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, and NEXTERA ENERGY TRANSMISSION SOUTHWEST, LLC,

Plaintiffs,

v.

DEANN T. WALKER, Chairman, Public Utility Commission of Texas, ARTHUR C. D'ANDREA, Commissioner, Public Utility Commission of Texas, AND SHELLY BOTKIN, Commissioner, each in his or her official capacity,

Defendants.

CIVIL ACTION NO. 1:19-cv-00626

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States," in response to Defendants' motion to dismiss Plaintiffs' complaint. The motion should be denied because the complaint sufficiently pleads a dormant Commerce Clause violation.

Interest of the United States

The United States has a longstanding interest in preserving and promoting competition in interstate commerce. It pursues this interest through enforcement of the federal antitrust laws and through competition advocacy by supporting federal and state laws that promote competition and opposing those laws that—as in this case—unnecessarily restrict competition.

As this Statement explains, the United States can promote competition in the U.S. economy by ensuring proper enforcement of the "dormant Commerce Clause," which prohibits states from "unduly restrict[ing] interstate commerce" or "adopt[ing] protectionist measures." *Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

In protecting competition in interstate commerce, the United States has garnered specific expertise in the electricity industry—through federal antitrust enforcement in electricity matters[1] and advocacy to promote competition in electricity markets.[2]

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[1] *See, e.g.*, Competitive Impact Statement, *United States v. Morgan Stanley*, 881 F. Supp. 2d 563 (S.D.N.Y. Sept. 30, 2011) (No. 11-cv-6875), https://www.justice.gov/atr/case-document/file/505056/download; Competitive Impact Statement, *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. Feb. 23, 2011) (No. 10-cv-1415), https://www.justice.gov/atr/case-document/file/500576/download; Competitive Impact Statement, *United States v. Exelon Corp.*, No. 1:06-cv-1138 (D.D.C. Aug. 10, 2006), https://www.justice.gov/atr/case-document/file/495451/download; Competitive Impact Statement, *United States v. Enova Corp.*, 107 F. Supp. 2d 10 (D.D.C. June 8, 1998) (No. 98-cv-583), https://www.justice.gov/atr/case-document/file/495196/download.

[2] *See, e.g.*, Letter from Daniel Haar, Acting Chief, Competition Pol'y & Advoc. Sec., Antitrust Division to Rep. Travis Clardy, Tex. House of Reps. (Apr. 19, 2019),

Procedural Background

On May 16, 2019, Texas passed Senate Bill 1938 ("S.B. 1938" or "the Bill"), codified in Texas Utilities Code § 37.056. On June 17, NextEra Energy Capital Holdings, NextEra Energy Transmission ("NEET") Midwest, Lone Star Transmission, and NEET Southwest (corporate affiliates of NextEra and collectively "the Plaintiffs") filed suit alleging that S.B. 1938 violates the dormant Commerce Clause. Compl. 1-6, 29-32, ECF No. 1.[3] On August 23, Defendants moved to dismiss for failure to state a claim. Def.'s Mot. to Dismiss 1, 6-17, ECF No. 94.

Factual Background

S.B. 1938 changed Texas law so that projects to build, own, or operate new transmission facilities "may be granted only to the owner of [an] existing facility" that directly interconnects to the new facility. Tex. Util. Code § 37.056(e). Before S.B. 1938's passage, nonlocal entities could develop new transmission facilities. For example, the Public Utility Commission of Texas ("PUCT") could grant a certificate of convenience and necessity "to transmission-only utilities without a service area anywhere in Texas." *Joint Petition of Sw. Pub. Serv. Co. & Sw. Power Pool, Inc. for Declaratory Order*, 341 P.U.R.4th 195, 2017 WL 5068379, at *12 (Oct. 26, 2017) [hereinafter PUCT Declaratory Order] (citing *Pub. Utility Comm'n of Texas v. Cities of Harlingen*, 311 S.W.3d 610, 620-21 (Tex. App. 2010)) (addressing PUCT's authority dating

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https://www.justice.gov/atr/page/file/1155881/download [hereinafter U.S. Letter on S.B. 1938] (opposing Texas Senate Bill 1938); Brief for the United States of America as Amicus Curiae in Support of Neither Party, Vacatur, and Remand, *LSP Transmission Holdings, LLC v. Lange*, No. 18-2559 (8th Cir. Oct. 19, 2018), https://www.justice.gov/atr/case-document/file/1102866/download (addressing a dormant Commerce Clause claim regarding a state right of first refusal law); Statement of Interest on Behalf of the United States, *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018) (No. 17-cv-04490), https://www.justice.gov/atr/case-document/file/1053256/download (same). *See also infra* note [7] (examples of past U.S. Dept. of Just. competition advocacy with FERC).

[3] This Statement does not address the Plaintiffs' Contracts Clause claim. Compl. 32-33.

back before 2009).

S.B. 1938 also provides the owner of an interconnecting facility the option to "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." Tex. Util. Code § 37.056(g). PUCT has jurisdiction to grant a certificate only within Texas, so section 37.056(g) as modified permits designations only to utilities with a preexisting physical presence within the relevant geographic subdivision of Texas.

Recent Texas experience illustrates the competition that is placed at risk from S.B. 1938. Before S.B. 1938 passed, the Hartburg-Sabine Transmission project ("Hartburg-Sabine") in East Texas was competitively awarded to NEET Midwest, a nonlocal company with a principal place of business in Florida. Compl. 4. Hartburg-Sabine is located within the footprint of the Midcontinent Independent System Operator ("MISO"), a regional transmission organization ("RTO") approved by the Federal Energy Regulatory Commission ("FERC") to administer an electric transmission grid across fifteen states including portions of East Texas. MISO designated Hartburg-Sabine a "market efficiency project" in its 2017 MISO Transmission Expansion Plan "aimed at relieving both near-term and long-term system congestion in East Texas." *Order Granting Abandoned Plant Incentive*, 166 FERC ¶ 61,169, at P 4 (2019). Building additional transmission can relieve congestion and allow access to lower-priced electric generation that can displace higher-priced generation. When lower-priced generation can serve demand, consumers can benefit from lower electricity prices even after paying for additional transmission. Before soliciting bids, MISO estimated that Hartburg-Sabine would produce "benefits in excess of 1.35 times the cost, have an estimated 20-year present value benefit of $214 million, and fully relieve congestion in the Sabine/Port Arthur area." *Id.*

Through its extensive "Comparative Analysis Process," MISO used a competitive process to solicit and identify better proposals. *See* Midcontinent Indep. Sys. Operator, Inc., *Selection Report: Hartburg-Sabine Junction 500 kV Competitive Transmission Project* 18-20, 107-12 (2018), https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf [hereinafter Selection Report]. NEET Midwest prevailed over eleven alternatives, including a competitor with assets and personnel "in the project area," *id.* at 38, 42-43, because of NEET Midwest's "outstanding combination of low cost and high value, with best-in-class cost and design, best-in-class project implementation plans, and top-tier plans for operations and maintenance," *id.* at 2. NEET Midwest's proposal has an estimated benefit-to-cost ratio of 2.20, "which is well above the MISO estimated ratio of 1.35," *id.* at 21, and well above the proposal with the lowest ratio of 1.37, *id.* at 5. NEET Midwest also offered "cost caps and cost containment measures [that will] enhance cost certainty and convey substantial benefits to ratepayers over time." *Id.* at 6.

S.B. 1938 puts in jeopardy the benefits from this competition. Because NEET Midwest does not own facilities that directly interconnect with Hartburg-Sabine and does not operate any other facilities in Texas, Compl. 27, S.B. 1938 would appear to prevent it from obtaining a certificate to build the project that will result in lower electricity costs for consumers. S.B. 1938 also would appear to block next-best proposals without a local interconnecting facility. The likely result is higher electricity costs for consumers. These anticompetitive effects are the kinds of harm predicted by the United States in its competition advocacy letter.[4]

S.B. 1938 also prevents entry through acquisition of existing facilities by out-of-state transmission providers into Texas. For example, in the Southwest Power Pool, Inc. ("SPP")

[4] U.S. Letter on S.B. 1938, at 6-7.

footprint of eastern Texas, NEET Southwest entered into an asset purchase agreement in 2017 to acquire a high-voltage transmission line from an electric cooperative (the "Jacksonville-Overton Line"). *See Joint Application of NextEra Energy Transmission Sw., LLC and Rayburn Country Electric Cooperative, Inc. to Transfer Certificate Rights to Facilities in Cherokee, Smith, and Rusk Counties*, PUC Docket No. 48071. NEET Southwest has a principal place of business in Florida, Compl. 5, and does not currently own or operate utility facilities in Texas, *id.* at 28. NEET Southwest's application for the Jacksonville-Overton Line is pending approval from PUCT. Without facilities in Texas, S.B. 1938 would deny NEET Southwest a certificate necessary for its acquisition.

S.B. 1938 also diverges from national trends towards more competition that arose after FERC found in the 1990s that "the economic self-interest of public utility transmission providers [is not] to expand the grid to permit access to competing sources of supply." *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC ¶ 61,051, at P 254 (2011) (describing earlier findings supporting Order Nos. 888 and 890), [hereinafter Order No. 1000]. The Hartburg-Sabine selection process exemplifies competition, which FERC has been facilitating since the 1990s. One early FERC order unbundled wholesale generation and transmission services to provide competitive electricity generators with non-discriminatory access to the electricity grid.[5] Another FERC order encouraged the use of independent system operators ("ISOs") or RTOs to coordinate planning, operation, and use of regional and interregional transmission systems in competitive markets for wholesale power.[6]

[5] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540, at 21552 (Apr. 24, 1996) [hereinafter Order No. 888].

[6] Regional Transmission Organizations, 65 Fed. Reg. 810, 811 (Dec. 20, 1999).

The Department of Justice advocated for these market reforms because of their expected benefits to competition and consumers.[7] Many of the organizations that emerged from these reforms cover more than one state, including MISO and SPP, which both extend into portions of Texas.[8] The remainder of Texas (a majority of it) is covered by the Electric Reliability Council of Texas ("ERCOT"), an ISO whose footprint does not extend outside Texas.[9]

In 2011, pursuant to this broader effort, FERC Order 1000 required that FERC-approved agreements eliminate federal rights of first refusal ("ROFRs") with respect to lines built under regional transmission plans.[10] ROFRs grant local electric transmission owners a right of first refusal to build new high-voltage transmission lines that connect to the local owner's facilities. FERC determined that eliminating the federal ROFR would further competition, concluding that a local owner's ability to use a ROFR can discourage entrants from proposing and investing in

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[7] *See, e.g.*, Comments of the U.S. Dep't of Just., FERC Docket No. RM99-2-00 (Aug. 23, 1999), https://www.justice.gov/atr/comments-us-department-justice-0; Comments of the U.S. Dep't of Justice, FERC Docket Nos. RM95-8-000 & RM94-7-001 (Aug. 7, 1995), https://www.justice.gov/sites/default/files/atr/legacy/2000/08/03/ferc2.txt; Reply Comments of the U.S. Dep't of Just., FERC Docket No. RM94-20-0000 (Apr. 3, 1995), https://www.justice.gov/atr/reply-comments-us-department-justice.

[8] *See Order No. 1000 – Transmission Planning and Cost Allocation*, FERC, https://www.ferc.gov/industries/electric/indus-act/trans-plan.asp (last updated Oct. 26, 2016) (containing approximate map of transmission planning regions).

[9] FERC does not exercise jurisdiction over ERCOT.

[10] In particular, FERC-regulated entities were required "to eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000 at ¶ 313. There are some exceptions to the rule that FERC-regulated entities cannot impose ROFRs. Local transmission facilities are permitted by FERC to maintain a federal ROFR within their Commission-jurisdictional tariffs and agreements, as FERC's focus "is on the set of transmission facilities that are evaluated at the regional level." *Id.* at ¶ 318. Additionally, incumbent transmission providers are permitted by FERC to maintain a federal ROFR "for upgrades to [their] own transmission facilities," even if these upgrades are included in a regional transmission plan, as long as the construction is not funded through the regional planning cost-allocation process. *Id.* at ¶ 319.

the development of new, successful transmission projects given that the incumbent may exercise its ROFR once a project's benefits are demonstrated. Order No. 1000 at PP 256-57. By contrast, "Greater participation by transmission developers in the transmission planning process may lower the cost of new transmission facilities, enabling more efficient or cost-effective deliveries by load serving entities and increased access to resources." Order No. 1000 at P 291.

Order 1000 expressly states that it was not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities." Order No. 1000 at P 287. As this quote illustrates, FERC left in place any state authority or lack thereof on the construction of new transmission facilities, including as it pertains to a ROFR or similar restriction.[11] FERC did not affirmatively grant states any authority to create a ROFR or similar restriction.[12]

Order 1000 also required that ISOs and RTOs adopt regional planning and that new transmission lines subject to regional cost allocation be awarded based on an evaluation and comparison of competing proposals. Order No. 1000 at PP 321, 326, 328, 330, 336. Market efficiency projects like Hartburg-Sabine are examples of regional cost allocation projects subject to competition after Order 1000. Two courts of appeals have upheld Order 1000 as a valid exercise of FERC's authority, acknowledging that ROFRs harm competition and that

[11] Accordingly, in later orders, FERC allowed FERC-regulated entities to recognize the existence of state legal restrictions when considering proposals for new transmission lines during the regional transmission planning process. *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61,037 at P 25 (2015) (Order on Rehearing and Compliance Filings). But in doing so, FERC simply recognized that requiring FERC-regulated entities to ignore state legal restrictions would waste time and resources, as the entities' decision-making process ultimately could be overruled by state law. *Id.* at P 14.

[12] Indeed, in a concurring statement to FERC's order approving MISO's tariff filing implementing the requirements of Order 1000, one commissioner noted that a court might find that state rights of first refusal "run afoul of the dormant commerce clause." *See MISO*, 150 FERC at P 61,195 (Comm'r Bay, concurring).

competition in selecting the developer of new transmission facilities can produce important consumer benefits. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 332-35 (7th Cir. 2016); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 68-69, 74 (D.C. Cir. 2014).

Despite this trend towards competition, Texas passed S.B. 1938 and joined a subset of states protecting local facility owners from nonlocal competition to develop transmission facilities. *E.g.*, Minn. Stat. § 216B.246 (granting a ROFR to local facility owners). Texas S.B. 1938 is more restrictive than a ROFR because it grants the local owner the exclusive right to build interconnecting projects without a time limit. Tex. Util. Code § 37.056(e). S.B. 1938 is also distinct in granting the local owner the option to select a replacement from other in-state entities. *Id.* § 37.056(g).

Discussion

"[T]o avoid the tendencies toward economic Balkanization," the dormant Commerce Clause "restricts state protectionism." *Tenn. Wine & Spirits*, 139 S. Ct. at 2461. In particular, the Clause "prohibit[s] States from discriminating against or imposing excessive burdens on interstate commerce." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). Plaintiffs' case should not be dismissed. Plaintiffs adequately allege that by restricting the interstate market to develop electric transmission facilities only to owners of interconnecting local facilities or in-state entities the local owners designate, S.B. 1938 impermissibly discriminates in favor of in-state interests and forecloses entry by nonlocal and out-of-state competitors. The law also appears to impose a substantial burden on interstate commerce, and it is not apparent that there are any purported local benefits that could not be achieved with reasonable, alternative policies. No general exception to the dormant Commerce Clause exists or applies to the facts here. Finally, FERC has not authorized or approved of state ROFRs, S.B.

1938, or any similar legislation.

I. Texas S.B. 1938 Violates the Dormant Commerce Clause by Discriminating Against Interstate Commerce.

The dormant Commerce Clause bars states from discriminating between "substantially similar entities," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997), "on the basis of some interstate element," *Wynne*, 135 S.Ct. at 1794. A state law can discriminate against interstate commerce on its face, through a "discriminatory purpose" such as economic protectionism, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), or a "discriminatory effect," *Wynne*, 135 S.Ct. at 1801 n.2. Such discrimination is unconstitutional unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). The Supreme Court has described this test as "a virtually *per se* rule of invalidity," *id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)), upholding discriminatory regulations only if the "nondiscriminatory alternatives will prove unworkable," *id.* at 493. Here, the Plaintiffs sufficiently allege that Texas electricity utilities and nonlocal companies like NextEra are similarly situated, and S.B. 1938 discriminates against interstate commerce by favoring entities with a local physical presence and disfavoring nonlocal and out-of-state entities.

a. Local and nonlocal transmission development companies are similarly situated under the dormant Commerce Clause.

Entities are similarly situated for dormant Commerce Clause purposes if "actual or prospective competition [exists] between the supposedly favored and disfavored entities in a single market." *Tracy*, 519 U.S. at 300. Here, Hartburg-Sabine demonstrates actual competition to develop transmission. MISO identified the project to reduce congestion in the RTO's

footprint and successfully solicitated twelve proposals, including both utilities and transmission-only companies, both a company with assets and personnel in the project area and companies with no in-state presence. Following an extensive comparative analysis process, MISO decided that the proposal offering the greatest benefits net cost was from NEET Midwest, a nonlocal transmission-only company. That a nonlocal transmission development company was selected indicates that it competes with local companies and that local and nonlocal companies are similarly situated. Texas' assertion that they are "not similarly situated," Def.'s Mot. To Dismiss 8, and that "no competitive sales are involved," *id.* at 9, simply ignores the relevant competition.

Texas also argues: "Amounts paid to Texas transmission providers for their service are set by regulators, not by competitive forces." *Id.* at 9. This statement cannot be squared with the FERC Order 1000 requirement that transmission lines subject to regional cost allocation, like Hartburg-Sabine, be awarded after an evaluation and comparison of competing proposals. Order No. 1000 at PP 321, 326, 328, 330, 336. MISO's process illustrates the many dimensions on which proposals compete: cost and design, project implementation, and operations and maintenance. Selection Report at 3-4. This competition can reduce costs allocated across consumers in a region, enhance reliability, and improve access to lower cost generation resulting in lower consumer prices for electricity.

b. Texas S.B. 1938 discriminates in favor of utilities with a local presence.

1. S.B. 1938 discriminates in favor of companies with a local physical presence. In the first instance, S.B. 1938 restricts who can build, own, or operate new transmission to the owner of an existing facility that directly interconnects with the new project. Tex. Util. Code § 37.056(e). If facilities of different owners directly interconnect to the project's end points then "each entity shall be certificated to build, own, or operate the new facility in separate and

discrete equal parts unless they agree otherwise." *Id.* By allowing only owners of local facilities to build out transmission facilities, S.B. 1938 discriminates against interstate commerce similarly to: a city ordinance that required that milk sold in a city be pasteurized within five miles of a city line, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), a state statute that effectively segmented the market in waste management along Michigan county lines, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Res.*, 504 U.S. 353 (1992), or a town ordinance requiring that solid waste processed or handled within town be processed or handled at the town's designated transfer station, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). In each of these cases, the U.S. Supreme Court found that favoring physically local entities against out-of-state as well as nonlocal in-state entities discriminated against interstate commerce.

Texas wrongly argues that the Bill is saved because these provisions merely favor owners of local facilities over "all other entities, without regard to whether they are in-state or out-of-state." Def.'s Mot. To Dismiss 9. As the Supreme Court has explained, however, "a State . . . may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot*, 504 U.S. at 361. The Supreme Court has held that such laws are "no less discriminatory because in-state or in-town processors are also covered by the prohibition." *Carbone*, 511 U.S. at 391.

The law also is not saved by describing, as Texas does, local protectionism as "a preference for incumbents," not "a preference for in-state over out-of-state interests." Def.'s Mot. To Dismiss 11. *Contra id.* at 10 ("Distilled to its essence . . . existing owners of transmission facilities in Texas are given a preference to build, own and operate the needed new lines"). The Supreme Court in *Carbone* rejected a similar argument. The dissent in *Carbone* argued that a town's protection of a single "local monopoly" (the incumbent), 511 U.S. at 413

(Souter, dissenting), was not unconstitutional because, *inter alia*, it was not discrimination "according to geography alone," *id.* at 417, and so "not a discrimination against out-of-state investors as such," *id.* at 418. The Supreme Court instead held that exclusively "favor[ing] a single local proprietor" "just makes the protectionist effect of the ordinance more acute" because, unlike a geographic restriction, the exclusivity "leav[es] no room for investment from outside." *Carbone*, 511 U.S. at 392. The same argument applies here where only owners of local, interconnecting facilities can build out transmission facilities.[13]

2. S.B. 1938 also discriminates against interstate commerce through limitations on a local owner's option to transfer its rights to develop new transmission to a designee. Potential designees are restricted to "another electric utility [with a PUCT certificate] within the same electric power region, coordinating council, [ISO], or power pool or a municipally owned utility." Tex. Util. Code § 37.056(g). Because a potential designee needs a physical presence in Texas to have a PUCT certificate, the law prevents transfers to companies outside of Texas.

Furthermore, the local owner's option under S.B. 1938 to transfer a project is more limited than the scheme in *Fort Gratiot*, which violated the dormant Commerce Clause. In *Fort Gratiot*, Michigan counties could not accept solid waste from outside the county unless the county's solid waste management plan expressly authorized it, which several did. 504 U.S. at 357, 363. The Supreme Court found that exercising this option could reduce "the extent of the discrimination" but had "no relevance" to finding Michigan law discriminated against interstate commerce. *Fort Gratiot*, 504 U.S. at 363 n.4 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437,

[13] The Supreme Court subsequently distinguished the harm to interstate commerce from a local law favoring "a particular private processing facility" as in *Carbone* from one "owned and operated by a state-created public benefit corporation." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007). This exception to *Carbone* for a government-owned-and-operated entity does not appear to be relevant here.

455 (1992)). Unlike *Fort Gratiot*, S.B. 1938 makes gatekeeper the party most interested in reducing competition (rather than a county government), exacerbating the competitive problem.

3. Finally, Texas wrongly claims S.B. 1938 is not discriminatory because many owners of local transmission facilities are themselves subsidiaries of companies headquartered or incorporated outside of Texas. *Id.* at 15. But impermissible discrimination "on the basis of some interstate element," *Wynne*, 135 S. Ct. at 1794, goes beyond a parent company's headquarters or state of incorporation. An "in-state presence requirement," *Heald*, 544 U.S. at 475, also can discriminate against interstate commerce. In *Heald*, the Supreme Court found that conditioning access to a local market on having physical assets in the state raises comparable concerns as requiring that "a firm become a resident to compete on equal terms." *Id.* (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)). Such laws may merit "particular suspicion" when business operations "could more efficiently be performed" without the in-state presence requirement. *Id.* In *Heald*, the Supreme Court found discriminatory a New York statute that permitted out-of-state entities to ship directly to in-state customers only if they established an unnecessary in-state brick-and-mortar distribution operation, including a branch office and warehouse. *Id.* at 474-76. Likewise here, S.B. 1938 discriminates against interstate commerce when it permits only owners of local facilities to build out transmission facilities even when more efficient alternatives are available as is the case for the Hartburg-Sabine project.[14]

II. Texas S.B. 1938 Plausibly Imposes Burdens on Interstate Commerce That Exceed the Burdens Before the U.S. Supreme Court in *Pike*.

Even when a state law is not discriminatory, it can violate the dormant Commerce Clause if the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative

[14] As discussed *supra* p. 9, such discrimination is virtually per se invalid unless Defendants show nondiscriminatory alternatives will prove unworkable. *Infra* section III addresses how purported local benefits appear achievable with reasonable alternatives.

local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). "If a legitimate local purpose is found," its significance will depend on "whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Here, the entry barriers on interstate commerce plausibly exceed the type at issue in *Pike*, and as discussed *infra* in section III, it is not clear from the record why legitimate local benefits cannot be achieved with a lesser impact.

Assessing whether the burdens on interstate commerce are excessive relative to putative local benefits is known as the "*Pike* test." *United Haulers Ass'n, Inc. v. Oneida-Herkimer*, 550 U.S. 330, 346 (2007). Though "[s]tate laws frequently survive this *Pike* scrutiny," that is "not always [the outcome], as in *Pike* itself." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (internal citations omitted). The Supreme Court has "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Heald*, 544 U.S. at 475 (quoting *Pike*, 397 U.S. at 145).

Here, the burden on interstate commerce appears to be a more substantial version of the very kind of harm found in *Pike*. In the statute at issue in *Pike*, all cantaloupes grown in Arizona and offered for sale had to "meet certain standards of wholesomeness and quality, and . . . be packed in standard containers in such a way that the outer layer or exposed portion of the pack does not 'materially misrepresent' the quality of the lot as a whole." *Pike*, 397 U.S. at 142-43. The plaintiff in *Pike*, an Arizona cantaloupe grower, had been shipping uncrated cantaloupe to out-of-state packers. To comply with the state law, the grower would have had to "build and operate an unneeded $200,000 packing plant in the State." *Id.* at 145. Even though the state law may not have had an "express or concealed purpose" to discriminate and did "not impose such rigidity on an entire industry," the Supreme Court found the "incidental consequence" of Arizona's law on the plaintiff to be a constitutionally excessive burden. *Id.* at 145-46.

Texas S.B. 1938 appears more burdensome because NextEra is effectively foreclosed from entering the Texas market, whereas in *Pike*, the plaintiff faced a $200,000 hurdle in the form of an unnecessary packing facility that could be justified with sufficiently high profits from its "exceptionally high quality" cantaloupes. *Id.* at 144. Here, without a direct interconnection or at least holding a certificate within Texas in the same electric power region, a company cannot build, own, or operate a new transmission line.

This kind of burden falls not only on disfavored out-of-state companies, but also on consumers who experience the law's anticompetitive effects. As a result of less competition, the incentives to identify new transmission projects and to develop high-quality, low-cost proposals is reduced. *See, e.g.*, *MISO Transmission Owners*, 819 F.3d at 332-33 ("[B]y 2011 FERC was convinced that competition . . . to build transmission facilities" would produce benefits like "a low bidder" and "incentive to explore the need for a new transmission facility"). With less robust transmission, both in-state and out-of-state consumers may have reduced access to lower cost and more reliable generation. *See, e.g.*, *id.* at 332 (a well-developed regional transmission system can "promote[] competition among the producers of electrical power"). In addition, the higher cost of Texas transmission lines may be passed on to in-state and out-of-state consumers under the regional cost-allocation process. *See* Order No. 1000 at P 622 (explaining cost allocation mechanism). As the Supreme Court has recognized, both in-state and out-of-state consumers can be victims of dormant Commerce Clause violations. *See, e.g.*, *Tracy*, 519 U.S. at 286 (granting Article III standing to "[c]onsumers who suffer this sort of injury").

III. Purported Local Benefits Appear Achievable With Reasonable Alternatives.

If a law discriminates against interstate commerce, "The burden is on the state to show that the discrimination is demonstrably justified" and, "based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable." *Heald*, 544 U.S. at 492-93

(internal quotations and citations omitted). A state law that burdens interstate commerce without discrimination is subject to a similar but less demanding analysis and will "frequently survive" unless the "putative local benefits" clearly exceed the burden imposed on interstate commerce. *Davis*, 553 U.S. at 338-39. *Pike* illustrates that a substantial burden on interstate commerce will outweigh benefits that appear to be "minimal at best." *Pike*, 397 U.S. at 146.

Here, although S.B. 1938's sponsors voiced some goals that appear legitimate and non-protectionist, the purported local benefits appear minimal or at least such that likely can be achieved with alternative, less restrictive policies. For example, the sponsors stated that the Bill "would ensure the geographic continuity of the system in a way that further facilitates reliability," and "will protect the integrity of the electric transmission infrastructure and the way it is developed and built today." Tex. Senate Research Ctr., Bill Analysis for S.B. 1938 (May 29, 2019), https://capitol.texas.gov/tlodocs/86R/analysis/html/SB01938F.htm; *see also* Def.'s Mot. to Dismiss 12-13 ("transmission system reliability is a core purpose of the bill"); *id.* at 17 (limiting competition "protect[s] ratepayers and the stability of the electric grid").

Although reliability and integrity are legitimate goals of electrical regulation, eliminating competition is generally not necessary to achieve them—as the expert industry regulatory agency, FERC, has found with respect to federal ROFRs. Order No. 1000 at PP 329, 342-44. Where an owner of local facilities has distinct advantages, 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," eliminating competition is not required for the incumbent to "highlight its strengths to support transmission project(s) in the regional transmission plan, or in bids to undertake transmission projects in regions that choose to use solicitation processes." Order No.

1000 at P 260. That is, if such advantages exist, they should allow the incumbent to win in a competitive process. Yet the Hartburg-Sabine selection process illustrates why a local presence is not always enough. NEET Midwest, a non-incumbent, won the bid against eleven competitors, including one with assets and personnel "in the project area." Selection Report at 38, 42-43. NEET Midwest prevailed because it was consistently the best or second-best proposal in terms of "cost and design," "project implementation," and "operations and maintenance," Selection Report at 4-5, 7-8. MISO—the operator of the electric grid evaluating alternatives—is responsible for grid reliability and is well-placed to determine which bidder (local or nonlocal, utility or transmission-only company) can best deliver on the project.

Even if the Bill's sponsors identify some legitimate local purposes, Defendants have the burden to show why less restrictive means available to Texas through its authority to regulate "siting, permitting, and construction" are not sufficient to neutrally address these purposes. Order No. 1000 at P 107. In addition, FERC has required that regulated public utility transmission providers create qualification criteria such that a nonlocal transmission company must prove that "it has the necessary financial resources and technical expertise to develop, construct, own, operate and maintain transmission facilities." *Id.* at P 323. Moreover, if necessary, Texas could establish more rigorous criteria and other even-handed regulations to allay concerns about the construction and operation of transmission lines by nonlocal companies.

Lastly, if Defendants cannot justify an excessive burden under the *Pike* test, *a fortiori*, those benefits will not be able to justify the stricter scrutiny that applies to S.B. 1938's discrimination against out-of-state commerce.

IV. *Tracy* Does Not Foreclose Plaintiff's Claim.

Texas wrongly argues that *Tracy* controls the outcome in this case and forecloses Plaintiff's claim, among other reasons, because the Supreme Court in *Tracy* recognized "the

importance of . . . the state's health and safety regulation of the monopoly utility market." Def.'s Mot. to Dismiss 8. Rather, *Tracy* reasoned that "utilities should not be insulated from our contemporary dormant Commerce Clause jurisprudence by formalistic judge-made rules." *Tracy*, 519 U.S. at 291 n.8. Instead, *Tracy* turned on case-specific factors not present here.

At issue in *Tracy* was an Ohio sales tax exemption that applied to natural gas sales by local distribution utilities, but not to sales by independent marketers of natural gas, which competed to serve mainly large industrial customers. Because the utilities' tax exemption applied with equal force in the captive (i.e., non-competitive) market in which only the utilities operated and in the non-captive (i.e., competitive market) between utilities and non-utilities, the Court had to choose which market to give controlling weight in its analysis. Here, the Court does not have to choose which market to give controlling weight in its analysis because S.B. 1938 is unlike the Ohio tax law in *Tracy*. S.B. 1938 only restricts who can build, own, or operate new transmission facilities in Texas—a noncaptive market where local utilities and nonlocal companies compete. Unlike the Ohio sales tax in *Tracy*, S.B. 1938 does not also apply to a "noncompetitive, captive market in which the local utilities alone operate." *Tracy* at 303-04. *Tracy*, therefore, does not control the outcome here.

Even when a state law applies to both a captive and a noncaptive market, *Tracy* acknowledged there was "no a priori answer" to the question of which market receives controlling weight, as the case makes clear that it does not create a broad "public utility" exception to the dormant Commerce Clause. *Id.* at 304.[15] The State's brief in this case does not

[15] *Tracy* did not categorically shield electricity-related regulation from dormant Commerce Clause scrutiny. The Supreme Court has invalidated state regulations that discriminated against or burdened interstate commerce in markets different from, but adjacent to, retail electricity. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (holding that a state law violated the dormant Commerce Clause because it required in-state electricity generators to use a certain

address the case-specific factors that "for present purposes" in *Tracy* gave priority to the captive utility market. *Id.* at 304. *Tracy*'s analysis was driven by the concern that "any decision to treat the [utilities] as similar to the interstate marketers . . . could affect the [utilities'] ability to continue to serve the captive market [i.e., residential and small-business customers] where there is no such competition." *Id.* at 307. This analysis was cautious because "the record before th[e] Court [in *Tracy*] reveal[ed] virtually nothing about the details of th[e] competitive market." *Id.* at 302. Against concerns that the Court might "imperil the delivery by regulated [utilities] of bundled gas to the noncompetitive captive market," *id.* at 304, *Tracy* weighed merely a "possibility of competition" between utilities and non-utilities, *id.* at 302.

In contrast to possible competition in *Tracy*, there is actual competition here as evidenced by the Hartburg-Sabine project. Moreover, given the many state electric markets that operate without a ROFR or similar law, it is difficult to argue that those states have jeopardized the capacity of their utilities to serve retail markets. Rather, there are compelling reasons to believe that competition in transmission development produces important benefits for downstream consumers, including on the facts here. For example, Hartburg-Sabine is a market efficiency project identified by MISO under a FERC Order 1000 regional planning process because it is likely to reduce congestion in the Sabine/Port Arthur area. *NextEra Energy Transmission Midwest, LLC*, 166 FERC at ¶ 61,169 at P 4 (2019). FERC developed these regional planning processes because FERC recognized that local utility monopolies do not always have incentives

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amount of coal mined in-state); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (holding that a state law unconstitutionally required an electric utility to obtain the state utility commission's permission before conveying electricity out-of-state). Given these precedents, which *Tracy* did not touch, *Tracy* cannot be reasonably read to create a broad dormant Commerce Clause exception for public utilities.

to develop these projects independently, Order No. 1000, P 254, and MISO solicits competition for these projects to encourage higher quality and lower cost proposals that bring lower electricity prices for consumers. Indeed, that has happened here. The estimated market benefit-to-cost ratio for Nextera's proposal (2.20) is almost twice what MISO estimated initially (1.35) when MISO selected Hartburg-Sabine as a market efficiency project. Selection Report at 21.

V. FERC Did *Not* Approve or Authorize State Laws Like S.B. 1938

Texas intimates that FERC approved or authorized state laws like S.B. 1938, Def.'s Mot. to Dismiss 16-17, but FERC has not done so. Rather, FERC has acknowledged that state ROFR laws exist but only because "it is appropriate for [the regional authority] to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." *MISO*, 150 FERC ¶ 61,076 at P 25. The Seventh Circuit agreed: "it would be a waste of time for MISO to conduct a protracted competitive bidding and evaluation process when the incumbent transmission company has a [state ROFR]." *MISO Transmission Owners*, 819 F.3d at 336-37.

Although Order 1000 states that it was not preempting state ROFR laws, FERC did not then go on to affirmatively approve such state laws. Order No. 1000 at P 287. 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 Wyoming*, 502 U.S at 458. Texas also implies that Congress authorized state ROFRs under the Federal Power Act. Def.'s Mot. to Dismiss 17. The State relies, however, on the same FPA section (16 U.S.C. § 824) that the *Wyoming* Court reviewed when it concluded that "[o]ur decisions have uniformly subjected [dormant] Commerce Clause cases implicating the Federal Power Act to scrutiny on the merits." 502 U.S. at 458.

Conclusion

This Court should find that NextEra has sufficiently plead that S.B. 1938 violates the dormant Commerce Clause.

Respectfully submitted,

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Dated: September 20, 2019

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CERTIFICATE OF SERVICE

I certify that on September 20, 2019, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties.

September 20, 2019

/s/ Matthew C. Mandelberg
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