**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

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| **LS POWER MIDCONTINENT, LLC, and SOUTHWEST TRANSMISSION, LLC,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**THE STATE OF IOWA, IOWA UTILITIES BOARD, GERI D. HUSER, GLEN DICKINSON and LESLIE HICKEY,**<br><br>**Defendants.** | **CASE NO. CVCV060840**<br><br>**REPLY IN SUPPORT OF APPLICATION FOR INTERVENTION** |

ITC Midwest LLC ("ITC Midwest"), pursuant to Iowa Rule of Civil Procedure 1.407, sought intervention in this matter either as a matter of right, or as a permissive intervenor. Plaintiffs have resisted, arguing that ITC Midwest's interests are adequately represented by the named governmental defendants. Plaintiffs ignore Iowa's policy of liberally granting intervention. *See Rick v. Boegel*, 205 N.W.2d 713, 717 (Iowa 1973) (intervention is remedial and is to be liberally construed to reduce litigation and expeditiously determine matters before the court); *see also Lakes Gas Co. v. Terminal Properties, Inc.*, 720 N.W.2d 192 (2006) (Table, text in Westlaw) (citing *Boegel* for same proposition). More importantly, Plaintiffs are wrong with respect to the legal test for intervention of right, and fail to contest ITC Midwest's alternative request for permissive intervention.

## I. ITC MIDWEST IS ENTITLED TO INTERVENTION AS A MATTER OF RIGHT; ITS INTERESTS WOULD NOT OTHERWISE BE ADEQUATELY REPRESENTED.

Iowa Rule of Civil Procedure 1.407(1)(b) states the two-part test for a timely motion to intervene of right where it is not provided by statute:

> [i] the applicant claims an interest relating to the property or transaction which is the subject of the action and [ii] the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless* the applicant's interest is adequately represented by existing parties.

Plaintiffs do not challenge the timeliness of the motion to intervene. ITC Midwest's interest relating to the "property or transaction" is also unchallenged – ITC Midwest has a clear interest in both. The challenged statute impacts electric transmission lines connecting directly to ITC Midwest's existing facilities – the relevant property.[1] ITC Midwest similarly has a clear interest in the transaction: the challenged statute grants to ITC Midwest and other incumbent electric transmission owners a right of first refusal for a narrow class of regional projects that connect to the incumbent's existing facilities. Simply stated, the Plaintiffs filed this case in an effort to take away rights that ITC Midwest currently holds by statute.

Plaintiff's sole challenge to ITC Midwest's intervention is an argument that ITC Midwest's "interest is adequately represented" by the named government defendants. Plaintiffs are mistaken. Courts – many in jurisdictions with more stringent standards than Iowa's "liberally construed" approach to interventions – routinely allow private parties to intervene alongside government parties, particularly where the interest of the applicant is narrow, specific, or "parochial," and therefore different from that of the general public which the government represents. For example, the Eighth Circuit allowed an electric utility aligned with the United States Environmental Protection Agency to intervene, explaining:

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[1] *See* H.F. 2643, Division XXXIII, Section 128, new section 478.16(2):

> 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.*

(Emphasis added)

> Here, NSP's interests in its Sherco facility diverge from the EPA's general interests in assuring that the proper regulatory procedures are followed. Both NSP and the EPA argue that the Environmental Groups cannot bypass the proper steps required . . . But NSP's interest in the litigation is more than mere procedural formality. NSP owns the target power plant; it "is seeking to protect a more narrow and 'parochial' financial interest not shared by [the general public]." *Mille Lacs Band of Chippewa Indians*, 989 F.2d at 1000 (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C.Cir.1986))

*National Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014); *see also Mille Lacs*, 989 F.2d at 1001 (granting landowners intervention, stating "the landowners' property values may be affected by the depletion of fish and game stocks. Again, these interests are narrower and more parochial interests than the sovereign interest the state asserts in protecting fish and game"); *Hardin v. Jackson*, 600 F. Supp. 2d 13, 16 (D.D.C. 2009) ("BASF seeks to intervene to protect its economic and proprietary interests. . . The D.C. Circuit has frequently found 'inadequacy of governmental representation' when the government has no financial stake in the outcome of the suit.")

The clearest example of this is a case decided just this year from neighboring Wisconsin, involving an electric transmission project of the kind contemplated in this case. In that case, the project had been approved by the Public Service Commission of Wisconsin (PSCW). Opponents of the project brought an action in federal district court against the PSCW. The transmission companies sought to intervene and the district court denied intervention, based on the same arguments raised here by Plaintiffs. The transmission companies appealed the district court's decision to the Seventh Circuit Court of Appeals. Although the Seventh Circuit applies a more complex intervention test that includes three different levels of scrutiny and is more stringent than the standard in Iowa, it nonetheless found no problem reversing and allowing the intervention. While the quote is lengthy, it is valuable as it is directly on point regarding the current motion:

> [I]t's not enough that a defense-side intervenor "shares the same goal" as the defendant in the brute sense that they both want the case dismissed. The judge seemed to think it was, but that mode of analysis operates at too high a level of generality. Needless to say, a prospective intervenor must intervene on one side of the "v." or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail. The judge's analysis essentially boils down to this: The Commission wants the case dismissed. The transmission companies do too. Therefore, they share the same goal, and the presumption of adequate representation applies. If that's truly how the presumption works, then the default standard will rarely apply.
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> That's not how the presumption works. Rule 24(a)(2) requires a more discriminating comparison of the absentee's interests and the interests of existing parties. When that kind of contextual analysis is done here, it quickly becomes clear that the transmission companies are entitled to participate as parties to this litigation to protect their private investment in this massive energy project. Their interests are independent of and different from the Commission's in several important respects. To name a few: They own, finance, and will operate the transmission line in question, and have obligations to their investors in connection with its construction and operation.

*Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). The court, finding the role and interests of the government as a regulator and the role and interests of a regulated private company--as is the case here where the IUB would implement the ROFR--were sufficiently different, held that "The basic prerequisites for intervention under Rule 24(a)(2) are unquestionably satisfied, and the transmission companies have carried their burden to show that the Commission's representation may be inadequate to protect their interests." *Id*. at 749.

In this case, ITC Midwest has a specific, parochial interest, *i.e.*, the right that ITC Midwest holds by statute and which stands to be impaired is different from that of the state or citizens generally; ITC Midwest has a pecuniary interest in a market that the state and citizens generally do not; and unlike the state or citizens generally, ITC Midwest has physical facilities and is responsible for the safe, reliable, well-coordinated operation of those facilities. Such

specific and unique interests overcome any presumption that the state broadly represents the interests of ITC Midwest. ITC Midwest has, therefore, established all requirements for intervention as a matter of right.

## II. ALTERNATIVELY, THE COURT SHOULD GRANT ITC MIDWEST PERMISSIVE INTERVENTION.

In focusing on the adequacy of representation issue, Plaintiffs have failed to resist permissive intervention. Read properly, the "adequately represented" test applies *only* to intervention of right, and would not preclude permissive intervention even were Plaintiffs' argument meritorious (which, as ITC Midwest explains above, it should not be). Compare ICRP 1.407(1)(including reference to "adequately represented" test) with ICRP 1.407(2) (for permissive intervention, making no mention of adequate representation); see also 1.407(4) ("The court shall grant interventions *of right unless the applicant's interest is adequately represented by existing parties*. The court shall consider applications for *permissive intervention and grant or deny the application as the circumstances require*.") (emphasis added)[2]

Indeed, Plaintiffs' approach, if applied to permissive intervention, is so constrictive it would virtually strike ICRP 1.407 from the rules. It is hard to envision, under Plaintiffs' arguments, when an intervenor would not be aligned with a named party and therefore be precluded because the named party seeks the same outcome. Courts, however, are to give effect to the rules and their purpose, not to negate them.

The test for permissive intervention, then, is broad and simple: *anyone* may be permitted to intervene in an action . . . (b) when an applicant's claim or defense and the main action have a

[2] The distinction between a test looking at adequate representation for intervention of right but omitting that requirement for permissive intervention is commonplace. *Compare, e.g.*, Fed. R. Civ. P. 24(a)(2) *with* 24(b); *also* Minn. R. Civ. P. 24.01 *with* 24.02.

question of law or fact in common. *See* ICRP 1.407(2). Here, particularly as to the equal protection claim and the elements of the injunctive relief sought, ITC Midwest's defenses have questions of law and fact in common. It is difficult to imagine a stronger case for a court to grant discretionary intervention than this one. By the terms of the challenged statute, the new electric transmission lines at issue here will connect to existing facilities of the incumbent electric transmission owners – companies like ITC Midwest. There will be no physical attachment to the property of the State of Iowa; it is ITC Midwest's system whose safety and reliability are at issue. Moreover, the right of first refusal to construct transmission facilities is challenged in this case; that is a right that presently is held by ITC Midwest and other incumbent electric transmission owners. These are the facts covered by the statute at issue and therefore by the claims and defenses in this case.

In addition, ITC Midwest is uniquely situated to address the differences between incumbent and non-incumbent transmission companies relevant to an equal protection analysis, for example, or to bring understanding as to the length of the planning process for new regionally-planned transmission lines relevant to whether a harm is "immediate" under a preliminary injunction analysis. ITC Midwest is entitled to participate in the process of defending its own rights, and its own transmission network. If ITC Midwest is not a party in this case, there will be no other avenue for ITC Midwest to protect the rights granted to it by this statute. These are precisely the types of interests contemplated by the right of intervention, and any reasonable notion of due process requires that the existing rights granted to ITC Midwest by the challenged statute not be rescinded without ITC Midwest having a fair opportunity to be heard.

While ITC Midwest believes it fully qualifies for intervention as a matter of right, in the event the court finds otherwise the court should use its broad discretion to effectuate Iowa's policy of liberally construing intervention and allow ITC Midwest to intervene permissively in this matter. No reasons to the contrary have been presented.

Filed this 10th day of December, 2020.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 10th day of December, 2020, the foregoing document was electronically filed with the Clerk of Court using the EDMS system which will send a notice of electronic filing to all counsel of record registered with the EDMS system.

*/s/ Sarah McCray*
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