

IN THE SUPREME COURT OF OHIO

CLYDE A. HUPP, et al.,)
) Case Number 2014-1933
Plaintiffs-Appellants,)
)
v.) On Appeal from the Monroe County
) Court of Appeals, Seventh Appellate
BECK ENERGY CORPORATION,) District
)
Defendant-Appellee,) Court of Appeals Case Numbers
)
and) 12 MO 6
) 13 MO 2
XTO ENERGY INC.,) 13 MO 3
) 13 MO 11
Proposed Intervenor-Appellee.)
)
and)
)
STATE OF OHIO EX REL. CLAUGUS)
FAMILY FARM, L.P.,) Case Number 2014-423
)
Relator,)
) Original Action in Prohibition
v.) and Mandamus
)
SEVENTH DISTRICT COURT OF)
APPEALS, et al.,)
)
Respondents.)

**MOTION OF XTO ENERGY INC. FOR LEAVE TO PARTICIPATE IN
ORAL ARGUMENT**

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and Judge Mary DeGenaro

XTO Energy Inc., as the party with greatest interest in the outcome of these consolidated actions, moves the Court under S.Ct.Prac.R. 17.06 for leave to participate in oral argument. Counsel for the side whose position XTO supports have consented to XTO's participation. *See* S.Ct.Prac.R. 17.06(A)(1).

BACKGROUND

These consolidated actions arise out of a class-action lawsuit filed by landowners seeking to invalidate oil and gas leases they entered into with Beck Energy Corporation. Although the lessors' original contracts were with Beck, Beck sold and assigned to XTO the deep rights in those leases, leaving XTO with the exclusive right to extract oil and gas deposits below 3,860 feet. *See Hupp v. Beck Energy Corp.*, 7th Dist. Monroe Nos. 12 MO 6, 13 MO 2, 13 MO 3, 13 MO 11, 2014-Ohio-4255, ¶ 13. It is thus XTO, rather than Beck, that now has the greater financial interest in preserving the drilling rights embodied in the leases.

Despite XTO's greater interest, the trial court denied XTO's motion to intervene in the lessors' trial-court action. *See id.* at ¶ 22. XTO was therefore deprived of the opportunity to participate in the trial-court proceedings that led to a class-wide (and state-wide) declaratory judgment voiding the leases ab initio. *See id.* at ¶ 22-24, 27.

Beck appealed the trial court's orders granting declaratory judgment and

class certification, and XTO appealed the denial of its motion to intervene. *See id.* at ¶ 27. The Seventh District Court of Appeals consolidated these appeals. *See id.* at ¶ 2. The Seventh District ultimately reversed the declaratory judgment and affirmed the class certification, and in light of these holdings, did not reach the appeal of the trial court's denial of XTO's motion to intervene. *See id.* at ¶ 131-133. The Seventh District also issued an order tolling the primary ten-year term of the leases to mitigate the impact of the litigation on Beck's and XTO's drilling rights. *See id.* at ¶ 26.

In Case No. 2014-1933, this Court accepted the lessors' discretionary appeal on a proposition of law addressing the validity of the leases. In Case No. 2014-423, the Court granted an alternative writ of mandamus requested by one of the lessors, Claugus Family Farms, L.P., challenging the Seventh District's tolling order. The Court ordered full briefing on the issues raised in that mandamus petition and has also granted the parties' motion for oral argument. The Court has consolidated the two actions for oral argument.

XTO has filed merit briefs in both actions. In Case No. 2014-423, XTO is not a party, so it designated its brief as an amicus brief. In Case No. 2014-1933, XTO believes it is an appellee, because it was a party to the consolidated Seventh

District appeals. But the lessors have suggested that XTO is not an appellee,¹ so in filing its merit brief in Case No. 2014-1933, XTO designated itself as an appellee or, in the alternative, as an amicus curiae; the distinction did not matter for purposes of briefing, because amici are permitted to file merit briefs without leave of Court. *See* S.Ct.Prac.R. 16.06(A).

But the distinction does matter for purposes of oral argument. And the lessors' position—that XTO is not a party even to Case No. 2014-1933—calls into question XTO's right to participate in oral argument. *See* S.Ct.Prac.R. 17.06(A)(1) (“No time for oral argument shall be allotted to counsel who have filed amicus curiae briefs” unless Court grants leave). Thus, for the avoidance of doubt, XTO asks the Court to grant it explicit leave to participate in oral argument.

ARGUMENT

The Court should grant XTO leave to participate in oral argument because—whether appellee or amicus—it has the greatest interest on the appellee/respondent side in securing a favorable outcome in these consolidated actions.

S.Ct.Prac.R. 17.06(A)(1) provides, in relevant part: “[W]ith leave of the Supreme Court and the consent of counsel for the side whose position the amicus curiae supports, counsel for the amicus curiae may present oral argument within the time allotted to that side.” In this case, counsel for Beck (the only other

¹ *See, e.g.*, Reply Brief of Appellants Clyde A. Hupp, et al. (May 12, 2015) at 10, fn. 3.

appellee in Case No. 2014-423) and for all of the respondents in Case No. 2014-423 have consented to XTO's participation.

The lessors argue that XTO paid "handsomely" to acquire the deep rights from Beck.² They highlight the size of XTO's payment in an effort to suggest that they have somehow been treated inequitably. The suggestion of inequitable treatment is misguided, but the underlying facts remain true: XTO did pay handsomely to acquire the deep rights to the lands in question, and the lessors want the Court to invalidate those rights. The true inequity would be for the Court to decide that matter without permitting XTO, as the party with the greatest interest in the outcome of these proceedings, to participate fully in the case.

CONCLUSION

The Court should grant XTO leave to participate in the oral argument of these consolidated actions.

Respectfully submitted,

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² See Merit Brief of Appellants Clyde A. Hupp, et al. (Mar. 24, 2015), at 30.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of XTO Energy Inc. for Leave to Participate in Oral Argument were served via ordinary U.S. mail this 14th day of October, 2015 on the following:

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