ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1334

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDUSTRIAL ENERGY CONSUMERS OF AMERICA, *et al.*
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

REPLY BRIEF OF PETITIONERS:

Case No. 23-1334
Industrial Energy Consumers of America
Resale Power Group of Iowa
Coalition of MISO Transmission Customers
Wisconsin Industrial Energy Group

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Dated: May 31, 2024

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GLOSSARY

The Abandonment Incentive or the Incentive	The ability for ITC Midwest to recover 100% of its prudently incurred costs associated with the Iowa portion of the Skunk River-Ipava 345 kV project if the project is cancelled or abandoned for reasons beyond ITC Midwest's control.
Application	*ITC Midwest, LLC*, ITC Midwest Abandonment Incentive Application, Docket No. ER23-2033 (filed May 30, 2023) (R.1, J.A.__).
Consumer Alliance Protest	*ITC Midwest, LLC*, Protest of Industrial Energy Consumers of America, Coalition of MISO Transmission Customers, Resale Power Group of Iowa and Wisconsin Industrial Energy Group, Docket No. ER23-2033 (filed June 20, 2023) (R.10, J.A.__).
Denial Notice	*ITC Midwest, LLC*, Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, Docket No. ER23-2033-001, 185 FERC ¶ 62,013 (Oct. 10, 2023) (R.18, J.A.__).
FERC or Commission	Respondent Federal Energy Regulatory Commission.
FERC Br.	Brief of Federal Energy Regulatory Commission.
IECA	Industrial Energy Consumers of America.
Initial Order	*ITC Midwest, LLC*, Order on Transmission Rate Incentive, Docket No. ER23-2033-000, 184 FERC ¶ 61,083 (Aug. 8, 2023) (R.15, J.A.__).
Iowa Injunction Ruling	*LS Power Midcontinent, LLC, et al v. State of Iowa, et al*, Ruling On Motions For Summary Judgment, Case No. CVCV060840, District Court for Polk County (issued Dec. 4, 2023).
Iowa ROFR Law or ROFR Law	Iowa's Right of First Refusal statute, Iowa Code § 478.16(2), which was enjoined by the Iowa Supreme Court in March 2023 in *LS Power Midcontinent, LLC v.*

	State, 988 N.W. 2d 316, 338 (2023).
ITC Midwest	Intervenor ITC Midwest, LLC.
ITC Br.	Brief of Intervenor ITC Midwest, LLC.
JA	Joint Appendix.
MISO	Midcontinent Independent System Operator, Inc.
Order No. 679 and Order No. 679-A	*Promoting Transmission Inv. Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).
Petitioners	Industrial Energy Consumers of America, Resale Power Group of Iowa, Coalition of MISO Transmission Customers, and Wisconsin Energy Industrial Group.
Project	Iowa portion of Skunk River-Ipava 345 kV project in Tranche 1 of the long-range transmission plan of MISO.
R.	An item in the record of this proceeding.
Rehearing Order	*ITC Midwest, LLC*, Order Addressing Arguments Raised on Rehearing, Docket No. ER23-2033-001, 185 FERC ¶ 61,123 (Nov. 16, 2023) (R.19, J.A.__).
Rehearing Request	*ITC Midwest, LLC*, Request for Rehearing and Alternative Request for Clarification of Industrial Energy Consumers of America, Resale Power Group of Iowa, Coalition of MISO Transmission Customers, and Wisconsin Energy Industrial Group, Docket No. ER23-2033 (filed Sep. 7, 2023) (R.16, J.A.__).
RPGI	Resale Power Group of Iowa.
Tariff	The MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff.

STATUTORY PROVISIONS AND ADDENDUM

Pertinent statutes appear in the Addendum of Petitioners' main brief. Petitioners are including the following Iowa state court decisions in the Addendum: *LS Power Midcontinent, LLC et al. v. State of Iowa, et al.*, Ruling on Defendant and Intervenors' Motions for Reconsideration; Ruling on Motion for Leave to File Amicus Curiae Brief Filed by Midcontinent Independent System Operator, Inc., Case No. CVCV060840, District Court for Polk County (issued Mar. 19, 2024). Petitioners are also including *LS Power Midcontinent, LLC et al. v. State of Iowa, et al.*, Appellees' Resistance to Intervenor/Appellant ITC Midwest LLC's Motion to Stay, No. 24-0641, Iowa Supreme Court (May 7, 2024), which is responsive to content included on the addendum submitted by ITC Midwest.

SUMMARY OF REPLY ARGUMENT

On brief, the Commission mischaracterizes Petitioners' claims as concerning the rates they will have to pay if and when the utility abandons the Project and seeks recovery of its costs. But it is the *Incentive* itself, which the Commission deliberately created by granting the utility's Application, and from which legal consequences immediately flow, which gives rise to Petitioners' claims. The final orders below preclude Petitioners in any future rate-increase proceeding from arguing that the facts on which the Application was presented did not warrant the grant of the Incentive.

The Commission minimizes the nature, circumstances, and significance of the legal challenge that has been raised under Iowa state law to the applicant's entitlement as an incumbent utility for purposes of building new, FERC-jurisdictional transmission facilities. That challenge, however, is the foundation for several errors Petitioners have raised concerning the justness and reasonableness of granting the utility, ITC Midwest, a further "incentive" to proceed with the Project. The grant of the Incentive directly affects the utility applicant's behavior, decreases the likelihood that the consumers will enjoy the price-lowering benefits of competitive bidding for the Project, and transfers Project cost risk and uncertainty to consumers.

The orders below fail to balance consumer and utility interests, and the Commission has not demonstrated it has fulfilled its statutory duty to protect consumers from excessive rates. The Commission's invocation of its discretionary authority to govern its calendar and grant the Incentive when it did fails to give credence to the legitimate interests of ratepayers in having a competitive process given due opportunity to function and avoiding further Project delays attendant to protracted litigation, particularly here where the interests of time are not shown to be overtly superior and where there is no deadline for the Commission to act.

The orders below are arbitrary and capricious because the Commission failed to meaningfully engage the legal and practical consequences of authorizing the Incentive requested. Regardless of the existence of the Iowa litigation (or its outcome), the Commission's orders are not supported by substantial evidence because the utility applicant did not demonstrate that the Incentive was necessary for project development and narrowly tailored to the risks faced by the Project.

ARGUMENT

I. The Commission Misconstrues Petitioners' Claims to Advance Its Ripeness Argument and Avoid Merits.

A. The Commission's Orders Below Are Final, and Have Legal Consequences.

The Commission has conceded that the orders below (with respect to its grant of the Incentive and the reasoning which underlies that grant) are final.

FERC Br. 27; *see also* ITC Br. at cover page (referencing "final agency actions"). The Commission's determination of the applicant's eligibility and corresponding decision to increase prudently-incurred abandoned plant costs eligible for recovery to 100% is also final and will not be the subject of, and cannot be cured in, any future rate proceeding. Neither the Commission's decision to grant the Incentive, nor the reasoning for it, will be revisited. FERC Br. 27, n.5. The Commission's orders under review have resulted in direct and immediate legal consequences.

B. Petitioners' Claims Concern the *Incentive* the Commission Created, and the Incentive's Immediate Effects; Thus, Petitioners' Claims Are Ripe.

The Commission argues that because it has not yet approved any change which incorporates any abandoned plant costs into rates, Petitioners' claims are not ripe for review. FERC Br. II(A). The Commission concedes, however, that its incentive eligibility determination and approval of the proportion of recoverable costs are, in fact, final. FERC Br. 27, n.5. The net practical result is, if the Court adopts the Commission's reasoning, that customers are denied an actual means of seeking redress for the award of the Incentive. That can have substantial real-world consequences. The total value of the Project is nearly $600,000,000. *See* R.10 at 7, J.A. __, Exhibit A. Even if only a sixth of that amount in costs is incurred before the Project is abandoned, the disputed amount is still $50,000,000. Petitioners' claims relate to the *Incentive* the Commission created by the grant of the

Application. The grant of the Incentive is a finalized practice affecting rates that affects the ratemaking regime that may or may not apply in the future.[1] The Incentive was granted and remains in effect, irrespective of when and how the Incentive would be implemented or translated into rates.

The Incentive has already had its intended effect: it has affected the behavior of the applicant, encouraging it to proceed with efforts to own and operate an expansion project that it might not otherwise have continued to sponsor, or to have done so under competitive conditions that receipt of the Incentive was designed to weaken and circumvent. The Commission's orders on review conferred an advantage over any other potential sponsors, as the applicant intended.

i. The Incentive's Direct Effect on the Applicant's Behavior.

The Incentive undermines both the meaning and effectiveness (as a means to protect consumers from soaring electricity costs) of the very prudence review in a subsequent rate case the Commission contends is the proper forum[2] for Petitioners' claims here. The Commission's assertion that it can defer consideration of the justness and reasonableness of rates to a subsequent proceeding (while it does the work of fundamentally altering the factual underpinnings of that consideration in

[1] The Incentive is a practice affecting rates under the Federal Power Act, and neither the Commission nor the utility applicant suggest otherwise.

[2] Petitioners are not aware of any instance in which the Commission has rejected as imprudent any transmission-related investment it has previously authorized.

the first one) does not logically reconcile with Section 219 of the Federal Power Act, 16 U.S.C. § 824s, which expressly incorporates the just and reasonable rate standard. 16 U.S.C. §§ 824d-e.

The Commission cites the following definition of prudence: "'a prudent expenditure' on utility plant or operations 'is one reasonable utility management would have made, in good faith, under the same circumstances, and at the relevant point in time." FERC Br. 25. The Commission fails to recognize that its grant of the Incentive irrevocably *changed the circumstances* and in ways that favored the utility going forward with the Project. If a utility has obtained the Commission's approval of an abandonment incentive that eliminates the utility's financial risk associated with advancing a project with potential threats to its viability, the better question is how could it *not* justify proceeding with such a project? The Commission cannot reasonably distinguish its decision to grant the Incentive from the impact its actions had on the prudence review, whenever it might occur.

The Initial Order itself explicitly identifies this causal connection. *See* Initial Order, R.15, J.A.__, P 5 ("ITC Midwest asserts the importance of timely action to ensure that 100% of prudent construction costs incurred after its requested effective date are eligible for recovery if the Project is abandoned for reasons outside of ITC Midwest's control."). Absent "timely action," the applicant thus insisted that the Project might not proceed. That is the only reading of this

representation that has any meaning and the only reasonable interpretation of the Commission's reliance on the assertion in support of its approval of the Incentive. FERC Commissioner Christie has repeatedly observed the direct, causal, and perverse relationship between the Commission's grants of transmission incentives and resulting outcomes, "[a]dding insult to consumers' injury, that amount [$250,000,000] … for a project that was never built or found needed by a single state regulator … was *caused and inflated by* a whole host of Commission-approved transmission incentives" (an abandoned plant incentive among them). *Potomac-Appalachian Transmission Highline, LLC, et al.*, 185 FERC ¶ 61,198 P 3 (2023) (concurring) (emphasis added).

In short, the Commission's actions have already impacted the course of events relating to the Project, irrespective of whether or how the rates that the utility might seek to charge are affected.

ii. The Commission Arbitrarily and Capriciously Ignores the Implications for Transmission Competition.

The Commission asserts that the Incentive grant "serves a clear and Congressionally-directed purpose--to encourage ITC Midwest, the only utility currently developing the Project, to continue pursuit of the Project's ratepayer benefits." R.19, pp. 34-35, J.A.__. The assertion is both self-serving and self-ratifying, as it presumes the applicant would remain the sole developer of the Project, even if the applicant's status as the exclusive incumbent was removed.

But, by reason of the Incentive the Commission created, the Commission facilitated the path forward for ITC Midwest and fortified its status as an incumbent, in whole or in unknown part. This demonstrates the issue raised by Petitioners,[3] a challenge to the exclusive incumbency the applicant occupies. The purpose of the Incentive the applicant sought was to insulate itself from the potential effects of losing its exclusive status, certainly a plausible result of the challenges to the Iowa ROFR Law that Petitioners opposed and has now been found unlawful. The only consumers active in the proceeding below and in front of the Court now have argued that they are more likely to enjoy ratepayer benefits if ITC Midwest was denied an exclusive or presumptive status as the developer of the Project. The Commission gave that argument no weight.

Petitioners are deeply committed to the view that competitive dynamics are a crucial protection against excessive costs in the planning and implementation of expansions of the electric grid. *See* R.10 at 3-6, J.A. __-__ (explaining their active participation through the Electricity Transmission Competition Coalition and various competition initiatives), 5, J.A. __ (explaining that CMTC members are "deprived of the benefits of competition for the development and ownership of MISO [] projects and the loss of efficiencies, innovation, and cost containment

[3] Petitioners RPGI and the Coalition of MISO Transmission Customers each filed amicus briefs in the Iowa litigation in support of transmission competition.

strategies delivered through competitive solicitation"). Petitioners are not the only or even the original authors of these concerns. Indeed, as the United States has taken the position noted above on the subject of state statutes that afford a preference or a right of first refusal to incumbent electric utilities, preserving their preferred position in the construction of transmission facilities – the very subject of the orders under review – the Commission should have given due regard to these considerations in its disposition of the Application here, particularly in light of the Commission's deviation from its long-standing policy supporting transmission competition. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051, PP 253, 256-57 (2011) (eliminating federal rights of first refusal in an effort to disallow practices which can result in rates that are unjust and unreasonable); *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency must, when changing course from a prior position, provide "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by [its] prior policy); *see* R.10 at 2, J.A. __ (asking FERC to respect the Iowa judicial process by rejecting the application or to proceeding to grant the Consumer Alliance's longstanding complaint in Docket No. EL22-78 asking the Commission to find that it is unjust and unreasonable to require MISO to apply state right of

first refusal laws for interstate transmission projects subject to the Commission's jurisdiction).

Petitioners challenge the basis on which the "incentive" was created pursuant to the specific request of the applicant and the deliberate decision of the Commission to grant it. They do not challenge any specific rate impact because the impacts of the applicant going forward with the Project are themselves the subject of their Protest. The relevant factual record is developed. The Commission has already set in motion the circumstances which are the subject of Petitioners' claims, and the applicant has already begun acting on them. *See* ITC Br. 18 (acknowledging it has begun spending money on the project). It is thus timely and ripe for judicial review of the sufficiency of the Commission's actions.

II. Petitioners Have Standing As "Aggrieved Persons" under the Federal Power Act.

The Commission concedes Petitioners' standing. FERC Br. 27, n.5. Only ITC Midwest disputes it and only as to the injury-in-fact prong. As a summary description of the effects of abandonment incentives on the interests of transmission customers, Petitioners endorse the words of FERC Commissioner Christie: "[T]he Abandoned Plant Incentive effectively makes [customers] the insurer of last resort…. [C]onsumers receive no…premiums for the insurance they provide through the Abandoned Plant Incentive if the project is never built." *Midcontinent Independent System Operator*, 186 FERC ¶ 61,092 (2024), Christie,

Commissioner, Concurring, par. 3. Like most insurance contracts, the essence of such transactions are the terms under which a claim *may or may not be filed*, which is inherently unknown in advance. In this case, Petitioners' showing to meet the hardship prong of the ripeness analysis is the same as their showing to meet the injury-in-fact harm prong of the standing analysis. *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) ("In deciding whether a case is ripe for adjudication, federal courts generally consider the hardship to the parties of withholding court resolution (a factor that overlaps with the 'injury in fact' facet of standing doctrine)....").

ITC Midwest bases its standing argument in large part on this Court's decision in *San Diego Gas & Electric Company v. FERC*, 913 F.3d 127, 133 (D.C. Cir. 2019). That decision underscores the Petitioners' standing here. As the opinion notes, the utility's election to make use of a "two-stage" process under FERC's incentive rules brings into play a different analysis than would be applicable under the "one-stage" procedures. In *San Diego*, the utility had applied for an abandonment incentive that would have expanded the scope of eligible costs to a point in time that predated the date of the Commission's decision. A dispute arose as to "the scope of the current beneficial assurance due to SDG&E" when FERC partially denied the incentive request. *Id.* at 136. Neither the abandonment of the project nor the associated costs, if any, were known or measured in the

record. *See id.* at 134-135. These are the same circumstances presented here. Neither the timing nor amount of the costs to be recovered in rates are currently fixed: however, the "scope of the beneficial assurance" has been expanded from 50% of costs to 100% of costs, on the basis of facts that Petitioners urge here were insufficiently examined by the Commission in issuing its approval of the application. Consumers are now precluded in any future rate-increase proceeding from arguing that the facts on which the application was presented did not warrant the grant of an incentive. They have been unwillingly placed in the role of uncompensated "insurer of last resort" and ITC Midwest has been commensurately benefited in an amount that neither ITC Midwest nor Petitioners have quantified.

III. The Commission's Disregard of the Iowa State Court Litigation and Its Direct Import on this Case is Arbitrary and Capricious.

A. Ignoring State Judicial Decisions/Injunctions issued by the Iowa Supreme Court Is Not a Ratemaking Decision to Which the Commission Is Entitled to Deference.

Despite FERC's request for "great deference," FERC Br. 6, 21-22, the deference this Court affords the Commission's orders is not unconstrained. The Court's review is sufficiently expansive to include ensuring reasoned decision-making, based on the Commission's examination of the relevant record evidence. *Entergy Arkansas, LLC v. FERC*, 40 F.4th 689, 701-02 (D.C. Cir. 2022) (quoting *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016)) and *Coal. of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1017 (D.C. Cir. 2022)). The

Commission's failure to account for the Iowa state court litigation was neither a determination based on rate-making expertise, nor did it involve a complex scientific or technical utility rate issue. *See Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (acknowledging FERC evaluations of "scientific data within its technical expertise" and "complex scientific or technical questions" are afforded deference). Instead, the Commission relied exclusively on generic statements and a high-level affidavit from an interested witness. *See* FERC Br. 42-43.

When the Commission granted the utility's Application for an abandonment incentive, the Commission had the benefit of Iowa's highest court's view of the legal authority pursuant to which the applicant was awarded the Project:

> [The ROFR Law] is quintessentially crony capitalism. This rent-seeking, protectionist legislation is anticompetitive. Common sense tells us that competitive bidding will lower the cost of upgrading Iowa's electric grid and that eliminating competition will enable the incumbent to command higher prices for both construction and maintenance. Ultimately, the ROFR will impose higher costs on Iowans.

LS Power Midcontinent, LLC v. State, 988 N.W. 2d 316, 338 (Iowa 2023). In the first ten months which passed from the utility's award of the Project, it sought no transmission incentive from the Commission for the Project. Within two months, however, of the Iowa Supreme Court's issuance of an order enjoining enforcement of the ROFR Law, the utility sought one, citing in its Application a number of

general categories of project risk. The uncertainty of the outcome of the Iowa state court litigation – at the time, the *only known* risk to the applicant's ability to develop the project – was not among them.[4]

Rather than give the Iowa Supreme Court's assessment the "careful[] consider[ation]" the Commission is obligated to give to state and local approvals and siting and permitting authorities in connection with approving transmission incentives, Order No. 679 at P 54, the Commission gave it no weight. The Commission treated the Iowa state court litigation as "simply another regulatory or legal uncertainty that may impact ITC Midwest's construction of the project," ITC Br. 12, maintaining that state law injunctions and uncertainty do not preclude granting transmission incentives which insulate utilities from the consequences of that uncertainty. FERC Br. II(B)(1)(a). Those legal uncertainties and impediments, the Commission concedes, are not reasons to grant the Incentive. FERC Br. 34. The Commission's apparent view is that the nature and substance of the uncertainty is irrelevant; no inquiry whatever is required. The Commission makes no effort to explain its indifference to the circumstances of the uncertainty, nor how it can square this indifference with the obligation at the heart of its mission – responsibility for ensuring just and reasonable rate protection for consumers. *Xcel*

[4] For its part, the applicant on brief attempts to now claim the Iowa litigation as a risk to the Project. ITC Br. 27. Yet, the applicant omitted any specific reference to the Iowa litigation in the application filed with the FERC.

Energy Servs. v. FERC, 815 F.3d 947, 952 (D.C. Cir. 2016) (primary purpose of Federal Power Act is "the protection of consumers from excess rates and charges").

As Petitioners explained in their initial brief, the circumstances presented by the Iowa state court litigation are material, they were due qualitatively different and thus obligated engaged consideration by the Commission, and the Commission's disregard of them is not entitled to the Court's deference.[5]

B. The Timing of the Issuance of the Order Authorizing the Incentive is Arbitrary and Capricious and Does Not Reflect Reasoned Decision-making.

Petitioners do not challenge the Commission's authority to control *its* calendar and procedures. Rather, they challenge the Commission's failure to recognize the fact that in managing its calendar, any value it may have accorded to expedition was at odds with the potential value of enhancing competition in the development of the Project and, derivatively, any potential for reduced costs over the lifetime of the Project. Rather than send a signal to the applicant that it is not appropriate to grant the Incentive at this time in light of the Iowa litigation and lack

[5] At the time the Commission filed the Certified Index to Record, Court Doc. No. 2036150, and relinquished its authority to modify or set aside its Initial and Rehearing Orders pursuant to 16 U.S.C. § 825*l*(b), the Commission also had, and declined to act on, the Iowa Injunction Ruling, which was filed in the proceeding below by ITC Midwest's competitor, LS Power Midcontinent, LLC; *see also* FERC Br., p. 23 n.4. The Iowa Injunction Ruling permanently enjoined the applicant "from taking any [] action, or relying on prior actions, related to" the Project. ADD. 33-34.

of clear title to the project, the Commission's orders further incentivize litigation by the applicant, create additional uncertainty for the project, and ultimately increase costs for ratepayers.[6] The orders on review do not demonstrate that the Commission accorded ratepayer interests in a price-lowering competitive process any weight whatever in managing its calendar and procedures with, and counterbalanced by, the efficiency interests competition might advance, the potential impacts that a more competitive process might produce, and considerations that were fully warranted by the facts presented here. The Commission's interests in the management and conduct of its processes cannot and do not supersede the statutory functions the agency is assigned. Citing the authority to govern a calendar fails to give credence to the legitimate interests of ratepayers in having a competitive process given due opportunity to function and avoiding further project delays attendant to protracted litigation, particularly here where the interests of time are not shown to be overtly superior and where there is no deadline to act.

[6] Even if the Project is ultimately developed by ITC Midwest and never abandoned, continued litigation will create additional Project delays and more costs for consumers, as it is highly foreseeable that ITC Midwest will seek to recover some of its litigation costs from ratepayers at either the state or federal level or both.

C. The Commission's Grant of the Incentive to the Incumbent Utility Unduly Materially Advances the Position of the Incumbent Utility/Applicant When the Incumbent's Right to the Project Has Been Challenged by Competitors.

The Commission concedes, but then ignores, the fact that the Iowa state court litigation was initiated by *competitors of the utility*. *See* FERC Br. 14. The fact that the litigation is driven by potential competitors directly implicates the justness and reasonableness of granting an incentive to the incumbent, which served to materially advance the competitive position of the incumbent/applicant in the state court litigation. The legal challenge brought by the competitors was not only credible, it has twice been upheld in state court. *See* Iowa Injunction Ruling and FERC Br. 23, n.4. With the Iowa ROFR Law being deemed unconstitutional, the grounds for the incumbent utility preference are removed, leaving competition as the basis for Project assignment under FERC policy and Iowa law. Yet, FERC's grant of the Incentive serves to further embolden the applicant to continue to litigate to obtain title to the Project, reducing the likelihood that the litigation will timely run its course and that a process for any competitive bidding will occur, consistent with the MISO Tariff and FERC policy under Order No. 1000. *See* R. 13 at 4-5.

In a recent amicus filing to the United States Supreme Court, the United States urged the Court to decline to review a circuit court decision striking down a state right-of-first-refusal law that granted a preference to incumbent utilities in the

award of new electric transmission projects. Brief for the United States as Amicus Curiae, No. 22-601, *Peter Lake, Chairman, Pub. Util. Comm'n of Texas, et al. v. NextEra Energy Capital Holdings, Inc., et al.*, (filed Oct. 23, 2023), Supreme Court of the United States. In so doing, the government noted that "the fact that [the statute] eliminates out-of-state competition is a reason for striking it down, not for upholding it." *Id*. at16.

In the orders under review here, the Commission took no account of the impact the Incentive would have on the competitive conditions under which the Project was sponsored and awarded and, therefore, does not reflect reasoned decision-making.

IV. The Commission's Rote, Mechanical Application of Its Incentives Rule/Precedent Does Not Reflect Reasoned Decision-making; the Commission's Authorization of the Abandonment Incentive Is Not Supported by Substantial Evidence.

The Court need not evaluate the Commission's review under Order No. 679 in order to find for Petitioners, but if it does, the Court can readily conclude that the applicant did not demonstrate that the requested 100% recovery of prudently-incurred abandoned plant costs is narrowly tailored to the risks that the applicant alleged the Project faced. First, the categories of risk the applicant catalogued in support of its application were generic risks, described in the most conclusory terms, associated with any large-scale transmission project. There would be no reason to provide for case-specific review of applications, supported by evidence,

if the intent was to grant incentives for all such projects. Second, those risks bore no relationship to the project abandonment or cancellation transmission incentive sought. The "nexus test" analysis requires more – that is, a case-specific evidentiary review to ensure that the incentive sought is narrowly tailored to address the specific risks presented by the project. *See* Order No. 679 at P 164. In this case, the disconnect between the showing made by, and the incentive afforded to, the applicant, demonstrates the Commission's failure to conduct a meaningful review and does not reflect reasoned decision-making. Importantly, the applicant itself on brief to this Court is not able to support its application with any specificity. *See* ITC Br 33 (deferring to FERC's review of nexus test and project risks); *See San Diego,* 913 F.3d at 133 (explaining the nexus test's requirement that incentives be "rationally tailored" to risks presented) (quoting Order No. 679 at P 26)).

CONCLUSION

The petition for review should be granted, and the Commission's Initial Order and Rehearing Order should be vacated.

Respectfully submitted,

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Dated: May 31, 2024

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, but excluding the (i) cover pages, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) signature block, contain approximately 4,358 words, as counted by the word count feature of the latest version of Microsoft Word for Microsoft 365, with which this brief was prepared. Per Fed. R. App. 32(a)(5)-(6), this document has been prepared in a proportionally-spaced typeface in Microsoft Word using Times New Roman 14-point font.

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ADDENDUM

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC, Plaintiffs, vs. THE STATE OF IOWA, IOWA UTILITIES BOARD, ERIK M. HELLAND, GLEN DICKINSON and LESLIE HICKEY, Defendants, MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC, Intervenors.	Case No. CVCV060840 RULING ON DEFENDANT AND INTERVENORS' MOTIONS FOR RECONSIDERATION; RULING ON MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF FILED BY MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC. ("MISO")

Introduction

On December 4, 2023, the Court granted Plaintiffs' motion for summary judgment and issued a permanent injunction enjoining operation or enforcement of Iowa Code § 478.16 and Iowa Administrative Rule 199-11.14. The Court also permanently enjoined the Defendant Iowa Utilities Board, and Intervenors MidAmerican Energy Company, and ITC Midwest LLC, from "taking any additional action, or relying on prior actions, related to any and all transmission line projects in Iowa that were claimed pursuant to, under, or in reliance on Iowa Code § 478.16 and Iowa Administrative Rule 199-11.14."

Following the issuance of the Court's Ruling, the Defendants, and Intervenors, have each filed a motion requesting that the Court reconsider its December 4, 2023 Ruling. Additionally, on February 6, 2024, MISO filed a motion seeking leave to file an amicus curiae brief in this matter. After MISO filed its request, the Court gave the

parties an opportunity to weigh in on MISO's request. Plaintiffs resist MISO's request to file an amicus curiae brief and Defendants and Intervenors support MISO's request.

While the parties have requested an opportunity to present additional oral arguments on their motions to reconsider, the Court concludes that additional oral arguments are not necessary as the parties have thoroughly briefed their respective positions and the Court does not wish to further delay these proceedings. The Court having considered the pleadings, briefs, and arguments of the parties, now enters the following Ruling on pending motions.

Motion to Reconsider Filed by MidAmerican Energy

MidAmerican Energy has filed a motion to reconsider in which it requests that the Court reconsider its decision to grant Plaintiffs injunctive relief. Specifically, MidAmerican Energy contends that in issuing injunctive relief, the Court failed to properly balance the impact of its injunction on ongoing transmission projects that have been approved while this litigation has been pending by MISO and which are now subject to the MISO tariff and the authority of FERC. MidAmerican contends that the impact of the Court's injunction is that these projects will be ground to a halt to the detriment of all Iowans unless the Court reconsiders its earlier Ruling.

Contrary to MidAmerican Energy's claims, in deciding whether to grant injunctive relief, the Court did, in fact, balance the harms to the parties before it granted Plaintiffs' request for injunctive relief. As the Court noted in its December 4, 2023 Ruling, MidAmerican Energy claimed the projects that it seeks to continue to advance under what has now been declared an unconstitutionally enacted ROFR.

Any balancing of harms by the Court must take into account the fact that MidAmerican Energy took a risk when it chose to advance its claims under a ROFR which they knew was being challenged as being unconstitutionally enacted. In other

words, the harm that MidAmerican Energy now claims should preclude the Court's grant of injunctive relief was clearly foreseeable as MidAmerican either knew or should have known that the Iowa Supreme Court could overturn the decisions of its inferior courts and declare the ROFR unconstitutional. In contrast, Plaintiffs were shut out from competing for the assignment of the transmission projects at issue only because what the Iowa Supreme Court determined were erroneous decisions entered by this Court and the Iowa Court of Appeals.

When the Court balanced the harms to the parties as it was considering injunctive relief, the Court concluded that the only way to do justice between the parties was to return the parties to the status quo that existed prior to the enactment of the unconstitutional ROFR. The Court continues to believe this was the correct decision. Consequently, MidAmerican Energy's motion requesting that the Court reconsider its grant of injunctive relief is denied.

In its motion to reconsider, MidAmerican Energy also contends that the injunction issued by the Court is overbroad. Specifically, MidAmerican Energy contends that certain portions of the transmission projects at issue are not subjective to competitive bidding. Additionally, MidAmerican Energy seeks clarification as to whether the Court's injunction prohibits MidAmerican from acquiring right of way for future transmission lines by seeking to obtain voluntary easements from landowners. It is unclear whether any other party to this lawsuit believes that the Court's injunction prohibits such activity.

Nevertheless, the Court continues to believe that the injunction issued by the Court was properly limited in scope to address the harm the Court sought to prevent. However, to be clear, the Court retains authority to hear and decide any disputes that may arise between the parties as to whether any specific action by any party is

prohibited by the Court's injunction. But the resolution of any such dispute cannot be done in the abstract but instead requires the development of a factual record, which the Court can consider as it resolves any future disputes.

Motion to Reconsider Filed by ITC Midwest

ITC Midwest also requests that the Court reconsider its decision to grant Plaintiffs injunctive relief. Specifically, ITC Midwest contends that the Court erred in granting injunctive relief because: (1) the Court did not properly analyze the factors required for issuance of a permanent injunction; (2) the Court's injunction is impermissibly retroactive; (3) the injunction is overbroad and vague; and (4) injunctive relief is preempted by federal law. As to ITC Midwest's first two claims, the Court summarily denies them; however, the Court will address ITC Midwest's overbreadth and federal preemption claim in more detail.

Regarding ITC Midwest's claims that the Court's injunction is overbroad and vague, the Court will clarify its injunction to address a claim advanced by ITC Midwest. To the extent clarification is needed, the Court rules that it is not a violation of this Court's injunction for any party to challenge this Court's ruling through the appellate process. All other overbreadth or vague claims advanced by ITC Midwest are denied.

ITC Midwest's argument for federal field preemption is not that state ROFR statutes are preempted by federal law but that the Court's injunction is preempted because it improperly intrudes on FERC's exclusive authority to interpret its Tariff in light of this Court's determination that the ROFR and the implementing regulations were unconstitutional. Simply put, the Defendants and Intervenors argue that once MISO goes through the steps provided for in its Tariff to assign ownership of transmission facilities, including assignment of ownership to incumbent based on any

ROFR's then in effect, such assignment has the force of federal law and is subject to FERC's exclusive jurisdiction. In other words, even if the award was based on an unconstitutional ROFR, ITC Midwest contends that this Court is powerless to impact such award once it has occurred.

ITC Midwest's argument for conflict preemption is that this Court's grant of injunctive relief has improperly placed Intervenors in a situation where they believe they must choose between complying with this Court's injunction or their federal obligations under the Tariff. Because of this alleged conflict, ITC Midwest contends that this Court is preempted from granting injunctive relief. In other words, ITC Midwest contends that any change to the current assignment of the LRTP projects must be made solely by MISO utilizing its FERC-approved Tariff process and not through this Court's injunction.

In advancing their preemptions arguments, Intervenors must necessarily concede that FERC could conclude that it will not permit retroactive re-assignment of the projects at issue based on this Court's finding of unconstitutionality. In fact, MISO, in its proposed amicus curiae brief, acknowledges this very real possibility.[1] This fact alone supports the Court's conclusion that a grant of injunctive relief is the only way to ensure that Plaintiffs have a remedy for the state constitutional violation that they have established in this case.

Again, to be clear, neither MISO nor FERC are parties to this action and the Court took great pains in its December 4, 2023 Ruling to point out that in issuing its Ruling, this Court was only seeking to do justice between the parties to this action and the Court need not concern itself with how its decision might impact MISO or any other entity. The Court continues to believe that its injunction in no way interferes

[1] Miso Amicus Brief, Docket No (D0153), at pg. 14.

with FERC or MISO's role and/or authority. Nor does the Court believe that its authority to issue injunctive relief for a state constitutional violation is in any way preempted by federal law. Apparently, the Iowa Supreme Court shared this Court's view as it issued temporary injunctive relief in this matter.

Motion to Reconsider Filed by the State and IUB

The State of Iowa related Defendants also move the Court to reconsider its grant of summary judgment. Specifically, the State contends that the Iowa Supreme Court and this Court erred because the Act that included the ROFR passed constitutional muster because "financial regulation" constituted a single subject that rendered the statute constitutional. The State also contends that the Court improperly enjoined the administrative rules that were put in place after the enactment of Iowa Code § 478.16. Because the State's arguments are merely a rehashing of previous arguments that have been considered and rejected by this Court, the Court summarily denies the State's motion for reconsideration.

MISO'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The final issue before the Cout is MISO's motion seeking leave to file an amicus curiae brief.[2] Plaintiffs have resisted MISO's motion while the remaining parties to this action urge the Court to consider MISO's amicus curiae brief. No party has cited any Iowa Code provision, any Iowa Rule of Civil Procedure, or any reported Iowa appellate decision which authorizes amicus participation at the trial court level. So, the first issue for the Court to decide is whether amicus participation at the trial court level is even authorized by law.

[2] While MISO filed a motion seeking leave to file its brief, it also filed the brief which can be found at Docket No (D0153). Therefore, the real issue before the Court is whether the Court should consider the now-filed brief.

The only provision of Iowa law that the Court can find governing amicus participation is Iowa Rule of Appellate Procedure 6.906(1) which provides that an amicus curiae brief "may be filed only by leave of the appropriate appellate court granted on motion, at the request of an appropriate appellate court, or when accompanied by written consent of all parties." The absence of any corresponding rule in the rules of civil procedure, the rules which govern actions before the district court, would seem to suggest an intent to limit the filing of amicus briefs to only appellate proceedings. *See, Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995)(legislative intent is expressed by omission as well as by inclusion).

In sum, the Court is not convinced that it has the legal authority to allow amicus participation at the trial court level. However, even if the Court has such discretionary authority, the Court concludes that amicus participation in this case by MISO is not warranted. In making this decision, the Court notes that the Court has not sought such amicus briefing and the parties do not consent to such amicus briefing, so the issue for the Court to determine is whether the legal criteria have been met to allow amicus curiae briefing.

When the Court applies the criteria set forth in Iowa Rule of Appellate Procedure 6.906(5), the Court concludes that the proposed amicus curiae has not established the existence of any of the factors set forth in the subparagraphs of Rule 6.906(5)(a) justifying its participation in this case as amicus curiae. In making its decision the Court finds it significant that the proposed amicus curiae is not a party to this action. As a result, the proposed amicus curiae lacks standing to participate in this litigation. It seems to the Court that to allow the applicant's participation as an amicus would serve to contravene the rules on standing without any legitimate purpose or need.

The Court also finds that the request is untimely in that it was not made until after the Court had issued its dispositive ruling in this case. In other words, the only issue left for the Court to consider in this case is whether the Court should reconsider its earlier ruling. For all these reasons, the Court denies MISO's request.

In so ruling, the Court wants to make clear that it no way questions the legal acumen or depth of knowledge that MISO's counsel, Colin Smith and Amanda James, possess. Additionally, the Court wants to make clear the Court's ruling does not prevent the proposed amicus curiae and its counsel from offering assistance to any of the name-parties, if so accepted by those parties. This ruling, likewise, does not prevent the proposed amicus curiae from filing motions seeking leave to file an amicus brief before any appellate court, in the event there is an appeal from this Court's decision.

RULING

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for reconsideration filed by Defendants State of Iowa, Iowa Utilities Board, and Erik Helland, in his capacity as Chairman of the Iowa Utilities Board, are DENIED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for reconsideration filed by Intervenor MidAmerican Energy Company is DENIED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for reconsideration filed by Intervenor ITC Midwest LLC is DENIED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for leave to file and/or have the Court consider the amicus curiae brief filed by Midcontinent Independent System Operator, Inc. is DENIED.

SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV060840	LS POWER MIDCONTINENT ET AL VS STATE OF IOWA ET AL
Type:	OTHER ORDER

So Ordered

Coleman McAllister, District Judge
Fifth Judicial District of Iowa

Electronically signed on 2024-03-19 12:03:46

IN THE IOWA SUPREME COURT

LS POWER MIDCONTINENT, LLC, and SOUTHWEST TRANSMISSION, LLC, Plaintiffs/Appellees, vs. THE STATE OF IOWA, IOWA UTILITIES BOARD, and ERIK M. HELLAND, Defendants/Appellants, MIDAMERICA ENERGY COMPANY and ITC MIDWEST LLC, Intervenors/Appellants.	CASE NO. 24-0641 (Polk County No. CVCV060840) **APPELLEES' RESISTANCE TO INTERVENOR/ APPELLANT ITC MIDWEST LLC'S MOTION TO STAY**

PRELIMINARY STATEMENT

Goodness! While this case was pending on appeal, Intervenor/Appellant ITC Midwest ("ITC") purported to claim transmission projects in Iowa under a statute it knew was challenged as unconstitutional. After (1) this Court entered a temporary injunction to prevent harm because then Appellees LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively "LSP") were likely to prevail in showing Iowa Code Section 478.16 was unconstitutionally enacted, and (2) the district court granted a permanent injunction to prevent harm to LSP because Section 478.16 *was*, in fact, unconstitutionally enacted, ITC asks that the permanent injunction be stayed so ITC can move forward with projects it seized under that unconstitutional act during litigation. Rather than preserving the status quo prior to

the statute's unconstitutional enactment, ITC asks that it be allowed to cause the very injury this suit was designed to prevent—constructing hundreds of millions of dollars of projects without competition to the detriment of the consuming public and irreparably harming LSP.

Remarkably, despite "consistently argu[ing] new projects are years away"[1] to prevent a temporary injunction, ITC *now* claims it succeeded in delaying this case so long that it would be wrong for it not to be allowed to complete the very projects it previously claimed were so remote. ITC argues it not only planted the poisonous tree, but this Court should enter a stay to allow it to devour the poisonous fruit, whereupon it surely will claim, after final ruling, it is too late to cure the misdeed. Indeed, as Intervenors sought delay, LSP warned this was the intent. Thus, despite losing, ITC wins (to the consuming public's and LSP's detriment). This Court and the district court already correctly held injunctive relief was necessary because LSP otherwise "face[d] irreparable harm through the loss of opportunity to land multi-million-dollar electric transmission projects in Iowa." *Id.* at 338. Because this Court's temporary injunction and the district court's permanent injunction properly protected LSP and the consuming public, staying that order to ensure profit from an unlawful act that was void *ab initio* is inappropriate and must be denied.

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[1] *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 339 (Iowa 2023).

BACKGROUND

This Court knows the facts. In 2020, Iowa's Legislature unconstitutionally passed Iowa Code section 478.16, granting incumbent transmission entities "a right of first refusal (ROFR) that forestalls competitive bidding." 988 N.W.2d at 322. After the district court dismissed and the Court of Appeals affirmed, this Court reversed and remanded, finding LSP had standing to challenge the act. *Id.* at 333. This Court also found prior courts erred denying LSP's motions for a temporary injunction restraining the act's enforcement. *Id.* This Court stayed section 478.16's enforcement "pending resolution of this case." *Id.* at 340. This Court found LSP was likely to succeed on the merits, would be irreparably harmed by the loss of projects claimed under the act, Intervenors and State were not harmed by enjoining benefits of an unconstitutional law, and protecting competition benefited the public. *Id.* at 335–40. The Court denied the State's and Intervenors' petitions for rehearing, despite the State's contention the injunction could be interpreted to stop projects Intervenors had already seized. State Pet. Rehearing at 14.

On remand, LSP promptly sought summary judgment, including seeking permanent injunctive relief ending the unconstitutional act's effects. *See generally* D0084, M.S.J. (6/2/2023). The State and Intervenors resisted. *See generally* D0109, State Resist. to M.S.J. (8/4/2023); D0115, ITC Resist. to M.S.J. (8/4/2023); D0118, MidAm. Resist. to M.S.J. (8/4/2023). On December 4, 2023, the district court

granted summary judgment, declaring section 478.16 unconstitutional and void. *See generally* D0136, Order on M.S.J. (12/4/2023). "[T]o correct [the court's] earlier error and prevent substantial injury and damage to [LSP]," "grant[] [LSP] long delayed justice" and "serve the public interest," the district court permanently enjoined section 478.16's enforcement and enjoined Intervenors and the State from furthering projects Intervenors claimed under the unconstitutional statute while the prior appeal was pending. D0136 at 19, 21-22. There is no claim construction of those projects has started; only that they were claimed under a void law. The district court denied the State's and Intervenors' motions to reconsider. *See generally* D0159, Order on Mot. to Reconsider (3/19/2024). The State and Intervenors appealed, and ITC thereafter filed this motion seeking to proceed under an unconstitutional law.

ARGUMENT

LSP sought declaratory and injunctive relief in equity. Permanently enjoining projects claimed under an unconstitutional statute was appropriate and within the district court's authority. ITC seeks to stay that injunction. The authority to grant a stay is "not unbridled." *Chicoine v. Wellmark, Inc.*, 894 N.W.2d 454, 460 (Iowa 2017). Rather, ITC must "clearly and convincingly show[] that the need for a stay outweighs the potential for harm or prejudice to the other litigants." *Id.* at 459. Under Iowa law, generally a prohibitive injunction "is **not** affected by a stay of

proceedings pending the appeal." *Scheffers v. Scheffers*, 241 Iowa 1217, 1221, 44 N.W.2d 676, 678 (1950) (emphasis added). A *supersedeas* stay is merely meant to preserve "the existing state of the matter, whatever it may be" and thus a permanent "injunction remains in full force, and the appeal and *supersedeas* do not affirm or give the party enjoined the right to violate it." *Lindsay v. Dist. Ct. of Clayton Cnty.*, 75 Iowa 509, 39 N.W. 817, 818 (1888). A stay should not affect the case's merits, and the "court presented with an application for a stay order should not be required to prejudge a reasonably meritorious controversy." *Hanna v. State Liquor Control Comm'n*, 179 N.W.2d 374, 376 (Iowa 1970). Because ITC, in essence, seeks to enjoin an injunction, the Court should consider ITC's likelihood of success on the merits, whether ITC will suffer irreparable harm, and the harm to LSP and the public if the permanent injunction is stayed.

I. THE DISTRICT COURT HAD JURISDICTION TO GRANT THE PERMANENT INJUNCTION.

First, ITC claims the district court lacked jurisdiction to enjoin the projects. Logically, this Court already determined jurisdiction existed when ***it*** granted injunctive relief. *LS Power*, 988 N.W.2d at 340; *Lloyd v. State*, 251 N.W.2d 551, 558 (Iowa 1977) ("It is elementary that the court's first duty is to determine its jurisdiction over a claim to entertain and decide a case on its merits." (quotation omitted)). Regardless, the permanent injunction was not preempted by Midcontinent Independent System Operator, Inc. 's (MISO) reliance on a void, unconstitutional

statute. Just as in the district court, this argument remains a red herring. If preemption does not apply, the injunction order was within the district court's authority. If preemption does apply, then the Federal Energy Regulatory Commission's ("FERC") disapproval of incumbent preference laws (referenced in this litigation as a ROFR) made section 478.16 improper and the permanent injunction valid.

To extent there is a federal preference, it favors competition and disfavors granting incumbents a monopoly. FERC made clear ROFRs harm consumers and should be removed from federal agreements and tariffs. "Failure to [remove ROFRs in tariffs and agreements] would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable…." *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842, 49,885-86 (2011) (hereinafter "FERC Order 1000"). MISO's tariff makes clear competition is the default: "[T]he Competitive Developer Section Process shall be applicable to **all** transmission facilities and substation facilities included in an Eligible Project." MISO Tariff Attachment FF Section VIII.A.1 (Attachment to D0007, Exh. 13 at 102 (11/13/2020)) (emphasis added). A state ROFR may overcome this preference for

competition only if it was "duly promulgated." MISO Tariff Module A, § 1.A (Attachment to D0119, Supp. App. at 47 (9/8/2023)) (defining "Applicable Laws and Regulations"); MISO Tariff Attachment FF, § VIII.A.1 (Attachment to D0007, Exh. 13 at 102 (11/13/2020)). The district court correctly held section 478.16 was *not* "duly promulgated," but was unconstitutionally promulgated.

By Code, preemption on electric transmission can "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824 (West) (emphasis added). Contrary to ITC's claims, both the FERC and MISO recognize state law can affect, or stop, transmission projects after assignment. *See, e.g.,* MISO Tariff Attachment FF Section VI.C (Attachment to D0007, Exh. 13 at 96-97) (recognizing state court proceedings can affect transmission owners' obligation to build projects); *id.* at Section VIII.G (Attachment to D0007, Exh. 13 at 189) (same); MISO Transmission Owners Agr. art. 4 § 1, https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf (posted Mar. 2, 2018) (stating facility construction is subject to siting and permitting restraints imposed by the state and subject to receipt of any necessary state regulatory approvals). Indeed, ITC itself told FERC, in successfully seeking abandoned plant incentive protection for the Skunk River-Ipava project, that the project "face[d] significant regulatory, environmental, financial, and construction risks that could result in ITC Midwest's development of the Project being abandoned for reasons

beyond ITC Midwest's control," including that such projects "are increasingly facing challenges in … judicial forums by project opponents that increase the risk that a needed permit will be denied." *ITC Midwest, LLC*, 184 FERC ¶ 61,083, at ¶ 17 (2023). ITC knew the risk and took it when it claimed projects under a challenged statute and gained protection from that risk.

Recognizing ITC *could* be forced to abandon the project, FERC granted ITC's request for abandoned plant incentive protection and upheld its decision on rehearing. *Id.* at ¶ 43; *ITC Midwest, LLC*, 185 FERC ¶ 61,123, at ¶ 32 (2023). In so doing, contrary to the assertion here, FERC expressly identified ***this*** litigation as an event that *could* stop ITC from completing projects. *ITC Midwest, LLC*, 185 FERC ¶ 61,123, at ¶¶ 35, 37. FERC stated, "[t]he merits decision on the constitutionality of the Iowa ROFR Statute, the timing of the merits decision, the effect of any appeals, and the effect of all of the above on ITC Midwest's rights to own, develop, and construct the Project remain uncertain and are beyond ITC Midwest's control." *Id.* at ¶ 35. Far from holding the district court was preempted from affecting MISO's assignment, FERC emphasized state court litigation ***can*** impact projects, recognizing, "all applicants in these proceedings are faced **with a risk that developments in state law could cast doubt on their respective rights to develop**

the project." *Id.* at ¶ 37.[2] As discussed below, contrary to ITC's complaint, when state law changes, MISO under its tariff can reassign projects. MISO Tariff Attachment FF, §§ IX.C.4, IX.E.3 (Attachment to D0007, Exh. 13 at 196-97, 205-06).

ITC contends the permanent injunction interfered with FERC's and MISO's role and authority. FERC correctly emphasizes, however, that it and MISO are not arbiters of state law. *Midwest Independent Transmission System Operator*, 150 FERC ¶ 61,037, at ¶¶ 19, 26-31 (2015) (rejecting concerns that MISO could become

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[2] *Midcontinent Indep. Syst. Operator, Inc. Republic Transmission, LLC*, 184 FERC ¶ 61,040, ¶¶16, 20 (2023) (granting abandoned plant incentive where new state ROFR law created risk that incumbents would challenge nonincumbent's right to project that could lead to project's cancellation); *NextEra Energy Transmission Sw., LLC*, 180 FERC ¶ 61,032, at ¶¶ 1, 8, 18 (2022) (granting incentive where there was risk incumbents would lobby for state ROFR law and then challenge nonincumbent's right to project, preventing it from obtaining required regulatory approval or permits). FERC has granted incentives for other projects where there was the risk of state judicial or administrative proceedings preventing the projects from continuing. *See, e.g., N.Y. Power Auth.*, 185 FERC ¶ 61,102, at ¶¶ 20, 24 (2023) (granting incentive where applicant faced alleged "factors beyond its control that could impact whether the Project will ultimately be built including legal challenges and changes in legislative or executive leadership in New York"); *Citizens Energy Corp.*, 157 FERC ¶ 61,150, at ¶ 38-39 (2016) (finding risks of "opposition to the Project, such as routing, siting or environmental legal challenges"); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, 62,600 (2009) ("We find that Pioneer faces significant risks and challenges in developing the project…. Pioneer will have to initiate eminent domain proceedings in the circuit court for each county traversed by the project that may result in inconsistent circuit court rulings and appeals.").

the arbiter of state and local law because "we expect states will provide input regarding their state or local laws or regulations" and reiterating "our expectation is that state regulators should play a strong role and that public utility transmission providers will consult closely with state regulators *to ensure that their respective transmission planning processes are consistent with state requirements*" (quotation omitted) (emphasis added)). Rather, Iowa's courts, and Iowa's courts alone, enforce Iowa's Constitution. *Davis v. Bennett*, 400 F.2d 279, 281 (8th Cir. 1968) (holding federal courts must defer to state courts on meaning of state's constitution); *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 79, 991 N.E.2d 745, 765 ("No federal court can interpret the meaning of our state constitutional provisions."). ITC would allow MISO's reliance on a state law subsequently found unconstitutional to nevertheless prohibit any remedy by the state court. That cannot be.

Indeed, Intervenors repeatedly emphasized to this Court the state's role and that MISO cannot compel construction of any project contrary to state requirements:

> MISO's process is a planning process, not a programming process – **MISO neither implements nor compels the implementation of recommended transmission projects**. Project implementation is left to developers and owners to undertake and complete, **subject to the state requirements discussed herein**.

(21-0696) MidAm. Final Br. at 20 (12/21/2021) (emphasis added); *see also* (21-0696) MidAm. Final Br. at 11 ("FERC left such control to the states and continues to recognize the important role states play in regulating the siting, permitting, and

construction of transmission lines as transmission needs are planned and expanded."); (21-0696) ITC Final Br. at 9 n.3, 14 ("Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities."); (21-0696) Intervenors-Appellees Joint Res. to Mot. for Temporary Injun. at 3-4 (6/10/2022) ("Order 1000 … did not limit, preempt, or otherwise affect state or local laws or regulations.").

Although LSP would prefer FERC preempt incumbent preference laws, like section 478.16, FERC to date has not found its exclusive jurisdiction over transmission rates, and practices affecting those rates, preempts such laws or litigation regarding such laws. Thus, the district court had jurisdiction to enjoin projects claimed under the unconstitutional section 478.16 and properly did so.

II. ITC IS UNLIKELY TO PREVAIL ON THE MERITS OF ITS APPEAL.

Although ITC largely ignores this, it is unlikely to prevail on appeal. As this Court believed likely and the district court found true, section 478.16 violated article III, section 29. Under article III, section 29, an act's title must express its subject matter. *LS Power*, 988 N.W.2d at 335. H.F. 2643, which had the same title before and after the early morning amendment, gave no such notice. *Id.* Further, "each act must embrace only a single subject." *Id.* at 336. H.F. 2643 instead contained a "breathtaking sweep" of unrelated matters. *Id.* Because Intervenors claimed

projects under an unconstitutional statute to LSP's and the public's detriment, injunction was the appropriate remedy.

III. LSP WOULD BE IRREPARABLY INJURED BY STAYING THE INJUNCTION.

To justify a stay, ITC must clearly and convincingly show its need outweighs harm to LSP. *Chicoine*, 894 N.W.2d at 461. Given the very purpose of permanent injunction was to prevent ITC from harming LSP and the public, ITC cannot meet its burden. Thus, courts, including this one, routinely decline to stay or lift an injunction pending appeal. *See, e.g., Chi., R.I. & P. Ry. Co. v. Woods*, 196 Iowa 1063, 195 N.W. 957, 957 (1923) (declining to lift injunction where "plaintiff would suffer injury if it is not continued" because "defendants could proceed to do the things prohibited by the injunction if there was no stay"); *Lindsay*, 39 N.W. at 818 (holding injunction should not be stayed by *supersedeas* bond because it would allow irreparable injury to continue).[3] Precisely the same is true here. ITC does not

[3] *See also SmartSky Networks, LLC v. Wireless Sys. Solutions, LLC*, 630 F. Supp. 3d 718, 729 (M.D.N.C. 2022) ("Leaving Plaintiff without redress until the appeal is decided … opens the door for Defendants to violate the injunction and misuse SmartSky's technology in the future."); *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, Case No.: 14-cv-02061-H-BGS, 2016 WL 7319538, at *5 (S.D. Cal. Sep. 19, 2016) (holding stay of injunction inappropriate where it would cause plaintiff to continue suffering harm for which money damages were inadequate); *Staley v. Harris Cnty., Texas*, 332 F. Supp. 2d 1041, 1043 (S.D. Tex. 2004) (holding staying injunction would substantially harm plaintiff by permitting continuing violation of plaintiff's rights); *Knutson v. AG Processing, Inc.*, 302 F. Supp. 2d 1023,

seek to preserve the status quo, but to continue proceeding under an unconstitutional act that never should have existed to LSP's and public's great detriment.

The only case ITC cites where the court stayed an injunction, *Dallas Real Estate Co. v. Groves*, supports *denying* a stay here. There, the district court enjoined the plaintiffs from filing lawsuits on certain claims. *Dallas Real Estate Co. v. Groves*, 228 Iowa 1232, 289 N.W. 900, 900 (1940). The supreme court stayed the injunction to prevent the statute of limitations from expiring pending appeal to prevent the risk that, should plaintiffs prevail, they not be "deprived of the fruits of their victory in this court." *Id.* Staying the injunction here risks the type of injury to LSP the *Groves* court sought to prevent—depriving LSP the fruits of its victory. If ITC proceeds on projects claimed under an unconstitutional act while that act was challenged, it will argue, as it did in the district court, that it pushed those projects too far down the line to reimpose the injunction, mooting that part of the appeal. D0142, ITC Mot. to Reconsider Br. at 13, 18 (12/19/2023); *Hanna*, 179 N.W.2d at 376 (holding a stay should "not render [an action] ineffective"); *Woods*, 195 N.W.

1038 (N.D. Iowa 2004) (holding harm to plaintiff in staying injunction "would be immense in comparison to any potential harm" to defendant because a stay would only serve to continue the hardship the injunction sought to remedy).

at 957 (holding lifting of injunction on appeal improper where it would render ruling on merits ineffectual).

This Court already held, and the district court agreed, the balance of harms favors LSP. Without injunctive relief, "LSP is harmed by the loss of opportunity to compete," whereas ITC has "no right to protection from an unconstitutional statute." *LS Power*, 988 N.W.2d at 339. In granting preliminary injunctive relief, this Court sought to prevent harm. *LS Power*, 988 N.W.2d at 338; *Foods, Inc. v. Leffler*, 240 N.W.2d 914, 919 (Iowa 1976). "If these multi-million-dollar transmission projects go to the incumbents and we ultimately hold section 478.16 is unconstitutional, then LSP will be irreparably harmed by having lost out on a unique opportunity to do business in Iowa." *LS Power*, 988 N.W.2d at 338. The Court identified five transmission projects in Iowa—referred to as "Tranche 1"—the very projects at issue now. *Id.* at 333. "It is plain to see that LSP's injury is traceable to the defendant State's actions and that a favorable decision **will** redress that injury." *LS Power*, 988 N.W.2d at 332 (emphasis added). "A right without a remedy is unknown to the law." *Barrett v. Holmes*, 102 U.S. 651, 652 (1880). Because there is no "adequate remedy at law through a cause of action for money damages on projects where [LSP] was wrongfully prevented from bidding," meaningful injunctive relief was the only remedy, in line with this Court's temporary injunction. *Id.* at 338.

"It is one of the boasts of a court of equity that it delights to do complete justice, and not by halves." *Darlington v. Effey*, 13 Iowa 177, 179 (1862). "A court of equity seeks to do justice between the parties by penetrating to the very substance of the matter." *Petty v. Mut. Benefit Life Ins. Co.*, 15 N.W.2d 613, 618 (Iowa 1944). "We have long recognized that we may enjoin 'an unconstitutional statute or ordinance to prevent irreparable injury to the business and property of the plaintiff.'" *LS Power*, 988 N.W.2d at 331, 338 ("Iowa courts may enjoin unconstitutional legislation.") (quoting *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 1324, 78 N.W.2d 843, 850–51 (1956)). "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). "[A] remedy must 'neutralize the taint' of a constitutional violation," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), and the court sitting in equity may enjoin furthering projects or other purported rights claimed under an unconstitutional statute. *Mid-Am. Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 1145, 114 N.W.2d 622, 626 (1962).

Contrary to ITC's unsupported assertion, the status quo that must be protected is not the advantage it took when it claimed projects under an unconstitutional statute it knew was challenged. Rather, as the district court found, the proper, equitable

status quo is the period prior to the unconstitutional statute. Otherwise, ITC wins by losing and the consuming public and LS Power lose by winning.

> The point of prohibitive injunctive relief is to preserve the last uncontested status between the parties which *preceded* the controversy. To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions, but … [s]uch an injunction restores, rather than disturbs, the status quo ante.

Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085, 1104 (S.D. Iowa 2020) (emphasis added) (internal citations and quotations omitted). Enjoining projects claimed under the unconstitutional section 478.16 restored that status quo.[4] "[M]eaningful backward-looking relief" is appropriate to correct constitutional violations. *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 511 (Iowa 2012).

Because staying the injunction causes extreme harm to LS Power and the public, ITC's motion should be denied.

IV. ITC SUFFERS NO HARDSHIP KEEPING THE INJUNCTION IN PLACE.

Conversely, ITC is not harmed by respecting the injunction, preventing it from further injuring LSP and reaping benefits from an unconstitutional statute. *LS Power*, 988 N.W.2d at 339 (ITC has "no right to protection from an unconstitutional

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[4] A stay of a district court judgment is merely meant to preserve the status quo of the case at that time, thus self-executing judgments like the prohibitive injunction here remain in place and are generally unaffected by a stay. *Scheffers*, 44 N.W.2d at 678; *Lindsay*, 39 N.W. at 818.

statute"). It merely loses that to which it had no right. First, the injunction is merely prohibitory. It does not compel ITC to take any action, nor does enforcing the injunction risk loss of the projects. Thus, in the unlikely scenario ITC prevails on appeal, the Court may ultimately allow it to pick back up where the projects left off. ITC therefore suffers no harm by leaving the injunction in place. What it seeks is to advance harm, not prevent it.

Because section 478.16 was deemed unconstitutional, ITC has no right to usurp projects pending appeal. "[A] law repugnant to the constitution is void…." *Marbury v. Madison*, 5 U.S. 137, 180 (1803); *State v. Taylor*, 557 N.W.2d 523, 527 (Iowa 1996) (holding act violating Iowa Constitution article III, section 29 "is void and unenforceable"). "When it is clear that [article III, section 29] of the Constitution has been disregarded, we must not hesitate to proclaim the supremacy of the Constitution." *W. Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1986). Because section 478.16 is unconstitutional and void, it "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Security Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8, 10 (Iowa 1924); *LS Power*, 988 N.W.2d at 339; W. Int'l, 396 N.W.2d at 366. Yet, ITC demands the benefit of what never should have been. ITC demands the rewards of an unconstitutional act that is void *ab initio*.

Contrary to ITC's contention, MISO did not claim it could never reassign the projects. Rather, MISO merely asserted any change in assignment should be done through its tariff. As noted, under its tariff, MISO may perform a variance analysis and reassign projects when an incumbent transmission owner cannot complete a project, including where: (1) the incumbent cannot secure necessary state approvals, permits, rights of way, etc.; (2) the incumbent notifies MISO it cannot proceed; or (3) where the incumbent must abandon the project. *Id.* at Attachment FF, §§ IX.C.4, IX.E.3 (Attachment to D0007, Exh. 13 at 196-97, 205-06). LSP continues to assume MISO will respect a court ruling and its clear tariff provisions, including related to its variance analysis authority. This is particularly true given the Legislature did not reenact the ROFR.

Indeed, MISO has exercised its variance analysis authority after assignment due to state incumbent preference laws. *Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,020, at ¶¶ 2, 18, 23 (2023); *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at ¶¶ 3–6, 12, 14, 45–48, 71 (2023). After a project was assigned to a nonincumbent through competitive bidding, Texas enacted a ROFR preventing nonincumbents from obtaining necessary permits. *Midcontinent Indep. System Operator, Inc.*, 182 FERC ¶ 61,175, at ¶¶ 3-6, 12, 14 (2023). Thereafter, despite already assigning the project, MISO exercised its variance analysis authority (canceling rather than reassigning the project), determining the nonincumbent could

not complete the project because state law changed. *Id.* at ¶¶ 6, 45. FERC upheld MISO's decision, finding the nonincumbent unable to complete the project because state law prohibited the relevant state commission from issuing certificates necessary to construct the line. *Id.* at ¶¶ 46- 48, 71; *Midcontinent Indep. System Operator, Inc.*, 184 FERC ¶ 61,020, at ¶¶ 2, 18, 23 (2023) (affirming earlier decision). Rather than hold a change in state law affecting MISO's assignment decision was preempted, MISO and FERC both recognized such a change may trigger MISO's variance analysis authority.[5] The same is true here.

ITC claims it must proceed with projects under MISO's tariff and a transmission owners agreement, but the injunction makes it impossible to fulfill its alleged obligation. This is false. MISO recognizes state court proceedings can inhibit projects and therefore waived any requirement the transmission owner proceed pending litigation:

> The affected Transmission Owner(s), Selected Developer(s), or other designated entity(ies), shall make a good faith effort to design, certify, and build the designated facilities to fulfill the approved MTEP.

[5] At least one FERC commissioner recognized MISO would need to competitively bid the projects should the Court affirm section 478.16 is unconstitutional. Order on Transmission Rate Incentive, 184 FERC ¶ 61,083 (FERC Aug. 8, 2023) (Christie, Commissioner dissenting) ("There currently is pending in Iowa state courts a challenge to Iowa's Right of First Refusal (ROFR) law—the same law which MISO assigned the Project to ITC Midwest. Should the Iowa ROFR law ultimately be struck down by the Iowa courts, presumably the bidding for the Project would have to be rerun by MISO on a competitive basis….").

> However, in the event that an MTEP Appendix A project approved by the Transmission Provider Board is being challenged through the dispute resolution procedures under this Tariff **or in court proceedings**, **the obligation of the Transmission Owners, or other designated entity(ies), to build that specific project (subject to required approvals) is waived until the approved project emerges from the dispute resolution procedures**.

MISO Tariff Attachment FF Section VI.C (Attachment to D0007, Exh. 13 at 96-97) (emphasis added); *see also id.* at Section VIII.G (Attachment to D0007, Exh. 13 at 189) ("in the event that a MTEP Appendix A Competitive Transmission Project approved by the Transmission Provider Board is being challenged through … a court proceeding, the obligation of the Selected Developer(s) to build the specific Competitive Transmission Project (subject to required approvals) is waived until the Competitive Transmission Project emerges from … court proceedings…."). MISO's Transmission Owners Agreement confirms the obligation to use "due diligence to construct transmission facilities directed by MISO" is "subject to such siting, permitting, and environmental constraints as may be imposed by state, local, and federal laws and regulations, and subject to the receipt of any necessary federal or state regulatory approvals." MISO TOA, art. 4 § I(C), https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf (posted Mar. 2, 2018). Thus, not only did MISO not override state power, it expressly deferred to it.

Finally, ITC contends it is inequitable to enjoin it from continuing projects when it allegedly invested $10 million to pursue them. That also is contrary to the law. ITC claimed those projects during the pendency of the prior appeal, assuming the risk section 478.16 could be declared unconstitutional, and projects enjoined. *Kragnes*, 810 N.W.2d at 512; *Aking v. Mo. Gaming Comm'n*, 956 S.W.2d 261, 265 (Mo. 1997). Gambling and losing is not irreparable injury. ITC is "a big boy; it took a risk; the risk materialized…." *MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016). Further, by insisting it will lose its alleged investment if the injunction causes the projects to be competitively bid, ITC only highlights the injury to the public this Court and the district court sought to prevent: ITC only loses the bid if it is not the most beneficial to ratepayers. ITC's assumption that it cannot compete, and will lose its investment, when the playing field is leveled, says everything that needs to be said about the act and the public interest.[6]

[6] Even if ITC were harmed, staying the permanent injunction also would not alleviate it because, presumably, this Court's injunction would still remain in place. *LS Power*, 988 N.W.2d at 340 (enjoining enforcement of section 478.16 "pending resolution of this case").

V. THE PERMANENT INJUNCTION PROTECTS THE PUBLIC FROM CRONY CAPITALISM AND THE HARM OF AN UNCONSTITUTIONAL LAW.

The district court did not write on a blank slate when it held enjoining projects taken under an unconstitutional act advanced the public interest. Indeed, this Court already made clear section 478.16 "is quintessentially crony capitalism." *LS Power*, 988 N.W.2d at 338. It is "rent-seeking, protectionist legislation" and "anticompetitive." *Id.* In line with FERC, this Court recognized section 478.16 "will decrease competition and thereby increase the cost of electricity for Iowans." *Id.* at 339. "It is axiomatic that competition breeds innovation, variety, higher quality goods and services, and lower prices for consumers." *Id.* (quotation omitted).

> Common sense tells us that competitive bidding will lower the cost of upgrading Iowa's electric grid and that eliminating competition will enable the incumbent to command higher prices for both construction and maintenance. Ultimately, the ROFR will impose higher costs on Iowans. The data back this up: amicus Coalition of MISO Transmission Customers offers data collected from two recent bid-based projects that indicate competition reduces costs by fifteen percent compared to MISO's estimates. As the Coalition summarizes, "Without competition, there are fewer checks and balances on cost estimates, and no pressures or incentives to curb project costs and prevent cost overruns."

Id. at 338. Section 478.16 "will undoubtedly injure Iowa residents by removing [the incumbent's] incentives to innovate, improve, and reduce costs." *Id.* at 339 (quotation omitted) (finding section 478.16 "will almost certainly increase the cost

of electricity to customers across the State" (quotation omitted)). The fact ITC believes it will lose this bid if forced to compete confirms this.[7]

Yet, ITC demands the Court perpetuate this anticompetitive system, which the Legislature never reenacted, despite the law being unconstitutional. Allowing ITC to continue projects pending appeal, despite the district court's declaration, only harms the public interest. Further, staying an order enjoining a constitutional violation "would not serve the public interest" because "[t]he public has an interest in ensuring that all parties are required to comply with the law." *Staley*, 332 F. Supp.

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[7] FERC and numerous courts agree with this Court. *Nw. Requirements Utilities v. FERC*, 798 F.3d 796, 809 (9th Cir. 2015) ("consumers of energy plainly stand to benefit from open access and increased competition in energy markets"); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 968 (D.C. Cir. 2000) ("FERC was entitled to rely on the general economic theory that the introduction of competition to the market will benefit consumers."); *Kansas Power & Light Co. v. FERC*, 891 F.2d 939, 940 (D.C. Cir. 1989) (recognizing benefits of competition in energy delivery); *Assoc. Gas Distr. v. FERC*, 824 F.2d 981, 994 (D.C. Cir. 1987), modified, 89 P.U.R.4th 273 (F.E.R.C. 1987) ("competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market"); *Nw. Pipeline Corp.*, 51 F.E.R.C. at 61, 912 ("the benefits which will accrue to the public as a result of competition in the natural gas industry outweigh any adverse impacts on particular parties"); FERC Order 1000, 76 Fed. Reg. at 49,886 ("The Commission is concerned that the existence of federal rights of first refusal may be leading to rates for jurisdictional transmission service that are unjust and unreasonable…. * * * [P]roposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs."); *Nw. Pipeline Corp.*, Docket No. CP89-1343-001, 53 F.E.R.C. ¶ 61,012, 61,052 (1990) (concluding competition benefits the public).

2d at 1043 ("In this case the law requires that the County comply with the court's injunction pending successful relief through the appellate process."). Thus, the Court should deny ITC's motion.

VI. STAYS REQUIRE A BOND.

Finally, in seeking a stay, ITC appears to ignore that a bond would be required. Generally, an appeal does not stay a judgment or order "unless the appellant executes a bond with sureties, filed with and approved by the district court or clerk of the district court where the judgment or order was entered." Iowa R. App. P. 6.601(1). Because ITC does not appeal a money judgment, "the bond must be an amount sufficient to hold [LSP] harmless from the consequences of the appeal…." Iowa R. App. P. 6.601(2)(b).[8] Here, enjoining this unconstitutional act was to remedy LSP's "loss of opportunity to compete for new projects." *LS Power*, 988 N.W.2d at 339. If the permanent injunction is affirmed, MISO can exercise variance authority to allow LSP to compete. But if Intervenors devour the projects, a bond must be in place sufficient to protect LSP from being unconstitutionally deprived of the

[8] The $100 million bond cap under Iowa Code section 625A.9 only applies to money judgments. Iowa Code § 625A.9(2)(a)(1), (2)(b) (West); Iowa R. App. P. 6.601(2)(b) (stating section 625A.9(2)(b) applies to money judgments and "**[i]n all *other* cases**, the bond must be an amount sufficient to hold the appellee harmless from the consequences of the appeal….").

opportunity to compete for approximately $2,643,000,000 of projects in Iowa. *Id.* at 333. The damage is extreme; thus, the bond must be extreme.

CONCLUSION

ITC and the others repeatedly sought to delay resolution of this matter only to then claim delay they created deprived the court of its power to remedy the harm. ITC fails to meet its high burden to stay the permanent injunction pending appeal. Allowing ITC to continue the very harm to LSP and the public this Court and the district sought to prevent is inequitable. Therefore, LSP respectfully requests the Court deny ITC's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 7th day of May, 2024, I electronically filed the foregoing Appellees' Resistance to Intervenor/Appellant ITC Midwest LLC's Motion to Stay with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following party. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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VI. Implementation of the MTEP:

A. If the Transmission Provider and any Transmission Owner's planning representatives, or other designated entity(ies), cannot reach agreement on any element of the MTEP, the dispute may be resolved through the dispute resolution procedures provided in the Tariff, or in any applicable joint operating agreement, or by the Commission or state regulatory authorities, where appropriate. The MTEP shall have as one of its goals the satisfaction of all regulatory requirements as specified in Appendix B or Article IV, Section I, Paragraph C of the ISO Agreement.

B. The Transmission Provider shall present the MTEP, along with a summary of relevant alternative projects that were not selected, to the Transmission Provider Board for approval on a biennial basis, or more frequently if needed. The proposed MTEP shall include specific projects already approved as a result of the Transmission Provider entering into Service Agreements with Transmission Customers where such agreements provide for identification of needed transmission construction, timetable, cost, and Transmission Owner or other parties' construction responsibilities.

C. Approval of the MTEP by the Transmission Provider Board certifies it as the Transmission Provider plan for meeting the transmission needs of all stakeholders subject to any required approvals by federal or state regulatory authorities. The Transmission Provider shall provide a copy of the MTEP to all applicable federal and state regulatory authorities. The affected Transmission Owner(s), Selected Developer(s), or other designated entity(ies), shall make a good faith effort to design, certify, and build the designated facilities to fulfill the approved MTEP. However, in the event that an MTEP Appendix A project approved by the

Transmission Provider Board is being challenged through the dispute resolution procedures under this Tariff or in court proceedings, the obligation of the Transmission Owners, or other designated entity(ies), to build that specific project (subject to required approvals) is waived until the approved project emerges from the dispute resolution procedures. In the event that selection of the Selected Developer(s) to construct a project is being challenged through the Dispute Resolution Process under Attachment HH of the Tariff, the obligation of the Selected Developer(s) to construct the project pursuant to the Selected Developer Agreement is not waived. The Transmission Provider Board shall allow the Transmission Owners, or other designated entity(ies), to optimize the final design of specific facilities and their in-service dates if necessary to accommodate changing conditions, provided that such changes comport with the approved MTEP and provided that any such changes are accepted by the Transmission Provider through the Variance Analysis process described in Section IX of this Attachment FF, as necessary. Any disagreements concerning such matters shall be subject to the dispute resolution procedures of this Tariff.

D. The Transmission Provider shall assist the affected Owner(s), Selected Developer(s), or other designated entity(ies), in justifying the need for, and obtaining certification of, any facilities required by the approved MTEP by preparing and presenting testimony in any proceedings before state or federal courts, regulatory authorities, or other agencies as may be required. The Transmission Provider shall publish annually, and distribute to all Members and all appropriate state regulatory authorities, a five-to-ten-year planning report of forecasted transmission requirements. Annual reports and planning reports shall be available to the general public upon request.

VIII.A. APPLICABILITY

Except as otherwise provided in Sections VIII.A.1, VIII.A.2 and VIII.A.3 of this Attachment FF, the Competitive Developer Selection Process shall be applicable to all transmission facilities and substation facilities included in an Eligible Project.

VIII.A.1. State or Local Rights of First Refusal:

The Transmission Provider shall comply with any Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner. The Transmission Owner will be assigned any transmission project within the scope, and in accordance with the terms, of any Applicable Laws and Regulations granting such a right of first refusal. These Applicable Laws and Regulations include, but are not limited to, those granting a right of first refusal to the incumbent Transmission Owner(s) or governing the use of existing developed and undeveloped right of way held by an incumbent utility.

VIII.A.2. Upgrades to Existing Transmission Facilities:

A Transmission Owner shall have the right to develop, own, and operate any upgrade to a transmission facility owned by the Transmission Owner, in accordance with this Tariff and the ISO Agreement.

VIII.A.2.1. Upgrades to Existing Transmission Lines: Upgrades to existing transmission line facilities include any expansion, replacement, or modification, for any purpose, made to existing transmission line facilities that are classified as transmission plant and owned by one or more Transmission Owners,

VIII.G. OBLIGATION TO CONSTRUCT COMPETITIVE TRANSMISSION PROJECT

The Selected Developer(s) will assume the responsibility and obligation to construct the Competitive Transmission Facilities it is selected to construct. If the Selected Developer(s) is/are financially incapable of carrying out its construction responsibilities, alternate construction arrangements shall be identified. Depending on the specific circumstances, such alternate arrangements shall include solicitation of Transmission Owners to take on financial and/or construction responsibilities. If the delay in construction adversely affects the Transmission System reliability, the Transmission Provider shall coordinate with and support the affected Transmission Owner(s) regarding any mitigation measures that may be required by the Applicable Reliability Standards.

However, in the event that a MTEP Appendix A Competitive Transmission Project approved by the Transmission Provider Board is being challenged through the Dispute Resolution process under Attachment HH of the Tariff or a court proceeding, the obligation of the Selected Developer(s) to build the specific Competitive Transmission Project (subject to required approvals) is waived until the Competitive Transmission Project emerges from the Dispute Resolution process or court proceedings as an approved Competitive Transmission Project. In the event that selection of the Selected Developer to construct a project is being challenged through the Dispute Resolution Process under Attachment HH of the Tariff, the obligation of the Selected Developer to construct the project pursuant to the Selected Developer Agreement is not waived.

the terms thereof.

IX.C.4 Inability to Complete Facilities

If the Transmission Provider makes a determination that a Selected Developer or an incumbent Transmission Owner will be unable to complete facilities for which it has been designated to construct; where such determination may be based on, but is not limited to the following:

a. A Selected Developer's or an incumbent Transmission Owner's inability to secure necessary approvals, permits, certificates, financing, resources, needed expertise and/or third party support identified in the Selected Proposal, property rights, rights of way, or is otherwise unable or unlikely to construct the facilities;

b. A Selected Developer's or an incumbent Transmission Owner's notification to the Transmission Provider that it is unable or unwilling to proceed with construction of its facilities for which it has been designated to construct;

c. A Selected Developer or an incumbent Transmission Owner's abandonment of the facilities it has been designated to construct;

d. A determination by the Transmission Provider that a Selected Developer is no longer a Qualified Transmission Developer; and

e. A determination by the Transmission Provider that reassignment is necessary pursuant to Section IX.E.3 of this Attachment FF.

In selecting the appropriate Variance Analysis Outcome to apply where the Transmission Provider has determined that a Selected Developer or an incumbent Transmission Owner will be unable to complete the facilities for which it has been designated to construct, the Transmission Provider will consider, but is not limited to considering the following, in addition to the general factors set forth in Section IX.D.2.1:

(i) The reasons that the Selected Developer or the Transmission Owner was unable or was unlikely to construct the facilities;

(ii) Whether the facilities are still needed;

(iii) Whether a Mitigation Plan, as further described in Section IX.E.2 of this Attachment FF, is available that could remedy the ground(s) for Variance Analysis, including consideration of the extent to which it will cost; and

(iv) Whether reassignment, as further described in Section IX.E.3 of this Attachment FF, is available, including the impacts of reassigning the facilities to another entity.

IX.C.5 Undisclosed Assignments

If the Transmission Provider determines that the Selected Developer has assigned the Competitive Transmission Facilities, Competitive Transmission Project, or Selected Developer Agreement to an entity not disclosed in its Proposal as required by Section VIII.D.5.12 or on terms materially different than

combination of the following components: (i) an updated implementation plan; (ii) an operating procedure; or (iii) alternative facilities and or projects to mitigate reliability violations. If a mitigation plan is used, the Transmission Provider and Selected Developer shall work together to amend the Selected Developer Agreement to reflect the mitigation plan. In the event that the Selected Developer or incumbent Transmission Owner refuses to execute the Transmission Provider's proposed mitigation plan or offer a substitute plan reasonably acceptable to the Transmission Provider, the Transmission Provider may elect either to file its proposed mitigation plan with the Commission unexecuted, select an alternate Variance Analysis Outcome or, in if the Selected Developer is a signatory to the ISO Agreement, proceed thereunder.

IX.E.3. Reassignment

The Transmission Provider may determine to reassign Competitive Transmission Facilities in accordance with Section IX.E.3.1 of this Attachment FF. Reassignment shall also be proper if a Selected Developer fails to maintain its Qualified Transmission Developer status after the expiration of any applicable cure period. If a Selected Developer is the incumbent Transmission Owner whose service area is the service area for which the facilities triggering Variance Analysis are located, the Transmission Provider shall seek recourse through the ISO Agreement or FERC, as appropriate. In all other cases, the Transmission Provider will consider the factors set forth in Sections IX.D.2.1, IX.E.1, and IX.E.2 of this Attachment FF as well as the following, in

determining whether Reassignment is applied including but not limited to:

A. Whether a mitigation plan would be sufficient to alleviate the ground(s) for Variance Analysis;

B. The actions that the incumbent Transmission Owner(s), to whom the facilities would be reassigned to if the Transmission Provider selects the Reassignment Variance Analysis Outcome, would reasonably be required to take to successfully complete the facilities;

C. The incremental costs of the Reassignment Variance Analysis Outcome; and

D. The extent of any potential delay that the Reassignment Variance Analysis Outcome may cause and any potential impacts on reliability.

If the Transmission Provider selects the Reassignment Variance Analysis Outcome, the Selected Developer(s) shall be obligated to work cooperatively and in good faith with the Transmission Provider, the incumbent Transmission Owner(s), and the affected Transmission Owner(s) and/or non-MISO transmission owners, to implement the transition.

IX.E.3.1. Procedure for Reassignment

Prior to making any determination to reassign facilities or projects, the Transmission Provider shall consult with the entity or entities to which such facilities or projects would be assigned to ascertain: (1) the

Ancillary Services: Those services that are necessary to support Capacity and the transmission of Energy from Resources to Loads while maintaining reliable operation of the Transmission System in accordance with Good Utility Practice.

Annual ARR Allocation: The procedure used by the Transmission Provider annually to allocate ARRs and MVP ARRs.

Annual ARR Registration: The annual process for registering ARR Entitlements and MVP ARR Entitlements.

Applicable Laws and Regulations: All duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority having jurisdiction over the Parties, their respective facilities and/or the respective services they provide.

Applicable Reliability Standards: Reliability Standards approved by the Federal Energy Regulatory Commission (FERC) under Section 215 of the Federal Power Act relating to operation of the Transmission Provider in carrying out its Reliability Coordinator, Balancing Authority, Market Operator, Transmission Service Provider, and Planning Coordinator functions. In addition to FERC approved standards, any regional reliability criteria and/or standards relating to operation of the Transmission Provider in carrying out the functions listed above.

Applicant: An entity desiring to hold FTRs, take Transmission Service, engage in Market Activities or take any other service under this Tariff, or become a Market Participant, Transmission Customer or Coordination Customer under this Tariff.

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. All participants in this case registered with CM/ECF will be served by the CM/ECF system.

Respectfully submitted,

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