

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC and
SOUTHWEST TRANSMISSION, LLC,

Plaintiffs,

v.

THE STATE OF IOWA, IOWA UTILITIES
BOARD, GERI D. HUSER, GLEN
DICKINSON and LESLIE HICKEY,

Defendants.

Case No. CVCV060840

**MIDAMERICAN ENERGY
COMPANY'S REPLY TO
PLAINTIFFS' RESISTANCE TO
APPLICATION TO INTERVENE**

COMES NOW Applicant, MidAmerican Energy Company ("MEC"), who, in support of its reply to Plaintiffs' resistance to its application to intervene in this action, states as follows:

ARGUMENT

Plaintiffs' resistance concedes that MEC's application to intervene is timely, that MEC has an adequate interest to intervene as of right and MEC is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. See Iowa Rule of Civil Procedure 1.407(1)(b).

The only exception taken by Plaintiffs to intervention is adequacy of representation by the State. Plaintiffs' position is not well-taken.

A. MEC's Interest Will Not Be Adequately Represented by the State.

The comparison-of-interest test is used to analyze the adequacy of representation element when a governmental entity is defending a constitutional or statutory challenge. See *Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir.2004).

An instructive Iowa case applying this standard occurred in *Great Lakes Communication Corp. v. Iowa Utilities Board*, 2009 WL 3806176 (N.D. Iowa). In that case, the comparison-of-interest test was applied to allow competing utilities to intervene as of right due to their economic interest which the Iowa Utility Board (“IUB”) could not adequately represent even though the State had an interest in the general citizenry. *Id.* at *5.

Like MEC here, Qwest and Sprint argued their interests were not represented adequately by the IUB and the long distance carriers had a financial interest in the outcome in the matter that the IUB did not have. Like the plaintiffs here, it was claimed that the proposed intervenors’ financial interests in the outcome were not sufficient to require intervention as of right and that the IUB was capable of making every argument on the merits that Qwest and Sprint could make.

The court considered the arguments of the parties and the proposed intervenors, both in the abstract and in light of the specific facts of this case, and found that Qwest and Sprint were entitled to intervene as of right because there was no question that Qwest and Sprint had a present and future interest in the outcome of this litigation, that their interests went beyond the general public interest represented by the IUB defendants, and that if the court granted the requested relief, Qwest and Sprint would be impacted directly by such a decision. See also *Center for Biological Diversity v. U.S. Department of State*, 2011 WL 5909488 (D. Neb.) (court held, in a challenge to Keystone XL Pipeline project, that even though a gas company and the federal defendants had similar interests in defending against the plaintiffs’ claims, their interests diverged with respect to gas company’s commercial and contractual interests in seeking a speedy and favorable resolution to the litigation and the court acknowledge that the gas company was intimately familiar with the studies, reports, and procedures involved in the disputed transboundary permit process and had a great monetary incentive in keeping this litigation moving forward toward resolution); *Defenders*

of Wildlife v. North Carolina Department of Transportation, 281 F.R.D. 264, 269 (E.D. N.C. 2012) (where claim was brought against government entities and related officials arising from government's plans to replace a bridge in North Carolina, court found public utility company's interests were not adequately represented by government entities and related officials because utility had greater understanding of expense of providing electricity to a certain area than government entities, it could argue more vigorously how such expenses affected determination regarding feasible alternatives to bridge, and while government's interests were public in general, utility would advocate primarily for its approximately 7,500 customers who lived and worked in certain area); *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (government's representation of the public interest may not be "identical to the individual parochial interest" of a particular group just because "both entities occupy the same posture in the litigation.").

MEC has an economic interest as an owner of such transmission lines and to exercise a right of first refusal provided by Iowa Code §478.16, has a strong interest in maintaining any transmission line that attaches to its facilities, and has a distinct economic interest in serving its customers. MEC is also intimately familiar with studies, reports, and procedures of Midcontinent Independent System Operator ("MISO") and Southwest Power Pool ("SPP")--the non-governmental agencies that plan expansion of transmission lines. MEC has a commercial interest in seeking a speedy and favorable resolution of the litigation. The State, through the IUB, only has a regulatory interest and does not have any commercial or economic interest in this matter.

MEC's position on lack of adequate representation has been aptly summed up by another court in Iowa:

IUB is a government agency that adequately represents the public's interest, the intervening [utilities] have shown that they have peculiar interests that are distinct from

the public interest in available, efficient, economical telecommunications services that the IUB can be expected to protect. The [utilities'] interests are unique operational, competitive, and financial interests.

Aventure Communications Technology, L.L.C. v. Iowa Utilities Board, 734 F. Supp. 2d 636, 651 (N.D. Iowa 2010). For these reasons, this court should grant MEC's application to intervene in this matter as of right.

B. Plaintiff's Authority is Distinguishable

The principal cases cited by Plaintiffs are distinguishable. Those cases involved attempts to intervene when the State is a party in a matter involving *social* (but not economic) policy.

Keith v. Daley, 764 F.2d 1265, 1270 (7th Cir. 1985) (abortion rights); *Helgeland v. Wisc. Municipalities*, 724 N.W.2d 208, 221 (Wisc. 2008) (same sex marriage); see also *Baker v. Wade*, 743 F.2d 236, 241-42 (5th Cir. 1984) (criminal statute); *McLean v. State of Arkansas*, 663 F. 2d 47, 48 (8th Cir. 1981) (creationism taught in schools); *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212-13 (D. Nev. 2009) (ballot referendums/initiatives); *State ex rel Miles v. Minar*, 540 NW2d 462, 465 (Iowa App. 1995) (child support claim by former wife).

Only two cases cited by Plaintiffs involved economic matters, but neither involved the potential for direct competition with the plaintiff and neither involved utility companies that are regulated by the State. See *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996) (trade association attempted to intervene); *FTC v. Johnson*, 800 F. 3d 448, 452 (8th Cir. 2015) (two consumers attempted to intervene).

This distinction is significant. Courts recognize when an application for intervention is pending that the State can adequately address social policy, but economic rights held by an applicant are different, particularly a regulated utility company. For that reason, courts have

routinely permitted an economically impacted utility company to intervene to defend its commercial and economic rights.

C. Alternative Request

To the extent the court would not allow intervention as of right, permissive intervention is proper. MEC incorporates arguments made by ITC Midwest in its reply.

CONCLUSION

For these reasons, the court should grant MEC's application to intervene.

/s/Stanley J. Thompson
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on December 10, 2020 by:

- FAX
 Hand Delivered X Email
 Federal Express X Other: ECF Filing

Signature: /s/ Stanley J. Thompson