UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, LLC, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC,

Plaintiffs,

v.

DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity,

and

ONCOR ELECTRIC DELIVERY COMPANY LLC,

Defendants.

Civil Action No. 1:19-cv-00626-LY

ONCOR ELECTRIC DELIVERY COMPANY LLC'S MOTION TO DISMISS

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INTRODUCTION

"[T]he unique attributes of electricity . . . create problems that do not arise in other competitive markets." *TXU Generation Co., L.P. v. Pub. Util. Comm'n of Tex.*, 165 S.W.3d 821, 827 (Tex. App.—Austin 2005, pet. denied). To solve these problems and protect consumers, Texas "closely regulate[s]" electricity transmission and distribution. *Id.* at 827–28. "[A]n electricity utility enters into a 'regulatory compact' with the public: in return for a monopoly over electricity service in a given area; the utility agrees to provide service to all requesting customers and to charge only the retail rates set by the [Public Utility Commission of Texas ('PUCT')]." *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 104 S.W.3d 225, 227–28 (Tex. App.—Austin 2003, no pet.). So, recognizing "the importance of avoiding any jeopardy to service of the state-regulated captive market," the Supreme Court has explained that the Commerce Clause imposes no barrier on the States' power to enact "an outright prohibition of competition." *See General Motors Corp. v. Tracy*, 519 U.S. 278, 305–07 (1997); *accord Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the States").

Senate Bill 1938 ("S.B. 1938") comes from this mold.[1] Under the statute, the State eliminates competition for new transmission facilities, mandating they be built by the entity that owns the existing endpoint which will directly connect with the new facility—without regard to citizenship or residency. Thus, as a result of S.B. 1938, Oncor and NextEra[2] alike are entitled to

[1] The relevant provisions of S.B. 1938 are codified at TEX. UTIL. CODE §§ 37.051, 37.053, 37.056, 37.057, 37.151, and 37.154. Compl. ¶ 1, ECF No. 1.

[2] NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission, LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest, LLC (collectively, "NextEra").

build, own, and operate new transmission lines that directly interconnect with their existing facilities. By using endpoint ownership to determine who will build, own, and operate new facilities, S.B. 1938 ensures that Texas has "a robust, reliable, and well-regulated electric grid" and retains the State's jurisdiction over rate-setting and operational issues. Ex. 1, House Comm. on State Affairs, Bill Analysis, Tex. H.B. 3995, 86th Leg., C.S. (2019).[3]

The dormant Commerce Clause prohibits States from enacting statutes that "discriminate[] between similarly situated in-state and out-of-state interests." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007) (citation omitted). Texas's comprehensive regulatory scheme distinguishes incumbent utilities (wherever they may reside) from prospective entrants (wherever they may reside) such that these entities are not similarly situated for constitutional purposes. Thus, NextEra's suit is foreclosed by *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). And because S.B. 1938 treats all "similarly situated in-state and out-of-state companies . . . identically," *Allstate*, 495 F.3d at 163, NextEra cannot show that the statute discriminates against out-of-state interests. The Court should dismiss NextEra's dormant Commerce Clause claim.[4]

This Court will not be the first to reject the precise challenge NextEra brings here. In *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018), the court considered the constitutionality of a Minnesota law substantially similar to S.B. 1938 and dismissed the

[3] The Court may consider the legislative history of S.B. 1938 in deciding Oncor's motion to dismiss, both because it is judicially noticeable, *Starr v. Cty. of El Paso*, No. 09-cv-353, 2010 WL 3122797, at *6 (W.D. Tex. Aug. 5, 2010), and because NextEra's complaint relies on it, *see* Compl. ¶¶ 63–64; *see also Hunt Constr. Group, Inc. v. Cobb Mechanical Contractors, Inc.*, No. 17-cv-215, 2017 WL 9285507, at *2 (W.D. Tex. June 2, 2017) (Yeakel, J.).

[4] Because the transmission market in Texas (and elsewhere) is "a heavily regulated industry," and because S.B. 1938 codifies in statute the existing practices that govern the transmission industry in most of Texas, NextEra has not adequately alleged a Contract Clause claim. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413–16 (1983); *see also Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1051 n.9 (9th Cir. 2004). To avoid duplicative briefing, Oncor incorporates and adopts Entergy Texas, Inc.'s arguments on the Contract Clause claim.

complaint. Reflecting the strong public policy interest in allowing States to regulate the transmission of electricity, the court in *Lange* concluded that *Tracy* foreclosed the plaintiff's dormant Commerce Clause challenge. *See id.* at 706–08. The court rejected the same argument NextEra makes in this case about S.B. 1938, explaining that "[t]he [Minnesota] statute draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." *See id.* at 708–10. The Court should reach the same conclusion here.

BACKGROUND

A. Texas Has a Legitimate and Longstanding Interest in Regulating Electricity.

"[U]nder our constitutional scheme, the States retain 'broad power' to legislate protection for their citizens in matters of local concern," *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (citation omitted), and that power is most evident in utility regulation. The Supreme Court has long recognized that utility regulation is "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec.*, 461 U.S. at 377; *see also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." (citation omitted)). Congress similarly has recognized the States' traditional role in regulating electric utilities by explicitly limiting the federal government's "regulatory reach." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016). Congress expressly preserved the States' authority over in-state "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce," 16 U.S.C. § 824(b)(1), giving the States unquestioned control over locations and permits for all transmission facilities. *New York v. FERC*, 535 U.S. 1, 24 (2002); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014).

While the Texas Legislature has deregulated "the production and sale of electricity for a large portion of the state," transmission service remains a state-regulated monopoly, *City of San Antonio v. Pub. Util. Comm'n of Tex.*, 506 S.W.3d 630, 635 (Tex. App.—El Paso 2016, no pet.), with the PUCT authorized by the Legislature "to regulate utilities as a substitute for competitive forces." *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing TEX. UTIL. CODE § 31.001(b)); *see also TXU Generation*, 165 S.W.3d at 827. In this role, the PUCT regulates all aspects of the rates and operations of electric utilities. *Sw. Elec. Power*, 73 S.W.3d at 216. Transmission service in most of Texas is overseen by the Electric Reliability Council of Texas, Inc. ("ERCOT"), an independent organization subject to PUCT oversight. *City of San Antonio*, 506 S.W.3d at 635–36. ERCOT, under the authority of the PUCT, is responsible for ensuring the reliability and adequacy of the electric grid. *BP Chems., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 451–52 (Tex. App.—Corpus Christi 2006, no pet.). To accomplish its purpose, ERCOT promulgates rules—referred to as "ERCOT Protocols"—that "provide the framework for the administration of the Texas electricity market." *Id.* at 452 (citation omitted). "Utilities are required to abide by the procedures established by ERCOT." *Id.* (citations omitted).

The term "ERCOT" also refers to the footprint of the "independent and self-contained electric production and transmission grid" that ERCOT (as an organization) manages for the majority of the State. *Id.* at 451; *see also City of San Antonio*, 506 S.W.3d at 635. ERCOT is a wholly intrastate grid, and because the Federal Energy Regulatory Commission's jurisdiction extends only to the transmission of electric energy in *interstate* commerce, the majority of Texas's electric system is not subject to plenary federal regulation.[5] Compl. ¶¶ 18–19, ECF No. 1.

[5] FERC has recognized ERCOT's independence and disclaimed plenary federal jurisdiction over ERCOT assets on numerous occasions. *See, e.g.*, *LS Power Dev., LLC*, 155 FERC ¶ 61,176 at ¶¶ 1, 13 & n.2 (2016); *Sharyland Util., L.P.*, 121 FERC ¶ 61,006 at ¶ 7 (2007).

B. S.B. 1938 Represents a Legitimate Exercise of the State's Authority Over Utility Regulation that Preserves the *Status Quo* in Texas.

Texas's regulatory regime "protect[s] the public interest inherent in the rates and services of electric utilities" and "assure[s] rates, operations, and services that are just and reasonable to the consumers and to the electric utilities." TEX. UTIL. CODE §§ 11.002(a), 31.001(a). Before a new transmission line can be built in Texas, a utility must obtain a certificate of convenience and necessity ("CCN") from the PUCT. *Id.* §§ 37.051(a), 37.056(a). That utility is required to "serve every customer in the utility's certificated area" and to "provide continuous and adequate service in that area." *See id.* §§ 37.151–.152; *see also id.* §§ 38.001, 38.005(a). Importantly, the PUCT is authorized to require incumbent utilities to build, operate, and maintain electric transmission lines. *See id.* §§ 35.005, 38.071(1). Texas's regulatory regime thus imposes "a typical blend of limitation and affirmative obligation" on electric utilities. *See Tracy*, 519 U.S. at 295–96.

Under S.B. 1938, enacted in May 2019, "[a] certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility." TEX. UTIL. CODE § 37.056(e)–(f). The PUCT recognized years ago that there are a number of "inherent advantages" to having "incumbent [transmission service providers] that currently hold a CCN" build, operate, and maintain new transmission projects, including institutionalized knowledge of service areas, "efficient completion" of the projects, "[e]conomies of scale," and a streamlined process for operation and maintenance of the projects. *See Commission Staff's Petition*, PUCT Docket No. 35665, 2009 WL 1431662 (May 15, 2009). FERC similarly has acknowledged that "incumbent transmission providers may have 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 . . . ."

Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, 136 FERC ¶ 61,051 at ¶ 260 (2011) ("Order 1000").[6] S.B. 1938 reflects the Legislature's recognition of these inherent advantages and codifies longstanding regulatory practices, which grant a preference to build a new transmission project to the entity (or entities) owning the endpoints—such as an existing electric station or transmission line—of the new project.[7]

Contrary to NextEra's claim that S.B. 1938 "effectively close[s] the border to further new entrants," Compl. ¶ 3, and "prevents out-of-state entities from entering the Texas market," *id.* ¶ 73, the statute continues to allow new entrants, including out-of-state utilities. Section 7 of S.B. 1938 allows incumbents to "sell, assign, or lease a certificate or a right obtained under a certificate," through a transaction approved by the PUCT, even if the incumbent seeks to transfer the CCN "to an entity that has not been previously certificated." TEX. UTIL. CODE § 37.154(a). Far from forbidding new entrants, § 7 explicitly provides a path for them.

C. FERC Order 1000 Affirmed the States' Authority Over Transmission Regulation.

In Order 1000, FERC required "the removal from FERC-approved tariffs and agreements of any provision granting a right of first refusal for certain new transmission facilities." Compl. ¶ 32. But FERC expressly acknowledged the States' "longstanding . . . authority over certain matters that are relevant to transmission planning and expansion, such as matters relating to siting, permitting, and construction." Order 1000 at ¶¶ 107, 156. FERC's recognition of the States' continued authority to enact right of first refusal ("ROFR") laws was clear:

> Eliminating a federal right of first refusal in Commission-jurisdictional tariffs and agreements does not . . . result in the regulation of matters reserved to the states,

[6] *See also* Order 1000-A, 139 FERC ¶ 61,132 (2012); Order 1000-B, 141 FERC ¶ 61,044 (2012).

[7] *ERCOT Nodal Protocols* § 3.11.4.8(1) (Apr. 11, 2018), http://www.ercot.com/content/wcm/libraries/151823/April_11__2018_Nodal_Protocols.pdf ("The default TSPs will be those TSPs that own the end points of the new projects.").

> such as transmission construction, ownership or siting. . . . The Commission acknowledges that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions. *Nothing in this Final Rule 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 at ¶ 287 (emphasis added); *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016). "Order No. 1000 terminated only *federal* rights of first refusal[,]" *MISO Transmission Owners*, 819 F.3d at 336 (emphasis added); it did not question the States' authority to enact such laws. Thus, even after Order 1000, "States retain control over the siting and approval of transmission facilities," *S.C. Pub. Serv. Auth.*, 762 F.3d at 76, and that power includes the right "to adopt a [ROFR] to build new transmission lines," *Lange*, 329 F. Supp. 3d at 708.

ARGUMENT AND AUTHORITIES

NextEra's dormant Commerce Clause claim fails for two reasons. *First*, because incumbent transmission and distribution utilities are substantially *dissimilar* entities from proposed transmission-only new entrants under Texas's regulatory regime, this claim is foreclosed by *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). *Second*, S.B. 1938 is a legitimate, evenhanded regulation that treats *all* nonincumbents the same, irrespective of geography; thus, S.B. 1938 does not violate the dormant Commerce Clause.

A. The Dormant Commerce Clause Contemplates State Regulation in the Interest of Health and Safety.

Under the dormant Commerce Clause, "discrimination means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). A statute, like S.B. 1938, that "treat[s] in-state private business interests exactly the same as out-of-state ones" does not discriminate against

interstate commerce. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007). "The crucial inquiry" is "whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). "[T]his initial inquiry is often dispositive of the underlying issue." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 500 (5th Cir. 2001).

The Commerce Clause 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 (citations and internal quotation marks omitted). Nor does the Commerce Clause free parties who engage in interstate commerce from state regulation. *Panhandle Eastern Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329 (1951). Accordingly, a State's policy choice in an area of legitimate local concern should be respected "so long as the state's choice does not discriminate between in-state and out-of-state competitors." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987); *accord United Haulers*, 550 U.S. at 347 (courts should decline "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power").

B. Under *General Motors Corp. v. Tracy*, Texas Has the Right to Differentiate Between Existing Facility Owners and Prospective Entrants With No Existing Facilities.

In *General Motors Corp. v. Tracy*, the Supreme Court explained that "any notion of discrimination assumes a comparison of substantially similar entities," and thus, courts must begin their analysis by addressing the "threshold question" of whether entities are "similarly situated for constitutional purposes." 519 U.S. at 298–99; *see also Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 105 (2d Cir. 2017). Simply put, "in the absence of actual or prospective competition between the

supposedly favored and disfavored entities in a single market there can be no local preference . . . to which the dormant Commerce Clause may apply." *Tracy*, 519 U.S. at 300.

NextEra suggests that incumbent utilities and prospective entrants should compete to build new transmission lines. *See* Compl. ¶¶ 3, 8–9, 21–23, 28–54, 78–89. NextEra's claim ignores all of the inherent differences between incumbent utilities, which provide transmission *and* distribution services, and start-up utilities, which propose to provide only transmission service, as well as the benefits the State and customers derive from these differences. S.B. 1938 is part of Texas's comprehensive regulatory regime governing the electricity industry, and that scheme distinguishes regulated owners of existing transmission facilities from prospective entrants such that these entities are not "similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299. And even assuming there was "a possibility of competition" between incumbent utilities and prospective entrants, *Tracy* instructs the Court to give greater weight to the monopoly market and the incumbents' "singular role in serving it." *See id.* at 302–04; *see also Allco*, 861 F.3d at 106; *accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 607 (1997) (Scalia, J., dissenting) ("*Tracy* . . . effectively creates what might be called a 'public utilities' exception to the negative Commerce Clause . . . .").

"The electricity market is unlike an ordinary market for goods or services because of the unique attributes of electricity," and "these attributes create problems that do not arise in other competitive markets." *TXU Generation*, 165 S.W.3d at 827. Recognizing its unique nature, "the Texas Legislature made the determination . . . not to deregulate the 'transmission of energy.'" *City of San Antonio*, 506 S.W.3d at 635 (quoting TEX. UTIL. CODE § 39.001); *cf. Tracy*, 519 U.S. at 288–90 & nn.5–7 (explaining the "predictable and disastrous" results from the States' "experiments with free market competition in the manufactured gas and electricity industries").

Incumbent utilities are subject to a "regulatory compact" with the State and its citizens, which imposes both benefits and burdens. *See Office of Pub. Util. Counsel*, 104 S.W.3d at 227–28.[8]

Nonincumbent, transmission-only providers like those NextEra desires to create in Texas do not bear the full weight of this compact. NextEra is asking the Court to upend Texas's longstanding regulatory regime by requiring Texas to allow federally rate regulated new transmission-only entrants to compete for every transmission project, while forcing incumbent transmission and distribution companies to serve all retail customers from incumbents' distribution facilities, with all the associated obligations that entails. The Court should decline to bestow upon NextEra "a right to compete for the cream of the . . . business without regard to the local public convenience or necessity." *See Panhandle Eastern*, 341 U.S. at 334, 336–37. The potential negative effects on Texas's electricity industry threatened by NextEra's position "make[] a powerful case against any judicial treatment that might jeopardize [the incumbents'] continuing capacity to serve the captive market." *See Tracy*, 519 U.S. at 304, 308–09. Moreover, NextEra is asking the Court to step into an area Congress specifically ceded to the States. The dormant Commerce Clause prevents "discriminatory state legislation" in the face of congressional silence, but "Congress has not been silent about electricity," *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 525 (7th Cir. 2018); it expressly authorized the States to regulate locations and permits for transmission facilities and service. *See* 16 U.S.C. § 824(b)(1).

The Court would not break new ground in concluding that NextEra's challenge to S.B. 1938 is foreclosed by *Tracy*. In *LSP Transmission Holdings, LLC v. Lange*, the court considered

[8] *See also* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in An Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1236 (1998) (utilities, unlike "ordinary private businesses," are "held to significantly more rigorous dealing requirements and service terms and conditions").

a Minnesota statute that granted a preference to incumbent utilities to build and own transmission lines that connect to their existing facilities. 329 F. Supp. 3d at 701–02, 708. Like Texas, electric service in Minnesota is provided by monopolies, *id.* at 700, and many of the incumbent utilities are "regulated public utilities[] who serve captive markets and have monopolies with respect to the sale of electricity to consumers," *id.* at 707. The court noted the potential for competition between incumbents and nonincumbents "for the right to build transmission lines," but applied *Tracy* and granted "controlling weight to the monopoly market," explaining that such deference was necessary "to avoid any jeopardy or disruption to the service of electricity to the state electricity consumers and to allow for the provision of a reliable supply of electricity." *Id.* The court, recognizing that the judiciary is ill suited "to 'determine the economic wisdom and the health and safety effects' of a decision on the correct balance between competition and a right of first refusal in the area of the building of electric transmission facilities," properly refused to "upset the balance" of Minnesota's regulatory scheme. *Id.* at 708 (quoting *Allco*, 861 F.3d at 107).

Tracy instructs this Court to avoid "any judicial treatment" that could jeopardize the incumbent utilities' ability to provide reliable and efficient transmission service to Texas citizens and industry. *See* 519 U.S. at 304–05, 309; *accord United Haulers*, 550 U.S. at 344 (stating that courts "should be particularly hesitant" to interfere with state and municipal regulation in matters that are "both typically and traditionally a local government function" (citation and internal quotation marks omitted)). The Court should dismiss NextEra's challenge.

C. S.B. 1938 Is a Legitimate, Evenhanded Regulation That Does Not Discriminate Against Out-Of-State Entities.

Though *Tracy* controls this case and calls for dismissal, NextEra's complaint should also be dismissed because NextEra has failed to allege sufficient facts to demonstrate that S.B. 1938 discriminates against out-of-state entities on its face, in its effect, or in its purpose.

S.B. 1938 does not discriminate on its face. "A facially discriminatory [statute] is one that by its terms authorizes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 475 (5th Cir. 2013) (quoting *Or. Waste Sys.*, 511 U.S. at 99). This inquiry turns on whether the statute contains "language explicitly identifying geographical distinctions." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1141 (10th Cir. 2016). By its terms, S.B. 1938 draws a neutral distinction based solely on "owner[ship] of . . . existing facilit[ies]." TEX. UTIL. CODE § 37.056(e); *see also* Compl. ¶¶ 68–71. Because S.B. 1938's restrictions apply without regard to whether the utility is "from outside the State," the statute is facially neutral. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981); *accord Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, ___ F.3d ___, 2019 WL 3822150, at *3 (5th Cir. 2019) (Texas statute was facially neutral because it applied to all public corporations "irrespective of domicile"); *Int'l Truck & Engine*, 372 F.3d at 726 n.11 (Texas statute was facially neutral because it did not "mention[] Texas or out-of-state manufacturers").

With no support, NextEra alleges that S.B. 1938 prohibits "*out-of-state*[] new entrant market participants[] from building transmission lines in the State of Texas." Compl. ¶ 97 (emphasis added). S.B. 1938 makes "no such distinction[]"—the statute applies to all nonincumbents equally, "irrespective of geography."[9] *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 751 (W.D. Tex. 2013), *aff'd*, 589 F. App'x 233 (5th Cir. 2014). If Oncor wants to build a new line in South Texas off endpoints from a line of another utility, S.B. 1938 precludes Oncor

[9] S.B. 1938 expressly allows new entrants to obtain CCNs, so long as the transaction "will not diminish the retail rate jurisdiction of th[e] state." TEX. UTIL. CODE § 37.154(a); *supra* p. 6.

from building that line; the same is true if Oncor wants to build off the endpoints of an existing NextEra transmission line in Central Texas.

Because S.B. 1938 does not authorize discriminatory treatment based on an entity's geographic location, NextEra argues that S.B. 1938 improperly discriminates against "new entrants," *see* Compl. ¶¶ 63, 74, 97, 102, for the benefit of "existing electric utilities," *id.* ¶ 1, and "current transmission line owners," *id.* ¶ 68. This argument fails.

Again, *Lange* is directly on point. That plaintiff asserted that the Minnesota statute's preference for "incumbent utilities with an existing footprint in Minnesota," 329 F. Supp. 3d at 703, "discriminate[d] against out-of-state transmission developers in favor of in-state utilities," *id.* at 700. The court rejected this argument, explaining that "[i]ncumbency bias is not the same as discrimination against out-of-state interests." *Id.* at 709 (citing *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016)). There was no dispute that the Minnesota statute "grant[ed] a preference to 'incumbent electric transmission owners,'" but that preference applied "whether those incumbents are in-state or out-of-state." *Id.* at 708. Because the statute drew "a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state," the court held that the plaintiff had failed to allege that the statute impermissibly discriminates against out-of-state interests. *Id.* at 708–09. The Court should reach the same conclusion here.

The only relevant factor under S.B. 1938 is whether an entity seeking to build a new transmission line owns the facility that will connect with the proposed line, irrespective of citizenship. Treating "incumbency . . . as the proxy for in-state status would be a risky proposition," *Hazel*, 813 F.3d at 154, and one that has no support in the law. Courts consistently have focused on whether a statute differentiates between entities based on residency or citizenship.

See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987) (upholding statute that had "the same effects . . . whether or not the offeror is a domiciliary or resident"); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 39–42 (1980) (striking down statute that made "the out-of-state location of a bank holding company's principal operations an explicit barrier to the presence of an investment subsidiary within the State"); *see also Wal-Mart Stores*, 2019 WL 3822150, at *3 (statute was facially neutral because it banned "all public corporations from obtaining . . . permits *irrespective of domicile*" (emphasis added)). Moreover, interpreting S.B. 1938's preference for incumbents as facially nondiscriminatory is a reasonable construction that saves the statute from unconstitutionality. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) ("[A] statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it." (citation omitted)). Thus, when a statute treats all prospective entrants equally, incumbency is *not* a proxy for in-state status. *See Lange*, 329 F. Supp. 3d at 709.[10]

NextEra does not allege that S.B. 1938 treats *Texas* nonincumbents differently than *out-of-state* nonincumbents, or that it favors *Texas* incumbents over *out-of-state* incumbents. And for good reason. Under S.B. 1938, *all* existing owners of transmission facilities—regardless of residency—receive the benefits and bear the burdens associated with the statute, while *all*

[10] *See also Hazel*, 813 F.3d at 152–54 (regulatory regime that benefitted existing service providers, but made "no distinction between in-state and out-of-state service providers," was not facially discriminatory); *Locke v. Shore*, 634 F.3d 1185, 1193–94 (11th Cir. 2011) (state law that treated existing holders differently than new applicants did not discriminate because "[t]he grandfather clause was not limited to Florida residents"); *Int'l Truck & Engine*, 372 F.3d at 726–27 (rejecting challenge to statute's "grandfather clause" because it did "not discriminate" against out-of-state entities); *Norfolk Southern*, 822 F.2d at 404 & n.23 (state law that "discriminates between preexisting in-state interests and potential new in-state interests" did not violate the dormant Commerce Clause); *accord Or. Waste*, 511 U.S. at 98, 101 & n.5 (although a State may not "unjustifiably . . . discriminate against or burden the interstate flow of articles of commerce," it may treat products and entities differently if there is "a reason, apart from [their] origin," to do so (citations and internal quotation marks omitted)).

nonincumbents—again, regardless of residency—are denied the benefits and spared the burdens. This case perfectly illustrates why, "as a matter of law, . . . incumbency bias . . . is not a surrogate for the negative impact on interstate commerce with which the dormant Commerce Clause is concerned." *Hazel*, 813 F.3d at 154 (citation, internal quotation marks, and alterations omitted).

S.B. 1938 does not discriminate in its effect. A statute discriminates in its effect when it treats similarly situated in-state and out-of-state entities differently. *Allstate*, 495 F.3d at 163; *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194–97 (1994); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 350–54 (1977). In analyzing discriminatory effects, courts must be cautious not to "cripple the States' 'authority under their general police powers to regulate matters of legitimate local concern.'" *Hazel*, 813 F.3d at 152 (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). When a statute is facially neutral—as it is here—courts have been reluctant "to take an expansive view of the concept of 'discriminatory effects.'" *Wal-Mart*, 2019 WL 3822150, at *8 n.17 (citations omitted).

This case is materially distinguishable from other cases where courts have struck down utility regulations for violating the dormant Commerce Clause. In *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), for example, the Supreme Court considered an order by the New Hampshire Public Utilities Commission prohibiting a public utility from exporting its hydroelectric energy outside the State of New Hampshire. *Id.* at 335–36. The Court easily concluded that the commission's "exportation ban," which was "designed to gain an economic advantage for New Hampshire citizens at the expense of [the utility's] customers in neighboring states," had a discriminatory effect on interstate commerce. *Id.* at 339. And in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Court invalidated a statute requiring "Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal

containing at least 10% Oklahoma-mined coal," noting that the clear effect of the statute was to "reserve[] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States." *See id.* at 440, 455.

These cases have a common theme: a statute or ordinance that imposed undue burdens or outright prohibition on the flow of utility-related goods and services in interstate commerce solely for the benefit of in-state interests. *See Wyoming*, 502 U.S. at 455; *New England Power*, 455 U.S. at 339; *see also Middle South Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404, 416–17 (8th Cir. 1985) (public service commission order voiding contracts for the purchase of power from out-of-state plant violated the Commerce Clause). Unlike these protectionist regulations, S.B. 1938 is driven by the realities of transmission service. There are tangible, physical assets that incumbents already possess in the State, and that new entrants do not. Ensuring that the State receives the benefits and efficiencies of incumbents' existing assets is the justification for S.B. 1938, and not an interest in benefiting in-state utilities at the expense of out-of-state competitors.

More importantly, S.B. 1938 "visits its effects equally upon both interstate and local business." *CTS Corp.*, 481 U.S. at 87 (citation omitted). The statute limits the opportunities for *all* utilities—both incumbents and prospective entrants—to compete for projects to build new transmission lines that directly interconnect with facilities owned by another utility;[11] thus, NextEra has failed to allege that S.B. 1938 has a discriminatory effect. *See Wal-Mart*, 2019 WL 3822150, at *9; *Allstate*, 495 F.3d at 163.

S.B. 1938 does not discriminate in its purpose. The Legislature enacted S.B. 1938 to codify "the practices and procedures that govern transmission development on a statewide basis and to

[11] NextEra does not seriously contend otherwise; in fact, as NextEra notes, S.B. 1938 has the effect of favoring out-of-state incumbents over NextEra's *Texas-based* subsidiary. Compl. ¶¶ 9, 89.

ensure continued PUC[T] rate and regulatory jurisdiction over applicable transactions." Ex. 1. The Court must assume that these objectives are the "actual purposes of the statute," *Clover Leaf*, 449 U.S. at 463 n.7, 471 n.15, and "apply the 'presumption of legislative good faith,'" *Wal-Mart*, 2019 WL 3822150, at *5 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). The Court may consider the following factors:

> (1) whether the effect of the state action creates a clear pattern of discrimination; (2) the historical background of the action, which may include any history of discrimination by the decisionmakers; (3) the specific sequence of events leading up to the challenged state action, including (4) any departures from normal procedures; and (5) the legislative or administrative history of the state action, including contemporary statements by decisionmakers.

Wal-Mart, 2019 WL 3822150, at *4 (citation, internal quotation marks, and alterations omitted). NextEra has failed adequately to allege that S.B. 1938 was purposefully discriminatory.

S.B. 1938 does not discriminate in its effect, *supra* pp. 15–16, and NextEra has made no attempt to allege "a history of hostility towards [NextEra] singularly or towards out-of-state companies in general." *Allstate*, 495 F.3d at 160–61. NextEra does not allege any facts to suggest that S.B. 1938 was the product of the Legislature's hostility towards out-of-state entities. Contrary to NextEra's claim, the impetus for S.B. 1938 was the confusion created by the PUCT's 2017 decision regarding the rights of incumbent utilities to build new transmission facilities,[12] which conflicted with ERCOT's longstanding practice of granting a preference "based upon ownership of transmission 'end points.'" *See* Compl. ¶¶ 31 n.7, 56–60. Rather than evidence a discriminatory purpose, codifying the existing practices and procedures in statute clarified the law and ensured

[12] *See Joint Petition*, 341 P.U.R. 4th 195, 2017 WL 5068379 (Oct. 26, 2017). Representative Dade Phelan, the House sponsor of the bill, stated that S.B. 1938 was designed to address the 2017 decision by the PUCT, which "called into question what had been established practice for decades in Texas." House of Representatives, Committee on State Affairs Hearing at 7:49:04-7:49:11 (Apr. 1, 2019), http://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=16845.

that the same regulatory policy that has guided transmission development throughout most of the State for the last several decades will continue to govern.

NextEra also does not allege any facts to show that S.B. 1938 was the result of a legislative session that departed from "normal procedures." *Allstate*, 495 F.3d at 160. Simply "characterizing the legislative hearings . . . as perfunctory," without more, is insufficient to call into question the motivations of the Legislature and the Governor. *Id.* at 161. NextEra concedes that S.B. 1938 was debated in numerous public hearings and analyzed in public reports, and during those debates, opponents of the bill (including NextEra) testified against the bill. Compl. ¶¶ 62–64. The legislative history of S.B. 1938 undercuts NextEra's contention that "the Legislature departed from usual procedures in its consideration or enactment of the bill." *See Allstate*, 495 F.3d at 161.

NextEra claims that some legislators worried that "out-of-state transmission companies might be less reliable than in-state companies." Compl. ¶ 77. That concern was justified. The regulatory compact between the State, utilities, and their customers grants utilities certain rights and privileges in areas they serve in exchange for providing reliable, cost-effective service. Geographic continuity plays a large role in this compact. *See, e.g.*, Order 1000 at ¶ 260. By virtue of their prior experience in or near a given area where new facilities need to be built, incumbents have unique insights and abilities relating to operational and reliability issues that nonincumbents simply cannot offer. For example, utilities that already serve area retail customers best understand developing load patterns—*i.e.*, where electric demand exists and where it will soon arise—and can best anticipate and plan to serve those customers. Utilities already serving a given area have established facilities, such as service centers, that can be used to restore power quickly when a storm or other occurrence interrupts service. S.B. 1938 simply reinforced the State's existing policies, allowing Texas to create a more reliable, efficient, and coherent grid.

Finally, NextEra points to the legislative history of S.B. 1938, including a statement by the bill's sponsor, in an effort to allege a discriminatory purpose.[13] Compl. ¶ 64. The statements identified by NextEra, however, simply describe the statute's operation. It is undisputed that S.B. 1938 grants a preference to the existing owner of the endpoint of the proposed facility, *id.* ¶¶ 64, 68–71, and it is uncontroversial to note that existing owners have "boots on the ground," *id.* ¶ 64, meaning skilled employees and the necessary equipment and related facilities that enable incumbents to provide efficient and reliable service. Considered in their proper context, these statements merely demonstrate that the Legislature intended to treat incumbents (almost all of whom provide transmission *and* distribution service) and proposed new entrant, transmission-only utilities differently, "a distinction based not on domicile but on business form." *Wal-Mart*, 2019 WL 3822150, at *5 (quoting *Allstate*, 495 F.3d at 161); *see also Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 912 (9th Cir. 2018).

D. S.B. 1938 survives scrutiny under the *Pike* balancing test.

Because S.B. 1938 does not discriminate against out-of-state entities, it must be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Texas's regulation of

[13] Under Texas law, "[a]n individual legislator's statements—even those of the bill's author or sponsor—do not and cannot describe the understandings, intentions, or motives of the many other legislators who vote in favor of a bill." *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136–37 (Tex. 2018); *accord Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906–07 (2019) (describing the "well-known conceptual and practical" concerns involved with attempting to discern state legislative motives based on individual legislators' intention). The Fifth Circuit agrees. *See Wal-Mart*, 2019 WL 3822150, at *5 (explaining that "'stray protectionist remarks'" from legislators are "'insufficient to condemn' an otherwise nondiscriminatory statute" (quoting *Allstate*, 495 F.3d at 161)). NextEra also notes that the private-sector proponents of S.B. 1938 "were clear about why they supported the bill." Compl. ¶ 63. Comments by non-legislators simply have no bearing on the legislative purpose behind S.B. 1938. *See Wal-Mart*, 2019 WL 3822150, at *4 & n.9. More importantly, this statement suggests no discriminatory purpose; as NextEra notes, this statement merely explains "what this bill does." Compl. ¶ 63.

transmission facilities is "well within the scope of legitimate local public interests," *Ark. Elec.*, 461 U.S. at 394 (internal quotation marks omitted), and the Commerce Clause does not interfere with its "pursuit of such interests," *see Tracy*, 519 U.S. at 306–07. The preference granted to incumbents under S.B. 1938 ensures the electric grid's reliability, affordable rates, and the rapid development of new facilities demanded by Texas's growing economy. The statute also operates to minimize disputes by providing a clear framework for construction of new lines. Because "[a]ny incidental effects on interstate commerce caused by giving existing facilities a right of first refusal are insufficient to outweigh the significant local interest described above," S.B. 1938 survives the *Pike* test. *Lange*, 329 F. Supp. 3d at 709–10; *see also Allco*, 861 F.3d at 107–08.

CONCLUSION

For the foregoing reasons, the Court should dismiss NextEra's complaint with prejudice.

Dated: August 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 23, 2019, I filed the foregoing document with the Clerk of Court for the U.S. District Court for the Western District of Texas by using the Court's CM/ECF system and mailed the foregoing document to the following non-CM/ECF participants via U.S. Mail:

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