No. 20-641

In the

Supreme Court of the United States

LSP TRANSMISSION HOLDINGS, LLC,

Petitioner,

v.

KATIE SIEBEN, DAN M. LIPSCHULTZ, MATTHEW SCHUERGER, JOHN TUMA, VALERIE MEANS, STEVE KELLEY, ITC MIDWEST LLC, NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* RESALE POWER GROUP OF IOWA, COALITION OF MISO TRANSMISSION CONSUMERS, INDUSTRIAL ENERGY CONSUMERS OF AMERICA AND THE AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF PETITIONER

Robert A. Weishaar, Jr.
McNees Wallace
and Nurick LLC
1200 G Street, NW, Suite 800
Washington, DC 20005
(202) 898-5700

Counsel for Amici Curiae Coalition of MISO Transmission Customers, Industrial Energy Consumers of America and American Forest and Paper Association

Kirk Howard Betts
Counsel of Record
James H. Holt
David E. Crawford
Betts & Holt LLP
1101 Connecticut Ave., NW, Suite 450
Washington, DC 20036
(202) 530-3380
kbetts@bettsandholt.com

Counsel for Amicus Curiae Resale Power Group of Iowa

(For Continuation of Appearances See Inside Cover)

300215

Kenneth R. Stark
McNees Wallace
and Nurick LLC
100 Pine Street
Harrisburg, Pennsylvania 17101
(717) 232-8000

Counsel for Amici Curiae Coalition of MISO Transmission Customers, Industrial Energy Consumers of America and American Forest and Paper Association

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INTRODUCTION

The *Amici Curiae* are the Resale Power Group of Iowa, the Coalition of MISO Transmission Consumers, the Industrial Energy Consumers of America, and the American Forest & Paper Association (together, "Interstate Consumers").[1] The Interstate Consumers are organizations representing large-scale electric purchasers that include municipal utilities and manufacturing and commercial electric energy purchasers and consumers, all of which depend on, and benefit from, federal policies designed to reduce electric transmission costs through increased competition in the interstate transmission market. The Interstate Consumers support the Petition for Writ of Certiorari ("Petition") filed by Petitioner LSP Transmission Holdings, LLP ("Petitioner") herein because the Minnesota Statute at issue ("Minnesota Statute"), Minn. Stat. §216B.246 subd. 2, raises constitutionally impermissible barriers to competition by granting a right of first refusal ("ROFR") to incumbent utilities for the ownership, construction, and maintenance of new transmission lines, thereby insulating those utilities from competition while imposing higher costs on consumers far beyond the state's borders in contravention of federal policy for lowering transmission costs through competition. The Eighth Circuit's decision that upheld the Minnesota

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1. Pursuant to this Court's Rule 37, the Interstate Consumers state that no counsel for any party in this proceeding authored this brief in whole or in part, and no person or entity other than the constituent members of the Interstate Consumers made a monetary contribution to the preparation or submission of this brief. The Interstate Consumers notified counsel of record at least 10 days prior to filing regarding their intent to file this brief and secured counsels' written consent to its filing.

Statute's protectionism[2] has already triggered retaliation by its neighbor Iowa, which on June 30, 2020 adopted a similar statute to protect its own incumbents, Iowa Stat. §478.16 (2020), further impairing federal pro-competition policies and effectively closing another market to out-of-state companies like Petitioner. At a time when the nation's electric transmission infrastructure requires substantial capital investment, allowing states to "play favorites" does not serve the national or public interest, yet that is precisely what the Minnesota Statute accomplishes – and why the Interstate Consumers consider the Petition to be vitally important and worthy of the Court's consideration.

INTERESTS OF *AMICI CURIAE*

The electric transmission systems that serve the Interstate Consumers are operated by the Midcontinent Independent System Operator ("MISO"), a regional transmission organization ("RTO") regulated by the Federal Energy Regulatory Commission ("FERC") that coordinates, controls, and monitors the transmission systems of 51 utilities across 15 states and the province of Manitoba. MISO is one of the largest power grid operators in the world and is responsible for planning regional transmission infrastructure and overseeing more than 65,000 miles of transmission lines that serve 42 million customers.[3]

Each year, MISO develops a MISO Transmission Expansion Plan ("MTEP") that evaluates various types

2. *LSP Transmission Holdings, LLC v. Sieben,* 954 F.3d 1018 (8th Cir. 2020).

3. *See* MISO (2020), available at https://www.misoenergy.org/about/ (last visited December 3, 2020).

of transmission projects to meet local and regional reliability standards and facilitate competition among electric producers.[4] Since MTEP 2003, $25.2 billion in transmission infrastructure has gone into service.[5] MTEP 2020 alone identifies 515 new transmission infrastructure projects with a total projected cost of $4.159 billion.[6]

Multi-Value Projects are capital improvement projects planned by MISO, each with a total cost of $20,000,000 or more, that promote reliability, resolve problems, or confer other benefits across all, or a significant portion of, the MISO system. The costs of Multi-Value Projects located in Iowa, Minnesota, Missouri, and other MISO states have been, or will be, recovered through the rates paid by consumers across MISO.[7]

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4. *See* MISO Transmission Expansion Plan (2020), available at https://www.misoenergy.org/planning/planning/ (last visited December 3, 2020).

5. MISO Quarter 3, 2020 Status Report, dated November 24, 2020, https://cdn.misoenergy.org/MTEP%20Status%20Report%20Dashboard327160.pdf (last visited December 3, 2020).

6. Final Draft MTEP20 Chapter 1-MTEP Overview, available at https://cdn.misoenergy.org//Final%20Draft%20MTEP20%20Chapter%201%20-%20MTEP%20Overview485663.pdf, p. 12 (last visited December 3, 2020). MTEP20 will be presented to the MISO Board of Directors for final approval in December 2020.

7. For example, the Cardinal-Hickory Creek Transmission Line Project runs from northern Iowa into southern Wisconsin. Upon completion, its costs will be recovered through rates charged customers throughout MISO. *See* ITC Midwest LLP, ITC's Continuing Response to COVID-19 (2020), available at https://www.itc-holdings.com/projects-and-initiatives/project-

The Minnesota Statute harms the Interstate Consumers' interests in at least three respects. First, the absence of competition for new transmission projects in Minnesota increases the rates of Interstate Consumers in Minnesota, Iowa, and other states. An incumbent Minnesota utility has little or no incentive to minimize costs because such costs are passed directly through rates to customers outside Minnesota. Second, the Eighth Circuit's decision to uphold the Minnesota Statute has prompted Iowa and other states to enact their own ROFR statutes to preclude competition for transmission improvements within their own incumbent utilities' service areas, allowing monopoly pricing for portions of interstate projects located in Iowa and other states to be recovered from consumers in Minnesota. Third, the Minnesota Statute and similar statutes in Iowa and other states incentivize incumbent utilities to make choices related to technical approach, project design, equipment and material selection, and other matters without regard to value engineering – an imperative in competition – which seeks to achieve the same functionality, service life, and reliability at a cost lower than MISO planners' estimate. In short, the Minnesota Statute and similar statutes produce a "perfect storm" for consumers: monopoly pricing with an incentive for "gold-plating" projects.

Resale Power Group of Iowa ("RPGI") is a special-purpose governmental entity organized in 1986 pursuant to Iowa law to purchase electric supply, transmission, and related services as agent for its members. Currently, RPGI's members include 24 Iowa municipal utilities, one

detail/2015/10/21/cardinal-hickory-creek-transmission-line-project (last visited .December 3, 2020).

electric cooperative association, and one privately-owned utility. RPGI is legally separate and fiscally independent from other state and local governmental entities. Most RPGI members purchase transmission service from ITC Midwest LLC ("ITCM") at formula rates approved by the FERC and contained in MISO's open access transmission tariff. The rates paid by RPGI's members allow ITCM to recover the cost of, and earn a rate of return on, transmission improvements. Since 2008, ITCM's zonal integration transmission service rates to RPGI's members have increased by 265.44% (11.17% annually compounded), primarily because of transmission system construction costs.[8]

Coalition of MISO Transmission Customers ("CMTC") is a continuing *ad hoc* association of large industrial and commercial endusers of electricity in the Midwest operated to represent the interests of industrial energy consumers before regulatory and legislative bodies. CMTC has participated in MISO market/transmission issues since the inception of that organization more than 20 years ago. CMTC member companies pay transmission rates that are assessed by MISO transmission owners. Some CMTC member facilities are assessed transmission charges as a separate, stand-alone charge on invoices assessed by market suppliers. Other CMTC facilities pay for transmission charges on a bundled basis, as a component of retail electricity charges that also includes charges for generation and distribution service. CMTC has actively supported competition for transmission projects within the MISO stakeholder process, before FERC, and

8. In 2008, ITCM's zonal NITS service rate was $2.654 kW/month. In 2020, the same rate is $9.46 kW/month, compared with the MISO average of $3.37/kW per month.

in United States Courts of Appeals. ROFR laws adopted by states in the MISO region prevent the efficiency and price-lowering benefits of competition for transmission projects. CMTC's members include manufacturers facing significant domestic and international competition, and increased energy costs impair CMTC members' competitiveness.

Industrial Energy Consumers of America ("IECA") is a 501(c)(6) nonprofit member-led organization created to promote the interests of manufacturing companies for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and global markets. IECA is a nonpartisan association of leading manufacturing companies with $1.1 trillion in annual sales, over 4,000 facilities nationwide, and with more than 1.8 million employees. IECA membership represents a diverse set of industries including: chemicals, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, automotive, independent oil refining, and cement. IECA member companies operate facilities throughout the Midwest and thus are directly affected by ROFR laws that deny them the efficiency and price-lowering benefits of competition for transmission projects. IECA's members include manufacturers facing significant domestic and international competition. Increased electricity costs impair IECA members' competitiveness and directly impact investment in domestic job creation.

American Forest & Paper Association ("AF&PA") is the national trade association of the paper and wood products industry to advance public policies that promote a strong and sustainable U.S. forest products industry in the global marketplace. AF&PA's member companies represent about 85% of U.S. pulp, paper, paper-based packaging and tissue products manufactured in the U.S. and include small, medium and large companies with family, private and public-ownership and operations in rural and urban communities across the country. AF&PA member company facilities in the paper and wood products industry, like CMTC and IECA member companies, pay transmission charges as a growing portion of their total charges for electricity. AF&PA members include manufacturers facing significant domestic and international competition. Increased energy costs impair AF&PA members' competitiveness, a concern that has been magnified over the last year due to the economic and health challenges associated with the COVID-19 pandemic.

SUMMARY OF ARGUMENT

The Petition seeks this Court's review of the Eighth Circuit's decision to uphold the Minnesota Statute in *LSP Transmission Holdings, LLC v. Sieben*. The Minnesota Statute protects local incumbent utilities from competition by out-of-state entities seeking to enter the interstate transmission market in Minnesota, thereby undermining FERC's well-established jurisdiction to regulate transmission service to ensure that prices paid by consumers for transmission service are just and reasonable, as required by Section 205(a) of the Federal Power Act ("FPA").[9]

9. 16 U.S.C. §824(a).

FERC created RTOs like MISO to, *inter alia*, overcome the unwillingness of vertically-integrated utilities (that is, utilities that owned electric generation, transmission, and distribution facilities) to connect independently-owned electric generators and to innovate and invest in transmission system improvements. Beginning with the issuance of Order No. 888 in 1996[10] and continuing through Order No. 2000 in 1999[11] and Order No. 1000 in 2011,[12] FERC has consistently sought to bring the power of competition to bear on the interstate transmission market to lower costs, stimulate investment, and encourage innovation.

The Minnesota Statute, however, quashes competition by granting incumbent utilities the exclusive right of first refusal to own, construct, and maintain new transmission facilities. The roster of eligible instate incumbents was thus fixed as of the time the legislation was adopted.

10. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, 75 FERC ¶61,080 (1996) ("Order No. 888"), *order on reh'g,* Order No. 888-A, 78 FERC ¶61,220 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶61,248 (1997), *order on reh'g,* Order No. 888-C, 82 FERC ¶61,046 (1998) ("Order No. 888-C"), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

11. *Regional Transmission Organizations*, 65 Fed. Reg. 810, 817 (2000) ("Order No. 2000").

12. *18 CFR Part 35 Transmission Planning and Cost Allocations,* Order No. 1000, 136 FERC ¶61,051 (2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶61,132 (2012) ("Order No. 1000-A").

The statute effectively excludes non-incumbents from participating in new transmission projects within the state at a time when the electric grid is anticipated to require large-scale investments to accommodate the burgeoning renewable electric generation industry. For reasons explicitly identified in inquiries before FERC, ROFR provisions effectively relegate non-incumbents, including multi-state enterprises that are developing projects throughout the national grid, to bystander status.

"The very purpose of the Commerce Clause was to create an area of free trade among the several States." *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 170 (1954). The Minnesota Statute repudiates that standard. Fixing squarely on the interstate component of the electricity transmission industry in Minnesota, it affirmatively disrupts free trade in favor of a command-and-control approach that explicitly favors incumbent companies.

Under FERC rules, the costs of major new transmission infrastructure are allocated across the entire multi-state RTO. Thus, the Minnesota Statute has direct consequences to out-of-state consumers, which bear the rates for transmission services designed to recover costs on a regional basis. Not surprisingly, a statute that arrogates market control to one state, with potential cost consequences borne by consumers in other states, creates incentives for reciprocal measures. The Petition identifies instances in which this trend has already emerged.

Petitioner is an active and established participant in the interstate transmission system in other states, but not in Minnesota, where it could serve a vital role as an additional, alternative participant to local incumbents.

That potential is foreclosed and interstate trade thus restrained by the preclusive effects of the state's protectionist statute.

The disruption of free trade damages the efficient functioning of the interstate transmission system and unjustly and unreasonably increases the price of electricity paid by *Amici Curiae* Interstate Consumers.

ARGUMENT

I. The Minnesota Statute Explicitly Targets Interstate Commerce.

As the very title of the Minnesota Statute proclaims, its subject and object is "Federally Approved Transmission Lines" over which the state confers "Incumbent Transmission Lineowner Rights."[13] The statute directly affects federally regulated facilities by dictating what entities may engage in the ownership and construction of interstate transmission of electricity within the state, in effect posting a "do not enter" sign at the Minnesota border for companies without a Minnesota presence. In short, the statute facially discriminates against interstate commerce and therefore violates the Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978) (facially discriminatory statutes raise "a virtually per se rule of invalidity").

The Minnesota Statute defines an "incumbent" as any "public utility that owns, operates, and maintains an electric transmission line in this state. . .."[14] Incumbents,

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13. *See* Minn. Stat. §216B.246.

14. Minn. Stat. § 216B.246 subd. 1.

but not others, are eligible for a valuable right:

> An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. The right to construct, own, and maintain an electric transmission line that connects to facilities owned by two or more incumbent electric transmission owners belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed upon in writing.[15]

The use of the present tense verb, "owns," in the definition of "incumbent," and the corresponding reference to facilities "owned" by such entities in the quoted provision excludes any future transmission owner from exercising such a right, ensuring that there will be no future additions to the roster of incumbents. In essence, the state has ossified the existing structure of the transmission industry in Minnesota, and contravened FERC's exclusive jurisdiction under the FPA to regulate the "transmission of electric energy in interstate commerce" by public utilities. 16 U.S.C. §824(b)(1).[16]

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15. Minn. Stat. § 216B.246 subd. 2.

16. The nomenclature employed, "public utility," is also drawn from the federal statute, which establishes the scope of federal authority as applying to such an entity.

The right conferred by the Minnesota Statute on incumbent transmission owners applies within the confines of that state, but to specific federally approved facilities. Although the federal authority is not named in the statute, the federal authority is FERC:

> An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line *that has been approved for construction in a federally registered planning authority transmission plan* and connects to facilities owned by that incumbent electric transmission owner.

Minn. Stat. §216B.246, Subd. 2. (emphasis added.) The italicized language refers to regional organizations governing interstate aspects of the electric utility industry, or RTOs, pursuant to regulations adopted by FERC. Those organizations have been structured and empowered in a series of measures originating in the mid-1990s and continuing to the present, the stated goal of which has been "a more competitive electricity marketplace." *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 610-11 (D.C. Cir. 2001). These same purposes undergird MISO. *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004). MISO is an RTO that operates facilities that are owned by other, constituent member public-utility entities.

The jurisdictional division between interstate and local commerce was explicitly addressed by FERC in its seminal Order No. 888 series, which was upheld in all relevant respects on judicial review.

Order No. 888 required that transmission utilities furnish non-discriminatory access to interstate facilities. When FERC found that that requirement did not fully accomplish its efficiency goals, it adopted more pointed directives to "transmission-owning utilities" to participate in RTOs that would plan and oversee the facilities that such utilities owned. Order No. 2000 at 817. Order Nos. 888, 2000, and 1000 form the complementary elements of the regulatory framework that now govern electric transmission services in interstate commerce in certain regions, including the MISO region that includes Minnesota.

Even as it moved to segregate, or "unbundle," wholesale transmission services, FERC recognized that the states would retain oversight authority in specified, purely local matters. Order No. 888 at 31,782, nn.543, 544; *New York,* 535 U.S. at 24. State authority over local service issues, however, was delineated as remaining distinct from the interstate transmission function, which the RTOs were designed and empowered to administer.

Thus, the explicit reference to regional planning organizations in the Minnesota Statute directly incorporates and ratifies a jurisdictional delineation under which RTOs have been created and are supervised. The very language used in the Minnesota Statute acknowledges, and conclusively demonstrates, the intent of the state legislation to affect interstate commerce and the interstate transmission of electricity within the state of Minnesota.

As noted, Order No. 888 encouraged — but did not require — the development of multi-utility RTOs. The concern was that the segmentation of the transmission grid among different utilities, even if each had functionally unbundled transmission, contributed to inefficiencies that impeded free competition in the market for electric power. Combining the various segments and placing control of the grid in one entity — an RTO — was expected to overcome these inefficiencies and promote competition. Order No. 888 at 31,730-32; *petition denied, Public Utility District No. 1,* 272 F.3d 607 (D.C. Cir. 2001).

Notably, the Minnesota Statute adopts no ROFR or other standard for any activities other than interstate transmission. The ROFR applies explicitly, and exclusively, to certain interstate commerce within its borders, specifically, the interstate transmission of electricity that is the subject of prior "federal" review and approval. FERC regulates such commerce through RTOs under its exclusive federal jurisdiction, and the state undermines FERC's regulatory authority and FERC's prior orders by attempting to mandate a state preference for local entities.

This case presents a clear instance in which a state has deliberately acted to "discriminate against or burden the interstate flow of articles of commerce." It violates the negative proscription of the Commerce Clause. *Oregon Waste Systems,* Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 98 (1994).

II. The Minnesota Statute Indisputably Restrains Trade In The Interstate Transmission Market.

The policy initiatives that FERC brought about in its landmark Order No. 888 and related measures were dependent on the creation of a consolidated authority over electric transmission facilities and services within a specified region, the purpose being, consistent with the Commerce Clause, to enhance the role of free trade in the national interstate electricity market. "Since 1996, to facilitate the development of competitive wholesale power markets, FERC has required power utilities to provide non-discriminatory open access transmission services. To this end it has encouraged creation of RTOs—entities consolidating control of all transmission services in a particular region." *Braintree Electric Light Dept. v. FERC,* 550 F.3d 6, 8 (D.C. Cir. 2008).

Under the new regulatory regime, two of the three traditional sectors of that market – generation and transmission – have been exposed to both a broader range of participants and a reduction in barriers to competitive influences. Order No. 888 explicitly recognized that the scope of these measures was consistent with the demarcation of regulatory responsibilities between interstate commerce and local matters, over which local authorities remained undisturbed. That order explicitly addressed the distinction between transmission that occurred in interstate commerce, which was one of the prime objects of the new regulatory regime, and purely local transmission, which was not subjected to the planning or coordinating features of the regional organizations then being structured.

Thus, the Minnesota Statute, referring to "federally-approved transmission lines," changes the terms under which interstate commerce is conducted, and ventures into federal regulatory territory administered exclusively by FERC.

The Minnesota Statute creates a right that no market participant would otherwise have: an ability to deny market entry to a potential competitor, and thereby to preserve a monopoly role in the development and ownership of additional transmission facilities. Rather than enabling competition as FERC Order No. 1000 envisions and requires, the state has sought to minimize it. "[T]he history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." *Otter Tail Power Co. v. United States*, 410 U.S. 366 at 374 (1973). The Minnesota Statute constrains such competition by intervening in one of the most fundamental aspects of competition, the right of entry into a market.

The statute is tantamount to an absolute bar, much like the state law that effectively banned trucks of a certain dimension from operating within Wisconsin. *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 447 (1978). As in *Raymond*, the banned activity/actor is common in other states. Petitioner LSP and other similarly situated multi-state transmission companies have established operations in states other than Minnesota. The statute effectively ensures that they will be unable to own or operate interstate transmission lines in Minnesota or compete for new expansions of facilities in Minnesota that will be used in interstate transmission.

Through the federal policy of unbundling, FERC has sought to expand the roster of transmission participants and has fostered the development of stand-alone transmission entities, including the Petitioner itself. Indeed, a transmission entity that joins an RTO can be eligible for an "independence" adder to its FERCauthorized return on equity investment if it is not affiliated with any other market participants. As the Federal Trade Commission has noted, the existence of a federal right of first refusal in jurisdictional tariffs and agreements "reduces capital investment opportunities for potential nonincumbent developers by increasing their risk, encourages free ridership among incumbent developers, and creates a barrier to entry." Order No. 1000 at ¶ 231. A state statute that fails to address these deleterious effects on interstate commerce, or even to acknowledge them, effectuates a constraint on interstate commerce for the same reasons and trespasses on the area of free trade that the Commerce Clause mandates.

The Minnesota Statute thus represents an explicit retreat from a burgeoning, more diversified and competitive transmission industry to the detriment of consumers such as those represented here, who depend on the efficient functioning of the interstate transmission market and just and reasonable electric prices. The "incumbents" that are afforded preferential treatment under the statute are in most instances affiliates of traditional retail utilities that occupied an exclusive position as owners and operators of utility facilities during the fully bundled world of pre-open access transmission, which the D.C. Circuit has given the useful shorthand designation, "the bad old days." *Midwest ISO Transmission Owners v. FERC,* 373 F.3d 1361, 1363 (D.C. Cir. 2004).

In creating the ROFR for new transmission facilities, Minnesota has effectively restored a key feature of the old regime, affording an important tool of predominance over local electric service that was found, nearly thirty years ago and repeatedly since then, not to be suited to electric industry conditions. The state-created ROFR grants a sinecure to established transmission providers, at the expense of customers that depend on the continuing growth of alternatives to the incumbents and potential transmission companies.

The statute under review, and the viral growth of such statutes that it may presage, validate FERC's concern over state laws that might "balkanize" the electric transmission systems serving the interstate market. This is in part a function of the geographic characteristics of transmission.

MISO encompasses portions of fifteen states as well as the Canadian province of Manitoba. A project subject to RTO review and approval could present various geographic configurations, with facilities being constructed wholly within a single state, crossing a boundary between two states, or occupying multiple states, thereby necessitating multiple state border crossings. Statutes such as the Minnesota Statute would present a potential project sponsor with an array of potential constraints. Illustratively, the prospective transmission participant could be foreclosed entirely from a project if the incumbent in a single state exercised the state's ROFR. It could be foreclosed from ownership of only those facilities located in one of two states if such rights were conferred and obtained within a single state, with the resulting hybrid of ownership left unresolved as a practical and legal matter, or it could find that it is foreclosed from owning and operating a portion or portions of multistate facilities, which might even cross the same boundary more than once. The consequent disruption of planning and operation would serve as a dictionary representation of "balkanization."

The Minnesota Statute and ROFR statutes based on the same model in other states operate to restrain trade in the most blatant and fundamental way, and thus violate the Commerce Clause. By specifying a limited class of business entities that may compete for future interstate transmission construction projects, and thereby dictating the roster of competitors in one important sector of the energy industry, such statutes preclude competitors from operating in that area of interstate trade.

These statutes, if allowed to remain in effect, represent a textbook violation of the Commerce Clause.

III. The Eighth Circuit's Analysis of the Purpose and Effects of The Statute is Superficial and Inaccurate: The Statute Plainly Discriminates Against Non-Local Competitors, With Harm to Consumers.

For the reasons discussed above, the Minnesota Statute is facially unsound under the Commerce Clause analysis. In its analysis of the Minnesota Statute, the Eighth Circuit ignores its preclusive effects, adopting a superficial characterization of "neutrality." This confounds the reason RTOs were established: "to overcome these inefficiencies and promote competition." *Midwest ISO Transmission Owners*, 373 F.3d 1361.

A. The "Long-Standing" Minnesota State Practice That the Statute Seeks to Preserve Only Allows Transmission Facilities to Be Built By The Holder of the Exclusive Franchise For That Territory; The ROFR Thus Effectively Excludes Only Out-of-State Project Sponsors and Is In No Sense "Neutral".

Notwithstanding the characterization of the Minnesota Statute as resting on a "neutral" differentiation among local and multi-state participants in the interstate transmission of electricity, the distinction in the statute plainly discriminates against multi-state transmission operators. This distinction is not "neutral" as it pertains to instate and out-of-state entities for the simple reason that only out-of-state entities are excluded from the analysis. The court below suggests that multi-state entities are simply treated the same as an instate utility that seeks to construct transmission facilities within the exclusive service territory of another state utility: there is no suggestion that any such circumstance has ever transpired, however. Thus, no instate utility has ever been excluded from transmission outside its service territory, and the "neutral" application of the ROFR reduces to a *de facto* distinction between instate and out-of-state participants.

Indeed, no Minnesota utility other than an incumbent *could* compete to build transmission facilities, as the state affirmed in its brief to the Eighth Circuit.[17] There, it describes state law as conferring a monopoly on all electric

17. Brief of Defendants-Appellees Lange, *et al.* at 28-32, *LSP Transmission Holdings, LLC v. Sieben,* 954 F.3d 1018 (8th Cir. 2020) (No.18-2559).

utilities operating within the state, within the confines of their respective franchise areas. Thus, the only entity that could compete with an incumbent is an out-of-state utility. The ROFR forecloses that competition, and thus facially discriminates against any out-of-state entity that would otherwise proceed with a new transmission project.

B. The Commerce Clause Does Not Authorize States to Determine How Much Interstate Commerce Should Be Allowed Within Their Borders.

The court below found that the statute imposed no undue burden on interstate commerce because the record did not establish that the cumulative effect of state ROFR laws would "eliminate competition in the market completely." App. 21. This finding exhibits a superficial understanding of both the facts and relevant economic principles and incorporates a misreading of the protections afforded interstate commerce. It fails to acknowledge that even a little restraint on competition can have major impacts if the restraint applies at the point of an expansion.

The panel effectively reads the Commerce Clause as accommodating a pro-rata analysis, authorizing each state to determine how much interstate commerce should be allowed to function freely within its boundaries and how much interstate commerce should be restrained to suit a state's priorities. There is no support in the text or case law for such a reading.

Second, the panel's economic analysis fails to confront the material facts of the case. First, the court appears to rely on a proportionate measure of the instate incumbents in *existing* interstate transmission within Minnesota: the relevant dimension, however, is how competition by multi-state entities would be precluded from *expansions* of the existing transmission grid. By that standard, the court could not make any finding because "incumbents" could wholly foreclose new entrants depending on whether they elected to exercise the ROFR created in Minnesota. Moreover, in economic terms, the specific element of interstate transmission markets that is the subject of this dispute is the *marginal* supply of interstate transmission capacity, *i.e.*, the new and growing supply that is being planned by MISO to accommodate demand for new interstate transmission capacity. The statute could effectively extinguish new, multi-state entrants from that market.

The court's economic analysis suggests that the Commerce Clause allows states to enact legislation that interferes with competition in interstate commerce as long as there is some residual commerce that can be identified that is not inhibited by the restraint. Again, such a reading would effectively neutralize the purpose of the Commerce Clause: ensuring the interstate market is an area of free trade. The Minnesota Statute plainly divides potential project sponsors into two categories, one of which is occupied by out-of-state entities that violates the Commerce Clause.

It is not left to individual states to determine whether they can intervene to create local exceptions in an otherwise clearly assigned function of a federal regulatory scheme. Congress has demonstrated that it is responsible for identifying such instances and has done so. *See, e.g.,* Section 15 USC Section 717(c), (exempting certain intrastate natural gas transactions conducted in interstate commerce from regulation under the Natural Gas Act). Congress has not done so here, and no state can disregard the scope of interstate commerce within its borders or impede its operations by granting a preference to local entities over others.

IV. By Impeding Transmission Competition, ROFR Laws Increase the Energy Costs and Operating Costs of Manufacturers, Industrial Consumers, and Large-Scale Electric Purchasers.

Interstate Consumers support FERC's orders and policies seeking to reduce electric transmission costs through increased competition in the interstate transmission market. CMTC, IECA, and AF&PA represent manufacturers and other large industrial consumers that consume substantial quantities of electricity. RPGI's members are large scale electric purchasers. By providing a ROFR and monopoly control to incumbent utilities over the ownership, construction, and maintenance of new, federally regulated transmission lines, ROFR laws insulate those utilities from competition, and thereby impose higher electric transmission costs on consumers. Without competition, there are fewer checks and balances on cost estimates, and no pressure or incentive to curb project costs and prevent cost overruns. Competition is critical because transmission plant in service has grown exponentially over the last decade – from $127.6 billion in 2010 to $337.4 billion in 2019.[18]

18. See "Comments of American Manufacturers," *Electric Transmission Incentives Policy Under Section 219 of the Federal Power Act*, FERC Docket No. RM20-10-000, Exhibit No. AMF-1 (Affidavit of Michael P. Gorman) at 8-9 (filed July 1, 2020).

Two recent competitive processes conducted by MISO demonstrate competition's benefit.[19] MISO received comprehensive proposals from 11 different respondents for ownership, construction, and maintenance of the Duff-Coleman 345 kV project.[20] It received proposals from nine different respondents for the Hartburg-Sabine Junction 500 kV project.[21] The winning proposals in both instances resulted in estimated cost savings of 15% over MISO's projected costs, along with a cost cap, and other benefits that would have been foregone if a ROFR statute had been in effect in those states.

New transmission system capacity is needed in the MISO region to connect generation resources to the load centers where the electricity is ultimately consumed. New transmission projects can have an estimated 40-year life and allow the transmission owner to recover the costs of that project and earn a return on and of that project investment through a FERC-regulated annual transmission revenue requirement. The cost of

19. Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5, 38 (December 20, 2016), available at https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf (last visited December 5, 2020); Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5 (November 27, 2018), available at https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf (last visited December 5, 2020).

20. Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5.

21. Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5.

the project will be recovered from consumers over many years. Therefore, ensuring competition for large-scale transmission projects (that are needed now) will have repercussions for consumers for many years from now.

Because energy is a significant operational cost and one of the top expenditures for industrial consumers, significant increases in electricity costs impact the viability and competitiveness of their businesses. Manufacturers open, close, and relocate their businesses due in large part to the cost of energy and the regulatory environment of a particular area. Today, manufacturers and other industrial consumers face significant domestic and international competition, a concern that has been magnified over the last year due to the economic and health challenges associated with the COVID-19 pandemic. During a time when transmission competition is poised to provide significant and necessary costs savings for consumers, ROFR laws backpedal on promise of Order 1000 and would only serve to unjustly and unreasonably increase transmission costs.

Additional major transmission infrastructure projects are imminent. MISO recently reported that requests for new renewable electric power generation facilities could overwhelm available transmission system capacity. Since renewable resource-based generation facilities are often distant from the load centers that consume the electricity, MISO recognizes that major enhancements to its transmission system are needed to connect many of these new facilities over a wide geographic area to balance the variability in renewable resource availability.[22]

22. ITC Midwest LLP, Partners in Business Presentation, October 21, 2020, pp. 59-63, available at https://www.itc-holdings.

These projects will run through Iowa and Minnesota and potentially other states that have enacted ROFR statutes, which means that Interstate Consumers will pay higher rates than would be the case if the ownership, construction, and maintenance of each project is subject to competition. The Minnesota Statue violates the Commerce Clause and should be struck down.

CONCLUSION

The Eighth Circuit erred in determining that the Minnesota Statute did not violate the Commerce Clause. For this reason, the Interstate Consumers respectfully urge this Court to grant the Petition herein.

Respectfully submitted,

Robert A. Weishaar, Jr.
McNees Wallace
and Nurick LLC
1200 G Street, NW, Suite 800
Washington, DC 20005
(202) 898-5700

Counsel for Amici Curiae Coalition of MISO Transmission Customers, Industrial Energy Consumers of America and American Forest and Paper Association

Kirk Howard Betts
Counsel of Record
James H. Holt
David E. Crawford
Betts & Holt LLP
1101 Connecticut Ave., NW, Suite 450
Washington, DC 20036
(202) 530-3380
kbetts@bettsandholt.com

Counsel for Amicus Curiae Resale Power Group of Iowa

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Kenneth R. Stark
McNees Wallace
and Nurick LLC
100 Pine Street
Harrisburg, Pennsylvania 17101
(717) 232-8000

Counsel for Amici Curiae Coalition of MISO Transmission Customers, Industrial Energy Consumers of America and American Forest and Paper Association

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