

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC, and)	CASE NO. CVCV060840
SOUTHWEST TRANSMISSION, LLC,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
THE STATE OF IOWA, IOWA UTILITIES)	
BOARD, GERI D. HUSER, GLEN)	
DICKINSON and LESLIE HICKEY,)	PLAINTIFFS' COMBINED
)	RESISTANCE TO APPLICATIONS
Defendants.)	TO INTERVENE

Plaintiffs LS Power Midcontinent, LLC and Southwest Transmission, LLC, by and through the undersigned, hereby resist ITC Midwest LLC's ("ITC Midwest") and MidAmerican Energy Company's ("MidAmerican") (collectively "the Applicants") Applications to Intervene, which must be denied because the Applicants' interests are already adequately represented and their presence in the case would not serve the purpose of intervention.

PRELIMINARY STATEMENT

On October 14, 2020, Plaintiffs filed their Petition in this matter requesting the Court declare Division XXXIII of H.F. 2643 unconstitutional and enjoin its enforcement. The State of Iowa ("the State"), the Iowa Utilities Board ("IUB"), IUB Chair Geri Huser, Legislative Services Agency Director Glen Dickinson and Iowa Code Editor Leslie Hickey are named Defendants and are resisting Plaintiffs' Petition.¹ On November 17, 2020, MidAmerican and ITC Midwest filed separate applications for intervention, along with simultaneous answers to Plaintiffs' Petition and

¹ Huser, Dickinson and Hickey were named in their official capacities.

joinders to Defendants’ pending Motion to Dismiss.² Applicants fail to state any valid reason to allow their intervention in this matter and their applications must be denied.

ARGUMENT

Plaintiffs are challenging the enforcement of protectionist and unconstitutional legislation that deprives Plaintiffs of their ability to participate in the electrical transmission market. Applicants fail to provide the Court any reason why they are needed in this matter when all relevant parties necessary to litigate and defend their alleged interests are already named and participating in this case.

Applicants argue they should be allowed to intervene as a matter of right. To do so, Applicants must either point to “a statute confer[ring] an unconditional right to intervene,” or “claim[] an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, **unless the applicant’s interest is adequately represented by existing parties.**” Iowa R. Civ. P. 1.407(1) (emphasis added).³ Applicants do not identify any statute conferring an unconditional right to intervene in this matter.

² As more stated more fully in Plaintiffs’ Combined Motion to Strike Applicants’ Joinders to Motion to Dismiss, the Applicants’ joinder motions must be stricken and dismissed because they are untimely and improper.

³ Applicants assert they have a sufficient interest in this matter to confer standing because whether the Court declares the legislation unconstitutional and restrains its enforcement could affect “hypothetical projects” Applicants may wish to pursue or “could” affect their facilities sometime in the future. ITC Midwest Application ¶¶ 5-6. Though Plaintiffs disagree their standing in this matter is merely based on hypothetical projects as Defendants allege in their Motion to Dismiss, *see* Plaintiffs’ Resistance to Motion to Dismiss, if the Court agrees the Applicants have standing and allow intervention, then the Court must equally hold Plaintiffs have standing and deny the Defendants’ pending Motion to Dismiss.

Applicants also fail to show they are not already adequately represented in this challenge to transmission legislation where the State, the IUB, IUB Chair, Legislative Services Agency Director and Iowa Code Editor are named Defendants seeking the same result as Applicants. *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 465 (Iowa 1995) (affirming denial of application to intervene where “there was no indication [party] would not adequately represent their concern”); Iowa R. Civ. P. 1.407(1)(b). “In this attack on the facial unconstitutionality of a statute adopted by the state legislature and signed by the state governor, the state as a sovereign body politic was the real party in interest.” *Baker v. Wade*, 743 F.2d 236, 241-42 (5th Cir. 1984). Applicants have the burden to prove Defendants are not adequately representing their interests and “[t]he burden is greater if the named party is a government entity that represents interests common to the public.” *F.T.C. v. Johnson*, 800 F.3d 448, 452 (8th Cir. 2015). “We presume that the government entity adequately represents the public, and we require the party seeking to intervene to make a ***strong*** showing of inadequate representation.” *Id.* (emphasis added). Applicants are presumed to be adequately represented where they have “the same ultimate objective as a party to the suit,” and Applicants must show “adversity of interest, collusion, or nonfeasance” to overcome this presumption. *Baker*, 743 F.2d at 240-41.

Courts routinely hold the State is the proper party to defend proposed or recently enacted legislation against constitutional challenges, including single subject matter claims, and adequately represents all citizens’ interests, including those who benefit from the legislation. *Id.* at 241-43; *Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985); *McLean v. State of Ark.*, 663 F.2d 47, 48 (8th Cir. 1981); *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212-13 (D. Nev. 2009) (in single-subject matter challenge, Court held applicants that would allegedly benefit from legislation were

already adequately represented by the State in defending the act); *Magee v. Boyd*, 175 So. 3d 79, 140-42 (Ala. 2015) (same).

Applicants do not allege Defendants are colluding with Plaintiffs or have committed some malfeasance necessitating Applicants's intervention. Applicants merely claim they may offer better arguments in favor of the legislation because they are somehow much more experienced with electrical transmission legislation than the State or IUB. Claims of greater experience or conviction to litigate the matter (than the Attorney General) are not sufficient to overcome the presumption Applicants are adequately represented:

The IPC suggests that it is the principal proponent of HB 1399 and that the defendants, while “honorably committed to their duty of defending duly enacted state legislation ... cannot match the conviction and thorough knowledge of the subject area held by the proposed intervenors.” A subjective comparison, however, of the conviction of defendants and intervenors is not the test for determining adequacy of representation.

Keith, 764 F.2d at 1270; *Baker*, 743 F.2d at 243; *PEST Comm.*, 648 F. Supp. 2d at 1213-14 (holding argument applicants had more specific interest at stake in favor of legislation and more experience with the subject matter was not sufficient to overcome presumption because applicants presented essentially same argument as the State and the State was always involved in such challenges).

Applicants cannot simply say they would make additional or better arguments than the State in defending the legislation. “A difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of adequate representation.” *Johnson*, 800 F.3d at 452 (quotation omitted). “It is not enough to show that the movant could bring additional, cumulative arguments to the table; there must be actual divergence between the state's position on the primary issue and the potential intervenor's position.” *Helgeland v. Wis. Municipalities*, 724 N.W.2d 208, 221 (Wis. Ct. App. 2006), *aff'd in Helgeland v. Wis. Municipalities*, 745 N.W.2d 1 (Wis. 2008); *Environmental Def. Fund, Inc. v. Higginson*, 631 F.2

738, 740 (D.D.C. 1979). There is no divergence between Applicants' goals and the State's. *Id.* Indeed, Applicants' joinder to Defendants' Motion to Dismiss provides *no* diverging or additional arguments, demonstrating not only that Applicants have nothing different to add in this matter, but are "content to rely" on the State's efforts. *Baker*, 743 F.2d at 243; *PEST Comm.*, 648 F. Supp. 2d at 1213 (rejecting application where applicants "present the same essential arguments" as the State in single subject matter challenge); *Magee*, 175 So. 3d at 141 (same). Because Applicants fail to make a strong showing that the Defendants cannot adequately represent their interests, they cannot intervene in this case as a matter of right.

Further, permissive intervention is unnecessary and unwarranted. "When intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996). The Applicants have the same claims and goals as those who already adequately represent them, which "diminishes" any need for permissive intervention. *Magee*, 175 So. 3d at 142. Adding Applicants as parties would only "unnecessarily encumber the litigation." *PEST Comm.*, 648 F. Supp. 2d at 1214. This would not serve the purpose of intervention and Applicants' request for permissive intervention must be denied. *Minar*, 540 N.W.2d at 465 ("Litigation would not be reduced by intervention, and Melissa's presence in the lawsuit as a party would have done little to assist in the efficient disposition of the case.").

CONCLUSION

Allowing the Applicants to insert themselves into this matter is unnecessary and would not promote efficiency. Applicants are already adequately represented by the State and have made no

offering to overcome that strong presumption. Plaintiffs respectfully request the Court deny ITC Midwest's and MidAmerican's applications for intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on November 30, 2020, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System which will send a notice of electronic filing to the following:

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