UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LSP TRANSMISSION HOLDINGS, LLC, Plaintiff, vs. **NANCY LANGE**, Commissioner and Chair, Minnesota Public Utilities Commission; **DAN LIPSCHULTZ**, Commissioner, Minnesota Public Utilities Commission; **MATT SCHUERGER**, Commissioner, Minnesota Public Utilities Commission; **JOHN TUMA**, Commissioner, Minnesota Public Utilities Commission; **KATIE SIEBEN**, Commissioner, Minnesota Public Utilities Commission; and **MIKE ROTHMAN**, Commissioner, Minnesota Department of Commerce, each in his or her official capacity, and Northern States Power Company d/b/a Xcel Energy, and ITC Midwest LLC Defendants.	**Civil No.** 0:17-cv-04490-DWF-HB **DEFENDANT NORTHERN STATES POWER COMPANY'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

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INTRODUCTION

Plaintiff LSP's brief presents a full-throated defense of the policy benefits of adopting a free market in the construction of electric transmission lines. LSP is entitled to hold that view. What it is not entitled to do is force its view on the people of Minnesota by calling it constitutional law.

As LSP cannot dispute, courts show great caution in reviewing state utility regulations under the dormant Commerce Clause, given that "'regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'" *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002) (quoting *Ark. Elec. Co-op Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)). In this case, the reasons for judicial deference are multiplied, since both Congress and FERC have made clear that adopting a right of first refusal to build new transmission lines is a policy decision that is Minnesota's to make, with FERC rejecting LSP's statutory and policy objections to the very Minnesota statute at issue, *Midwest Indep. Trans.Sys. Operator, Inc.*, 150 FERC at 61166, ¶¶ 25 & 27, 2015 WL 285969, at *7-8, and the Seventh Circuit affirming FERC's decision under the Federal Power Act, *MISO Transmission Owners v. FERC*, 819 F3d. 329, 336 (7th Cir. 2016).

LSP seems to believe that it has come up with a new argument when it equates *limiting competition* (which utility regulations do) with *discriminating* against *interstate commerce* (which Minnesota's right of first refusal does not do). But that argument is neither new nor correct. "The battle between laissez fairists and regulators is as old as

the hills," *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 158 (4th Cir. 2016), and choosing to provide electricity through existing, regulated entities that can reliably and safely serve the public interest—and that, unlike LSP, can be compelled to build new facilities when it is in the public interest—is not the same as discriminating against interstate commerce. "Legislators, not jurists," are best suited to decide the balance between regulation and competition based on "their own political valuations of the public interests at stake." *Id.* The Constitution neither requires nor allows this Court to substitute itself for Minnesota's policy makers.

Courts routinely grant motions to dismiss meritless dormant Commerce Clause claims. *See, e.g.*, *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 941-43 (8th Cir. 2009) (affirming dismissal of discrimination and *Pike* claims); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103-08 (2d Cir. 2017) (same); *Doran v. Mass. Turnpike Auth.*, 348 F.3d 315 (1st Cir. 2003) (same). Because Minnesota was entitled to decide to regulate the construction of electric transmission lines to serve the interests of its citizens, LSP's Complaint should be dismissed.

I. The Long History of Judicial Deference to Utility Regulation Requires the Dismissal of LSP's Challenge.

LSP's brief does precisely what the Eighth Circuit has said it cannot do: "ignore[] this nation's long history of public utility regulation" when applying the dormant Commerce Clause. *S. Union*, 289 F.3d at 507 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 288-97 (1997)).

As demonstrated in NSP's opening brief, the right of first refusal created by § 216B.246 is part of Minnesota's larger scheme of utility regulation. (Dkt. 39 at 8-10.) Because legislatures are uniquely suited to find facts and make policy decisions regarding the "health, life, and safety of their citizens," courts have "an obligation to proceed cautiously" in reviewing utility regulations. *Tracy*, 519 U.S. at 304, 306.

The mandate for judicial caution is particularly strong in this case, given how clearly the federal legislative and executive branches have preserved Minnesota's role to make the policy choice it did. As the Eighth Circuit recognized in *Southern Union*, "[a] major purpose" of the Federal Power Act "was to preserve and protect state and local regulation" on matters of local interest, such as siting. 289 F.3d at 507. Moreover, FERC expressly preserved state rights of first refusal like Minnesota's in the very same Order 1000 that LSP touts as withdrawing analogous federal rights. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.,* 136 FERC ¶ 61051, at ¶ 287, 2011 WL 2956837, at *92 (July 21, 2011). In addition, FERC rejected LSP's challenge to MISO's decision to honor Minnesota's right of refusal statute, holding that it was "***appropriate*** for MISO ***to recognize state or local laws or regulations***." *Midwest Indep. Trans.Sys. Operator, Inc.*, 150 FERC at 61166, ¶ 25, 2015 WL 285969, at *7 (emphasis added). Order 1000, FERC said, "struck ***an important balance*** between removing barriers to participation for potential transmission providers in the regional transmission planning process and ensuring the

nonincumbent developer reforms ***do not result in the regulation of matters reserved to the states***." *Id.* at ¶ 27 (emphasis added).

NSP established that *Tracy* requires deference to states' legislative policy judgments in how to regulate utilities to best advance the health, life, and safety of their citizens (Dkt. 39 at 18-24), and LSP never disputes *Tracy*'s instructions. Instead, it offers a series of technical distinctions, none of which is persuasive.

First, LSP argues that *Tracy* is different because it involved a tax statute. (Opp'n at 20.) But *Tracy* is not limited to taxes: it stated that the dormant Commerce Clause "prohibits state taxation *or regulation* that discriminates against or unduly burdens interstate commerce." 519 U.S. at 287 (citations omitted, emphasis added); *see also id.* at 299 (noting that courts must examine "the tax *or other regulatory differential*" (emphasis added)). The cases cited by LSP do not hold that taxes receive less scrutiny under the Commerce Clause, only that states have broad discretion in enacting them, *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1070 n.5 (8th Cir. 2000), and that a discriminatory tax scheme violates the Commerce Clause, *cf. Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 583 (1995).

Second, LSP argues that *Tracy* implicated concerns about retail energy sales, whereas Minnesota's statute relates only to transmission lines. This is an artificially narrow view of *Tracy*. *Tracy* teaches that there cannot be discrimination between entities that are not similarly situated, and regulated utilities are not similarly situated to unregulated businesses. *See* 519 U.S. at 298-99. That principle fully applies here,

where all existing transmission owners that receive § 216B.246's right of first refusal are regulated entities that can be *compelled* to build new lines when it is in the public interest, § 216B.246(3)(b), whereas LSP is an unregulated entity that cannot be so compelled, and that wants to compete only for those lines that are most profitable. Hence, *Tracy* is squarely on point.

In deciding this motion, the Court should therefore follow the analysis in the most recent decision either party cited applying *Tracy*, and the one that is most on point both legally and procedurally: *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017). In *Allco*, the Second Circuit considered a dormant Commerce Clause claim in the same posture as this case—on a motion to dismiss—and it affirmed the dismissal. Connecticut allowed its electric utilities to meet renewable energy standards by purchasing renewable energy certificates (RECs), but only from utilities located within or adjacent to Connecticut's regional system (ISO-NE, analogous to MISO in this case). *Id.* at 92-93. A Georgia-owned utility whose RECs were excluded argued discrimination against interstate commerce. But the Second Circuit, in reasoning that applies directly here, held that Connecticut had made a legitimate policy decision authorized by Congress and FERC.

"It is FERC," the *Allco* court wrote, "that has created the geographic distinctions on which Connecticut's program is predicated by organizing owners of transmission lines into 'independent system operators' (ISOs)." *Id.* at 107. "Congress and FERC," moreover, "are ***better-situated than the courts*** to supervise and to

determine the economic wisdom and the health and safety effects of these geographic boundaries that Connecticut has incorporated into its RPS program." *Id.* (emphasis added). As a result, the court rejected the claim of discrimination, citing *Tracy* and holding that "[i]t is they [Congress and FERC] that, in this setting, are best suited to decide which products ought to be treated similarly, and which should not." *Id.* (citing *Tracy*, 519 U.S. at 307).

In the same way here, Congress and FERC have decided that the correct balance between competition and rights of first refusal in the context of building certain transmission facilities is to withdraw federal rights but allow states to make their own decisions. Minnesota, acting within this preserved authority, exercised its judgment "to ensure that Minnesota utilities provide reliable service, at reasonable costs, in consideration of Minnesota's policy objectives." (Dkt. 39 at 11 (quoting 2013 Dept. of Commerce Report at 8).) Because Congress, FERC, and the Minnesota legislature "are better-situated than the courts" to "determine the economic wisdom and the health and safety effects" of this decision, the Court should defer to their judgment. *Allco*, 861 F.3d at 107. Just as *Allco* rejected a dormant Commerce Clause challenge on a motion to dismiss, this Court should do the same.

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

LSP seeks to escape the governing precedent by arguing that § 216B.246 discriminates against out-of-state entities, either on its face or in purpose and effect. Neither argument is correct.

A. Section 216B.246 applies equally to in-state and out-of-state entities.

First, as NSP demonstrated, § 216B.246 does not discriminate against out-of-state interests. Instead, it draws the neutral distinction between existing electric transmission owners to whose facilities a new line will connect (a group that includes both in-state and out-of-state companies) and all other entities.[1] (Dkt. 39 at 25-26.) Since "[d]iscrimination' for purposes of the Commerce Clause means 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1384 (8th Cir. 1997) (quotation marks omitted), LSP's claim fails for lack of any such discrimination.

LSP's core response is that any entity that owns a transmission facility in Minnesota should be considered an "in-state" company, even if it is incorporated or headquartered elsewhere. (Opp'n 26.) Under this logic, a Texas corporation

[1] LSP Transmission falsely claims that NSP "admit[s] that on its face," § 216B.246 gives "*in-state* incumbents" a right of first refusal. (Opp'n 25 (emphasis added).) But NSP admitted no such thing, because the statute applies equally to in-state and out-of-state incumbents.

headquartered in Texas would be considered Minnesotan if it owned a transmission facility here, and a Minnesota law benefitting that company would be deemed to discriminate against interstate commerce. That, of course, is absurd.

The very same argument LSP makes was rejected in *Colon Health Centers*, where two out-of-state companies challenged a Virginia law prohibiting them from building new medical facilities without obtaining a certificate of need. 813 F.3d 145. They argued "the certificate requirement discriminate[d] in favor of incumbent health care providers at the expense of new, predominantly out-of-state firms." *Id.* at 154. The Fourth Circuit rejected that argument, holding that "incumbency is not the focus of the dormant Commerce Clause," and "incumbency bias" is not the same as discrimination against out-of-state interests. *Id.* To the contrary, "[o]ne can be . . . an incumbent recipient of some state contractual benefit without necessarily being an in-state resident." *Id.*

Just so here, where out-of-state companies benefit from § 216B.246's right of first refusal on the same terms as Minnesota companies. Indeed, as NSP demonstrated and LSP never disputes, the Wisconsin, South Dakota, Iowa, and North Dakota companies that own transmission facilities in Minnesota receive exactly the same benefits (and burdens) under § 216B.246 as their Minnesota counterparts. (Dkt. 39 at 26-27.) The statute "affect[s] in-state and out-of-state players equally," and hence must be affirmed. *Heffner v. Murphy*, 745 F.3d 56, 74 (3d Cir. 2014) (upholding statute benefitting corporations in existence when the statute was enacted).

LSP appears to argue that, because § 216B.246 impedes the ability of new companies to enter the market, it discriminates against interstate commerce. But that is a non sequitur. Reducing competition generally does not discriminate against out-of-state entities. It simply chooses regulated entities over competitive markets, and under *Tracy*, "regulated sellers [and] independent marketers . . . should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause." 519 U.S. at 310. As the Fourth Circuit likewise declared, "we will not take the potentially limitless step of striking down every state regulatory program that has some alleged adverse effect on market competition." *Colon Health Ctrs.*, 813 F.3d at 155.

LSP also cannot succeed by arguing that more out-of-state entities than in-state entities are precluded from entering the market, because the Supreme Court rejected that argument in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). There, the plaintiff argued that an Indiana statute targeting hostile corporate takeovers discriminated against interstate commerce because "most hostile tender offers are launched by offerors outside Indiana." *Id.* at 88. The Supreme Court remarked that "this argument avails [plaintiff] little." *Id.* "Because nothing in the Indiana Act imposes a *greater* burden on out-of-state offerors than it does on similarly situated Indiana offerors," the Court held, "we *reject* the contention that the Act discriminates against interstate commerce." *Id.* (emphasis added). In exactly the same way, nothing in § 216B.246 imposes any greater burden on out-of-state entities trying to enter the

transmission-line market than it does on similarly-situated Minnesota entities. There is no discrimination claim.

LSP argues that the Eighth Circuit's decision in *Ben Oehrleins*, 115 F.3d 1372, requires treating an out-of-state company with operations in Minnesota as if it were an in-state company for purposes of analyzing discrimination. (Opp'n 29-30.) But that is simply wrong. In fact, *Ben Oehlreins* supports dismissing LSP's claim. There, the district court had been convinced by the plaintiff's argument that a monopoly on waste that stayed in state "discriminate[d] against interstate commerce by prohibiting out-of-state entities full access to the local market in waste processing." *Id.* at 1386. But the Eighth Circuit disagreed, holding that because *all* potential competitors were precluded, a "Delaware corporation doing business in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state." *Id.* at 1386-87. In the same way here, LSP cannot argue that it is discriminated against by § 216B.246, which denies the right to compete to *all* businesses seeking to gain entrance to the transmission market, regardless of their state of incorporation. "It would be a different matter, of course, if the state were to treat a company incorporated or principally located in another state differently from Minnesota companies on that basis." *Id.* at 1387 n.13. But § 216B.246 does no such thing. It is neutral.

In contrast to these on-point cases, the Eleventh Circuit case relied on by LSP expressly did not consider whether the statute at issue was discriminatory. *Fla. Transp.*

Servs., Inc. v. Miami-Dade Cnty., 703 F.3d 1230, 1257 (11th Cir. 2012) (because the statute failed *Pike* balancing, the court did "not address" the discrimination challenge).[2] At the other end of the spectrum, the statute at issue in *Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005), was held to be discriminatory in effect because its certificate-of-need requirements were applied unevenly to exclude out-of-state competitors. No such uneven application of Minnesota's right-of-first-refusal statute has been alleged by LSP.[3]

Because LSP has failed to establish that § 216B.246 discriminates against interstate commerce, its *per se* challenge fails.

B. Section 216B.246 does not have the purpose of discriminating against interstate commerce.

Section 216B.246 also cannot be subjected to heightened scrutiny based on an allegedly improper purpose. NSP previously cited the legislative findings showing that § 216B.246 serves the public interest in safe, reliable electricity. (Dkt. 39 at 10-11.) In response, LSP cites two snippets of purported "legislative history" that it asserts show

[2] Notably, the district court held that "[a] local law which benefits a selected group of in-state and out-of-state companies to the detriment of all other competitors, by definition, does not 'discriminate' on the basis of local versus out-of-state origin." *Fla. Transp. Serv., Inc. v. Miami-Dade Cnty.*, 757 F. Supp. 3d 1260, 1275 (S.D. Fla. 2010), *aff'd on other grounds*, 703 F.3d 1230.

[3] To the extent *Walgreen* can be read more broadly to equate favoring incumbents with discrimination against interstate commerce, its reasoning is unsound. *See, e.g.*, *Fla. Transp. Servs.*, 757 F. Supp. 2d at 1275-76 (finding *Walgreen*'s reasoning unpersuasive); *Doran v. Mass. Turnpike Auth.*, 256 F. Supp. 2d 48, 53 (D. Mass. 2003), *aff'd* 348 F.3d 315.

a "discriminatory purpose." (Opp'n 33; *see also id.* at 25-26.[4]) Neither citation is valid evidence of legislative intent.

First, LSP relies on the "Overview" statement contained in the H.F. 1989 House Research Summary. (*Id.* at 25 (citing Nauen Aff. ¶ 4, Ex. 3).) A House Research Summary, however, "is not part of the legislative history of [a] bill" and is therefore "accord[ed] no weight" in assessing legislative history. *State v. Smith*, 899 N.W.2d 120, 131 (Minn. 2017). Second, LSP relies on certain testimony supporting the bill. (Opp'n 25-26 (citing Peick Aff., Ex. A at 4, 13).) A non-legislator's testimony, however, sheds no light on a statute's purpose. *See Smith*, 899 N.W.2d at 131 ("statements by a non-legislator" are "usually given no weight" (citing, *inter alia*, *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986))).

Finally, both citations fail to show a discriminatory purpose because their shorthand references to "Minnesota utilities" do not suggest any intent to distinguish between in-state and out-of-state entities. In context, those references refer simply to utilities that operate in Minnesota, including both in-state and out-of-state entities.

Because LSP has not alleged any facts supporting its claim that § 216B.246 has a discriminatory purpose, its claim should be dismissed.

[4] Neither the Complaint nor the Opposition brief contain any factual allegations regarding the statute's discriminatory *effect*, instead focusing solely on its purpose.

III. Section 216B.246's Incidental Burden on Interstate Commerce is Not "Clearly Excessive" to the Statute's Local Benefits.

LSP presents the *Pike* balancing test as requiring a "fact-intensive" inquiry. (Opp'n 35.) But as noted in the Introduction, courts often dismiss *Pike* claims on the pleadings, and doing so is appropriate here.

The Supreme Court has "rarely invoked *Pike* balancing to invalidate state regulation under the Commerce Clause," and parties bringing such challenges carry a "substantial burden" in the context of utility regulations. *S. Union*, 289 F.3d at 509. As observed in *Tracy*, only a "small number" of cases have invalidated genuinely non-discriminatory statutes under *Pike* balancing, and they have done so only when "such laws undermined a compelling need for national uniformity in regulation." 519 U.S. at 298 n. 12.

There is no such interest in national uniformity here. As discussed above, FERC specifically endorsed a state-by-state approach in Order 1000 and explained that by doing so, it had "struck an important balance" between promoting competition and allowing continued "regulation of matters reserved to the states." 150 FERC at 61166, ¶ 27, 2015 WL 285969, at *8.

Here, where Congress and FERC have both endorsed the state's role, a regulation will easily pass "the more permissive *Pike* test" as long as it was enacted in a "legitimate state pursuit." *Allco*, 861 F.3d at 107. LSP's argument that the state must introduce evidence to establish the legitimacy of its interest in regulating is simply

incorrect. As the Eighth Circuit held, "the long history of utility rate regulation in this country establishes that [a state] has a legitimate interest in protecting local ratepayers by regulating the corporate structure of utility companies." *S. Union*, 289 F.3d at 509. "Without question," states have "long regulated the siting, construction, and operation" of electric facilities within their borders. *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62 (D.C. Cir. 2014) ("[T]he States' traditional role in regulating siting and construction requires little discussion."). As NSP demonstrated, the right of first refusal created by § 216B.246 is part of a broader utility-regulation scheme that serves compelling health and safety goals. (Dkt. 39 at 8-10.) The statute thus falls directly within the type of law that courts have upheld as legitimate. *See S. Union*, 289 F.3d at 509 (upholding statute that was "part of a complex regime for the regulation of public utilities"); *Balt. Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985) (upholding statute that was "one subsection of an elaborate public service corporation law").

LSP does not dispute these principles. Instead, it attempts to avoid them by creating a more "fact intensive" test. But the case LSP relies on merely establishes that where a "statute provides little or nothing in the way of demonstrable legitimate local benefit, any significant burden on interstate commerce is too much." *R&M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 737 (8th Cir. 2002). There, a regulation required certain business operations to be performed in Missouri without any rationale for discriminating against the same operations just across the border. *Id.* Similarly, in *U&I*

Sanitation, a city ordinance regulating the flow of locally-produced garbage offered only "attenuated local benefits" and would, if universally enacted, "substantially diminish[] or impair[], if not cripple[]" the interstate market for recyclable materials. 205 F.3d at 1072. Neither case involved public-utility regulations, and hence neither speaks to the health and safety concerns underlying Minnesota's statute.

Neither these cases, nor any of the other cases cited by LSP, address Minnesota's strong, historical, and judicially-recognized interest in regulating utilities located within its territory. *See Martin Marietta Materials, Inc. v. City of Greenwood, Mo.*, 2008 WL 4832638, at *5 (W.D. Mo. Sept. 4, 2008) (local ordinance barring truck traffic, but not local traffic); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (state ban of all sale of petroleum-sweeping compounds based on environmental considerations); *Blue Circle Cement v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1512 (10th Cir. 1994) (application of zoning ordinance to waste disposal); *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 281-82 (8th Cir. 1993) (state regulations on consumer credit lenders); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545-46 (4th Cir. 2013) (nursing home regulation). In these cases, the courts required additional evidence of the local benefits. But none of them involved "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec.*, 461 U.S. at 377; *see also S. Union*, 289 F.3d at 508-09.

In short, § 216B.246 easily passes the *Pike* balancing test, just as Connecticut's policy regarding renewable energy credits passed that test on a similar motion to dismiss. *See Allco*, 861 F.3d at 107-08.

CONCLUSION

Minnesota Statute § 216B.246's even-handed regulation of the construction of electric transmission lines does not discriminate against interstate commerce, and any indirect effect it has is easily justified by the State's legitimate, strong, long-held interest in regulating electric utilities to serve public health and safety. In addition, Minnesota did only what Congress and FERC expressly allowed it to do. LSP's claims should be dismissed.

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