UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 17-cv-04490 DWF/HB

LSP Transmission Holdings, LLC,

v.

Nancy Lange, *et al*.

(Full caption on the next page)

STATEMENT OF INTEREST ON BEHALF OF
THE UNITED STATES OF AMERICA

GREGORY G. BROOKER
United States Attorney for the District of Minnesota

ANA H. VOSS
Assistant United States Attorney for the District of Minnesota

600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
Phone: (612) 664-5600
Email: Ana.Voss@usdoj.gov

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

WILLIAM J. RINNER
JULIA A. SCHILLER
Counsels to the Assistant Attorney General

ROBERT POTTER
DANIEL E. HAAR
MATTHEW C. MANDELBERG
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Phone: (202) 598-2413
Email: Matthew.Mandelberg@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

LSP Transmission Holdings, LLC, Plaintiff, v. 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. and Northern States Power Company d/b/a Xcel Energy, and ITC Midwest, LLC, Intervenor-Defendants.	Case No. 17-cv-04490 DWF/HB **STATEMENT OF INTEREST OF THE UNITED STATES**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States."

INTEREST OF THE UNITED STATES

The United States has an interest in preserving and promoting competition in interstate commerce. As the Supreme Court has explained, "[t]he heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v.*

FTC, 340 U.S. 231, 248 (1951). The United States, through the Justice Department's Antitrust Division, pursues this interest in its enforcement of the federal antitrust laws, *see N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."), as well as in its competition advocacy, expressing support for federal and state laws and regulations that promote competition and opposition to those that—as in this case—unnecessarily restrict competition.[1]

As this Statement explains, the interest of the United States in promoting competition in the U.S. economy can be advanced by ensuring states do not inappropriately interfere with interstate commerce. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, grants the U.S. Congress the power to regulate interstate commerce, and the Supreme Court has interpreted the Clause to contain as well the negative implication—referred to as the "dormant Commerce Clause"—that the states may not regulate interstate commerce. *Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328, 337 (2008). The Commerce Clause reflects "a central concern of the Framers"—"that in

[1] "In addition to enforcing the antitrust laws, the Antitrust Division also acts as an advocate for competition, seeking to promote competition in sectors of the economy that are or may be subject to government regulation." *Mission*, U.S. Dep't of Justice Antitrust Div., https://www.justice.gov/atr/mission (last updated July 20, 2015); *see also Comments to Federal Agencies*, U.S. Dep't of Justice Antitrust Div., https://www.justice.gov/atr/comments-federal-agencies (last updated Oct. 27, 2017) (listing competition advocacy comments the Antitrust Division has provided to other federal agencies); *Comments to States and Other Organizations*, U.S. Dep't of Justice Antitrust Div., https://www.justice.gov/atr/comments-states-and-other-organizations (last updated Mar. 14, 2018) (listing competition advocacy comments the Antitrust Division has provided to state legislatures, governors, and others).

order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Comptroller of Treasury of Md. v. Wynne*, 135 S.Ct. 1787, 1794 (2015) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)). Toward that end, the Supreme Court has viewed the dormant Commerce Clause as guarding against "economic protectionism" that "benefit[s] in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337-38 (quoting *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 273-74 (1988)). As a result, the doctrine "strikes at one of the chief evils that led to the adoption of the Constitution," *Wynne*, 135 S.Ct. at 1794, and "effectuate[s] the Framers' purpose to prevent a State from retreating into [] economic isolation." *Davis*, 553 U.S. at 338 (internal quotations omitted) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

In the instant case, the United States believes that a state law which grants local electricity monopolists the right to obtain new monopolies in transmission projects in interstate commerce, and thereby block entry by potentially out-of-state competitors, unconstitutionally regulates interstate commerce in violation of the dormant Commerce Clause.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff LSP Transmission Holdings, LLC ("LSP") and its affiliates are in the business of building and operating transmission lines. Compl. at ¶¶ 2, 18-20. LSP currently does not have an in-state presence in Minnesota, but it has developed transmission lines elsewhere. *Id.* at ¶¶ 2, 76-78. LSP seeks to compete to build certain transmission lines in Minnesota. *Id.* at ¶¶ 69-76. LSP has filed a complaint against officials of the State of Minnesota, alleging that Minnesota's right of first refusal law violates the dormant Commerce Clause. *Id.* at ¶¶ 99-102. Two local incumbents have intervened as defendants in the lawsuit, and motions to dismiss by all defendants are currently pending. *See* Def.'s Mot. to Dismiss, ECF No. 18 (motion to dismiss by Minnesota official defendants); Def.'s Mot. to Dismiss, ECF No. 37 (motion to dismiss by intervening defendant Northern States Power Company); Def.'s Mot. to Dismiss, ECF No. 48 (motion to dismiss by intervening defendant ITC Midwest LLC).

The challenged law effectively prevents new entrants who lack a preexisting physical presence in Minnesota from building transmission lines within the state. It does so by giving any incumbent electric transmission owner ("incumbent") a right of first refusal to build new high-voltage transmission lines that connect to the incumbent's facilities. Minn. Stat. § 216B.246. An incumbent can exercise this right to build transmission lines adjacent to its territory even where the new entrant proposing to build those lines has invested in conceiving of the new project, proving the merits of the new line, and winning approval for construction. *See* Minn. Stat. § 216B.246, subdiv. 3. According to the complaint, 87 percent of all transmission lines in Minnesota are owned by incumbents with Minnesota headquarters. Compl. at ¶ 66.

Minnesota enacted this law following a 2011 FERC rule, Order No. 1000, which eliminated certain federal rights of first refusal. *See* Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (July 21, 2011) (hereinafter FERC Order No. 1000). FERC found that such rights restricted competition, were not just and reasonable, and created opportunities for undue discrimination and preferential treatment. *Id.* at ¶ 285-86. By contrast, those testifying in favor of *Minnesota's* right of first refusal statute sought to preserve local control and the status quo. *See, e.g.*, Ex. A to Peick Affidavit, ECF No. 22-1, at 13-14 (testimony of Rick Evans from Xcel Energy) ("[W]hat this bill is intended to do is preserve the status quo.").

FERC Order No. 1000 followed decades of state and federal initiatives to increase competition in interstate markets. Since the 1990s, FERC has issued orders to open up U.S. wholesale electricity markets to more competition, and these changes followed findings that "the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50 (D.C. Cir. 2014). One FERC order, for example, unbundled wholesale generation and transmission services to provide competitive electricity generators with non-discriminatory access to the electricity grid. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21,540, at 21,552 (Apr. 24, 1996). Another FERC order encouraged the use of independent system operators or regional transmission organizations to coordinate planning, operation, and use of regional and interregional transmission systems in competitive markets for wholesale power. Regional Transmission Organizations, 65 Fed. Reg. 810, at 811 (Dec. 20, 1999). The

Antitrust Division of the Department of Justice was actively engaged in advocating for these market reforms because of their expected benefits to competition and consumers.[2]

Consistent with this broader effort, FERC Order No. 1000 required that FERC-approved agreements eliminate federal rights of first refusal with respect to lines built under regional transmission plans.[3] Most of the regional transmission plans, including the regional plan at issue here, cover more than one state. *Order No. 1000 – Transmission Planning and Cost Allocation*, FERC, https://www.ferc.gov/industries/electric/indus-act/trans-plan.asp (last updated Oct. 26, 2016) (containing approximate map of transmission planning regions). FERC

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[2] *See*, *e.g.*, Comments of the U.S. Dep't of Justice, FERC Docket No. RM99-2-00 (Aug. 23, 1999), https://www.justice.gov/atr/comments-us-department-justice-0; Comments of the U.S. Dep't of Justice, FERC Docket Nos. RM95-8-000 & RM94-7-001 (Aug. 7, 1995), https://www.justice.gov/sites/default/files/atr/legacy/2000/08/03/ferc2.txt; Reply Comments of the U.S. Dep't of Justice, FERC Docket No. RM94-20-0000 (Apr. 3, 1995), https://www.justice.gov/atr/reply-comments-us-department-justice.

[3] In particular, FERC-regulated entities were required "to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation." FERC Order No. 1000 at ¶ 313. Thus, there are a couple exceptions to the rule that FERC-regulated entities cannot impose rights of first refusal. Local transmission facilities are permitted by FERC to maintain a federal right of first refusal within their Commission-jurisdictional tariffs and agreements, as FERC's focus "is on the set of transmission facilities that are evaluated at the regional level." *Id*. at ¶ 318. Additionally, incumbent transmission providers are permitted by FERC to maintain a federal right of first refusal "for upgrades to [their] own transmission facilities," even if these upgrades are included in a regional transmission plan, as long as the construction is not funded through the regional planning cost-allocation process. *Id*. at ¶ 319.

determined that elimination of the federal right of first refusal would further competition, concluding that:

> (1) "[A]n incumbent transmission provider's ability to use a right of first refusal to act in its own economic self-interest may discourage new entrants from proposing new transmission projects in the regional transmission planning process."
> (2) "Federal rights of first refusal exacerbate these problems by . . . *creating a barrier to entry* that discourages nonincumbent transmission developers from proposing alternative solutions for consideration at the regional level."
> (3) "[S]ignificant investment is needed to support the development of a successful transmission project, yet there is a disincentive for a nonincumbent transmission developer to commit its resources to a potential transmission project when it runs the risk of an incumbent transmission provider exercising its federal right of first refusal once the benefits of the transmission project are demonstrated."
> (4) "Greater participation by transmission developers in the transmission planning process may lower the cost of new transmission facilities, enabling more efficient or cost-effective deliveries by load serving entities and increased access to resources."

FERC Order No. 1000 at ¶¶ 256-57, 291 (emphasis added).[4]

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[4] The Federal Trade Commission (FTC), the other federal agency responsible for civil antitrust enforcement and competition policy, supported the elimination of federal rights of first refusal due to the "procompetitive benefits" that would stem from it. Comment of the Fed. Trade Comm'n at 11, 136 FERC ¶ 61,051 (Sept. 29, 2010) (No. RM10-23-000), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-federal-energy-regulatory-commission-concerning-transmission-planning-and-cost.rm10-23-000/100929transmissionplanning.pdf. The FTC saw FERC's proposed order as being "[c]onsistent with longstanding antitrust policy" since "[c]onsumers benefit from market competition that often takes the form of new entry." *Id.* at 2, 7. The FTC concluded that "[t]he existing federal right of first refusal increases risk for potential entrants, without any countervailing incentives, and encourages free riding by incumbent transmission owners on the investments of potential entrants in developing transmission project proposals." *Id.* at 8.

FERC Order No. 1000 has withstood challenges in two Courts of Appeals. In 2014, the D.C. Circuit rejected a challenge to FERC's authority to eliminate federal rights of first refusal. *S.C. Pub. Serv. Auth.*, 762 F.3d 41. The D.C. Circuit agreed with FERC that "basic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts." *Id.* at 74. Further, even accepting the incumbents' argument that transmission markets are natural monopolies (i.e., new entry is impossible), the court recognized that "the threat of competitive entry (*e.g.*, through competitive bidding) will lead [incumbent] firms to lower their costs," even if no new entry actually occurs. *Id.* at 68-69. That is, "competition for a natural monopoly can be just as beneficial to consumers as competition within an ordinary market." *Id.* (quoting III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 658b3 (3d ed. 2008)).

In 2016, the Seventh Circuit likewise rejected a challenge to FERC's decision to eliminate rights of first refusal from preexisting contractual arrangements, holding that FERC's action was lawful given the anticompetitive nature of rights of first refusal. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333-35 (7th Cir. 2016) (Posner, J.). The Seventh Circuit noted that rights of first refusal give each incumbent "a protected monopoly, . . . creat[ing] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies' service areas was allowed." *Id.* at 333.

With respect to the states, FERC Order No. 1000 did not expressly preempt rights of first refusal under state law. Rather, FERC Order No. 1000 says generally that it was not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities." FERC Order No. 1000 at ¶ 287. In later orders, FERC allowed FERC-regulated entities to recognize the existence of state rights of first refusal when considering proposals for new transmission lines during the regional transmission planning process. Midwest Indep. Transmission Sys. Operator, Inc., 150 FERC ¶ 61,037 at ¶ 25 (Jan. 22, 2015) (Order on Rehearing and Compliance Filings). But in doing so, FERC simply recognized that requiring FERC-regulated entities to ignore state rights of first refusal would waste time and resources, as the entities' decision-making process ultimately could be overruled by the state's right of first refusal. *Id.* at ¶ 14.

At the same time, none of FERC's orders granted states any new authority to create rights of first refusal, or suggested that state rights of first refusal are consistent with the dormant Commerce Clause. Indeed, one FERC commissioner noted in a concurring statement that a court might find that state rights of first refusal "run afoul of the dormant commerce clause." Midwest Indep. Transmission Sys. Operator, Inc., 150 FERC ¶ 61,037 at ¶ 61,195 (Comm'r Bay, concurring).

DISCUSSION

"[T]o avoid the tendencies toward economic Balkanization," the dormant Commerce Clause prohibits states from interfering with interstate commerce by either "discriminating against" or "imposing excessive burdens" on interstate commerce.

Wynne, 135 S.Ct. at 1794. Minnesota's right of first refusal statute fails both the anti-discrimination test and the undue burden test because it raises entry barriers, segments the interstate market in developing transmission lines, favors in-state incumbents, and causes substantial anticompetitive effects in interstate commerce. Moreover, the federal government has not authorized or approved such state regulation of interstate commerce.

I. Minnesota's Right of First Refusal Violates the Dormant Commerce Clause by Discriminating Against Interstate Commerce.

A state law can discriminate against interstate commerce on its face or through a discriminatory purpose or effect. If a state law has a "discriminatory purpose" such as economic protectionism, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), or a "discriminatory effect," such as "discriminat[ing] between transactions on the basis of some interstate element," *Wynne*, 135 S.Ct. at 1794, the state law violates the dormant Commerce Clause unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *New Energy Co. of Ind.*, 486 U.S. at 278)). The Supreme Court has described this test as "a virtually *per se* rule of invalidity," *id*. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), upholding discriminatory regulations only if the "nondiscriminatory alternatives will prove unworkable," *id.* at 493. Here, Minnesota's statute has unconstitutional discriminatory effects because it favors local incumbents with a physical presence and disfavors out-of-state entities, which are similarly situated for constitutional purposes.

a. Minnesota's right of first refusal statute has a discriminatory effect on interstate commerce because it favors local Minnesota incumbents by shielding companies that have a local physical presence.

States are barred from "discriminat[ing] between transactions on the basis of some interstate element." *Wynne*, 135 S.Ct. at 1794 (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332, n. 12 (1977)). State laws that place regulatory limits on out-of-state entities' ability to participate in in-state commerce have discriminatory effects. *E.g.*, *Heald*, 544 U.S. 460 (finding unconstitutional restrictions that permit direct shipments to customers only from in-state wineries).

Minnesota's right of first refusal law has an unconstitutional discriminatory effect because it favors in-state entities by benefitting *only* those entities that already have the required presence in Minnesota. *See* Minn. Stat. § 216B.246. As recognized in FERC Order No. 1000, this preference can result in an entity with an in-state presence developing transmission lines, even when an entity located elsewhere can identify and develop those transmission lines more efficiently—if the line is developed at all. *See* FERC Order No. 1000 at ¶ 7 (rights of first refusal "have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs"). Moreover, the statute predominantly benefits entities with Minnesota headquarters. As LSP alleges, nearly 90 percent of transmission line miles in Minnesota are owned by entities headquartered in Minnesota. Compl. at □ 66.

When determining whether a state-imposed entry barrier has a discriminatory effect on the basis of some interstate element, courts analyze "not the formal language . . . but rather its practical effect." *Wynne*, 135 S.Ct. at 1795 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). The practical effect of Minnesota Statute § 216B.246 is plain. It discriminates against interstate commerce by favoring in-state entities and disfavoring out-of-state entities that lack a preexisting local presence. Indeed, the Supreme Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Heald*, 544 U.S. at 475 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)). Particular suspicion is warranted here because all of the benefited companies have a Minnesota presence and nearly 90 percent have headquarters in the state.

The reverse is also true: the law discriminates by disfavoring out-of-state entities. In particular, a builder of transmission lines without a preexisting Minnesota presence does not qualify for a right of first refusal. Such discrimination raises significant entry barriers because a nonincumbent transmission developer must "commit its resources to a potential transmission project when it runs the risk of an incumbent transmission provider exercising its [] right of first refusal once the benefits of the transmission project are demonstrated." FERC Order No. 1000 at ¶ 257.

These discriminatory effects are sufficient to render the law unconstitutional even if Minnesota's rule is "facially neutral" because the favored incumbents need not be Minnesota corporations. Def.'s Mem. Supp. Mot. to Dismiss 25, ECF No. 39 (hereinafter

NSP's Mem.). "[T]he advantage of appearing nondiscriminatory does not save it from invalidation." *Wynne*, 135 S.Ct. at 1804-05 (internal quotations omitted) (quoting *Gen. Motors Corp. v. Washington*, 377 U.S. 436, 460 (1964)). The Supreme Court rejected a similar argument in *Heald*. In *Heald*, New York argued that its statute did not discriminate based on the residency of a corporation: it claimed to have a neutral statute because both in-state and out-of-state wineries could become licensees to ship wine directly to New York customers. 544 U.S. at 474. The Supreme Court nevertheless invalidated the New York statute because the out-of-state winery would need to establish an in-state physical presence to obtain a license. *Id.* at 474-75. As in *Heald*, NSP acknowledges that incumbents "must own a facility in the state" to benefit from the law. NSP's Mem. 25, ECF No. 39. That "restrictive in-state presence requirement," *Heald*, 544 U.S. at 475, is what concerns the dormant Commerce Clause.

The law is not saved simply because it disfavors Minnesota corporations without a footprint in the relevant part of the state. NSP's Mem. 26, ECF No. 39. The Supreme Court long ago held that a law "is no less discriminatory because in-state or in-town processors are also covered by the prohibition." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994). Favoring a local monopolist "deprives out-of-state businesses of access to a local market" and "[t]hese economic effects are more than enough to bring [a local] ordinance within the purview of the Commerce Clause." *Id.* at 389. As the Court has explained, "[A] State . . . may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot Sanitary*

Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 361 (1992); *see also id.* (finding unconstitutional a statutory requirement that effectively segmented the market in waste management along Michigan county lines); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (finding unconstitutional a city ordinance requiring that milk be processed at a plant within a radius of five miles from the central square of Madison).

NSP's reliance on *Colon Health Centers* to argue that the law is nondiscriminatory is also unavailing. *See* NSP's Mem. 27, ECF No. 39. There, the Court evaluated a law where, *after discovery*, it was found that "approval rates for applications submitted by in-state and by out-of-state firms considered by the Virginia Department of Health [were] virtually identical" and where that approval rate was "just under *eighty-five percent*." *Colon Health Ctrs. of Am., LLC v. Hazel,* 813 F.3d 145, 153 (4th Cir. 2016) (emphasis added). That 85 percent approval rate for new facilities left the court "unconvinced" that entry barriers discriminated against interstate commerce. *Id.* By contrast, Defendant NSP already acknowledges that the right of first refusal is provided only to those facilities with a preexisting in-state presence.

b. Minnesota's incumbent transmission owners and out-of-state developers are similarly situated for constitutional purposes.

Incumbents and out-of-state developers are "similarly situated for constitutional purposes," and therefore the statute's discrimination between them runs afoul of the dormant Commerce Clause. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

1. Minnesota's incumbent transmission owners and out-of-state developers plausibly compete in the same geographic and product market.

The dormant Commerce Clause doctrine would not apply if "the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Id.* Here, but for Minnesota's statute, both in-state incumbents and out-of-state entrants would be competing to serve the same transmission development market.

Determining whether incumbents and non-incumbent developers are similarly situated raises an issue that arises in many antitrust cases—that is, how to define a relevant product and geographic market in order to assess the degree to which the companies serve that market. *See, e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (requiring "inquiry into the relevant product and geographic market"). The Supreme Court has found that defining a relevant market aids courts in locating the zone of competition where anticompetitive effects are most likely to be present. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Although antitrust law has developed sophisticated tools to define a market, the burden on the plaintiff at the pleading stage in antitrust cases is to specify a product market and geographic market "in a way that is plausible and bears a rational relation to the methodology courts prescribe." *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, 164 F.Supp.3d 1117, 1126 (D. Minn. 2016).

Here, non-incumbent companies (including out-of-state companies such as LSP) and incumbent companies would operate in the same transmission development market, but for the Minnesota right of first refusal law. As the Seventh Circuit has recognized, the very fact that incumbent transmission owners want rights of first refusal indicates that the incumbents and non-incumbents compete—that is, the non-incumbents pose a competitive threat to the incumbents. *MISO Transmission Owners*, 819 F.3d at 333-34. Thus, there is at least a factual question of whether LSP and incumbent transmission providers are similarly situated in that they would serve the same product and geographic markets, but for the right of first refusal law.

2. **Tracy** ***does not create a general exception from the dormant Commerce Clause for public utilities.***

Public utilities do not enjoy a general exemption from the dormant Commerce Clause. *See Tracy*, 519 U.S. 278. The State characterizes *Tracy* as creating a "'public utilities' exception," Def.'s Mem. Supp. Mot. to Dismiss 8, 10-11, ECF No. 21 (hereinafter Minn. Mem.) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting)), and then characterizes this purported exception broadly to extend whenever there exists "the mere possibility of a negative impact" on a public utility's position in the market where it has a natural monopoly. Minn. Mem. 12, ECF No. 21. But rather than create a broad exception for public utilities, *Tracy* relied on case-specific factors to find that "for present purposes" the dormant Commerce Clause did not apply. *Tracy*, 519 U.S. at 304.

In *Tracy*, the Supreme Court rejected a dormant Commerce Clause challenge to a state sales tax exemption provided to natural gas public utilities, but not to independent marketers of natural gas. Historically, natural gas public utilities offered a bundled service of natural gas and transportation of that gas. A FERC order, requiring the unbundling of natural gas transportation from the sale of natural gas, gave rise to independent interstate marketers, which sold natural gas mostly to large industrial customers. *Id*. at 284. These independent interstate marketers were subject to an Ohio tax from which the utilities were long exempt. *Tracy*'s analysis—which upheld the differential application of the tax—was driven by the concern that "any decision to treat the [utilities] as similar to the interstate marketers . . . could affect the [utilities'] ability to continue to serve the captive market where there is no such competition." *Id.* at 307. This "captive market" consisted of residential and other small users of natural gas who lacked "the capacity to buy on the interstate market" and valued "the reliability and protection that state regulation provided." *Id.* at 294.

Indeed, the Court made clear that it was not creating a broad exception by holding that there was "no *a priori* answer" to whether the Court should "accord controlling significance to the noncaptive market in which [utilities and interstate marketers] compete, or to the noncompetitive, captive market in which the local utilities alone operate". *Id.* at 303-04.

The unique factors present in *Tracy* do not apply to LSP's claims here. For example, in *Tracy* the Court surmised that "any resulting contraction of the [utility's] total customer base would increase the unit cost of the bundled product," which could affect the utility's ability to serve the captive residential market. *Id.* But that economic story "might prove right or wrong," *id.* at 308, and in circumstances where the record "reveals virtually nothing about the details of that competitive market," *id.* at 302, and the economic outcome cannot be resolved by "assumption or supposition," *id.* at 308, the Court needed "to proceed cautiously lest we imperil the delivery by regulated [utilities] of bundled gas to the noncompetitive captive market," *id.* at 304.

Here, Defendants do not point to any economic theory suggesting that the captive market for retail sales of electricity by utilities will be harmed if competition is allowed in the distinct market for developing transmission facilities. FERC has already rejected the idea that a federal right of first refusal has economic merit, *see* FERC Order No. 1000 at ¶ 291, and several courts have sustained FERC's action in the face of state and industry challenges. Moreover, many state electric markets operate without any right of first refusal law, and Defendants offer no reason to believe that in those states the capacity to deliver electricity in retail markets has been jeopardized.

Rather, concern for the health of the electric transmission system should disfavor leaving in place a right of first refusal law that favors incumbents. As the FTC has recognized, "the incumbent may have incentives to maintain a less than robust transmission system to discourage new generation entry and competition from distant generators, or it may simply have made a decision not to invest in transmission." Comment of the Fed. Trade Comm'n at 10, 131 FERC ¶ 61,253 (Sept. 29, 2010) (No. RM10-23-000). Indeed, the captive retail sales market could benefit from a competitive transmission development market by decreasing the cost of using transmission facilities, which could result in lower rates paid by consumers. *See MISO Transmission Owners*, 819 F.3d at 333 (noting that the "protected monopoly" caused by a right of first refusal "create[s] a potential for higher rates to consumers of electricity than if competition to create transmission facilities in transmission companies' service areas was allowed"); FERC Order No. 1000 at ¶ 291 (suggesting that more competition in transmission development could *decrease* the cost of new transmission facilities).

Finding a dormant Commerce Clause violation here and rejecting a broad exception for public utilities is consistent with Supreme Court case law invalidating state electricity regulations that discriminated against or burdened interstate commerce in markets different than, but adjacent to, retail electricity. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (holding that state law violated the dormant Commerce Clause because it required in-state electricity generators to use a certain amount of coal mined in-state, excluding out-of-state sources); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (holding that state law unconstitutionally required the state utility commission's permission before a utility could convey electricity out-of-state).

c. Minnesota's statute does not advance a legitimate local purpose that can justify its discriminatory effects on interstate commerce.

Once a law is found to discriminate against interstate commerce, it will be struck down unless it "advances a legitimate local purpose," *Heald*, 544 U.S. at 489, that survives an "exacting standard" of judicial scrutiny, *id.* at 493. Supreme Court precedents "require the 'clearest showing' to justify discriminatory state regulation." *Id.* at 490 (quoting *Carbone*, 511 U.S. at 393). "The burden is on the state to show that the discrimination is demonstrably justified" and, "based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Heald*, 544 U.S. at 492-93 (internal quotations and citations omitted). By contrast, a nondiscriminatory state law will "frequently survive" the similar but less demanding scrutiny under the undue burden analysis of the dormant Commerce clause, so long as the "putative local benefits" are not clearly exceeded by the burden imposed on interstate commerce. *Davis*, 553 U.S. at 338-39. As shown in Section II.b, below, Minnesota's right of first refusal law fails the more lenient undue burden analysis because the purported local benefits are *de minimis*. It therefore follows that the statute does not advance a legitimate local purpose that survives the more demanding standard needed to justify and overcome a finding of discrimination against interstate commerce.

II. The Excessive Burden Imposed by Minnesota's Right of First Refusal on Interstate Commerce is Not Justified by a Legitimate Local Interest.

A state law also violates the dormant Commerce Clause if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. "If a legitimate local purpose is found," its significance will depend on "whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Here, the entry barriers on interstate commerce are unduly burdensome and clearly exceed any legitimate local benefits, which are at most *de minimis*.

a. The burden imposed by Minnesota's statute on competition and consumers in interstate commerce exceeds the burden at issue in *Pike*.

Assessing whether the burdens on interstate commerce are excessive relative to putative local benefits is known as the "*Pike* test." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007). Though "[s]tate laws frequently survive this *Pike* scrutiny," that is "not always [the outcome], as in *Pike* itself." *Davis*, 553 U.S. at 339 (internal citations omitted).

Here, the burden on interstate commerce is a more substantial version of the very kind of harm found in *Pike*. In *Pike*, the Supreme Court found that an Arizona state law substantially burdened interstate commerce. Under the statute, all cantaloupes grown in Arizona and offered for sale had to "meet certain standards of wholesomeness and quality, and . . . be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially misrepresent' the quality of the lot as a whole." *Pike*, 397 U.S. at 142-43. The plaintiff in *Pike* was an Arizona cantaloupe grower that had been shipping uncrated cantaloupe to out-of-state packers. To comply with the state law, the grower would have had to "build and operate an unneeded $200,000 packing plant in the State." *Id.* at 145. Even though the state law may not have had an "express or concealed purpose" to discriminate and did "not impose such rigidity on an entire industry," the Supreme Court found the "incidental consequence" of Arizona's law on the plaintiff to be a constitutionally excessive burden. *Id.* at 145-46.

Though both turn on unnecessary in-state facilities, Minnesota's right of first refusal law is more burdensome than the statute at issue in *Pike* because LSP is effectively foreclosed from entering the Minnesota market, whereas in *Pike* the plaintiff merely faced an expensive hurdle. In *Pike* the plaintiff could choose to pay the $200,000 for an unnecessary packing facility if the profits from its "exceptionally high quality" cantaloupes could justify the expense. *See Pike*, 397 U.S. at 144. Here, incumbents with in-state facilities can block LSP and similar entrants from building new transmission lines in Minnesota and establishing an in-state presence, even if LSP were willing to and could afford to spend unnecessary money in-state and even if the proposed lines advanced the

Midwest Independent Transmission System Operator (MISO) interstate transmission plan. *See* FERC Order No. 1000 at ¶ 257. In such circumstances, outside companies are unlikely to invest in identifying and proposing valuable new lines in the first place, *see S.C. Pub. Serv. Auth.*, 762 F.3d at 74; FERC Order No. 1000 at ¶ 256, and so incumbents will be under less competitive pressure to identify such projects, as well. With fewer transmission lines, the output, prices, and quality of service of the transmission network will be reduced, harming both in-state and out-of-state consumers who buy electricity from Minnesota. *See, e.g.*, *MISO Transmission Owners*, 819 F.3d at 332-33 ("[B]y 2011 FERC was convinced that competition among firms for the right to build transmission facilities would result in lower rates to consumers of electricity."). In addition, the higher costs of Minnesota transmission lines may be passed on to consumers in other states under the regional cost-allocation process. *See* FERC Order No. 1000 at ¶ 622 (explaining cost allocation mechanism). The Supreme Court recognizes both in-state and out-of-state consumers as potential victims of violations of the dormant Commerce Clause. *See, e.g.*, *Tracy*, 519 U.S. at 286 (granting Article III standing to "[c]onsumers who suffer this sort of injury").

b. Any purported local benefits are *de minimis* at best and could be reasonably achieved by alternative policies.

Here, as in *Pike*, the substantial burden on interstate commerce clearly outweighs benefits that appear to be "minimal at best." *Pike*, 397 U.S. at 146.

NSP claims that incumbents are "best positioned" to handle certain hurdles to construct new transmission lines. NSP's Mem. 20, ECF No. 39. But where the incumbent has distinct advantages for the construction of a transmission line, such as "unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability," the incumbent does not require a right of first refusal to "highlight its strengths to support transmission project(s) in the regional transmission plan, or in bids to undertake transmission projects in regions that choose to use solicitation processes." FERC Order No. 1000 at ¶ 260. That is, if such advantages exist, they should allow the incumbent to win in a competitive process. Thus, the right of first refusal merely serves to reduce incentives for potential entrants to make bids in those instances where the incumbent is *not* the most efficient party.

Minnesota's assertion that striking down Minnesota's right of first refusal law "would inject uncertainty and risks into Minnesota's electric energy market" is belied by history and experience. Minn. Mem. 12, ECF No. 21. FERC removed the federal rights of first refusal because they restricted competition, were not just and reasonable, and created opportunities for undue discrimination and preferential treatment—findings upheld by federal courts in subsequent litigation. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 74; FERC Order No. 1000 at 256. Many states have not imposed rights of first refusal after the federal repeal, and Defendants do not offer the court a reason to believe their electric energy markets have suffered as a result.

Even if the Minnesota law advances some legitimate local purposes, Minnesota could use a variety of less restrictive means to achieve those purposes through its authority to regulate "siting, permitting, and construction." FERC Order No. 1000 at

¶ 107. In addition, FERC has required that regulated public utility transmission providers create qualification criteria such that a non-incumbent transmission company must prove that "it has the necessary financial resources and technical expertise to develop, construct, own, operate and maintain transmission facilities." *Id.* at ¶ 323. Moreover, if necessary, Minnesota could establish more rigorous qualification criteria and other even-handed regulations to allay any concerns about the construction and operation of transmission lines by non-incumbents.

c. Because the local benefits are *de minimis* but the harm to competition and consumers in interstate commerce is excessive, the courts are equipped to perform the *Pike* test.

Minnesota's statute causes substantial harm to competition and consumers in interstate commerce, and any purported benefits are *de minimis* at best. Although the Supreme Court has twice declined to balance substantial but opposing economic welfare effects against each other, *see Tracy*, 519 U.S. at 307; *Davis*, 553 U.S. at 353, such quantification and balancing are unnecessary where the harm is substantial but the state benefits are insignificant. *See, e.g.*, *Pike*, 397 U.S. at 146. In *Tracy*, the Supreme Court explained that "it behooves us to be as reticent about projecting the effect of applying the Commerce Clause here, as we customarily are in declining to engage in elaborate analysis of real-world economic effects." *Tracy*, 519 U.S. at 309. Similarly, in *Davis*, the Supreme Court declined to invalidate a state law that exempted in-state but not out-of-state bonds from the state income tax that was "critical to the operation of an identifiable segment of the municipal financial market." *Davis*, 553 U.S. at 352. The Court determined that it was "not institutionally suited" for "weighing or quantifying" the legitimate local interest of improving smaller municipalities' ability to issue bonds against a variety of costs on the bond market. *Davis*, 553 U.S. at 353-54.

Here, such quantification and weighing of substantial benefits and costs is not necessary where the harm is substantial but the state benefits are insubstantial. The relevant questions are well within the competency of the courts: to determine whether the state law discriminates against out-of-state entities, whether it unduly burdens interstate commerce by raising an entry barrier, and whether any purported local benefits of the law are "minimal at best," *Pike*, 397 U.S. at 146.

III. The Federal Government Did *Not* Approve or Authorize Minnesota to Pass a State Right of First Refusal for Transmission Line Construction.

Defendants do not identify any specific authorization of Minnesota's right of first refusal, which is fatal to their argument that the statute should be upheld because it is federally authorized. *See* NSP's Mem. 23-24, ECF No. 39; Minn. Mem. 13, ECF No. 21.

Though Congress (or an agency exercising delegated authority) has "the power to authorize the States to place burdens on interstate commerce," states may not violate the dormant Commerce Clause "[a]bsent such congressional approval." *Heald*, 544 U.S. at 493. The requisite approval must be "clear and unambiguous," and Defendants bear the burden of proving such an affirmative defense. *Wyoming*, 502 U.S. at 458; *see also Yakima Valley Mem'l Hosp. v. Washington*, 654 F.3d 919, 933 (9th Cir. 2011) (holding "Congressional authorization must be unmistakably clear and unambiguous" (internal quotations omitted) (quoting *Maine v. Taylor*, 477 U.S. 131, 139 (1986))). Defendants cannot meet this standard.

To the extent that Defendants rely on the fact that FERC did not preempt state right of first refusal laws, the Supreme Court has made clear that declining to preempt a state law does not on its own authorize states to violate the dormant Commerce Clause. In *Wyoming*, the Supreme Court found that a general savings clause that "simply saves from pre-emption under Part II of the Federal Power Act such state authority as was otherwise lawful" did not demonstrate that Congress intended for the state to burden or discriminate against interstate commerce. *Wyoming*, 502 U.S. at 458 (internal quotations omitted) (quoting *New England Power Co.*, 455 U.S. at 341).

Defendants are similarly unable to demonstrate that Congress intended to authorize states to violate the dormant Commerce Clause in the Federal Power Act (FPA) or in FERC's implementation of the FPA here. For example, Defendants cite § 824 of the FPA, which authorizes states to regulate electric utilities and the siting, permitting, and construction of electric facilities. Minn. Mem. 2, ECF No. 21 (citing 16 U.S.C. § 824); NSP's Mem. 1-2, 4-5, ECF No. 39 (citing same). But, in *Wyoming*, the Court reviewed the very same section, 16 U.S.C. § 824, and concluded that "[o]ur decisions have uniformly subjected [dormant] Commerce Clause cases implicating the Federal Power Act to scrutiny on the merits." 502 U.S. at 458.

Defendants also point to language from FERC generally disclaiming that Order No. 1000 is "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities." NSP's Mem. 6, ECF No. 39 (quoting FERC Order No. 1000 at ¶ 227); Minn. Mem. 4, ECF No. 21 (quoting same). This is simply general language stating that Order No. 1000 did not preempt state laws and regulations, which is insufficient to show clear and unambiguous federal authorization to violate the dormant Commerce Clause.

To the extent that FERC has acknowledged that state right of first refusal laws exist, that does not amount to the clear and unambiguous federal approval of those laws' harm to interstate commerce. Defendants argue that Minnesota's right of first refusal "was recognized by the regional planning entity and approved over LSP Transmission's objection by FERC." NSP's Mem. 11, ECF No. 39; *see also* Minn. Mem. 5-6, ECF No. 21. That is not accurate. All FERC found was that "it is appropriate for MISO to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." Midwest Indep. Transmission Sys. Operator, Inc., 150 FERC ¶ 61,037 at ¶ 25. Otherwise, there might be "inefficiencies and delays" if MISO conducted a process "where state law requires a different outcome." *Id.* at ¶ 26. Moreover, "a right of first refusal 'based on a state or local law or regulation would still exist under state or local law even if removed from the Commission-jurisdictional tariff or agreement and nothing in Order No. 1000 changes that law or regulation.'" *Id.* at ¶ 30 (quoting Order No. 1000-A, 139 FERC ¶ 61,132 at ¶ 381.). The Seventh Circuit agreed: "it would be a waste of time for MISO to conduct a protracted competitive bidding and evaluation process when the incumbent transmission company has a right of first refusal conferred by state law." *MISO Transmission Owners*, 819 F.3d at 336-37. FERC's administrative acknowledgement of a state law does not amount to clear and unambiguous approval of that law's burden on interstate commerce. *See also* 150 FERC

¶ 61,037 at ¶ 61,195 (Comm'r Bay, concurring) (stating that FERC was not deciding constitutionality of the Minnesota law under the dormant Commerce Clause).

CONCLUSION

The Minnesota right of first refusal law discriminates against and unduly burdens interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

Respectfully submitted.

s/ Matthew C. Mandelberg
California Bar #: 281240

GREGORY G. BROOKER
United States Attorney for the District of Minnesota

ANA H. VOSS
Assistant United States Attorney for the District of Minnesota

600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
Phone: (612) 664-5600
Email: Ana.Voss@usdoj.gov

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

WILLIAM J. RINNER
JULIA A. SCHILLER
Counsels to the Assistant Attorney General

ROBERT POTTER
DANIEL E. HAAR
MATTHEW C. MANDELBERG
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Phone: (202) 598-2413
Email: Matthew.Mandelberg@usdoj.gov

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