**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| **LSP TRANSMISSION HOLDINGS, LLC**,<br><br>Plaintiff,<br><br>vs.<br><br>**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,<br><br>and<br><br>Northern States Power Company d/b/a Xcel Energy,<br><br>and<br><br>ITC Midwest LLC<br><br>Defendants. | **Civil No.** 0:17-cv-04490-DWF-HB<br><br>**DEFENDANT NORTHERN STATE POWER COMPANY'S MEMORANDUM IN RESPONSE TO THE STATEMENT OF INTEREST OF THE UNITED STATES DEPARTMENT OF JUSTICE** |

## INTRODUCTION

Several months after briefing was completed on the motions to dismiss, the Antitrust Division of the United States Department of Justice belatedly submitted a statement of interest arguing that Minn. Stat. § 216B.246 is unconstitutional under the dormant Commerce Clause. One would have expected that any statement in this case would be from the Federal Energy Regulatory Commission (FERC), because FERC is the agency that has authority and expertise over electricity regulation. But the statement was not from FERC, it does not claim to speak for FERC, and it is inconsistent with FERC's actions. Indeed, FERC not only permitted state rights of first refusal in general, but it expressly rejected Plaintiff LSP's challenge to the Minnesota's right of first refusal on statutory and policy grounds. *See Midwest Indep. Trans.Sys. Operator, Inc.*, 150 FERC at 61166, ¶ 25, 2015 WL 285969, at *7.

If the Court considers the Antitrust Division's belated statement at all, it should give the statement no deference. There are no antitrust issues in this case, only issues regarding whether the dormant Commerce Clause precludes state regulation of electric utilities. The Antitrust Division has no special expertise in that area, as illustrated by its failure to discuss either the leading Eighth Circuit decision applying the Commerce Clause to utilities, *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002), or the most closely analogous, recent circuit decision doing the same, *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103-08 (2d Cir. 2017). Both of those cases rejected dormant Commerce Clause challenges to utility regulations, yet the Antitrust

Division offers no reason why they do not control this case. Similarly, although the Antitrust Division briefly discusses the leading Supreme Court decision, *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), which also rejected a Commerce Clause challenge to a state utility regulation, its distinction of the case is superficial and incorrect.

The reality of the electricity market is that regulation is required because the physical facilities necessary to transmit electricity guarantee that "competition would simply give over to monopoly in due course." *Tracy*, 519 U.S. at 290. For this reason, as well as serious health and safety concerns, "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. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The Antitrust Division never disputes the core state interests underlying the regulation of electricity. What it argues is that those interests do not extend to the selection of the entity that will become the regulated monopolist. It cites no case to support this argument—for there is no such case—and to state the argument is to refute it. States are not required to be indifferent to the identity of the entity they will have to regulate to ensure the safety and soundness of their citizenry.

Under the dormant Commerce Clause, states cannot discriminate against entities because of their state of citizenship. But the Antitrust Division never argues that Minn. Stat. § 216B.246 does that. Instead, it implicitly (and correctly) concedes that the statute is neutral on its face, applying its benefits and burdens equally to entities regardless of their state of organization or principal place of business. The

Antitrust Division argues only that the statute discriminates in effect. But in doing so, it confuses incumbency with citizenship, again while failing to cite or discuss the leading Commerce Clause cases that reject its position.

Finally, in arguing that no legitimate purpose underlies Minnesota's regulation, the Antitrust Division does exactly what the Eighth Circuit said it cannot do: "ignore[] this nation's long history of public utility regulation." *S. Union*, 289 F.3d at 508. Both the Eighth Circuit and the Supreme Court have affirmed the States' legitimate interest in regulating utilities. For the Antitrust Division to argue otherwise, without acknowledging the contrary, controlling cases, disserves the Court.

Ultimately, like Plaintiff LSP, the Antitrust Division simply attempts to impose its preferred free-market policy position on Minnesota as a constitutional mandate. But "[t]he battle between laissez fairists and regulators is as old as the hills," *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 158 (4th Cir. 2016), and the dormant Commerce Clause does not take sides in the battle. Instead, it leaves to the people the choice of what approach to follow, acting through their elected representatives. This Court should follow the controlling cases and grant the motion to dismiss.

## ARGUMENT

### I. The Antitrust Division's Statement of Interest Is Untimely and Not Entitled to Deference.

At the outset, this Court has no obligation to consider the Antitrust Division's untimely Statement of Interest, and it should give no weight to it.

The Statement is undoubtedly untimely. Defendants' motions to dismiss were filed in November 2017, oppositions were due early in January 2018, and by January 26, 2018, briefing was completed—all under a schedule approved by the Court. The Court heard argument on February 9, 2018, and took the motions under advisement. Yet the Antitrust Division waited more than two months after that to file its Statement of Interest, offering no explanation for the delay.

The Antitrust Division's unjustified delay provides sufficient reason to reject its Statement outright. "[T]he decision on whether a court permits or denies a statement of interest lies solely within the court's discretion," and the relevant factors include whether "the proffered information is timely and useful or otherwise necessary to the administration of justice." *Creedle v. Gimenez*, Case No. 17-22477-CIV-Williams/Torres, 2017 WL 5159602, at *2 (S.D. Fla. Nov. 7, 2017). Thus, for example, a statement by the government was struck when it was filed late and with no showing of "good cause for its untimely filing." *U.S. ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 926–29 (S.D. Tex. 2007), aff'd sub nom. *U.S. ex rel. Gudur v. Deloitte & Touche*, No. 07-20414, 2008 WL 3244000 (5th Cir. Aug. 7, 2008). Recognizing that there is "no express time limitation provided under 28 U.S.C. § 517 to file a statement of interest," *Creedle*, 2017 WL 5159602 at *2, the Court need not formally strike the Statement of Interest. At the same time, particularly in light of the unjustified delay, the interests of justice do not require the Court to give it any consideration.

Even if the Statement is allowed, the Court should give it no deference because the Antitrust Division does not have expertise in the relevant issues. Lack of expertise and lack of utility are common reasons for courts to disregard a government statement. *See*, *e.g.*, *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't,* No. 116CV02457-SEB-TAB, 2017 WL 5634965, at *1 n.1 (S.D. Ind. Nov. 7, 2017) (noting that a statement of interest is not entitled to any "special deference," and that "we have not found [the statement of interest] to be particularly helpful or persuasive"); *U.S. ex rel. Calilung v. Ormat Indus., Ltd.*, No. 3:14-CV-00325-RCJ-VPC, 2015 WL 1321029, at *6 n.9 (D. Nev. Mar. 24, 2015) (noting that the government's statement of interest "is not entitled to any particular deference in this matter"); *California ex rel. Harris v. Fed. Hous. Fin. Agency,* No. C 10-03084 CW, 2011 WL 3794942, at *3–5 (N.D. Cal. Aug. 26, 2011) (considering and dismissing standing argument raised in the government's statement of interest). Here, the Antitrust Division has nothing to add to the constitutional issues before the Court, as shown by its repeated failure to discuss the relevant authority.

## II. The Antitrust Division Overlooks the Long History of Judicial Deference to Utility Regulation in its Description of the Commerce Clause.

There is a gaping hole in the Antitrust Division's description of the dormant Commerce Clause—a hole where a discussion of the cases applying that Clause to utility regulations should belong.

In support of taking the extreme step of declaring Minnesota's statute unconstitutional, the Antitrust Division cites cases addressing facially discriminatory taxes on personal income,[1] municipal bonds,[2] and liquor,[3] and a facially discriminatory regulation of wine.[4] (Dkt. 70 at 3, 9.) Regulating the provision of electricity, however, is utterly unlike taxing and regulating income, bonds, liquor, and wine, and the law has long recognized the difference.

As NSP established (*see* Dkt. 39 at 18; Dkt. 62 at 2-4), both the Supreme Court and the Eighth Circuit have recognized that 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).

As a consequence, the Supreme Court has held that courts "must recognize an obligation to proceed cautiously" in reviewing dormant Commerce Clause challenges to utility regulations for three distinct reasons. *Tracy*, 519 U.S. at 304. First, it is critically important that States be allowed to regulate the provision of utilities to serve the health and safety of their citizens. *Id.* at 306. Second, courts are "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them." *Id.* at 308; *see also Allco*, 861 F.3d at 107

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[1] *Comptroller of Treasury of Md. v. Wynne*, 135 S.Ct. 1787 (2015).
[2] *Dep't of Revenue of Ky. v. Davis*, 554 U.S. 328 (2008).
[3] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).
[4] *Granholm v. Heald*, 544 U.S. 460 (1978).

(recognizing that legislative bodies "are better-situated than the courts" to "determine the economic wisdom and the health and safety effects" of utility regulations). Finally, Congress and FERC have demonstrated their ability to intervene when circumstances require, and courts should therefore defer to them. *Tracy*, 519 U.S. at 309. (*See generally* Dkt. 39 at 18–24 (applying these factors); Dkt. 62 at 2–6 (same).)

In sum, "[p]rudence thus counsels against running the risk of weakening or destroying a regulatory scheme of public service and protection recognized by Congress despite its noncompetitive, monopolistic character." *Id.* at 308-09. The Court cannot decide this case without following the Supreme Court's guidance.

## III. The Antitrust Division Wrongly Advocates for Constitutional Intervention in An Area That FERC Expressly Left to The States.

One of the most powerful reasons *not* to declare Minnesota's utility regulation unconstitutional is that the "risk" of "weakening or destroying a regulatory scheme of public service and protection" is not "justifiable in light of Congress's own power and institutional competence to decide upon and effectuate any desirable change in the scheme that has evolved." *Tracy*, 519 U.S. at 309. The Antitrust Division seeks to undermine this clear reason for dismissing LSP's claim in two ways, but neither is well founded.

First, the Antitrust Division loudly proclaims that the federal government did not authorize Minnesota to enact § 216B.246 in a way that would make the statute exempt from the dormant Commerce Clause. (Dkt. 70 at 25.) This is true but

irrelevant. NSP has never argued that § 216B.246 is exempt from Commerce Clause scrutiny. For the Antitrust Division to suggest otherwise is to set up a straw man.

Second, the Antitrust Division argues that this Court should give no weight in its constitutional analysis to FERC's decision to expressly reserve to the States the ability to enact their own right-of-first-refusal statutes, but that it should give controlling weight to the policy reasons FERC gave for partially withdrawing the federal right of first refusal. This is completely upside down. The controlling constitutional rule from the Supreme Court is that, because "Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear," the courts should show great caution in declaring a utility regulation unconstitutional. *Tracy*, 519 U.S. at 309. This is particularly true regarding electricity regulation, where, as the Eighth Circuit recognized in *Southern Union*, "[a] major purpose" of the Federal Power Act "was to preserve and protect state and local regulation" on matters of local interest, such as siting. 289 F.3d at 507. In addition, as the Second Circuit recognized in *Allco*, "it is FERC itself that has instituted a sort of regionalization of the national electricity market." 861 F.3d at 107. To paraphrase *Allco* to apply to this case, since "neither FERC nor Congress has given any indication that [a state right-of-first-refusal] is unduly harmful to interstate commerce," this Court should refuse to reach that conclusion under the Constitution. *Id.*

The Antitrust Division doubts that FERC has spoken clearly or specifically enough to warrant judicial reluctance to intervene, characterizing its statements as "general language" and "administrative acknowledgement." (Dkt. 70 at 26, 27.) But that simply ignores FERC's orders. To be perfectly clear, FERC rejected a challenge made ***by the Plaintiff in this case*** to MISO's decision to honor ***Minnesota's right of refusal statute***, holding that it was "***appropriate for MISO to recognize state or local laws or regulations***." *Midwest Indep. Trans.Sys. Operator, Inc.*, 150 FERC at 61166, ¶ 25, 2015 WL 285969, at *7 (emphasis added). In addition, FERC wrote that its decision in Order 1000 to allow States to enact their own rights of first refusal "***struck an important balance*** between removing barriers to participation for potential transmission providers in the regional transmission planning process and ensuring the nonincumbent developer reforms ***do not result in the regulation of matters reserved to the states***." *Id.* at ¶ 27 (emphasis added). It is impossible to imagine statements any more clear or specifically on point than these statements are.

The Antitrust Division argues that the same policy reasons that FERC relied on in deciding to partially withdraw the federal rights of first refusal apply with equal force to state rights of first refusal. But FERC itself did not find those reasons sufficient to preclude the state rights as a matter of federal policy—indeed, it even left some *federal* rights of first refusal in place, as the Antitrust Division acknowledges (*see* Dkt. 70 at 6 n.3)—so it is impossible to maintain that this Court should use them to preclude the state rights as a matter of constitutional law. The Antitrust Division is

asking this Court to take the far greater step, when the lesser step has been rejected. (*See* Dkt. 39 at 16 (summarizing the statutory and policy history).) *See also MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (recognizing that FERC acted appropriately "to avoid intrusion on the traditional role of the States in regulating the siting and construction of transmission facilities") (internal quotations omitted).

If the Antitrust Division wishes to advance its policy arguments, it should take them to FERC, its sister agency in the Executive Branch. It should not ask this Court to impose them on the country unilaterally. This Court should follow *Tracy*, *Southern Union*, and *Allco* and decline to override Minnesota's legitimate policy choice under the dormant Commerce Clause.

## IV. Minnesota's Even-Handed Exercise of Regulatory Authority in § 216B.246 Does Not Discriminate Against Out-Of-State Entities.

Under *Tracy*, *Southern Union*, and *Allco*, the Antitrust Division's claim that § 216B.246 discriminates against interstate commerce is incorrect.

To be clear, the Antitrust Division (unlike Plaintiff LSP) does not argue that § 216B.246 facially discriminates against interstate commerce. Its implicit concession that the statute is facially neutral is correct. As NSP has previously demonstrated, § 216B.246 does *not* discriminate against out-of-state entities but instead draws the neutral distinction between the entities that own the facilities to which a new transmission line will connect and all other entities. (*See* Dkt. 39 at 25-27; Dkt. 62 at 7-

11.) In-state and out-of-state entities fall in both categories and are treated exactly the same, regardless of where they are organized or have their principal places of business. Both receive the right of first refusal; both incur the obligation to build if the Minnesota Public Utilities Commission so decides. Hence, § 216B.246 is facially neutral. *See Southern Union*, 289 F.3d at 508.

The Antitrust Division also does not argue that § 216B.246 discriminates in purpose. Again, this implicit concession is appropriate because § 216B.246 serves the legitimate purpose of serving the public interest in safe, reliable electricity. (*See* Dkt. 62 at 11-12 (discussing the legislative purpose).)

The Antitrust Division's only argument is that § 216B.246 has the ***effect*** of discriminating against interstate commerce because in excluding entities that do not own existing facilities from consideration to become new monopoly transmission providers, it excludes out-of-state entities. (Dkt. 70 at 11.) This argument fails for two reasons.

### A. Entities that do not own the facilities to which a new transmission line will connect are not similarly situated to those that do.

First, entities that do not own the facilities to which a new transmission line will connect are not similarly situated to those that do, and hence distinguishing between them is not discrimination for purposes of the constitutional analysis.

Under *Tracy*, the first step in applying the dormant Commerce Clause to utility regulations is assessing whether the parties being treated differently are "substantially

similar entities," because where "different entities serve different markets," there is no discrimination. *Tracy*, 519 U.S. at 298-99. The Antitrust Division declares that "incumbents and out-of-state developers *are* 'similarly situated for constitutional purposes.'" (Dkt. 70 at 14 (emphasis added).) But the line that § 216B.246 draws is not between incumbents and out-of-state developers, it is between the entities that own the facilities to which a new transmission will connect and all other entities, including not just out-of-state developers but in-state developers as well. There is no way to claim that those groups are deemed similarly situated under *Tracy* and its recent progeny, *Allco*. For one thing, the entities that own the connecting facilities can be *compelled* to build the new lines by the State. Minn. Stat. § 216B.246, subd. 3. No other entities bear this burden, and hence no other entities are similarly situated. Second, no other entities will have to integrate their facilities with the new lines or have the expertise that accompanies operating them. For both reasons, the Antitrust Division's claim of discrimination fails at the outset.

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, even when the utilities and interstate companies were competing head to head for commercial clients. 519 U.S. at 281–82. The interstate companies claimed discrimination, but the Supreme Court rejected the argument. The Court acknowledged that the companies were directly competing in the interstate market for the sale of natural gas to industrial users, but it noted that the

utilities also participated in the separate, captive retail market for delivery of natural gas to retail customers. *Id.* at 285 (describing market development). Where there was this separate market in which the interstate companies would not compete, the Supreme Court held that it was appropriate to defer to the state's choice to treat the utilities differently *in both markets*. *Id.* at 303-04.

Here, the Antitrust Division makes a passing, irrelevant reference to antitrust cases in defining a market (Dkt. 70 at 15), then argues that this case is different from *Tracy* because non-incumbent companies and incumbent companies "would operate in the same transmission development market." (*Id.*) But that is no difference at all, because in *Tracy*, the regulation at issue applied to two different natural gas markets, the industrial end-user market and a captive retail market. Indeed, the Court in *Tracy* described a very similar regulatory history in the natural gas market as the Antitrust Division does in its statement for the electricity market, with the federal government taking incremental steps to increase competition in the interstate transportation market for natural gas without affecting state-level regulation of the retail market. 519 U.S. at 283-84. The State of Ohio imposed a regulation that affected both the local market that was clearly under its jurisdiction and the interstate sellers subject to federal regulation, and the Supreme Court held that the state was entitled to give its interest in one of those markets "the greater weight." *Tracy*, 519 U.S. at 304. *Tracy's* argument for deference applies with even greater force here, where FERC has

specifically recognized the states' rights to enact the very regulation that Minnesota did.

The Antitrust Division argues that public utilities do not enjoy a general exemption from the dormant Commerce Clause. (Dkt. 70 at 16.) NSP does not contend otherwise. But what the Supreme Court in *Tracy* repeatedly emphasized, and what the Antitrust Division ignores, is "the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." 519 U.S. at 306. This accommodation has at times allowed the "outright prohibition of competition for even the largest end users." *Id.* And as NSP has demonstrated above, all of the traditional reasons for accommodation apply here.

The Antitrust Division faults NSP for not "point[ing] 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." (Dkt. 70 at 18.) Once again, this argument ignores *Tracy*, which allowed States to make the judgment about the effect of regulation on the captive market and made it perfectly clear that courts should not second guess that judgment, as they are "institutionally unsuited … and professionally untrained" to do so. 519 U.S. at 308

The Second Circuit's decision in *Allco* illustrates the correct way to apply *Tracy* to a utility regulation. (*See* Dkt. 62 at 5-6 (discussing *Allco*).) There, the Georgia plaintiff had brought a dormant Commerce Clause challenge against a Connecticut

law that gave electric utilities credit for buying renewable energy certificates only if they bought them from utilities located in or adjacent to Connecticut's regional system. 861 F.3d at 92-93. There was no question that the law limited commerce, as it excluded credits from entire regions of the county, including Georgia. Nevertheless, applying *Tracy*, the Second Circuit held that the legislative and executive branches were better positioned than the court to "determine the economic wisdom and the health and safety effects of these geographic boundaries." *Id.* at 107. The Court therefore affirmed the grant of a motion to dismiss the case. This Court should likewise grant NSP's motion to dismiss.

**B. Section 216B.246 does not discriminate in practical effect.**

The Antitrust Division argues that Minnesota's right of first refusal discriminates in practical effect because the statute benefits only those entities that have facilities in the state. This argument ignores the fact that *all* utility regulations apply only to entities that have facilities within the relevant state, because otherwise the state would have no jurisdiction to act. Section 216B.246, which applies matching regulatory burdens and benefits even-handedly to all entities who own transmission facilities regardless of their state of citizenship, does not discriminate in effect.

It is a settled principle of dormant Commerce Clause analysis that states may legitimately regulate the utilities operating within their borders. In *Tracy*, the Supreme Court wrote that it had "consistently recognized the legitimate state pursuit of such interests [in protecting captive markets from competition] as compatible with the

Commerce Clause, which was never intended to cut the States off from legislating on all subjects relating to 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 (internal quotations omitted). The Eighth Circuit similarly observed that the federal laws over the interstate utility markets were intended "to preserve and protect state and local regulation of the distribution of natural gas and electricity to local retail customers." *S. Union*, 289 F.3d at 504. As a result, there is no "economic protectionism" at work where the states act to implement that authority. *Id.* at 508.

The Antitrust Division argues that, because out-of-state entities are included among the entities that do not receive the right of first refusal, this makes the § 216B.246 discriminatory and *per se* invalid. But as the Eighth Circuit held in *Southern Union*, Commerce Clause analysis does not work that way: "the Supreme Court has limited its per se rule of invalidity 'to provisions that patently discriminate against interstate trade . . . whose object is local economic protectionism.'" *S. Union*, 289 F.3d at 508 (internal quotations omitted). Where, as here, all regulated entities—both in-state and out-of-state—are subject to the same requirements, there is no discrimination. *Id.* This remains true, moreover, even if a greater number of out-of-state entities than in-state entities are covered by the requirements, as the Supreme Court held in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987). To argue otherwise, the Antitrust Division relies heavily on *Comptroller of Treasury v. Wynne*, partially quoting its statement that courts "must consider not the formal language of

the tax statute but rather its practical effect." 135 S.Ct. 1787, 1795 (2015) (internal quotations omitted). (*See* Dkt. 70 at 13.) But *Wynne* is inapposite because it addressed only the narrow question of whether a distinction between gross receipts or net income had different impacts for purpose of Commerce Clause analysis (they did not). 135 S.Ct. at 1795.[5]

In another misapplication of dormant Commerce Clause precedent, the Antitrust Division argues that this case is controlled by the Supreme Court's comment that it views "with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm v. Heald*, 544 U.S. 460, 475 (1978). But that comment has no application here, because the business operations of transmitting electricity in Minnesota can be performed ***only*** by transmission lines in Minnesota. This is not an arbitrary regulatory decree, it is a basic reality of physics. Plaintiff LSP, moreover, is not claiming that it wants to be able to ship its products into the state without building a facility here. Rather, its argument is that it ***wants*** to build a facility here.

[5] In taxation cases, the Supreme Court evaluates whether the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Even if these standards apply outside the taxation context, Minnesota's regulation related to the provision of electric utility services within it borders easily qualify.

None of the cases that the Antitrust Division cites address a comparable situation. In *Heald*, a statute prohibited out-of-state wine sellers from selling wine directly to customers in the state, while permitting in-state sellers to do so. *Id.* at 474. That Supreme Court correctly found the requirement of an in-state location to be unnecessary and hence discriminatory. The same goes for arbitrary limits on where garbage or milk may be taken to or shipped from. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992); *Dean Milk. Co. v. Madison*, 340 U.S. 349 (1951). Here, of course, § 216B.246 places no limits on where the transmitted electricity comes from or may be transmitted to; those issues are regulated by federal law.

Finally, the Antitrust Division's effort to distinguish *Colon Health Ctrs. of Am., LLC v. Hazel* are unavailing. In *Colon Health*, the Fourth Circuit held that a certificate-of-need requirement imposed by the state on new pharmacies did not have an unconstitutionally discriminatory effect on interstate commerce, because it did not create a "special barrier to market entry by non-domestic entities." 813 F.3d at 153. The relevant principle set forth in *Colon Health* is that incumbency is not a proxy for in-state status when evaluating this question. *Id.* The fact that *Colon Health* was decided after summary judgment is of no moment, because that principle applies here to the facts *as alleged by LSP*, which show that both Minnesota and non-Minnesota entities are covered by the regulation. (Dkt. 1 ¶ 64.) No expert testimony is required to know

which entities are subject to Minn. Stat. § 216B.246, so Plaintiffs' Commerce Clause challenge can be dismissed on the pleadings.

## V. Section 216B.246 Advances a Legitimate Public Interest.

Because § 216B.246 does not discriminate against interstate commerce, it must be upheld under the deferential *Pike* balancing test. (*See* Dkt. 39 at 30-33; Dkt. 62 at 16 (both applying that test).)

Citing none of the relevant cases, the Antitrust Division argues that the benefits of Minn. Stat. § 216B.246 are *de minimis*. (Dkt. 70 at 22.) Controlling precedent in this Circuit holds otherwise. As a matter of law, "the long history of utility rate regulation in this country establishes that [a state] has a legitimate interest in protecting local ratepayers by regulating the corporate structure of utility companies." *S. Union*, 289 F.3d at 508. In addition, "[w]ithout question," states have "long regulated the siting, construction, and operation" of electric facilities within their borders. *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016); *see also Piedmont Envt'l. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("[t]he states have traditionally assumed *all jurisdiction* to approve or deny permits for the siting and construction of electric transmission facilities.") (emphasis added); *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"). Finally, the Supreme Court in *Tracy* expressly recognized the strong state interest in regulating utilities, referring to the "predictable and disastrous" consequences of a laissez-faire approach to natural gas,

and noting that the public "suffered through essentially the same evolution in the electric industry." 519 U.S. at 289 and n.7.

In addition, Minnesota has expressly tied its regulatory actions to the interests that the courts have repeatedly recognized as legitimate. In the purpose statement accompanying its regulatory scheme, it cites the interests of adequate, reliable, and efficient electric service. Minn. Stat. § 216B.01. These very same policy objectives are repeatedly cited in the legislative history of § 216B.246 and a report on the effect of the statute. (*See* Dkt. 39 at 10-11 (surveying the history).) Moreover, FERC also recognized the benefits of a right of first refusal; not only did it preserve the states' authority to enact such rights, it also preserved some federal rights of first refusal. (*See* Dkt. 70 at 6 n.3 (describing existing federal first refusal rights.)

Contrary to the Antitrust Division's arguments, NSP did in fact identify how Minnesota's right of first refusal fits into its overall regulatory structure. (Dkt. 39 at 19-22.) No one disputes that the construction of new transmission lines is crucially important to the provision of electricity to consumers. *See MISO Transmission Expansion Plan 16*, at 46. The Antitrust Division never disputes that the State of Minnesota may regulate the siting, construction, or operation of new lines. Indeed, it concedes that the State may do so, and even that the State may select the builders and operators using criteria it sets. (Dkt. 70 at 23-24.) Having conceded this much, however, the Antitrust Division argues that Minnesota cannot make the reasonable decision to have new lines built by the entities that already own and operate facilities

to which new transmission lines will connect—entities that are already subject to state regulation and whose performance the State is intimately familiar with. Entities, moreover, that the State can *compel* to construct new lines, even if they would rather not do so. Minn. Stat. § 216B.246, subd. 3. The Antitrust Division never addresses this regulatory burden or explains why the corresponding benefit is not legitimate.

No case law under *Pike* supports displacing Minnesota's considered policy preferences with those of the Antitrust Division. To the contrary, the case most closely on point is the Second Circuit's *Allco* decision, which dismissed a dormant commerce clause claim against Connecticut's utility regulation, finding it "clear that the burden imposed" by the statute was not "clearly excessive" under "the more permissive *Pike* test" *Allco,* 861 F.3d at 107. This Court should likewise dismiss LSP's claim.

## CONCLUSION

The Antitrust Division's untimely submission does not bring any particular expertise to the dormant Commerce Clause issues facing the Court, and indeed, it fails to cite or address the most relevant cases from the Eighth Circuit and other courts. Under those cases, for all the reasons set forth in NSP's briefing and oral argument, this Court should hold that the dormant Commerce Clause does not override Minnesota's legitimate policy choice, and it should grant the motion to dismiss.

DATED: April 30, 2018

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