UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LSP Transmission Holdings, LLC,

Plaintiff,

vs.

Nancy Lange, Commissioner and Chair, Minnesota Public Utilities Commission, Dan Lipschultz, Commissioner, Minnesota Public Utilities Commission, Matt Schuerger, Commissioner, Minnesota Public Utilities Commission, John Tuma, Commissioner, Minnesota Public Utilities Commission, Katie Sieben, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity,

Defendants.

Case No. 17-cv-04490 DWF/HB

STATE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This reply memorandum is submitted on behalf of the State Defendants, in their official capacities as Commissioners of the Minnesota Public Utilities Commission (PUC) and the Department of Commerce. The State Defendants' initial memorandum showed that LSP's dormant Commerce Clause challenge to Minnesota's right-of-first-refusal (ROFR) law, Minn. Stat. § 216B.246, is foreclosed by *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). In *Tracy*, the Supreme Court held that private businesses and energy utilities with local monopolies are not similarly situated for purposes of the

dormant Commerce Clause, and thus arguments that a state law discriminates between private businesses and local energy utilities must fail. *Tracy*, 519 U.S. at 310. The Court's rationale was to avoid judicial intervention that might possibly hinder the distribution of energy to consumers in a monopoly market. *Id.* at 304. This holding and rationale apply to this matter, for the reasons explained in the State Defendants' initial memorandum. In its response, LSP attempts to distinguish *Tracy* on several bases, none of which have merit.

ARGUMENT

I. *TRACY* IS ON POINT AND FORECLOSES LSP'S CLAIM THAT THE ROFR LAW DISCRIMINATES AGAINST INTERSTATE COMMERCE.

Because there is no relevant distinction between *Tracy* and LSP's action, the Court must dismiss LSP's claim that the ROFR law unconstitutionally discriminates against interstate commerce.

A. As In *Tracy*, The Challenged Law Benefits Local Utilities With Monopoly Distribution Rights.

Tracy applies where the challenged law benefits in-state utilities that provide regulated energy services to a monopoly "market in which the local utilities alone operate." 519 U.S. at 303–04. LSP attempts to distinguish *Tracy* by arguing that the ROFR law not only benefits local utilities but also transmission companies, which do not distribute electricity and do not have monopolies. LSP Memo. at 16.

However, LSP's Complaint alleges the ROFR law was intended to benefit four Minnesota utilities that own nearly eighty percent of the transmission line assets in Minnesota. Compl. ¶ 67. The Complaint specifically alleges that the ROFR "law

protects these [four] incumbent utilities from competition from out-of-state developers for the right to develop transmission lines," and that the "statute was intended to protect those owners from competition." *Id.* ¶¶ 68, 87. These utilities distribute electricity to consumers in service areas where they, or their members, have monopolies.[1] *See* Compl. ¶ 64; Minn. Stat. §§ 216B.38, subd. 5, and 216B.40 (providing that electric utilities, including investor-owned utilities and cooperative electric associations, "shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless the electric utility consents thereto in writing"). Thus, based on LSP's own allegations, the primary effect and purpose of the law is to benefit energy utilities serving monopoly markets, just as in *Tracy*.

[1] Three of these utilities are structured as investor-owned utilities that distribute electricity directly to consumers. Compl. ¶¶ 64, 67. The fourth, Great River Energy, is structured as a generation and transmission cooperative, which means it is made up of cooperative members, each of which distributes electricity in its service area. *Id.*; *see also Great River Energy*, 148 FERC P. 62112, 64403, 2014 WL 3843210 (Aug. 5, 2014) (noting that Great River supplies electricity to its member distribution cooperatives, who in turn distribute it). LSP does not suggest that this difference in organizational structure has constitutional significance.

For further information on these four utilities, including their distribution structures, the Court may look to the 2015 Biennial Transmission Projects Report at 124, 129, and 132–33. This report is a public document embraced by the Complaint, Compl. ¶ 64 n. 12, and available at https://www.leg.state.mn.us/docs/2015/mandated/151162.pdf. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (holding that a court deciding a motion to dismiss may consider the complaint, matters of public record, and materials embraced by the complaint).

Moreover, as in *Tracy*, the possibility that judicial intervention could harm the utilities' abilities to serve their consumers justifies upholding the law, as discussed below. Because this core rationale for the *Tracy* opinion applies here, *Tracy* is on point and controlling authority.

B. As In *Tracy*, The Possibility That Elimination Of The Law Could Harm Energy Consumers Justifies Upholding The Law.

LSP further attempts to distinguish *Tracy* by arguing that the ROFR law does not apply to and does not affect the distribution of electricity to consumers. LSP Memo. at 17, 21–25. However, in *Tracy*, the challenged law also did not apply to the distribution of energy to residential consumers. In *Tracy*, the plaintiff was challenging a law that taxed natural gas sales to bulk buyers, such as corporations, but exempted sales by in-state utilities. 519 U.S. at 285, 302–03. This market of bulk buyers did not include individual consumers in monopoly service areas. *Id.* The Supreme Court rejected the dormant Commerce Clause challenge because eliminating the in-state utilities' advantage in the bulk market could, in theory, indirectly impact the utilities' abilities to serve consumers in the monopoly markets. *Id.* at 309. The same rationale applies here.

Here, as in *Tracy*, the challenged law does not on its face apply to the distribution of electricity to consumers in monopoly markets, but eliminating the law could negatively affect these consumers. *See* State Defs.' Memo. at 3–5 (ECF No. 21). One commissioner of the Federal Energy Regulatory Commission (FERC) expressed concerns that eliminating federal ROFR laws could jeopardize regional cooperation and the reliable distribution of electricity to consumers. 76 Fed. Reg. 49842, 49972–73 (Moeller,

Comm'r, dissenting). Indeed, the Minnesota legislature enacted the ROFR law to avoid the uncertain effects from the elimination of the federal ROFR. *See* State Defs.' Memo. at 5 (ECF No. 21) (citing Statement of Senator David Brown).

LSP suggests there is a fact issue as to whether consumers would, on net, be hurt by the elimination of the ROFR. LSP Memo. at 21. However, the *Tracy* Court made clear that it is not a court's role to assess how eliminating the law might affect consumers dependent on utilities for energy distribution. The *Tracy* Court stated that "what in fact would happen as a result of [eliminating the law,] we do not know." *Tracy*, 519 U.S. at 307. The Court suggested that eliminating the law might weaken the utilities' abilities to serve customers, but also that it was "far more likely" that eliminating the law would not, on net, have a negative effect. *Id.* at 307–308. The Court ultimately concluded that such predictions were impossible to make because "the Court is institutionally unsuited to gather the facts upon which economic predictions can be made." *Id.* at 308. The mere possibility of a negative impact on the distribution of energy to consumers was enough to justify upholding the law. *Id.* at 309.

Tracy instructs this Court to decline LSP's request to estimate how Minnesota consumers of electricity might benefit or suffer if the Court were to invalidate the ROFR law. The possibility that eliminating the law could impede electricity distribution is sufficient, under *Tracy*, to uphold the law.

C. The *Tracy* Court Expressly Extended Its Holding Beyond Taxes To Any Regulatory Burden.

LSP also argues that *Tracy* does not apply because *Tracy* involved a tax, and the ROFR law is not a tax. LSP's Memo. at 20–21. This attempt at distinguishing *Tracy* is easily disposed of because the *Tracy* Court expressly extended its holding to a "tax or other regulatory differential." 519 U.S. at 299. The Supreme Court stated that, where the plaintiff is not similarly situated to the in-state entities, as is the case where those entities are local utilities with monopolies, "eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id.* Thus, the fact that *Tracy* involved a tax, while this case involves a different type of regulatory burden, is irrelevant.

D. The ROFR Law Allows For Consideration Of Alternatives Through The PUC's "Certificate of Need" Process.

Lastly, LSP argues that *Tracy* involved only a regulatory advantage, while the ROFR law completely prohibits competition. LSP's Memo. at 20 and 32 n. 10. In particular, the Complaint states that MISO has decided to select transmission builders in accordance with applicable state ROFR laws instead of by a competitive solicitation process. Compl. ¶¶ 40–45. Thus, according to LSP, incumbent transmission owners protected by Minnesota's ROFR law face no competitive pressures. However, LSP overlooks that the ROFR law expressly contemplates that alternatives to an incumbent's proposal will be considered through the PUC's "certificate of need" process. Minn. Stat. § 216B.246, subd. 3(a).

A "certificate of need" from the PUC is required before building a new high-voltage transmission line in Minnesota. Minn. Stat. § 216B.243, subds. 2 & 3(3) (no high-voltage transmission lines "shall be sited or constructed in Minnesota without the issuance of a certificate of need"). In determining whether an applicant for a certificate has justified its need, the PUC must consider, among other factors, "possible alternatives for satisfying the energy demand or transmission needs." *Id.*, subd. 3(6). Third parties may intervene in the proceedings and propose alternatives. Minn. R. 7829.0800 (establishing procedures for intervention in PUC proceedings); Minn. R. 7849.0110 (establishing that the PUC will consider alternatives proposed prior to the last public hearing); *see also In re Great River Energy*, A09-1646, A09-1652, 2010 WL 2266138, at *1 (Minn. Ct. App. June 8, 2010) (noting that third parties became "intervenors on the certificate-of-need docket").

The PUC will only grant the certificate of need if "a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record." Minn. R. 7849.0120, subp. B. As the Minnesota Court of Appeals has explained: "An applicant fails to meet [its] burden when another party demonstrates that there is a more reasonable and prudent alternative to the facility proposed by the applicant." *In re Application of City of Hutchinson*, No. A03-99, 2003 WL 22234703, at *7 (Minn. Ct. App. Sept. 23, 2003) (citing Minn. Stat. § 216B.243, subd. 3).

The ROFR law's subdivision on "Commission procedure" expressly incorporates these certificate of need procedures, stating:

> If an electric transmission line has been approved for construction in a federally registered planning authority transmission plan, the incumbent electric transmission owner . . . shall give notice to the commission . . . regarding its intent to construct, own, and maintain the electric transmission line. If an incumbent electric transmission owner gives notice of intent to build the electric transmission line then, . . .the incumbent electric transmission owner shall file an application for a *certificate of need* under section 216B.243 or certification under section 216B.2425.

Minn. Stat. § 216B.246, subd. 3(a) (emphasis added). This language establishes that, even where an incumbent transmission owner has a right of first refusal to build a transmission line, it still must receive either a certificate of need or certification under section 216B.2425, which uses the same standards and procedures as a certificate of need.[2]

An incumbent transmission owner seeking certification will fail to meet its burden if the record demonstrates there is a more reasonable and prudent alternative. Minn. Stat. § 216B.243, subd. 3; Minn. R. Pt. 7849.0120, subp. B. Without the Commission's certification of its transmission proposal, the incumbent cannot build its proposed transmission line, notwithstanding its right of first refusal. Minn. Stat. § 216B.243, subds. 2 & 3.

[2] Section 216B.2425 requires utilities to submit a biennial "transmission projects report" to the PUC. Minn. Stat. § 216B.2425. A utility may seek certification of a transmission project identified in the report. *Id.* § 216B.2425, subds. 2 & 3. The PUC considers certification by using the standards and procedures for a certificate of need. Minn. Stat. § 216B.2425, subd. 3 ("The commission may only certify a project that is . . . (2) needed, applying the criteria in section 216B.243, subdivision 3."); Minn. R. 7848.1400, subp 1 ("Any biennial transmission projects report must comply with both the filing requirements of this chapter and the filing requirements of the certificate of need rules, parts 7849.0010 to 7849.0400, for certification of each high-voltage transmission line.").

LSP's portrayal of the ROFR law as eliminating all competitive pressures for the building of transmission lines in Minnesota is mistaken. The ROFR law expressly requires that the incumbent receive approval through the certificate of need process, which analyzes whether the incumbent's proposed transmission project is better than any proposed alternatives to meet the identified need.

In short, none of LSP's purported bases for distinguishing *Tracy* have merit. For all of the reasons stated here and in the State Defendants' initial memorandum, *Tracy* is on point and forecloses LSP's claim that the ROFR law patently discriminates in violation of the dormant Commerce Clause.

II. The ROFR Law Survives The *Pike* Test.

Where a law is not patently discriminatory, it may still violate the dormant Commerce Clause if it fails the so-called *Pike* test—*i.e.*, if its burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). LSP argues that this balancing test is fact intensive, and thus dismissal at this stage is not appropriate for this issue.

However, in *Tracy*, the Supreme Court made clear that laws that are not patently discriminatory have only been invalidated "where such laws undermined a compelling need for national uniformity in regulation." *Tracy*, 519 at 298 n. 12. Here, the Minnesota ROFR law does not undermine a compelling need for national uniformity because FERC, the agency charged by Congress with ensuring national regulation of electric markets, has expressly allowed for the use of state ROFR laws in the regional transmission process. 150 FERC ¶ 61,037 at P. 18; Compl. ¶ 46. No fact discovery is

needed on this point. Thus, the ROFR law does not fail the dormant Commerce Clause's *Pike* test.

CONCLUSION

For all of reasons stated in this and the State Defendants' initial memorandum, the State Defendants respectfully request that this Court grant their motion and dismiss this action with prejudice.

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Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/ Jason Marisam
JASON MARISAM
Assistant Attorney General
Atty. Reg. No. 0398187
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1275
jason.marisam@ag.state.mn.us

ATTORNEY FOR THE STATE DEFENDANTS