IN THE UNITED STATES DISTRICT COURT
FOR THE 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, and Northern States Power Company d/b/a Xcel Energy, Defendants.	**Civil No.** 0:17-cv-04490-DWF-HB **MEMORANDUM IN SUPPORT OF DEFENDANT NORTHERN STATES POWER COMPANY'S MOTION TO DISMISS**

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INTRODUCTION

Intervenor Northern States Power Company ("NSP") owns and operates several thousand miles of electric transmission lines in Minnesota. Because it owns those existing lines and accompanying facilities, it holds the right of first refusal under Minnesota Statute § 216B.246 to construct new transmission lines that will connect with its facilities, and it can correspondingly be compelled to build such lines by the Minnesota Public Utility Commission. On March 3, 2017, NSP exercised its right to build a proposed new line called the Huntley-Wilmarth line that will connect to NSP's Wilmarth substation near Mankato.

In this suit, Plaintiff LSP Transmission Holdings, LLC, claims that § 216B.246 violates the dormant Commerce Clause of the U.S. Constitution by discriminating against interstate commerce. The Court should dismiss that claim because § 216B.246 is an even-handed exercise of Minnesota's traditional police power to regulate electric utilities in the public interest, and it is entirely consistent with Supreme Court and Eighth Circuit precedent under the Commerce Clause.

The "'regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'" *Southern Union Co. v. Missouri Public Service Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002) (quoting *Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)). In the Federal Power Act ("FPA"), Congress expressly preserved a role for the states to exercise their regulatory power over electric utilities. 16 U.S.C. § 824. Acting under the FPA, the Federal

Energy Regulatory Commission ("FERC") recently preserved to the states precisely the power that Minnesota exercised in § 216B.246—the power to decide to give existing facility owners a right of first refusal to build and operate new electric transmission lines that will connect with their facilities. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61051, at ¶ 287, 2011 WL 2956837, at *92 (July 21, 2011) ("Order 1000"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61037, at ¶ 25, 2015 WL 285969, at *7 (Jan. 22, 2015).

Plaintiff LSP Transmission disagrees with Minnesota's regulatory policy choice and has tried several times to impose its own policy views on Minnesota. First, LSP Transmission argued to FERC that it should bar Minnesota and other states from regulating electric transmission lines through right-of-first-refusal statutes. FERC, however, rejected that argument in the orders cited above. Second, LSP Transmission challenged FERC's decision in court, arguing that FERC could not permissibly allow states like Minnesota to regulate electric transmission lines in the public interest. The U.S. Court of Appeals for the Seventh Circuit rejected LSP Transmission's argument and held that FERC had acted appropriately "'to avoid intrusion on the traditional role of the States' in regulating the siting and construction of transmission facilities." *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (citation omitted).

Having failed on both policy and statutory grounds, LSP Transmission is now raising the extreme argument that § 216B.246 violates the dormant Commerce Clause

of the U.S. Constitution. This argument is baseless. Section 216B.246 is a legitimate, non-discriminatory exercise of Minnesota's long-held authority to regulate the provision of electricity to its citizens in the public interest. As the Supreme Court recognized in rejecting a dormant Commerce Clause challenge to an Ohio law, state public-utility regulation "serves important interests in health and safety in fairly obvious ways." *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997). Here, § 216B.246 protects the interests of Minnesota's citizens in receiving safe, reliable electric service, and it does so without discriminating against either interstate competition or interstate companies. Many of Minnesota's existing electric facilities are owned by out-of-state companies, and those companies receive the same right of first refusal as their Minnesota-owned counterparts. Conversely, entities that do not own the facilities to which a new line will connect do not receive a right of first refusal, even if they are Minnesotan.

Accordingly, the Court should dismiss this case in its entirety, with prejudice, under Fed. R. Civ. P. 12 for failure to state a claim.

BACKGROUND

This case arises out of the world of electric generation, transmission, and delivery, where states have long regulated providers to ensure the reliable, widespread availability of a service deemed critically important to consumers. Consistent with this history, Minnesota has made the policy judgment that regulating electricity providers as public utilities is necessary to provide:

> the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers.

Minn. Stat. § 216B.01.

In 2012, the Minnesota legislature exercised its historic authority in enacting § 216B.246, which grants incumbent electric transmission owners a right of first refusal to build new transmission lines that will connect to the owners' existing facilities, and also requires them to build such lines if the Minnesota Public Utilities Commission (the "Commission") orders them to do so. Section 216B.246 reflects the State's policy decision to regulate the provision of electricity in the public interest rather than trusting an unregulated market to provide it.

A. Congress enacts the Federal Power Act and preserves the states' traditional authority to regulate the location and construction of electric transmission lines.

State regulation of industries deemed to be in the "public interest" has been recognized by courts as a valid exercise of a state's police powers since the 1800s. *See Munn v. Illinois*, 94 U.S. 113, 126 (1876). For nearly as long, Congress has also recognized and preserved the states' traditional regulatory authority.

The principal federal statute governing the generation and transmission of electricity is the Federal Power Act ("FPA"). Enacted in 1935, the FPA gives

jurisdiction over retail sales and the "transmission of electric energy in intrastate commerce" to the states, while a federal agency (now FERC) exercises authority over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824.

Under the FPA, "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Envt'l. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009); *see also New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC as finding that "[a]mong other things, Congress left to the States authority to regulate generation and transmission siting").

B. FERC promulgates Order 1000 and specifically affirms the states' rights to enact right-of-first-refusal statutes.

In 2011, FERC promulgated an order—called Order 1000—that specifically affirms the right of states to enact right-of-first-refusal statutes such as Minnesota's.

Order 1000 arises out of efforts to manage the electric grid regionally that began in 1999. *See Reg'l Transmission Organizations*, 89 FERC ¶ 61285, ¶ 1, 1999 WL 33505505, at *3 (Dec. 20, 1999); *see also* 18 C.F.R. § 35.34. To aid such efforts, FERC authorized the creation of non-governmental, non-profit entities known as either Regional Transmission Organizations ("RTOs") or Independent System Operators ("ISOs"). *Id.*

Originally, FERC designed the regional planning process to give incumbent utilities a *federal* right of first refusal with respect to any new transmission project that interconnected with their system. *MISO Transmission Owners*, 819 F.3d at 332. In 2011, however, in response to the desire of some states to shift to a less-regulated market for electricity, FERC eliminated the *federal* right-of-first-refusal rule in its Order 1000, freeing states to adopt more market-oriented policies. *Id.* at 333.

At the same time, however, and in the very same Order 1000, FERC recognized that some states would make the policy choice to continue regulating electric transmission lines—and it expressly ruled that it would respect that choice. "We acknowledge," FERC stated, "that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relating to siting, permitting, and construction." Order 1000, 136 FERC at ¶ 107, 2011 WL 2956837, at *33. "[N]othing in this Final Rule," FERC declared, "is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order 1000, 136 FERC at ¶ 227, 2011 WL 2956837, at *72; *see also id.* at ¶¶ 253 n.231, 287.

C. Minnesota enacts § 216B.246 as allowed by Order 1000 to preserve its regulatory authority over transmission lines.

In 2012, the year after FERC promulgated its Order 1000, Minnesota enacted § 216B.246 to preserve its regulatory authority over transmission lines.

The core of § 216B.246 is a matched set of rights and obligations. First, incumbent electric transmission owners are given "the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan" ***if*** the line will "connect[] to facilities owned by that incumbent electric transmission owner." Minn. Stat. § 216B.246, subd. 2. If a proposed line connects to more than one incumbent owner's facilities, each connecting owner receives the right to build and operate the line "individually and proportionally" with the other owner or owners. *Id.*

Second, and correspondingly, the statute authorizes the Minnesota Public Utilities Commission to ***require*** an incumbent to "build the electric transmission line, taking into consideration issues such as cost, efficiency, reliability, and other factors identified in this chapter," even if the incumbent declared it did not want to build the line. *Id.*, subd. 3(b).

The rights and obligations granted by § 216B.246 do not reflect any decision to prefer in-state over out-of-state entities. To the contrary, Minnesota and non-Minnesota entities are treated even-handedly, and the fundamental choice is for regulated entities whose facilities the new transmission line will connect to over other entities. Section 216B.246 defines an "incumbent electric transmission owner" as "***any*** public utility that owns, operates, and maintains an electric transmission line in this state; ***any*** generation and transmission cooperative electric associates; ***any*** municipal power agency; ***any*** power district; ***any*** municipal utility; or ***any***

transmission company . . . ." Minn. Stat. § 216B.246, subd. 1 (emphasis added). This definition is ***not*** limited to in-state entities but includes ***all*** current owners and operators, regardless of their state of organization or principal place of business.

Many out-of-state entities are covered as incumbent electric transmission owners and are given the right of first refusal under Minnesota's statute. *See* Compl. ¶ 64(a)-(p) [Dkt. 1]. The incumbents include entities headquartered in Iowa, North Dakota, South Dakota, and Wisconsin, as well as Minnesota. *Id.* Moreover, many of the entities own and operate facilities in other states. *Id.*

The process under § 216B.246 is as follows: Once a qualifying electric transmission line has been approved for construction, incumbent owners have a 90-day window in which to notify the Commission whether they intend to exercise their right of first refusal. Minn. Stat. § 216B.246, subd. 3(a). If an owner gives notice that it will construct the line, it has 18 months from the date of that notice, or such longer time as approved by the Commission, "to file an application for a certificate of need under section 216B.243 or certification under section 216B.2425." *Id.* If an incumbent indicates that it does not want to build a proposed line, it must explain its reasoning to the Commission, and the Commission may override the decision and order the incumbent to build the line. *Id.*, subd. 3(b).

Section 216B.246 is part of Minnesota's broader regulatory program for regulating the construction of "large energy facilit[ies]," which include significant

electric transmission lines.[1] *Id.* §§ 216B.243 & 216B.2421. No such line can be built "without the issuance of a certificate of need" by the Commission. *Id.* § 216B.243, subd. 2. In deciding whether to issue a certificate, the Commission must consider a host of factors, including "the relationship of the proposed line to regional energy needs," the "benefits of this facility, including its uses to protect or enhance environmental quality, and to increase reliability of energy supply to Minnesota and the region," "the benefits of enhanced regional reliability, access, or deliverability to the extent these factors improve the robustness of the transmission system or lower costs for electric consumers in Minnesota," and more. *Id.*, subd. 3. Other state agencies are invited to participate in the process as appropriate, *id.*, subd. 7(a), including specifically the commissioner of agriculture because of the potential impact on "cultivated agricultural land," *id.*, subd. 7(b). The Commission must also hold at least one public hearing "at a location and hour reasonably calculated to be convenient for the public." *Id.*, subd. 4.

A high-voltage transmission line also cannot be constructed until the Commission issues a route permit. *Id.* § 216E.03, subd. 2. The route permit requires a separate application, environmental impact statement, and consideration of another list of factors set out by the legislature. *Id.*, subd. 3, 5, & 7. Under certain

[1] The statute specifically governs "any high-voltage transmission line with a capacity of 200 kilovolts or more and greater than 1,500 feet in length" and "any high-voltage transmission line with a capacity of 100 kilovolts or more with more than ten miles of its length in Minnesota or that crosses a state line." Minn. Stat. § 216B.2421.

circumstances, utilities may have eminent domain authority to build a transmission line once it is approved. *See id.* § 216E.12.

Section 216B.246 reflects the legislature's decision to keep in place a regulatory approach that has been tested and proved valid through years of experience. In a January 24, 2012 report required by Minn. Stat. § 216C.054, the Commissioner of Commerce expressed concern that FERC's removal of the federal right of first refusal in Order 1000 could "discourage utilities from sharing information since another entity could step in and build lines a utility would like to build." 2012 Department of Commerce Report at 7 (Zylstra Decl. Ex. A.) [2] The Commissioner therefore recommended considering a state right of first refusal to ensure that state utilities would continue to "build more transmission." *Id.* In a Minnesota State Senate Committee hearing on the bill, Senator David Brown—an author of the bill—said,

[2] NSP submits and requests that the Court take judicial notice of public records including agency reports and filings with the Public Utilities Commission, as well as a report cited in the complaint, which are attached to the Declaration of Nathaniel J. Zylstra submitted herewith. On a motion to dismiss, it is appropriate for the Court to consider "the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint." *Shoemaker v. Cardiovascular Sys., Inc.*, Civ. No. 16-568 (DWF/KMM), 2017 WL 1180444,*6 (D. Minn. Mar. 29, 2017); *see also* Fed. R. Evid. 201(b); *Bradfield v. Corr. Med. Servs.*, No. 1:07-cv-1016, 2008 WL 5685586, at *4 (W.D. Mich. July 3, 2008) ("As a general rule, this court may take judicial notice of documents filed in a state agency proceeding." (citing *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008)); and *Shiraz Hookah, LLC v. City of Minneapolis*, No. 11-CV-2044, 2011 WL 6950483, at *2 (D. Minn. Dec. 30, 2011) (citing *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003)).

"Our regulatory system has served Minnesota well, and our system is reliable and our rates are fairly competitive."[3] Senator Brown cautioned that:

> If we choose not to pass this legislation, we are moving into the world of unknown, versus we have a very known process right now, members. And I think it's best to stick with that process . . . .[4]

After § 216B.246 was enacted, the 2013 annual report required by § 216C.054 reinforced the state's view that the "statute works in conjunction with Minnesota's existing statutes to ensure that Minnesota utilities provide reliable service, at reasonable costs, in consideration of Minnesota's policy objectives." 2013 Department of Commerce Report at 8 (Zylstra Decl. Ex. B).

D. FERC approves the regional tariff recognizing Minnesota's right-of-first-refusal statute and rejects LSP Transmission's objection to it.

After Minnesota enacted § 216B.246, its right of first refusal was recognized by the regional planning entity and approved over LSP Transmission's objection by FERC.

The regional planning entity covering Minnesota is the Midcontinent Independent System Operator ("MISO"), which governs 15 U.S. states and the Canadian province of Manitoba. (Compl. ¶ 16.) Consistent with Order 1000, MISO prepared tariff amendments that implemented the rights of first refusal enacted by

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[3] *Hearing on S.F. 1815 Before the S. Comm. on Energy, Utilities and Telecommunications*, 87th Minn. Leg. (Minn. 2012) (Statement of Senator Brown at 00:01:32). *See* Affidavit of Julie Peick, [Dkt. 22] Exhibit A.

[4] *Id.* (Statement of Senator Brown at 00:49:46).

states within its region, including Minnesota. In 2015, FERC approved MISO's tariff and expressly rejected the argument that state rights-of-first-refusal should not be permitted. *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC at 61176 ¶ 25, 2015 WL 285969, at *7.

LSP Transmission Holdings, LLC, the same entity that is the Plaintiff in this case, objected to FERC's ruling, arguing that FERC should preclude states from enacting right-of-first-refusal statutes. *Id.* at ¶¶ 2, 17-22. But FERC rejected that argument, holding that "it is appropriate for MISO to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." *Id.* at ¶ 25. By removing *federal* rights of first refusal but honoring *state* rights, FERC emphasized that its Order 1000 had "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms *do not result in the regulation of matters reserved to the states*." *Id.* at ¶ 27 (emphasis added).

E. The Seventh Circuit rejects LSP Transmission's statutory challenge to FERC's approval of Minnesota's right of first refusal.

After FERC promulgated Order 1000 and approved the MISO tariff, the balance it struck between federal and state regulatory power was challenged from both sides. Some parties argued that Order 1000 intruded too much on state authority by requiring regional planning processes. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41,

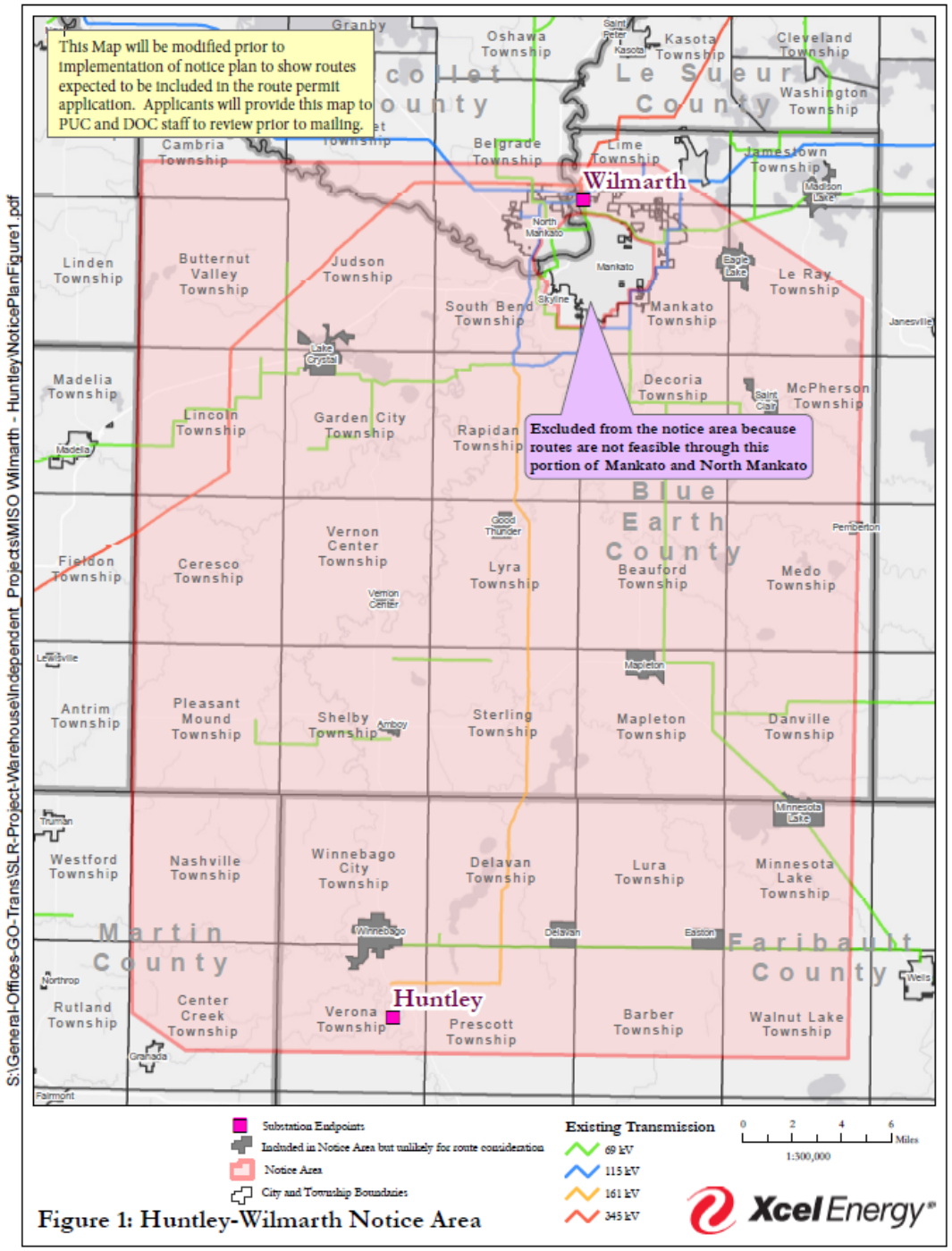
62-63 (D.C. Cir. 2014). Although the D.C. Circuit found that argument to be "not without force," it ultimately concluded that FERC had acted within its authority under the FPA in requiring those processes. *Id.*

Others parties, including Plaintiff LSP Transmission, argued that FERC had not gone far enough, and that it should not have allowed MISO to implement state rights of first refusal. *See MISO Transmission Owners*, 819 F.3d at 336 (noting LSP Transmission's objection to Minn. Stat. § 216B.246). The Seventh Circuit, however, rejected LSP Transmission's argument, holding that FERC's desire "to avoid intrusion on the traditional role of the States' in regulating the siting and construction of transmission facilities" was a "proper goal." *Id.*

F. NSP exercises its right of first refusal in connection with the proposed Huntley-Wilmarth line, which will connect to NSP's existing Wilmarth sub-station.

This case arises out of a particular proposed 345 kilovolt electric transmission line, the Huntley-Wilmarth line. Located wholly within Minnesota, the proposed line will run approximately 40 miles, connecting Xcel Energy's existing Wilmarth substation, north of Mankato, Minnesota, to ITC Midwest's Huntley substation, currently under construction, south of Winnebago, Minnesota. Compl. ¶ 70; *see also* Notice of Intent at 1 (Zylstra Decl. Ex. C). The following map depicts the proposed route area:

FIGURE 1



Notice Plan at 14, Fig. 1, (Zylstra Decl. Ex. D).

In connection with the Huntley-Wilmarth line, each implicated entity—federal and state, governmental and non-governmental—has exercised its respective rights

and authority over electric power transmission. First, MISO conducted a years-long study as part of its Transmission Expansion Planning process to identify the need for new transmission lines to alleviate congestion. *See* Compl. ¶ 69. It concluded that the proposed Huntley-Wilmarth transmission line qualified as a Market Efficiency Project, and it awarded the project to NSP and the other incumbent owner, ITC Midwest LLC. *Id.* ¶ 71.

After the Huntley-Wilmarth line was approved, NSP and ITC Midwest jointly exercised their rights of first refusal under § 216B.246 on March 3, 2017 by filing with the Commission a Notice of Intent giving formal notice of the companies' "inten[t] to construct, own and maintain the Huntley –Wilmarth 345 kV transmission line project to be located in south central Minnesota." Notice of Intent at 1 (Zylstra Dec. Ex. C).

They also were required to file a Notice Plan at least three months before filing a certificate of need application for the Huntley-Wilmarth line. Minn. R. 7829.2550. NSP and ITC Midwest filed their Notice Plan on June 30, 2017. Notice Plan (Zylstra Decl. Ex. D). The project is scheduled for completion by January 1, 2022. (Compl. ¶ 72.)

They now must submit a certificate of need application to the Commission pursuant to Minnesota Statutes §§ 216B.243, 216B.246, and 216B.2421.

STANDARD OF REVIEW

In evaluating this motion to dismiss, the Court must accept the facts alleged in the complaint as true and grant all reasonable inferences in the plaintiff's favor. *Crooks*

v. Lynch, 557 F.3d 846, 848 (8th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In this case, that means the complaint must allege facts sufficient to bear the burden of establishing that Minn. Stat. § 216B.246 violates the Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

ARGUMENT

I. Minnesota's Even-Handed Regulation Of Electric Transmission Lines Does Not Violate The Dormant Commerce Clause.

This is LSP Transmission's third attempt to override Minn. Stat. § 216B.246 and impose its own policy views on the State of Minnesota.

FERC rejected LSP Transmission's position when it was raised as a policy argument. *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC at 61176 ¶¶ 26, 30, 31 & 33, 2015 WL 285969, at *6-7.

The Seventh Circuit rejected LSP Transmission's position when it was raised as a statutory argument. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (citation omitted).

Now LSP Transmission is raising its position as a constitutional argument. The third time is not the charm. This Court should dismiss LSP Transmission's complaint for failure to state a claim because § 216B.246 is a legitimate, non-discriminatory exercise of Minnesota's long-held authority to regulate the provision of electricity to

its citizens in the public interest, and it does not violate the Commerce Clause of the United States Constitution.

A. The level of scrutiny under the dormant Commerce Clause depends on whether the state action discriminates against or only incidentally burdens interstate commerce.

The Commerce Clause of the U.S. Constitution authorizes Congress "[t]o regulate Commerce . . . among the several states." Art. I, § 8, cl. 3. The Supreme Court has held that the "negative or dormant implication" arising from this affirmative grant of authority "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Tracy*, 519 U.S. at 287.[5]

If a "statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

If, on the other hand, "the state law discriminates against interstate commerce—facially, in purpose or in effect—it will be invalidated unless the state can show, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste Mgt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006) (internal quotation marks omitted). This standard has been limited "to

[5] NSP acknowledges that this Court is bound to apply the "dormant" aspect of the Commerce Clause but preserves for Supreme Court review the argument that this aspect is unfounded in the text and history of the Constitution.

provisions that patently discriminate against interstate trade." *Southern Union*, 289 F.3d at 508 (quoting *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 647 (1994)). It is designed to forbid laws "whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measure the Constitution was designed to prevent." *Id.* (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

B. Even-handed state public-utility regulations are presumptively valid under the dormant Commerce Clause.

Even-handed state public-utility regulations are presumptively valid under the dormant Commerce Clause because of the long history of state authority in this area and doubts about the courts' institutional competence to make policy judgments via constitutional law. As the Supreme Court has written and the Eighth Circuit has quoted, the "'regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'" *Southern Union*, 289 F.3d at 508 (quoting *Ark. Elec. Co-op*, 461 U.S. at 377). State legislatures are uniquely situated to find facts and make determinations regarding the "health, life, and safety of their citizens." *Tracy*, 519 U.S. at 306. Because of these fact-finding capacities and local knowledge, legislatures are also uniquely situated to assess the impact a public-utility regulation will have on commerce and "to give the greater weight to the captive market and the local utilities' singular role in serving it." *Id.* at 304; *see also S.C. Pub. Serv. Auth.*, 762 F.3d at 62.

Because of "this nation's long history of public utility regulation," courts act cautiously when considering a Commerce Clause challenge. *Southern Union*, 289 F.3d at 507. In *Tracy*, the Supreme Court summarized the reasons for judicial deference this way:

> [W]e must recognize an obligation to proceed cautiously lest we imperil the delivery by regulated LDC's of bundled gas to the noncompetitive captive market. Second, as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market. Finally, should intervention by the National Government be necessary, Congress has both the resources and the power to strike the balance between the needs of the competitive and captive markets.

Tracy, 519 U.S. at 304.

All of the reasons for caution apply in this case. First, it is critically important to "avoid[] any jeopardy to service of the" regulated consumer market. *Id.* at 305. As with natural gas in *Tracy*, so here the ability to provide electricity is crucially important for consumers' "health and safety." *Id.* at 306. New transmission lines ensure a reliable supply of electricity. *See MISO Transmission Expansion Plan 16*, at 46 (Zylstra Decl. Ex. E).[6] They allow new power plants, including wind and solar facilities, to be brought online and enable the retirements of older and less environmentally friendly generators. *Id.* at 60–63. They also reduce costs to consumers by allowing electricity to flow from areas with excess supply to areas of high demand. *Id.* at 47.

[6] This report is cited in Plaintiffs' Complaint, *see* ¶ 71 n.13, and therefore may be considered on a motion to dismiss. *Shoemaker* 2017 WL 1180444, *6.

The process of building and siting new transmission lines is just as complex as it is important. Even relatively small projects cost tens of millions of dollars, *id.* at 105, and larger projects, such as regional upgrades, can cost tens of billions, *id.* at 18. Projects take years to plan, build, and bring into service. *Id.* at 16. In addition to the delays inherent in designing and obtaining regulatory approval for large-scale construction projects, new transmission must be carefully engineered and integrated into the electric grid to avoid unforeseen reliability problems. *Id.* at 6. Because transmission projects typically require the exercise of eminent domain, *see* Minn. Stat. § 216E.12, and detailed environmental analysis, *see id.* § 216E.03, subd. 5, public opposition can be significant.

In light of these considerations, Minnesota has made a reasonable determination that the entities that own the facilities to which new lines would connect are best positioned to ensure the reliable delivery of power, and hence it has given them corresponding rights and obligations under § 216B.246. That decision is entitled to deference.

Second, the economic effects of judicial intervention are unclear. *Tracy*, 509 U.S. at 307-08. With § 216B.246, Minnesota made a reasonable decision to retain the bargains it had previously struck with the entities it regulates. As in *Tracy*, if a court were to strike down part of the benefits given to regulated entities, it might "strain the capacity of the States to continue to demand the [corresponding] regulatory benefits that have served" the public. *Id.* at 307.

The demands that Minnesota places on its regulated entities are extensive. Many of the existing electric transmission owners that receive the right of first refusal under § 216B.246, including intervenor-defendant NSP, are public utilities, who are subject to regulations requiring them to:

- file reasonable and equitable rates, Minn. Stat. §§ 216B.01, 216B.03;
- provide safe, adequate, efficient, reasonable, and reliable service, *id.* §§ 216B.01, 216B.04;
- adhere to safety requirements in the National Electrical Safety Code, as published by the Institute of Electrical and Electronics Engineers, Inc. (IEEE), Minn. R. 7826.0300;
- provide electric service to all retail customers within its exclusive geographic service area, Minn. Stat. § 216B.37;
- comply with the Commission's authority on electric service standards and rules, including technical standards on service quality, testing, and equipment, *id.* § 216B.09;
- establish affordability programs for low-income residential customers, *id.* § 216B.16, Subd. 15;
- comply with the Commission's standards for interconnection and operation of distributed generation resources, *id.* § 216B.1611;
- establish an Electric Vehicle charging tariff, *id.* § 216B.1614;
- purchase energy and capacity from any qualifying facility that offers to sell the energy and agrees to the applicable interconnection, installation, and operational conditions, Minn. R. 7835.1900;
- generate 25 percent of total electric sales from renewable energy sources by 2025, Minn. Stat. § 216B.1691;
- spend a portion of gross revenues from Minnesota for conservation improvements, *id.* § 216B.241, subd. 1(a);

- file integrated resource plans with the Commission, with the information required in Minn. R. 7843.0400; and
- fund the expenditures of the Commission and the Department of Commerce as they perform their duties related to public utility regulation, Minn. Stat. § 216B.62.

Other incumbent owners are municipal utilities and cooperative electric associations, Minn. Stat. § 216B.01, as well as "transmission company[ies,]" *id.* § 216B.02, subd. 10. These entities are also subject to regulation. For example, entities that own high-voltage transmission lines must submit reports every other year regarding "present and reasonably foreseeable future inadequacies" in the transmission system in Minnesota as well as analyses of alternatives to address those inadequacies. Minn. Stat. § 216B.2425, subd. 2. Utilities must also report to the Commission each year about the investments they consider "necessary to modernize the transmission and distribution system by enhancing reliability, improving security against cyber and physical threats, and by increasing energy conservation opportunities." *Id.* § 216B.2425, subd. 2(e).

Minnesota is entitled to decide to give existing owners a right of first refusal to build new transmission lines that will connect to their facilities, in exchange for the regulatory burdens it places on them, including the burden of potentially being forced to build new lines. This Court, like the Supreme Court, is not well positioned to upset the regulatory balance, because it is "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make

them." *Tracy*, 519 U.S. at 307. It should therefore be reluctant to use the Commerce Clause to upend Minnesota's regulatory scheme.

Finally, federal authorities are quite capable of stepping in here if necessary to preserve federal interests. Congress could no doubt override state authority over electric transmission construction and operation if it wanted to. U.S. Const. art. I, § 8, cl. 3; *see generally United States v. Lopez*, 514 U.S. 549 (1995); *Gonzales v. Raich*, 545 U.S. 1 (2005). Indeed, it has done so for natural gas terminals and interstate natural gas lines. *See* 15 U.S.C. §§ 717b, 717f. But Congress has chosen a different approach to electricity. For decades, Congress has consistently acted "to preserve and protect state and local regulation of the distribution of . . . electricity to local retail customers." *Southern Union*, 289 F.3d at 507 (citing *Tracy*, 519 U.S. at 288-97). In this respect, Congress's regulation of electric transmission lines implements the foundational principle of federalism that weaves together much of the American political economy. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Just as important, Congress has empowered FERC to act in this arena, and the agency has done so in carefully drawing a line that preserves statutes such as Minnesota's. *See Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 107 (2d Cir. 2017) ("[N]either FERC nor Congress has given any indication that this structure is unduly harmful to

interstate commerce."). In Order 1000, FERC specifically stated that its order did not remove states' authority to provide rights of first refusal to incumbents and that it would honor state statutes choosing to provide those rights. Order 1000, 136 FERC at ¶ 287, 2011 WL 2956837, at *92. Later, FERC approved MISO's tariff implementing Minnesota's right-of-first-refusal statute. *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC at ¶ 25, 2015 WL 285969, at *7. Not only that, but FERC rejected LSP Transmission's request to reconsider its approval. *Id.* Because FERC has reviewed the precise Minnesota regulation at issue and concluded that it is allowed under the FPA, this Court should be extraordinarily hesitant to use the Constitution to upend the statute.

C. Minnesota's even-handed exercise of regulatory authority in § 216B.246 does not discriminate against interstate commerce.

Under the approach established by the Supreme Court in *Tracy* and the Eighth Circuit in *Southern Union*, this Court should hold that LSP Transmission has failed to show that § 216B.246 discriminates against interstate commerce. The burden of establishing that a challenged statute discriminates against interstate commerce "rests on the party challenging the validity of the statute." *Hughes*, 441 U.S. at 336.

Unlike state regulations that have been struck down under the Commerce Clause, § 216B.246 does not discriminate between in-state and out-of-state competitors. It neither imposes taxes on out-of-state companies nor subsidizes in-state companies. *Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994). It does

not charge out-of-state entities higher fees. *Cf. Or. Waste Sys., Inc. v. Dep't of Envt'l. Quality*, 511 U.S. 93, 99 (1994). It does not demand a preference for in-state suppliers of raw materials. *Cf. Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

Instead, § 216B.246 draws the facially neutral distinction between the incumbent electric transmission owners to whose facilities a new line will connect and all other entities. Minn. Stat. § 216B.246, subd. 2. To the extent LSP Transmission argues that incumbency is a proxy for "in-state status," that is incorrect. "One can be, for example, an incumbent recipient of some state contractual benefit without necessarily being an in-state resident." *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016). Just so under § 216B.246. Although an entity must own a *facility* in the state to receive a right of first refusal, it need not be a Minnesota *entity*, either in its form of organization or in its principal place of business. To the contrary, as the Complaint acknowledges, several of the entities that qualify for a right of first refusal are non-Minnesota entities, including:

- American Transmission Company, LLC and Dairyland Power Cooperative, which are both headquartered in Wisconsin, (Compl. ¶¶ 64.a & 64.b);
- East River Electric Power Cooperative, which is a South Dakota entity (*id.* ¶ 64.c);
- L&O Power Cooperative, which is headquartered in Iowa (*id.* ¶ 64.g);

- Minnkota Power Cooperative, which is headquartered in North Dakota (*id.* ¶ 64.j); and
- Missouri River Energy Services, which is an association of municipally-owned electric utilities, including utilities from Iowa, South Dakota, and North Dakota, as well as Minnesota (*id.* ¶ 64.k).

Conversely, just as out-of-state entities may enjoy the rights and obligations granted to incumbents, in-state entities are denied those rights if they do not own a facility to which the proposed new transmission line will connect. For example, if a new line was proposed to connect to a facility owned by an out-of-state entity, that out-of-state company would have the right of first refusal to build the line, even if a Minnesota company wanted to build it.

Because § 216B.246 treats in-state and out-of-state entities exactly the same, the Eighth Circuit's decision in *Southern Union* controls its treatment and requires the holding that it is not discriminatory and therefore not *per se* invalid under the dormant Commerce Clause. In *Southern Union*, the court reviewed a Missouri statute that required all public utilities doing business in the state to receive state regulatory approval before investing in any other utility, even utilities that operated entirely outside Missouri. 289 F.3d at 505. The Eighth Circuit made short work of the plaintiff's charge of discrimination, holding that "no discrimination against interstate commerce" was "at work," since "[a]ll regulated utilities doing business in Missouri"

were subject to the investment review. *Id.* at 508. In the same way here, § 216B.246 applies equally to all entities that own current transmission facilities to which a new line will connect, and it is therefore presumptively valid under the Commerce Clause.

D. Minnesota's distinction between the existing, regulated entities that own the facilities to which a new transmission line will connect and other entities cannot be labeled discriminatory.

To the extent LSP Transmission argues that § 216B.246 is discriminatory and *per se* invalid because of the distinction it draws between the existing, regulated entities that own the facilities to which a new transmission line will connect and other entities, the argument is foreclosed by the Supreme Court's decision in *Tracy* and its progeny.

In *Tracy*, the Supreme Court reviewed an Ohio statute that granted an exemption from a tax on retail sales of natural gas to domestic utilities but denied it to interstate gas transmission companies. *Id.* at 281-82. In considering the plaintiff's dormant Commerce Clause challenge, the Supreme Court first assessed whether the statute applied to "substantially similar entities," *Tracy*, 519 U.S. at 298, because where "different entities serve different markets," there is no discrimination, *id.* at 299. The Court concluded that the in-state domestic utilities served a captive market of consumer end-users that the interstate companies did not serve, and the utilities provided gas "bundled" with the various regulatory requirements imposed by the state to those consumers. *Id.* at 304. Thus, even though the domestic utilities also competed head to head with the interstate companies for the sale of retail gas to large-scale factory users who were not part of the regulated market, the Court held that the state

was justified in treating the utilities differently in *both* markets. The Court reasoned that the state's

> regulatory response to the needs of the local natural gas market has resulted in a noncompetitive bundled gas product that distinguishes its regulated sellers from independent marketers to the point that the enterprises should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause.

Id. at 310. Hence, *Tracy* held that the Ohio statute did not discriminate against interstate commerce for purposes of the dormant Commerce Clause.

The Second Circuit recently applied *Tracy* to a Connecticut program that distinguished between in-state and out-of-state entities in the market for electricity. In relevant part, the program required state electric utilities to purchase renewable energy credits from "renewable energy producers located *in the region*." *Allco Fin.*, 861 F.3d at 86 (emphasis added). A national market exists for renewable energy credits, so the state program prejudiced renewable energy generators outside the region. *Id.* at 106. But there was another market, the state's local energy market, and the court found that the state program advanced legitimate interests in that market by "promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power." *Id.* at 107. In addition, because FERC had acted to establish a regional market in electricity, its close involvement weighed strongly against court intervention:

> [I]t is FERC itself that has instituted a sort of regionalization of the national electricity market. And neither FERC nor Congress has given any indication that this structure is unduly harmful to interstate

> commerce. Congress and FERC are better-situated than the courts to supervise and determine the economic wisdom and the health and safety effects of these geographic boundaries that Connecticut has incorporated into its RPS program. It is they that, in this setting, are best suited to decide which products ought to be treated similarly, and which should not.

Id. For all these reasons, the Second Circuit refused to hold the state regulation *per se* invalid as discriminatory under the dormant Commerce Clause. Instead, it held that the "means and ends" Connecticut selected to advance its regulatory interests were "well within the scope of what Congress and FERC have traditionally allowed the States to do in the realm of energy regulation." *Id.* at 106.

Under *Tracy* and *Allco*, Minnesota's right-of-first-refusal statute cannot be held *per se* invalid as a discrimination against interstate commerce. Like the Ohio tax statute in *Tracy* and the Connecticut renewable-energy-credit statute in *Allco*, Minnesota's right-of-first-refusal statute arises out of and is part of its broader regulation of the provision of electricity to the consumer market. As demonstrated above, many of the entities that own existing transmission facilities are highly regulated public utilities. Minnesota is entitled to take account of the effect on those entities and the consumers they serve and "to give the greater weight to the captive market and the local utilities' singular role in serving it." *Tracy*, 519 U.S. at 304.

For all these reasons, the Court should reject any claim of *per se* invalidity raised against Minn. Stat. § 216B.246.

E. Minnesota's legitimate, strong interest in regulating the provision of electricity to its citizens far outweighs any indirect effect its regulation has on interstate commerce.

Since Minnesota's statute does not discriminate against interstate commerce, it must be upheld "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *Southern Union*, 289 F.3d at 507 (quoting *Pike*, 397 U.S. at 142). Section 216B.246 easily satisfies this test.

As described above, Minnesota has an exceedingly strong, well-recognized interest in regulating the market for electricity to serve the best interests of its citizens. Indeed, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States," *Ark. Elec. Co-op Corp.*, 461 U.S. at 377, and legislatures are uniquely situated to make determinations regarding the "health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country," *Tracy*, 519 U.S. at 306.

Minnesota also has a long history of regulating the construction and operation of electric power transmission facilities in the state as part of its overall regulatory regime governing utilities. *See North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016); *S.C. Pub. Serv. Auth.*, 762 F.3d at 62 (the states' "traditional role in regulating siting and construction requires little discussion"). LSP Transmission argues that competition always serves the public interest, but that is not invariably true. *See, e.g.,* David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 Wake Forest L. Rev. 417, 417 (2005) ("California's disastrous experience with restructured

electricity markets has given pause to restructuring's proponents and ammunition to restructuring's opponents."). Moreover, the authority to choose between competition and regulation does not lie with LSP Transmission, or even with this Court, but with the State of Minnesota. And here, the Minnesota legislature has found that regulation is necessary to provide "the retail consumers of natural gas and electric service in this state with adequate and reliable services at reasonable rates," "to avoid unnecessary duplication of facilities which increase the cost of service to the consumer," and "to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers." Minn. Stat. § 216B.01.

These sorts of interests are recognized as paramount. In *Southern Union*, the Eighth Circuit held that Missouri has a strong interest in "assuring a reliable and affordable supply of natural gas" and therefore could regulate out-of-state purchases of corporate stock by public utilities. 289 F.3d at 509. In *Balt. Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985), the Fourth Circuit similarly noted that the statute at issue was "but one subsection of an elaborate public service corporation law, one of the primary purposes of which is to regulate the rates charged to the public by the utility and which involves a balancing of investor and consumer interests." *Id.* The same is true here.

In contrast to the compelling interests served by § 216B.246, any burden on interstate commerce imposed by Minnesota's right of first refusal is slight and incidental. The statute does not bar any out-of-state entity from engaging in

commerce in Minnesota. It provides no preference to in-state companies or individuals. Rather, it gives the companies whose facilities the new transmission line will connect to the first opportunity—and potentially the obligation, if directed by the Commission—to build the line. This type of incidental effect is plainly insufficient to strike down a state exercise of legitimate police power. In *Arkansas Electricity Co-op.*, the Supreme Court found that even though the regulation of electric rates within a state would have an effect on interstate commerce since the utilities at issue were connected to the interstate electric grid, that effect was not sufficient to outweigh the local interests. 461 U.S. at 395. Similarly, in *Baltimore Gas*, the Fourth Circuit held that the direct prevention of a range of financial transactions involving public utilities would have an effect on interstate commerce, but it held that the burden was not enough to override the state's interest in protecting consumers. 760 F.2d at 1425-26; *see also Alliant Energy Corp. v. Bie*, 330 F.3d 904, 916 (7th Cir. 2003).

To be clear, NSP does not agree with the economic case LSP Transmission sets out in its pleadings. But this Court is not the entity charged with deciding the issue, and the dormant Commerce Clause is not a vehicle through which Plaintiff can impose its policy preferences on Minnesota. The choice whether and how to regulate belongs to Minnesota, as the Fourth Circuit recently explained:

> At the heart of appellants' argument is the basic economic maxim that barriers to entry like [certificate of need] programs may reduce competition and thereby allow entrenched incumbents to exert market power and charge inefficiently high prices. Like Virginia's legitimate state interest arguments, we do not find appellants' countervailing argument

> to be unreasonable. The points noted above, however, might be more persuasively made before the Virginia General Assembly, not a panel of unelected federal judges. The battle between laissez fairists and regulators is as old as the hills. The fighting, however, is more often over economics and politics than over law. Legislators, not jurists, are best able to compare competing economic theories and sets of data and then weigh the result against their own political valuations the public interests at stake.

Colon Health Ctrs., 813 F.3d at 158. The Court should therefore reject LSP Transmission's challenge.

CONCLUSION

The Court should dismiss LSP Transmission's Complaint in its entirety, with prejudice. It is for Congress, FERC, and the Minnesota Legislature to decide what approach to take in regulating electric transmission lines. Since Congress and FERC have made it clear that the policy decisions in this area are Minnesota's to make, and since Minnesota has chosen to exercise its traditional regulatory authority in a way that does not discriminate against interstate commerce, LSP Transmission's claim under the dormant Commerce Clause fails as a matter of law.

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