

IN THE SUPREME COURT OF IOWA

No. 24-0641

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.

Polk County Case No. CVCV060840

**FINAL BRIEF OF AMICUS CURIAE
RESALE POWER GROUP OF IOWA**

KELLY A. CWIERTNY AT0000282

SHUTTLEWORTH & INGERSOLL, P.L.C.

235 6th St. SE

Cedar Rapids, IA 52401

Tel: 319-365-9461; Fax: 319-365-8443

kac@shuttleworthlaw.com

ATTORNEY FOR THE RESALE POWER GROUP OF IOWA, AMICUS CURIAE

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STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Resale Power Group of Iowa (“RPGI”) is a special-purpose governmental entity, organized in 1986 pursuant to Chapter 28E of the Code of Iowa, to purchase electric supply, transmission, and related services as an agent for its members. Currently, RPGI’s members include 24 Iowa municipal utilities, one electric cooperative association, and one privately-owned utility¹, all of which depend on, and benefit from, federal and state policies and regulations designed to reduce electric transmission costs through increased competition in the interstate and intrastate transmission market.

¹ Participant members include: City of Afton, Amana Society Service Company, Anita Municipal Utilities, City of Buffalo, Coggon Municipal Light Plant, City of Danville, City of Dysart, Farmers Electric Cooperative - Kalona, Grand Junction Municipal Utilities, City of Guttenberg, Hopkinton Municipal Utilities, La Porte City Utilities, City of Long Grove, Mount Pleasant Municipal Utilities, New London Municipal Utilities, Ogden Municipal Utilities, City of Pocahontas, Sibley Municipal Utilities, State Center Municipal Electric Utilities, Story City Municipal Electric Utility, Tipton Municipal Utilities, Traer Municipal Utilities, Vinton Municipal Electric Utility, City of West Liberty, City of West Point, City of Whittemore.

RPGI is a Market Participant in the Midcontinent Independent System Operator (“MISO”) and Southwest Power Pool (“SPP”). RPGI’s load is predominately located in the ITC-Midwest LLC (“ITC-MW”) and MidAmerican Energy Company (“MidAm”) transmission zones. Both are incumbent transmission owners and both are intervenors in this proceeding. RPGI purchases electric transmission service on behalf of its members from ITC-MW and MidAm at formula rates through MISO’s Open Access Transmission Tariff, as approved by the Federal Energy Regulatory Commission (“FERC”).

Concurrent with this brief, RPGI seeks leave to file an amicus brief supporting the position of Plaintiffs-Appellees LS Power Midcontinent, LLC and Southwest Transmission, LLC (together as “LSP”) because the final resolution of this matter could have tremendous impact on electric utility transmission costs across Iowa. If the project approvals granted while Iowa Statute § 478.16 was a valid and enforceable law in Iowa are allowed to stand without being competitively bid, the result will almost certainly be

an increase in the cost of electricity to customers across the State, including rate payers in RPGI's small, rural communities.

Iowa's Statute § 478.16 gave incumbent transmission owners the right of first refusal ("ROFR") to develop, construct, and own new MISO interconnection projects. The history of the challenges to the ROFR have been presented thoroughly by the parties to this appeal. Ultimately, the ROFR has been removed from the Iowa Statutes and is no longer valid. The crux of the argument before the court now centers on how to treat the projects that were approved and awarded while the unconstitutional ROFR Statute was (improperly) on the books. RPGI is concerned that allowing these projects to simply proceed will harm RPGI's interests, which are representative of electric customers in the state, because the lack of actual competition for constructing the electric transmission projects at issue in Iowa will drive up electricity prices to consumers.

Approval for new electric transmission projects in Iowa is ongoing, with current short and long range transmission planning a continuous process at MISO. Renewable energy projects are

gaining traction across the state and the transmission facilities required to carry energy from these new generation resources are currently being proposed and considered for approval as well. Allowing the transmission projects approved without competitive bidding during the pendency of this litigation to simply continue to completion defeats the essence of the ruling by the Iowa Supreme Court that found Plaintiffs were likely to succeed on their claims that the ROFR was unlawfully passed. The import of that ruling, and the district court's ruling on remand based on that ruling, was that the ROFR Statute should not have ever been codified into law.

Major projects with wide ranging cost impacts were non-competitively awarded during the time that the ROFR Statute was improperly and unconstitutionally in effect. Allowing these transmission projects to proceed will have a significant impact on consumers who pay for electricity across this state and would be detrimental to the public interest. These projects can and should be bid competitively now.

**STATEMENT OF AUTHOR
AND CONTRIBUTION RULE 6.906(4)(d)**

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned indicates no counsel of record of any party authored this brief or contributed money to fund its preparation or submission. The Resale Power Group of Iowa is the only entity or person that contributed money to fund the preparation or submission of the brief.

ARGUMENT

On June 14, 2020, Iowa’s legislature passed Iowa Code § 478.16, a state-level Right of First Refusal (“ROFR”) providing “[a]n incumbent electric transmission owner”² has the “right to construct, own, and maintain an electric transmission line” approved for construction in a federally-registered planning authority and connected to its facility. Iowa Code § 478.16(2) (“ROFR Statute”). Under the ROFR Statute, only if the incumbent transmission owner

² An “incumbent electric transmission owner” was defined essentially as an electric transmission owner already active in the State of Iowa. *Id.* § (1)(c).

declined the opportunity to construct a new transmission line would another entity be eligible to develop and construct the project. *Id.*

As enacted, Iowa Statute § 478.16 provided incumbent transmission owners in Iowa the right of first refusal (“ROFR”) on new electric transmission projects to be built in Iowa that will interconnect with the vast network of the electric transmission system already in place throughout the state. While Plaintiff-Appellee LSP is active in states other than Iowa, the Iowa ROFR Statute effectively ensured that Plaintiff-Appellee LSP (and other non-incumbent transmission owners) were unable to develop, own or operate new intrastate and interstate transmission lines and facilities in Iowa or compete for new expansions of transmission facilities in Iowa. In fact, during the time the ROFR Statute stood as the law of Iowa, LSP and other non-incumbent transmission owners were, in fact, foreclosed from being awarded significant transmission projects in the state.

Even for the limited time it operated before being declared invalid and unconstitutional, the ROFR process resulted in decreased actual and potential competition in the electric

transmission development, construction, and ownership in Iowa. The fact that projects were simply claimed by Intervenor-Appellants without competition over the past three years will have tremendous detrimental impact on the long-term cost of delivery of electric energy across Iowa, ultimately increasing the cost of electricity to Iowa consumers in small, rural communities. During the narrow window when it was operational, the ROFR Statute precluded the cost savings that would accrue to consumers from competitive bidding processes and the selection of lower cost transmission owners for new transmission projects.

RPGI does not dispute the need for these projects (and ultimately does not have a preference as to which particular transmission owner is awarded any given project, so long as the winning bid is the least costly to consumers), but in order to effectively protect the interests of electric customers across the state, the transmission projects awarded to Intervenor-Appellants during the pendency of this long and winding litigation process must be bid in the corrected competitive landscape. RPGI presents these arguments now to the court in an effort to support Plaintiffs-

Appellees, with whom RPI's, and Iowa electric customers', interests are aligned for the purposes of this appeal.

I. Regional Transmission Development and Ownership Benefits from Competition in the Electric Transmission Market to Keep Costs to Consumers Down and Allowing Projects Awarded in the Absence of a Competitive Bidding Process During the Pendency of the Litigation Regarding the Constitutionality of Iowa's ROFR Will Harm the Public's Interest

The electric transmission market in Iowa is governed under the Federal Power Act of 1935, which gave the Federal Energy Regulatory Commission ("FERC") the jurisdictional authority to regulate interstate electrical transmission as a function of interstate commerce. 16 U.S.C. 824(a). Since that time, FERC policy has encouraged and approved independent organizations for the "coordination of facilities for the generation, transmission, and sale of electric energy." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 49 (D.C. Cir. 2014) (quoting 16 U.S.C § 824(a)). This FERC action led to the creation of regional transmission organizations ("RTOs"), which are independent, non-governmental, entities who oversee a coordinated effort for planning transmission grid expansion within their regions.

The RTOs that coordinate electric transmission planning and development in Iowa are MISO and SPP. The electric transmission systems that primarily serve RPGI members are operated by MISO³, which coordinates, controls, and monitors the transmission systems of 51 utilities across 15 states and the province of Manitoba. MISO is one of the largest power grid operators in the world. It is responsible for planning regional transmission infrastructure and overseeing more than 65,000 miles of transmission lines that serve 42 million customers. When an electric transmission project is approved for Iowa, it is MISO that gives approval for that project, in conjunction with the IUC having siting approval.⁴

In the past, MISO tariffs contained an ROFR for potential electric transmission projects, which, similar to Iowa's ROFR Statute, meant that if MISO decided that another "transmission facility was needed . . . the MISO member that served the local area

³ SPP's transmission system also provides electric transmission service to RPGI members.

⁴ The Iowa Utilities Commission has authority for issuing franchises for these transmission projects.

in which the facility would be built had the first crack at building it.” *MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329, 332 (7th Cir. 2016). Like Iowa’s ROFR Statute, this meant that even where non-incumbent competing entities proposed the most cost efficient and technically innovative projects, incumbent transmission owners would still be awarded the project. *S.C. Pub. Serv. Auth.*, 762 F.3d at 72.

In 2011, MISO revised its tariff to remove federal ROFRs pursuant to FERC Order 1000 and was required to develop a competitive process by which entities propose, compete, and are selected to construct MISO approved regional transmission projects subject to FERC-approved tariffs. As part of a series of reforms, FERC found the practice of including ROFRs in tariffs undermined the cost-efficient development of regional electric transmission and deprived customers of the benefits and costs savings that competition produces. The ROFR, FERC reasoned, left non-incumbent transmission owners with little incentive to innovate and propose efficient solutions where an entity knew its bid would

ultimately be lost to a previously established local market participant. *MISO Transmission Owners*, 819 F.3d at 332-33.

Under the Iowa ROFR Statute, any novel, innovative, and cost-efficient solutions to satisfy electric transmission expansion were stifled because non-incumbent transmission owners were essentially foreclosed from competing for project development opportunities. Simply put, those outside entities, like Plaintiff-Appellees, could not attempt to engage in the bidding process at all because there was none. Any proposed development efforts would be futile because Intervenor-Appellant incumbent transmission owners pursued and simply took the projects, even amidst constitutional legal challenges to the ROFR Statute, because they had the precarious right to at that moment in time. Without this competition, Intervenor-Appellant incumbent transmission owners had no incentive to innovate for more efficient and cost-effective solutions because the transmission projects would be developed and built by the incumbent regardless of costs. As construction of electric transmission projects, and the planning for those projects, continue to increase rapidly across Iowa, RPGI, and its members,

will be directly impacted by the projects that were approved without that competitive process during the pendency of the ROFR Statute.

Allowing the projects granted to the incumbent transmission owners pursuant to Iowa's ROFR Statute will harm RPGI members' financial interests in several respects. First, the absence of competition for new transmission projects proposed by developers in Iowa resulted in those developers determining the projects' final cost without being tested by the market – the ROFR Statute essentially nullified the “market” entirely. With guaranteed rates of return on investments imbedded in the MISO cost-allocation framework (*see* Order No. 1000, 76 Fed. Reg. 49,842, at ¶ 335 (2011)), an incumbent transmission owner such as Intervenor-Appellants ITC-MW or MidAm has little or no incentive to minimize project costs – every dollar it spends is guaranteed to be recouped in its rate structure with a guaranteed rate of return. Because such costs are passed through its rates to consumers in Iowa, and because the incumbent transmission owners know they will be awarded the project regardless of what the anticipated costs will be, ITC-MW and MidAm took the opportunity the ROFR

Statute provided to increase their presence, their projects, and their profits. Not surprisingly, it is Intervenor-Appellants who are now trying to cling to those non-competitively bid projects awarded to them during the pendency of this litigation because they have good reason to fear they will not be the winners of a competitive bid process.

Second, the Iowa ROFR Statute makes investing in capital projects more attractive for incumbent transmission owners like ITC-MW and MidAm, again because they have no competitors to propose more cost-effective and technologically innovative alternatives. This lack of competition incentivizes transmission utilities to invest in capital-intensive, and often “gold-plated,” approaches to enhancing the grid’s efficiency and reliability, rather than considering other technical approaches or operational practices that could provide the same level of efficiency and reliability at a lower cost to ratepayers.

Additionally, economic development for RPGI member communities can be stifled by disproportionately high electric transmission rates. Typically, prospective customers are generally

unaware of the various individual cost components (generation, transmission, and distribution) of electricity that make up an overall electric rate. The primary concern of a prospective customer is normally centered on the overall electric rate per kilowatt hour of one utility versus another. When even one component (transmission, in this case) of the overall electric cost is exponentially high, however, it is reflected in that overall electric cost and prospective customers take notice.

Municipal utilities in Iowa operate in an intensely competitive environment where even small differences in delivered power supply costs can have significant consequences. With 181 retail electric utilities operating in the state, there are many locations where an alternative electric service provider, with a lower delivered cost of electricity, can be found nearby – sometimes even just across the street. Retail electric rates are a major factor in a community's efforts to attract and keep businesses and residents. Since electricity is a significant expense for almost all end users (especially commercial and industrial customers), differences

between utilities in retail electric prices can be a significant asset or a crippling detriment to a municipality's marketing efforts.

RPGI member communities are harmed by businesses and industrial electric users opting not to locate or expand in their communities. Instead, these organizations choose locations outside of ITC-MW's footprint to avoid higher electricity costs due to the exorbitant transmission rates of ITC-MW. This is especially germane in the case of high load users like data centers, where conversations about building what could be a significant source of economic benefit and jobs in a community can stop abruptly when the talk turns to electric rates and costs.

It is challenging for RPGI members to grow their electric service rate base because ITC-MW's rates are so much higher than other transmission providers elsewhere in Iowa. Consequently, if a community's municipal utility charges its customers a higher electric service rate than its competitors, local officials will frequently pressure the municipal utility to identify aggressive ways to lower the community's retail electric rates to levels that are equal to, or lower than, its competitors' rates. Often, even a very

small difference in electric service rates can be a major factor in a prospective customer's decision about where to locate its new business. It can also be a major factor in a current customer's decision of whether to remain in, or move out of, a community.

Hence, it becomes difficult to spread ITC-MW's increased costs over a broader range of customers, leaving those already connected to ITC-MW's transmission system disproportionately paying higher and higher rates. With no competition to force ITC-MW to keep costs and rates down as it continues to invest in transmission infrastructure, the cycle has no end in sight, and the projects awarded to ITC-MW under the ROFR Statute prove to be more of the same exorbitant cost shifting. Furthermore, if price differentials between a municipal utility and an adjacent electric cooperative or other utility become too significant, city leaders may begin to question the value of their local utility. This may lead to significant political pressure to sell the municipal utility.

All of these cost concerns related to ROFRs, and the consequences of higher pricing that results, will be realized in Iowa and for RPGI's members absent the application of the appropriate

injunctive relief as awarded by the district court because projects were actually awarded to ITC-MW and MidAm in the absence of competition under the unconstitutional ROFR Statute. RPGI previously called out these concerns as a reason to strike down the ROFR Statute. These concerns remain in place and now that transmission projects have actually been awarded under the unconstitutional ROFR Statute, the impacts are no longer theoretical, but are on the doorstep of being reality if these transmission projects are allowed to move forward without being competitively bid.

Simply put, competition lowers pricing, as illustrated by two recent competitive processes conducted by MISO to identify an entity to construct, own, and maintain two major transmission lines in states without ROFR statutes. MISO received proposals from eleven (11) different entities for ownership, construction, and development of the Duff-Coleman 345kV project. Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p.

5, 37 (December 20, 2016).⁵ MISO received nine (9) proposals for the Hartburg-Sabine Junction 500 kV Project. Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5 (November 27, 2018).⁶ The winning proposals for both projects came in with estimated cost savings of fifteen percent (15%) under MISO's projected costs, contained cost caps, and presented other efficiency and engineering benefits that would never have been explored had an ROFR Statute been in effect in those states because incumbent transmission owners simply would have been awarded the project regardless of their own proposed costs.

MISO plans primarily interstate Multi-Value Projects, which are capital improvement projects, each with a total cost of \$20,000,000 or more, that promote reliability, resolve problems, or confer other benefits across all, or a significant portion of, the MISO-operated transmission system. The costs of Multi-Value Projects located in Iowa, Minnesota, Missouri, and Wisconsin are

⁵ Available at <https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf>

⁶ Available at <https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf>

recovered on a cost-share basis through rates that are paid by consumers across all of MISO. With a ROFR, states such as Iowa and Minnesota would make such MISO-wide investments constrained by the lack competition in ROFR states. Across all of MISO, even with this cost sharing, ITC-MW rates are the highest of all of the major transmission owners in MISO.

The rates paid by RPGI's members allow ITC-MW to recover the cost of, and earn a rate of return on, these transmission expansion projects. From 2008 to 2024, ITC-MW's zonal network integration transmission service ("NITS") rates to RPGI's members increased cumulatively by 366.85% (a compound increase of 10.11% annually), primarily because of transmission system construction costs.⁷ Transmission costs for RPGI now constitute well over 40% of its total wholesale electric costs. With the ROFR and with the expected increases in renewable energy-based generation in Iowa, the end to this impact of transmission rates on RPGI and its customers is nowhere in sight.

⁷ In 2008, the ITC-MW's zonal NITS rate was \$2.654 kW/month. In 2024, that same rate is \$12.390 kW/month, compared with the MISO average of \$4.470 kW/month.

The Iowa ROFR Statute created a right that no market participant would otherwise have – an ability to essentially deny market entry to a potential competitor, and thereby preserve a monopoly role in the development and ownership of additional transmission facilities. Any time a statute creates a monopoly opportunity, the benefits of a competitive system, including market checks and balances to incentivize fair and reasonable prices for retail customers, tend to disappear. ITC-MW and MidAm faced no competitive pressure to motivate them to find construction, design and other development efficiencies and cost savings because these entities already had a monopoly, and simply did not have an incentive to explore cost saving measures. *S.C. Pub. Serv. Auth.*, 762 F.3d at 74. FERC has a long-developed policy position that interstate transmission planning should strive to diversify and encourage competition, with an understanding that such competition is in the public interest. See, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *Braintree Electric Light Dept. v. FERC*, 500 F.3d 6, (D.C. Cir. 2008). Iowa’s ROFR Statute turned this policy position on its head and allowing projects granted

under it would obfuscate this overarching public policy consideration, an especially egregious result when the ROFR was ultimately declared void.

II. Regional Transmission Planning Remains Ongoing and Projects Can be Competitively Bid Now in Order to Protect the Public Interest

For the purposes of understanding the potential harm of allowing the projects granted under the ROFR Statute to continue to proceed, it is important to understand the long-term planning already underway at MISO, even where transmission projects may not be constructed immediately. When a ROFR exists under state law, although no federal ROFR is in place, MISO will defer to state procedures. By its passage, Iowa Code § 478.16(2) effectively ended the prospect of competitive processes for developing and constructing new electric transmission lines in Iowa because MISO was required to assign any eligible new projects to the incumbent seeking to continue to develop in the state. MISO, Business Practices Manual Competitive Transmission Process, Manual No.

027, at 30.⁸ Non-incumbent transmission providers, like LSP, were therefore cut out of the simultaneously fast-moving, yet long ranging, impending electric transmission planning at a regional level to the short and long term detriment of Iowa ratepayers. This is especially true given that newly proposed and approved facilities are likely to connect to already existing transmission lines, giving incumbent transmission owners an ever-expanding monopoly with the ever-increasing need for electric transmission.

Each year, MISO develops a MISO Transmission Expansion Plan (“MTEP”) that evaluates various types of transmission projects to meet local and regional reliability standards and facilitate competition among electric suppliers. Since MTEP 2003, \$34 billion in transmission infrastructure has gone into service in MISO. MTEP 2030 alone identified 572 new transmission infrastructure projects with a total projected cost of \$8.979 billion, a portion of which will be recovered from consumers throughout the

⁸ Available at <https://www.misoenergy.org/legal/business-practice-manuals/>

MISO region, including RPGI's members and other Iowa ratepayers.

Moreover, MISO is currently engaged in a Long Range Transmission Planning ("LRTP") initiative. This regional planning is long-term (forecasting out multiple decades) and continuous and new projects in Iowa are constantly on the threshold of MISO approval.⁹ In July of 2022, MISO's Board of Directors unanimously approved \$10.3 billion in new transmission projects as a part of MTEP 21. This LRTP Tranche 1 Portfolio is the first of four tranches of transmission solutions developed to provide reliable and economic energy delivery to address future reliability needs.¹⁰ MISO is currently finalizing its \$23-\$27 billion Tranche 2.1

⁹Technical Update, MISO Long Range Transmission Planning ("LRTP") Workshop, April 30, 2021; Q&A Session: Dialogue/Stakeholder Questions, MISO LRTP Workshop, April 30, 2021. Both Available at <https://www.misoenergy.org/events/long-range-transmission-planning-lrtp-workshop---april-30-2021/>

¹⁰MTEP 21 Addendum-LRTP Tranche 1 Report with Executive Summary, available at <https://cdn.misoenergy.org/MTEP21%20Addendum-LRTP%20Tranche%201%20Report%20with%20Executive%20Summary625790.pdf>

Portfolio and plans to seek Board approval in December 2024 as a part of MTEP 24.¹¹

Both Tranches 1 and 2.1 include transmission projects in Iowa. LRTP Tranche 1 projects in Iowa include the following transmission routes: Webster-Franklin-Marshalltown-Morgan Valley; Beverly-Sub 92; Skunk River-Ipava; and Orient-Denny-Fairport. MISO has not yet released the LRTP Tranche 2.1 projects, but has shown “indicative” projects on maps, with four projects potentially located in Iowa. All of these LRTP projects are classified as Multi-Value Projects (“MVPs”) under the MISO Tariff, and as such must be competitively bid in states that do not have ROFR statutes. MISO could have engaged in this continuously moving planning process to competitively bid the projects awarded to ITC-MW and Mid-Am during the period of the ROFR Statute.

Additional major transmission infrastructure projects in Iowa are needed with expediency, even as long-term planning is

¹¹ Tranche 2.1 Near-Final Portfolio, MISO LRTP Workshop, June 10, 2024; LRTP Tranche 2.1 Project Status & Schedule Review, MISO LRTP Workshop, June 10, 2024; both available at <https://www.misoenergy.org/events/2024/long-range-transmission-planning-lrtp-workshop---june-10-2024/>

underway. MISO is continually evaluating the needs of the region in its LRTP and is developing potential solutions for multiple scenarios of growth in the electric transmission network across Iowa and the region.¹² In fact, MISO has commenced the variance analysis process for the projects at issue, given the status of this litigation.¹³ The general transmission line projects being considered now and the overall strategy for transmission development at MISO is continual and layered, even though approval of any given transmission line may not occur for years.

MISO recently reported that requests by new renewable electric power generation facilities in Iowa for interconnection to the grid far exceed forecasts and are overwhelming available transmission system capacity. Many of these renewable energy

¹² Discussion of the MISO Indicative Roadmap Projects Presentation, MISO LRTP Workshop, April 30, 2021. Available at <https://www.misoenergy.org/events/long-range-transmission-planning-lrtp-workshop---april-30-2021/>

¹³ See, e.g., Summary of Commencement of Variance Analysis for Webster-Franklin-Marshalltown-Morgan Valley Transmission Project. Available at <https://cdn.misoenergy.org/Webster%20-%20Franklin%20-%20Marshalltown%20-%20Morgan%20Valley%20Variance%20Analysis%20Public%20Notice633079.pdf>

generation facilities are located at great distances from customer load centers. MISO recognizes the need for major enhancements to its transmission system to connect these new generation facilities across the state.¹⁴

Rather than accept the consequences of the repeal of the unconstitutional ROFR Statute by turning attention to submitting a bid in a competitive bidding process for the projects at issue in order to comply with the district court's injunctive ruling, and which can be done in conjunction with MISO's ongoing planning for Tranche 1 and Tranche 2.1 projects, ITC-MW and MidAm sought to drag on the litigation process by appealing the scope of the injunctive relief. As the district court properly recognized in its Ruling on Defendants and Intervenors Motion for Reconsideration, the intervenors took a risk when they continued to advance their projects during the previous litigation knowing that there was a possibility the ROFR Statute would be struck

¹⁴ ITC Midwest LLP, Partners in Business Presentation, October 21, 2020, pp. 59-63. Available at www.itc-holdings.com/docs/default-source/partners-in-business/midwest-partners-in-business-documents/itcmw-pib-slides-fall-2020-final-for-website-10-20-20.pdf?2fvrsn=e662cbf6_2

down as unconstitutional. The district court's order did not preclude ITC-MW and MidAm from ultimately being granted to right to construct these exact transmission projects. RPGI does not dispute that these Tranche 1 projects are needed to serve Iowans, but ITC-MW and MidAm's responses to the legal challenge results only seek to further delay the actual implementation and construction of vital projects.

It is incredulous that ITC and MidAm now take the position that the public interest is paramount when they have pushed through projects that result in extremely high rates for customers and have shown little willingness to keep customers in mind with its focus on unnecessary and proliferative litigation rather than preparing to competitively bid for these transmission projects. The injunction from the district court does not preclude these projects from going forward if they are competitively bid and if ITC-MW and MidAm are deemed to have successful bids. RPGI does not dispute that if that is indeed the result of the competitive bidding process, such would be the best result for customers that can be had. However, instead of moving quickly to get the projects bid in

a competitive marketplace, ITC-MW and MidAm moved quickly to continue more litigation. If their claims that projects that are urgent and vital are in jeopardy, they could truly center the public interest for customers to see reasonable rates and focus on getting the projects competitively bid and re-awarded, rather than continuing the never ending litigation.

Customers would be the beneficiaries of a competitive bidding process.¹⁵ To engage in the MISO competitive bidding process, a transmission provider must meet rigorous qualifications including the following:

- They must be in good standing
- They must comply with all applicable laws, regulations, codes, and standards governing engineering, design, construction, operation, maintenance, including state and fed laws.

¹⁵ *See, e.g.*, MISO Minimum Project Requirements for Competitive Transmission Projects Business Practices Manual, BPM-029r10, Effective Date APR-01-2024

<https://www.misoenergy.org/legal/rules-manuals-and-agreements/business-practice-manuals/>

- They must demonstrate they have sufficient capabilities and competency to operate, maintain, test, inspect, repair, and replace lines.

There are fifty (50) MISO Pre-Qualified Transmission Providers, including ITC-MW, MidAm, and LSP.¹⁶ Absent the ROFR, it is not a certainty that ITC-MW and/or MidAm (or even LSP) would have been granted the projects at issue and there remains ample opportunity to bid those projects in a competitive market. RPGI is not advocating on behalf of any single transmission owner, but is advocating on behalf of its members and Iowa customers in general that the competitive process be implemented now in order to provide sufficient remedy for the projects erroneously awarded while the unconstitutional ROFR Statute was being properly challenged in this state's legal forums.

Construction of the projects at issue can still be accomplished in a timely manner if they are competitively bid expeditiously. ITC-

¹⁶MISO List of Pre-Qualified Transmission Providers, Available At <https://cdn.misoenergy.org/MISO%20Qualified%20Transmission%20Developers%20List82330.pdf>

MW and MidAm should not be able to reap the rewards of projects awarded to them based on an invalidated and unconstitutional ROFR Statute that should never have been enacted. Neither should they be allowed to reap the benefits of a string of erroneous court decisions denying injunctive relief at every opportunity. Incumbent transmission owners in Iowa should not be allowed to enjoy the fruits of the poisonous tree they planted and cultivated. Put another way, Iowa electric customers should not be penalized because it took multiple years to get to the proper result where the ROFR Statute is no longer operational because it has correctly been declared unconstitutional and where ITC-MW and MidAm knew the risks of relying on a statute subject to constitutional legal challenges, but pushed through their projects anyway.

MISO's Tariff respects state rights of first refusal. If the court does not allow the injunction to stand as drafted, MISO could see this situation occur again and again, as could the courts. ROFR legislative proposals are often brought to the floor during Iowa legislative sessions. There is no saying whether a new ROFR could be passed in a similar manner and then be, once again, tied up in

litigation while incumbent transmission providers work hastily to secure project approvals during the pendency of the legal process that Intervenor-Appellants now claim can never be undone even if the ROFR is invalidated time and time again.

But for the reliance on an unconstitutional law, MISO may not have assigned the projects at issue, or parts of the projects at issue, to ITC-MW and/or Mid-Am because the projects would have gone through a competitive process under the Tariff. In other words, MISO's assignment was based on improper grounds, therefore, upholding the injunction is consistent with principles of equity, and consistent with the MISO's tariff requirements that these projects must be subject to a competitive bid process in compliance with FERC Order No. 1000. Upholding the injunction puts the parties of this litigation in the position they would have been "but/for" MISO's reliance on an unconstitutional Iowa ROFR Statute.

III. The Scope of the Injunctive Relief Is Appropriate as Crafted, is Protective of the Public Interest, and Projects Should Be Competitively Bid to Abide by FERC's Mandate to Approve Just and Reasonable Rates Under the Federal Power Act

Transmission planning is unique in both its scope and breadth in terms of geography and time and in terms of interwoven state and federal rules, regulations, planning and permitting. Time is of the essence in both short term and long term planning, which encompasses vital, immediate needs and potential needs decades down the line. Projects approved by MISO and permits and approvals granted by the IUC confer benefits and have impacts for years to come. Due to the manner in which transmission projects continuously build upon what is already there, the projects that were approved during the pendency of the underlying litigation will have impacts on and intersect with project approvals yet to come and will continue to have a ripple effect and confer an unfair advantage to the incumbent transmission providers who were awarded those projects in error, even when future projects are competitively bid. The scope of the injunctive relief granted by the district court in this litigation recognized the inherent tensions at

play between projects that have been approved, but should not have been, and the need to balance the interests of the parties to this litigation and those of the public for the provision of reliable, efficient, and cost effective electric transmission now and into the future.

The ROFR Statute did not simply allow the lowest bidder to win an electric transmission project. It did not require incumbent transmission owners to low price-match if another, outside transmission owner presents a more cost-effective alternative transmission project. Under Iowa Code § 478.16(2), the incumbent transmission owner simply had the right to develop the transmission project, without amending its proposal, regardless of whether cost efficiencies had been presented by other entities.

There are clear consequences to decreased competition, including rates that increased 389% (from \$2.654/kW in 2008 to \$10.338 in 2024) during the decade after which Alliant sold its transmission assets to ITC-MW. In 2007, transmission costs were 15% of the total RPGI wholesale supply costs, where as in 2018

(after nearly a decade of ITC-MW ownership), they had increased to 44%.

This is the antithesis of FERC’s mandate under the Federal Power Act, which is to approve just and reasonable rates that are not unduly discriminatory or preferential. FERC’s overarching mission, at its core, is to “assist consumers in obtaining reliable, safe, secure and **economically efficient energy services** at a **reasonable cost** through appropriate regulatory and market means, and collaborative efforts.”¹⁷ (emphasis added) Should the injunction relief be vacated, and ITC-MW and Mid-Am be allowed to proceed with construction of the pending projects at issue, it could result in rates that have not been found to be just and reasonable and not unduly discriminatory or preferential in conflict with FERC’s mandate.

Competitively bidding the projects for MISO approval addresses the needs of ITC-MW, Mid-Am, and LSP, as well as the needs of RPGI members and Iowa electricity consumers on the

¹⁷ FERC Website, About FERC, <https://www.ferc.gov/what-ferc#>

whole and is wholly consistent with the requirements of FERC Order No. 1000 as memorialized in MISO's FERC-approved tariff. If ITC-MW and MidAm believe they have the best bids for these projects, they need not do anything more than resubmit them in the competitive bidding process. If ITC-MW and MidAm are worried they will lose out on the projects they have been awarded, they can do more to make their bids more attractive. Relying on an invalid ROFR Statute to push through non-competitive projects that but for the ROFR Statute MISO would not have selected unduly penalizes customers and does not provide the appropriate remedy in this proceeding.

RPGI is not suggesting that the court determine who will ultimately construct these projects, but is merely representing the public interest to urge the court to reflect on the proper remedy for the parties and the public, given the fact that projects were erroneously approved under an invalid and unconstitutional statute. The court's ultimate determination is that the ROFR Statute was invalid from the moment it was codified. *See, e.g. Sec. Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8, 10 (1924). It

simply took a couple of years of litigation, driven in large part by Intervenor-Appellants, for that to be properly recognized. The proper remedy, therefore, should reflect that status and should not allow projects approved in reliance on that invalid statute to move forward where the option to competitively bid them is available. *See, e.g., O'Donnell Const. Co. v. D.C.*, 963 F.2d 420, 429 (D.C. Cir. 1992). The remedy at issue, the injunctive relief as crafted, does not unduly punish or reward any transmission provider, and puts the parties back into the appropriate position under the MISO tariff and requires the project to be competitively bid, which ultimately protects all Iowans from over-paying for electric service. *See, e.g., Mid-Am Pipeline Co. v. Iowa State Commerce Comm'n*, 114 N.W.2d 622, 623 (1962).

CONCLUSION

For the reasons set forth above, Resale Power Group of Iowa respectfully requests that this Court uphold the injunction entered by the District Court.

/s/ Kelly Cwiertny

Kelly A. Cwiertny

AT0000282

SHUTTLEWORTH & INGERSOLL, P.L.C.
235 6th Street SE
Cedar Rapids, IA 52401
Tel: 319-365-9461; Fax: 319-365-8443
kac@shuttleworthlaw.com
ATTORNEY FOR RESALE POWER GROUP OF
IOWA, AMICUS CURIAE

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August 30, 2024
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I certify that on August 30, 2024, I electronically filed the foregoing document with the Clerk of Court using the EDMS system with a copy being sent via electronic notice to counsel of record.

*/s/ Kelly Cwiertny*_____

Date: August 30, 2024