

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

**LSP TRANSMISSION HOLDINGS,
LLC,**

Civil No. 0:17-cv-04490-DWF-HB

Plaintiff,

v.

**PLAINTIFF’S RESPONSE TO DOJ’S
STATEMENT OF INTEREST**

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,

Defendants,

and

Northern States Power Company d/b/a
Xcel Energy,

and

ITC Midwest, LLC,

Intervenor-Defendants.

Plaintiff LSP Transmission submits this response in support of the Statement of Interest submitted by the Antitrust Division of the United States Department of Justice on April 13, 2018, pursuant to 28 U.S.C. § 517 [Dkt. 70].

The decision by the Antitrust Division of the Department of Justice to file a Statement of Interest in this case underscores the negative impact that Minnesota's right of first refusal statute has on interstate commerce, competition, and consumers. In particular, the Statement of Interest highlights and supports three key points made in LSP Transmission's Memorandum of Law in Opposition to Defendants' Motions to Dismiss [Dkt. 60].

First, Minnesota's Right of First Refusal statute is, and always has been, *per se* invalid because it favors entities with a physical presence in Minnesota to the exclusion of any out-of-state entities. LSP Transmission maintains that this discrimination is plain on the face of the statute, and, as the Statement of Interest argues, the statute undoubtedly discriminates in its purpose, protecting incumbents with an in-state physical presence, and its effect, creating a barrier to entry that effectively prevents any out-of-state entity from competing to build transmission lines approved through a federally mandated regional planning process.

Second, the Statement of Interest persuasively distinguishes *General Motors v. Tracy* and emphasizes why this Court is not bound by the Supreme Court's narrow opinion in that case. The Statement of Interest's analogy to the "relevant market" inquiry in the antitrust context underscores why LSP Transmission and the Intervenors are "similarly situated" for purposes of the dormant Commerce Clause analysis.

Finally, the Statement of Interest identifies the substantial burden that the Right of First Refusal statute places on interstate commerce and highlights the negative effects on consumers that occur when competition is eliminated. It further explains why the alleged

benefits of the statute are illusory and how the supposed harms that would result from eliminating the statute are either unsupported or are capable of being addressed through less discriminatory means.

The Statement of Interest affirms LSP Transmission's position that the Minnesota right of first refusal statute violates the dormant Commerce Clause and harms consumers by discriminating against interstate commerce and creating a barrier to entry. Therefore, the Court should hold that Minn. Stat. § 216B.246 is unconstitutional and deny the Defendants' and Intervenors' Motions to Dismiss.

Dated: April 30, 2018

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

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