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PUBLIC UTILITIES - MINNESOTA

LSP Transmission Holdings, LLC v. Sieben

United States Court of Appeals, Eighth Circuit - March 25, 2020 - F.3d - 2020 WL 1443533

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, alleging Minnesota statute granting incumbent electric utilities a right of first refusal to build and own electric transmission lines that connected to their existing facilities violated the dormant Commerce Clause.

Incumbent utilities intervened as defendants. The United States District Court granted defendants' motions to dismiss for failure to state a claim. Developer appealed.

The Court of Appeals held that:

- Statute did not facially discriminate against out-of-state entities;
- Statute did not have purpose of discriminating against out-of-state entities;
- Statute did not have effect of discriminating against out-of-state entities; and
- Statute did not violate dormant Commerce Clause under *Pike* balancing test, 90 S.Ct. 844.

Minnesota statute granting incumbent electric utilities a right of first refusal to build and own electric transmission lines that connected to their existing facilities did not facially discriminate against out-of-state entities, as would have violated dormant Commerce Clause; Minnesota's preference was for electric transmission owners who had existing facilities, regardless of whether they were Minnesota-based entities or based out-of-state, and incumbent utilities in Minnesota included entities headquartered in Minnesota and four other states.

Minnesota statute granting incumbent electric utilities a right of first refusal to build and own electric transmission lines that connected to their existing facilities did not have purpose of discriminating against out-of-state entities, as would have violated dormant Commerce Clause; statute was not primarily aimed at protecting in-state interests but at maintaining a regulatory system that had worked and provided adequate and reliable services at reasonable rates to Minnesota residents, state regulation inherently involved siting, permitting, and constructing transmission lines, and Federal Energy Regulatory Commission (FERC) left such control to state authority and had not deemed that state right of first refusal laws used highly ineffective means to accomplish state interests.

Minnesota statute granting incumbent electric utilities right of first refusal to build and own electric transmission lines that connected to their existing facilities did not have effect of discriminating against out-of-state entities, as would have violated dormant Commerce Clause; although many incumbent utilities that possessed right of first refusal under statute were headquartered in Minnesota and controlled most of state's transmission lines, Minnesota allowed entities other than utilities, such as independent transmission companies, to qualify as incumbents, and if entity did not already own existing transmission facility in Minnesota, then entity, whether from Minnesota or out

of state, faced incidental hurdle of seeking approval and gaining transmission facilities in Minnesota.

Burden imposed by Minnesota statute granting incumbent electric utilities right of first refusal to build and own electric transmission lines that connected to their existing facilities was not clearly excessive in relation to Minnesota's legitimate interests in regulating its electric industry and maintaining its historically-proven status quo for constructing and maintaining electric transmission lines, and thus statute did not violate dormant Commerce Clause under *Pike* balancing test, 90 S.Ct. 844; the states had authority over location and construction of electrical transmission lines, incumbents were not obligated to exercise right of first refusal, and there was no evidence cumulative effect of state right of first refusal laws would eliminate competition in the market completely