CROSSED WIRES AND SPLIT CIRCUITS: TRANSMISSION RIGHTS OF FIRST REFUSAL

by Alessandra Papa

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As climate change accelerates and countries adopt more policies to address it, it is clear that economies must rely less on fossil fuels.[1] We have already seen significant growth in the renewable energy sector, and more and more technology is electrifying rather than continuing to use fossil fuel—cars and stoves, for example.[2] As population growth and increased electrification rapidly raise demand for power, U.S. electric grids are struggling to keep pace, and the need for more transmission capacity is pressing.[3] To reach net-zero carbon emissions in the United States by 2050—a goal adopted by the United Nations—we would need to expand current transmission capacity by two to five times by 2050,[4] focusing especially on physically delivering energy from remote solar and wind farms to the load centers where it is needed most.[5] If that were not ambitious enough, the Joseph Biden Administration has set a goal of reaching carbon-free electricity by 2035.[6]

In addition to building transmission lines in new locations like rural wind farm sites, we also must address problems like congestion and line losses within the current footprint of the grid. These transmission constraints do not just threaten grid reliability—they also contribute to higher emissions in the energy sector. Line losses mean that a power generator must produce more than 1 kilowatt (kW) of electricity in order to deliver 1 kW to consumers, requiring power plants to produce more energy (and accompanying emissions) than is actually demanded.[7] In 2016, transmission and distribution losses accounted for a 6% reduction in supply compared to what was generated.[8] Thus, a more efficient grid would benefit the environment by decreasing the need for production, even if demand were projected to stay the same in the future.

Having established the dire need for transmission buildout in the United States, let us turn to the jurisdictional complexities surrounding it. The U.S. Congress has delegated its interstate commerce authority to the Federal Energy Regulatory Commission (FERC) to regulate interstate transmission rates.[9] Meanwhile, states regulate intrastate transmission rates.[10] What is perhaps surprising, though, is the fact that states generally have authority over the siting and construction of interstate transmission lines.[11] This complex division of jurisdiction means that states have a certain level of control over the future of interstate transmission, which can (and has) led to questions of exactly where a state's authority ends.

Some states have tested this boundary more than others—with mixed results. This Comment sets out to analyze recent challenges to Minnesota and Texas laws that have led to a current circuit split as to the constitutionality of state restrictions on transmission buildout. It begins by exploring how rights of first refusal (ROFRs) affect competition in the interstate transmission market. Second, it summarizes FERC's earlier shift away from the ROFR model and some states' attempts to reconstruct it. Third, it sets out the basis of the challenges in both the U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of Appeals for the Fifth Circuit—the dormant Commerce Clause (DCC). Next, it examines the Eighth and Fifth Circuit decisions in turn, summarizing each court's version of the DCC analysis. It then compares the two decisions, finding the Fifth Circuit's analysis fundamentally more convincing. Last, it considers the reasoning behind FERC's move toward greater competition, and urges the regulator to fortify that stance with an even stricter rule against ROFRs.

1. United Nations, *Renewable Energy—Powering a Safer Future*, https://www.un.org/en/climatechange/raising-ambition/renewable-energy (last visited Mar. 14, 2023).
2. Saul Griffith, *From Homes to Cars, It's Now Time to Electrify Everything*, Yale Env't 360 (Oct. 19, 2021), https://e360.yale.edu/features/from-homes-to-cars-its-now-time-to-electrify-everything.
3. U.S. Energy Information Administration, *Electricity Explained: Electricity Is Delivered to Consumers Through a Complex Network*, https://www.eia.gov/energyexplained/electricity/delivery-to-consumers.php (last reviewed Aug. 11, 2022).
4. Eric Larson et al., Princeton University, Net-Zero America: Potential Pathways, Infrastructure, and Impacts: Final Report Summary 17 (2021), https://netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20(29Oct2021).pdf.
5. *Id.* at 76.
6. U.S. Department of Energy, Comment Letter on Advanced Notice of Proposed Rulemaking on Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection (Oct. 12, 2021), https://elibrary.ferc.gov/eLibrary/filedownload?fileid=1460C8B3-E842-C0B2-9DCA-7C7693800000.
7. Kavita Surana & Sarah M. Jordaan, *The Climate Mitigation Opportunity Behind Global Power Transmission and Distribution*, 9 Nature Climate Change 660 (2019).
8. *Id.*
9. 16 U.S.C. §824(b)(1) (2015).
10. *Id.*
11. *Id.* That is, except when they do not. There are certain situations where FERC retains authority to issue permits for the construction of certain interstate transmission projects, such as in National Interest Electric Transmission Corridors. *Id.* §824p.

I. How ROFRs Amp Up Incumbents' Power

Because extensive transmission infrastructure is so expensive and complicated to build, it is treated as a natural monopoly. In exchange for exclusive territories and the benefits of monopoly economics, FERC and state agencies regulate the rates that transmission companies charge to make sure they are just and reasonable.[12] Even in states like Texas that have adopted competition in retail sales of electricity, transmission remains a regulated monopoly.[13]

Whether FERC or state agencies regulate transmission rates, utilities may include reasonable investment costs in their ratemaking procedures and recover those costs from ratepayers.[14] This creates an incentive for monopoly transmission companies to invest—or perhaps overinvest—in infrastructure, because they will be allowed to recover those expenses, plus a reasonable rate of return, through the rates they charge customers. This is especially so when the proposed project is within the monopoly's exclusive service area, where they have a captive market and many ratepayers to spread the costs over.

A ROFR is a tool regulators can use to incentivize transmission buildout. Regional transmission organizations (RTOs) around the country plan what transmission buildout is needed for grid stability and to accommodate new generation in the interconnection queue. When a ROFR is in place, the incumbent transmission utility gets first dibs to build and own any transmission project the RTO proposes within their service territory.[15] If the incumbent decides to pass, the project would then be opened up to competitive bidding.[16] When there is no ROFR in place, the project is instead open to competition from the beginning, and any transmission company can submit a bid to the RTO to build and own the project.[17]

Incumbent transmission utilities generally favor the ROFR model; it gives them an opportunity to earn a return on investment without obligating them to take on the project or requiring them to first craft a bid that would be able to compete against other would-be market entrants. Utilities might offer several other, more palatable, explanations, such as that transmission systems are complex and can be administered most effectively and efficiently when controlled by a minimum number of entities—especially ones who are already familiar with location-specific technical aspects.[18] Additionally, they might say a successful grid expansion project requires strong communication that decentralized project coordination would simply struggle to achieve.[19] From an economic standpoint, they could harken back to the very reasons transmission has been treated as a natural monopoly in the first place—a risk of redundant infrastructure, loss of the benefits of economies of scale, potential technological incompatibility—all of which support continuation of the monopoly that has succeeded thus far.[20] With billions of dollars' worth of transmission projects likely to be approved in the next decade, utilities have every incentive to push for ROFRs.[21]

On the other hand, consumer advocates tend to disfavor ROFRs, arguing that monopoly power in transmission has and will continue to encourage utilities to overinvest in capital projects since they know they can recover the costs, plus profit, from ratepayers.[22] Not only does this system lack the transparency that would arise from the bidding process, it allows incumbent utilities' discretion in investment to go unchecked, leading to perhaps artificially high prices for ratepayers.[23] They might posit that a competitive system leads to the lowest cost to consumers and ensures that plans for buildout are organized and coordinated throughout the region.

II. Order 1000—FERC's Crown Joule or Just Fool's Gold?

While the need for additional transmission is obvious, the lack of investment may signal a lack of incentive. Transmission infrastructure is expensive, and highly complicated and time-consuming from a regulatory perspective; who would want to go through the trouble unless they were confident they would recoup the cost and then some? FERC has attempted to clear the way for investors by removing at least some uncertainty. Perhaps responding to a fear from utilities that their cost allocation would be found invalid and thus leave them with no way to recover their investment, FERC promulgated methods for allocating the costs of transmission projects across ratepayers.[24] This 2011 rule, dubbed Order 1000, provided guidelines for utilities and RTOs to consider in allocating the cost of new transmis-

12. *Id.* §824e(a).
13. Lynne Kiesling & Michael Giberson, Conservative Texans for Energy Innovation, Electric Competition in Texas: A Successful Model to Guide the Future (2020), https://www.conservativetexansforenergyinnovation.org/research/.
14. *See* Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679 (1923).
15. Josiah Neeley, *Right of First Refusal Laws for Electric Transmission Are Anti-Competitive in Interstate Commerce*, R St. (June 24, 2021), https://www.rstreet.org/2021/06/24/right-of-first-refusal-laws-for-electric-transmission-are-anti-competitive-in-interstate-commerce/.
16. *Id.*
17. *Id.*
18. Helen Kemp, *Revisiting FERC Order No. 1000 Should Maximize Investment in Regional Transmission Infrastructure*, Lewis & Clark L. Sch.: Env't, Nat. Res. & Energy L. Blog (Jan. 13, 2022), https://law.lclark.edu/_ingredients/templates/details/blogs.php?id=178.
19. *Id.*
20. *Id.*
21. In MISO alone, $100 billion in transmission projects could be approved this decade. Jeffrey Tomich, *Utilities' Push to Extend Monopolies May Shape Grid's Future*, EnergyWire (Mar. 15, 2023), https://subscriber.politicopro.com/article/eenews/2023/03/15/utlities-push-to-extend-monopolies-may-shape-grids-future-00086119.
22. *See Coalition Pushes Congress to Support Competition, Oppose Monopolies on Electric Transmission Projects*, Energy Choice Coal. (Aug. 6, 2021), https://www.energychoicecoalition.org/headlines/2021/8/6/coalition-pushes-congress-to-support-competition-oppose-monopolies-on-electric-transmission-projects.
23. *See id.*
24. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842 (Aug. 11, 2011) (Order No. 1000).

sion projects; for example, requiring that the costs ratepayers pay must be "roughly commensurate" with the benefit they receive.[25] In addition to addressing the cost-allocation problem, and more importantly for our purposes, Order 1000 ended the federal ROFR for incumbent transmission providers with respect to new transmission projects selected through the regional planning process.[26]

Before Order 1000, FERC had offered a federal ROFR for transmission lines connecting to an incumbent's existing facilities.[27] FERC's explanation for ending the federal ROFR through Order 1000 was that competition in transmission expansion would ensure just and reasonable interstate transmission rates—one of FERC's foremost duties.[28] The Commission reasoned that the federal ROFR had created a barrier to entry that discouraged nonincumbent developers from proposing regional solutions that might be more efficient or cost effective than what the incumbent would offer.[29] Further, the lack of competition and ensuing opportunity to act in their own self-interest had given incumbent utilities the opportunity to artificially charge consumers more than would be necessary in a competitive market.[30]

Order 1000 did not completely vitiate the federal ROFR; incumbents could continue to exercise their federal right when making upgrades to existing facilities.[31] This encouraged incumbents to continue investing in local projects where they would undergo less scrutiny and more certainly recover their investment from ratepayers, while avoiding regional-scale buildout.[32] Additionally, Order 1000 stated that it was not "intended to limit, preempt, or otherwise affect state or local laws or regulations," leaving open the opportunity for states to adopt their own ROFRs.[33]

Ultimately, Order 1000 has seen mixed results.[34] Even though public utility transmission providers were required to participate in regional planning, regions differ significantly in the extent to which that planning has led to actual transmission development.[35] The proportion of nonincumbents whose bids were ultimately selected has also varied greatly among various regions.[36]

Utilities have criticized the end of the federal ROFR, pointing out that it has not produced the benefits it intended—namely an increase in regional transmission facilities.[37] They argue that the barriers of complexity and cost imposed by a competitive bidding process have hindered buildout, even at a time when the need for transmission investment is urgent.[38] Meanwhile others, such as market monitors and consumer advocacy groups, have argued that Order 1000 should have gone further by requiring competition in even local transmission planning, so utilities would no longer remain focused on local projects.[39]

Amidst the imbroglio of legal challenges to Order 1000 from both utilities and consumer groups, several state legislatures huddled to consider their options. In the time since Order 1000 essentially ended the federal ROFR, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas have enacted state ROFR statutes to apply to intrastate transmission buildout.[40] After witnessing the fervor over a change in federal ROFR laws, perhaps these states should have anticipated an uproar in response to their own changes.

III. Watts Up With the DCC?

The Commerce Clause of the U.S. Constitution states that "Congress shall have Power . . . to regulate Commerce

25. *Id.*
26. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection, 87 Fed. Reg. 26504, 26561 (May 4, 2022). Order 1000 defined "nonincumbent" as a "transmission developer who does not have a retail distribution footprint" or utility transmission provider that would be building transmission facilities outside its existing retail distribution territory. *Id.*
27. Brief for the United States of America as Amicus Curiae in Support of Neither Party, Vacatur, and Remand at 2, LSP Transmission Holdings, LLC v. Sieben, 954 F.3d 1018 (8th Cir. 2020) (No. 0:17-cv-04490-DWF).
28. *Coalition Pushes Congress to Support Competition, Oppose Monopolies on Electric Transmission Projects*, *supra* note 22.
29. 87 Fed. Reg. at 26562.
30. *Id.*
31. *Id.* at 26562-63.
32. *Id.*; Kemp, *supra* note 18.
33. Order No. 1000, 76 Fed. Reg. 49842, 49891 (Aug. 11, 2011).
34. While removal of the federal ROFR has not quite been successful in actually producing buildout, it is important to note that several major transmission projects have seen huge success without using a ROFR. Foremost among them is Texas' Competitive Renewable Energy Zone (CREZ) transmission investment project. This $7,000,000,000 project consisted of 3,500 miles of high-voltage transmission lines that facilitated ambitious state renewable energy goals and enhanced grid resiliency in some load centers. Powering Texas, Transmission and CREZ Fact Sheet 1 (2018), https://www.poweruptexas.org/wp-content/uploads/2018/12/Transmission-and-CREZ-Fact-Sheet.pdf. "CREZ is considered a significant infrastructure success story . . . due in large part to using a competitive process to select the transmission companies to build the new lines." Barry Smitherman, *Order 1000 Should Remain a Priority for FERC*, Util. Dive (May 9, 2018), https://www.utilitydive.com/news/order-1000-should-remain-a-priority-for-ferc/522989/. Nonincumbent transmission companies were selected through a competitive bidding process and ultimately built significant sections of CREZ, "on time and on budget." *Id.*

    This widely heralded success story illustrates that competition in bidding for large-scale transmission projects can and has worked to achieve efficient, cost-competitive, resilient grid infrastructure. New York's AC Transmission Public Policy Project, which allowed nonincumbents to use existing utility rights-of-way, serves as another example of the successful use of competitive bidding. Johannes P. Pfeifenberger et al., Brattle Group, Cost Savings Offered by Competition in Electric Transmission 21 (2019), https://www.brattle.com/wp-content/uploads/2021/05/16726_cost_savings_offered_by_competition_in_electric_transmission.pdf.
35. 87 Fed. Reg. at 26563.
36. *Id.*
37. *Id.* at 26563-64.
38. *Id.*
39. *Id.* Vanderbilt energy law professor Jim Rossi summarizes a similar sentiment: "I think the interstate regional transmission expansion process will be slowed down significantly [if states keep enacting ROFRs]. . . . [W]e're going to have more in-state lines and more in-state lines that are at smaller scales than necessary to effectively modernize the interstate grid." Tomich, *supra* note 21.
40. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 314, 52 ELR 20103 (5th Cir. 2022); *Mississippi Senate Bill 2341*, LegiScan, https://legiscan.com/MS/bill/SB2341/2023 (last visited Mar. 23, 2023). Mississippi's ROFR was signed into law on March 6, and several states, including Kansas, Missouri, Montana, and Oklahoma, have also introduced state ROFR legislation this year. *Id.*; Tomich, *supra* note 21. Iowa's 2020 ROFR was placed under a temporary injunction by the Iowa Supreme Court on March 24, following a challenge on state constitutional grounds. Jeffrey Tomich, *Iowa High Court Suspends Anti-Competitive Transmission Law*, EnergyWire (Mar. 27, 2023, 7:11 AM), https://subscriber.politicopro.com/article/eenews/2023/03/27/iowa-high-court-suspends-anti-competitive-transmission-law-00088806.

. . . among the several States."[41] In addition to being an affirmative grant of power to Congress, it serves as a reservation of power from the states, disallowing them from "unjustifiably [discriminating] against or burden[ing] the interstate flow of articles of commerce."[42] This conception of a negative grant of power to the states is known as the "dormant Commerce Clause." Under the DCC, states may not discriminate against or burden out-of-state economic interests in favor of in-state interests.[43] Laws that are discriminatory against out-of-state interests on their face are most often invalid under the Constitution.[44] Further, if a state law is discriminatory in its intent or has the effect of extraterritorial regulation of commerce, it may be held invalid as well.[45]

When the state law in question is not discriminatory, which is to say it does not treat in-state and out-of-state interests differently, it may still have incidental effects on interstate commerce.[46] If this is the case, the law will be held valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[47] This *Pike* balancing test, named after the case in which it was articulated, examines whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,"[48] as well as the burdens it imposes on interstate commerce. This notion that state protectionism should be limited in the interest of cooperative federalism has roots as deep as the Federalist Papers.[49]

Challenges under the DCC often arise when there is a gap in federal regulation of interstate commerce that states have tried to fill.[50] Transmission-related state statutes have a history of DCC challenges.[51] Because electrons obey the laws of physics rather than the will of grid operators, transmission may very well be considered "interstate" even if the transaction attached to those electrons takes place between all in-state parties, especially if the generator or consumer is near a border.[52]

It is important to note that the future of the DCC is currently uncertain; *National Pork Producers Council v. Ross*,[53] which raises a claim of extraterritorial regulation, was argued before the U.S. Supreme Court last October. That case concerns a California law prohibiting the sale of pork in the state unless the animal was raised in compliance with certain conditions, such as a minimum area of confinement.[54] Challengers argue that this law has the effect of extraterritorial regulation, since California consumes 13% of the nation's pork, while only less than 1% of sows are raised in the state.[55] This means that the vast majority of sow farms that sell meat in California, and are thus affected by the regulation, are situated out of state. Challengers further argue that the law fails the *Pike* balancing test, since an interest in animal welfare is not a legitimate local interest, and the state's interest in reducing the transmission of illnesses resulting from narrow confinement is outweighed by the law's burden on interstate commerce.[56] They allege that the law would require a significant restructuring of the national pork-producing industry, amounting to a severe burden on the industry in other states.[57]

National Pork Producers may refine the scope of the doctrine of extraterritoriality, determine the weight between the state interest and its burdens on interstate commerce, or scrap the current DCC test altogether. Both parties to the case boast heavy-hitting amici.[58] The current Court has not shied away from controversy nor shown a particular loyalty to long-standing precedents, making it difficult to predict the outcome of this case.[59] As with all DCC disputes, *National Pork Producers* implicates questions of federalism with long and sticky fingers. Perhaps many state laws with far-reaching effects, not the least of which being state ROFRs for incumbent transmission providers, will face quite a different analysis by the end of this Supreme Court term.

IV. Circuit Split

Since FERC's rejection of a federal ROFR, several states have stepped in to provide one. Two of these states' laws have led to major litigation—Minnesota and Texas. The heart of the controversy boils down to the concern that by limiting transmission projects to local incumbent utilities—who are by nature in-state—would-be out-of-state transmission builders are discriminated against. Each of these two states' laws were appealed to federal circuit

41. U.S. Const. art. 1, §8, cl. 3.
42. Oregon Waste Sys., Inc. v. Department of Env't Quality of Or., 511 U.S. 93, 98, 24 ELR 20674 (1994).
43. *Id.*
44. *Id.*
45. *NextEra Energy*, 48 F.4th at 319.
46. *Oregon Waste Sys.*, 511 U.S. at 99.
47. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
48. New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988).
49. Constitution Annotated, *Artl.S8.C3.7.1 Overview of Dormant Commerce Clause*, https://constitution.congress.gov/browse/essay/artI-S8-C3-7-1/ALDE_00013307/ (last visited Mar. 14, 2023).
50. *See, e.g.*, Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).
51. *See, e.g.*, Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 49 ELR 20010 (9th Cir. 2019); Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 45 ELR 20134 (10th Cir. 2015); North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016).
52. *See Heydinger*, 825 F.3d at 921.
53. National Pork Producers Council v. Ross, No. 21-468 (U.S. argued Oct. 11, 2022).
54. Yue (Wendy) Wu & Wentao Yang, *National Pork Producers Council v. Ross*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/supct/cert/21-468 (last visited Mar. 14, 2023).
55. *Id.*
56. *Id.*
57. *Id.*
58. Supreme Court of the United States, *Docket No. 21-468*, https://www.supremecourt.gov/docket/docketfiles/html/public/21-468.html (last visited Mar. 14, 2023). Karen Ross, in her official capacity as secretary of the California Department of Food and Agriculture, is supported by such organizations as the Humane Society, the American Society for the Prevention of Cruelty to Animals, and the Physicians Committee for Responsible Medicine, while the National Pork Producers Association draws support from the Canadian Pork Council and the U.S. Chamber of Commerce. *Id.*
59. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); West Virginia v. Environmental Prot. Agency, 142 S. Ct. 2587, 52 ELR 20077 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). *See also* Adam Liptak & Jason Kao, *The Major Supreme Court Decisions in 2022*, N.Y. Times (June 30, 2022), https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html.

courts, which reached opposite conclusions about their respective constitutionality. The difference in outcome can be somewhat attributed to the differences between the two laws, but the circuits are certainly split on their analytical reasoning.

A. *Eighth Circuit*—LS Power Transmission, Inc. v. Sieben

In 2012, mere months after the effective end of the federal ROFR, Minnesota passed a state law codifying the right of an incumbent electric transmission owner to the construction, ownership, and maintenance of new lines approved by the regional planning authority.[60] The right extends to a line "that connects to facilities owned by two or more incumbent electric transmission owners," and "belongs individually and proportionally to each incumbent electric transmission owner, unless otherwise agreed upon in writing."[61] The law defines "incumbent electric transmission owner" in part as "any public utility that owns, operates, and maintains an electric transmission line in this state," and provides an exception for lines with a capacity of less than 100 kilovolts.[62] Minnesota's law imposes a 90-day limitation on exercising the ROFR, after which point either in-state or out-of-state competitors can bid for the project.

LS Power Transmission (LSP), headquartered in New York, challenged the Midcontinent Independent System Operator's (MISO's) inclusion of the new Minnesota state ROFR, arguing that FERC should preclude the inclusion of state ROFRs in FERC-approved tariffs.[63] However, FERC declined to do so, stating that MISO is authorized to consider state and local laws during the regional transmission planning process.[64]

After this challenge pathway fizzled out, LSP set their sights on the Minnesota Public Utilities Commission (Minnesota PUC) and Department of Commerce, challenging the constitutionality of the state ROFR.[65] When two in-state incumbent utilities exercised their state ROFRs to construct a new project, LSP filed suit against the Minnesota PUC, fundamentally arguing that the state law identifies an in-state beneficiary of the regulation at the expense of potential out-of-state competitors.[66] Both incumbents intervened, and their motions to dismiss for failure to state a claim were granted by the district court.[67]

First, the district court took the position that an overt discrimination argument was foreclosed by *General Motors Corp. v. Tracy*,[68] which excepted a law granting benefits to public utilities from DCC analysis.[69] While the case was awaiting appeal, the U.S. Department of Justice (DOJ) Antitrust Division filed an amicus brief in support of neither party, arguing that *Tracy* did not create a general exception to the DCC for public utilities and instead was a case-specific finding that hinged on specific regulatory factors at play there.[70] That case could be differentiated, DOJ argued, because the law there benefitted local in-state distribution utilities that were not similarly situated to the unregulated challengers.[71]

DOJ urged that when considering the underlying facts and broader regulatory background at play in *Tracy*, it was clear that that analysis was simply not appropriate for state incumbent transmission ROFRs.[72] The Eighth Circuit declined to decide whether *Tracy* was applicable in *LSP* because, regardless, the question of undue burden and a *Pike* balancing test would remain.[73] Thus, they accepted, arguendo, that the protected beneficiaries of the ROFR were similarly situated to LSP, setting aside the district court's application of *Tracy*.[74]

Now purportedly setting out to perform a full DCC analysis, the Eighth Circuit found handily that the Minnesota ROFR was not facially discriminatory.[75] The district court had concluded, and the circuit agreed, that Minnesota's ROFR "draws a neutral distinction between existing electric transmission owners . . . and all other entities, regardless of whether they are in-state or out-of-state."[76] Both the district and circuit courts made much of the fact that some current incumbents who would benefit from the law were entities headquartered in other states, some of which also owned facilities in other states.[77] The circuit court did acknowledge that "[i]t would be a different matter, of course, if the state were to treat a company incorporated or principally located in another state differently from Minnesota companies on that basis,"[78] and that "[i]n some instances, laws that restrain both intrastate and interstate

60. Minn. Stat. §216B.246, subdiv. 2 (2012).
61. *Id.*
62. *Id.*
63. LSP Transmission Holdings, LLC v. Sieben, 954 F.3d 1018, 1024, 50 ELR 20071 (8th Cir. 2020). LSP styles itself as "a leading advocate for transparent and competitive processes to plan, build and own transmission infrastructure," noting on its website landing page that "[w]hile competition now exists for certain projects in certain regions, it remains limited and should be expanded to benefit consumers." LS Power, *LS Power Transmission*, https://www.lspower.com/ls-power-transmission/ (last visited Mar. 14, 2023). This page also features a quote from its president of development: "Competition leads to lower costs and more efficient projects for consumers." *Id.* The company views itself as "leading the way in transmission sector competition," apparently taking on a mantle broader than this single case. *Id.*
64. *LSP Transmission*, 954 F.3d at 1024.
65. *Id.* at 1025. The Iowa Office of Consumer Advocate also filed an amicus brief in support of the challenge, arguing that the availability of a state ROFR for regional projects is "contrary to the spirit of federalism," due in large part to the problems with cost allocation of the lines. Neeley, *supra* note 15.
66. *LSP Transmission*, 954 F.3d at 1025.
67. *Id.*
68. General Motors Corp. v. Tracy, 519 U.S. 278 (1997).
69. *Id.*
70. Brief for the United States of America as Amicus Curiae in Support of Neither Party, Vacatur, and Remand at 10, *LSP Transmission*, 954 F.3d 1018 (No. 0:17-cv-04490-DWF).
71. *LSP Transmission*, 954 F.3d at 1026-27.
72. Brief for the United States, *supra* note 70, at 10-14.
73. *LSP Transmission*, 954 F.3d at 1027.
74. *Id.*
75. *Id.*
76. *Id.* (quoting LSP Transmission Holdings, LLC v. Lange, 329 F. Supp. 3d 695, 708 (D. Minn. 2018)).
77. *Id.* at 1028.
78. *Id.* (quoting Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1387 n.13, 28 ELR 20048 (8th Cir. 1997)).

commerce may be discriminatory."[79] However, the instant case was not captured by either principle.

It is worth noting that the court did *not* take a position on whether an entity with an in-state presence that is headquartered out of state should be considered an in-state entity for DCC purposes.[80] Rather, it only found that Minnesota's ROFR was facially neutral. It did, however, appear to rebuke LSP's arguments that incumbents with meaningful in-state operations should be regarded as in-state for purposes of a DCC discrimination analysis of the ROFR.[81] It was similarly unswayed by DOJ's version of the argument that the location of a company's headquarters or state of incorporation is simply not the correct yardstick for whether a law has discriminatory effects. It made no mention of DOJ's point that state laws that favor only some in-state entities are not automatically consistent with the Commerce Clause.[82]

Next, the circuit court found that the Minnesota law was neither discriminatory in purpose nor effect, rejecting LSP's argument that the legislature had openly sought to protect incumbents from the competition introduced by Order 1000.[83] It noted that 11 of the 17 incumbent transmission companies—owning 87% of transmission lines in the state—were headquartered in Minnesota.[84] The court used these statistics to argue that the law's primary purpose was to maintain the regulatory status quo and continue to provide adequate and reliable services, rather than to protect in-state interests.[85]

As for discriminatory effects, the court spent less than one page concluding that the law discriminates equally between in-state and out-of-state transmission builders.[86] When incumbents chose not to exercise their ROFR, the court pointed out, either an in-state or out-of-state entity (such as LSP) could seek approval to build the project.

Having found no discriminatory text, purpose, or effect, the court went on to find that the law survives a *Pike* balancing test.[87] Minnesota's interest in preserving the "historically-proven status quo for the construction and maintenance of transmission lines" was found to be legitimate.[88] Additionally, the court noted that in the aggregate, LSP had not established that the cumulative effect of multiple state ROFRs would completely eliminate competition in the market, because incumbents are not obligated to exercise the right.[89]

79. *Id.*
80. *Id.* at 1029 n.7.
81. *Id.* at 1028.
82. Brief for the United States of America as Amicus Curiae in Support of Neither Party, Vacatur, and Remand at 5, *LSP Transmission*, 954 F.3d 1018 (No. 0:17-cv-04490-DWF).
83. *LSP Transmission*, 954 F.3d at 1029.
84. *Id.*
85. *Id.*
86. *Id.* at 1030. *But see* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391, 24 ELR 20815 (1994) (finding that a law "is no less discriminatory because in-state or in-town processors are also covered by the prohibition"; rather, favoring some local entities but not all local entities "just makes the protectionist effect . . . more acute").
87. *LSP Transmission*, 954 F.3d at 1031.
88. *Id.*
89. *Id.*

B. *Fifth Circuit*—NextEra Energy Capital Holdings, Inc. v. Lake

In 2019, Texas passed Senate Bill (SB) 1983, barring transmission companies from competing for projects in MISO or Southwest Power Pool (SPP) territory if they did not already own a transmission facility in Texas.[90] The new law specified that certificates of convenience and necessity (CCNs) to build transmission lines "that directly [connect] with an existing utility facility . . . may be granted *only to the owner of that existing facility*."[91] If the incumbent utility did not want to pursue the project, it could "designate another electric utility that is currently certificated by [the Public Utility Commission of Texas (PUCT)] within the same electric power region" to build the new line.[92] This meant that only companies with a Texas presence could build and operate new transmission lines; out-of-state actors would first have to acquire an incumbent utility in that power region in Texas before they could build or own transmission in the state.[93] SB 1983 functioned as "an outright ban on new entrants" to the Texas transmission market.[94]

While Texas is of course not the only state to have adopted a ROFR since Order 1000, its version is the most restrictive.[95] For example, Minnesota's ROFR requires an incumbent exercising the right to do so within 90 days; Texas' version has no time limitation.[96] Additionally, no other state has gone so far as to place a complete ban on out-of-state entrants, and they do not allow the incumbent to choose another in-state provider in their stead should they decline the proposed project.[97]

Before the law was passed, NextEra Energy—a Florida company—was awarded a transmission project in Texas through a MISO competitive bidding process.[98] Even though the project had already been awarded, NextEra found itself unable to obtain a CCN from PUCT to begin construction under the new law because it was neither the owner of the existing facility being connected to nor currently certificated by PUCT in that power region.[99] Next Era brought suit against PUCT, alleging that the Texas law violated the DCC.[100]

The district court dismissed the complaint for failure to state a claim, concluding that "SB 1938 does not . . . regulate the transmission of electricity in interstate commerce; it regulates only the construction and operation of transmission lines and facilities within Texas," and that the "law's text establishes a preference for *incumbency*, not *geography*."[101] The Fifth Circuit reversed, finding NextEra

90. NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 314, 52 ELR 20103 (5th Cir. 2022).
91. *Id.* (quoting Tex. Util. Code Ann. §37.056(e)).
92. *Id.* (quoting Tex. Util. Code Ann. §37.056(g)).
93. *Id.*
94. *Id.* at 320.
95. *Id.* at 314.
96. *Id.*
97. *Id.*
98. *Id.* at 314-15.
99. *Id.* at 315.
100. *Id.*
101. *Id.* (emphasis added).

had at least raised a plausible allegation that SB 1983 was discriminatory and unnecessary to advance a legitimate local interest.[102]

The Fifth Circuit began by brushing away two proposed theories that would shield the law from DCC scrutiny. First, it noted that while Texas does have the authority to approve the siting and construction of transmission lines, that authority is still subject to Commerce Clause scrutiny if it regulates a competitive market and impacts the interstate market.[103] Next, it explicitly rejected the Eighth Circuit's apparent view in *LSP* that the place of incorporation of incumbent utilities controls, calling the notion "irreconcilable with Supreme Court dormant Commerce Clause jurisprudence."[104]

The Fifth Circuit spurned the Eighth Circuit's notion that the place of *incorporation* of the favored interest can save a state law from running afoul of the Commerce Clause.[105] The court brushed this argument away like a pesky fly, stating that "local presence, rather than a place of incorporation, should matter" for purposes of determining protectionist regulation.[106] Focusing on the technicality of where a company had filed its incorporation, the court said, is not sufficiently indicative of its ability to lobby for protectionist measures in states where it conducts appreciable business.[107]

Rather than looking to the place of incorporation, the Fifth Circuit focused on the fact that the Texas statute barred companies without a *presence* in Texas from entering that portion of the interstate market.[108] Simply put, "[r]equiring boots on the ground discriminates against interstate commerce."[109] Thus, the court held that the terms of SB 1983 discriminated against interstate commerce on their face, and remanded the case to the district court to consider whether the Texas Legislature had no other means by which to "advance[ ] a legitimate local purpose."[110]

As for the discriminatory purpose or effect prong of the DCC test, the court found that NextEra's claim raised a plausible allegation of discriminatory purpose, and should have at least progressed to the discovery stage of litigation rather than being dismissed for failure to state a claim.[111] To ensure that the issues of discriminatory purpose or effect were properly considered and a *Pike* balancing analysis could be conducted, the court reversed the Fed. R. Civ. P. rule 12(b)(6) dismissal and remanded the case for further factual development.[112]

V. Crossed Wires—Comparing the Eighth and Fifth Circuits' Decisions

The uncertainty surrounding the legal viability of state ROFRs has perhaps discouraged transmission buildout at a time when it is urgently needed. To achieve the capacity and reliability we so badly need, regulatory barriers to buildout should be removed or simplified. This Comment posits that the Fifth Circuit's arguments stand on firmer ground and are more persuasive than those accepted by the Eighth Circuit, and more generally that ROFRs hinder transmission growth and should be discouraged.

A. *Determining In-State Status*

First, the Eighth Circuit's deep consideration of an incumbent's place of incorporation or headquarter location as a means of determining in-state versus out-of-state status is untenable. To carry this line of reasoning to its logical conclusion, consider the flashy (if hypothetical) company Big-Time Transmission. It operates exclusively in the metropolitan areas of New York, owning significant portions of New York City transmission lines, and has outposts in Buffalo and Albany where it has also bought smaller transmission companies. To save some on rent, it locates its small headquarters two hours away from New York City in New Haven, Connecticut—even imagine that the headquarters staff work from home on Long Island.

102. *Id.* at 326.

103. *Id.* at 320. This case raises—or, rather, does not raise—interesting issues regarding the Preemption Clause. The typical preemption concerns that might arise surrounding FERC's regulation of interstate transmission do not appear in this case due to the fact that states generally have authority to approve or deny permits or CCNs for the siting and construction of transmission lines even when they are used for interstate commerce. Piedmont Env't Council v. Federal Energy Regul. Comm'n, 558 F.3d 304, 310, 39 ELR 20036 (4th Cir. 2009) (stating that "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electrical transmission facilities," while also noting that FERC retains this authority in national interest corridors). This case has to do with state issuance of a CCN rather than the actual interstate transmission of electricity for wholesale, which FERC retains jurisdiction over. 16 U.S.C. §824(b)(1).

Another entry point for a preemption conversation might have been the Electric Reliability Council of Texas (ERCOT), which is a conspicuous (and after Winter Storm Uri, notorious) outlier when it comes to the general rules of FERC regulation of transmission. Because ERCOT is (at least for regulatory purposes) completely contained intrastate, Texas regulates its transmission and wholesale of electricity. *Id.* ("[FERC] shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."). One might initially assume that a case about transmission lines in Texas is not broadly applicable in the rest of the country, due to ERCOT's famously unique situation as an intrastate transmission network. However, the transmission lines at issue in this case would have been part of MISO, a multistate grid, rather than ERCOT. The court did not call much attention to the fact that despite the transmission line's location within Texas, the case actually did not involve ERCOT at all, only quickly noting in a parenthetical that the decision "applies to the *interstate* electricity networks in Texas (but *not* the intrastate ERCOT network)." *NextEra Energy*, 48 F.4th at 310 (emphasis added).

104. *NextEra Energy*, 48 F.4th at 323.

105. *Id.* at 322.

106. *Id.* at 323.

107. *Id.*

108. *Id.* at 324. "A law that 'discriminates among affected business entities according to the extent of their contacts with the local economy' may violate the Commerce Clause." *Id.* (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980)).

109. *Id.* at 325. The court referenced *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), as the most recent Supreme Court case interpreting the DCC, saying "[i]t took a single sentence to note that such a residency requirement would violate the Commerce Clause for the typical business; *the tougher issue was whether the authority the Twenty-First Amendment grants states over alcohol regulation changed that result*." *NextEra Energy*, 48 F.4th at 324 (emphasis added). Though not as powerful as constitutional authority, the present case presents a similar quandary in that the Federal Power Act specifically grants states jurisdiction over the siting and construction of transmission lines. 16 U.S.C. §824(b)(1).

110. *NextEra Energy*, 48 F.4th at 326 (quoting Oregon Waste Sys., Inc. v. Department of Env't Quality of Or., 511 U.S. 93, 93, 24 ELR 20674 (1994)).

111. *Id.* at 327.

112. *Id.* at 328.

Say Big-Time Transmission spends lots of money lobbying New York's state representatives and senators for laws that benefit their operation in varying ways. When considering the DCC, the Eighth Circuit would apparently seriously consider the argument that "actually, the law could not be protectionist of in-state transmission companies because Big-Time Transmission is in fact headquartered in Connecticut and is thus an out-of-state beneficiary." Why should a cheaper office space near the border miraculously transform a company with 95% of its assets and operations in New York into an out-of-state company?

Granted, the Eighth Circuit did not actually take the position that a company headquartered out of state with an in-state presence should always be considered out-of-state for purposes of DCC analysis. Still, the mere space dedicated to the abstract argument in the opinion is disappointing. While perhaps a hard rule of *never* looking to the state of incorporation or headquarter location might be as ostrich-like as *always* giving it weight, the discussion should at least consider the specific situation—both geographical and metaphorical—of the interests at play.

But when the Eighth Circuit *did* venture into the specifics, its outcome was even more baffling. By the court's own admission, only 13% of Minnesota's transmission lines are owned by companies headquartered outside the state, and a whopping 79% of the state's lines are owned by just four incumbents.[113] These overwhelming statistics render a clinical discussion of headquarter location or place of incorporation nugatory compared to the reality of in-state incumbents' lobbying power.

In contrast, the Fifth Circuit took a more cogent approach: "For the concern about in-state interests being able to obtain favorable treatment over out-of-state interests, local presence, rather than a place of incorporation, should matter."[114] The *NextEra* court gave no airtime to the technicality that had starred in *LSP*, instead focusing on the more meaningful amount of contact a company has with the local economy.

B. Discriminatory Effect

Further, the Eighth Circuit conceded that nearly all the transmission lines in Minnesota are owned by companies headquartered within the state, yet still refused to see the law as protectionist of in-state entities, even just in effect.[115] It even stated that "LSP's argument that disproportionate ownership by [in-state] incumbents shows discriminatory effects misses the point."[116] How this clear demonstration of the discriminatory practical effect of the law "misses the point" of a discriminatory effects analysis is perplexing.

At bottom, under both the Texas and Minnesota laws, a developer must own a transmission facility in the state to benefit from the law. The Eighth Circuit argued that this fact was not in and of itself discriminatory because, "[i]f an entity does not already own an existing transmission facility in Minnesota, then it—*whether a Minnesota or an out-of-state entity*—faces the incidental hurdle that is placed by the Minnesota ROFR provision."[117] But a deep and broad chasm separates the court's hypothetical "in-state transmission builder" who incidentally owns zero in-state transmission from an actually operational out-of-state transmission company. The court's counterfactual of an entity that is in-state in name, but not yet operational and completely lacks any in-state presence, contorts the rationale of the DCC and is utterly unconvincing in the analysis of the law's protectionist effects.

Further, while LSP's pleading was indeed fact-specific, it somehow feels dubious to perform any effects analysis before even reaching the discovery stage.[118] The procedural posture before both circuits was the same, but only the Fifth Circuit took issue. Where the Eighth Circuit was emboldened to base an effects analysis exclusively on the pleadings, the Fifth Circuit refused to do so, stating instead that "pleadings-stage dismissal of these claims was premature," and emphasizing the need for further factual development on remand.[119] The Fifth Circuit's approach of waiting to conduct an effects analysis until the facts are developed beyond the pleadings is more appropriate—regardless of what that analysis ultimately determines.

C. Pike *Balancing Test*

When analyzing the Minnesota ROFR's burden on interstate commerce, the Eighth Circuit stated that "this record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market *completely*."[120] But when has a *Pike* test required that competition in interstate commerce be *eliminated completely* in order to find the burden outweighs the state interest? The insertion of this single word dramatically moves the goalpost of 50-plus years of constitutional jurisprudence. *Pike* merely stated that when a law's effects on interstate commerce are incidental, it must be struck down when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[121] The word "completely" never appears in *Pike*, nor does "complete" elimination of competition appear to be required in any of the most famous instances of DCC violations.[122]

113. LSP Transmission Holdings, LLC v. Sieben, 954 F.3d 1018, 1029, 50 ELR 20071 (8th Cir. 2020).
114. *NextEra Energy*, 48 F.4th at 323.
115. *LSP Transmission*, 954 F.3d at 1029.
116. *Id.* at 1030.
117. *Id.* (emphasis added).
118. *See* West Lynn Creamery v. Healy, 512 U.S. 186, 201 (1994) (noting that Supreme Court Commerce Clause jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects"); Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535, 545-46 (4th Cir. 2013) (reversing dismissal for failure to state a claim on DCC discriminatory-purpose-and-effect grounds due to the "fact-intensive quality of the substantive inquiry"); Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 334, 28 ELR 20090 (4th Cir. 2001) (finding genuine issues of material fact precluded summary judgment on a DCC claim because "[q]uite obviously, both [discriminatory purpose and effect] inquiries present questions of fact").
119. *NextEra Energy*, 48 F.4th at 327.
120. *LSP Transmission*, 954 F.3d at 1031 (emphasis added).
121. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
122. *See, e.g.*, Oregon Waste Sys., Inc. v. Department of Env't Quality of Or., 511 U.S. 93, 24 ELR 20674 (1994); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); *West Lynn Creamery*, 512 U.S. 186.

Aside from its bungling of the constitutional analysis, the dismissive tone of this section of the Eighth Circuit's opinion is interesting considering the posture of the case. The *Pike* balancing test is inherently fact-specific and calls for factual development beyond the pleading stage.[123] Even the correct version of the *Pike* analysis would be premature here.

In contrast, the Fifth Circuit recognized the impropriety of conducting a balancing test at this early stage of the proceeding. Because the challenger had "at least plausibly alleged that the claimed local benefit of reliability [was] 'insignificant and illusory,' this claim warrant[ed] the factual development that effects claims typically receive."[124] The Fifth Circuit's refusal to "weigh in" on a balancing test at the pleadings stage is more in keeping with DCC precedent.[125]

D. Policy Effects

Even if one accepts the Eighth Circuit's argument that the law is neutral in its effect, its substantial barrier to new market participants raises an eyebrow when seen against the background of FERC's explicit push for competition in regional transmission buildout. Further, the court's nod toward a state interest in continuing to provide adequate and reliable services rings hollow amidst the chorus lamenting our country's inadequate and increasingly unreliable grid that is stunted by a lack of competition. One state's Supreme Court recently weighed in on a ROFR similar to Minnesota's, calling it "protectionist," "anticompetitive," "rent-seeking," and "quintessentially crony capitalism."[126]

In terms of ultimate effect and policy development, this Comment posits that the Fifth Circuit's conclusion is the more convincing. In the case of *NextEra*, MISO's selection report for the transmission project called NextEra's proposal "an outstanding combination of low cost and high value, with best-in-class cost and design, best-in-class project implementation plans, and top-tier plans for O&M [operations and maintenance]. [The] Proposal has an estimated benefit-to-cost ratio of 2.20 [compared to MISO's initial estimate of a benefit-to-cost ratio of 1.35]."[127] What policy benefit would justify allowing a state ROFR law to foreclose and stand in the way of the obviously beneficial outcome of a competitive system?

VI. Flipping the Switch—FERC's Policy Reversal

While the Minnesota and Texas ROFRs can certainly be factually distinguished—for example, Texas' requires an incumbent to name another in-state developer in their stead if they do not wish to exercise the right—there is no denying that the Eighth and Fifth Circuits deviated significantly in their analyses of the laws' constitutionality. Perhaps the simplest way to resolve the issue would be for Congress to authorize states to place burdens on interstate commerce for select transmission regulation purposes, but a more likely next step is a proposed rule from FERC.[128]

While the question of state ROFRs' interaction with the DCC is left open for the moment, the Supreme Court may take up the issue this fall. While the Court previously denied cert for *LSP*, the Texas Attorney General's cert petition for *NextEra* remains pending. The Justices have asked the Solicitor General to file a brief on the matter, which may carry special weight in their decision whether to hear the case.[129] A Supreme Court decision directly addressing state ROFRs and the DCC would bring the clarity needed now more than ever, as more and more state legislatures consider enacting their own ROFRs.

FERC recently proposed RM21-17, which would amend Order 1000 by allowing a federal ROFR for transmission facilities selected in a regional planning process, on the condition that the incumbent provider exercising the ROFR establish joint ownership of the transmission facility with, and a meaningful level of participation from, either an unaffiliated nonincumbent developer or another unaffiliated entity.[130] The conditional federal ROFR would not place any obligation on utilities; it would simply provide an opportunity for utilities to exercise the conditional right if they believe it will help their regional planning process or alleviate misaligned incentives for investing in regional buildout.[131]

To justify its policy reversal, FERC explains that investment trends since 2011 suggest that Order 1000 "may in fact be inadvertently *discouraging* investment in and development of regional transmission facilities to some extent."[132] It concedes that developers may have a perverse incentive to develop only transmission facilities that will benefit their

123. *See* LSP Transmission Holdings, LLC v. Lange, 329 F. Supp. 3d 695, 695 (D. Minn. 2018); *Colon Health Ctrs. of Am.*, 733 F.3d at 545-46 (reversing dismissal for failure to state a claim because *Pike* balancing tests "present issues of fact that cannot be properly resolved on a motion to dismiss"); Cachia v. Islamorada, 542 F.3d 839, 841-44 (11th Cir. 2008) (reversing and remanding dismissal of a DCC claim because "[t]he complaint adequately states a claim for relief, and further proceedings are necessary to develop a record upon which [a *Pike* balancing test] may be properly considered by the district court"); United Transp. Union v. Foster, 205 F.3d 851, 863 (5th Cir. 2000) (reversing summary judgment on a *Pike* balancing test because of "an empty record").

124. *NextEra Energy*, 48 F.4th at 327.

125. *See supra* notes 118, 123.

126. LS Power Midcontinent, LLC v. Iowa, No. 21-0696, slip op. at 34 (Iowa Mar. 24, 2023). The Iowa Supreme Court was granting a temporary injunction on the state ROFR on the basis that it was tacked onto an unrelated bill, violating state constitutional restrictions on bill titles and subject matter. *Id.* at 3. The ROFR had been introduced to the state Senate at 1:33am on the last day of the legislative session, as part of a "potpourri" bill including provisions on state spending, revenue bonds for the State Fair Board, alarm system contractors, absentee ballots, and hemp regulation. *Id.* at 9-10.

127. MISO, Selection Report: Hartburg-Sabine Junction 500 kV Competitive Transmission Project 2 (2018), https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf.

128. Granholm v. Heald, 544 U.S. 460, 493 (2005).

129. Niina Farah, *SCOTUS Requests Biden Admin's Views on Transmission Fight*, EnergyWire (Mar. 7, 2023), https://subscriber.politicopro.com/article/eenews/2023/03/07/scotus-requests-biden-admins-views-on-transmission-fight-00085657.

130. 87 Fed. Reg. 26504, 26564-66 (May 4, 2022).

131. *Id.* at 26565.

132. *Id.*

own local retail distribution service territory, rather than those that would benefit the region more broadly.[133]

While FERC does have the authority to reverse its policy and effectively rescind a previous rule, challenges to the new rule are to be expected.[134] FERC has preliminarily found that Order 1000's complete elimination of the federal ROFR for new regional transmission was "overly broad," and may have overlooked alternatives to that elimination, such as placing conditions on the ROFR to ensure its exercise is just and reasonable and not unduly discriminatory or preferential, in compliance with FERC's charge under the Federal Power Act.[135] The proposed rule also explains how the condition of joint partnership can promote a favorable outcome and just and reasonable rates, for example by combining the development strengths and technical knowledge of the parties to achieve a more cost-effective project.[136]

While FERC's promulgation of the proposed rule would not answer the DCC question, it may functionally sidestep it. Developers might simply claim the federal ROFR rather than the state version; if no one is exercising the state ROFR, then challenges to it would not likely continue to be litigated. Beside the proposed rule reinstating a federal ROFR, FERC has not intervened in the DCC issue. It has not explicitly rejected state ROFRs, but on the other hand, the decision not to preempt such state laws is not an authorization to violate the DCC.[137]

The proposed rule has already drawn many critical comments. DOJ and the Federal Trade Commission have filed a joint letter, arguing explicitly that "the reinstatement of a federal [ROFR] is not justified," and that competition carries benefits such as lower rates for consumers and "a more efficient, reliable, and resilient grid."[138] Other commenters have raised the "major questions doctrine" due to the significant economic consequences of national-scale grid regulation.[139] The proposed rule also addresses cost allocation methods for regional-scale transmission, as did Order 1000, which has perhaps drawn even more ire than the ROFR segment of the rule. Traditional administrative law challenges would be available to those opposing the rule, such as arguments that the rule is arbitrary and capricious due to an insufficient evidentiary record, inadequate reasoning and support, or failure to sufficiently explain a policy change.

VII. Jump-Starting Meaningful Competition in Regional Transmission Planning

Order 1000 was well-reasoned, so why did it not generate greater regional transmission investment? Perhaps the elimination of the federal ROFR did not go far enough. Order 1000 left open what could be considered loopholes, such as carve-outs for local projects, certain reliability projects, and low-voltage lines. Between 2013 and 2017, only 3% of transmission investments in the United States were made in projects subject to competition.[140] While transmission buildout has occurred in the years since Order 1000, it has generally been done in ways that skirt the competitive processes Order 1000 set out to encourage.

ISOs have also been known to undermine competition. For example, in March of last year, FERC approved a proposal by the New York ISO that would give incumbent utilities a ROFR to build upgrades within their service footprint, even when those upgrades are part of a winning competitive bid from a third-party developer.[141] Opponents argue third parties will be discouraged from participating in the bidding process because of the possibility that an incumbent could exercise their ROFR at the very end of the process, when the bidding party has already sunk costs into planning and pitching their project.[142] Practices such as this have undercut the potential of Order 1000 and stifled the competition it tried to inject.

Utilities have also exerted considerable pressure on states to enact ROFRs since Order 1000. For example, in Missouri—which is actively considering a ROFR in its current legislative session—a single in-state utility has 20% more registered lobbyists than there are state senators.[143] Utilities in states considering ROFRs have also employed former state politicians and FERC commissioners to testify on their behalf.[144] With so much local pressure on state governments, central federal action is needed.

Rather than reinstating a federal ROFR, FERC should take an even firmer anti-ROFR stance, starting with eliminating exceptions to Order 1000. It should focus on correcting the perverse incentives that lead incumbents to only invest in local projects rather than caving to them and restoring the federal ROFR. Requiring co-ownership does appear to be a middle ground, but it may not be enough to correct the market failures of a ROFR system, as it does

133. *Id.* at 26564-65.
134. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 13 ELR 20672 (1983) (stating that while an agency may reverse its views and rescind a rule, it is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). *See also* 16 U.S.C. §825h (granting FERC power to "amend, and rescind such orders, rules, and regulations as [the Commission] may find necessary or appropriate" in administering the Federal Power Act); 87 Fed. Reg. at 26565 n.571 ("[M]ethodologies perceived to produce just and reasonable results in the past may be scrapped in favor of other methodologies now perceived to be preferable.") (quoting American Pub. Power Ass'n v. Federal Power Comm'n, 522 F.2d 142, 144 (D.C. Cir. 1975)).
135. 87 Fed. Reg. at 26565.
136. *Id.* at 26568-69.
137. Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992).
138. U.S. DOJ & Fed. Trade Comm'n, Comment on Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection (Aug. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p072104_doj_ftc_transmission_comment_to_ferc.pdf.
139. State of Texas et al., Comment Letter on Notice of Proposed Rulemaking on Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection (Sept. 19, 2022), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20220919-5188.
140. Pfeifenberger et al., *supra* note 34, at 1.
141. Ethan Howland, *Amazon, DOE, PJM Urge FERC to Support Proactive Transmission Planning for an Evolving Grid*, Util. Dive (Oct. 15, 2021), https://www.utilitydive.com/news/amazon-doe-pjm-ferc-proactive-transmission-planning-grid/608266/.
142. *Id.*
143. Tomich, *supra* note 21.
144. *Id.*

not necessarily create an incentive to lower the bid price as much as possible like a competitive system would.

Competition is well known to bring down costs; one study found that winning proposals in competitive transmission selection processes averaged 40% below either the lowest cost incumbent project offer price or the initial project cost estimate.[145] Based on the results of competitive bidding processes in the United States and abroad, that study estimates that a competitive bidding system can be expected to yield cost savings between 20%-30%.[146] In addition to cost savings, a competitive bidding process increases transparency in accounting and cost-tracking, as well as produces advanced project due diligence and risk reduction.[147]

While a competitive system comes with its own challenges, FERC is well-equipped to address them after many decades of regulatory compacts with utilities and monopolies. While the bidding process might have appreciable friction in the beginning, the more it is used, the faster and more efficient regulators will become in their responses.[148] Additionally, while there can still be funny business in a competitive bidding process, FERC has control mechanisms at its disposal similar to those it has successfully deployed in response to past market manipulation, such as cost escalation caps.[149]

VIII. Conclusion

In the years since FERC largely eliminated the federal ROFR, several states have stepped in to pass their own versions, with varying degrees of success. Texas' law was the most extreme, requiring incumbents to designate another in-state company in their stead should they decline the project, and it is the only law opponents have gained a foothold challenging. Meanwhile, Minnesota's version, which lacks such a conspicuously protectionist feature, has been allowed to stand. While this admittedly distinct factual difference can help explain the opposing outcomes in the Fifth and Eighth Circuits, one would be remiss to end one's investigation there.

The circuits follow fundamentally different lines of reasoning to their conclusions. The Eighth Circuit entertained the notion that a company's place of incorporation was a significant factor in determining in-state status for purposes of a DCC analysis, while the Fifth Circuit expressly rejected this notion. Instead of looking to letterhead, the Fifth Circuit took a more searching approach, focusing on the company's local presence and lobbying power. The latter method is more compelling—it ignores distracting legal fictions and trains its eye on the underlying justifications of DCC jurisprudence.

Even setting aside that underwhelming line of reasoning, the remainder of the Eighth Circuit's rationale is flimsy at best. In trying to argue that the state law favors status as an incumbent rather than location, the court ignored wholesale its lopsided practical effects on the interstate market. Then, on the last prong of the DCC analysis, the court bowed to a state interest that, as presented, runs directly counter to Order 1000's stated federal policy of competition while simultaneously raising the bar of the balancing test to ("completely") unreachable heights.

While the Texas ROFR underlying that case may have been more eyebrow-raising at first glance than Minnesota's, the Fifth Circuit's logic could have been applied to either state's law with the same result. Further, the procedural posture of the cases—motions to dismiss for failure to state a claim—make the Fifth Circuit's more circumspect approach all the more welcome. Stiff-arming the challenge at such an early procedural stage, especially when the district court had not even conducted two-thirds of the fact-specific DCC analysis, undermines confidence in the Eighth Circuit's opinion when it was rickety enough to begin with.

However convincing one finds either circuit's rationale, the question of whether state ROFRs violate the DCC remains open. Hopes of Congress addressing the question are dim. For the judicial branch's part, it remains to be seen where the DCC analysis will stand by the end of this Supreme Court term, and whether the Court will take up a *NextEra* appeal. Perhaps the test will be refined or reformulated, further prying open the question; whatever the result of *National Pork Producers*, it is unlikely to quell DCC controversy, much less as applied to electricity regulation. The executive branch remains the best-positioned to address the controversy, and it has already taken preliminary steps to do so by proposing to reinstate a federal ROFR, albeit a conditional one. While such a rule would not directly resolve the DCC question, it may lead to its quiet languishment if parties stop exercising—and, as such, challenging—state ROFRs.

As the country's need for additional transmission capacity grows ever more pressing, every reasonable effort should be made to remove barriers to buildout. However, continuing to grant incumbent utilities a ROFR just is not as reasonable as it once might have been. Competition has been shown to lower prices for consumers and increase transparency, and has already proven hugely successful in several large-scale transmission projects.

Instead of assuaging the historical interests of incumbents, regulators should forge ahead with Order 1000's push to eliminate ROFRs and subject even more projects to competitive bidding processes. While offering a conditional ROFR may be more palatable than reinstating a robust one, it is still a retreat from FERC's decades-long trend toward competition. Rather than balk at friction from incumbents, it is time for FERC to deploy its tools of market management to correct perverse incentives, tighten the screws of competition, and finally realize Order 1000's well-reasoned aims of protecting the public's interest in just and reasonable transmission rates.

145. Pfeifenberger et al., *supra* note 34, at 40.
146. *Id.* at 43.
147. *Id.* at 33, 45.
148. *Id.* at 22, 39.
149. *Id.* at 30.