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NOT-SO-DORMANT COMMERCE CLAUSE TRANSMITTING TROUBLE FOR MINNESOTA AGENCIES?

[Natural Resource \(/full-blog/category/Natural+Resource\)](#)

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Regarding federally approved transmission lines in the state, Minnesota passed statute §216B.246, which states in subdivision 3(b):

If the incumbent electric transmission owner, or owners, gives notice of intent not to build the electric transmission line, then the commission may determine whether the incumbent electric transmission owner or other entity will build the electric transmission line, taking into consideration issues such as cost, efficiency, reliability, and other factors identified in this chapter.[i]

In essence, this statute offers a right of first refusal to incumbent electric transmission owners to construct and maintain federally approved transmission lines.[ii] LSP Transmission Holdings has sued five members of the Minnesota Public Utilities Commission and the Minnesota Department of Commerce Commissioner, alleging that this statute is anti-competitive and a violation of the Commerce Clause.[iii] A few other states have similar laws in place, so the decision made on this case will likely set an important precedent.[iv]





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In the past, Independent System Operators (ISOs) were established regionally to facilitate these type of projects in a manner that would be cost efficient.[v] Many of their members had contract clauses that afforded them the right of first refusal on projects in their region.[vi] However, in 2011 the FERC responded to this by issuing Order 1000, abrogating the ability of ISOs to continue offering the right of first refusal.[vii] In April 2016, the 7th Circuit upheld Order 1000, even though it was contrary to many ISOs negotiated membership contracts.[viii] A major concern the court had was that these rights were creating monopolies in an unnatural way, squashing those trying to enter the market and likely not being taken at the lowest available bid because of the insufficient bidding process.[ix]

In this case, LSP argued that the Minnesota law is facially discriminatory [AC1] to out-of-state companies, like LSP, and that this discriminatory law interferes with interstate commerce in violation of the Dormant Commerce Clause.[x] This law does not allow non-Minnesota companies to build or maintain transmission lines, unless the incumbent does not want to and the state agrees to it.[xi] Currently, Dormant Commerce Clause cases that limit access to local markets by out-of-staters will only be upheld if they are found to be necessary for an important government purpose.[xii] For example, in *Maine v. Taylor*, a law that prevented out-of-staters from entering the baitfish industry in Maine, was upheld due to the interest in protecting the fragile marine ecology from the potential introduction of parasites and predators in its waters.[xiii] For this law to be upheld, Minnesota will have to successfully argue that despite being facially discriminatory, there is a government purpose that is more important than the promotion of interstate commerce.

[i] Minn. Stat. § 216B.246(3)(b).

[ii] Complaint at 1, *LSP Transmission Holdings, LLC v. Swanson*, No. 0:17-cv-04490-DWF-HB (D. Minn. Sep. 29, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/10/ElectricMN.pdf>.

[iii] Mike Hughlett, *Minnesota Agencies Sued Over Power Law Favoring Home-State Companies*, StarTribune (Oct. 4, 2017, 9:06 PM), <http://www.startribune.com/minnesota-agencies-sued-over-power-law-favoring-home-state-companies/449490513/>.

[iv] *Id.*

[v] *Miso Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016).

[vi] *Id.*

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*

[x] See *Swanson*, No. 0:17-cv-04490-DWF-HB.

[xi] Stat. §216B.246(3)(b).

[xii] Erwin Chemerinsky, *Constitutional Law Principles and Policies* 458 (4th ed. 2011).

[xiii] 477 U.S. 131 (1986).

[AC1]Including “on its face” seems redundant when also using the phrase “facially discriminatory”

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