

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

LSP Transmission Holdings, LLC,

Case No. 17-cv-04490 DWF/HB

Plaintiff,

vs.

**STATE DEFENDANTS’  
MEMORANDUM IN  
RESPONSE TO THE 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.

This memorandum is submitted on behalf of the State Defendants, in their official capacities as Commissioners of the Minnesota Public Utilities Commission (PUC) and the Department of Commerce, and in response to the Statement of Interest filed by the U.S. Department of Justice (DOJ) Antitrust Division.<sup>1</sup>

Minnesota law grants incumbent electric transmission owners a right of first refusal (ROFR) to build and own transmission lines that connect to their existing

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<sup>1</sup> DOJ’s brief repeats many of the same arguments raised by Plaintiff. In response, the State Defendants refer the Court to their previous submissions and statements at the hearing.

facilities. Minn. Stat. § 216B.246. In both their initial and reply briefs, the State Defendants showed that this statute is constitutional under *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

DOJ argues that the ROFR law falls outside *Tracy* and unconstitutionally discriminates against interstate commerce because, unlike the law at issue in *Tracy*, there is no economic theory under which the ROFR law has merit. Docket No. 70 at 18. DOJ does not dispute that an “incumbent has distinct advantages for the construction of a transmission line, such as unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to funds needed to maintain reliability.” *Id.* at 23. However, DOJ argues that these advantages cannot justify granting incumbents a right of first refusal. DOJ insists that Minnesota’s regulated-market approach to the provision of electric service must be rejected in favor of a competitive-market approach as a matter of constitutional law. *Id.* (“That is, if such advantages exist, they should allow the incumbent to win in a competitive process.”).

DOJ’s theory of this case rests on an incomplete understanding of the history of electricity transmission regulation generally, and of how the Minnesota law operates specifically. Historically, incumbent utilities have built electric transmission projects that connect to their facilities. Compl. ¶¶ 9, 17; Docket No. 21 at 3. Minnesota’s ROFR law recognized the advantages for incumbents in the electric transmission market and preserved this status quo. *See* Compl. ¶ 53 (citing legislative committee testimony that the bill was intended to “preserve the status quo”); Docket No. 21 at 4–5. The ROFR law

also preserved the incumbents' obligation to request a certificate of need from the PUC and, if they satisfy the applicable criteria, to receive a certificate before they begin construction, as explained in the State Defendants' reply memorandum. Docket No. 64 at 6–9. The ROFR law provides the incumbent the right to propose a transmission project before other entities can, but it does not guarantee approval of the project. The incumbent must still persuade the PUC, in the certificate of need proceedings, that its proposal is justified and there is not a “more reasonable and prudent alternative.” Minn. R. 7849.0120, subp. B.

The dormant Commerce Clause does not require incumbents to prove the advantages of their electricity transmission projects through a competitive process in addition to a robust certification process. “[I]ncumbency is not the focus of the dormant Commerce Clause,” and “incumbency bias” does not show unconstitutional discrimination. *Colon Health Centers of America, LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016). This is particularly true for laws that favor incumbents in electricity transmission. Because incumbents have historically built their own transmission projects, enactment of a ROFR reflects a preference for historically-proven practices and is not evidence of discrimination.

Moreover, a fundamental premise of the *Tracy* decision is that, historically, states have determined the best way to ensure the universal provision of adequate, safe, and reliable energy service is through heavily-regulated monopolies. *Tracy*, 519 U.S. at 289 n. 7, 290–97, and 303. Because this monopoly approach to the regulation of energy service is unquestionably legitimate, and because the provision of energy is such an

important governmental goal, the Court recognized an “obligation to proceed cautiously” before invalidating state energy laws and thereby disrupting the status quo in energy regulation. *Id.* at 304. Thus, even though *Tracy* involved a regulatory differential that clearly favored local utilities over out-of-state competitors, the Court held that “eliminating the . . . regulatory differential would not serve the dormant Commerce Clause’s fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.” *Id.* at 299. Under the logic and holding of *Tracy*, Minnesota’s decision to preserve the status quo by enacting the ROFR law is not unconstitutional discrimination, as explained in more detail in the State Defendants’ earlier submissions.

For all of the reasons stated here and in the State Defendants’ earlier submissions, this lawsuit should be dismissed.

Dated: April 30, 2018

Respectfully submitted,

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State of Minnesota

s/ Jason Marisam

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