IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC, Plaintiffs, v. KEN PAXTON, Attorney General of the State of Texas, DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity, Defendants.	Civil No. 1:19-cv-00626 (LY) Hon. Judge Lee Yeakel **LSP TRANSMISSION HOLDINGS II, LLC'S MOTION TO INTERVENE**

LSP Transmission Holdings II, LLC ("LSP") hereby moves to intervene in this action as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, by permission under Rule 24(b)(1). Pursuant to Local Rule CV-7(i), LSP certifies that it has conferred in good faith with the parties to the case. Pursuant to Local Rule CV-7(i), LSP certifies that it has conferred in good faith with the parties to the case. Plaintiffs consent to this motion; Defendants are still evaluating their position.

This case concerns a constitutional challenge brought by NextEra Energy Capital Holdings, Inc., NextEra Energy Transmission, LLC, NextEra Energy Transmission Midwest, LLC, Lone Star Transmission, LLC, and NextEra Energy Transmission Southwest, LLC (collectively,

"NextEra") to invalidate the Texas legislature's recent amendments to the state Utilities Code that restrict the building, ownership, and operation of new electric transmission lines to incumbent utilities who already have transmission lines in place. *See* Tex. Utilities Code §§ 37.051, 37.056, 37.057, 37.151, 37.154. The new law expressly protects in-state transmission and distribution utilities from competition by out-of-state utilities, which is facially discriminatory against out-of-state interests and thus unconstitutional under the Commerce Clause of the United States Constitution.

LSP has a direct and substantial interest in establishing that the amended provisions are unconstitutional. LSP subsidiaries and entities are transmission utilities that have a long history of developing new electric transmission solutions. They are qualified under FERC Order No. 1000—the FERC order that establishes a process for transmission developers to compete for and be awarded transmission projects—including for FERC Order No. 1000 projects in Texas. They have competed and intend to compete in the future for business in Texas. The amendments to the Utilities Code prohibit LSP's subsidiaries and affiliates from competing solely on the ground that they do not already operate in certain areas of Texas. That plainly discriminates against out-of-state utilities. LSP thus timely files this motion to intervene to protect its interests, which are not adequately protected by the existing parties. If intervention is granted, LSP also intends to join NextEra's motion for a preliminary injunction to enjoin the enforcement of the unconstitutional provisions.

ARGUMENT

LSP satisfies the standard for intervention as of right or, in the alternative, permissive intervention. LSP's subsidiaries and affiliates are qualified under FERC Order No. 1000 to compete for transmission projects in Texas, have competed for transmission projects in Texas, and have a demonstrated desire to compete for transmission projects in Texas in the future. LSP thus

has a direct and substantial interest the validity of the amendments to the Utilities Code that prohibit it from doing so. LSP is filing this motion to intervene while the case is in its very beginning stages, before any responsive pleadings, briefing, orders, or hearings. And LSP's interests cannot be adequately represented by the existing parties.

A. LSP Satisfies the Requirements for Intervention as of Right.

The Court must grant a motion to intervene when a party satisfies four elements: (1) the motion to intervene is "timely," (2) the movant "claims an interest relating to the property or transaction that is the subject of the action," (3) the disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest," and (4) the existing parties do not "adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994). The Court evaluates these elements "by a practical rather than technical yardstick." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (citations and quotations omitted). LSP readily satisfies each element.

First, LSP has timely filed its motion. This Court reviews the timeliness of an intervention motion in view of four factors: (1) the length of time the applicant knew or should have known of his interest in the case, (2) prejudice to existing parties caused by the applicant's delay, (3) prejudice to the applicants if their motion is denied, and (4) any unusual circumstances. *See United States v. Covington County Sch. Dist.*, 499 F.3d 464, 466 (5th Cir. 2007). The Fifth Circuit has clarified that "the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties should be used to determine whether it acted promptly," as opposed to its knowledge of its interest in the case generally. *X-Drill Holdings Inc. v. Jack-Up Drilling Rig SE 83*, 320 F.R.D. 444, 448 (S.D. Tex. 2017) (internal quotation marks omitted).

LSP has filed its motion without delay. NextEra filed its complaint and motion for a preliminary injunction on June 17, 2019. There have been no further pleadings, no discovery, no briefing, and no hearings. As this case is in its very beginning stages, there would be no prejudice to any of the parties, and no other unusual circumstances are present that render this motion untimely. LSP seeks to intervene at this early stage so that it may fully participate in the litigation, including joining NextEra's motion for a preliminary injunction.

Second, LSP clearly has a "direct, substantial, [and] legally protectable" interest in the outcome of the action. *Sierra Club*, 18 F.3d at 1207. The Fifth Circuit has made clear that "prospective interference" with a party's business interests "can justify intervention." *Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex.*, 19 F.3d 992, 994 (5th Cir. 1994). This is especially so when the litigation involves a statute that implicates a party's constitutional rights. *See Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014).

The challenged law impermissibly discriminates against LSP and directly affects its current and prospective business interests. LSP subsidiaries and affiliates are among a limited set of transmission developers that are qualified under FERC Order No. 1000. They are qualified to compete in all three of the competitive Order No. 1000 regions in Texas: Midcontinent Independent System Operator ("MISO"), which spans much of the Midwestern United States, parts of Canada, and parts of eastern Texas; Southwest Power Pool ("SPP"), which runs from Canada into parts of eastern Texas and the Texas Panhandle; and WestConnect in the Western Electricity Coordinating Council ("WECC"), which covers part of West Texas. LSP subsidiaries and affiliates have competed for transmission projects or intend to compete for transmission projects in each of these three Order No. 1000 regions. LSP subsidiaries and affiliates Verdant Plains Electric, LLC, Republic Transmission, LLC, Cardinal Point Electric, LLC, and LS Power

Midcontinent, LLC, are qualified MISO development companies and therefore are eligible to bid on and be assigned FERC Order No. 1000 projects in the MISO portions of Texas.[1] LSP's subsidiary Western Energy Connection, LLC, is qualified in WestConnect and therefore is eligible to bid on and be assigned FERC Order No. 1000 projects in the WestConnect or WECC portions of Texas. LSP subsidiary Southwest Transmission, LLC ("Southwest") is a qualified SPP development company and therefore is eligible to bid on and be assigned FERC Order No. 1000 projects in the SPP portions of Texas.[2]

In February 2017, Southwestern Public Service Company ("SPS") and SPP sought a declaratory judgment from the Public Utility Commission of Texas ("PUCT") regarding whether SPS had the exclusive right to build transmission lines within its service area in SPP so that no competitive solicitation process should take place from projects in its area (specifically, the SPP-recommended 90-mile transmission line from a substation in Potter County, Texas (the "Potter Project")). *Decl. Order, Joint Pet. of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Decl. Order*, PUC Docket No. 46901, 341 P.U.R.4th 195, at *1 (Oct. 26, 2017). LSP subsidiary Southwest Transmission, LLC ("Southwest") intervened in that case. *See Southwest Transmission, LLC's Motion to Intervene*, PUC Docket No. 46901, at *1-2 (Mar. 10, 2017). The PUCT found that SPS did not have an exclusive right to build projects in its SPP service area, and the state district court affirmed. The district court's affirmance is currently on appeal before the Third Court of Appeals

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[1] *See* https://cdn.misoenergy.org/2019%20MISO%20Qualified%20Transmission%20Developers%20List82330.pdf (last visited June 30, 2019).

[2] *See* https://www.spp.org/documents/59159/approved%20qrp%20for%202019.pdf (last visited June 30, 2019).

in Austin. *See Entergy Tex., Inc. et al. v. Pub. Util. Comm'n of Tex.*, No. 03-18-00666-CV (Tex. App.—Austin).

In February 6, 2018, MISO issued a request for proposals for the construction of a 500 kV competitive transmission project in the Entergy service territory in East Texas, known as the Hartburg-Sabine Junction Transmission Project (the "Hartburg-Sabine Project"). The Hartburg-Sabine Project was opened for competitive solicitation, and Verdant Plains Electric, LLC, an LSP subsidiary, submitted a proposal for the project and competed strongly. LSP has shown that it is a willing, capable, and competitive player in the transmission development field and that it consistently delivers significant benefits to ratepayers when given the opportunity to participate.

Additionally, in 2005, the Texas Legislature required the PUCT to designate certain areas as Competitive Renewable Energy Zones ("CREZ"). *See* Utilities Code §39.904(g). The goal of the CREZ program was primarily to move electricity generated by renewable sources from West Texas and the Texas Panhandle to more populated areas downstate, including Dallas/Fort Worth, Austin, and San Antonio. LSP affiliate Cross Texas Transmission, LLC ("CTT") has been actively involved in the CREZ program, being selected by ERCOT to construct, own, and operate multiple transmission lines and stations with the ERCOT area. Most recently, in April 2018, CTT completed construction and placed into service a 68-mile double circuit 345 kilovolt transmission line between the Limestone Substation in Limestone County and the Gibbons Creek Substation in Grimes County.

The amended provisions of the Utilities Code impair LSP's and its subsidiaries' and affiliates' efforts to develop business in Texas in violation of the Constitution. Those effects are more than sufficiently "direct" and "substantial" to warrant intervention. *Sierra Club*, 18 F.3d at 1207.

Third, intervention is appropriate here so that LSP can protect its substantial interests. This Court's holding on the dormant Commerce Clause challenge will likely carry a "*stare decisis* effect" on any challenge that LSP might bring to the same provisions, a prospect the Fifth Circuit has held "constitutes a sufficient impairment to compel intervention." *X-Drill Holdings Inc.*, 320 F.R.D. at 449; *see also Heaton*, 297 F.3d at 424; *Brumfield*, 749 F.3d at 344. Because this proceeding will for all practical purposes determine whether LSP can or cannot compete to build, own, or operate transmission lines in Texas, the Court should allow LSP to intervene.

Finally, LSP's interests will not be adequately represented by the existing parties. The burden to show that the existing parties cannot adequately represent LSP's interests is "minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). The Fifth Circuit has made clear that the requirement is "satisfied" where the intervenor "shows that representation of his interests '*may be*' inadequate." *Edwards*, 78 F.3d at 1005 (internal quotations omitted; emphasis added). Indeed representation may be inadequate even if the intervenor and existing party "agree[] on the merits of the substantive issues to be litigated." *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 425 (5th Cir. 2002).

While NextEra and LSP agree on the constitutional infirmities of the amended provisions, they are not identically situated because NextEra was actually awarded a transmission project that the new law thwarted. *See* Dkt.7 at 3-4. NextEra and LSP thus each may have distinct arguments available based on their relative as-applied situations at this juncture. Accordingly, intervention is necessary to ensure that LSP's interests are adequately protected.

B. LSP Satisfies the Standard for Permissive Intervention.

At a minimum, the Court should allow permissive intervention. Rule 24(b)(1) provides that the court may allow "anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B); *see also Newby v. Enron*

Corp., 443 F.3d 416, 421 (5th Cir. 2006) ("The decision to permit intervention … requires a threshold determination that the [intervenor's] claim or defense and the main action have a question of law or fact in common." (internal quotation marks omitted)). The Fifth Circuit has construed the "claim or defense" requirement broadly. *See Newby*, 443 F.3d at 424. In assessing a motion, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As set forth above, this motion is timely, as this case is in only its very beginning stages, *see supra* at 3-4, and LSP has a direct and substantial interest in the provisions under review, *see supra* at 4-6. The ground for which LSP argues the amended provisions are unconstitutional—that they violate the Commerce Clause—is substantially the same as one of the grounds set forth in NextEra's complaint. Because LSP's interest involves the same state legislative act and the same constitutional question, common questions of law and fact exist. The Court should permit intervention.

CONCLUSION

For the foregoing reasons, LSP respectfully requests that it be permitted to intervene through the filing of Exhibit 1, LSP's Complaint in Intervention.

Dated: July 11, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July 2019, I filed the foregoing with the Clerk of the Court by overnight delivery via Federal Express.

The undersigned further certifies that on said date the foregoing was served via U.S. Mail, postage prepaid, with courtesy copies via email, to the following:

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
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NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC ,	)	Civil No. 1:19-cv-00626 (LY)
	)	Hon. Judge Lee Yeakel
Plaintiffs,	)	
v.	)	
KEN PAXTON, Attorney General of the State of Texas, DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity,	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
Defendants.	)	

INTRODUCTION

1. Intervenor-Plaintiff LSP Transmission Holdings II, LLC ("LSP" or "Intervenor-Plaintiff") brings this Complaint for Declaratory and Injunctive Relief against Ken Paxton, Attorney General of the State of Texas; DeAnn T. Walker, Chairman, Public Utility Commission of Texas ("PUCT"); Arthur C. D'Andrea, Commissioner, PUCT; and Shelly Botkin, Commissioner, PUCT; each in his or her official capacity, (collectively, "Defendants"), challenging the constitutionality of the amendments to §§37.051, 37.056, 37.057, 37.151, and 37.154 of the Texas Utilities Code (the "Utilities Code"), which grants incumbent Texas electric

transmission owners the exclusive right to construct or acquire electric transmission facilities in the state of Texas, to the exclusion of out-of-state competitors like LSP.

2. Pursuant to 42 U.S.C. §1983, Intervenor-Plaintiff seeks declaratory relief to invalidate the amendments to Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 because these sections, as amended, violate the Commerce Clause of the United States Constitution, and injunctive relief to prevent the unconstitutional enforcement of these laws by Defendants.

PARTIES

3. Intervenor-Plaintiff LSP Transmission Holdings II, LLC is a Delaware limited liability company with its principal place of business located at 16150 Main Circle Drive, Suite 310, Chesterfield, MO 63017. LSP and its related entities develop and own electric transmission projects throughout the United States.

4. Defendant Ken Paxton is the Attorney General of the State of Texas, and charged with enforcing the laws of the State of Texas.

5. Defendant Commissioners of the PUCT, DeAnn T. Walker, Arthur C. D'Andrea, and Shelly Botkin, are charged with the regulation of electric utilities doing business in the State of Texas. Among other duties, the PUCT is responsible for granting certificates for new transmission facilities throughout the State of Texas. The amendments to §§37.051, 37.056, 37.057, 37.151, and 37.154 of the Utilities Code restrict the PUCT's authority to award certificates to in-state Texas companies. The Commissioners are therefore engaged in implementing and enforcing these unconstitutional laws.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the claims asserted in this action pursuant to 28 U.S.C. §1331. Intervenor-Plaintiff asserts claims under 42 U.S.C. §1983 and the Constitution of the United States.

7. This Court has personal jurisdiction over Defendants because all Defendants are residents of Texas and regularly conduct business in Texas.

8. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b) because Defendants reside in this district and a substantial part of the events giving rise to this claim have occurred in this district.

STATEMENT OF FACTS

A. Congress's and FERC's Efforts To Mitigate Monopoly Power In Interstate Electric Energy Transmission.

9. Recognizing that interstate electric energy transmission and wholesale rates are a matter of federal public interest, Congress enacted the Federal Power Act in 1935, which granted the Federal Power Commission, later renamed the Federal Energy Regulatory Commission ("FERC"), the exclusive authority to regulate transmission and wholesale sales of electricity in interstate commerce.

10. Finding that "the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors," *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50 (D.C. Cir. 2014), FERC enacted a series of reforms to promote development of competitive markets. In 1996, FERC promulgated Order No. 888, requiring each jurisdictional electric public transmission provider to unbundle its wholesale

generation and transmission services. Through this Order, FERC sought to open the electric grid to all sources of electric power.

11. In 1999, FERC issued Order No. 2000, which encouraged the owners of electric transmission operating in interstate commerce to cede operation of their transmission systems to grid operators, independent system operators ("ISOs") or regional transmission organizations ("RTOs"), to coordinate transmission planning, operation, and use on a regional and interregional basis.

12. Most ISOs and RTOs, with the exception of one part of Texas, are federally-regulated and FERC-approved non-governmental corporations that manage portions of the transmission grid and regional markets for wholesale power for much of the country. These grid operators also plan the expansion of transmission grids within their regional footprints. A key role of an ISO or RTO is to plan for the development of new transmission facilities to ensure the reliability of the system and provide transmission access to wholesale power at reasonable costs.

13. Four grid operators serve Texas: Midcontinent Independent System Operator ("MISO"), which spans much of the Midwestern United States, parts of Canada, and parts of eastern Texas; Electric Reliability Council of Texas ("ERCOT"), which covers much of Texas and is wholly within Texas; Southwest Power Pool ("SPP"), which runs from Canada into parts of eastern Texas and the Texas Panhandle, and the Western Electricity Coordinating Council ("WECC"), which covers a sliver of West Texas.[1]

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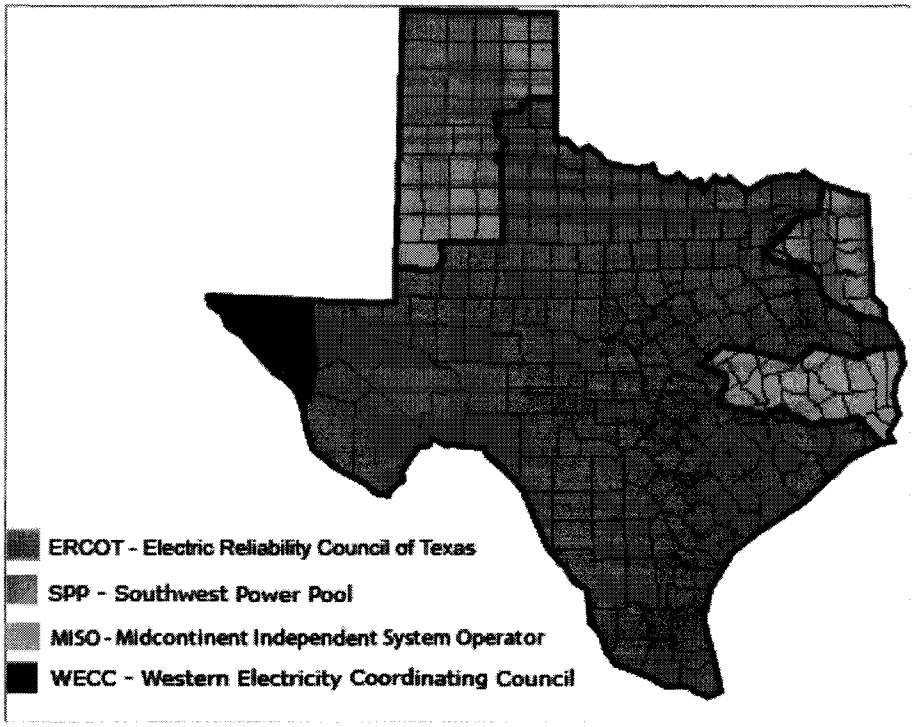
[1] *See* Public Utility Commission of Texas, Scope of Competition in Electric Markets in Texas, Report to the 86th Legislature, at 9, *available at* https://www.puc.texas.gov/industry/electric/reports/scope/2019/2019scope_elec.pdf.



14. FERC has regulatory authority over transmission in the portions of Texas covered by MISO, SPP, and WECC. Unlike MISO, SPP, and WECC, which manage interstate grids, ERCOT operates wholly within Texas, and as such, is not subject to FERC's jurisdiction and instead is subject to the jurisdiction of the PUCT.

15. Until recently, both the federally-regulated MISO and SPP Transmission Owner Agreements and Tariffs, like the agreements or tariffs of many other federally-regulated grid operators, included provisions—referred to as rights of first refusal—through which incumbent utilities gave themselves a first right to construct any new transmission facilities in their service areas, even if a third party proposed a particular project.

16. Similarly, the ERCOT Nodal Protocols contain a right of first refusal based upon ownership of transmission "end points."[2] Thus, the vast majority of lines in ERCOT are owned and operated by utilities that also own the transmission lines in their monopoly retail service area.

B. FERC Order No. 1000 Reinforces Policies Favoring Competition.

17. In July 2011, FERC issued Order No. 1000, which, among other things, required that any provision granting a right of first refusal for certain new transmission facilities be removed from any FERC-approved tariffs and agreements. Based on their inclusion in agreements or tariffs subject to federal jurisdiction, Order No. 1000 referred to the provisions as "federal" rights of first refusal. Since then, federal courts have rebuffed numerous challenges to Order No. 1000, not only upholding FERC's authority to eliminate rights of first refusal, but also recognizing that rights of first refusal impede competition and harm the public interest.

18. FERC Order No. 1000: (a) seeks to foster competition in the construction of transmission facilities; (b) sets certain standards for regional cost allocation; (c) removes federal rights of first refusal from FERC-approved tariffs; (d) requires identification of the most cost effective projects; (e) requires—with exceptions—competition to select the developer for transmission projects selected for regional cost allocation; (f) requires Order No. 1000 regions to establish financial and technical qualification criteria for developers to be eligible to be assigned competitive transmission projects; and (g) charges Order No. 1000 regions (generally ISOs and RTOs) with implementation. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶31,323 (2011) (hereinafter "Order No. 1000"), *order on reh'g and clar.*, Order No. 1000-A, 139 FERC ¶61,132 (2012)

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[2] ERCOT Nodal Protocols §3.11.4.8.

(hereinafter "Order No. 1000-A"), *order on reh'g and clar.*, Order No. 1000-B, 141 FERC ¶61,044 (2012).

19. FERC found that these reforms were needed to ensure that Commission-jurisdictional services continued to be offered at "rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential." Order No. 1000 ¶30.

20. FERC concluded in Order No. 1000 that:

> [L]eaving federal rights of first refusal in place for these facilities would allow practices that have the potential to undermine the identification and evaluation of a more efficient or cost-effective solution to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination by public utility transmission providers.

Id. ¶7.

21. FERC further found that "federal rights of first refusal in favor of incumbent transmission providers deprive customers of the benefits of competition in transmission development, and associated potential savings." *Id.* ¶285.

22. Order No. 1000 catalogued the numerous comments that supported the removal of federal rights of first refusal. For example:

a. The Federal Trade Commission stated that the existence of a federal right of first refusal reduces capital investment opportunities for potential non-incumbent developers by increasing their risk, encourages free ridership among incumbent developers, and creates a barrier to entry. *Id.* ¶231.

b. Numerous state utility commission and consumer advocate groups agreed that the right of first refusal provisions impede transmission development and removing the provisions would provide a more level playing field for incumbent and non-incumbent transmission developers. *Id.* ¶231.

23. Conversely, numerous incumbent transmission owners, including the MISO and SPP transmission owners, opposed Order No. 1000 and its efforts to benefit ratepayers through

transmission planning reform and competition. *Id.* ¶¶239-40. Many of these incumbent transmission owners asserted that Order No. 1000 would conflict with state law requirements, including obligations to serve retail customers, which the incumbent transmission owners claimed dictated what transmission facilities should be built and where they should be built. *Id.* at ¶¶248, 276-77. Accordingly, FERC clarified that its focus was on the detrimental impact of rights of first refusal on rates subject to federal jurisdiction and that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id.* at ¶287.

24. In *South Carolina Public Service Authority v. FERC*, the D.C. Circuit affirmed FERC's authority to order removal of federal rights of first refusal from tariff agreements under Section 206 of the Federal Power Act, and found:

> [B]asic economic principles make clear that the rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts.

762 F.3d 41, 74 (D.C. Cir. 2014).

25. Because FERC rejected rehearing requests based on transmission owner assertions of a protected contractual right to build all new transmission in an existing footprint, deferring ruling on such assertions to the regional compliance filings, *see* Order No. 1000-A ¶¶388-89, the Order No. 1000 compliance filings of numerous transmission owners contained assertions of a contractually protected federal right to exclusively build new transmission in a particular region.

26. FERC rejected each of these assertions, leading to multiple follow-up appeals challenging FERC's rejection of the asserted protected contractual right.

a. In *Oklahoma Gas & Electric Co. v. FERC*, 827 F.3d 75 (D.C. Cir. 2016), the court upheld FERC's refusal to apply the *Mobile-Sierra* presumption to a right of first refusal provision in the SPP region, finding that "terms arrived at by horizontal competitors with a common interest to exclude any future competition" are not subject to such protection. *Id.* at 80.

b. In *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017), the court reached the same result, finding that FERC did not err in concluding that the right of first refusal must be removed from the ISO New England Transmission Operating Agreement because maintaining such rights would adversely affect transmission development and were not in the public interest. *Id.* at 671-72.

c. The Seventh Circuit upheld FERC's abrogation of the right of first refusal in the MISO Transmission Owners Agreement, finding that the transmission owners had "made no effort to show that the right is in the public interest," and therefore subject to protection. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir. 2016). The MISO transmission owners sought review of this decision before the United States Supreme Court, which denied certiorari. *See Ameren Servs. Co. v. FERC*, 137 S. Ct. 1223 (2017).

d. The Fifth Circuit also upheld competition under FERC Order No. 1000 in the WestConnect region. *See El Paso Elec. Co. v. FERC*, 832 F.3d 495, 507 (5th Cir. 2016).

27. Thus, numerous federal courts have not only upheld FERC's authority to order the removal of rights of first refusal in FERC-approved tariffs and agreements, but recognized in no uncertain terms that rights of first refusal impede competition and harm the public interest.

C. MISO and SPP Respond to Order No. 1000.

28. In compliance with Order No. 1000—and over the objections of their incumbent transmission owners—MISO and SPP filed revisions to their Transmission Owner Agreements and Open Access Tariffs to remove the federal right of first refusal provisions. MISO and SPP also created a competitive solicitation process to select developers for new transmission projects

and created rules governing system-wide cost allocation for new projects. These revisions in MISO, SPP, and WestConnect agreements and tariffs applied to the portions of MISO, SPP, and WECC grid that are located in the State of Texas.

29. Following Order No. 1000, MISO developed a competitive system to propose and build transmission facilities. MISO's competitive solicitation process, in compliance with Order No. 1000, allocates the cost of new projects among MISO ratepayers, including for some projects across the entire region. Thus, through these cost allocation mechanisms, costs of a regionally-planned MISO project that is located entirely within the State of Texas or any single MISO state could be allocated across all or a substantial part of the MISO region. The same is true today in the SPP and WestConnect regions of Texas.

30. MISO's competitive solicitation process also removed a federal right of first refusal from the tariff. At the same time, MISO added language to its tariff to recognize state-created rights. The MISO Tariff reads:

> **State or Local Rights of First Refusal**. The Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with such terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right of way held by an incumbent utility.

31. In ruling on MISO's Compliance Filings, after initially rejecting MISO's Tariff addition to recognize state laws, FERC ultimately decided to permit MISO to bind itself by state or local laws or regulations when deciding whether MISO would apply its competitive solicitation process for transmission facilities. *Midwest Indep. Transmission Sys. Operator and MISO*

Transmission Owners, Order on Rehearing and Compliance Filings, 150 FERC ¶61,037 ¶25 (Jan 22, 2015). FERC found that it would be inefficient for MISO to have to consider competitive proposals for projects, if, under state and local laws, the project would be automatically assigned to the existing utility. *Id.* ¶26.

32. However, the then-Chair of FERC, Norman Bay, filed a concurring opinion, in which he questioned the constitutionality of state rights of first refusal:

> I write separately to note that the Constitution limits the ability of states to erect barriers to interstate commerce. State laws that discriminate against interstate commerce—that protect or favor in-state enterprise at the expense of out-of-state competition—may run afoul of the dormant commerce clause. The Commission's order today does not determine the constitutionality of any particular state right-of-first refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.

Id. at 61,195.

33. MISO's revised tariff also implemented regional and system-wide cost sharing for critical projects.

34. At the outset, the MISO tariff categorizes projects based on need, dollar value, and size. For a number of categories of projects, MISO does not require regional cost allocation. These generally small projects are also not subject to competitive bidding and are instead automatically awarded to the incumbent because, in the view of the MISO members, the cost of holding the bids was not worth any efficiency gains from competition.

35. Relevant here, two types of projects are subject to system-wide cost sharing and competitive bidding: Multi-Value Projects and Market Efficiency Projects.

36. Multi-Value Projects support a range of system-wide public policies (*i.e.*, promoting renewable energy) and/or provide widespread reliability, public policy, and economic

benefits across the MISO footprint. The costs of Multi-Value Projects are allocated system wide. Thus, a Multi-Value Project built in Texas would be paid for by consumers across all MISO states.

37. Market Efficiency Projects seek to reduce market congestion. MISO's Tariff requires 80% of the costs of Market Efficiency Projects to be distributed to local resource zones commensurate with the expected benefit, and the remaining 20% to be allocated system wide. *See Midcontinent Independent System Operator, Inc.*, 162 FERC ¶61,063 (Jan. 29, 2018). Through these cost allocation mechanisms, even the costs of a wholly intrastate project may be allocated across all or a substantial part of the MISO region.

38. Like MISO, SPP revised its Tariff after Order No. 1000 and developed a system of competitive bidding and regional cost allocation. Also like MISO, SPP eliminated the federally sanctioned right of first refusal from its Tariff. At the same time, the SPP Tariff—like the MISO Tariff—recognized the effect of state laws that provided for rights of first refusal.

39. In FERC's order approving SPP's competitive process, Chairman Bay again filed a concurring opinion, questioning the constitutionality of the state rights of first refusal, stating:

> I again write separately to note that the Constitution limits the ability of states to erect barriers to interstate commerce. State laws that discriminate against interstate commerce — that protect or favor in-state enterprise at the expense of out-of-state competition — may run afoul of the dormant commerce clause. The Commission's order today does not determine the constitutionality of any particular state right-of-first-refusal law. That determination, if it is made, lies with a different forum, whether state or federal court.

Sw. Power Pool, Inc., 151 FERC ¶61,045, 61,390 (Apr. 16, 2015).

40. Several state laws have passed since the finalization of MISO and SPP tariffs that have erected barriers to competitive transmission. States that passed these laws include, but are

not limited to, Minnesota, North Dakota, and South Dakota. The mere existence of these state laws can prevent a competitive process from occurring in MISO and SPP.

41. On-going litigation in the Eighth Circuit challenges the Minnesota right-of-first-refusal law (which is written differently than the Texas law, but the impact is the same).[3] In its amicus brief, the United States explained that it does not approve of the Minnesota right-of-first-refusal law "because the Supreme Court has made clear that declining to preempt state law, without more, does not authorize states to violate the dormant Commerce Clause." *See id.*, Br. for the United States as Amicus Curiae in Support of Neither Party, Vacatur, and Remand, at 16 (Oct. 19, 2018).

42. The Department of Justice ("DOJ") likewise commented regarding the Eighth Circuit case that it is "the view of the United States that state ROFR laws are not protected by a general exception to the dormant Commerce Clause and do not have approval of the federal government." *See* Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advocacy Sec., Antitrust Div., U.S. Dep't of Justice to Travis Clardy, State Rep., Tex. House of Rep., at 4 n.16 (April 19, 2019) (internal citations omitted) (the "DOJ Letter"). Moreover, DOJ noted that a state restriction providing that "companies must own a facility in the state to benefit from the state law" amounts to a "restrictive in-state presence requirement" that is the "concern[]" of "the dormant Commerce Clause." *Id.* (internal quotation marks and citation omitted).

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[3] *See LSP Transmission Holdings, LLC v. Lange, et al. and N. States Power Co. d/b/a Xcel Energy, and ITC Midwest, LLC*, Case No. 18-2559 (8th Cir. 2018).

D. LSP Aggressively and Successfully Pursued Competitive Opportunities Opened Up by Order No. 1000.

43. In addition to opening transmission projects up to greater competition, Order No. 1000 mandated that entities undergo a regional qualification process to be assigned a regionally planned, Order No. 1000, project. Transmission developers that qualify under Order No. 1000 may compete for and be awarded Order No. 1000 transmission projects. The qualification process is extensive, requiring prospective transmission developers to clearly outline rigorous technical, managerial, and financial capabilities in order to qualify.[4]

44. Consistent with and following implementation of Order No. 1000, LSP subsidiaries and affiliates are qualified under Order No. 1000 as transmission developers in transmission planning regions administered by ISO New England, New York Independent System Operator, PJM Interconnection, LLC ("PJM"), SPP, Florida Reliability Coordinating Counsel, MISO, Northern Tier Transmission Group, WestConnect, and the California Independent System Operator ("CAISO").

45. LSP affiliates and subsidiaries Verdant Plains Electric, LLC, Republic Transmission, LLC, Cardinal Point Electric, LLC, and LS Power Midcontinent, LLC are qualified MISO development companies and therefore are eligible to bid on and be assigned FERC Order No. 1000 projects in the MISO portions of Texas.[5]

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[4] *See* https://spp.org/engineering/transmission-owner-selection-process/ and https://www.misoenergy.org/planning/competitive-transmission-administration/#nt=%2Fctadoctype%3APrequalification&t=10&p=0&s=Name&sd=asc.

[5] *See* https://cdn.misoenergy.org/2019%20MISO%20Qualified%20Transmission%20Developers%20List82330.pdf.

46. LSP's subsidiary Western Energy Connection, LLC is qualified in WestConnect and therefore are eligible to bid on and be assigned FERC Order No. 1000 projects in the WestConnect or WECC portions of Texas.[6]

47. LSP subsidiary Southwest Transmission, LLC ("Southwest") is a qualified SPP development company and therefore is eligible to bid on and be assigned FERC Order No. 1000 projects in the SPP portions of Texas.[7]

48. Nationally, in competitive solicitations held since Order No. 1000 became effective, several subsidiaries or affiliates of LSP have been selected as the more efficient or cost-effective transmission developer for needed transmission additions. This includes winning the first competitive solicitation in both PJM Interconnection and MISO, which together serve more than 100 million people across more than 25 states. LSP subsidiaries or affiliates have also been awarded competitive projects in New York (NYISO), CAISO, and the ERCOT portions of Texas.[8] Many of the selected LSP subsidiaries' or affiliates' successful proposals contained binding cost caps, innovative technology, or other cost reduction factors beneficial to ratepayers.

49. Commissioner LaFleur's Statement on the Assignment of the Artificial Island Project in PJM to one of LSP's affiliates in FERC Docket EL 15-40-000 also states:

> One of Order No. 1000's key goals was to harness the benefits of competition in transmission development for customers, and it is important that, as regions implement their Order No. 1000 procedures, we do not lose sight of that goal: facilitating the identification, development, and ultimately the construction of more efficient or cost-effective transmission projects that are better for customers. Order No. 1000's competitive

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6 *See* http://regplanning.westconnect.com/images/wc_planning_region_map_large.jpg.

7 *See* https://www.spp.org/documents/59159/approved%20qrp%20for%202019.pdf.

8 ERCOT is not subject to FERC Order No. 1000, and its processes are different than FERC Processes. The competitive process which resulted in an LSP affiliate being awarded a competitive project was conducted by the PUCT.

> solicitation processes – and in some cases, the mere prospect of competitive solicitation processes – have already led to a host of innovative rate structures and cost containment proposals that, if properly designed, could provide significant benefits for customers. I believe that these efforts should be encouraged, both by the Commission and in the regional transmission planning processes, to foster a dynamic environment for new transmission development.

50. In the MISO region, for example, LSP affiliate Republic Transmission was selected to develop the Duff-Coleman EHV 345 kV Transmission Project, which will run from southern Indiana to western Kentucky.[9] MISO selected Republic Transmission's proposal as providing the greatest overall value out of eleven comprehensive proposals.

51. Thus, LSP and its subsidiaries and affiliates have shown that they are willing, capable, and competitive players in the transmission development field and that they consistently deliver significant benefits to ratepayers when given the opportunity to compete, as compared to transmission projects where incumbent owners are assigned the project without competition.

E. The Regulation of Transmission in Texas.

52. Under Texas law, before a new transmission line can be built anywhere in the state (whether inside or outside of ERCOT), a prospective line-owner must receive a Certificate of Convenience and Necessity ("CCN") from the PUCT, which allows the line owners to build, own, and operate the line.

53. Historically, the PUCT has issued CCNs to new entrant transmission utilities, including to entities based out-of-state. When a new, out-of-state transmission company builds

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[9] *See* MISO, Duff-Coleman EHV 345 kV Selection Report (Dec. 20, 2016), *available at* https://www.misoenergy.org/Library/Repository/Study/Transmission%20Developer/20161220_FINAL_Section%20Report_SRPT_v1.pdf.

transmission in Texas, that company must submit to regulation by the PUCT for purposes of siting and reliability, and therefore become a Texas utility. Accordingly, out-of-state utilities are subject to the same rules as their in-state counterparts.

54. For example, in 2005, the Texas Legislature required the PUCT to designate certain areas as Competitive Renewable Energy Zones ("CREZ"). *See* Utils. Code §39.904(g). The goal of the CREZ program was primarily to move electricity generated by renewable sources from West Texas and the Texas Panhandle to more populated areas downstate, including Dallas/Fort Worth, Austin, and San Antonio. In selecting transmission service providers ("TSPs") for the CREZ program, the PUCT considered:

> several factors, including: the interested TSP's current and expected capabilities to finance, license, construct, operate, and maintain the [CREZ Transmission Plan's ("CTP")] facilities in the most beneficial and cost-effective manner; the expertise of the TSP's staff; the TSP's projected capital costs and operating and maintenance costs for each CTP facility, the proposed schedule for development and completion of each CTP facility, financial resources, expected use of historically underutilized businesses (unless the TSP is an electric cooperative or municipally owned utility), and understanding of the specific requirements to implement the CTP facilities; and if applicable, the TSP's previous transmission experience and historical operating and maintenance costs for existing transmission facilities.[10]

55. In 2008, Cross Texas Transmission, LLC ("CTT"), an LSP affiliate, was formed specifically to develop, construct, own, and operate transmission utility assets in ERCOT. CTT participated in the CREZ program. After CTT participated in various contested CREZ dockets, the PUCT awarded CTT the responsibility of constructing, owning, and operating over 230 miles of high voltage transmission lines and associated station equipment to be located in one of the

[10] https://interchange.puc.texas.gov/Documents/35665_1324_612713.PDF.

most important wind-generating areas of Texas. Today, CTT is a member of ERCOT, in operation, and regulated by the PUCT.

56. Nonetheless, Texas incumbents, including Texas' established transmission and distribution utilities,[11] have periodically attempted to argue that Texas law forbids the PUCT from granting CCNs within the state to transmission-only utilities. In doing so, these Texas utilities have sought to effectively drive other utilities from the business of building, owning, and operating transmission facilities, by preventing the PUCT from approving anything but a traditional transmission and distribution utility—that is, companies that both transmit high-voltage electricity and deliver low-voltage electricity to end users—from owning facilities.

57. In January 2007, Electric Transmission Texas, LLC ("ETT") sought approval from the PUCT under Utilities Code §§37.056 and 37.154 to become an electric utility "whose activities would be limited to acquiring, constructing, owning, and operating transmission facilities" in ERCOT. *Pub. Util. Comm'n of Tex. v. Cities of Harlingen*, 311 S.W.3d 610, 614 (Tex. App.—Austin, no pet. 2010). The PUCT approved the ETT application. Nonetheless, the City of Harlingen (and others) argued that the PUCT had no authority to approve a transmission-only utility—effectively claiming that only traditional, integrated transmission and distribution utilities with defined service areas could operate in Texas. A Texas lower court agreed. *See Cities of Harlingen v. Pub. Util. Comm'n of Tex.*, 2008 WL 8089334 (Tex. Dist. Oct. 8, 2008). This decision was eventually overturned on appeal, with the appellate court concluding that a transmission-only utility was fully consistent with the PUCT's authority under existing Texas law.

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[11] A "transmission and distribution utility" is a person that "owns or operates for compensation in" Texas "equipment or facilities to transmit or distribute electricity." Tex. Util. Code Ann. §31.002(19).

Cities of Harlingen, 311 S.W.3d at 620-21. In the time between the lower court's decision and the eventual reversal, the Texas legislature intervened, passing laws specifically addressing the ETT transaction and clarifying that a transmission-only utility could operate within ERCOT. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1170 (HB 3309), §§1-4, 2009 Tex. Gen. Laws 3700 (codified at Tex. Util. Code §§37.0541, .051(e)-(g), 053(a), .055, .057, .151).

F. Texas Transmission and Distribution Owners Contest the Right of Federally-Regulated Grid Operators to Solicit Competitive Bids

58. Following the implementation of Order No. 1000 in SPP and MISO, Texas transmission owners outside of ERCOT asserted that, despite the decision on *Cities of Harlingen*, Texas law granted them an absolute right to build transmission facilities in their service areas.

59. These arguments first came to a head in SPP in late 2016 when Southwestern Public Service Company's ("SPS") argued it had the exclusive right under Texas law to build an SPP planned transmission line within its service area and therefore claimed that that SPP could not hold a competitive process for the project.[12]

60. On February 28, 2017, SPS and SPP filed a joint request for a declaratory ruling from the PUCT, asking whether "SPS ha[d] the exclusive right to construct and operate new, regionally-funded transmission facilities in areas of Texas that lie within SPS's certificated service area." *Decl. Order, Joint Pet. of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Decl. Order*, PUC Docket No. 46901, 341 P.U.R.4th 195, at *1 (Oct. 26, 2017). LSP subsidiary Southwest intervened

[12] Although this dispute occurred in SPP, the question of whether Texas law granted current Texas utilities the exclusive right to build transmission facilities impacted all of the power regions in Texas because the outcome would affect MISO as well. *See* Cook, A., Texas Law Could Affect MISO Competitive Transmission, available at: https://www.rtoinsider.com/miso-market-efficiency-project-43345/ (May 23, 2017).

in the case, stating that should SPP issue a request for proposal ("RFP") for the Potter Project, as an SPP-qualified RFP participant, Southwest was eligible and intended to participate in the process. *See Southwest Transmission, LLC's Motion to Intervene*, PUC Docket No. 46901, at *1-2 (Mar. 10, 2017).

61. The PUCT found that SPS did not have an exclusive right to build projects in SPP because "[n]owhere does [Texas utility law] explicitly grant [incumbent transmission and distribution] utilities an exclusive right to provide transmission service—including the right to construct transmission facilities—within their certificated service areas." *Decl. Order*, PUC Docket No. 46901, 341 P.U.R.4th 195, at *16. The PUCT cited the *Cities of Harlingen* decision in reaching this determination. *See id.*

62. The PUCT's decision was appealed by SPS and Entergy Texas, Inc. ("Entergy"), two entities that already owned and operated lines in Texas, and the Texas Industrial Energy Consumers. The state district court affirmed,[13] and the case is currently pending before the Third Court of Appeals in Austin.[14]

G. In May 2019, The Texas Legislature Amended the Utilities Code, Adding Provisions that Unconstitutionally Favor In-State Utilities

63. After the PUCT determined that Texas law did not insulate Texas transmission owners from competition and the state district court affirmed in September 2018, those same Texas

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[13] *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, No. D-1-GN-18-000208 (459th Dist. Ct., Travis County, Tex. Sept. 27, 2018).

[14] *Entergy Tex., Inc. et al. v. Pub. Util. Comm'n of Tex.*, No. 03-18-00666-CV (Tex. App.—Austin). However, Appellants have moved to dismiss the Third Court of Appeals case as moot due to the recent amendments to the Utilities Code. Appellees opposed the motion to dismiss based on the filing of this action.

utilities turned to the Texas legislature in early 2019 to attempt to gain the protection that the PUCT and the Texas courts had not given them.

64. In March 2019, lawmakers in the Texas House and Senate introduced Senate Bill 1938 and the companion House Bill 3995, which sought to grant transmission utilities that already owned and operated lines in Texas the exclusive right to build lines that interconnected to their current lines.

65. On April 2, 2019, the Texas Senate Committee on Business & Commerce heard testimony on Senate Bill 1938. A number of large Texas utilities spoke in favor of the bill. The Texas utilities were clear about why they supported the bill. As a representative for Oncor Electric, CenterPoint Energy, AEP Texas, and Texas New Mexico Power explained, the bill was not about determining whether a project would go forward, but rather was about determining who would build the projects. To the representative, Senate Bill 1938 was clear on this point: "The end point owners of an existing facility will build any extensions that come off that facility, that's what this bill does."[15]

66. The House Report plainly stated: "[t]he bill *limits* the persons to whom the Public Utility Commission of Texas (PUC) may grant a certificate to build, own, or operate a new electric transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility *to the owner of that existing facility* and requires, for a new transmission facility that will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity to be certificated to build, own, or operate the

[15] http://tlcsenate.granicus.com/MediaPlayer.php?view_id=45&clip_id=14109 at 28:49-29:00.

new facility in separate and discrete equal parts unless they agree otherwise."[16] Representative Phelan, the sponsor of the House Bill was even clearer about the protectionist purposes of the bill, explaining that "transmission operations are best managed by accountable companies *with boots on the ground in our communities*."[17]

67. Notably, a member of the Texas House of Representatives invited the DOJ to comment on House Bill 3995. *See* DOJ Letter. In its response, DOJ expressed concern that the House Bill "would limit competition, thereby potentially raising prices and lowering the quality of service for electricity consumers." *Id.* at 1. Examining the background on competition to develop transmission facilities, DOJ noted that "FERC Order No. 1000 eliminated certain federal [rights of first refusal ("ROFR")] because they restricted competition, were not just and reasonable, and created opportunities for undue discrimination and preferential treatment." *Id.* at 3. "[J]ust as a now-eliminated federal ROFR granted by FERC could do, ROFRs granted by state law can restrict entry to develop high-voltage transmission lines, particularly where there would otherwise be a competitive process. Consequently, such laws can similarly reduce competition and thereby harm consumers. State ROFR laws also may interfere with interstate commerce." *Id.* at 4.

68. DOJ specifically discussed the recent award of a MISO transmission project in Texas to an independent, transmission-only company, noting that "H.B. 3995 would prevent this type of competition from occurring in the future." *Id.* at 6. "[B]y restricting the development of transmission facilities to local incumbents, H.B. 3995 can harm consumers by reducing or

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16 https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB03995H.pdf#navpanes=0

17 http://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=16845 at 7:50:21 – 7:50:27.

eliminating competition. For example, even if a nonlocal utility or a transmission-only company was more efficient and could develop higher quality transmission facilities at a lower cost, H.B. 3995 could deny that firm the opportunity to construct that project and likewise deny consumers the benefits of the new competitor's efforts." *Id.*

69. DOJ also explained that in the absence of that competition, "consumers may have higher expenses in the form of greater transmission rates" and "may face higher electricity rates and less reliable service[.]" *Id.*

70. Despite the concerns raised by DOJ, the bill advanced through the legislative process. It was sent to Governor Gregory Abbott on May 8, 2019, and on May 16, 2019, Senate Bill 1938 was signed into law.

71. The enacted statute begins by requiring that before any utility provides any service in Texas, it must receive a certificate from the PUCT. Utils. Code §37.051.

72. New subsections codified in Utilities Code §37.056 give current transmission line owners the exclusive right to build new transmission lines that interconnect with their existing projects by limiting who the PUCT can issue certificates to, providing:

> (e) A certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility. If a new transmission facility will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity shall be certificated to build, own, or operate the new facility in separate and discrete equal parts unless they agree otherwise.
>
> (f) Notwithstanding Subsection (e), if a new transmission line, whether single or double circuit, will create the first interconnection between a load-serving station and an existing transmission facility, the entity with a load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility at

> the load-serving station shall be certificated to build, own, or operate the new transmission line and the load-serving station. The owner of the existing transmission facility shall be certificated to build, own, or operate the station or tap at the existing transmission facility to provide the interconnection, unless after a reasonable period of time the owner of the existing transmission facility is unwilling to build, and then the entity with the load-serving responsibility or an electric cooperative that has a member with a load-serving responsibility may be certificated to build the interconnection facility.

Utils. Code §37.056(e)-(f).

73. The statute goes on to grant current Texas utilities the right to choose—but only among the pool of existing utilities that are already certified within a power region—which entity will operate a new line in the event the line's owner chooses to pass up the project, stating:

> (g) Notwithstanding any other provision of this section, an electric utility or municipally owned utility that is authorized to build, own, or operate a new transmission facility under Subsection (e) or (f) may designate another electric utility that is currently certificated by the commission within the same electric power region, coordinating council, independent system operator, or power pool or a municipally owned utility to build, own, or operate a portion or all of such new transmission facility, subject to any requirements adopted by the commission by rule.

Id. §37.056(g).

74. Next, the statute provides that a CCN holder "shall serve every consumer in the utility's certificated area." *Id.* §37.151.

75. Finally, the statute limits the entities to which an electric utility that holds a CCN can transfer its CCN, providing:

> An electric utility or municipally owned utility may sell, assign, or lease a certificate or a right obtained under a certificate if the purchaser, assignee, or lessee is already certificated by the commission to provide electric service within the same electric power region, coordinating council, independent system operator, or

> power pool, or if the purchaser, assignee, or lessee is an electric cooperative or municipally owned utility.

Id. §37.154(a).

76. The statute therefore limits the right to build and operate approved transmission lines in Texas to those entities that already have a Texas transmission and distribution footprint, and excludes any out-of-state entities from building these lines, regardless of whether the lines cross Texas' state boundaries, whether costs for the lines are allocated to ratepayers outside of Texas, or whether the lines were approved by an interstate organization such as MISO, SPP, or WestConnect. The statute contains restrictive in-state presence requirements and thus violates the Commerce Clause.

77. Moreover, because the statute prevents transfer of CCN rights to an entity that does not already have a certificate in the "same electric power region, coordinating council, independent system operator, or power pool" even in the rare cases when a facility owner decides not to build a given facility or wishes to transfer an existing facility, the statute still prevents out-of-state entities from entering the Texas market by requiring the facility owner to transfer their rights to another entity that is already operating in Texas.

78. In a recent motion to dismiss filed in the Third Court of Appeals, the current transmission line owners have taken the position that the Utilities Code was amended to prevent out-of-state competition, stating that the "[l]egislature has thus clarified that Texas law provides

SPS and Entergy, subject to limitations on transfer rights, the exclusive right to build new transmission lines in their respective service territories."[18]

> These amendments also clarify the Legislature's intent to retain the state's jurisdiction over retail rates in the areas of Texas outside ERCOT by effectively prohibiting the certification of new-entrant transmission-only utilities whose rates would be subject to FERC's exclusive jurisdiction. Because no transmission-only utilities currently operate in Texas outside ERCOT, the exclusivity provisions and limitations on transfers of certificate rights to utilities already certified within a particular power region will act as a bar to any future certification of such entities, which bar functions to preserve state jurisdiction over the rates charged for transmission service.

Id. at 2-3. The bill was clearly intended to preserve the exclusive rights of incumbent utilities to operate in Texas, even outside of ERCOT.

79. The justifications the Texas legislators gave for the bill were unwarranted and pretextual. For example, some legislators argued that the bill was needed to protect the PUCT's rate jurisdiction. But the week before the Committee hearings on the bill, the PUCT took the exact opposite position, arguing in a brief filed in Texas appellate court that allowing new, transmission-only companies in Texas does nothing to divest the PUCT of jurisdiction. As the PUCT explained: "If a transmission-only electric utility provides service in the non-ERCOT areas of Texas, FERC will still have jurisdiction over the wholesale transmission rates and the Commission will continue to set retail rates for these areas; there will be no relinquishment of jurisdiction."[19]

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[18] Appellants Entergy Texas, Inc., Southwestern Public Service Company, and Texas Industrial Energy Consumers' Motion to Dismiss for Mootness, *Entergy Tex., Inc., et al. v. Pub. Util. Comm'n of Texas*, No. 03-18-00666-CV, at 2 (Tex. App.—Austin June 21, 2019).

[19] Br. of the Pub. Util. Comm'n of Tex., *Entergy Tex., Inc.*, No. 03-18-00666-CV, at 27-28 (Tex. App.—Austin Mar. 28, 2019).

80. Legislators also worried that out-of-state transmission companies might be less reliable than in-state companies. But there is no basis for the concern. As noted, the small number of out-of-state companies brought into ERCOT to run CREZ lines have successfully shown that out-of-state new entrant transmission service providers are just as reliable as in-state traditional transmission and distribution utilities. Moreover, for an out-of-state company to run transmission lines in Texas, even without the bill, the out-of-state company would need to demonstrate that it could provide reliable service in order to obtain a CCN from the PUCT and to win a competitive bid from MISO or SPP. Additionally, transmission facilities are uniformly required to comply with the North American Electric Reliability Corporation's standards, ensuring that all lines are operated reliably.

H. LSP Is Foreclosed From Pursuing New Business in Texas

81. LSP and its affiliates and subsidiaries have a long history of active development of new electric transmission solutions. They partner with communities across the country to create lower-cost, cleaner energy solutions.

82. Since inception, LSP and its affiliates have developed, constructed, managed, and acquired more than 41,000 megawatts of competitive power generation and over 630 miles of transmission infrastructure, for which they have collectively raised over $40 billion in debt and equity financing. More than 370 miles of additional projects are currently in the planning stages.

83. Indeed, the PUCT has previously recognized LSP affiliate CTT's superior service by selecting CTT as one of eight entities to construct, own, and operate a portion of the 2,300 miles of new transmission infrastructure under the CREZ program. CTT's project was completed ahead of schedule, below budget, and at the lowest cost per mile of any provider.

84. Following the CREZ award, CTT applied for and obtained a CCN and two amendments to the CCN for three double-circuit 345-kV transmission lines and two substations, all of which are located in a seven-county area in the Texas Panhandle. These transmission lines and substations were built in two phases, with the first being placed into service on March 9, 2013, and the second on September 13, 2013, consistent with the in-service date contemplated by the PUCT.

85. After the construction of the CREZ facilities, CTT invested in additional significant ERCOT transmission facilities and assets. First, CTT constructed the Railhead Substation to allow for interconnection of a renewable generating station in the proximity of its existing Gray to White Deer 345-kV transmission line. Second, CTT invested capital in an expansion of its Gray Substation to also allow for interconnection of renewable generation. Third, CTT invested in an addition to the Railhead Substation to further facilitate generation interconnection and its field office to support operations in Amarillo. Finally, following notice of termination of its operating agreement with South Texas Electric Cooperative, Inc., CTT determined that it would provide control room services for its system in-house to improve operational oversight, curb risk, and ensure appropriate levels of regulatory compliance. To that end, CTT invested in a primary control center and a backup control center to manage operations of its transmission system.

86. In addition, in April 2018, CTT completed construction and placed into service a 68-mile double circuit 345-kV transmission line between the Limestone Substation in Limestone County and the Gibbons Creek Substation in Grimes County. The PUCT approved the project in January 2016 after ERCOT identified that the project needed to be completed by June 2018 to ensure reliability and reduce congestion on the transmission grid.

87. LSP and its subsidiaries have also demonstrated a desire to compete in Texas outside of ERCOT. In February 6, 2018, MISO issued a request for proposals for the construction of a 500 kV competitive transmission project in the Entergy service territory in East Texas, known as the Hartburg-Sabine Junction Transmission Project (the "Hartburg-Sabine Project"). The Hartburg-Sabine Project was designated as a Market Efficiency Project, and accordingly, was opened for competitive solicitation.

88. The solicitation was highly competitive—MISO received 12 bids from nine qualified developers to build the line, including Verdant Plains Electric, LLC, a LSP subsidiary. MISO selected NextEra Energy Transmission Midwest, LLC to build the Project. LSP has shown that under applicable federal and state law, it is a willing, capable, and competitive player in the transmission development field and that it consistently delivers significant benefits to ratepayers when given the opportunity to participate.

89. Given its history, LSP and its affiliates and subsidiaries are well-positioned to build, own, and operate high-quality, low-cost transmission lines in Texas. But the amendments to the Utilities Code will foreclose LSP and its subsidiaries—qualified MISO, SPP, and WestConnect transmission development companies—from advancing MISO, SPP, and WestConnect FERC Order No. 1000 projects, solely because they do not currently operate projects in those areas. The state law could also prevent MISO, SPP, and WestConnect from even running a competitive process.

90. Due to the recent amendments to the Utilities Code, LSP and its subsidiaries will be unconstitutionally prohibited from competing within Texas, resulting in substantial harm to their businesses and to interstate commerce in the United States. The Texas Utilities Code is

currently causing hardship to LSP and its subsidiaries by interfering with their ability to plan, invest in, and conduct and grow their business operations in Texas.

COUNT I
THE UTILITIES CODE VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION
42 U.S.C. §§1983 and 1988

91. Intervenor-Plaintiff realleges paragraphs 1 through 90 of this Complaint as though fully set forth herein.

92. The United States Constitution provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, §8, cl. 3.

93. The Commerce Clause includes a "dormant" limitation on the authority of the States to enact legislation affecting interstate commerce.

94. The doctrine "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation marks and citations omitted).

95. A state statute that discriminates against interstate commerce in favor of in-state commerce is unconstitutional. That is true whether the discrimination is found on the face of the statute, in its effect or its purpose. *See* slip op., *Tennessee Wine & Spirits Retailers Assoc. v. Thomas*, No. 18-96 (U.S. June 26, 2019).

96. Texas is regulating activities in the interstate market, because it is applying its exclusive right to build law to projects that have been approved through a federally mandated-planning process in MISO and SPP and will be connected to or form a part of multi-state transmission grids or systems (and indeed, even to lines that run across state lines). In addition,

projects in these ISOs are eligible for regional (*i.e.*, multi-state) cost allocation, even where the footprint of the project does not cross state lines.

97. Texas also is regulating the provision of services in the nation-wide market to provide transmission services.

98. As amended, Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 facially discriminate against Intervenor-Plaintiff by effectively prohibiting Intervenor-Plaintiff and its affiliates, as well as other out-of-state, new entrant market participants, from building transmission lines in Texas, including those lines approved through a federally mandated planning process. As amended, the Utilities Code contains restrictive in-state presence requirements.

99. As amended, Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 also discriminate in purpose and effect by imbuing transmission developers with a Texas footprint with rights well beyond a right of first refusal. They unequivocally grant a select few utilities with the absolute right to construct all transmission projects within their geographic footprint, to the exclusion of out-of-state developers, including those approved through a federally mandated planning process, who otherwise could qualify as public utilities under Texas law.

100. The legislative history shows that the law was not enacted for a legitimate, non-protectionist purpose. Many other methods would allay any concerns regarding cost and reliability of service, such as requiring new entrants to become public utilities and imposing other permit obligations on the new entrants to ensure reliability of service. *See Cities of Harlingen*, 311 S.W.3d at 617 (noting that under Texas law an entity must become a utility to provide transmission services).

101. Thus, the burden on interstate commerce caused by Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 is not justified by valid public welfare, consumer protection, or other legitimate public purpose unrelated to economic protectionism.

102. In addition, as amended, Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 unduly burden interstate commerce by restricting entry to the transmission market in Texas, thus walling off the state from new market participants. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

103. The purported local benefits of amended Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 are insignificant and illusory, and are a mere pretext for discrimination against out-of-state transmission developers. As numerous courts have found, basic economic theory leads to the conclusion that wholesale transmission competition benefits the markets and consumers. Accordingly, the burden on interstate commerce is clearly excessive in relation to any purported local benefits.

104. This legislation has injured and will continue to injure Intervenor-Plaintiff by preventing its entry to the Texas transmission-development marketplace as regulated utilities, and interfering with its ability to plan, invest in, and conduct their business operations as MISO, SPP, and WestConnect qualified entities.

105. This unconstitutional legislation, as enacted and as applied, should be stricken as unconstitutional and/or its enforcement should be enjoined as it threatens Intervenor-Plaintiff with irreparable injury for which there is no adequate remedy at law.

106. Intervenor-Plaintiff also seeks attorneys' fees pursuant to 42 U.S.C. §1988.

COUNT II
DECLARATORY RELIEF
28 U.S.C. §2201

107. Intervenor-Plaintiff realleges paragraphs 1 through 90 of this Complaint as though fully set forth herein.

108. "In a case of actual controversy . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201(a).

109. As amended, Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 violate the Commerce Clause because they discriminate on their face and in purpose and effect against interstate commerce in order to benefit in-state competitors.

110. The legislation was enacted for purely protectionist purposes, and there are no local benefits that justify its continued enforcement.

111. Enforcement of the legislation creates a genuine, credible, and immediate threat of harm to Intervenor-Plaintiff's business and interstate commerce, by preventing new transmission development entities from entering the Texas market.

112. Intervenor-Plaintiff seeks a declaration that amended Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 are void under the Commerce Clause of the United States Constitution.

PRAYER FOR RELIEF

Based on the foregoing, Intervenor-Plaintiff hereby respectfully requests the Court grant the following relief:

a. An order pursuant to 28 U.S.C. §2201 declaring that amended Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154 are unconstitutional because

they violate the Commerce Clause and are therefore invalid and unenforceable to the extent they grant in-state transmission owners the exclusive right to build or acquire transmission lines in Texas.

b. An order enjoining Defendants from enforcing the unconstitutional provisions of Utilities Code §§37.051, 37.056, 37.057, 37.151, and 37.154.

c. An order awarding Intervenor-Plaintiff the costs and expenses incurred in the instant litigation, including its reasonable attorneys' fees pursuant to 42 U.S.C. §1988(b).

d. An order for such other relief, including preliminary injunctive relief, and further relief as may be just and appropriate under the circumstances.

Dated: July 11, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July 2019, I filed the foregoing with the Clerk of the Court by overnight delivery via Federal Express.

The undersigned further certifies that on said date the foregoing was served via U.S. Mail, postage prepaid, with courtesy copies via email, to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXTERA ENERGY CAPITAL HOLDINGS, INC., NEXTERA ENERGY TRANSMISSION, LLC, NEXTERA ENERGY TRANSMISSION MIDWEST, LLC, LONE STAR TRANSMISSION, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC , Plaintiffs, v. KEN PAXTON, Attorney General of the State of Texas, DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, and SHELLY BOTKIN, Commissioner, Public Utility Commission of Texas, each in his or her official capacity, Defendants.	Civil No. 1:19-cv-00626 (LY) Hon. Judge Lee Yeakel

ORDER GRANTING LSP TRANSMISSION HOLDINGS II, LLC'S MOTION TO INTERVENE

This matter is currently before this Court on the motion of LSP Transmission Holdings II, LLC ("LSP") to intervene as a plaintiff in the above-captioned case as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, alternatively, by permission under Rule 24(a)(b)(1). Having considered the arguments and the filed pleadings, and finding that LSP has satisfied the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure, the motion to intervene is hereby GRANTED.

Dated: _____, 2019

_____
Honorable Judge Lee Yeakel