

MOTION FILED
MAY 9 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 82, Original

THE STATE OF NEW MEXICO,
Plaintiff,

THE STATE OF ARKANSAS,
Applicant for Intervention
and

THE COMMITTEE ON POWER FOR THE
SOUTHWEST, INC. and THE NEW MEXICO
RURAL ELECTRIFICATION ASSOCIATION,
Applicants for Intervention

V E R S U S

THE STATE OF TEXAS,
Defendant

**ORDER FOR APPEARANCE, MOTION FOR LEAVE
TO FILE MOTION TO INTERVENE AS PLAINTIFFS,
COMPLAINT, AND STATEMENT OF FACTS AND
BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO FILE MOTION TO IN-
TERVENE AS PLAINTIFFS**

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May, 1979

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FILE MOTION TO INTERVENE
AS PLAINTIFFS**

ORDER FOR APPEARANCE

The Clerk will please enter our appearance as counsel
for the Committee on Power for the Southwest, Inc., and
the New Mexico Rural Electrification Association.

LOONEY, NICHOLS, JOHNSON & HAYES

By: _____

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Rural Electrification Association

**MOTION FOR LEAVE TO FILE
MOTION TO INTERVENE AS PLAINTIFFS**

The Committee on Power for the Southwest, Inc., and the New Mexico Rural Electrification Association move the Court for leave to intervene as plaintiffs in this action, in order to assert the claims set forth in its proposed Complaint, of which a copy is hereto attached.

This Motion is made on the grounds that the Applicant and its members generate, transmit, and consume electric energy with which the defendant has interfered and curtailed through its Order involving the interstate transportation of said electric energy. The Applicant presents questions both of law and fact which are common to the main action.

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as Plaintiffs, the Committee on
Power for the Southwest, Inc. and
the New Mexico Rural Electrifica-
tion Association

COMPLAINT

The Committee on Power for the Southwest, Inc. and the New Mexico Rural Electrification Cooperative Association file this Complaint against the defendant, State of Texas, and for their claim for relief state:

I.

The Committee on Power for the Southwest, Inc. ("Committee") is comprised of 175 distribution and generation and transmission cooperatives and 65 municipally-owned systems located in the States of Missouri, Kansas, Oklahoma, Arkansas, Louisiana, and Texas. The Committee members own and maintain an estimated 532,000 miles of line; provide electric service to an estimated Five Million consumers; sell over Twenty-Three Billion kilowatt hours of electricity, and generate over Eight Billion kilowatt hours annually.

The New Mexico Rural Electrification Cooperative Association ("New Mexico Coop") is an association of sixteen (16) rural electric distribution cooperatives and one (1) generation and transmission cooperative located in the State of New Mexico, which provide electric power and energy to approximately 105,000 member-consumers.

II.

The defendant, State of Texas, is one of the fifty (50) sovereign States.

III.

The jurisdiction of this Court is invoked pursuant to the Federal Rule of Civil Procedure 24(a)(2), or in the

alternative, Rule 24(b) (2) as incorporated by reference in this Court's Rule 9.

IV.

On July 11, 1977, the Texas Public Utilities Commission issued its final Order No. 14; this Order was issued pursuant to Texas Statutes which give the State authority over the regulation of electric utilities to the Texas Public Utilities Commission.

V.

The said Order No. 14 provides, in pertinent part, that no Texas electric utility which is a member of the Electric Reliability Council of Texas ("ERCOT") may connect up in interstate commerce with another electric utility except where specifically allowed by the Texas Public Utilities Commission, or the Federal Energy Regulatory Commission ("FERC"); to the date of this Complaint, neither the Texas Public Utilities Commission nor the FERC has allowed or required any ERCOT member to make an interconnection into interstate commerce.

VI.

The said Order No. 14 constitutes a burden on interstate commerce and violates the Commerce Clause of the United States Constitution.

VII.

The burden on interstate commerce of Order No. 14 is that it prevents interties, wheeling and pooling of electric power between ERCOT members and electric utilities who are not ERCOT members in the surrounding region which includes both the members of the Intervenors.

VIII.

The members of the Intervenor and those investor-owned utilities, municipally-owned systems, and rural electric cooperatives within the State of Texas are unable to utilize any economies of scale and diversity which may exist between the members of the Intervenor and ERCOT members.

IX.

The members of the Intervenor have been prevented from considering energy exchange agreements with ERCOT members, thus resulting in construction of new utility plant which would not be required if said Order No. 14 did not exist.

X.

Since Order No. 14 has existed, there has been no cause for the members of the Intervenor to fully explore what economies would exist with connections to ERCOT members; as a result, substantial economies have been foregone.

XI.

Due to the loss of economic efficiency from interconnections with ERCOT members, the Intervenor's members have been injured and will continue to be injured in the future in excess of One Billion Dollars (\$1,000,000,000.00) in the next twenty (20) years. Environmental harm will result from the construction and operation of unnecessary generation plant and transmission lines.

XII.

While Order No. 14 is currently being litigated in a number of forums, no Court has yet decided whether the Order itself violates the Commerce Clause.

XIII.

It is necessary that the validity of Order No. 14 be resolved by this Court as soon as feasible before there is any further waste of natural and financial resources.

XIV.

It is a waste of natural and financial resources to allow unnecessary utility plant to be built pending lower court adjudication of the issues raised in this Complaint.

WHEREFORE, Intervenors respectfully pray that a Decree be entered declaring invalid and enjoining the enforcement by the State of Texas or its agents of Order No. 14 of the Texas Public Utilities Commission insofar as said Order interferes with the free flow of interstate commerce of electric energy.

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**STATEMENT OF FACTS AND
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO
FILE MOTION TO INTERVENE AS PLAINTIFFS**

STATEMENT OF FACTS

Intervenors are in general agreement with the Plaintiff's Statement of Fact and the Statement of Facts presented by the State of Arkansas, Applicant for Intervention, and adds the following:

The interest of the Intervenors in this proceeding is to assure that an adequate and reliable supply of electric power and energy is available to the members and consumers, which the Intervenors herein serve, at the lowest possible cost. With the advent of Order No. 14, the consumers served by the Intervenors face unnecessary costs due to the restriction on interstate commerce which Order No. 14 imposes. The ability of the Intervenors to seek alternatives to building more generation and transmission plant is severely hampered by the current restrictions on interstate commerce between the Intervenors and members of ERCOT.

The electric industry, being a capital intensive industry, can save millions of dollars for each transmission line or generating unit, the constructions of which can be avoided.

The Intervenors serve the electric power and energy needs to an estimated 5,000,000 consumers located in the States of Missouri, Oklahoma, Texas, Arkansas, Louisiana, Kansas, and New Mexico.

As a specific example of the injury which the Intervenor will suffer under the authority of Order No. 14, the example of the South Texas Project (Units No. 1 and 2) will be used.

Currently, certain investor-owned utilities in the State of Texas are building a nuclear-powered electric generation plant. The excess power from this plant could be transmitted to the Intervenor over existing transmission lines, if it were not for Order No. 14. Thus, instead of being able to partially rely upon the output of the South Texas Project, the Intervenor have been forced to examine other options for obtaining power, such as the building of generation facilities.

In the same manner, the electric consumers of the ERCOT companies are being deprived of the opportunity to benefit from efficiencies which would result from interconnections with utilities in neighboring States.

**BRIEF IN SUPPORT OF MOTION FOR LEAVE
TO INTERVENE AS PLAINTIFFS**

The Intervenors are in agreement with the Plaintiff and the State of Arkansas, Applicant for Intervention herein, and support their arguments as to the jurisdiction of this Court; the standing of the Plaintiff and the State of Arkansas; and their legal arguments concerning the Commerce Clause claims.

JURISDICTION:

This Court's Rule 9, Procedure in Original Actions, states that the Federal Rules of Civil Procedure "may be taken as a guide to procedure in original actions in this court."

Using as a guide Federal Rule of Civil Procedure No. 24(a); it states that a party may intervene:

"... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The Applicants for Intervention qualify to meet the standards as set forth in Rule 24(a) for the right to intervene for we claim an interest relating to the property or transaction which is the subject of this action (the interconnection of electric systems); the Intervenors are so situated that the disposition of the action will, as a practical matter, impede our ability to protect that interest as any ruling from this Court will be a final ruling and the

law of the United States of America; and the Applicants' interests cannot be adequately represented by existing parties.

The Applicants desire to furnish their consumers' electric energy at the lowest possible cost, which will require that there be no restrictions on the interstate transmission of electric power and energy. Thus, the Applicants' interest is similar with those of the Plaintiff and the State of Arkansas, Applicant for Intervention herein.

An adverse disposition of this action will, as a practical matter, impede the Applicants' ability to protect our interest in allowing the free flow of electric power and energy across State lines. If this Court were to rule on behalf of the Defendant, State of Texas, the Applicants for Intervention would be precluded from obtaining a rapid solution to the barriers presented by Order No. 14.

Although the Attorney General's office of the State of New Mexico and the Attorney General's office of the State of Arkansas have excellent legal counsel, they will not adequately represent the private interests of the Applicants herein. The Courts have held that government representation is inadequate to represent the interests of private parties affected by the outcome of litigation. *Planned Parenthood v. Citizens For Comm. Action*, 558 F.2d 861 (8th Cir. 1977); and *Nader v. Ray*, 363 F.Supp. 946 (D.D.C. 1973).

This Court has held in the case of *Trbovich v. United Mine Workers of America et al.*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), that an intervenor has only a minimal burden in establishing that the legal representation may be inadequate. As the Plaintiff and the State of Arkan-

sas, Applicant for Intervention herein, are primarily concerned with their respective States only, the Applicants' interest will not be adequately represented as they cover members and consumers of electric power and energy in the Seven States previously mentioned.

The energy and environmental crisis currently facing the Nation present problems which have rarely been faced by this country in peacetime. These problems are immediate and directly affect the lives of each consumer who is served by the Applicants for Intervention herein. The action taken by the Texas Public Utilities Commission by issuing its Order No. 14 placed an illegal restraint on interstate commerce which both complicates and enhances the energy and environmental problems currently being faced in this country.

This Court should assume original jurisdiction of this case based upon Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. Section 1251 to enable the millions of affected citizens of Seven (7) States an opportunity to resolve this question in a minimum amount of time.

Respectfully submitted,

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May, 1979

CERTIFICATE OF SERVICE

I, Jay M. Galt, Attorney for the Intervenor herein, hereby certify that on the _____ day of May, 1979, I served three (3) copies of the foregoing, by first class mail, postage prepaid, to the office of the Governor and Attorney General, respectively, of the States of New Mexico and Texas, and Steven Clark, Attorney General, State of Arkansas, Justice Building, Little Rock, Arkansas, 72201, Attorney for the State of Arkansas, Intervenor.

JAY M. GALT

