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PUBLIC UTILITIES - MINNESOTA

LSP Transmission Holdings, LLC v. Lange

United States District Court, D. Minnesota - June 21, 2018 - F.Supp.3d - 2018 WL 3075976

After proposed 345-kilovolt intrastate electric transmission line was approved and two incumbent electric utilities gave formal notice of their intent to construct line, out-of-state transmission developer brought action against the Commissioners of the Minnesota Public Utilities Commission (PUC) and the Minnesota Department of Commerce, challenging, under the dormant Commerce Clause, the constitutionality of a Minnesota statute granting incumbent electric utilities a right of first refusal (ROFR) to build and own electric transmission lines that connect to their existing facilities.

Incumbent utilities intervened as defendants, and defendants filed motions to dismiss for failure to state a claim.

The District Court held that:

- The Supreme Court's decision in *General Motors Corp. v. Tracy*, 117 S.Ct. 811, foreclosed plaintiff's allegation that the Minnesota statute overtly discriminated against out-of-state transmission developers;
- Even if plaintiff's claim of overt discrimination was not foreclosed by Tracy, the Minnesota statute did not discriminate against out-of-state entities; and
- The Minnesota statute did not violate the dormant Commerce Clause under the *Pike* balancing test, 90 S.Ct. 844.

Supreme Court's decision in *General Motors Corp. v. Tracy*, 117 S.Ct. 811, foreclosed out-of-state transmission developer's allegation that Minnesota statute granting incumbent electric utilities a right of first refusal (ROFR) to build and own electric transmission lines that connect to their existing facilities overtly discriminated against out-of-state entities in violation of dormant Commerce Clause; many owners of existing transmission facilities were regulated public utilities that served captive markets and had monopolies with respect to sale of electricity to consumers though local Minnesota utilities and out-of-state entities may have competed for right to build transmission lines, under Tracy Minnesota was entitled to give greater weight to captive market and local utilities' singular role in serving it, so as to avoid service disruption and allow for provision of reliable electricity supply, and economic consequences of court intervening to strike down statute were unclear.

Minnesota statute granting incumbent electric utilities a right of first refusal (ROFR) to build and own electric transmission lines that connect to their existing facilities did not overtly discriminate against out-of-state entities in violation of the dormant Commerce Clause; although it was undisputed that statute granted a preference to "incumbent electric transmission owners," that preference did not discriminate against out-of-state entities, but instead afforded companies whose facilities would connect to new transmission lines the first chance to build the new line, preference did not apply to all incumbent owners, but only to those directly connected to proposed line, whether in-state or out-of-state, thus drawing neutral distinction between existing owners whose facilities

would connect to new line and all other entities, regardless of location, and of 16 entities listed in complaint that would qualify as incumbents, five were headquartered outside of Minnesota.

Minnesota statute granting incumbent electric utilities a right of first refusal (ROFR) to build and own electric transmission lines that connect to their existing facilities did not violate the dormant Commerce Clause under the *Pike* balancing test, 90 S.Ct. 844; Minnesota demonstrated strong interest in enacting the statute and various resulting benefits, such as providing state's retail consumers of natural gas and electric service with adequate and reliable services at reasonable rates, statute did not provide preference to in-state companies but, instead, gave ROFR to companies, whether in-state or out-of-state, whose facilities would connect to proposed transmission line, such that any incidental effects on interstate commerce caused by ROFR were insufficient to outweigh the significant local interests, and there was no showing that statute undermined a compelling need for national uniformity.