UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

Plaintiffs,

v.

DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity,

Defendants.

Civil No. 1:19-cv-00626

PLAINTIFFS' OPPOSITION TO TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTIONS TO INTERVENE

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COMES NOW Plaintiffs NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission, LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest, LLC, (collectively "NextEra") and files this, its Opposition to the Motions to Intervene of Texas Industrial Energy Consumers' ("TIEC") [ECF 68] and, in support thereof, would show as follows:

INTRODUCTION AND SUMMARY

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

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

Intervention, if allowed, should be subject to conditions that prevent delaying this litigation (including NextEra's request for a preliminary injunction) and ensure efficient resolution of NextEra's claims. Accordingly, NextEra requests that as a condition of allowing intervention, the Court require that: (1) intervenors comply with the briefing schedule set for NextEra's motion for

a preliminary injunction and not seek to delay or extend it; (2) intervenors not be allowed to participate in the preliminary injunction hearing beyond filing briefing; and (3) intervenors must submit joint briefs on all issues where their interests align. These conditions will allow proposed intervenors to fully protect their interests in this suit while at the same time ensuring that NextEra receives prompt review of its request for a preliminary injunction without the case becoming "fruitlessly complex or unending." *See Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969).

ARGUMENT

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

First, it is reasonable to require all intervenors to follow the deadlines and briefing schedule established by the Court. *See Corrigan v. Bernhardt*, 1:18-CV-512-BLW, 2019 WL 2717970, at

*2 (D. Idaho June 27, 2019) (allowing intervention on the condition that the intervenor "comply with the same deadlines").

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

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

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

That approach makes good sense. For one, as the Court has emphasized, "[t]ime is at a premium" in presenting at the preliminary injunction hearing. (*Id.* at 11:15-16.) *See United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001) (noting that courts can impose "reasonable limitations on . . . participation to ensure the efficient adjudication of the litigation"). TIEC has not justified the Court changing what it said about the participation of intervenors in a preliminary injunction proceeding. Its silence on this point is sensible because all the preliminary injunction seeks is to preserve the status quo during the pendency of the dispute.[1] To the extent

[1] Tellingly, all TIEC says about the preliminary injunction hearing is that its 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." *See* Motion to Intervene at 11 [Dkt 68].

TIEC has any unique interests in the preliminary injunction hearing, it can fully protect those interests with a written submission, especially because the State will no doubt adequately represent TIEC's interests at the preliminary injunction hearing. *See United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002) (no error in denying evidentiary hearing when party still had "meaningful and sufficient opportunity" to present); *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1396 (10th Cir. 2009) (courts can lessen delays caused by intervenors by denying evidentiary hearings).

Third, it is reasonable to ask TIEC to submit joint briefs when its interests align with other intervenors. When, as here, there are many similarly-situated intervenors, "excessive briefing" is a cogent risk to efficient case management. *Earthworks v. U.S. Dept. of Interior*, CIV.A. 09-01972 HHK, 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010). More specifically, "redundant briefing on substantially overlapping issues" can cause "undue delay and confusion." *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 10 (D.D.C. 2018). In these circumstances "courts have used their discretion to impose conditions that help to promote the fair and expeditious resolution of the action[,]" *id.*, often by requiring aligned intervening parties to file joint briefs. *See, e.g.*, *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1113 (N.D. Cal. 2017); *Planned Parenthood Minn., N. Dakota, S. Dakota v. Daugaard*, 836 F. Supp. 2d 933, 943 (D.S.D. 2011); *Earthworks v. U.S. Dept. of Interior*, CIV.A. 09-01972 (HHK), 2010 WL 3063139, at *2 (D.D.C. Aug. 3, 2010); *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, CV-07-8164PCT-DGC, 2008 WL 2275562, at *2 (D. Ariz. June 3, 2008).

TIEC does not say that what those interests are or how those interests would be impacted by a preliminary injunction that simply preserves the status quo.

Here, TIEC's purported interest in this case substantially overlaps with the incumbent Texas utilities. Indeed, TIEC claims a derivative interest in preserving those utilities favored status as local monopolies under SB 1938. In this context, there is no reason to speak that TIEC and the incumbent utilities cannot speak with one voice.

CONCLUSION

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

Dated: August 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2019, a true and correct copy of the foregoing document was served via ECF on all counsel of record who have accepted ECF filing and via first-class to the following non-CM/ECF participants:

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