

IN THE SUPREME COURT OF IOWA
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 NEXTERA ENERGY
TRANSMISSION, LLC IN SUPPORT OF PLAINTIFFS–
APPELLANTS**

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IDENTITY AND INTEREST OF AMICUS CURIAE

The amicus curiae in this case is NextEra Energy Transmission, LLC (“NEET”), the leading competitive transmission company in North America. NEET is a subsidiary of NextEra Energy, Inc., which is a diversified holding company that includes a vertically integrated utility as well as a competitive transmission company. As part of a company with unparalleled experience developing, owning, and operating renewable energy projects and that also has extensive experience developing, owning, and operating transmission facilities on both a traditional, vertically integrated basis and a competitive basis, NEET brings a unique perspective to these proceedings.

Specifically, NEET’s affiliates also develop, own, and operate 15 electric generating facilities in Iowa representing over 1300 MW of generation, many of which include transmission lines that connect wind turbines or solar panels to the facility substation, commonly referred to as “gen-tie” lines. The operation of gen-tie lines is insufficient, however, to bring NEET or its affiliates within the definition of an incumbent utility that would benefit from the State of Iowa’s right of first refusal law (“ROFR”). Thus, to the detriment of NEET, its affiliates, its parent company, and Iowa energy customers, NEET is precluded from fully competing in the Iowa

marketplace while other competing energy providers have no restrictions. As the developer of wind- and solar-powered generation facilities that must interconnect to an increasingly constrained grid, NEET's generation affiliates are keenly aware of the vital need for additional transmission development that is both efficient and cost-effective for customers.

In addition, Iowa's ROFR hinders the ability of NEET and its subsidiaries to partner with Iowa cooperatives and municipal utilities, to acquire transmission from them, or to expand its presence and services in the Iowa market—including to connect transmission lines to the renewable energy projects that NEET's affiliates own and operate in Iowa. In March 2020, NEET acquired GridLiance Holdco, LP and GridLiance GP, LLC (collectively, "GridLiance"). Through GridLiance, NEET has partnered with public power in other jurisdictions to develop, construct, own, and operate transmission projects. Currently, however, this work is frustrated in Iowa's competitive energy market because the State's ROFR—passed in June 2020, only months after NEET acquired GridLiance—precludes NEET from being an incumbent utility even when acquiring transmission from Iowa cooperatives or municipalities. In other words, NEET was walled off from working in Iowa before it even had the chance to get in the door.

NEET is one of the first non-incumbent transmission owners to be awarded projects by system operators and utility commissions in California, Kansas, Missouri, New York, Texas, and Ontario, and NEET's current portfolio includes operating assets in California, Kansas, Kentucky, Illinois, Indiana, Nevada, New Hampshire, Oklahoma and Texas, as well as numerous projects under development across the United States and Canada. In fact, in Texas, NEET successfully argued that a ROFR law in that state violated the Commerce Clause of the U.S. Constitution by unfairly blocking competition.¹ NEET is committed to combatting harmful ROFR laws in every jurisdiction where they exist, particularly the law here in Iowa given its thriving renewable energy sector.

In sum, the interests of the amicus curiae are to pursue investment opportunities within the State of Iowa, contribute to a competitive transmission regime in Iowa, and construct transmission in the State as cost-effectively and efficiently as possible for the public. A non-competitive ROFR in Iowa is directly contrary to these goals.

¹ *NextEra Energy Cap. Holdings, Inc., et al. v. Lake*, 48 F.4th 306, 309–310 (5th Cir. 2022) (“Imagine if Texas—a state that prides itself on promoting free enterprise—passed a law saying that only those with existing oil wells in the state could drill new wells. It would be hard to believe. . . . Texas recently enacted such a ban on new entrants in . . . the building of transmission lines that are part of multistate electricity grids. . . . [T]he ban’s interference with interstate commerce [is] as clear as it is for the oil well hypothetical.”).

RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP

This amicus curiae brief was authored entirely by counsel for NEET. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

ARGUMENT

The limitation of the electric transmission market in Iowa to existing incumbent utilities poses a significant barrier to entry to NEET and, ultimately, harms the residents of Iowa. It is axiomatic that competition breeds innovation, variety, higher quality goods and services, and lower prices for consumers.² Iowa Code § 478.16—which grants incumbent electric transmission owners in Iowa the exclusive right to construct, own, and maintain electric transmission lines that have been approved in federally registered planning authority transmission plans and which connect to an electric transmission facility owned by that party—is plainly anti-competitive. This statute promises only to allow incumbent Iowa electric transmission owners to deepen their hold on this market at the expense of potential competitors like NEET and the public.

This Court should act now to enjoin enforcement of Iowa Code § 478.16 for the following reasons. First, it deprives the Iowa market of the benefits of competition by eliminating the opportunity entirely. By granting an exclusive right to incumbent electric transmission owners to construct,

² Heather Boushey & Helen Knudsen, Council of Economic Advisers, *The Importance of Competition for the American Economy* (July 9, 2021) (available at <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/>).

own, and maintain electric transmission lines, desirable competitors are permanently deprived of the chance to propose, bid on, and ultimately construct, own, and operate critically important transmission line projects in the State of Iowa. Second, the denial of this opportunity to compete directly injures NEET by fundamentally precluding it from entering the Iowa market and seeking to work on highly valuable projects within the State. Instead, these projects would be instantaneously reserved for NEET's competitors—even if a NEET affiliate were developing, owning, or operating the project. Last, the preclusion of this competition and bolstering of the few incumbent electric transmission line owners in the State will undoubtedly injure Iowa residents by removing incentives to innovate, improve, and reduce costs. All these reasons, and those discussed in the Plaintiffs-Appellants' briefing and other supporting amicus briefs, warrant relief from Iowa Code § 478.16's unnecessary, injurious, and counterproductive ROFR provisions.

As a preliminary matter, NEET does not seek to intervene in these proceedings and therefore does not address its own standing here. However, it supports the standing of Plaintiffs-Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively "LSP") to bring its claims for the reasons that LSP outlined in its brief. In particular, the bar for standing at

the pleading stage is low,³ and parties like LSP are injured by being denied the opportunity to compete⁴ and being barred from pursuing their economic interests in the State.⁵ Moreover, courts have held that parties are not required to wait until they directly feel the devastating impact of a law when injury was already certain.⁶ Thus, this case should proceed, and LSP should be permitted to litigate the injuries it and other competitors have sustained in Iowa.

I. Elimination of the Opportunity to Compete.

The history of utility regulation in the United States evidences the need to foster competition within the industry in competitive energy markets. Formerly, “utilities were vertically integrated monopolies” where electricity generation, transmission, and distribution services in a given geographic area “were generally provided by, and under the control of, a single regulated utility.”⁷ Over time, the federal agency charged by Congress with regulating

³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

⁵ See *Iowa Bankers Ass’n v. Iowa Credit Union Dept.*, 335 N.W.2d 439, 44 (Iowa 1983).

⁶ See *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004); see also *NextEra Energy*, 48 F.4th at 316 (citing *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974)) (“‘When the inevitability of the operation of a statute against certain individuals is patent,’ a plaintiff need not ‘await the consummation of threatened injury to obtain preventative relief.’”) (alteration omitted).

⁷ *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004).

wholesale interstate transmission in the U.S., the Federal Energy Regulatory Commission (“FERC”), has taken affirmative steps toward creating “a more competitive electricity marketplace.”⁸ FERC’s explicit goal was “to promote efficiency in wholesale electricity markets and to ensure that electricity consumers pay the lowest possible price for reliable service.”⁹

Prior to 2011, the FERC-approved tariffs of many utilities within MISO and SPP, the two regional transmission organizations for electric transmission development in the Midwest, contained a ROFR for newly approved electric transmission projects. In other words, existing MISO utilities were given “the first crack at building” any new transmission facility.¹⁰ These incumbent utilities had “the opportunity to build [the transmission project] without having to face competition from other firms that might also like to build it.”¹¹ To address this restrictive ROFR, FERC issued Order No. 1000 which, among other things, instructed that ROFRs should be removed from federally approved tariffs for most projects.¹² Allowing competition to be suppressed

⁸ *Id.* at 1364.

⁹ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (2000).

¹⁰ *Midwest ISO Transmission Owners v. FERC*, 819 F.3d 329, 332 (7th Cir. 2016).

¹¹ *Id.* at 331.

¹² *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842, 49,885 (2011).

through ROFR in this manner “would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs” and “deprive customers of the benefits of competition in transmission development.”¹³

To address this concern, FERC’s policy has been to move away from ROFRs and towards encouraging robust competitive processes.¹⁴ This evolution towards allowing and facilitating an open market in the transmission sector has driven the industry forward, which both rewards leaders in the energy sector and benefits the consuming public.

Here, Iowa Code § 478.16 backslides the State into anti-competitive restrictions that both unfairly injure competitors and harm the public. Section 478.16(1)(c) defines an “incumbent electric transmission owner” as (1) a public utility or a municipally owned utility that already owns, operates, and maintains an electric transmission line in Iowa, (2) an electric cooperative, association, or municipally owned utility that owns an electric transmission facility in Iowa and has relinquished control of the facility to a federally approved authority, and (3) an electric transmission owner, *i.e.*, an individual

¹³ *Id.*

¹⁴ FERC has initiated a pending Notice of Proposed Rulemaking to consider this policy and its overall approach to transmission planning. *See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, FERC Docket No. RM21-17-000.

who owns and maintains an electric transmission line in Iowa that is required to provide electric service to the public for compensation. In other words, an incumbent electric transmission owner is an existing public transmission line or facility owner in the State, and no one else. Section 478.16(2) provides a clear ROFR to these incumbent electric transmission owners:

An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and which connects to an electric transmission facility owned by the incumbent electric transmission owner. Where a proposed electric transmission line would connect to electric transmission facilities owned by two or more incumbent electric transmission owners, each incumbent electric transmission owner whose facility connects to the electric transmission line has the right to construct, own, and maintain the electric transmission line individually and equally. If an incumbent electric transmission owner declines to construct, own, and maintain its portion of an electric transmission line that would connect to electric transmission facilities owned by two or more incumbent electric transmission owners, then the other incumbent electric transmission owner or owners that own an electric transmission facility to which the electric transmission line connects has the right to construct, own, and maintain the electric transmission line individually.

Section 478.16(2) amounts to a state-level ROFR that directly undercuts the value that increased competition can bring. It precludes NEET and any other competitors from entering the Iowa competitive energy market and performing this work regardless of whether it could complete the work at a lower price, has greater resources, has greater experience, could offer more

innovative solutions, or has any other favorable qualities. Eliminating competition will result in higher transmission costs, which will ultimately be borne by transmission customers, and slow the construction of needed transmission in the State, to the detriment of generators such as NEET's affiliates seeking to interconnect new generation.

All the beneficial hallmarks of encouraging head-to-head competition are sacrificed under Section 478.16 in favor of deferring to established transmission line and facility owners in Iowa at no gain to the State or the public.

Given that the statute's ROFR eliminates competition and goes against productive industry trends, the Court should afford injunctive relief in this case.

II. Direct Injury to NEET as a Competitor.

The elimination of competition discussed above directly and uniquely impacts NEET. As discussed above, NEET is already present in Iowa. NEET's affiliates develop, own, and operate 15 electric generating facilities in Iowa, many of which include gen-tie lines that connect wind turbines or solar panels to the transmission grid. Further, in early 2020, NEET actively expanded its business to partner with public power to develop, construct, own, and operate transmission and acquired GridLiance for this exact purpose.

Then and now, NEET has a strong desire to develop long-term transmission solutions and invest in Iowa's electric transmission infrastructure. Despite its in-state ties and recent steps towards expansion, NEET's growth in Iowa has been frustrated by the passage of Iowa's ROFR in June 2020. Admittedly, NEET does not qualify as an incumbent transmission owner under Section 478.16(1)(c). NEET's unique position here, perhaps more than any other competitor in the market, illustrates the arbitrary, unfair, and oppressive nature of the ROFR and how that provision brings a halt to progress and innovation.

As a result, despite its competency, qualifications, and promise, its ability to compete in Iowa to build an electric transmission line is wholly at the mercy of its established competitors. There is no selection criteria, bidding process, or consideration beyond the base fact of whether a firm happened to exist or not in Iowa when the statute was passed by the Iowa Legislature.

Given the substantial need for new transmission infrastructure on the horizon in Iowa, NEET is injured by the ROFR's arbitrary reservation of these projects for existing owners. An injury exists whenever the government erects a barrier that makes it more difficult for members of one group to obtain a

benefit that is for members of another group.¹⁵ Similarly, injury can occur when the government gives an unfair advantage to a competitor.¹⁶ Both such injuries have occurred here.

MISO has revealed transmission projects worth hundreds of millions or even billions of dollars in the State, and studies are currently underway to identify other transmission needs within Iowa that are set to fall under the scope of the ROFR. Planned transmission projects include the following:

- A \$755 million project in the Cedar Rapids area;
- A \$231 million project spanning from Cedar Rapids to Atalissa, Iowa;
- A \$390 million project spanning from Orient, Iowa into Missouri;
- A \$673 million project spanning from Madison County, Iowa to Mount Pleasant; and
- A \$594 million project spanning from Mount Pleasant into Illinois.

¹⁵ See, e.g., *N.E. Fla. Ch. Of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); see also *Horsefield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 457 (Iowa 2013) (holding the plaintiff had shown an injury because “its ongoing exclusion from the preapproved supplier list and the practical obstacles associated with postaward approval make it unlikely it will be able to get work on city projects.”).

¹⁶ *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 606 (Iowa 2012) (holding injury to competitive interests may be inflicted “by government action that gives an advantage to a competitor.”).

Intervenors MidAmerican Energy Company and ITC Midwest, as incumbent electric transmission owners, are the sole parties assigned the responsibility for building all of these projects in Iowa.¹⁷ Because of the ROFR law, they were awarded each project as a matter of course without any need to engage in competition whatsoever.

There was no opportunity for NEET (or any other entity) to bid on these valuable projects directly as a result of the ROFR granted under Iowa Code § 478.16(2). Similarly, NEET will be limited in its ability to work on any other projects that may arise in perpetuity, including necessary and valuable grid expansion projects and coordination with Iowa public power entities—which also could include connections to renewable energy projects that NEET affiliates will develop, own, and operate. There is no benefit at all to Iowa or the public from sidelining NEET so that existing owners can be handed projects. Despite this, the ROFR draws a baseless yet permanent line: all those seeking to enter the Iowa competitive energy market, grow their business, introduce new ideas, and compete on fair terms are forever relegated to the backseat merely because they were not previously present in the State.

¹⁷ Brittney J. Miller, *The Gazette*, *\$10.3 Billion Power Line Portfolio Approved for the Midwest* (Aug. 2, 2022) (available at <https://www.thegazette.com/environment-nature/10-3-billion-power-line-portfolio-approved-for-the-midwest/>).

The ROFR grants existing owners a stranglehold on the market for as long as they please, black and white, no exceptions.

Given that the statute's ROFR injures NEET and other competitors by preventing them from bidding or obtaining any of the highly valuable projects currently taking place in Iowa, the Court should afford injunctive relief in this case.

III. Direct Injury to the Iowa Public.

NEET is keenly aware of the vital need for policies that will facilitate the development of transmission projects that are efficient and cost-effective. In light of these necessary goals, the detriment to the public presented by the ROFR under Iowa Code § 478.16(2) is evident. As discussed, FERC found that removal of ROFR from the federal process was “essential to meeting demands of changing circumstances facing the electric industry” and avoiding severe harm to the public at large.¹⁸

Now more than ever, innovation in this country's electric infrastructure is critical. Many parts of the electrical grid were built in the 1960s and 1970s. Experts have estimated that the cost of replacing this infrastructure will be

¹⁸ *ISO New England Inc.*, Nos. ER-13-193-000, ER 13-196-000, 2013 WL 2189868, at *53, 58 (FERC May 17, 2013).

approximately a \$10 billion annual transmission investment.¹⁹ Updating and expanding the electrical grid are fundamental steps to improving our nation’s decarbonization efforts, energy security, and resilience.²⁰ Moreover, climate change and political destabilization both increasingly threaten the global energy supply and emphasize the need to invest in domestic transmission infrastructure. The continued drive of technology and creative thinking, both spurred by competition, must be present for our country to move forward, be secure, and remain on the cutting edge of energy infrastructure.²¹ As recently

¹⁹ Johannes Pfeifenberger & John Tsoukalis, Brattle Group, *Transmission Investment Needs and Challenges* (June 1, 2021) (available at <https://www.brattle.com/wp-content/uploads/2021/10/Transmission-Investment-Needs-and-Challenges.pdf>).

²⁰ United States Energy Department, *Building a Better Grid Initiative To Upgrade and Expand the Nation's Electric Transmission Grid To Support Resilience, Reliability, and Decarbonization* (Jan. 19, 2022) (available at <https://www.federalregister.gov/documents/2022/01/19/2022-00883/building-a-better-grid-initiative-to-upgrade-and-expand-the-nations-electric-transmission-grid-to>)

²¹ See, e.g., Advanced Research Projects Agency - Energy, *Department of Energy Announces Latest Challenge in Competition Aimed at Identifying Power Grid Solutions* (Feb. 16, 2022) (available at <https://arpa-e.energy.gov/news-and-media/press-releases/department-energy-announces-latest-challenge-competition-aimed>). (discussing the importance of competition in prompting growth and development of the electrical grid); Energy Systems Integration Group, *Transmission Planning for 100% Clean Electricity* (2021) (available at <https://www.esig.energy/wp-content/uploads/2021/02/Transmission-Planning-White-Paper.pdf>) (“The widespread adoption of clean energy goals by many U.S. States and businesses is underway, spurred by accelerating commitments to combat climate change and the growing cost-competitiveness of renewable resources.”).

noted by the U.S. Department of Justice and Federal Trade Commission in comments filed with FERC, “[s]ignificant expansion of regional and interregional transmission will be needed to accommodate growing demand, including the U.S. electricity sector’s transition to greater utilization of renewable energy resources and to obtain other benefits[.]”²² ROFRs, by virtue of awarding vital electric infrastructure projects solely to incumbent transmission owners by default, derails the momentum of this key innovative spirit.²³

Given that the statute’s ROFR injures Iowa residents by precluding innovation and creating an anti-competitive market that severely affects the public, the Court should afford injunctive relief in this case.

CONCLUSION

NextEra Energy Transmission, LLC respectfully requests that this Court find in favor of the Plaintiffs-Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC and against Defendants-Appellees State of

²² Comment of the U.S. Department of Justice and Federal Trade Commission at 3, filed in FERC Docket No. RM21-17-000 (Aug. 17, 2022).

²³ Johannes Pfeifenberger, et al., Brattle Group, *Cost Savings Offered by Competition in Electric Transmission*, at 5–6 (Apr. 2019) (“We recommend that federal and state policymakers consider the positive experiences with competitive processes to date and expand the scope of competitive transmission investments to capture more of the innovation and cost reductions benefits achieved through competition.”).

Iowa, Iowa Utilities Board, Geri D. Huser, Glen Dickenson, and Leslie Hickey, and grant appropriate relief, including but not limited to enjoining enforcement of Iowa Code § 478.16, its related rules, and its rights of first refusal to incumbent electric transmission owners. NEET further requests this Court reverse the District Court's order and remand for further proceedings.

Such relief is necessary in light of the arguments outlined above. The ROFR unfairly and needlessly eliminates competition in Iowa, which is contrary to the progress made towards increased competitiveness and innovation at the federal level. NEET is directly injured by the ROFR given that it is now permanently precluded from ever competing for electrical transmission projects in Iowa—regardless of the quality or merit of its bid—unless and until its competitors decide to allow it. The prospect of that occurring is slim. For all these reasons, the above requested relief is necessary to spare Iowa's electrical transmission industry from becoming controlled by an anti-competitive, unmotivated monopoly of a select few established parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(e)(1), and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, in font size 14 and contains 3,706 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 17, 2022, I electronically filed the foregoing document with the Clerk of the Iowa Supreme Court using the Electronic Document Management System, which will send notification of such filing to the following counsel of record.

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