTION AND VENUE

13. TIEC admits that NextEra is asserting claims under 42 U.S.C. § 1983 and the Constitution of the United States. The remaining statements in this paragraph contain legal conclusions to which no response is required.

14. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

15. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

STATEMENT OF FACTS

16. Admit.

17. Admit.

18. Admit.

19. TIEC admits that the Electric Reliability Council of Texas (ERCOT) areas of Texas are not subject to FERC jurisdiction. The remaining statements in this paragraph contain legal conclusions to which no response is required.

20. TIEC admits that utilities are generally required to receive a CCN from the PUCT before building, owning, or operating transmission facilities in Texas.

21. This paragraph states legal conclusions to which no response is required. To the extent a response is required, TIEC denies the allegations in this paragraph.

22. TIEC admits that the Texas Legislature required the designation of certain Competitive Renewable Energy Zones (CREZ) in 2005 and that the primary purpose of that program was to encourage the transmission of wind energy from the western portion of the state. TIEC admits that this paragraph contains a quote from Commission Staff's Petition for *Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable Energy Zones*, PUC Docket No. 35665 (Mar. 30, 2009). TIEC admits that Lone Star Transmission was selected to build certain CREZ transmission facilities.

23. TIEC admits that various parties have argued that prior versions of PURA precluded the PUCT from granting CCNs to transmission-only utilities. TIEC lacks knowledge or information sufficient to admit or deny NextEra's allegations with respect to the intent of incumbent Texas utilities.

24. TIEC admits that this paragraph contains a quote from *Public Utility Commission of Texas v. Cities of Harlingen*, 311 S.W.3d 610 (Tex. App.—Austin 2010, no pet.). Otherwise, this paragraph states legal conclusions to which no response is required.

25. TIEC admits that Congress enacted the Federal Power Act in 1935. TIEC also admits that the Federal Power Act created the Federal Regulatory Energy Commission (FERC)

and that FERC has the authority to regulate transmission and wholesale sales of electricity in interstate commerce.

26. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

27. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

28. TIEC admits that FERC promulgated Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21540 (1996), in 1996. Otherwise, this paragraph states legal conclusions to which no response is required.

29. TIEC admits that FERC promulgated Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶ 61,285 (1999), in 1999. Otherwise, this paragraph states legal conclusions to which no response is required.

30. Admit.

31. TIEC admits that ERCOT's Nodal Protocols provide that the endpoint owner of existing transmission facilities will construct new transmission line projects in the ERCOT power region. TIEC also admits that the MISO and SPP Transmission Owner Agreements used to contain rights of first refusal. Otherwise, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

32. TIEC admits that FERC promulgated Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) ("Order No. 1000"), in July 2011, and that that order required the removal from FERC tariffs and agreements of rights of first refusal for certain new transmission facilities, but did not

require the removal of state rights of first refusal for those purposes. The third sentence of this paragraph states legal conclusions to which no response is required. With respect to the fourth sentence of this paragraph, TIEC admits that MISO and SPP removed their tariff-based rights of first refusal following the issuance of Order No. 1000.

33. This paragraph states legal conclusions to which no response is required.

34. This paragraph states legal conclusions to which no response is required.

35. TIEC admits that this paragraph contains a quote from Order No. 1000. Otherwise, the allegations contained in this paragraph state legal conclusion to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

36. TIEC admits that this paragraph contains a quote from Order No. 1000. Otherwise, this paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC denies the allegations contained in this paragraph.

37. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

38. TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

39. TIEC admits that this paragraph contains a quote from Order No. 1000. Otherwise, the allegations contained in this paragraph state legal conclusion to which no response is required. To the extent that any response is required, TIEC admits that Order No. 1000 does not limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.

40. TIEC admits that this paragraph contains a quote from the United States Court of Appeals for the District of Columbia Circuit's opinion in *South Carolina Public Service Authority v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Otherwise, this paragraph states legal conclusions to which no response is required.

41. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

42. TIEC admits that MISO and SPP removed federal right of first refusal provisions from their tariffs and agreements. TIEC also admits that MISO and SPP created competitive solicitation processes.

43. TIEC admits that MISO has developed a solicitation process for transmission projects. TIEC further admits that the costs of some MISO projects are allocated across all or a substantial part of the MISO region.

44. TIEC admits that this paragraph contains a quote from MISO's tariff. TIEC further admits that MISO's tariff recognizes state right-of-first-refusal laws. Otherwise, this paragraph states legal conclusions to which no response is required.

45. TIEC admits that in *Order on Rehearing and Compliance Filings*, 150 FERC ¶ 61,037 (2015), FERC permitted MISO to recognize state right-of-first-refusal laws and regulations. Otherwise, this paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

46. TIEC admits that this paragraph contains a quote from the concurring opinion of Norman Bay, the former Chairman of FERC, in *Order on Rehearing and Compliance Filings*, 150

FERC ¶ 61,037 (2015). Otherwise, this paragraph states legal conclusions to which no response is required.

47. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

48. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

49. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

50. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

51. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

52. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

53. TIEC admits that SPP revised its tariff and developed a solicitation process for transmission projects. TIEC admits that SPP eliminated federal rights of first refusal from its tariff. TIEC admits that SPP's tariff recognizes the effect of state laws that provide rights of first refusal

for transmission projects. To the extent that any additional response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

54. TIEC admits that this paragraph contains a quote from the concurring opinion of Norman Bay, the former Chairman of FERC, in *Southwest Power Pool, Inc.*, 151 FERC ¶ 61,045 (2015). Otherwise, this paragraph states legal conclusions to which no response is required.

55. TIEC admits that various parties, including TIEC, have argued that before the adoption of SB 1938, Texas law prevented the PUCT from issuing CCNs to non-incumbent transmission-only utilities in the non-ERCOT areas of Texas.

56. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

57. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

58. TIEC admits the allegations in this paragraph.

59. TIEC admits that this paragraph contains a quote from a PUCT declaratory order, and that the PUCT cited *Cities of Harlingen* in that order.

60. TIEC admits that it appealed the PUCT's declaratory order, along with SPS and ETI. On August 2, 2019, Texas' Third Court of Appeals dismissed that appeal as moot in light of the passage of SB 1938.

61. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

62. TIEC admits that House Bill 3995 and Senate Bill 1938 were introduced in March of 2019. Otherwise, this paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

63. TIEC admits that the Texas Senate Committee on Business & Commerce held a hearing on SB 1938 on April 2, 2019. TIEC admits that at that hearing, a representative for Oncor, CenterPoint Energy, AEP Texas, and Texas New Mexico Power testified in favor of the bill. TIEC admits that a representative for NextEra testified against that bill. The last sentence of this paragraph states legal conclusions to which no response is required. However, TIEC disputes the NextEra representative's characterization of Texas law prior to the passage of SB 1938. To the extent that any additional response is required to this paragraph, TIEC denies the allegations made therein.

64. TIEC admits that this paragraph contains a quote from the Texas House Committee on State Affairs' Report on House Bill 3995, but notes that NextEra has added emphases to that quote. TIEC admits that Representative Phelan said the quoted words in the last sentence of this paragraph during a legislative hearing. However, TIEC notes that Representative Phelan was describing the positions of other entities, and further notes that NextEra has added emphasis to his statement. To the extent that any additional response is required to this paragraph, TIEC denies the allegations made therein.

65. TIEC admits that the Bill was sent to the Governor on May 8, 2019. Otherwise, TIEC denies the allegations made in this paragraph.

66. Admit.

67. Admit.

68. TIEC admits that this paragraph quotes TEX. UTIL. CODE § 37.056(e)–(f). Otherwise, this paragraph states legal conclusions to which no response is required.

69. TIEC admits that this paragraph quotes TEX. UTIL. CODE § 37.056(g). Otherwise, this paragraph states legal conclusions to which no response is required.

70. Admit.

71. TIEC admits that this paragraph quotes a portion of TEX. UTIL. CODE § 37.154(a). Otherwise, this paragraph states legal conclusions to which no response is required.

72. This paragraph states legal conclusions to which no response is required.

73. This paragraph states legal conclusions to which no response is required.

74. This paragraph states legal conclusions to which no response is required.

75. This paragraph states legal conclusions to which no response is required.

76. TIEC admits that legislators argued that the bill would protect the PUCT's rate jurisdiction. TIEC admits that this paragraph contains a quote from the PUCT's brief in *Entergy Texas, Inc. v. Public Utility Commission of Texas*, No. 03-18-00666-CV (Tex. App.—Austin). Otherwise, this paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC denies the allegations in this paragraph.

77. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations made in this paragraph.

78. TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

79. TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

80. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

81. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

82. TIEC admits that MISO issued a request for proposals for the construction of a 500 kV transmission project in ETI's service territory in East Texas. Otherwise, this paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

83. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

84. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

85. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

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88. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

89. This paragraph states legal conclusions to which no response is required. To the extent that any response is required, TIEC lacks knowledge or information sufficient to admit or deny the allegations contained in this paragraph.

COUNT I

90. TIEC incorporates its answers and responses in the foregoing paragraphs as if fully set forth herein.

91. This paragraph states a legal conclusion to which no response is required.

92. This paragraph states a legal conclusion to which no response is required.

93. This paragraph states a legal conclusion to which no response is required.

94. This paragraph states a legal conclusion to which no response is required.

95. This paragraph states a legal conclusion to which no response is required.

96. This paragraph states a legal conclusion to which no response is required.

97. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

98. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

99. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

100. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

101. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

102. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

103. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

104. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

105. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

COUNT II

106. TIEC incorporates its answers and responses in the foregoing paragraphs as if fully set forth herein.

107. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

108. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

109. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

110. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

111. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

COUNT III

112. TIEC incorporates its answers and responses in the foregoing paragraphs as if fully set forth herein.

113. This paragraph states a legal conclusion to which no response is required.

114. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

115. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

116. This paragraph states a legal conclusion to which no response is required. To the extent that any response is required, TIEC denies the allegations made in this paragraph.

117. Admit.

PRAYER FOR RELIEF

118. TIEC denies that Plaintiffs are entitled to the relief requested in this paragraph.

119. TIEC denies that Plaintiffs are entitled to the relief requested in this paragraph.

120. TIEC denies that Plaintiffs are entitled to the relief requested in this paragraph.

121. TIEC denies that Plaintiffs are entitled to the relief requested in this paragraph.

AFFIRMATIVE DEFENSES

Without assuming the burden of proof as to the following (other than any burden imposed by law), TIEC further asserts:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

NextEra's claims are barred, in whole or in part, by the doctrines of estoppel and laches.

Third Defense

NextEra's Contract Clause claim is barred, in whole or in part, because Contract Clause claims are not actionable under 42 U.S.C. § 1983.

Fourth Defense

NextEra's Contract Clause claim is barred, in whole or in part, because NextEra expressly assumed the risk of legislative and regulatory changes by contracting in a heavily regulated industry.

* * *

TIEC reserves the right to modify its answers to the specific allegations set forth in the Complaint and/or to assert additional defenses as they may become known during the pendency of this action.

Dated: August 23, 2019

Respectfully submitted,

/s/ Michael McMillin

Katherine L. Coleman (*pro hac vice to be filed*)

State Bar No. 24059596

katie.coleman@tklaw.com

Michael McMillin

State Bar No. 24088034

michael.mcmillin@tklaw.com

Thompson & Knight LLP

98 San Jacinto Blvd., Suite 1900

Austin, Texas 78701

(512) 469.6100

(512) 469.6180 (Facsimile)

ATTORNEYS FOR
TEXAS INDUSTRIAL ENERGY CONSUMERS

CERTIFICATE OF SERVICE

On August 13, 2019, I filed the foregoing document with the Clerk of the 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, or alternatively, a copy will be served via electronic mail, U.S. Mail, or facsimile to:

<p><i>Counsel for Plaintiffs</i> Carlos M. Sires csires@bsflfp.com Evan M. Ezray eezray@bsflfp.com Stuart Harold Singer ssinger@bsflfp.com Boles Schiller Flexner LLP 401 East Las Olas Blvd., Suite 1200 Fort Lauderdale, Florida 33312</p>	<p><i>Counsel for Movant LSP Transmission</i> Kenneth A. Young Kenneth.Young@kirkland.com Anna G. Rotman Anna.Rotman@kirkland.com Sarah E. Williams Sarah.Williams@kirkland.com Tabitha J. De Paulo Tabitha.DePaulo@kirkland.com Kirkland & Ellis LLP 609 Main Street, Suite 4500 Houston, Texas 77002</p>
<p><i>Counsel for Plaintiffs</i> Jeffrey Mark Tillotson jtillotson@tillotsonlaw.com Tillotson Law 1807 Ross Avenue, Suite 325 Dallas, Texas 75201-3242</p>	<p><i>Counsel for Movant LSP Transmission</i> Paul D. Clement Paul.Clement@kirkland.com Erin E. Murphy Erin.Murphy@kirkland.com Applicants for Admission Pro Hac Vice Kirkland & Ellis LLP 1301 Pennsylvania Avenue, N.W. Washington, D.C. 20004</p>
<p><i>Counsel for Defendant</i> Attorney General and PUC Commissioners John R. Hulme John.Hulme@oag.texas.gov H. Carl Myers Carl.Myers@oag.texas.gov Office of the Attorney General P.O. Box 12548 Austin, Texas 78711-2548</p>	<p><i>Counsel for Movant Oncor Electric</i> John C. Wander jwander@velaw.com Thomas S. Leatherbury tleatherbury@velaw.com Winston P. Skinner wskinner@velaw.com Kevin W. Brooks kbrooks@velaw.com Vinson & Elkins LLP 2001 Ross Avenue, Suite 3900 Dallas, Texas 75201-2975</p>

/s/ Michael McMillin
Michael McMillin

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 and §
NEXTERA ENERGY TRANSMISSION §
SOUTHWEST, LLC, §

Plaintiff, §

v. §

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

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, §

and §

TEXAS INDUSTRIAL ENERGY §
CONSUMERS, §

Defendants.

ORDER

Before the Court is Texas Industrial Energy Consumers’ (TIEC’s) motion to intervene. **IT IS HEREBY ORDERED** that the motion is **GRANTED**. TIEC shall answer or otherwise respond to Plaintiffs’ Complaint on or before **Friday, August 23, 2019**. The caption of this matter shall be changed to include TIEC as a named Defendant, as reflected above.

SIGNED this _____ day of August, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE