

Eighth Circuit Upholds Minnesota Incumbent Utilities' Right of First Refusal to Build and Own Transmission Facilities that Connect to their Existing Facilities

by Steven A. Weiler

On March 25, 2020, the United States Court of Appeals for the Eighth Circuit upheld a Minnesota statute granting incumbent electric transmission owners a right of first refusal (ROFR) to construct, own, and maintain electric transmission lines that connect to their existing facilities. LSP Transmission Holdings, LLC (LSP) argued that the Minnesota ROFR not only discriminates against out-of-state transmission developers in favor of in-state utilities, but also places an undue burden on interstate commerce. The Eighth Circuit disagreed and affirmed a lower court decision.

The Federal Power Act vests the Federal Energy Regulatory Commission (FERC) with authority to regulate interstate transmission of electricity and wholesales of electricity, but permits states to retain jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce. In 2011, FERC addressed regional transmission planning in Order No. 1000, a landmark administrative rule, which among other things, required the removal of any federal ROFR from FERC-approved tariffs and agreements. In response, the Midcontinent Independent System Operator, Inc. (MISO), which operates the transmission facilities owned by utilities in Minnesota and neighboring states, removed the federal ROFR from its tariff, but still honored applicable state ROFRs. Unsatisfied, LSP asked FERC to prevent MISO from considering state ROFRs. FERC declined, and LSP's appeal to the Seventh Circuit was unsuccessful.

Against this backdrop, Minnesota enacted Minn. Stat. § 216B.246, subdiv. 2, a state ROFR: "An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner." In a 2017 lawsuit against Minnesota's Public Utilities Commission and Department of Commerce, LSP challenged the constitutionality of Minnesota's ROFR. Specifically, LSP argued that the ROFR violates the dormant Commerce Clause, which forbids states from discriminating against or unduly burdening interstate commerce, even when no federal statute regulates the

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activity. On January 21, 2018, a federal trial court in Minnesota rejected LSP's claim, holding that Minnesota's interest in state regulation of electricity outweighs any ancillary impact on interstate commerce. LSP appealed to the Eighth Circuit. As discussed below, the court concluded that the Minnesota ROFR was neither discriminatory on its face, in purpose, or effect; it also ruled that the ROFR did not result in an undue burden on interstate commerce.

No Facial Discrimination. LSP argued that the Minnesota ROFR awards in-state entities preferential treatment to build new MISO-approved transmission lines in Minnesota. The trial court ruled that the Minnesota ROFR "draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." The Eighth Circuit agreed, noting that Minnesota incumbent transmission owners have headquarters in Iowa, North Dakota, South Dakota, Wisconsin, and Minnesota and, as such, operate facilities in states other than Minnesota.

No Discriminatory Purpose. LSP maintained that the discriminatory purpose of Minnesota's ROFR is buttressed by the statute's legislative history, which reflects a desire by lawmakers to insulate incumbent transmission owners from competition introduced by Order No. 1000. Acknowledging arguments raised by the appellees (Minnesota regulators and utilities), the Eighth Circuit concluded that "Minnesota's ROFR law is not primarily aimed at protecting in-state interests, but rather at maintaining an electricity regulatory system to provide Minnesota consumers with adequate and reliable services at reasonable rates. In this regard, the appellate court noted that Minnesota's power to regulate "inherently involves siting, permitting, and constructing transmission lines."

No Discriminatory Effect. A law discriminates in effect if it favors in-state economic interests over out-of-state interests. LSP claimed that the Minnesota ROFR results in disproportionate and discriminatory effects because nearly 70% of Minnesota's 16 incumbent transmission owners are Minnesota-based. The Eighth Circuit rejected the claim, instead noting that states have traditionally regulated utilities, including constructing needed transmission lines: "Minnesota's decision to allow entities other than utilities, such as independent transmission companies, to qualify as incumbents does not show an intent to favor in-state interests."

No Undue Burden. After resolving the discrimination issues, the Eighth Circuit turned to LSP's claim the Minnesota ROFR placed an undue burden on interstate commerce because (1) LSP cannot compete for Minnesota's MISO-approved transmission projects and (2) Order No. 1000 would be effectively abrogated, were all states to adopt an ROFR. The court found these arguments unavailing, reasoning that the Minnesota ROFR was enacted to eliminate regulatory uncertainty resulting from Order No. 1000 and to preserve the status quo, which is "within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy." The Eighth Circuit admitted that Minnesota's ROFR could affect the ability of LSP to build MISO-approved transmission lines in Minnesota, but noted, "from an aggregate standpoint, this record

does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely.” At bottom, the court determined that the burden imposed by Minnesota’s ROFR is not excessive when weighed against the state’s legitimate state interests in regulating the electric industry.