EXHIBIT 2

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., et al., *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, *Defendants*.	)	CIVIL ACTION NO. 1:19-cv-00626-LY Hon. Judge Lee Yeakel

SOUTHWESTERN PUBLIC SERVICE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Mark A. Walker (pro hac vice)
XCEL ENERGY SERVICES INC.
816 Congress Avenue, Suite 1650
Austin, Texas 78701-2471
Phone: (512) 236-6926
Fax: (512) 236-6935
mark.a.walker@xcelenergy.com

Ron Moss
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, TX 78701
Phone: (512) 370-2867
Fax: (512) 370-2850
rhmoss@winstead.com

Matthew E. Price (pro hac vice)
Max J. Minzner (pro hac vice)
Tassity S. Johnson (pro hac vice)
Jason T. Perkins (pro hac vice)
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 639-6066
mprice@jenner.com
mminzner@jenner.com
tjohnson@jenner.com
jperkins@jenner.com

Counsel for Southwestern Public Service Company

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INTRODUCTION

This case concerns longstanding Texas policy, recently codified by the Legislature in Senate Bill 1938 ("S.B. 1938"), that largely limits the development of new transmission lines to the franchised utilities responsible for providing universal transmission and distribution service to all customers within defined service territories. Plaintiffs are transmission-only companies, who believe they should have the right to submit competitive bids to build new transmission lines in the State. But Texas has determined that the public interest is best served by maintaining the traditional regulated model.

The Commerce Clause respects Texas's choice. S.B. 1938 does not discriminate against interstate commerce or interstate firms. Rather, it favors one business form (transmission-distribution utilities with universal retail service obligations) over another (transmission-only companies without retail customers). Compl. ¶¶ 23, 72, 74. The Fifth Circuit has thrice held that States may draw distinctions based on "business form" without running afoul of the Commerce Clause. *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, No. 18-50299, __ F.3d __ (5th Cir. Aug. 15, 2019), 2019 WL 3822150, at *7-10; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 500, 502 (5th Cir. 2001). The Supreme Court similarly has held that the Commerce Clause allows States to treat regulated utilities with universal retail service obligations, like SPS, differently than companies (like Plaintiffs) without such obligations. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 289 & n.7 (1997). Moreover, many of the State's transmission-distribution utilities—including SPS—are out-of-state companies or owned by such companies. Thus, Plaintiffs are not likely to succeed on the merits.

The balance of harms and public interest also tip strongly against the requested relief. The point of an injunction is to preserve the status quo. Today, there are no transmission lines in SPS's

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service territory owned by transmission-only companies. In all of Texas, there are only a very small number of such lines, the result of a brief experiment in the ERCOT region—and these lines are grandfathered in under S.B. 1938. A preliminary injunction will not preserve the status quo, but instead will allow Plaintiffs to permanently change the status quo by expanding the number of transmission-only utilities in the State and entering parts of the State that have never had them. Once there, they cannot be dislodged, and Texas's policy goals will be permanently frustrated.

BACKGROUND

"[R]egulation 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). Texas has enacted a "comprehensive and adequate regulatory system for electric utilities," to "protect the public interest inherent" in utility rates and services. Tex. Util. Code § 31.001(a). The Public Utility Commission of Texas ("PUCT") oversees this system. An electric utility cannot "directly or indirectly provide service to the public … unless the utility first obtains from the [PUCT] a certificate that states that the public convenience and necessity requires or will require the installation, operation, or extension of the service." Tex. Util. § 37.051(a). The PUCT can grant a Certificate of Convenience and Necessity ("CCN") if it finds the CCN "necessary for the service, accommodation, convenience, or safety of the public." *Id.* § 37.056(a). Once certificated to operate in the State, an electric utility must comply with a number of regulations: it must "serve every consumer in the utility's certificated area," and "provide continuous and adequate service in that area," *id.* § 37.151; must provide "safe, adequate, efficient, and reasonable" service, *id.* § 38.001; is largely restricted from withholding service, *id.* § 37.152; and can be ordered to construct or enlarge transmission facilities, *id.* § 35.005(b).

Texas's regulatory compact, which imposes significant regulatory burdens and oversight

on utilities in exchange for an exclusive franchise in their certificated areas, reflects a policy choice that many States have made since electricity's invention. Some States initially adopted a laissez-fair, open-market approach to electricity distribution—but this approach soon gave way to the "predictable and disastrous" results of "wasteful competition … massive consolidation and the threat of monopolistic pricing." *Tracy*, 519 U.S. at 289. States "learned from [this] chastening experience" that it was "virtually an economic necessity for States to provide a single, local franchise with a business opportunity free of competition from any source," balanced "by regulation and the imposition of obligations to the consuming public." *Id.* at 290.

At times, FERC and some States have experimented with opening aspects of the electric industry to competition. For example, Texas decided to allow competition in electric generation in the ERCOT region. In 2005, Texas also decided to allow competitive bidding for new transmission lines to serve new renewable energy projects located in "Competitive Renewable Energy Zones" ("CREZ") in the ERCOT region, *see* Tex. Util. § 39.904(g). But otherwise, Texas has maintained the traditional regulatory model—giving a single regulated utility an exclusive franchise to serve all transmission and distribution functions within a service territory. This choice reflects a policy judgment that competitive transmission and distribution markets are generally not in the public interest. Tex. Util. § 39.001(a) ("transmission and distribution services" remain a "monopoly warranting regulation," and competition is not in the public interest).

For a brief period, a PUCT decision (and a state court decision affirming it) created confusion about Texas' policy. Those decisions mistook the CREZ program and related legislation as a *reversal* of Texas' longstanding commitment to exclusive franchises for transmission-distribution utilities, rather than a limited exception. *See Sw. Pub. Serv. Co. v. Pub. Util. Comm'n*, No. D-1-GN-18-000208 (459th Dist. Ct., Travis County, Tex. Sept. 27, 2018), *vacated as moot*,

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Entergy Tex., Inc. v. Pub. Util. Comm'n, No. 03-18-00666, 2019 WL 3519051 (Ct. App.-Austin Aug. 2, 2019). In response, the Legislature enacted S.B. 1938, which confirmed that the State had not abandoned its policy favoring regulated transmission-distribution utilities.

The provisions challenged by Plaintiffs give existing certificated electric utilities the right to obtain CCNs to build, own, or operate new transmission lines that will directly interconnect with their facilities. Tex. Util. Code § 37.056(e). Because all new transmission lines must interconnect into the existing grid, such lines can only be built by existing transmission-distribution utilities within their certificated service territories and interconnected with their existing lines (unless authorized by another transmission-distribution utility within the same transmission region). *See* Tex. Util. Code §§ 31.002(19), 37.056(g), 37.154(a); Compl. ¶ 72.[1]

FERC has repeatedly sought to accommodate state policies like these. In 2011, FERC removed similar provisions from federal tariffs. Order No. 1000, 136 FERC ¶ 61,051, at PP 7, 253 (2011). But simultaneously, FERC reaffirmed state authority to decide whether, where, and by whom transmission lines could be constructed and operated. FERC declared that it would not "limit, preempt, or otherwise affect state or local laws or regulations" regarding "construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id.* at PP 107, 227, 253 n.231, 287. FERC has since repeatedly approved

[1] S.B. 1938 grandfathers in the few transmission-only utilities that built lines in the ERCOT region, including as part of the CREZ program. Under S.B. 1938, owners of these lines, just like transmission-distribution utilities, are permitted to build new lines interconnecting with their existing lines. Tex. Util. § 37.056(e). These lines, however, total only about 3,600 miles, *see* ERCOT, Competitive Renewable Energy Zones Process (Aug. 11, 2014), at 8, https://bit.ly/2KY0bt4—a sliver of ERCOT's 46,500 miles of lines, http://www.ercot.com/about; Compl. ¶ 31 ("the vast majority of lines in ERCOT" are owned by transmission-distribution utilities). There are no lines owned by transmission-only utilities in the non-ERCOT regions of the State. S.B. 1938 also provides special treatment for electric cooperatives, which typically generate, transmit, and distribute power for their members in rural areas. Co-ops may build new lines connecting power sources to their local member systems. *See* Tex. Util. Code § 37.056(f).

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federal tariffs that acknowledge and accommodate state laws like S.B. 1938—approval that federal courts have upheld against challenge, including by Plaintiffs. *See Midwest Indep. Transmission Sys. Operator*, 147 FERC ¶ 61,127, PP 147-150 (2014); *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,037, PP 17-22 (2015); *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,045, PP 28-35 (2015); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 332-33 (7th Cir. 2016). Recently, a federal district court rejected a similar dormant Commerce Clause challenge. *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 699-700 (D. Minn. 2018), *appeal docketed*, No. 18-2559 (8th Cir. July 24, 2018).

ARGUMENT

"A preliminary injunction is an "extraordinary remedy." *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013). A movant must show (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury … outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Id.* Plaintiffs do not satisfy these requirements.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiffs contend that S.B. 1938 is facially discriminatory. They are wrong. S.B. 1938 does not discriminate based on geography. Instead, it favors transmission-distribution utilities, *see* Compl. ¶¶ 23, 72, 74, which must charge rates regulated by the PUCT and comply with universal retail service obligations, over transmission-only companies, which do neither. Thus, transmission-distribution utilities are entitled to build new transmission lines in their service territories—but they may not build new transmission lines in *other* utilities' service territories. *See* Tex. Util. § 37.056(e) (providing that a CCN to build, own, or operate a transmission facility that directly interconnects with existing electric utility can only be granted to owner of existing

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facility); *id.* § 37.056(g) (authorizing certificated electric utility to designate electric utility certificated within same electric power region to build transmission facility). Transmission-only companies cannot build transmission lines, whether they are in-state or out-of-state companies.[2]

The Fifth Circuit has repeatedly held that the Commerce Clause does not prohibit laws treating two different "business forms" differently. In *Allstate*, it upheld a statute distinguishing between two business models for auto body shops—those owned by insurers and those not. Texas chose to restrict insurer-owned shops (who were out-of-state) while leaving independent shops (who were in-state) unaffected. The court rejected a Commerce Clause challenge, explaining that the legislation merely "treat[ed] differently two business forms . . . a distinction based not on domicile but on business form." 495 F.3d at 161. Likewise, in *Ford*, the court rejected a challenge to legislation that prohibited automobile manufacturers (largely out-of-state) from acting as dealers (thus protecting in-state dealers). 264 F.3d at 498. This law, the court said, "does not discriminate based on Ford's contacts with the State, but [based on its] status as an automobile manufacturer." *Id.* at 502. Most recently, in *Wal-Mart*, the court reversed a ruling invalidating a law that barred public corporations from owning package stores or obtaining liquor sales permits. Wal-Mart argued the law was intended to protect local businesses, but the court disagreed, holding that it permissibly distinguished among "business forms." 2019 WL 3822150, at *7, *9.

The Supreme Court's decision in *Tracy* likewise dooms Plaintiffs' claim. *Tracy* explained that "any notion of discrimination assumes a comparison of substantially similar entities." 519 U.S. at 298. Differential treatment of dissimilar entities is not prohibited by the Commerce Clause. *See also Ford*, 264 F.3d at 500. In *Tracy*, an Ohio law denied interstate gas transmission

[2] Again, with the exception of the few transmission-only utilities, located only in the ERCOT region, that have been grandfathered in, and are permitted to build new lines interconnected with their existing facilities. *See supra* note 1.

companies a tax break that it gave to domestic gas utilities that competed against the interstate companies in an unregulated market. *Id.* at 281-82. The Court upheld the law. Because the utilities were separately obligated to provide universal service in a regulated market, they were not "similarly situated" to the interstate transmission companies. *Id.* at 310. The Court emphasized the "importance of traditional regulated service" and "the values served by … traditional regulation." *Id.* at 304, 307. *Tracy* thus recognizes that when States impose burdens on utilities, like the burden of universal service, they may also provide benefits as part of their regulatory compact—and would-be competitors who do not carry these burdens are not "similarly situated." *Id.* at 310.[3] That principle controls this case.

S.B. 1938 is nothing like the "'flow control' laws that … require that all waste in a given region be processed in a single in-state facility." Mem. 5 (discussing *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994)). There, the in-state and out-of-state waste processing facilities were similarly situated: they had the same business form and provided the same service, and were distinguished only by geography. But the Court subsequently upheld a flow control law requiring waste to be processed by a municipally owned facility, drawing on *Tracy* and quoting Justice Scalia's concurrence: "'Nothing in this Court's negative Commerce Clause jurisprudence' compels the conclusion 'that private marketers engaged in the sale of natural gas are similarly situated to public utility companies.'" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste*

[3] Attempting to distinguish *Tracy*, Plaintiffs say that the domestic utilities and the interstate transmission companies "were not really supplying the same product." Mem. 8-9 n.2. Not so. In *Tracy*, the domestic utilities operated in two markets: they provided universal gas service in a regulated market, and also sold gas alongside the interstate companies in a competitive market. 519 U.S. at 304. The Ohio law applied to the competitive market, where the interstate companies and the utilities were supplying the same product. *Id.* at 281-82. Indeed, this case is easier than *Tracy*. Texas has chosen not to open the transmission market to competition *at all*, instead deciding that transmission should remain bundled with distribution. *Tracy* took as settled that States are empowered to grant exclusive franchises in regulated markets, as Texas has.

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Mgmt. Auth., 550 U.S. 330, 343 (2007) (quoting *Tracy*, 519 U.S. at 313 (Scalia, J., concurring)). For the same reason, S.B. 1938 is valid.

Plaintiffs are also wrong to claim that S.B. 1938 is discriminatory in effect. Mem. 6. Many transmission-distribution utilities are out-of-state companies or subsidiaries of out-of-state companies. SPS, for example, is a New Mexico company, owned by a Minnesota holding company. AEP Texas is owned by an Ohio holding company. Entergy is owned by a Louisiana-based holding company. Oncor is owned by a California holding company.[4] Moreover, nothing prevents NextEra—or anyone else—from becoming a certificated transmission-distribution utility by buying an incumbent utility. *See* Tex. Util. Code §§ 37.154(a); 39.915(a). Meanwhile, transmission-only entities are disfavored *regardless* of whether they are in-state or out.

Plaintiffs' intent-based arguments also fail. Mem. 7. S.B. 1938 did not mark any dramatic change; rather, it "codif[ied] the existing process in Texas for determining the proper party to construct" transmission lines. *See* Senate Research Center, Bill Analysis: S.B. 1938 (May 29, 2019), https://bit.ly/2Nqpjvk. The legislative record contains not a shred of protectionist intent. Instead, legislators were wary of relying on a FERC-regulated competitive process that had not delivered a single new transmission line, anywhere in the United States, in the eight years since its adoption. And they were also concerned that the PUCT would lose control over the transmission rates charged to retail customers. The PUCT can set such rates for the bundled service provided by transmission-distribution utilities, but cannot for transmission-only entities. *See*, *e.g.*, Hearing on House Bill 3995, Apr. 1, 2019, https://bit.ly/2TIcAFC, 7:54:00-7:56:00, 8:14:00; Hearing on

[4] U.S. SEC, Xcel Energy, Form 10-K at 5 (2019) (reporting ownership of SPS); U.S. SEC, American Electric Power Company, Inc., Form 10-K, Part I: Item 1 (2019) (reporting ownership of AEP Texas); U.S. SEC, Entergy, Form 10-K at iii, viii (2019) (reporting ownership of Entergy Texas); U.S. SEC, Sempra Energy, Form 10-K at 16-17 (2019) (reporting ownership of Oncor).

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Senate Bill 1938, Apr. 2, 2019, https://bit.ly/2zaEhgI, 26:00-28:05. Plaintiffs cite to one phrase, "boots on the ground," Mem. 7, but that interest is about reliability, not geography: As a witness stated, reliability is served when new lines are built by utilities "who have boots on the ground ready to restore those facilities when a storm comes through." House Hr'g at 8:40:00.

II. PLAINTIFFS FAIL TO ESTABLISH THE REMAINING PRELIMINARY INJUNCTION FACTORS.

Plaintiffs also cannot establish any "irreparable injury" warranting preliminary relief. While they assert unrecoverable monetary losses if they lose out on the Hartburg-Sabine and Jacksonville-Overton projects, Mem. 9, Plaintiffs voluntarily assumed that risk. The contracts for both projects acknowledged a need for regulatory approval, and recognized that approval might be denied. ECF Dkt. No. 7-7 at 29 ("Each of the FERC Approval and the PUCT Approval shall have been obtained" by the time of closing); ECF Dkt. No. 7-10 at 19 (NextEra "shall be solely responsible for … obtaining all necessary permits, siting, and other regulatory approvals"). Moreover, Plaintiffs state that "NEET Midwest has received approval from FERC to recoup much of its costs in the event it has to abandon the line for reasons outside of its control." *See* Decl. of David Davis ¶ 24. Thus, any financial loss will be limited.

These points confirm the wisdom of the rule that "a preliminary injunction is an inappropriate remedy where the potential harm to the movant is strictly financial"—absent facts like the "possibility of going out of business." *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989). This case is the polar opposite. It concerns only two projects, in a stream of other business opportunities that Plaintiffs can pursue. Nothing, for example, prevents Plaintiffs from operating in States that allow transmission-only entities to build transmission lines, or from pursuing future projects *in Texas* if they prevail on the merits. *See, e.g., Empower Energies, Inc. v. SolarBlue LLC,* No. 16cv3220, 2016 WL 5338555, at *13

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(S.D.N.Y. Sept. 23, 2016) (no irreparable harm where movant lost opportunity to work on one project, but was an "ongoing business" with "other opportunities" through other projects); *Doughtie & Co. v. Rutherford Cty.*, No. 3-13-0209, 2013 WL 3995277, at *2 (M.D. Tenn. Aug. 5, 2013) (no irreparable harm when movant has "not shown that its future business opportunities, other than with Defendants, have been foreclosed"); *cf. Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 541-43 (W.D. Tex. 2015) (offering evidence to show that challenged law affected core of movant's business model, and would put movant out of business).

Finally, the balance of harms and public interest disfavor a preliminary injunction. Plaintiffs' requested relief would not preserve the status quo; rather, it would allow Plaintiffs to permanently change the status quo. Currently, there are no transmission-only utilities outside the ERCOT region. Inside ERCOT, such entities own only a small number of lines. *See* Compl. ¶ 31. If a preliminary injunction issues, and Plaintiffs are allowed to become transmission-only utilities in Texas, the status quo will be permanently altered. Even if S.B. 1938 ultimately is upheld, Texas will have been forced to accept new transmission-only utilities—including in areas of the State that have never had them. The Court should not allow Plaintiffs to permanently frustrate Texas's longstanding policy at the preliminary injunction stage. *Cf. Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (mandatory injunctions that "go[ ] well beyond simply maintaining the status quo pendent lite, [are] particularly disfavored"); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 476 (5th Cir. 1985) (a "preliminary injunction … should not grant relief properly awarded only in a final judgment," as when the relief "in effect, grant[s the plaintiff] … all of the relief it might have had on the merits.").

CONCLUSION

The motion for a preliminary injunction should be denied.

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August 23, 2019

Respectfully submitted,

/s/ Matthew E. Price

Mark A. Walker (pro hac vice)
XCEL ENERGY SERVICES INC.
816 Congress Avenue, Suite 1650
Austin, Texas 78701-2471
Phone: (512) 236-6926
Fax: (512) 236-6935
mark.a.walker@xcelenergy.com

Ron Moss
WINSTEAD PC
401 Congress Avenue, Suite 2100
Austin, TX 78701
Phone: (512) 370-2867
Fax: (512) 370-2850
rhmoss@winstead.com

Matthew E. Price (pro hac vice)
Max J. Minzner (pro hac vice)
Tassity S. Johnson (pro hac vice)
Jason T. Perkins (pro hac vice)
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
Phone: (202) 639-6000
Fax: (202) 639-6066
mprice@jenner.com
mminzner@jenner.com
tjohnson@jenner.com
jperkins@jenner.com

Counsel for Southwestern Public Service Company