

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 CLARIFICATION OF ITS RIGHT
TO PARTICIPATE IN ORAL ARGUMENT, FOR LEAVE TO
PARTICIPATE IN ORAL ARGUMENT, AND FOR EXTENDED
ARGUMENT TIME**

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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 for:

- (1) clarification of its right to participate in the oral argument in Case No. 2014-1933;
- (2) leave under S.Ct.Prac.R. 17.06 to participate in oral argument as amicus curiae in Case No. 2014-423; and
- (3) extended oral-argument time in these consolidated cases to a total of 15 minutes per side per case (a total of 30 minutes per side), under S.Ct.Prac.R. 17.05(B).¹

The Court has already scheduled oral argument in these consolidated actions for December 15, 2015.

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

¹ XTO notes that Relator Claugus Family Farm, L.P., has filed a similar motion to extend the oral-argument time, and XTO joins in that aspect of Claugus's motion.

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 ("Plaintiffs' Appeal"), this Court accepted the lessors' discretionary appeal on two propositions of law addressing the validity of the leases. In Case No. 2014-423 (the "Original Action"), 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. XTO is not a party to the Original Action, so it designated its brief as an amicus brief. But XTO believes it *is* an appellee in Plaintiffs' Appeal, because it was a party to the consolidated Seventh District appeals. Nevertheless, the lessors have suggested that XTO is not an appellee.² So in filing its merit brief in Plaintiffs' Appeal, 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 (which the Court has now scheduled for December 15, 2015). The lessors' position—that XTO is not a party even to Plaintiffs' Appeal—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 clarify its right to participate in the oral argument in Plaintiffs' Appeal and for

² *See, e.g.*, Reply Brief of Appellants Clyde A. Hupp, et al. (May 12, 2015) at 10, fn. 3.

leave as amicus curiae to participate in the Original Action. And, because there are two different cases, several important issues, and multiple parties with an interest in the outcome, XTO moves the Court to expand the argument time to 15 minutes per side per case (a total of 30 minutes per side).

ARGUMENT

I. THE COURT SHOULD CLARIFY XTO'S RIGHT TO ARGUE IN PLAINTIFFS' APPEAL AND PERMIT IT TO ARGUE AS AMICUS CURIAE IN THE ORIGINAL ACTION.

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.

As a threshold matter, XTO is an appellee in Plaintiffs' Appeal; it was an appellant in the consolidated appeals in the Seventh District and has an undeniable interest in advocating affirmance in this Court. The Seventh District did not reach the intervention issue raised in XTO's appeal only because the appellate court reversed the trial court's declaratory judgment on the merits—the same result XTO would have advocated, as Beck's assignee, if the trial court had been permitted it to intervene. As such, the docket in this case has, from the beginning, accurately characterized XTO as appellee, and XTO should be permitted to argue in Plaintiffs' Appeal as a matter of course.

But even if XTO were not an appellee, its interest in the outcome of both

Plaintiffs' Appeal and the Original Action constitutes "the most extraordinary circumstances" that would justify an opportunity to address the Court at the oral argument as *amicus curiae*. See S.Ct.Prac.R. 17.06(A)(2).³ It is undisputed that the Court's decision in this case will affect XTO's rights far more than Beck's. XTO also respectfully suggests that the respondent judges in the Original Action also have less at stake here than XTO. This is not the ordinary case of an *amicus curiae* having an interest in the general propositions of law the Court will consider; this is a case in which XTO is an actual party to the *specific contracts* that are in dispute and holds the greatest financial interest in seeing them upheld. It would be illogical to require XTO to sit on the sidelines, watching others with less interest argue over XTO's fate.

The lessors argue that XTO paid "handsomely" to acquire the deep rights from Beck.⁴ 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

³ XTO has not secured the "consent of counsel" for Beck or for the respondents in the Original Action that would permit XTO to make its motion under the more-lenient standard of S.Ct.Prac.R. 17.06(A)(1). XTO suspects that the other parties would be more receptive to consenting if the Court allotted the parties more argument time, as addressed below.

⁴ See Merit Brief of Appellants Clyde A. Hupp, et al. (Mar. 24, 2015), at 30.

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.

II. THE COURT SHOULD EXPAND ORAL ARGUMENT TO 15 MINUTES PER SIDE PER CASE (30 MINUTES TOTAL PER SIDE).

The oral-argument notice in these consolidated appeals indicates that, as in most arguments in this Court, the parties will have “15 minutes per side.” But there are two underlying actions—Plaintiffs’ Appeal and the Original Action—each with its own full set of merit briefing and each raising distinctly different and important questions of law. XTO therefore requests that the Court permit 15 minutes of oral argument per side *per case*—meaning a total of 30 minutes per side—so that the Court may hear a full presentation of the important issues in this case from all parties with interests at stake.

Relator Claugus Family Farm, L.P. has already made a similar motion (in which XTO joins). Indeed, XTO anticipates that any objections Beck or the respondent judges may have to XTO’s participation in oral argument would likely dissipate if the Court afforded a full measure of argument time to each of the consolidated cases.

CONCLUSION

For these reasons, the Court should: (1) clarify that XTO, as an appellee, may participate in the oral argument of Plaintiffs’ Appeal; (2) grant XTO leave to

participate in the oral argument of the Original Actions; and (3) permit oral-argument time totaling 15 minutes per side per case (30 minutes total per side).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of XTO Energy Inc. for Clarification of Its Right to Participate in Oral Argument, for Leave to Participate in Oral Argument, and for Extended Argument Time were served via ordinary U.S. mail this 15th day of October, 2015 on the following:

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