IN THE IOWA SUPREME COURT
No. 21-0696

LS POWER MIDCONTINENT, LLC, and SOUTHWEST TRANSMISSION, LLC

Plaintiffs-Appellants,

v.

STATE OF IOWA, IOWA UTILITIES BOARD, GERI D. HUSER, GLEN DICKENSON, and LESLIE HICKEY,

Defendants-Appellees,
and

MIDAMERICAN ENERGY COMPANY and ITC MIDWEST, LLC,

Intervenors.

Appeal from the Iowa District Court for Polk County
The Honorable Celene Gogerty, Case No. CVCV060840

Brief of Amicus Curiae Coalition of MISO Transmission Customers in Support of Plaintiffs-Appellants

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Identity and Interest of Amicus Curiae

The Coalition of MISO Transmission Customers ("CMTC") is a continuing *ad hoc* association of large industrial and commercial end-users of electricity in the Midwest that represents the interests of industrial energy consumers before regulatory, judicial, and legislative bodies. CMTC members have facilities and operations in the State of Iowa, employ Iowans, and contribute meaningfully to the State's economy.

CMTC member companies pay electric transmission rates that are assessed by transmission owners in the electricity grid operated by the Midcontinent Independent System Operator, Inc. ("MISO"), a regional transmission organization ("RTO") regulated by the Federal Energy Regulatory Commission ("FERC"). Some CMTC member facilities are assessed transmission charges as a separate, stand-alone charge on invoices assessed by market suppliers. Other CMTC facilities pay for transmission charges on a bundled basis, as a component of retail electricity charges that also include charges for generation and distribution service.

For over 20 years, CMTC has participated in MISO market and transmission issues. CMTC has actively supported competition for transmission projects within the MISO stakeholder process, before FERC, in United States Courts of Appeals, and in the United States Supreme Court. Laws that grant the incumbent transmission owner a right of first refusal ("ROFR"), such as Iowa Code § 478.16 and ROFRs adopted by other states in the MISO region, prevent the efficiency and price-lowering benefits of competition for transmission projects.

Rule 6.906(4)(d) Statement of Authorship

CMTC is represented by the undersigned counsel of Nyemaster Goode, P.C. and McNees Wallace & Nurick LLC, who authored this brief in whole. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

Argument

The Iowa ROFR harms CMTC members in at least five ways. First, the ROFR precludes competition for transmission improvements within incumbent utilities' service areas. Second,

the absence of competition for new transmission projects in Iowa increases the rates of CMTC members in Iowa and in other MISO states. With the ROFR, an incumbent utility in Iowa has little or no incentive to minimize costs because such costs are passed directly through rates to captive customers without viable alternatives for transmission service. Third, the ROFR harms interstate commerce and intrudes upon federal authority, including statutory authority given to FERC,[1] over the regulation of transmission in interstate commerce.[2] Fourth, the Iowa ROFR incentivizes incumbent utilities to make choices related to technical approach, project design, equipment and material selection, and other matters without regard to value engineering – an imperative in competition – which seeks to achieve the same functionality, service life, and reliability at a cost lower than MISO planners' estimate. Fifth, state ROFRs can impede holistic regional planning by MISO, the regional grid operator, thereby impeding efficient,

[1] See Section 201 of the Federal Power Act, 16 U.S.C. § 824.
[2] A map of MISO's footprint with state ROFR laws is available here: State or Local Rights of First Refusal514796.pdf (misoenergy.org) (last visited Sep. 30, 2021).

innovative, and cost-effective solutions to regional transmission problems.[3]

I. Increased Spending on Electric Transmission Projects in the MISO Region and MISO's Role as the Regional Electricity Grid Operator

MISO coordinates, controls, and monitors the transmission systems across 15 states and the province of Manitoba. MISO is one of the largest power grid operators in the world and is responsible for planning regional transmission infrastructure and overseeing more than 65,000 miles of transmission lines that serve 42 million customers.[4] Nationwide, utilities continue to increase spending on electric transmission; MISO energized $3 billion worth in transmission projects in 2019 and $2 billion worth in 2020.[5] In

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[3] In a recent stakeholder presentation, MISO recognized that its Multi-Value Projects are subject to competitive procedures but "with deference to state ROFR laws." MISO's Updated Cost Allocation Proposal (Sep. 23, 2021) at Slide 16, available at MISO Transmission Planning Update (misoenergy.org) (last visited Sep. 30, 2021).

[4] *See* About MISO, available at About MISO (misoenergy.org) (last visited Sep. 29, 2021).

[5] "Utilities continue to increase spending on the electric transmission system," U.S. Energy Information Administration (Sep. 30, 2021), available at Utilities continue to increase spending on the electric transmission system - Today in Energy - U.S. Energy Information Administration (EIA) (last accessed Sep. 30, 2021).

late March 2021, MISO unveiled a long-range transmission package that could cost between $30 and $100 billion, with several high voltage transmission line additions.[6] An initial set of long-range transmission projects is targeted for approval by the MISO Board in March 2022.[7]

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 producers.[8] Since MTEP 2003, $27.8 billion in transmission infrastructure has been placed into service.[9] MTEP 2021 identified 367 new transmission

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[6] *See* Xcel Energy, First Quarter 2021 Earnings Report Presentation (Apr. 29, 2021) at Slide 8, available at PowerPoint Presentation (q4cdn.com) (last visited Sep. 30, 2021); *see* MISO, Long Range Transmission Planning Strategy (Mar. 23, 2021) at Slide 8, available at Long Range Transmission Planning - Preparing for the Evolving Future Grid (misoenergy.org) (last accessed Sep. 28, 2021).

[7] *See* MISO Draft MTEP21, Chapter 3, at 6, available at Draft MTEP21 Chapter 3 - Regional and Interregional Planning Studies581046.pdf (misoenergy.org) (last visited Sep. 30, 2021).

[8] *See* MISO Transmission Expansion Plan (2020), available at MTEP (misoenergy.org) (last visited Sep. 30, 2021).

[9] MTEP21, at p. 4, available at MTEP20 Report (misoenergy.org) (last visited Sep. 30, 2021).

infrastructure projects with a total projected cost of $3.4 billion.[10]

Multi-Value Projects are capital improvement projects planned by MISO, 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 system. The costs of Multi-Value Projects located in Iowa and other MISO states have been, or will be, recovered through the rates paid by consumers across MISO.[11]

II. By Impeding Transmission Competition in Contravention of FERC's Objectives, ROFR Laws Increase the Energy Costs and Operating Costs of Industrial Consumers like CMTC Members

CMTC supports FERC orders and federal policies seeking to reduce electric transmission costs through increased competition in the development of interstate transmission. In Order No. 1000, FERC ordered the removal of ROFRs from FERC tariffs for certain

[10] MTEP21 at p. 14.

[11] For example, the Cardinal-Hickory Creek Transmission Line Project runs from northern Iowa into southern Wisconsin. Project costs will be recovered through rates charged to customers throughout MISO. *See* https://www.itc-holdings.com/projects-and-initiatives/project-detail/2015/10/21/cardinal-hickory-creek-transmission-line-project (last visited Sep. 30, 2021).

RTO-approved projects subject to regional cost sharing to enhance competition and cost savings for customers.[12]

CMTC members consist of manufacturers and other large industrial consumers that consume substantial quantities of electricity. Enabling a ROFR and the corresponding monopoly control to incumbent utilities over the ownership, construction, and maintenance of new, federally regulated transmission lines insulates those utilities from competition, thereby imposing higher electric transmission costs on consumers. Without competition, there are fewer checks and balances on cost estimates, and no pressures or incentives to curb project costs and prevent cost overruns. In light of the exponential increase in transmission plant in service over the last decade, planned spending, and the volume of anticipated future projects, competition is critical to ensure just and reasonable rates.

Two recent competitive processes conducted by MISO demonstrate the consumer benefits of competition for new

[12] Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (2011).

transmission.[13] MISO received comprehensive proposals from 11 different respondents for ownership, construction, and maintenance of the Duff-Coleman 345 kV project.[14] MISO received proposals from nine different respondents for the Hartburg-Sabine Junction 500 kV project.[15] The winning proposals in both instances resulted in estimated cost savings of 15% over MISO's projected costs, along with a cost cap, and other benefits and financial innovation that would have been foregone if a ROFR statute had been in effect in those states.

New transmission system capacity is needed in the MISO region to connect generation resources to the load centers where the

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[13] Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5, 38 (December 20, 2016), available at https://cdn.misoenergy.org/Duff-Coleman%20EHV%20345kv%20Selection%20Report82339.pdf (last visited Sep. 30, 2021); Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5 (November 27, 2018), available at https://cdn.misoenergy.org/Hartburg-Sabine%20Junction%20500%20kV%20Selection%20Report296754.pdf (last visited Sep. 30, 2021).

[14] Duff-Coleman EHV 345 kV Competitive Transmission Project Selection Report, p. 5.

[15] Hartburg-Sabine Junction 500 kV Competitive Transmission Project, Selection Report, p. 5.

electricity is ultimately consumed. New transmission projects can have an estimated 40-year life, and FERC allows the transmission owner to recover the costs of that project and earn a return on and of that project investment through a FERC-regulated annual transmission revenue requirement. The cost of transmission projects will be recovered from consumers over many years. Ensuring competition for large-scale transmission projects (that are needed now) will impact consumers for many years from now.

MISO recently reported that requests for new renewable electric power generation facilities could overwhelm available transmission system capacity. Because renewable resource-based generation facilities (such as wind turbines) are often distant from the load centers that consume the electricity, MISO recognizes that major enhancements to the transmission system in the MISO region are needed to connect many of these new facilities over a wide geographic area to balance the variability in renewable resource availability.[16] These projects will run through Iowa and

[16] ITC Midwest LLP, Partners in Business Presentation, October 21, 2020, pp. 59-63, available at https://www.itc-holdings.com/docs/default-source/partners-in-business/midwest-

potentially other states that have enacted ROFR statutes, which means that CMTC members will pay higher rates than would be the case if the ownership, construction, and maintenance of each project is subject to competition, cost caps, and cost containment measures.

Because energy is a significant operational cost and one of the top expenditures for industrial consumers, significant increases in electricity costs impact the viability and competitiveness of their businesses. Manufacturers open, close, and relocate their businesses due in large part to the cost of energy and the regulatory environment of a particular area. Today, manufacturers and other industrial consumers face significant domestic and international competition, a concern that has been magnified over the course of the COVID-19 pandemic. During a time when transmission competition is poised to provide significant and necessary costs savings for consumers, ROFR laws like Iowa Code § 478.16 backpedal on the price-lowering benefits of competition (as

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partners-in-business-documents/itcmw-pib-slides-fall-2020-final-for-website-10-20-20.pdf?sfvrsn=e662cbf6_2 (last accessed Sep. 30, 2021).

envisioned in FERC Order No. 1000) and only serve to unjustly and unreasonably increase transmission costs.

Conclusion

The Iowa ROFR law harms consumers, undermines competition, and is contrary to the public interest. The Coalition of MISO Transmission Customers respectfully asks this Honorable Court to enjoin enforcement of, and the rulemaking related to, Iowa Code § 478.16; reverse the district court's order; remand for further proceedings; and order all necessary relief, consistent with the requests of Plaintiffs-Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC.

Respectfully submitted,

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1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Lynn C. Herndon, AT0014047

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on September 30, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System with a copy being sent via electronic notice to counsel for record.

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