

Honorable Susan K. Serko
Hearing Date: February 9, 2018
Hearing Time: 9:00 a.m.

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

EDWARD E. (TED) COATES; MICHAEL CROWLEY; MARK BUBENIK and MARGARET BUBENIK d/b/a Steele Manor Apartments; THOMAS H. OLDFIELD; and INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES, an Oregon nonprofit corporation,

Plaintiffs,

v.

CITY OF TACOMA,

Defendant.

NO. 17-2-08907-4

PLAINTIFFS' RESPONSE TO MITCHELL SHOOK'S MOTION TO INTERVENE AS ADDITIONAL DEFENDANT

Mitchell Shook's "Motion to Allow Intervenor as Additional Defendant" should be denied because (i) Mr. Shook has failed to comply with the most fundamental procedural requirements of CR 24(c) and (ii) he has failed to show that he meets the standards for either intervention of right under CR 24(a) or permissive intervention under CR 24(b). Mr. Shook seeks to introduce a jumble of issues and arguments having no real bearing on the parties' claims or defenses asserted in this matter. His intervention would clutter and confuse this action and would unduly delay or prejudice the adjudication of the rights of the original parties.

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NATURE OF THE CASE

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The plaintiffs are ratepayers of the Tacoma Power electric utility.¹ They are suing the City of Tacoma for declaratory and injunctive relief to prevent the city from using electric utility revenues to subsidize a city-owned commercial telecommunications business known as the Click! Network (“Click”), and for monetary relief requiring the city to reimburse the electric utility for past subsidies. On December 28, 2017 the plaintiffs filed a motion for partial summary judgment granting declaratory relief (Dkt. #16). That motion describes the nature of the case and the factual and legal background in greater detail. The motion is noted for hearing on March 2, 2018. Many thousands of pages of documents have already been produced and numerous depositions have been taken. The case is currently set for trial on June 21, 2018.

The motion presently before the Court was filed on February 1, 2018. The movant Mitchell Shook describes himself as a Tacoma resident and TPU ratepayer. His motion seeks an order allowing him to intervene in this case as an additional defendant. His motion purports to be supported by two declarations he submitted.² The first declaration, dated January 31, 2018, was filed together with the motion. It consists of four sentences: one stating that he met with plaintiffs’ counsel on January 29, 2018 to discuss the lawsuit; one stating in purely

¹ They are a former Director of Utilities for the City of Tacoma, a former Tacoma mayor and city councilman, a former Chief Assistant City Attorney for Tacoma Public Utilities, a prominent lawyer in Tacoma, and an association of large industrial customers of Tacoma Power and other Pacific Northwest utilities.

² The motion also says it relies on “the Complaint, Declarations and Motions of Plaintiff.” Motion at 2, line 9. The only motion the plaintiffs have filed thus far is the motion for partial summary judgment that was filed on December 28, 2017 and is set for hearing on March 2, 2018 (Dkt. #16). Since Mr. Shook says his motion relies on that motion and its supporting declarations, we encourage the Court to review that motion and those declarations to gain a fuller understanding of the nature of this case and the applicable factual and legal background.

1 conclusory terms that the issues in the case “will greatly affect my financial interests”; one
2 stating in even more conclusory terms that "I have issues of fact that can only be raised by my
3 intervention in this matter”; and one stating that he has emailed copies of his motion to
4 plaintiffs’ counsel. The second declaration, dated February 1, 2018, was filed separately. It
5 consists of an incoherent jumble of unauthenticated excerpts of various documents with
6 highlighting, annotations and other comments presumably placed on the document excerpts by
7 Mr. Shook. Nowhere in his motion or in his two declarations does Mr. Shook show that he
8 meets the standards for either intervention of right or permissive intervention, nor has he
9 complied with the procedural requirements for a motion to intervene.
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11 **ARGUMENT**

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13 A. The Motion Should Be Denied Because Mr. Shook Failed to Comply with CR 24(c).

14 CR 24(c) expressly requires that (i) a person desiring to intervene “shall serve a motion
15 to intervene upon all the parties as required in rule 5” and (ii) the motion “shall state the
16 grounds therefor and shall be accompanied by a pleading setting forth the claims or defenses for
17 which intervention is sought.” Mr. Shook has failed to comply with those requirements.
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19 Although Mr. Shook’s first declaration states that he emailed a copy of his motion to
20 plaintiffs’ counsel, it says nothing about whether he served his motion on counsel for the
21 defendant City of Tacoma, nor is there on file any proof of service on the city. PCLR 7(a)(4)
22 provides that “No motion shall be heard unless proof of service upon the opposing party is filed
23 or there is an admission of such service by the opposing party.” We have been advised by the
24 city attorney that the city has not consented to electronic service by Mr. Shook and has not been
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1 formally served.³

2 Furthermore, and perhaps more importantly, Mr. Shook has failed to comply with the
3 CR 24(c) requirement that the motion to intervene “be accompanied by a pleading setting forth
4 the claims or defenses for which intervention is sought.” Courts look to the pleadings to
5 determine whether intervention is warranted. *Westerman v. Cary*, 125 Wn.2d 277, 302-303,
6 892 P.2d 1067 (1994); *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 36, 499
7 P.2d 869 (1972) (“[a]s a preliminary matter, we note that, for purposes of determining whether
8 [the moving party] satisfies the conditions for intervention, we look to the pleadings...”); *see*
9 *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (upholding trial
10 court’s denial of motion to intervene on ground that proposed intervenor had failed to file a
11 pleading setting forth the claims or defenses for which intervention was sought). Without a
12 pleading as required by CR 24(c), the Court and the parties cannot properly ascertain what
13 interest the movant is trying to protect, or whether the movant’s interest is already adequately
14 represented by the existing parties, or what the movant’s claims or defenses are, or whether
15 those claims or defenses present questions of law or fact in common with those raised by the
16 existing parties, or whether the intervention would unduly delay or prejudice the adjudication of
17 the original parties’ rights.

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21 Mr. Shook’s failure to accompany his motion with a pleading setting forth his proposed
22 claims or defenses is fatal to his motion to intervene.
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25 ³ Even in courts like this one where electronic filing is mandatory, electronic service is allowed only by agreement of the parties (*see* GR 30(4)) or with the written consent of the party served (*see* CR 5(b)(7)).

1 B. Mr. Shook Has Failed to Show that He Meets the Standards for Intervention of Right.

2 Intervention of right is governed by CR 24(a). The rule allows intervention of right,
3 “upon timely application,” (1) when a statute confers an unconditional right to intervene (Mr.
4 Shook has cited no such statute) or

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6 (2) when the applicant claims an interest relating to the property or transaction
7 that is the subject of the action and the person is so situated that the disposition
8 of the action may as a practical matter impair or impede the person's ability to
protect that interest, unless the applicant's interest is adequately represented by
existing parties.

9 CR 24(a)(2). Washington courts have held that four requirements must be met before there is a
10 right to intervene: (1) timely application for intervention; (2) the applicant claims an interest
11 which is the subject of the action; (3) the applicant is so situated that the disposition will impair
12 or impede the applicant’s ability to protect the interest; and (4) the applicant’s interest is not
13 adequately represented by the existing parties. *Westerman, supra*, 125 Wn.2d at 303. Each of
14 these elements must be satisfied before an applicant may exercise a right to intervene. *Spokane*
15 *County v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998).

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17 There must be a “timely application” for intervention. Mr. Shook’s application is
18 hardly “timely.” This lawsuit was commenced last June; much discovery has already taken
19 place; important pretrial deadlines (including deadlines for disclosure of primary witnesses)
20 have already passed; the discovery completion deadline is fast approaching; and the case is
21 presently set for trial on June 21, 2018. Mr. Shook has offered no explanation or excuse for
22 why he waited so long before seeking to intervene.
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1 The interest which the intervenor seeks to protect must be one recognized by law and
2 “be of such a direct and immediate character that the intervenor will either gain or lose by the
3 direct legal operation and effect of the judgment.” *In re Dependency of J.H.*, 117 Wn.2d 460,
4 468, 815 P.2d 1380 (1991) (emphasis added). For example, in *In re Dependency of J.H.*, the
5 Washington Supreme Court held that foster parents had no right to intervene in juvenile court
6 dependency actions to challenge removal of children from their home to another foster home.
7 *Id.* at 471. The Court said that “While the law recognizes the importance of the psychological
8 parent to the child, this recognition does not go so far as to establish a *right* on the part of a
9 foster parent to have their foster family relationship continue permanently...” *Id.* at 470.

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11 As noted above, Mr. Shook has not submitted a pleading explaining what interest he
12 seeks to protect. His motion merely states that he is a city resident and TPU ratepayer and as
13 such “is affected by the outcome of this case.” Motion at 1, lines 17-19. His first declaration
14 adds, without further explanation, that “the issues will greatly affect my financial interests, as I
15 am also a Tacoma Public Utilities rate payer.” Declaration at 1, line 19. He makes no attempt
16 to show that his interests as a city resident or TPU ratepayer are not adequately represented by
17 the existing parties.
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20 We suspect that Mr. Shook is not really seeking to protect his interests as a utility
21 ratepayer, but rather his interests as an owner and CEO of a corporation named Advanced
22 Stream, Inc., d/b/a Advanced Stream Broadband, which is an internet service provider (“ISP”)
23 that uses the Click network infrastructure to provide retail internet service to its customers.
24 Advanced Stream Broadband benefits from the electric utility subsidies for Click that are being
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1 challenged by the plaintiff electric ratepayers in this case, which is why Mr. Shook seeks to
2 intervene as a defendant (hoping to preserve the subsidies) rather than as a plaintiff ratepayer.

3 In his capacity as CEO of Advanced Stream Broadband, Mr. Shook has expressed
4 opposition to the city's "All-In" plan (under which Click would offer its own retail internet
5 service rather than merely continuing to provide wholesale service),⁴ but Mr. Shook's
6 opposition to the "All-In" plan is for reasons having nothing to do with the illegal subsidies
7 that this case is about. Mr. Shook opposes the "All-In" plan, as well as proposals for Click to
8 "partner" with another telecommunications company or sell or lease its network infrastructure
9 to another company, because those proposals would create another competitor and threaten
10 Advanced Stream's business model. Litigation over those concerns would raise a host of new
11 and different issues that are not involved in the present dispute between the plaintiffs and the
12 city about the illegality of electric utility subsidies for Click's commercial telecommunications
13 business.

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16 Advanced Stream itself would have no right to intervene in this action because its
17 interests as a user of the Click network infrastructure are not the subject of this action and
18 would not be directly affected by a decision in this case about whether electric ratepayer
19 subsidies for Click are unlawful. Its interests might be affected *indirectly* by a judgment in this
20 case, because the cessation of electric ratepayer subsidies for Click might cause Click to raise
21 more revenues by, for example, increasing the amount it charges Advanced Stream for use of
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25 ⁴ The city's "All-In" plan for Click, and the distinction between wholesale and retail internet service, are explained in plaintiffs' motion for partial summary judgment filed on 12/28/2017 (Dkt. #16).

1 the network infrastructure; but that kind of *indirect* effect of the disposition of this case is
2 insufficient to confer a right to intervene.

3 Even if Mr. Shook's real concern were to protect his interest as an electric ratepayer,
4 rather than to protect his interest as an owner of Advanced Stream, he has failed to make any
5 showing that his interest *as a ratepayer* is not adequately represented by the existing parties.
6 Without such a showing, he cannot establish a right to intervene. *See* CR 24(a)(2); *Westerman*,
7 *supra*, 125 Wn.2d at 303; *Spokane County, supra*, 136 Wn.2d at 649.

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9 This situation is a good illustration of why CR 24(c) requires a proposed intervenor to
10 submit a pleading setting forth the claim or defense for which intervention is sought, so that the
11 Court and the other parties do not have to speculate about what interests the proposed
12 intervenor is trying to protect and what issues the intervenor seeks to raise.

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14 C. Mr. Shook Has Failed to Show that He Meets the Standards for Permissive Intervention.

15 Permissive intervention is governed by CR 24(b). The Court has discretion to allow
16 permissive intervention, "upon timely application," (1) when a statute confers a conditional right
17 to intervene (Mr. Shook has cited no such statute) or

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19 (2) When an applicant's claim or defense and the main action have a question of
20 law or fact in common. . . . In exercising its discretion the court shall consider
21 whether the intervention will unduly delay or prejudice the adjudication of the
22 rights of the original parties.

23 CR 24(b)(2).

24 As noted above, Mr. Shook's motion to intervene is hardly "timely," and he has offered
25 no explanation or excuse for waiting so long to seek intervention. Furthermore, since Mr.
Shook's motion was not accompanied by a pleading setting forth his claims or defenses, as

1 required by CR 24(c), he has not shown and he cannot show that his “claim or defense and the
2 main action have a question of law or fact in common,” as required by CR 24(b)(2).

3 What is perfectly clear from Mr. Shook’s filing, however, is that if intervention were
4 allowed it would no doubt “unduly delay or prejudice the adjudication of the rights of the
5 original parties,” within the meaning of the rule. This is apparent from the incoherent jumble
6 of unauthenticated, marked-up document excerpts attached to Mr. Shook’s second declaration.
7 Those materials have no apparent relevance to the issues presented by the motion to intervene.
8 One can only wonder what further mischief, distraction and irrelevancies might be offered by
9 Mr. Shook in this case if he were allowed to intervene.
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11 **CONCLUSION**

12 This is a serious case, raising important issues affecting the public interest. It is in
13 everyone’s interest to get the issues resolved promptly and efficiently, without the delay and
14 distractions of having to deal with Mr. Shook’s new issues or his incoherent ramblings. His
15 motion to intervene as an additional defendant is untimely, procedurally defective, and wholly
16 insufficient to meet the standards for either intervention of right or permissive intervention.
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18 Accordingly, the motion should be denied.

19 *Respectfully submitted* this 7th day of February, 2018.

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21 HELSELL FETTERMAN LLP

22
23 By 

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