

KANSAS OFFICE *of*
REVISOR *of* STATUTES

LEGISLATURE *of* THE STATE *of* KANSAS
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MEMORANDUM

To: Senate Committee on Utilities
From: Office of Revisor of Statutes
Date: February 2, 2023
Subject: Bill Brief - Senate Bill 68

Senate Bill 68 would enact a state right of first refusal (ROFR) for incumbent electric transmission owners to construct, upgrade, own and maintain an electric transmission line that has been approved for construction in a transmission plan of a regional transmission organization (RTO). An incumbent electric transmission owner could exercise the ROFR if the proposed electric transmission line would interconnect with facilities that are owned or proposed to be constructed by such incumbent electric transmission owner.

If the electric transmission line would interconnect with facilities owned by two or more incumbent electric transmission owners, the exercise of the ROFR would be determined pursuant to mutual agreement between the incumbent electric transmission owners.

To exercise the ROFR, an incumbent electric transmission owner would be required to provide notice to the RTO of whether the incumbent electric transmission owner, or an affiliate or subsidiary of such owner, intends to construct, upgrade, own and maintain the electric transmission line. An incumbent would have to provide notice within the timeframe prescribed by the RTO for such transmission line project. SB 68 would require the incumbent electric transmission owner to seek or obtain a certificate of convenience and necessity from the Kansas Corporation Commission for the construction of such transmission line within 18 months following the submission of such notice.

Subsection (d) of SB 68 would authorize any other electric transmission entity to construct, own and maintain an electric transmission line if the incumbent electric transmission owner does not provide notice indicating that the incumbent transmission owner, or an affiliate or subsidiary of such owner intends to exercise the ROFR. Additionally, any other electric transmission entity would be authorized to construct the line if the incumbent electric

transmission owner is deemed by the RTO to not be qualified for the project or fails to obtain a certificate of convenience and necessity from the KCC.

Subsection (e) of SB 68 preserves an incumbent electric transmission owner's existing property rights including, but not limited to, the right of an incumbent electric transmission owner to assign its rights to construct, upgrade, own and maintain an electric transmission line as described in SB 68.

Subsection (f) defines the following terms:

- "Electric transmission line" means any line or extension of a line in this state with a rating of greater than 100 kilovolts or any related transmission facilities, substations and controls.
- "Incumbent electric transmission owner" means every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter owns, controls, operates or manages, except for private use, any equipment or plant, or any part thereof, for the transmission, delivery or furnishing of electricity or electric power in this state and is approved by the regional transmission organization as qualified to provide proposals to construct, upgrade, own and maintain electric transmission lines subject to the competitive solicitations conducted by the regional transmission organization.
- "Regional transmission organization" means the organization authorized by the federal energy regulatory commission to conduct regional transmission planning and provide notice of requirements for electric transmission line construction in the region that includes the state of Kansas.
- "Transmission plan" means a transmission plan adopted by the entity with authority for transmission planning in a regional transmission organization recognized by the federal energy regulatory commission.

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SUMMARY OF STATE ROFR LITIGATION

MINNESOTA

Case:	<i>LSP Transmission Holdings, LLC v. Sieben</i> , 954 F.3d 1018, 1022 (8th Cir. 2020)
Court:	U.S. Court of Appeals, 8th Circuit On Appeal from U.S. District Court for the District of Minnesota
Parties:	Plaintiffs: LSP Transmission Holdings, LLC Defendants: Minnesota Public Utilities Commission; MN Department of Commerce; ITC Midwest, LLC; Northern States Power Company, dba Xcel Energy.
Facts:	<p>In 2012, in response to FERC order 1000, Minnesota enacted a new law that gave incumbent electric transmission owners a ROFR to construct, own, and maintain an electric transmission line project approved for construction in a federally registered planning authority.¹</p> <p>MISO then incorporated Minnesota's ROFR into the MISO transmission tariff. LSP challenged this decision and FERC ruled that MISO may consider state ROFR laws in its regional transmission planning process.</p> <p>Incumbents, Xcel Energy and ITC Midwest exercised their ROFR to construct a regionally planned 40-mile, 345 kV line.</p>
Issue:	Does the Minnesota ROFR law violate the Commerce Clause of the U.S. Constitution? ²

¹ M.S.A. §216B.246.

² U.S. Const. art I, §8, cl. 3.

Legal

Test:

Dormant Commerce Clause

- If a law overtly discriminates against interstate commerce, the law is unconstitutional unless the state can demonstrate 'under rigorous scrutiny' that it has no other means to advance the legitimate local interest.
- If a law does not overtly discriminate, the law is unconstitutional if it has an undue burden on interstate commerce that is clearly excessive in relation to the putative local benefits. (*Pike* balancing test).
-

Held:

The law does not overtly discriminate against out-of-state commerce.

1. The law does not facially discriminate against out-of-state interests.
 - Minnesota's ROFR statute draws a neutral distinction between existing transmission owners and all other entities, regardless of whether an entity is based or incorporated in-state or out-of-state.
2. The law does not have a discriminatory purpose.
 - Legislative testimony reflected that the law was not primarily aimed at protecting in-state interests but at maintaining the state's electric transmission regulatory system to provides adequate and reliable services at reasonable rates to residents. State police power includes the regulation of utilities through siting, permitting, and construction of transmission lines and FERC authorized such state authority.
3. The law does not have a discriminatory effect by favoring in-state economic interests over out-of-state interests.
 - The disproportionate transmission ownership by Minnesota-based entities does not mean in-state interests are necessarily favored. Any entity, whether in-state or out-of-state can qualify as an incumbent if it owns facilities that connect to the proposed line. Additionally, in-state entities will be limited by the ROFR if such entities don't have connecting facilities. Also, the law still allows a non-incumbent to construct the line if the incumbent does not exercise the ROFR.

The law does not place an excessive burden on commerce in relation to the putative local benefits (*Pike* balancing test).

1. State's Interest
 - Minnesota enacted its ROFR law, in part, in response to the uncertainty produced by FERC's Order 1000 "to preserve the [state's] historically-proven status quo for the construction and maintenance of electric transmission lines." This goal is within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy.
2. Burden on Commerce
 - Minnesota's ROFR law could affect LSP's ability to build MISO-approved transmission lines in Minnesota. But from an aggregate standpoint, this record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely. Incumbents are not obligated to exercise their ROFRs. The burden imposed by Minnesota's ROFR law is not clearly excessive in relation to Minnesota's legitimate state interests in regulating its electric industry and maintaining the status quo.

Appeal

On March 1, 2021, the United States Supreme Court denied petition for writ of certiorari.

TEXAS

Case:	<i>NextEra Energy Cap. Holdings, Inc. v. Lake</i> , 48 F.4th 306, 309 (5th Cir. 2022)
Court:	U.S. Court of Appeals, 5 th Circuit On appeal from the U.S. District Court for the Western District of Texas
Parties:	Plaintiffs: NextEra Energy Capital Holdings, Inc. Defendants: Public Utilities Commission of Texas
Facts:	<p>In 2017, NextEra entered into an asset purchase agreement for transmission lines in the SPP territory of Texas. NextEra sought the transfer and acquisition of the certificate of convenience from the public utilities commission to effectuate the sale.</p> <p>In November 2018, NextEra Energy was awarded the bid to construct a regional transmission project in MISO territory.</p> <p>In May 2019, before the public utilities commission issued any certificate of convenience for either project, the state legislature enacted a ROFR law that prohibited the public utilities commission of Texas from granting a certificate of convenience to any electric transmission owner who does not have facilities that would directly interconnect with the proposed transmission facility. The law also provided that if the incumbent chooses not to exercise its ROFR, the incumbent could designate another electric utility operating within the region to construct the line.³</p>
Legal Issue:	<p>Does the Texas law violate the Commerce Clause of the U.S. Constitution?⁴</p> <p>Does the law violate the Contacts Clause of the U.S. Constitution?⁵</p>
Legal Test:	<p>Dormant Commerce Clause</p> <ul style="list-style-type: none">• If a law overtly discriminates against interstate commerce, the law is unconstitutional unless the state can demonstrate 'under rigorous scrutiny' that it has no other means to advance the legitimate local interest.• If a law does not overtly discriminate, the law is unconstitutional if it has an undue burden on interstate commerce that is clearly excessive in relation to the putative local benefits. (<i>Pike</i> balancing test).

³ Tex. Util. Code § 37.056.

⁴ U.S. Const. art I, §8, cl. 3.

⁵ U.S. Const. Art. I, §10.

Held: The Texas law overtly discriminates against interstate commerce. Remanded for consideration of whether Texas has no other means to advance the legitimate local purpose.

- Overt discrimination against out-of-state interests can still occur even if companies are based or incorporated in other states. The court noted that only the 8th circuit in *LSP Transmission Holdings* looked to where a company was incorporated to determine whether a law discriminates against out-of-state interests.
- What matters instead is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas. SB 1938 is a local-presence requirement frozen in place. Only in Texas do nonincumbents like NextEra face a lifetime ban on building lines for interstate grids in the state.
- Limiting competition based on the local foothold of a business is the state protectionism that the Commerce Clause guards against.

NextEra also raises plausible allegations that the law has a discriminatory purpose and effect. Remanded for consideration of fact-dependent inquiry into the purpose and effect claims.

The law does not violate the Contracts Clause. Parties contract with a reasonable expectation of potential regulation, especially in highly regulated industries. The contracts were not impaired because the contracts required a certificate of convenience to be issued before the establishment of a concrete, vested contractual right.

Appeal: Petition for certiorari docketed with the U.S. Supreme Court.

IOWA

Case:	<i>LS Power Midcontinent, LLC v. State</i> , No. 21-0696, 2022 WL 2553177, (Iowa Ct. App. July 8, 2022)
Court:	Iowa Court of Appeals On Appeal from Iowa State District Court
Parties:	Plaintiffs: LS Power Midcontinent, LLC; Southwest Transmission, LLC Defendants: State of Iowa, Iowa Utilities Board Intervenors: Midamerica Energy Company; ITC Midwest, LLC
Facts:	In 2020, the Iowa legislature passed H.F. 2643, an omnibus appropriations bill which included a new law that gave incumbent electric transmission owners a ROFR to construct, own and maintain a transmission line project approved for construction by a regional transmission organization. ⁶
Legal Issues:	Do the plaintiffs have standing to assert the following challenges: <ul style="list-style-type: none">• Does the enactment of the ROFR statute in an appropriations bill violate the Iowa constitution's requirement that bills contain one subject?• Does the enactment of the ROFR statute violate the equal protection and privilege and immunities clauses of the Iowa constitution?
Legal Test:	In Iowa, to have standing a party must: <ul style="list-style-type: none">• Have a specific personal or legal interest in the litigation; and• Be injuriously affected.
Held:	Plaintiffs do not have standing. Since plaintiffs do not have standing, the court will not consider the merits of the claims. LSP may still have a right to raise some of the claims after being injuriously affected. Additionally, standing cannot be bypassed to allow a constitutional single-subject claim to progress. The constitutional single subject claim will thereafter be foreclosed under the Iowa Supreme Court's <i>Mabry</i> case which held constitutional defects in the title or subject matter are cured upon codification of the statute.

⁶ I.C.A. § 478.16.