No. 20-50160

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEXTERA ENERGY CAPITAL HOLDINGS, INCORPORATED, NEXTERA ENERGY TRANSMISSION, L.L.C., NEXTERA ENERGY TRANSMISSION MIDWEST, L.L.C., LONE STAR TRANSMISSION, L.L.C., AND NEXTERA ENERGY TRANSMISSION SOUTHWEST, L.L.C.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Texas, Civil No. 1:19-cv-00626-LY

Amicus Curiae Entergy Texas, Inc.'s Brief in Support of Defendants-Appellees and Affirmance

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Supplemental Certificate of Interested Persons

Pursuant to Fifth Circuit Rule 29, the undersigned counsel of record provides this supplemental statement of interested parties. Entergy Texas, Inc. is a majority-owned subsidiary of Entergy Corporation, which is a publicly-traded company with no parent company, and no publicly held corporation owns 10% or more of Entergy Texas, Inc.'s stock.

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Table of Contents

Table of Authorities

PAGE(S)

Cases

Statutes

Other Authorities

Statement Regarding Leave to File

On March 10, 2020, Entergy Texas, Inc. ("Entergy") filed a cross-appeal in this matter. On March 13, 2020, the Court issued an order severing Entergy's appeal and granting Entergy leave to "file a brief as an amicus in this case." Accordingly, having been granted leave, Entergy files this amicus brief in support of Appellees.

Interest of *Amicus Curiae* Entergy Texas, Inc.

Entergy has been providing electric generation, transmission, distribution, and retail service to southeast Texas since 1911. Today, Entergy serves more than 450,000 customers under rates, operations, and service obligations imposed by the State of Texas, and enforced by the Public Utility Commission ("Commission"). In exchange for submitting to Texas' comprehensive system of regulation, implemented with the Public Utility Regulatory Act's ("PURA") enactment in 1975, Texas gave Entergy a monopoly service territory that includes the right to construct new transmission facilities within that area. SB 1938 merely clarifies the State's traditional regulatory model.

Appellants (collectively, "NextEra") are attempting to force competition in Texas' transmission permitting process so that, among other things, NextEra can seek to build the Hartburg-Sabine transmission line, which will be located in Entergy's service area and interconnect with Entergy's infrastructure. NextEra's suit, if successful, would deprive Entergy of the benefit of its regulatory bargain and upend a transmission planning process that has served Texas well for 45 years. Entergy thus has a substantial interest in defending the constitutionality of SB 1938.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Entergy certifies that no party authored this brief in whole or in part, and no party, party's counsel, or other person other than Entergy Texas, Inc. contributed money that was intended to fund preparing or submitting the brief.

Summary of Argument

Because the transmission segment of the electric utility industry is "characterized by natural monopoly," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 536, (2008), Texas has imposed comprehensive regulation as a complete substitute for competition in this area:

> Public utilities traditionally are by definition monopolies in the areas they serve. As a result, the normal forces of competition that regulate prices in a free enterprise society do not operate. Public agencies regulate utility rates, operations, and services as a substitute for competition.

Tex. Util. Code § 11.002(b). The states' role in regulating utilities is squarely recognized by Congress, the U.S. Supreme Court, and the Federal Energy Regulatory Commission ("FERC"):

- "Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 304–05 (1997).
- "[T]he 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).
- "We affirm . . . that the states have a significant jurisdictional role in the siting, permitting, and construction of

> transmission facilities." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000–A, 139 F.E.R.C. ¶ 61,132, 2012 WL 1758693, at *62 (May 17, 2012) (hereinafter "FERC Order 1000-A").

NextEra's suit is an attempt to oust Texas from its traditional role under the striking notion that states are constitutionally required to open their fully-regulated transmission systems to competition. NextEra's arguments find no support in the Constitution's text, history, or relevant judicial opinions; yet they are unsurprising. For "[a]lmost as soon as the States began regulating . . . monopolies, their power to do so was challenged by interstate vendors as inconsistent with the dormant Commerce Clause." *Tracy*, 519 U.S. at 290.

Texas' policy choice "favors displac[ing] competition with regulation or monopoly public control in this area." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (quotation omitted). NextEra "may or may not agree with that approach, but nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary." *Id.* at 344-45.

NextEra's Contracts Clause challenge fares no better. NextEra's agreement with Midcontinent Independent System Operator, Inc.

("MISO") does not even give NextEra a right to build Hartburg-Sabine. Instead, only the State of Texas can grant that right. "Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op.) (citing *FERC v. Mississippi,* 456 U.S. 742, 767–768, n. 30 (1982)).

Although NextEra may have believed it was eligible to seek state certification to build Hartburg-Sabine, when it "purchased into an enterprise already regulated in the particular to which [it] now objects, [it] purchased subject to further legislation upon the same topic." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 n.14 (1983) (quotation omitted). State law has always prohibited the certification of new entrant "competitors" in Entergy's service territory, and NextEra knowingly took the risk that it would be unable to obtain regulatory approval when it entered into its contract. That does not give rise to a constitutional claim—the Constitution is "'intended to preserve practical and substantial rights, not to maintain theories.'" *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) (quoting *Davis v. Mills*, 194 U.S. 451, 457 (1904).

NextEra's appeal should be denied.

Background

1. Texas Imposes Comprehensive Regulation as a Substitute for Competition

At the turn of the 20th century, state and local municipalities generally allowed electricity providers to compete, awarding multiple franchises to serve the same area. *Tracy*, 519 U.S. at 289-90 (detailing development of gas industry and noting "essentially the same evolution in the electric industry."). "The results were both predictable and disastrous, including an initial period of wasteful competition, followed by massive consolidation and the threat of monopolistic pricing." *Id.* at 289 (quotation omitted). States responded to virtual "economic necessity" by providing "a single, local franchise with a business opportunity free of competition from any source," balanced by "the imposition of obligations to the consuming public upon the franchised retailers." *Id.* at 290.

Like many other states, Texas learned from "chastening experience," *id.*, that electric utilities need to be fully regulated in order to advance the public good. The Texas Legislature's enactment of PURA in 1975 established the Commission and created comprehensive regulation, giving the agency authority over utilities' rates, operations, and services. *See* Act of June 2, 1975, 64th Leg., R.S., ch. 721, 1975 Tex.

Gen. Laws 2327, 2327–52 (current version at Tex. Util. Code §§ 11.001, *et seq.*). The Act required any utility seeking to build a transmission line to obtain a certificate of convenience and necessity ("CCN") from the Commission. Tex. Util. Code § 37.051.

The Commission was also tasked with establishing the areas in which public utilities were permitted—and obligated—to provide service. "[G]enerally speaking, a single utility was given the authority to provide all of the electricity to customers located inside a specific geographical region." *Lamb Cty. Elec. Co-op., Inc. v. Pub. Util. Comm'n*, 269 S.W.3d 260, 265 (Tex. App.—Austin 2008, pet. denied).

What resulted is an example of a "regulatory compact," where "a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the public utility in exchange for a regime of intensive regulation, including price regulation, *quite alien to the free market*." *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (emphasis added).

The right of public utilities to construct new transmission lines located within their service areas was provided with PURA's original

enactment: "[n]otwithstanding any other provision of law, a public utility shall have the right to continue and extend service within its area of public convenience and necessity." Act of June 2, 1975, 64th Leg., R.S., ch. 721, §7, sec. 55(b) (now codified at Tex. Util. Code § 37.101(b)). SB 1938 merely clarifies this right.

2. Texas Deregulates Generation and Retail Services Within ERCOT

In 1999, the Texas Legislature revised PURA to deregulate portions of the electricity market within the Electric Reliability Council of Texas ("ERCOT") region. *See* Tex. Util. Code § 39.001(a). The revisions required utilities to "unbundle" their generation and retail delivery businesses from their transmission & distribution business. *Id.* at §39.051(b). However, PURA prohibits the utilities that serve the portions of Texas outside ERCOT from unbundling. *Id.* at §§ 39.401; 39.452(a); 39.501; 39.551.[1]

ERCOT is a transmission system, or "grid," located entirely within Texas. It is not synchronously interconnected with other regional transmission systems in the U.S., including some that cover portions of Texas. Those other systems are MISO, where Entergy is located, the

[1] Amicus Curiae LSP's statements that Texas has "abandoned vertical integration," LSP Br. 7, 22, are incorrect.

Southwest Power Pool ("SPP"), and the Western Electricity Coordinating Council ("WECC"). Because ERCOT is located wholly within Texas, it is not subject to federal regulation. Public utilities operating within MISO, SPP, and WECC are subject to both federal and state regulations. Nonetheless, Texas exercises exclusive jurisdiction over the siting, permitting, and construction of all transmission facilities everywhere in the state. *See S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 76 (D.C. Cir. 2014).

Texas also exercises ratemaking jurisdiction over every public utility that owns and operates transmission lines in Texas. It exercises jurisdiction in ERCOT because the system is wholly intrastate. It retains ratemaking jurisdiction in the Texas portions of MISO, SPP, and WECC, even though the utilities' transmission systems are interconnected across state lines, because they provide fully-bundled (*i.e.*, generation, transmission & distribution, and retail) service. *See New York v. F.E.R.C.*, 535 U.S. 1, 11-12, 25-28 (2002).

3. Limited Certification of Transmission-Only Utilities Within ERCOT

In 2007, Texas mandated the construction of thousands of miles of new transmission lines to bring wind-powered generation from West

Texas to the state's urban centers. ROA.2398. This project, known as "CREZ,"[2] was limited to ERCOT. ROA.34. As part of the permitting of new CREZ lines, the Commission was statutorily authorized to certify new-entrant utilities that would provide unbundled "transmission-only" service within ERCOT.[3] NextEra was certified as a transmission-only utility during CREZ, and currently owns and operates 330 miles of transmission lines in Central Texas. ROA.30.

No utility has ever been certified to provide transmission-only service in the MISO, SPP, or WECC portions of Texas, nor has the state implemented any sort of "competitive" transmission certification process in these areas.[4] In 2017, SPP and SPS asked a prior set of Commissioners if transmission-only utilities could be certified in SPP, or whether state law gave SPS a right of first refusal ("ROFR") to build new lines in its service territory. ROA.152. That set of Commissioners issued an advisory opinion that the Commission could certify transmission-only

[2] "CREZ" refers to the state's Competitive Renewable Energy Zone initiative mandated by SB 20 in 2005.

[3] *See* former Tex. Util. Code § 37.051(d), repealed by Acts 2019, 86th Leg., ch. 44 (S.B. 1938), § 8.

[4] The CREZ process was not competition within the meaning of the Commerce Clause. That process concerned the certification of existing and new public utilities for the limited purpose of building CREZ facilities.

utilities outside ERCOT, and that SPS did not retain a ROFR. ROA.168. Entergy, SPS, and others appealed that decision. ROA.114. While the appeal was pending, the Legislature passed SB 1938 to clarify that the prior Commissioners were wrong.[5] The bill author's statement of intent is unequivocal:

> Today in Texas, the entity that owns the endpoint of an existing transmission line is the entity that has the right to build any new facility that may be interconnected . . . . There has been some ambiguity because of statutory exceptions that were included in the Utilities Code to allow outside utilities to construct transmission as a part of the CREZ buildout. ROA.2153.

By clarifying that the vertically-integrated utilities outside ERCOT have ROFRs to build new transmission lines in their service territories, SB 1938 preserves Texas' ratemaking jurisdiction—an express purpose of the bill's passage. ROA.2153. ("S.B. 1938 will . . . maintain Texas rate jurisdiction over transmission in the non-ERCOT areas of Texas . . . .").

4. "Competitive" Transmission After FERC Order 1000

In 2012, FERC issued Order No. 1000 ("Order 1000") to promote transmission planning within the various regional grids under its

[5] *See Entergy Texas, Inc. v. Pub. Util. Comm'n of Texas*, No. 03-18-00666-CV, 2019 WL 3519051, at *1 (Tex. App.—Austin, Aug. 2, 2019) (appeal dismissed as moot).

jurisdiction. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 48. The order required regional transmission operators ("RTOs") to develop "regional" transmission plans that include provisions for allocating the cost of transmission facilities developed under such plans. *Id.* Order 1000 also requires the elimination of federal ROFRs for regional projects, but permits the continued enforcement of federal ROFRs for reliability projects, and the continued recognition of state ROFRs for all project types. *See MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329, 335-36 (7th Cir. 2016). Order 1000 thus required RTOs to allow competitive bidding for a narrow slice of projects – but only when the entity eligible to construct the line has not already been determined by state law.

Order 1000 was concerned with ensuring the reasonableness of rates charged under federal tariffs. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 64. FERC was not "effectively making decisions about which transmission facilities will be sited and constructed." FERC Order 1000-A, 2012 WL 1758693, at *63. Instead, a competitive bidding process:

> only establishes how the developer may allocate the costs of such a facility in Commission-approved rates if it is built. [It] does not . . . give any entity permission to build a facility, or relieve a developer from obtaining any necessary state regulatory approvals.

Id. After Order 1000 was issued, several RTOs, including MISO, incorporated provisions into their tariffs that give effect to state ROFRs. MISO Tariff, Attachment FF, § VIII.A.1.[6] *Amicus curiae* LSP Transmission Holdings II ("LSP") challenged FERC's authority to approve these revisions. The Seventh Circuit rejected LSP's arguments, recognizing that the agency "wanted to 'avoid intrusion on the traditional role of the States' in regulating the siting and construction of transmission facilities." *MISO Transmission Owners*, 819 F.3d at 336 (quoting *S.C. Pub. Serv. Auth.*, 762 F.3d at 76).

Having lost its challenge to state ROFR laws at FERC and the Seventh Circuit, LSP sued the Minnesota Public Utilities Commissioners in federal court, alleging that the dormant Commerce Clause invalidates state ROFR laws. The district court of Minnesota disagreed, dismissing LSP's suit on motions to dismiss under Rule 12(b)(6), a decision affirmed just last month by the Eighth Circuit. *LSP Transmission Holdings, LLC v. Sieben*, No. 18-2559, 2020 WL 1443533 (8th Cir. Mar. 25, 2020).

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[6] The tariff provides: "[t]he Transmission Provider [MISO] shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner."

Available at: https://cdn.misoenergy.org/Attachment%20FF240221.pdf.

5. The Hartburg-Sabine Transmission Line

In February 2018, while the prior Commissioners' advisory opinion was on appeal, MISO issued a request for proposals to develop the Hartburg-Sabine line. ROA.52. NextEra was selected, and entered into an agreement with MISO in which NextEra promised to develop the line in exchange for the right to charge rates under MISO's tariff. ROA.425, 444. The agreement does not purport to give NextEra construction rights. ROA.421-77. NextEra represented that it would "seek and obtain all required authorizations or approvals from Governmental Authorities . . . ." ROA.471.

NextEra never sought a CCN, either before or after the adoption of SB 1938. Instead, before SB 1938 was introduced, NextEra obtained an "Abandoned Plant Incentive" from FERC that allows it to recover "100 percent of prudently-incurred costs" in the event it is unable to obtain a CCN. *NextEra Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169, 2019 WL 1064886, at *5 (Mar. 5, 2019).

Argument

SB 1938 preserves Texas' regulation of the electric utilities that operate within the state, even-handedly preserves the service territory model upon which the state's regulatory compact is founded, and ensures the timely construction of transmission infrastructure. NextEra's allegations of discrimination are baseless. Neither the face of the statute, nor the history of its enactment, reveal the "simple economic protectionism" the dormant Commerce Clause is intended to address. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007). Instead, SB 1938 is a continued, lawful exercise of Texas' police power. *See Ark. Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

A. SB 1938 does not violate the dormant Commerce Clause.

There are two types of dormant Commerce Clause inquiries: the first asks whether a statute discriminates against out-of-state economic interests in favor of in-state interests; the second asks if a statute, though neutral, places burdens on interstate commerce that clearly outweigh a legitimate state purpose. *See Empacadora de Carnes de Fresnillo, S.A.*

de C.V., v. Curry, 476 F.3d 326, 335–36 (5th Cir. 2007). SB 1938 is valid under both tests.

1. Texas has permissibly imposed monopoly regulation as a substitute for competition.

NextEra's Complaint alleges that "as a result of SB 1938" NextEra has lost the opportunity to "compete for . . . transmission projects" in Entergy's service area, ROA.30, and that the legislation "discriminates . . . against interstate commerce in order to benefit in-state competitors." ROA.59. NextEra is wrong. Texas' enactment of PURA in 1975, and clarification through SB 1938, substitutes comprehensive regulation for competition in the construction, ownership, and operation of transmission lines. The state has provided each public utility—including NextEra—a franchise "free of competition from any source, within or without the State . . . ." *Tracy*, 519 U.S. at 290. This policy choice is constitutionally permissible. *See United Haulers*, 550 U.S. at 343; *cf. Tracy*, 519 U.S. at 313 ("Nothing in this Court's negative Commerce Clause jurisprudence" compels the conclusion "that private marketers . . . are similarly situated to public utility companies." (SCALIA, J., concurring)).

The dormant Commerce Clause prohibits "state regulation . . . that imped[es] free private trade in the national marketplace." *Tracy*, 519 U.S. at 287 (quotation omitted). NextEra's Complaint has nothing to do with free private trade. It complains SB 1938 discriminates by preventing its affiliates' "entry to the Texas transmission-development marketplace *as regulated utilities*." ROA.57 (emphasis added). NextEra wants them certified as public utilities, ROA.49., so it can charge FERC-regulated rates, ROA.53, for transmission lines it would build after state determinations of need (*id.*).

NextEra leans hard on FERC's removal of federal ROFRs for some projects as a predicate for its Commerce Clause challenge. Appellant's Br. 8-14, 38, 57. That reliance is misplaced. Order 1000 did not create a free private transmission market, since (1) the order does not even require the implementation of any regional plan developed under it, FERC Order 1000-A, 2012 WL 1758693, at *63, and (2) where competitive bidding does take place, "nothing in Order No. 1000 explicitly or implicitly requires that any transmission facilities be sited, permitted, or constructed." *Id.* The selection of a bidder "only establishes how the developer may allocate" costs "if it is built." *Id.* FERC took "great pains

to avoid intrusion on the traditional role of the States," including "authority over siting or permitting of transmission facilities." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 76 (D.C. Cir. 2014).

Order 1000's adoption reflects FERC's careful balancing of regulatory policies—encouraging regional transmission development while respecting the states' role in deciding whether facilities are built, and who can build them. That decision was within FERC's discretion, *MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329, 335–36 (7th Cir. 2016), just as states may regulate transmission providers as monopolies under their police powers, *see Tracy*, 519 U.S. at 304–05.

NextEra's appeal is little more than an attempt to constitutionalize its preferred regulatory outcome. It wants to reap the most lucrative benefits of being a public utility—highly certain cost recovery for the most lucrative projects under federally-regulated tariffs—while avoiding what it views as the burdens of the service territory model. Having failed to persuade FERC and the Texas Legislature,[7] NextEra asks this Court

[7] NextEra provided testimony urging Texas not to adopt SB 1938. Hearings on Tex. S.B. 1938 before the Senate Bus. & Commerce Comm., 86th Leg. R.S. (April 2, 2019), available at: http://tlcsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14109 at 9:37-10:33.

to dictate NextEra's preferred policy choice under the guise of the dormant Commerce Clause. The Court should reject that attempt. "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *United Haulers*, 550 U.S. at 343.

2. Entergy and NextEra are not similarly situated.

In *Tracy*, the Supreme Court considered whether an Ohio tax law that benefitted local gas distribution companies ("LDCs"), but was unavailable to independent, out-of-state gas marketers, violated the dormant Commerce Clause. *Tracy*, 519 U.S. at 287-88. The court held that the statute did not discriminate because the marketers' businesses differed with the LDCs' in significant respects. *Id.* at 299. Whereas the marketers sold "unbundled gas," *id.* at 297, LDCs provided "bundled" service under state franchises and were subject to Ohio's "blend of limitation(s) and affirmative obligation(s)." *Id.* at 295. For instance, the LDCs had to "comply with a range of accounting, reporting, and disclosure rules," and were restricted to state-determined "just and reasonable" rates. *Id.* at 296. They were also required to "serve all

members of the public, without discrimination, throughout their fields of operations." *Id.* at 297.

Tracy is directly on point; in fact, Entergy and NextEra are even less similar than the LDCs and marketers. Entergy, like the LDCs, provides bundled service to retail customers; NextEra, if it owned transmission facilities in MISO, would provide unbundled service and would not have any retail customers at all. As a transmission-only utility, NextEra would provide only wholesale service. ROA.57. Entergy, like the LDCs, is subject to pervasive state regulation over its retail rates and services, Tex. Util. Code §§ 11.001, 36.051, 38.002, and has an obligation to serve "every consumer in the utility's certificated area" and "provide continuous and adequate service in that area." Tex. Util. Code § 37.151. If certified in MISO, NextEra would not have retail customer service obligations, nor would it be subject to state ratemaking jurisdiction, *see New York v. FERC*, 535 U.S. 1, 24 (2002); 16 U.S.C. § 824.

Another aspect of *Tracy* bears mentioning. The court was especially concerned with the fact that the competition at issue—competition for the most lucrative industrial accounts, while avoiding service to less-

profitable end-use customers—might weaken the financial strength of the LDCs. *Tracy*, 519 U.S. at 304-05. This case concerns a similar issue—NextEra seeks to "compete" with Entergy for the largest, most valuable, transmission projects in Entergy's service area while avoiding end-use customer service obligations.

Because Entergy and NextEra are not similarly situated, NextEra's discrimination claim fails.

3. SB 1938 does not discriminate against out-of-state interests.

The Fifth Circuit's discrimination test asks whether the challenged statute "discriminates against interstate commerce either facially, by purpose, or by effect." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 214 (5th Cir. 2019) (quotation omitted). SB 1938 is facially neutral, and the district court correctly found that NextEra's complaint lacks plausible allegations of discriminatory purpose or intent.

i. SB 1938 is facially neutral.

SB 1938's ROFR provision applies to every utility owner's economic interests "irrespective of domicile." *Wal-Mart*, 945 F.3d at 214. SB 1938:

(1) applies a ROFR neutrally against all utilities, regardless of where the utilities' owners reside. Tex. Util. Code § 37.056(e). Even under NextEra's

flawed "in-state presence" theory, the statute is neutral, since it prohibits incumbents from competing with one another.

(2) prohibits the certification of any new transmission-only utility, regardless of who owns it, through the repeal of former section 37.051(d). ROA.91.

(3) allows anyone, anywhere, to acquire a utility operating in Texas as long as the acquisition "will not diminish the retail rate jurisdiction of the state." Tex. Util. Code § 37.154(a).

SB 1938 is thus facially neutral. *See Wal-Mart*, 945 F.3d at 214.

ii. SB 1938 was adopted without a discriminatory purpose.

The statute's purpose is also neutral. NextEra's allegation that SB 1938 reflects local "economic protectionism," ROA.28, is baseless. The legislative history is "devoid of discriminatory remarks directed toward out-of-state competition generally." *Wal-Mart*, 945 F.3d at 216. The bill history actually reveals that the Legislature was motivated to (1) ensure the timely, reliable construction and operation of critical infrastructure,

and (2) preserve the state's ratemaking jurisdiction over every public utility that operates within the state. ROA.2153. NextEra's allegations either refer to legislative history for the House bill that wasn't passed (and which lacks discriminatory intent) ROA.47, or to testimony from a bill supporter that describes how the ROFR would operate, ROA.46. The House testimony on SB 1938 likewise lacks any hint of economic protectionism.[8]

NextEra's allegations do not show a Legislative motive to discriminate. *See Wal-Mart*, 945 F.3d at 214. For instance, Representative Phelan's statement (about the unpassed House version) that "transmission operations are best managed by accountable companies with boots on the ground in our communities," concerns reliability and accountability, not discrimination. *See id.* at 215. The district court's ruling was proper, especially when SB 1938's history is viewed with the required "presumption of legislative good faith." *Id.* at 216. Even in the absence of this presumption, which NextEra fails to recognize or mention, NextEra's claims of discriminatory intent are just

[8] *See* H.J. of Tex., 86th Leg., R.S. 2990-2993 (May 6, 2019) available at: https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY59FINAL.PDF#page=78

legal conclusions masquerading as fact allegations, which the district court was not required to blindly accept. *Inclusive Communities Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019).

NextEra asserts that the Legislature's desire to preserve the state's ratemaking jurisdiction was "pretextual." Appellant's. Br. 50. But pretext cannot be shown through a Texas Attorney General appellate brief that defends an opinion the Legislature *disagreed with*. ROA.2153; *see Wal-Mart*, 945 F.3d at 215-16 (pretext shown through contemporaneous statements from Legislators, not third parties).

Regardless, the Legislature's motivations are revealed not just through testimony, but through specific statutory provisions. For instance, SB 1938 removes the Commission's authority to certify transmission-only utilities anywhere in the state. ROA.91. That preserves jurisdiction, since Texas would lack authority to set the rates of unbundled transmission providers, as their sales would be at wholesale. *See* 16 U.S.C. § 824(b). SB 1938 also permits utilities to transfer ROFRs to other utilities, but only if the transferee is certified within the same transmission grid. Tex. Util Code § 37.056(g). This prevents existing ERCOT transmission-only utilities from being certified

in MISO, SPP, or WECC. That too preserves jurisdiction, as it ensures the non-ERCOT areas of Texas will continued to be served by vertically-integrated utilities. *See New York*, 535 U.S. at 11-12, 25-28.

iii. SB 1938 regulates evenhandedly.

The legislation's effects are visited equally on utilities regardless of whether their economic interests reside in-state or out-of-state. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2471 (2019) (constitutional test is whether a statute favors "in-state economic *interests* over out-of-state *interests*" (emphasis in original)). At the time the State's motion to dismiss was filed, 10 of the 13 public utilities with transmission lines in Texas were owned by companies headquartered outside Texas. ROA.1672-1732. That number will rise to 11 with the recent approval of El Paso Electric Co.'s sale to a Delaware private investment fund.[9] Because the economic interests affected by SB 1938 are overwhelmingly located out-of-state, the statute's effects are not discriminatory. *See Wal-Mart*, 945 F.3d at 214; *see also*, *LSP*

[9] *Joint Report and Application of El Paso Electric Company, et al.*, PUC Docket No. 49849, Order at Finding of Fact No. 2, available at: http://interchange.puc.texas.gov/Documents/49849_280_1050282.PDF.

Transmission Holdings, LLC v. Sieben, No. 18-2559, 2020 WL 1443533, at *5 (8th Cir. Mar. 25, 2020).

NextEra attempts to define away this fatal fact by calling everyone that owns transmission lines in Texas an in-state entity. Appellant's Br. 29. But that view is inconsistent with the Supreme Court's admonition that "the Clause prohibits state discrimination against all 'out-of-state economic *interests*.'" *Tenn. Wine & Spirits*, 139 S. Ct. at 2471 (emphasis in original). Accordingly, a Fifth Circuit panel recently held that Texas' ban on public corporation ownership of liquor stores did not have a discriminatory effect because the ban applied evenly and several companies "owned by out-of-state residents" operated in Texas. *Wal-Mart*, 945 F.3d at 220.

NextEra misapplies cases disfavoring residency requirements. *See* Appellant's Br. 29-30. In each one, the state was giving in-state businesses a leg up in a competitive market by imposing residency as a barrier against out-of-state participation. *See, e.g.*, *Tenn. Wine & Spirits*, 139 S. Ct. 2449, 2476 (alcohol sales); *Granholm v. Heald*, 544 U.S. 460 (2005) (wine sales); *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) (private waste processing); *Dean Milk Co. v. City of Madison*, 340

U.S. 349 (1951) (milk processing).[10] SB 1938 neither prefers in-state businesses (see *supra* at A.3.i.) nor attempts to regulate competitive enterprises (see *supra* at A.1).

4. SB 1938 does not impermissibly burden interstate commerce.

Because SB 1938 is non-discriminatory, NextEra bears the burden of showing the statute imposes burdens on interstate commerce that "clearly outweigh the benefits" of the state practice. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 353 (2008). State laws rarely fail this test. *Tracy*, 519 U.S. at 298 n. 12.

NextEra alleges that SB 1938 "burdens interstate commerce by restricting entry to the transmission market in Texas, thus walling off the state from new market participants." ROA.57. This is wrong on two counts. First, SB 1938 does nothing to prohibit continued investment by the existing utilities' owners, most of whom are out-of-state. Second, SB 1938 permits investment from new out-of-state entrants, as long as the

[10] NextEra also cites *Buck v. Kuykendall*, 267 U.S. 307 (1925), but that case dealt with an *in-state* resident denied permission to operate an interstate auto carrier under a law that applied only to interstate travel. The court easily struck down the statute, since it only operated to reduce interstate competition, and did not further any legitimate state interest. *Id.* at 315-16. SB 1938 does not limit electric traffic on interstate transmission lines—those transmissions are fully regulated by FERC. 16 U.S.C. § 824(b).

state's ratemaking jurisdiction is preserved. Tex. Util. Code § 37.154(a). NextEra omits this provision in its complaint, and argues on appeal that any such investment is "hypothetical." Appellant's Br. 26. The reason is obvious—the section squarely contradicts NextEra's contention that the statute "was passed with the express aim of keeping foreign concerns out of Texas." Appellant's Br. 50. The Commission's approval of the $4 billion purchase of El Paso Electric Co. by a Delaware investment fund proves outside investment after SB 1938 is hardly hypothetical. *See supra* n. 10.

NextEra claims Texas' prohibition on competitive transmission-only providers will harm NextEra, because it "must forfeit the Hartburg-Sabine Line," Appellant's Br. 56, and will harm consumers, by allegedly reducing "access to lower cost and more reliable generation." Appellant's Br. 57. But "the Commerce 'Clause protects the interstate *market*, *not* particular interstate *firms*.'" *Wal-Mart*, 945 F.3d at 223 (emphasis in original) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)). Even if NextEra were right that "the consuming public will be injured by the loss of" competitive transmission providers, "that

argument relates to the wisdom of the statute, not to its burden on commerce." *Exxon Corp.*, 437 U.S. at 128.

The State's interest here far outweighs any potential burden on interstate commerce. Texas has a strong interest in ensuring that public utilities operating in the state are subject to its oversight. "[T]he 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). SB 1938 preserves state jurisdiction, *see supra* A.3.ii, and preserves utilities' service areas, Tex. Util. Code § 37.056(e), an integral part of the regulatory compact that underlies Texas' comprehensive system of utility regulation. *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Texas*, 104 S.W.3d 225, 227 (Tex. App.—Austin 2003, no pet.).

The legislature also found that the bill would "ensure the geographic continuity of the system in a way that further facilitates reliability." ROA.2153. The Supreme Court's precedents "have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause." *Tracy*, 519 U.S. at 306. As in *Tracy*, "[p]rudence 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 306.

SB 1938 is a valid exercise of Texas' police power to regulate public utilities. The district court properly dismissed NextEra's dormant Commerce Clause claim.

B. SB 1938 does not impair NextEra's contracts.

Courts generally employ a two-step test to determine whether a law violates the Contracts Clause. The first is "whether the state law has operated as a substantial impairment of a contractual relationship." *Sveen v. Melin*, 138 S. Ct. 1815, 1821–22 (2018). Second, if substantial impairment is shown, the inquiry turns to "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Id.* at 1817 (citations, quotations omitted).

However, in order to reach the impairment test, there must be a "contractual agreement regarding the specific . . . terms allegedly at issue." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992). The Court need not consider impairment here, since NextEra's contract with MISO does not give it the right to build Hartburg-Sabine (as the

Complaint alleges) or a right to a CCN under the Commission's "then-existing" certification criteria (as argued on appeal). Appellant's Br. 60.

The Complaint alleges that SB 1938 "substantially impair[s]" NextEra's "contractual right with MISO to build and operate" Hartburg-Sabine. ROA.58. But NextEra never cites a contractual provision purporting to grant such a right, nor does one exist. Instead, NextEra contractually represented that it "will seek or obtain, each consent, approval, authorization, order, or acceptance by any Governmental Authority . . . ." ROA.473. The contract made NextEra "solely responsible for . . . compliance with Applicable Laws and Regulations associated with the Project, including but not limited to obtaining all necessary permits, siting, and other regulatory approvals." ROA.439.

This language is consistent with Order 1000, as Hartburg-Sabine's selection by MISO "only establishes how [NextEra] may allocate" costs "if it is built." FERC Order 1000-A, 2012 WL 1758693, at *63. It "does not . . . give [NextEra] permission to build a facility, or relieve [NextEra] from obtaining [Texas] regulatory approvals." *Id.*

NextEra abandons the "right to build and own" theory on appeal, and replaces it with an even more bogus claim: that its contract with

MISO gave it a "specific contractual right" to "obtain a CCN" under the Texas Commission's "then-existing certification criteria." Appellant's Br. 60. Again, NextEra does not cite to, nor does the contract contain, language purporting to grant such a right. That's fatal. *Romein*, 503 U.S. at 186-87.

Even if the contract attempted to grant NextEra a right to a CCN under a particular view of state law, the Contracts Clause does not allow private parties to freeze regulations by contract. "'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'" *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). Since 1975, Texas law has provided the Commission sole authority to grant the right to build new transmission lines. *See* Tex. Util. Code § 37.051. When NextEra "purchased into an enterprise already regulated in the particular to which [it] now objects, [it] purchased subject to further legislation upon the same topic." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 n.14 (1983) (quotation omitted).

NextEra argues that it held "reasonable expectations" that it could be certified to build Hartburg-Sabine by pointing to a prior Commission's advisory opinion (that was on appeal) and a brief by the Texas Attorney General lodged in the opinion's defense. Appellant's Br. 61-62. But no transmission-only utility has ever been certified in MISO, SPP, or WECC, nor has there ever been any sort of competitive transmission certification process in these areas. SB 1938's legislative history is a much better indication of then-existing Texas law,[11] as it is consistent with the ROFR statute already in effect,[12] and the historical record.

In any event, the Legislature permissibly stepped in and corrected the Commission's opinion. *Romein*, 503 U.S. at 191. NextEra "took [its] chances with [its] interpretation of the" CCN requirements. *Id.* at 192. "Having now lost the battle in the . . . Legislature," NextEra wishes to "continue the war in court. Losing a political skirmish, however, in itself creates no ground for constitutional relief." *Id.*

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[11] "Today in Texas, the entity that owns the endpoint of an existing transmission line is the entity that has the right to build any new facility that may be interconnected . . . ." ROA.2153.

[12] "Notwithstanding any other provision of law, a public utility shall have the right to continue and extend service within its area of public convenience and necessity." Act of June 2, 1975, 64th Leg., R.S., ch. 721, §7, sec. 55(b) (codified at Tex. Util. Code § 37.101(b)).

NextEra asserts that it would have "made no sense" to undergo the "time, expense, and effort" of submitting a bid, and entering into a contract, if SB 1938 were contemplated. Appellant's Br. 60. Yet NextEra knew it was entering a legal gray area, and insured against any risk that its theory was wrong. NextEra's "Abandoned Plant Incentive," secured before SB 1938 was introduced, permitted NextEra to recover costs prudently incurred due to a failure to obtain a CCN. *Nextera Energy Transmission Midwest, LLC*, 166 FERC ¶ 61,169, 2019 WL 1064886, at *5 (Mar. 5, 2019). The Contracts Clause does not provide additional insurance. The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) (quotation omitted).[13]

Even if NextEra's contracts were substantially impaired, for the reasons discussed at Section A. *supra*, SB 1938 is drawn in a reasonable way to advance a significant and legitimate public purpose. *See Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). NextEra's Contracts Clause claim was properly dismissed.

[13] These conclusions apply equally to NextEra's contract to purchase a transmission line from Rayburn Country Electric Cooperative. ROA.58.

Conclusion

The district court's judgment should be affirmed.

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Respectfully submitted,

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Certificates of Service and Electronic Submission

On April 22, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with a commercially available anti-virus software and is free of viruses.

/s/ Michael Boldt
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Certificate of Compliance

The undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this Response contains 6,489 words, excluding the parts of exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced

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By: */s/ Michael Boldt*
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