IN THE IOWA SUPREME COURT

Supreme Court No. 24–0641

District Court No. CVCV060840

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,
Plaintiffs–Appellees,
vs.
STATE OF IOWA, IOWA UTILITIES BOARD, and ERIK HELLAND,
Defendants–Appellants,
and
MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC,
Intervenors–Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE COLEMAN J. MCALLISTER

Reply Brief of Appellant ITC Midwest LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

LS Power's responsive brief misses the mark because LS Power misconstrues the issue on appeal. Intervenor ITC Midwest LLC ("ITC") appealed only a narrow portion of the District Court's injunction in this case, specifically, the portion that prohibits the Iowa Utilities Commission ("IUC"), ITC, and Intervenor MidAmerican Energy Company ("MEC") from:

> taking any additional action, or relying on prior actions, related to any and all electric transmission line projects in Iowa that were claimed pursuant to, under, or in reliance on Iowa Code § 478.16 and/or Iowa Administrative Code rule 199-11.14.

D0136 at 22. Significantly, 70 percent of the Iowa long range transmission planning ("Iowa LRTP") projects Midcontinent Independent System Operator Inc. ("MISO") assigned to ITC were assigned as upgrades under its Open Access Transmission, Energy and Operating Reserve Markets Tariff ("Tariff") without any reliance upon and independent of § 478.16. In LS Power's attempt to establish an alternate reality, it completely ignores this fact. LS Power fails to address the threshold question before this Court: whether the District Court had subject matter jurisdiction to retroactively require MISO—a nonparty, regulated exclusively under the Federal Power Act ("FPA")—to reassign the Iowa LRTPs in a competitive process in contravention of its Federal Energy Regulatory Commission ("FERC") approved

Tariff.[1] It did not. The District Court also erred by issuing an injunction with such a sweeping, retroactive scope. Accordingly, this Court should reverse the retroactive portion of the District Court's injunction, which is also the portion that trespasses on exclusive federal jurisdiction.

REGULATORY BACKGROUND

LS Power mischaracterizes the regulatory framework governing electricity transmission, so it is important to clarify a few background points.[2]

The FPA provides for exclusive federal jurisdiction over wholesale electricity rates and interstate transmission. The FPA leaves decisions about the physical siting of transmission facilities to States—States may oversee "facilities used for the generation of electric[ity,] . . . local distribution or only for the transmission of electric[ity] in intrastate commerce." 16 U.S.C. § 824(b)(1); *see also NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 313 (5th Cir. 2022). In Iowa, the franchising provisions in Chapter 478 govern siting and routing proceedings of the

[1] MISO's Tariff is available at https://www.misoenergy.org/legal/rules-manuals-and-agreements/tariff/.

[2] LS Power also mischaracterizes ITC's arguments. In one of numerous instances of LS Power responding to the argument it ***wishes*** ITC made instead of the argument ITC actually made, LS Power states that "Appellants continue to misrepresent the record to claim it was LSP that sought reconsideration." LS Power Br. at 14 n.1. But ITC's brief accurately stated, "LS Power sought additional retrospective relief ***in its response*** to rehearing petitions by suggesting the Supreme Court clarify" that the preliminary injunction was retroactive. ITC Br. at 12 (emphasis added).

IUC.

Thus, LS Power's argument that states have exclusive jurisdiction over siting and routing is undisputed.[3] But the law about siting and routing is irrelevant. The issue of which projects will be competitive and who can bid are matters of interstate transmission subject to exclusive federal jurisdiction.

The history of this bright line division between state and federal authority began in 1927, when the U.S. Supreme Court held the Commerce Clause prohibited states from regulating interstate wholesale electricity. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265–66 (2016) (citing *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec Co.*, 273 U.S. 83, 89–90 (1927)). When Congress enacted the FPA in 1935, it declared federal regulation of interstate electric transmission and wholesale sales "necessary in the public interest." *See New York v. F.E.R.C.*, 535 U.S. 1, 19–20 & n. 11 (2002) (quoting 16 U.S.C. § 824(a)). Congress also established FERC and gave it jurisdiction to regulate "all facilities for such transmission or sale of electric energy." *Id.* at 22 (citing 16 U.S.C. § 824(b)(1)).

As the electricity grid shifted away from vertically integrated local utilities toward a regional energy grid in the 1970s and 1980s, FERC encouraged utilities

[3] *See* LS Power Br. at 37 n. 14, 40, 41 n. 17, 42, 43 n. 18, 47, 49 n. 22; *see also* LS Power Br. at 11 (characterizing the issue as whether federal law preempts decisions on siting and construction).

that owned transmission lines to form voluntary associations to "manage wholesale markets on a regional basis." *Elec. Power*, 577 U.S. at 267. These associations are regional transmission organizations ("RTOs") and independent system operators ("ISOs"), like MISO, and now operate most of the electrical grid based on FERC-sanctioned Tariffs.

A group of Midwestern transmission operators created MISO, a private and independent organization, in 2001. MISO oversees the reliable flow of wholesale electricity across the region. Under its FERC-approved Tariff, MISO must consider state law when selecting a developer to own a project.[4] *See* MISO Tariff, Attachment FF § VIII.A.1 (hereinafter, "Attachment FF").

In this case, as MISO's amicus brief and variance analysis decision outline, MISO selected developers for the Iowa LRTPs based on Attachment FF. *See* Tariff, Rate Schedule 1, Appendix B (Planning Framework); Attachment FF (Transmission Expansion Planning Protocol). MISO's selection decision falls on the federal side

[4] Absent the requirement under Attachment FF for MISO to consider state law, the Iowa ROFR would have had no effect on the ownership of the Iowa LRTPs. The Iowa Legislature does not regulate selection of interstate transmission owners because it cannot regulate interstate transmission under the FPA. The ROFR only applied because Attachment FF required MISO to consider state law when it assigned ownership of the projects. The district court cannot now order MISO to "undo" its decision under Attachment FF any more than it could order MISO to follow the ROFR if it were in effect, but Attachment FF did not require its consideration.

of the bright line between state and federal jurisdiction.[5] Put differently, MISO's transmission ownership assignment lies exclusively under federal law. That decision can only be challenged at FERC or, in appropriate circumstances, a federal circuit court of appeals.

After MISO assigned the Iowa LRTPs, ITC and MEC filed their required Notice of Intent to Construct with the IUC. They did so because the then-effective ROFR required the filing of a notice.[6] They then commenced the franchising process at the IUC. In that process, the IUC will have no occasion to apply the ROFR statute. (*See* D0125 at 2.). It will apply Chapter 478 state law provisions regarding siting and construction. In other words, even if Section 478.16 never existed, ITC and MEC would follow the same franchising procedures that the District Court enjoined in this case.

The District Court issued the challenged injunction in its summary judgment order. (D0136.) It was not until the District Court issued this expansive, overbroad,

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[5] In another overreach, LS Power states that ITC argued MISO "compelled" it to take the projects, *see* LS Power Br. at 22. Not so. MISO designates ITC and MEC as co-owners as required by Attachment FF.

[6] At the time, Iowa Code § 478.16(3) stated, "[i]f the incumbent electric transmission owner or owners give notice of intent to construct the electric transmission line, the incumbent electric transmission owner or owners *shall follow the applicable franchise requirements pursuant to this chapter*." (Emphasis added.) Similarly, 199 IAC 11.14(3) applies to notification of a decision by the incumbent transmission owner. Thus, LS Power misleads when it argues that by filing this notice, ITC "took" the Iowa LRTPs. LS Power Br. at 22–23.

retroactive injunction that ITC, MEC, MISO, and the IUC recognized the potential for this case to implicate the bright line between state and federal jurisdiction over energy regulation. Before that time, this lawsuit related only to forward-looking interpretation of Iowa law—which is plainly on the state side of the proverbial bright line.

ITC and MEC promptly filed for reconsideration. MISO submitted an amicus brief to inform the District Court regarding the implications of the order on regional transmission system reliability. MISO also commenced a variance analysis under Attachment FF to further mitigate the potential harms of the District Court's order.[7]

As ITC noted in its main brief, MISO properly assigned approximately 70 percent of the Iowa LRTP projects to ITC as "upgrades" as well as under the ROFR.[8]

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[7] LS Power repeatedly called for a Variance Analysis to resolve this dispute. *See e.g.* (D0149 at 13–15 (Jan. 16, 2024) ("If MISO believes a transmission developer cannot complete the facilities . . . MISO may perform a variance analysis and reassign the project."); D0155 at 6 ("MISO has variance analysis authority allowing it to reassign projects when state law changes."); Appellee's Resistance to Intervenor/Appellant ITC Midwest LLC's Motion to Stay at 18-19 (May 7, 2024) ("[A] change [in state law] may trigger MISO's variance analysis."); Reply in Support of Appellee's Request for Quorum Review of July 5, 2024 Order at 9-12 (Jul. 25, 2024) ("MISO has options to address any delay concerns, including using its variance analysis authority … *which it already started*." (emphasis in original) (citing Attachment FF); LS Power Br. at 52–53. MISO has now done what LS Power called for, and the result was assignment of the Iowa LRTPs to ITC and MEC.

[8] LS Power failed to address this argument, and accordingly it has forfeited any ability to challenge it. *See State v. Jackson*, 4. N.W.2d 298, 311 (Iowa 2024) (listing grounds for forfeiture, including "when the party does not include the issue in its main brief" and "when the party fails to make an argument").

ITC Br. at 10 n. 2, 18, 22 n. 14, & 35. Because these projects were assigned on grounds other than the ROFR statute, ITC continued to develop the projects, consistent with the District Court's injunction.

MISO recently released a Notice of Variance Analysis Outcome – Mitigation Plan for the Iowa LRTPs ("Mitigation Plans"), which is a ground other than the ROFR statute that confirms the assignment of the Iowa LRTPs for 100 percent of the projects.[9] A MISO variance analysis is a process MISO uses to review an approved project when it appears that the developer "will be unable to complete facilities for which it has been designated to construct." Attachment FF § IX.C.4.

[9] Beverly – Sub 92 Transmission Project, Notice of Variance Analysis Outcome – Mitigation Plan, MISO (Aug. 29, 2024) https://cdn.misoenergy.org/Beverly%20-%20Sub%2092%20Variance%20Analysis%20Mitigation%20Plan%20Public%20Notice645354.pdf; *see also* Madison – Ottumwa – Skunk River Transmission Project, Notice of Variance Analysis Outcome – Mitigation Plan, MISO (Aug. 29, 2024) (same) https://cdn.misoenergy.org/Madison%20-%20Ottumwa%20-%20Skunk%20River%20Variance%20Analysis%20Mitigation%20Plan%20Public%20Notice645355.pdf; Skunk River – Ipava Transmission Project Notice of Variance Analysis Outcome – Mitigation Plan, MISO (Aug. 29, 2024) (same) https://cdn.misoenergy.org/Skunk%20River%20-%20Ipava%20Variance%20Analysis%20Mitigation%20Plan%20Public%20Notice645357.pdf; Webster – Franklin – Marshalltown – Morgan Valley Transmission Project, Notice of Variance Analysis Outcome – Mitigation Plan, MISO (Aug. 29, 2024) (same) https://cdn.misoenergy.org/Webster-Franklin-Marshalltown-MorganValley%20Variance%20Analysis%20Mitigation%20Plan%20Public%20Notice645353.pdf; Orient – Denny – Fairport Transmission Project, Notice of Variance Analysis Outcome – Mitigation Plan, MISO (Aug. 29, 2024) (same) https://cdn.misoenergy.org/Orient%20-%20Denny%20-%20Fairport%20Variance%20Analysis%20Mitigation%20Plan%20Public%20Notice645356.pdf (collectively, "MISO Mitigation Plans").

The inability to complete facilities is significant because in an interconnected electric grid no project is an island: delay or lack of completion impacts other projects, other states, and the overall function of the grid.

In its Mitigation Plans, MISO explained that when it first assigned the Iowa LRTPs, "MISO followed its Tariff by determining that said facilities of the Project were not eligible for the competitive process due to the then-existing Iowa ROFR." In addition, 70 percent of the facilities assigned to ITC were upgrades and exempt from competitive bidding.

Ultimately, MISO concluded for each ITC Iowa LRTP that,

> in light of the applicable Tariff-provided factors and the accompanying findings of fact related to [the Iowa LRTP] Project[s], the most appropriate Variance Analysis outcome shall be a mitigation plan which will: (i) assign ownership of the Iowa facilities through existing provisions set forth within the Transmission Owner Agreement (TOA), and (ii) expediently resolve the reliability concerns created by potential or actual construction delays of the LRTP Tranche 1 Project. By implementing said mitigation plan, all facilities and assignments listed in the current LRTP Tranche 1 Appendix A will remain unchanged.

Mitigation Plans at 3. The Mitigation Plans acknowledge that "per the District Court Order, the Project can still be designated to ITC and MidAm provided it is assigned in a manner not in reliance on the Iowa ROFR."[10] *Id.*

[10] The Iowa LRTPs have been assigned by MISO in the Mitigation Plan "in a manner not relying on claimed existence of § 478.16" and ITC remains obligated under

In other words, MISO reviewed the Iowa LRTPs, determined they were still needed for transmission system reliability, applied its Tariff *again*—applying different provisions giving MISO options for projects that may be in jeopardy—and concluded that a mitigation plan that assigned the projects to ITC and MEC was best. This variance analysis confirms that the Iowa LRTPs are assigned to ITC and MEC based on existing provisions set forth in the MISO Transmission Owner Agreement ("TOA").[11] MISO's assignment of the Iowa LRTPs no longer relies on the claimed existence of the ROFR Statute.

With this background about the bright line between state and federal jurisdiction over electricity regulation clarified, ITC offers the following in reply to LS Power's arguments.

ARGUMENT

ITC agrees that Iowa courts have the power to strike down Iowa statutes as unconstitutional. *See* LS Power Br. at 24. That is why ITC appealed only one aspect of the District Court's Order—the retroactive portion of the injunction—because it

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MISO's Tariff to continue development of the Iowa LRTPs. (D0136 at 22). Thus, even if the retroactive permanent injunction is not dissolved, ITC can proceed with franchising the Iowa LRTPs consistent with the District Court's injunction.

[11] MISO's TOA is available at https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf.

unlawfully invades into a matter of exclusive federal jurisdiction and is improperly retroactive.[12]

I. IOWA COURTS CANNOT INVADE AREAS OF EXCLUSIVE FEDERAL JURISDICTION.

A. LS Power Failed To Respond To ITC's Argument That The District Court Lacked Subject Matter Jurisdiction.

LS Power recasts ITC's argument that the District Court lacked subject matter jurisdiction to contravene MISO's Tariff and the MISO TOA as an isolated preemption argument, suggesting that somehow the argument is time-barred or a required affirmative defense. *Teamsters Local 358 v. Des Moines Register*, 438 N.W.2d 598, 600 (Iowa 1989) (affirming district court's conclusion that it lacked subject matter jurisdiction due to federal preemption). But subject matter jurisdiction is a threshold argument about the Court's authority. *See Bailey v. Batchelder*, 576 N.W.2d 334, 338 (Iowa 1998) ("Once a court discovers it does not

[12] This case is not an example of "justice delayed" nor "justice denied." *See* LS Power Br. at 25. The District Court and Court of Appeals in this case grappled with difficult Iowa Constitutional issues before an appeal to this Court. They did so diligently and thoughtfully. That this Court ultimately disagreed with the District Court's decision is not "justice delayed," it is the legal system working as intended. *See Dep't of Gen. Servs. v. R.M. Boggs Co.*, 336 N.W.2d 408, 410 (1983) ("*Unwarranted* continuances clearly add to the delay" of justice (emphasis added)). Nor would justice be "denied" without the retroactive injunction—the ROFR statute has been struck down and to the extent MISO designates any future facilities in Iowa as competitive projects, LS Power can submit a bid. *See* MISO Long Range Transmission Planning, https://www.misoenergy.org/planning/long-range-transmission-planning/.

have subject matter jurisdiction, it has no choice but to dismiss the case . . . .").[13]ITC's argument is not just about which law—state or federal—applies, but is about *who* gets to apply the applicable law, in this case, MISO's Tariff and TOA.

As discussed, the FPA vests exclusive subject-matter jurisdiction for a challenge to an action under MISO's Tariff with FERC, and appeals with the federal courts of appeals. 16 U.S.C. § 824(a); 16 U.S.C. § 825l; *see also* ITC Br. at 25–27; MISO Amicus Br. at 13–18. LS Power makes only passing reference to "preemption" under 16 U.S.C. § 824 and fails to address that 16 U.S.C. § 825l provides that the exclusive venue to challenge a FERC order is "in the United States court of appeals." *See* LS Power Br. at 40.[14]

Contrary to LS Power's assertion that *NextEra* addressed whether a state ROFR statute could result in a new competitive bid, the Fifth Circuit's *NextEra*

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[13] Subject matter jurisdiction is the court's authority to hear and determine the general class of case before the court; it can be raised at any time. *Alliant Energy-Interstate Power and Light Co. v. Duckett*, 732 N.W.2d 869, 874 (Iowa 2007); *Pierce v. Pierce*, 287 N.W.2d 879, 881 (Iowa 1980).

[14] LS Power previously argued to this Court that harm was irreparable once MISO assigned a project because LS Power would be "forever foreclos[ed] . . . from any opportunity to obtain relief *from this Court* for the illegally approved ROFR." *See* LS Power Br. in Support of Temporary Injunction, Case No. 21-0696 (May 27, 2022) at 29 (emphasis added). This does not mean that a court could never issue a permanent injunction after issuing a preliminary injunction, this means that the permanent injunction must be within the court's jurisdiction. As LS Power previously recognized, Iowa Courts cannot provide relief for an order pursuant to MISO's Tariff and TOA, because that responsibility lies solely with FERC.

decision says nothing about whether a state court can order an RTO like MISO to complete a competitive bid. 48 F.4th at 329; *see* LS Power Br. at 41. In *NextEra*, MISO selected NextEra, a non-incumbent transmission operator, for a competitive transmission project. 48 F.4th at 315. After MISO made its assignment decision, Texas enacted a law that prohibited NextEra from receiving a state approval, specifically a certificate of convenience and necessity. *Id.* at 315. The Fifth Circuit held that NextEra plausibly stated a claim that the Texas law violated the dormant Commerce Clause by regulating interstate transmission and remanded the case for further fact development.[15] *Id.* at 326. The Fifth Circuit said nothing about whether a competitive bid is required after invalidation of a state ROFR statute.[16]

[15] LS Power is also incorrect when it argues that certain force majeure provisions in the Tariff would be applicable here. *See* LS Power Br. at 46 n. 20. The force majeure provision cited by LS Power is solely in the Selected Developer Agreement, which applies to the competitive developer selection process. As even LS Power acknowledges, there is no Selected Developer Agreement for any of the Iowa LRTPs. LS Power Br. at 46. Similarly, LS Power's reference to the TOA is unavailing as the quoted passages do not address a court action. *Id.* at 47.

[16] After the Fifth Circuit's *NextEra* decision, FERC concluded that MISO properly conducted a variance analysis pursuant to its Tariff. *See* FERC Docket No. ER23-865-000, Order Accepting Notice of Termination of Selected Development Agreement, 182 FERC ¶ 61,175 (Mar. 17, 2023). Ultimately, the project in *NextEra* was cancelled because MISO determined the economic and load factors that justified the project had changed. Thus *NextEra* does not stand for the proposition that MISO can or should hold a new competitive bid in this case. The aftermath of *NextEra* shows that here, MISO properly conducted a variance analysis.

B. Rate Cases Are Applicable To This Case Because The Tariff Is A Filed Rate.

LS Power's efforts to distance itself from the filed rate doctrine are unavailing. *See* LS Power Br. at 43 n. 19. The "'filed rate' doctrine . . . holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect . . . " *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); *see also* ITC Br. at 31 n. 17. The filed rate doctrine also applies to the terms and conditions by which federal tariffs are provided, including the Tariff that sets forth the procedures that govern RTO and ISO auctions. *See id.*; *PJM Power Providers Grp. v. FERC*, 96 F.4th 390, 395 (3d Cir. 2024) ("[T]he Tariff . . . is the filed rate in this case."); *Oklahoma Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829–30 (D.C. Cir. 2021) ("[The Tariff's] billing requirements, although non-rate terms, are part of the filed rate.") The filed-rate doctrine "reflects a congressional determination that parties in the [energy] industry need to be able to rely on the finality of approved rates, and that this interest outweighs the value of being able to correct for decisions that in hindsight may appear unsound." *Pub. Utilities Comm'n of the State of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990).

MISO's Tariff is a filed rate. MISO made its assignment determinations for the Iowa LRTPs pursuant to its Tariff, in reliance on the state law in effect at the time. The District Court's decision voiding the ROFR statute did not vest the court

with the jurisdiction to undo what was done under MISO's Tariff.[17] If LS Power wants to challenge MISO's application of Appendix FF based on the now-void ROFR statute, it can do so with FERC, a specialized agency with the statutory authority, experience and insight into the broader transmission plan to evaluate impacts on predictability, reliability, and rates. *See* 16 U.S.C. § 824(a); 16 U.S.C. § 825l.

MISO concurred with this limitation of state court jurisdiction in its variance analysis for the Iowa LRTPs. *See e.g.*, MISO Mitigation Plans, *supra* note 9

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[17] LS Power used to recognize that once a project is assigned by MISO pursuant to its Tariff, its damages were complete and the MISO decision could not be undone. *See* LS Power's Reply in Support of Motion for Temporary Injunction, Case No. CVCV060840 (Dec. 10, 2020) at 5-6 (internal citation omitted) (emphasis in original) ("This is particularly true where, as here, when a project arises, it will be too late: Once a transmission project subject to Division XXXIII is approved by a federal authority, it is *automatically* assigned to the incumbent provider—without opportunity to compete by Plaintiffs."); *see also id.* at 9–10 ("If allowed to proceed, the same irreparable harm occasioned by enforcement of Division XXXIII itself will result. The MISO and SPP regional transmission organization tariffs state they will "comply with Applicable Laws and Regulations granting a right of first refusal to a Transmission Owner." Thus, when a federally approved project arises, if administrative rules are in place, it will be automatically assigned to the incumbent owner by operation of the rules."); LS Power's Combined Reply to Intervenors' Resistances to Plaintiffs' Motion for Temporary Injunction, Case No. CVCV060840 (Jan. 25, 2021) at 22 (internal citation omitted) (emphasis in original) ("As described in Plaintiffs' Reply and admitted by [ITC's] Jeffrey Eddy, once a project arises, it will be automatically assigned to the incumbent entity to elect whether it wishes to build and maintain it. At that point, the harm is complete and irreparable.").

Moreover, even if MISO *can* undo what has been done, that does not give Iowa courts authority to *require* that MISO undo its assignment decisions. *See* LS Power Br. at 47 (arguing that MISO can reassign projects by citing to MISO's Tariff).

("Although the Iowa ROFR is no longer in effect following the District Court Order, MISO must continue to rely on its determination that the Iowa facilities of the Project were not eligible for the competitive transmission process at the time the Project was assigned, per the Tariff."). MISO implemented a mitigation plan for each of the projects and again assigned ownership to ITC and MEC pursuant to its Tariff. ITC and MEC were and are obligated to construct the lines under federal tariffs. *Id.* "ITC and MidAm are still listed as the owners of the Project in MISO's MTEP Appendix A, and the District Court Order did not suspend ITC and MidAm's obligation to construct the Project as imposed upon ITC and MidAm pursuant to the Tariff." *Id.*

C. Even If the District Court Had Subject Matter Jurisdiction, the Retroactive Portion of the Court's Injunction Is Preempted Due to Conflict with Federal Law.

The District Court's order is preempted under the doctrine of conflict preemption to the extent it is interpreted to preclude ITC from constructing the Iowa LRTPs. *See e.g.*, *City of Osceola v. Entergy Ark., Inc.*, 791 F.3d 904, 907 (8th Cir. 2015) (concluding that filed tariffs are federal law); MISO Variance Analysis Outcomes; MISO Amicus Br, at 26–27 ("[T]he District Court's injunction puts the Intervenor-Appellants in an untenable situation by requiring them to choose whether to comply with the Injunction Order or the federal obligations they incurred under the Tariff."). LS Power incorrectly concludes—without any citation—that ITC and

MEC would not violate federal requirements if they stopped developing.[18] *See* LS Power Br. at 45. But as discussed in the previous section, ITC and MEC have an obligation under federal law to construct the Iowa LRTPs pursuant to the Tariff, which means it would be "impossible for [ITC and MEC] to comply with both state and federal requirements.'" *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 300 (2019). The federal tariff provisions must prevail. *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015); *WinRed, Inc. v. Ellison*, 59 F.4th 934, 944 (8th Cir. 2023) (stating test for conflict preemption); *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 649 (Iowa 2019); *S. Ry. Co. v. Reid*, 222 U.S. 424, 442 (1912) ("If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. . . . The balances of the Constitution are only preserved, and there is given to the states the power which is the states' and to Congress the power which belongs to Congress.")

[18] LS Power also suggests that the issue of preemption was not properly preserved because ITC and MEC did not raise the issue as an affirmative defense in its answer. There was no reason to raise preemption as an affirmative defense in this case because, as LS Power needlessly belabors, Iowa Courts have jurisdiction and authority to interpret an Iowa Statute and the Iowa Constitution. ITC did not have notice of a preemption issue until the district court issued an injunction that invaded into a matter of exclusive federal jurisdiction. As the Iowa Court of Appeals has recognized, courts "may address [] preemption" even if it was not raised as an affirmative defense, when there is "a challenge to the court's subject matter jurisdiction or . . . compelling policy reasons to consider the issue." *Leahy v. Deere & Co.*, No. 99-191, 2000 WL 700889 (Iowa App. May 31, 2000). Here there are both.

II. LS POWER RECEIVED A COMPLETE REMEDY THROUGH A PROSPECTIVE INJUNCTION.

A. The Court Reviews the Legal Requirements to Issue an Injunction for Errors of Law and the District Court's Balancing of the Harms De Novo.

LS Power argues over the standard of review. In *Worthington v. Kenkel*, this Court observed that, "[a] petition for injunctive relief traditionally invokes the court's equitable jurisdiction, and [the Court's] review is de novo." 684 N.W.2d 228, 230 (Iowa 2004). Thus, the Court reviews the District Court's balancing of the harms de novo. To the extent this case implicates the legal requirements for the issuance of an injunction, the Court reviews for errors of law. *See id.* As ITC extensively set forth here and in its initial brief, the District Court committed errors of law by issuing an injunction that invaded exclusive federal jurisdiction and was retroactive; thus ITC should prevail under either standard.

B. A Retroactive Injunction Is Not the Remedy for an Unconstitutional Statute.

The ROFR statute has been struck down as unconstitutional and will not be applied in the future. *Contra* LS Power Br. at 29 (suggesting LS Power received no remedy). ITC challenges only the retroactive portion of the District Court's injunction—i.e., the District Court's order requiring specific conduct to undo past acts after it declared the statute void *ab initio*.[19]

[19] LS Power cites to *Ervin & Assocs., Inc. v. Dunlap*, 33 F. Supp. 2d 1, 13 (D.D.C. 1997) for the proposition that when a contract is void *ab initio*, the contract must be

The cases LS Power cites do not stand for the proposition that the District Court could issue a retroactive injunction. For example, in *Stoner McCray Sys. v. Des Moines*, this Court issued an injunction prohibiting *enforcement* of an unconstitutional ordinance. 78 N.W.2d 843, 850–51 (Iowa 1956); *see also Central States Theater Corp. v. Sar*, 66 N.W.2d 450, 457–58 (Iowa 1954) (observing that "an injunction will lie to restrain the threatened enforcement of an invalid law").

Moreover, while LS Power may have been harmed by not being able to bid on some portion of the Iowa LRTPs (had they been classified as competitive), LS Power is not *continually* harmed by a past lost opportunity to bid, especially when LS Power still has not shown that it would have bid on the Iowa LRTPs.[20] This

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rebid. It should go without saying that declaring a contract void *ab initio* will require a new contract—the contract is void. But declaring a statute void *ab initio* does not necessarily mean that every decision made based on that statute must be independently undone. For example, in *Sec. Sav. Bank of Valley Junction v. Connell*, this Court declined to vacate a prior judgment by the tax board of review that was based on a later-declared unconstitutional statute, observing "[i]f it be conceded that they are final as to the right to have the deduction made in the years there involved we think it does not necessarily follow that, when the statute upon which they were based is declared unconstitutional, they are binding as res judicata in subsequent years." 200 N.W. 8, 11 (1924). Thus, this case supports ITC's contention that because MISO's decision is final as to the Iowa LRTPs, the proper remedy is to declare the Iowa ROFR unconstitutional and bar future enforcement. *See also Teague v. Lane*, 489 U.S. 288, 309 (1989) (observing that "it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule").

[20] LS Power cites to ITC's request for an abandoned plant incentive as evidence that ITC recognized this lawsuit had the potential to impact its development of the Iowa LRTPs. *See* LS Power Br. at 48–50. The abandoned plant incentive permits a utility

makes LS Power's situation notably different from the Sixth Amendment and Due Process Clause cases it cites. *See* LS Power Br. at 33; *Montgomery v. La.*, 577 U.S. 190, 204 (2016); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *Kragnes v. Des Moines*, 810 N.W.2d 492, 511 (Iowa 2012) (concluding that "[m]eaningful backward-looking relief is especially appropriate to rectify the class members' overpayments *under the circumstances presented in this case*" (emphasis added)); *McKesson Corp v. Div. of Alcoholic Bevs. & Tobacco, Dep't of Bus. Regul. Of Fla.*, 496 U.S. 18, 51–52 (1990) (considering rule for Due Process violation in tax procedures); *see also State v. Taylor*, 557 N.W.2d 523 (Iowa 1996) (reversing a criminal conviction);[21] *Brodkey v. Sioux City*, 291 N.W. 171 (1940), *reh'g denied*

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to recover "100 percent of prudently-incurred costs associated with abandoned transmission projects … if such abandonment is outside the control of management." Promoting Transmission Investment Through Pricing Reform, Order No. 679, 116 FERC ¶ 61,057, at ¶ 163 (2006). FERC determined that "[t]his incentive will be an effective means to encourage transmission development by reducing the risk of non-recovery of costs." *Id.* There is no inconsistency in ITC taking prudent steps allowed by law to protect its investments from a state court decision while simultaneously arguing that the state court decision was erroneous. Nowhere in the cited FERC filings has ITC ever said the District Court injunction was valid or lawful. *See also* ITC Reply to Resistance to Stay at 6–7.

[21] In *State v. Taylor*, this Court did not, as an illustrative example, issue an injunction prohibiting an employer from relying on Mr. Taylor's later-reversed conviction for a trafficking weapons charge in its employment evaluations. It left the question of what the reversed conviction means for Mr. Taylor for private entities to figure out on their own.

and opinion modified, 296 N.W. 352 (1941) (concluding that district court should have enjoined *ongoing* unconstitutional acts).[22]

The cases that LS Power cites to support its claim that courts "routinely" reverse bid decisions are inapposite. *See* LS Power Br. at 34–35; *O'Donnell Const. Co. v. D.C.*, 963 F.2d 420, 429 (D.C. Cir. 1992) (concluding that a *preliminary* injunction against *enforcement* was appropriate under the facts of the case); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (same); *Express One Int'l, Inc. v. U.S. Postal Serv.*, 814 F. Supp. 93, 102–03 (D.D.C. 1992) (overturning arbitrary and capricious award by federal agency); *John W. Danforth Co. v. Veterans Admin.*, 461 F. Supp. 1062, 1071 (W.D.N.Y. 1978) (concluding that Veteran's Administration failed to observe procurement procedures

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[22] The cases LS Power cites to as examples of equity correcting "past acts" are also inapposite. *See* LS Power Br. at 34. In *Lysenko v. Jensen*, the permanent injunction was entered to protect from the ongoing harm of continual drainage issues. No. 10-0270, 2010 WL 4108826, at *6 (Iowa Ct. App. Oct. 20, 2010). In *United States v. Bailey*, the Eighth Circuit exercised statutory authority to issue injunctive relief for violations of that statute. 571 F.3d 791, 805 (8th Cir. 2009); *see also Rosendahl Levy v. Iowa State Highway Comm'n*, 171 N.W.2d 530, 538 (Iowa 1969) (concluding that State Highway Commission violated its statutory duty, causing ongoing damage to plaintiffs' land); *Albany Bank & Tr. Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 973 (7th Cir. 2002) (observing that statute authorized injunctive relief).

LS Power also cites to *Ohlensehlen v. Univ. of Iowa*, which involved a preliminary injunction and thus is not relevant here. 509 F. Supp. 1085, 1104 (S.D. Iowa 2020).

Last, in *Graham v. Henry*, this Court affirmed a district court decision setting aside a lease based on its ruling that the lease was fraudulent. 456 N.W.2d 364, 364 (Iowa 1990). It is unclear what applicability LS Power thinks *Graham v. Henry* has here.

required by law). Contrary to LS Power's assertion that such a decision is "routine," none of the cases was decided in this century, none applies Iowa law, and none of the cases discusses—let alone endorses—a conclusion that a permanent injunction can be retroactive. The fact that courts in other jurisdictions applying different laws have at times ordered that projects be rebid after balancing the equities of those particular cases is not a reason to abdicate the rule in Iowa that permanent injunctions are prospective.

The District Court's expansive, retroactive injunction went far beyond LS Power's Complaint and its authority. The District Court should have adhered to the scope of this Court's temporary injunction and issued a permanent injunction against enforcement of the ROFR, the limited and proper remedy for an unconstitutional statute.

III. LS POWER AGAIN DISREGARDS THE IMPACT OF DELAYS IN UPGRADES TO TRANSMISSION IN BALANCING HARMS.

LS Power does not dispute that rebidding will result in significant delays and electricity reliability consequences for Iowa customers. *See generally* LS Power Br.; *see* ITC Br. at 39–42. These significant harms to reliability of the electrical grid must be balanced against hypothetical harm in an alleged lost opportunity to bid on projects and speculative reduced costs that LS Power identifies. In discussing ROFR statutes, the Seventh Circuit observed that,

> the benefit [of a ROFR] is surely very considerable, of a quick resolution of reliability problems. Delays will be inevitable if companies outside the service area are permitted to bid for the project, since competitive bidding takes time and may get bogged down in litigation.

MISO Transmission Owners v. FERC, 819 F.3d 329, 335 (7th Cir. 2016).

If future Iowa transmission facilities are put up by MISO for bid, LS Power will be unhindered by the now invalidated ROFR statute. LS Power's alleged harms are in the past, speculative, and tenuous, whereas the consequences of delay to the reliability of the grid are imminent, urgent, complex, and may hinder future development. *See* ITC Br. at 41 (discussing reliability imperative). The Court should reverse the District Court's injunction because it is not supported by the balance of the harms.

IV. MISO'S AMICUS BRIEF WOULD HAVE HELPED THE DISTRICT COURT.

A central focus of summary judgment orders at the District Court was the scope of its authority over MISO. Thus, timing of MISO's amicus brief is justified. Nothing in LS Power's brief detracts from the fact that injunction aimed to impact MISO's authority and the District Court erred by not considering it. *See* ITC Br. at 50–55.

V. RESPONSE TO AMICUS RPGI.

Resale Power Group of Iowa ("RPGI") raises policy arguments about the purported benefits of competitive bidding without any factual background or

citation. The merits of ROFRs are outside the scope of this appeal. These policy arguments about ROFRs generally provide no insight into the proper scope of the District Court's injunction. To the extent RPGI's brief might be relevant to balancing the harms, RPGI follows LS Power's lead in disregarding the complex history that led to the current situation in Iowa, the fact that 70 percent of the ITC Iowa LRPTs are upgrades, and the importance of reliability to Iowa customers.

RPGI challenges ITC's costs without recognizing the substantial investment ITC had to make in the state after IUC approved the reorganization that transferred Interstate Power and Light's ("IPL") transmission assets to ITC. When the Commission approved the reorganization,[23] it intended for ITC to increase investment in the transmission system. At that time, witnesses testified that IPL had constraints on its lines, and that 800 miles of lines were old and needed updates. The IUC observed that "one of the main driving forces in this docket is the need to build and upgrade transmission in IPL's service territory." Reorganization Order at 38. The IUC knew about—and intended for—significant new investment by ITC to fix acute reliability issues.

[23] *Interstate Power and Light Co. and ITC Midwest LLC*, Docket No. SPU-07-11, Order Terminating Docket and Recommending Delineation of Transmission and Local Distribution Facilities (IUB, Sept. 20, 2007) ("Reorganization Order").

ITC's investment has, in fact, resulted in improved reliability. Comparing the most recent figures to when ITC took over the IPL transmission system in 2007, ITC has reduced transmission outages by 77 percent. The largest electrical loads (like those of RPGI's members) are also some of the biggest beneficiaries of the improved reliability and capacity of the system. That RPGI apparently now seeks to punish ITC for these needed and successful investments is a policy issue that is at best tenuously related to the ROFR statute; the relationship is certainly not direct or clear enough for this Court to give any consideration to the amicus.

CONCLUSION

For the reasons stated, this Court should reverse the District Court's decision and remand with instructions to dissolve its retroactive injunction.

Respectfully submitted on September 16, 2024.

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COST CERTIFICATE

I hereby certify that the cost of printing the foregoing brief was the sum of $0.00.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(i)(1) because this brief contains 6,491 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(i)(1).

This brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(g) and the type style requirements of Iowa Rule of Appellate Procedure 6.903(1)(h) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point.

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically filed with the Clerk of the Supreme Court using the Electronic Document Management System (EDMS) on September 16, 2024, which will send a notice of electronic filing to all registered counsel of record.

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