

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

NEXTERA ENERGY CAPITAL HOLDINGS, )  
 INC., NEXTERA ENERGY TRANSMISSION )  
 MIDWEST, LLC, LONE STAR )  
 TRANSMISSION, and NEXT ERA 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

**SOUTHWESTERN PUBLIC  
 SERVICE COMPANY’S  
 PARTIALLY OPPOSED  
 MOTION TO INTERVENE**

Southwestern Public Service Company (“SPS”) respectfully moves to intervene in this action as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, in the alternative, via permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1). The Declaration of Jarred J. Cooley, further detailing SPS’s interests in this litigation, is attached as Exhibit 1. To comply with Rule 24(c)’s requirement that this motion be accompanied by a proposed pleading, a Proposed Answer is attached as Exhibit 2. However, if intervention is granted, SPS intends to move to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). A proposed order follows this motion.

Pursuant to Local Rule CV-7(i), SPS confirms that it has conferred in good faith with the existing parties to the case. The State Defendants do not oppose this motion. Plaintiffs

(collectively, “NextEra”) stated that they would not oppose this motion so long as SPS (1) would not seek to alter or modify the current schedule; (2) would not seek the right to participate in the preliminary injunction hearing; and (3) agreed to file joint briefs with parties with similar or the same interests, by which SPS understands NextEra to mean any other utility intervenors.

SPS readily agrees to the first condition. It intends to file a motion to dismiss or, if this motion to intervene is still pending, a proposed motion to dismiss, on August 23, 2019, the date set by the Court for the State Defendants’ Answer or Rule 12 motion. But SPS cannot agree to the other conditions demanded by Plaintiffs. As a business that would be directly and adversely affected by a preliminary injunction, SPS has a strong interest in opposing NextEra’s motion for preliminary injunctive relief, and will file a brief (or proposed brief) in opposition on August 23, 2019, consistent with the Court’s schedule. SPS also would welcome the opportunity to present argument at the September 10, 2019 hearing. SPS will endeavor to avoid burdening the Court with unnecessarily duplicative briefing, but as a party with direct and unique interests in this proceeding, it cannot agree to NextEra’s categorical demand that all papers be filed jointly with other intervenors. Accordingly, SPS anticipates that NextEra will oppose this motion.

### **BACKGROUND**

SPS is an electric utility engaged in the generation, purchase, transmission, distribution, and sale of electricity, with operations in the States of Texas and New Mexico. Exhibit 1 ¶¶ 2-4. Its Texas service territory lies in the Panhandle and South Plains portion of the State. *Id.* ¶ 2. Within that service territory, it possesses an exclusive franchise on the provision of electric service to retail customers, such as homes and businesses. *Id.* ¶ 3. Its retail rates are regulated by the Public Utility Commission of Texas.

SPS additionally operates, maintains, and constructs high-voltage transmission lines within its service territory. *Id.* ¶¶ 1, 2. The planning process for the construction of high-voltage transmission lines in that area of the State is administered by a Regional Transmission Organization known as Southwest Power Pool, Inc. (“Southwest”). *Id.* ¶ 5. Consistent with the terms of a tariff approved by the Federal Energy Regulatory Commission (“FERC”), Southwest engages in transmission planning for an area covering all or parts of 14 states. Under Southwest’s current FERC-approved tariff, SPS is permitted to propose transmission projects to Southwest that will provide regional benefits, for which costs can be allocated across Southwest’s territory pursuant to FERC-approved formulas. If Southwest agrees that those projects warrant regional cost allocation, it approves their development and selects the entity authorized to develop it. *Id.* ¶¶ 6-8.

In making that selection, Southwest’s tariff expressly accommodates state laws, including state-law rights of first refusal, placing limits on who is permitted to develop the project. *See* Compl. ¶ 53; *Southwest Power Pool, Inc.*, 151 FERC ¶ 61,045 at ¶ 29, 2015 WL 1736849, at \*7 (Apr. 16, 2015) (“...it is appropriate for [Southwest] to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process”). This accommodation acknowledges the long history of close state regulation of utilities, the interest of many States in preserving the regulated utility model, and the power expressly reserved to States by the Federal Power Act to control the siting of transmission facilities. The combination of Southwest’s FERC-approved tariff and the Texas statute challenged by NextEra together give SPS the right of first refusal to build transmission projects proposed for its service territory, for which the costs will be allocated regionally by Southwest.

The Complaint in this case challenges the Texas statute that gives SPS a right of first refusal to build transmission lines that interconnect with its existing transmission facilities. According to the Complaint, SPS is one of a small number of intended beneficiaries of this statute: the Complaint alleges that the law under challenge was “meant to reserve business opportunities and the opportunity to serve Texas customers ... only to existing electric utilities that currently own facilities in Texas.” Compl. ¶ 1; *id.* at ¶ 3 (“This law was intended to benefit local entities—giving electric utilities that already operate in Texas the sole right to build transmission lines with an end point in Texas...”); *id.* ¶ 74 (alleging that the statute “effectively ousts NextEra ... for the benefit of a defined few utilities that already own transmission and distribution facilities in Texas.”). Indeed, the Complaint mentions SPS by name as one of the entities it alleges to be the intended beneficiary of the Texas statute, *id.* ¶ 56, and alleges that SPS was one of the “Texas utilities [that] turned to the Legislature” to advocate passage of the statute. *Id.* ¶¶ 60-61.

### ARGUMENT

SPS is entitled to intervene as of right to defend the constitutionality of a statute that the Complaint alleges was enacted for SPS’s benefit. SPS has a concrete and direct interest in preserving the existing statutory framework, and would face concrete injury if the challenged statute were invalidated.

SPS also should be allowed permissive intervention. This case involves the interaction of the Texas statute with three distinct transmission planning regions, each with its own regulatory framework: Southwest, which includes the Panhandle and South Plains areas of the State; Midcontinent Independent System Operator (“Midcontinent”), which includes a portion of east Texas; and the Electric Reliability Council of Texas (“ERCOT”), which covers the bulk of the State. Complaint ¶¶ 18-19. Southwest and Midcontinent are each governed by their own FERC-

approved tariffs, and each runs its own transmission planning process and has its own cost allocation methodology. *See* Complaint ¶ 11. ERCOT, meanwhile, is not FERC-regulated, and its grid does not carry electricity in interstate commerce. *Id.* ¶ 19. SPS can provide the Court with specialized knowledge of Southwest’s planning process and a unique perspective as a utility within that region.

#### **I. SPS is Entitled to Intervene as of Right.**

SPS has a right to intervene in this case under Fed. R. Civ. P. 24(a). The Fifth Circuit has instructed courts to consider four criteria when evaluating a motion under Rule 24(a): (1) whether the motion is “timely;” (2) whether the movant “has an interest relating to the property or transaction that is the subject of the case;” (3) whether the “disposition of the case may practically impair or impede its ability to protect its interest;” and (4) whether “it is inadequately represented by the existing parties.” *Adam Joseph Res. v. CNA Metals Ltd.*, 919 F.3d 856, 865 (5th Cir. 2019); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994). The Fifth Circuit has emphasized that “Rule 24 is to be liberally construed,” *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996), and intervention should be allowed, as here, “where no one would be hurt and greater justice could be attained,” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); *accord Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm’n*, 834 F.3d 562, 565 (5th Cir. 2016). Here, SPS easily satisfies all four factors.

***Timeliness.*** This motion is timely. The Complaint was filed a little over one month ago. SPS has filed its motion to intervene several weeks before the August 23, 2019 deadline for an Answer or Rule 12 motion, and intends to file a Rule 12 motion and opposition to the motion for preliminary injunction on August 23, 2019, the same day State Defendants must file. SPS is

willing to abide by the schedule already set by the Court. Moreover, no discovery has taken place. There is no prejudice to any party to allowing intervention at this stage of the case.

Accordingly, SPS easily satisfies the timeliness requirement. Indeed, courts regularly find intervenors to be timely even when they move after discovery has commenced. *See Wal-Mart*, 834 F.3d at 565 (finding that intervenor was timely when it moved to intervene “before discovery progressed[,] and because it did not seek to delay or reconsider [earlier] phases of the litigation”); *id.* (collecting cases).

***Interest in the Case.*** SPS has an interest relating to the property or transaction at issue in this case. The Complaint itself alleges as much, asserting that the statute under challenge was passed to benefit SPS and the small number of other Texas electric utilities, purportedly to protect them from interstate competition. Complaint ¶¶ 1, 3, 74. The Fifth Circuit has held that “the intended beneficiary of a government regulatory system” has “a legally protectable interest” sufficient for intervention as of right. *Wal-Mart*, 834 F.3d at 569.

The Fifth Circuit’s decision in *Wal-Mart* is directly on point. There, an out-of-state liquor distributor challenged Texas laws requiring liquor retailers to obtain a package store permit, and limiting the number of package store permits that could be held by a single entity. The plaintiff alleged that the scheme was intended to protect in-state package stores from interstate competition. A trade group representing package store permit holders moved to intervene to defend the law. The district court denied intervention as of right, and the Fifth Circuit reversed. It held that “the Association has a legally protectable interest in the regulatory scheme because, according to [the plaintiff], the Association is the scheme’s beneficiary.” *Id.* at 566. The court also noted its agreement with cases from other circuits recognizing that “associations representing licensed

business owners have a right to intervene in lawsuits challenging the regulatory scheme that governs the profession.” *Id.* at 567.

SPS’s position in this case is virtually identical to that of the trade group in *Wal-Mart*. SPS is a regulated business that seeks to defend a regulatory scheme that governs its business, which the plaintiff alleges was enacted for SPS’s benefit. Complaint ¶¶ 1, 3, 74; *see also Texas v. United States*, 805 F.3d 653, 660 (5th Cir. 2015) (finding that women who qualified for deferred action status had a sufficient interest to warrant intervention in a lawsuit challenging the federal government’s deferred action policies); *Flying J Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (permitting intervention by association of independent gas station owners seeking to defend legislation that allegedly limited competition, because the owners were “the statute’s direct beneficiaries”).

Moreover, as detailed in Exhibit 1, SPS would suffer an injury-in-fact if NextEra succeeded in invalidating the statute at issue. Exhibit 1 ¶ 9. The Fifth Circuit has previously held that “a movant who shows standing is deemed to have a sufficiently substantial interest to intervene.” *LULAC v. City of Boerne*, 659 F.3d 421, 434 n.17 (5th Cir. 2011); *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 737-38 (5th Cir. 2016) (holding that an intervenor association has standing to defend an economic regulation that benefits its members). Accordingly, the second factor is satisfied.

***Action May Impair/Impede the Interest.*** The third factor is likewise satisfied: adverse disposition of this case would directly impair and impede SPS’s interest. NextEra seeks to enjoin operation of the statute that benefits SPS, and that NextEra claims was intended to benefit SPS. *See* Compl. ¶ 119 (requesting permanent injunction); *id.* ¶ 121 (requesting preliminary injunction). If SPS is not permitted to intervene, it will have no other means to protect its interest. Indeed, SPS

is in the process of studying specific transmission upgrades in its service territory which, if approved by Southwest, SPS will have the exclusive right to build under the present framework. See Exhibit 1 ¶¶ 6-9. But if NextEra succeeds in its suit, SPS will no longer have that right.

***Adequate Representation.*** SPS also satisfies the fourth factor because its interests will not be adequately represented by the existing parties. As an initial matter, the burden to show inadequate representation is only “minimal”: the movant “need only show that ‘the representation may be inadequate.’” *Wal-Mart*, 834 F.3d at 569 (quoting *Texas*, 805 F.3d at 662) (emphasis in original).

SPS is not adequately represented by the State Defendants. For one thing, its interest is in its own business operations, which is “narrower than the [State Defendants’] broad public mission.” *Id.* at 569; see *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 425 (5th Cir. 2002) (inadequate representation where “the public interest” and “economic interests ... may diverge in the future,” even if the intervenor and existing party presently agree on the merits of the substantive issues). Moreover, because the State Defendants will seek to defend the statute in all areas of Texas—Southwest, Midcontinent, and ERCOT—they will not have any interest in advancing SPS- and Southwest-specific arguments concerning the statute’s legality. See *Wal-Mart*, 834 F.3d at 569 (finding inadequate representation because “[t]he Commission seeks to defend all portions of the litigation, which limits the range of arguments it can advance.”). Southwest’s planning process is unique and distinct from the planning processes in other areas of Texas and is governed by a federally approved tariff that only applies to entities in the Southwest Region subject to that tariff, which specifically accommodates state laws such as those challenged here. Compl. ¶¶ 19, 53. Nor are the State Defendants (or other electric utility intervenors) likely to emphasize, in their ten-page brief opposing a preliminary injunction, Southwest-specific harms

that would arise from such relief. After all, Southwest covers only a relatively small and less densely populated part of the State.

SPS also would not be adequately represented by another electric utility intervenor. No other proposed utility intervenor is active in the Southwest region. Yet an injunction would significantly impact SPS's rights under current state law as it applies in the Southwest region. Exhibit 1 ¶ 9. Each of the other utility intervenors are focused on defending Senate Bill 1938 as applied to their own respective planning regions—Midcontinent, for movant-intervenor Entergy Texas, Inc., and ERCOT, for movant-intervenor Oncor Electric Delivery Company LLC. *See* ECF No. 50 at 8-9 (“Entergy’s objective is to ensure” Senate Bill 1938’s application “within the portions of Texas that lie within the [Midcontinent] RTO” and under that region’s FERC-approved tariff); ECF No. 49 at 1-2, 6, 8 (explaining Oncor’s interest in its “facilities[’] ... end points,” which are in ERCOT and are not subject to FERC jurisdiction at all). Yet SPS’s interest is in defending the statute as applied to the Southwest region, governed by its own transmission planning rules and FERC-approved tariff. In sum, “[g]iven the broad policy favoring intervention” and “the differences in the objectives” of SPS and the State Defendants, SPS has met its “minimal” burden to establish that “it *may* be inadequately represented” by any existing party. *Wal-Mart*, 834 F.3d at 569 (emphasis added).

## **II. Alternatively, the Court Should Grant Permissive Intervention.**

In the alternative, this Court should grant SPS permissive intervention under Rule 24(b)(1), which provides that, “[o]n 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.” Fed. R. Civ. P. 24(b)(1). This provision is “construed liberally” and does not even require “the intervenor [to] ... have a direct personal or pecuniary interest in the subject of the litigation.” *Newby v. Enron*

*Corp.*, 443 F.3d 416, 422-23 (5th Cir. 2006) (quoting in part *SEC v. U. S. Realty & Improv't Co.*, 310 U.S. 434 (1940)). Rule 24(b)(3) also directs this Court to consider possible resulting delay or prejudice.

As set forth above, this motion is timely. An Answer or Rule 12 motion has not yet been filed, and no discovery has taken place. SPS does not seek to disturb the schedule set by the Court for NextEra's preliminary injunction motion or the State's Answer deadline. Thus, intervention would not impede efficient adjudication or prejudice any party.

SPS also has a defense that shares with the main action a common question of law and fact: namely, SPS, which has a direct pecuniary interest in the ongoing vitality of the statute challenged by NextEra, seeks to defend that statute on the ground that it is permitted by the Commerce Clause.

SPS's participation will also assist the Court's resolution of the case. NextEra's Complaint is complex, because it implicates the application of the right-of-first-refusal statute in three separate electric regions: Southwest, Midcontinent, and ERCOT. Each is governed by its own rules. SPS has detailed knowledge of the transmission planning and cost allocation regime in the Southwest region. *See generally* Exhibit 1. Accordingly, this Court should permit SPS's intervention.

### CONCLUSION

For the foregoing reasons, Southwestern Public Service Company respectfully requests that the Court grant it intervenor status. Because SPS intends to file a Rule 12(b)(6) motion to dismiss on August 23, 2019 (or proposed motion to dismiss if this motion is still pending), it respectfully requests that the Court treat Exhibit 2 as a Proposed Answer to satisfy the technical requirements of Rule 24(c), but not order that Answer to be filed at this time.

Dated: August 8, 2019

Respectfully submitted,

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*Counsel for Southwestern Public Service Company*

**CERTIFICATE OF CONFERENCE**

The State of Texas Defendants do not oppose this motion. The NextEra plaintiffs do not oppose the intervention so long as the intervening party does not seek to alter or modify the current schedule; does not seek the right to participate in the Preliminary Injunction hearing; and agrees that parties with similar or the same interests be required to file joint briefs.

So certified on this 7th day of August, 2019.

/s/ Ron Moss

**CERTIFICATE OF SERVICE**

I hereby certify that on the 8<sup>th</sup> day of August, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Ron Moss

**UNITED STATES DISTRICT COURT  
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CIVIL ACTION NO.  
1:19-cv-00626-LY

Hon. Judge Lee Yeakel

**ORDER GRANTING SOUTHWESTERN PUBLIC SERVICE COMPANY’S  
MOTION TO INTERVENE**

This matter is currently before this Court on the motion of Southwestern Public Service Company (“SPS”) to intervene as a defendant in the above-captioned case as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure, or, in the alternative, via permissive intervention pursuant to Rule 24(b)(1). In light of the record, and finding that SPS has satisfied the requirements for intervention under Rule 24, the motion to intervene is GRANTED.

Dated: \_\_\_\_\_, 2019

\_\_\_\_\_  
Hon. Judge Lee Yeakel