IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LSP MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC, Plaintiffs, v. THE STATE OF IOWA, IOWA UTILITIES BOARD, GERI D. HUSER, GLEN DICKINSON and LESLIE HICKEY, Defendants.	Case No. CVCV060840 **MIDAMERICAN ENERGY COMPANY'S RESISTANCE TO REQUEST FOR TEMPORARY INJUNCTION**

BACKGROUND

LSP Midcontinent, LLC and Southwest Transmission, LLC (collectively "LSP") seek a temporary injunction to enjoin the effectiveness of Iowa Code §478.16. In seeking such relief, LSP misstates the legislative history concerning Iowa Code §478.16 and improperly uses legislator affidavits to state the intent of the Legislature in passing such legislation. LSP also fails to show that it will likely succeed on the merits of its constitutional challenge and fails to demonstrate there are any imminent projects justifying temporary injunctive relief.

Accordingly, Intervenor MidAmerican Energy Company ("MidAmerican") requests that this court deny the request to enjoin the effectiveness of Iowa Code §478.16.

ARGUMENT

I. LEGISLATOR AFFIDAVITS ARE NOT APPROPRIATE TO DETERMINE LEGISLATIVE INTENT

When a constitutional challenge is made to an Iowa statute, it is not proper for a court to determine legislative intent from legislator affidavits. See *AFSCME Iowa Council v. State*, 928 N.W.2d 21, 36 (Iowa 2019); *Rhoades v. State*, 880 N.W.2d 431, 447 (Iowa 2016) (affidavits

from legislators or former legislators are inadmissible on the subject of legislative intent); *Lee Enterprises v. Iowa State Tax Commission*, 162 N.W.2d 730, 734 (Iowa 1968) (court sustained objections to offered testimony from legislator four legislators who testified as to the inadequate consideration given to an act by the legislature); see also *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 122–23, 137 N.W.2d 900, 905 (1965); *Tennant v. Kuhlemeier*, 142 Iowa 241, 245, 120 N.W. 689, 690 (1909).

Iowa adopts this view because legislators, individually and collectively, can have multiple or mixed motives when voting on legislation. *AFSCME*, 928 N.W.2d at 36.[1]

When affidavits are submitted which contain impermissible conclusions or other objectionable material during a pre-trial phase of a case, the proper course is to request that such portions of the affidavit not be considered and, accordingly, be given no weigh in the court's decision-making. See *Voice Capture, Inc. v. Intel Corp.*, 354 F. Supp. 2d 997, 1007-1008 (S. D. Iowa 2004) (argument in favor of a motion to strike an affidavit is more of a challenge to the weight to be accorded the challenged declaration); *Palmer Holdings and Investments, Inc. v.*

[1] The Iowa Supreme Court has embraced Justice Scalia's warning against efforts to ascertain the subjective intent of a group of legislators when determining a constitutional challenge to legislation:

> [D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed finite.... [The legislator] may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

928 N.W. 2d at 36-37 (citing *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1261 (4th Cir. 1989) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636–37, 107 S. Ct. 2573, 2605, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting)).

Integrity Insurance Co., ___ F. Supp. 3d ___, 2020 WL 7258857 *17 (S. D. Iowa 2020) (court refused to consider affidavits which offered conclusions on matters of law that were for the court to decide).

Accordingly, this court should not consider the portions of the affidavits submitted from Rep. Zumbach and Senator Bolton that, in effect, opine that "logrolling" occurred during the enactment of Iowa Code §478.16.[2]

II. THE LEGISLATURE CAN SUSPEND NON-CONSTITUTIONALLY MANDATED RULES

The objections raised by LSP regarding legislative rules are also misplaced. The Iowa Constitution provides the General Assembly with a free hand to determine its rules of procedure. *Carlton v. Grimes*, 237 Iowa 912, 923 23 N.W. 883, 889 (1946). Whether either chamber strictly observes these rules or waives or suspends them is a matter entirely within its own control or discretion, so long as it observes the mandatory requirements of the Constitution. *Id.*

Based upon this authority, MidAmerican objects to the portions of the affidavits from Rep. Zumbach and Sen. Bolton regarding committee consideration, funnel date and other procedural rules on the legislative chambers. Those portions of the challenged affidavits should be given no weight by this court because they address rules which are not mandated by the Iowa Constitution.[3] Consequently, those rules have no impact on the constitutional challenges made here.

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[2] This court should give no weight to paragraph 7 of the Zumbach Affidavit and paragraphs 21 and 23 of the Bolton Affidavit that create an inference of "logrolling" and/or impermissibly opine to legal conclusions.

[3] This court should not consider paragraphs 9, 14, 19, 21, 23 and 24 of the Zumbach Affidavit nor paragraphs 3,5, 8, 13-16, 18-19 of the Bolton Affidavit because those paragraphs contain conclusions on why Legislators voted or acted and/or contain speculation on citizen intent, legislative intent and hypothetical outcomes.

III. LSP INACCURATELY PORTRAYS THE LEGISLATIVE DEBATE

The 88th General Assembly of the Iowa Legislature was scheduled to convene on January 13, 2020th and adjourn on April 21st. (Ex. C). The Session was abruptly suspended on March 15th due to the effects of COVID-19. (Ex. D). The Legislature reconvened on June 3rd and stayed in session for 11 days. (Ex. D, Ex. G).

The actions by the Legislature in enacting Iowa Code §478.16 were not done in the "dark of night" as suggested by LSP. In fact, LSP's representation of the legislative history is riddled with inaccuracies and omissions.

For example, LSP inappropriately parses the comments of Senator Breitbach. Those comments, when taken in context and in their entirety, were not misleading and addressed each portion of the bill. (Ex 2 p. 2-3). Contrary to any assertion by LSP, Senator Breitbach accurately indicated during legislative debate that the House in a prior session had committee hearings on a bill which at that time included the right of first refusal ("ROFR") bill.(Ex. 2 p.6-8).

Additionally, LSP makes the interesting claim that "MidAmerican Energy Company expressed surprise at the Division XXXIII's inclusion." (LSP Br. p. 25) This is not true. The legislative debate simply indicates that Senator Bisignano did not "recall a discussion ever about MidAmerican coming to me." (Ex. 2 p. 7). There was no mention of "surprise" at the ROFR inclusion in the bill.

More significantly, Senator Bisignano stated during floor debate that MidAmerican was not a supporter of the ROFR bill. (Ex. 2 p. 8). That comment was also not in accord with the record. MidAmerican, through several registered lobbyists, declared it was in favor of the ROFR Study Bill as early as January 23, 2020. (Ex. A).

Senator Bisignano even seemed to mistakenly think a person named John Davis was the lobbyist for MidAmerican on the 2020 bill. John Davis was not MidAmerican's lobbyist in 2020. (Ex. A, Ex. H). MidAmerican had five registered lobbyists on this bill as of January 23, 2020 which did not include Mr. Davis.

LSP even overlooks that the full Senate Appropriations Committee considered *and* reported on HF 2643 on June 13, 2020. (Ex. F p. 46-47). The bill passed the Senate on a vote of 30-17. (Ex. F p.41-42).

It is also noteworthy that when given the opportunity to speak against the ROFR on the merits or procedurally on whether the title contained a single-subject, Rep. Zumbach remained silent (as did Senators Bisignano and Bolton). In fact, when a vote was taken in the House on whether the title should be amended, Rep. Zumbach voted *not* to change the title. (Ex. G p. 7-8). The bill passed the House on a vote of 51-41 (Ex. G p.8-9).

IV. PUBLIC NOTICE AND OPPORTUNITY FOR COMMENT EXISTED

House Study Bill 540, which contained provisions that became Iowa Code §478.16, was introduced on January 23, 2020. That very day, four MidAmerican lobbyists (David Adelman, Sara Allen, Frank Chiodo and Matt Hinch) declared as being "for" the bill. (Ex. A). Four days later, LSP's three lobbyists (Jim Carney, Doug Struyk and Jennifer Dorman) registered against that bill. (Ex. A). The Lobbyist Declaration record reflects that 69 lobbyist entries were made on HSB 540, including those for it, against it and undecided. (Ex. A).

Further, LSP's three lobbyists (Jim Carney, Doug Struyk and Jennifer Dorman) registered opposition to H.F. 2643 at 7:49 am on June 14, 2020. (Ex. B). The Lobbyist Declaration record reflects that 50 lobbyist entries were made on H.F. 2643, including those for it, against it and undecided. (Ex. B).

Ample opportunity existed for public input. Lobbyists from utilities, unions, business, AARP and others registered their respective positions on the bill that contained the ROFR.

Further, The Legislature's specific consideration of the title of the bill indicates an understanding of the matters on the bill.[4] Fair notice was provided so that members of the Legislature could extensively discuss provisions in ROFR bill.

V. LSP INACCURATELY PORTRAYS THE ELECTRIC INDUSTRY IN IOWA

LSP claims the enactment of Iowa Code §478.16 is a "drastic change" in bidding for transmission line projects in Iowa. That is simply not accurate.

Incumbent electric transmission owners had a long-standing federal right of first refusal for construction of new transmission lines. See *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils*., 136 FERC 61051, 3 ¶ 7 (2011)). However, the "drastic" change, if any, occurred when Federal Energy Regulatory Commission ("FERC") issued No. Order 1000 which took away the federal ROFR for a subset of regional transmission projects. Despite such change, Order No. 1000 nonetheless allowed states to continue the status quo of a ROFR being used for transmission line projects.

LSP further argues that a ROFR will result in "price gouging" of electric consumers. That is also not true. A key difference exists between LSP and MidAmerican. MidAmerican's rates are regulated and set by the Iowa Utilities Board ("IUB"). See Iowa Code §§474.9, 476.8 (2); 199 I.A.C §20.10(1); Rowley Aff. ¶2. LSP 's rates are not regulated by IUB. Moreover, the

[4] On June 14, 2020, Rep. Hunter stated: "I move that the title of the bill be changed to an act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for another voter suppression activity, and including effective dates and retroactive provisions, and I would move for a record on- -division and a record." LSP Ex. 7, p. 62

costs for construction of transmission lines by MidAmerican are reviewed by IUB. See Iowa Code §478.4.

The difference between an Iowa regulated utility like MidAmerican and an out-of-state company like LSP, that is *not* subject to IUB rate and service regulation, has been noted by the Iowa Supreme Court when addressing equal protection challenges. See *NextEra Energy Resources LLC v. Iowa Utilities Board,* 815 N.W.2d 30, 46-47 (Iowa 2012).

In addition to these differences, there are several other reasons exist why "price gouging" cannot occur under the ROFR provided in Iowa Code §478.16. First, MidAmerican's retail rates must be "just and reasonable and the return on equity recovered in retail rates is also set by the IUB. (Ex. I). Second, transmission costs are subject to a prudency review by FERC, return on equity is subject to FERC approval and MidAmerican selects its vendors for such projects through a competitive bidding process. These are the same mechanisms used effectively by IUB and MidAmerican to ensure reliable and affordable service for retail customers. (Ex. I).

Valid policy concerns also support a ROFR for an incumbent electric transmission owner. A non-incumbent electric transmission owner, like LSP, has no incentive to be responsive to a complaint by an Iowa retail electric customer. See *MISO Transmission Owners v. FERC*, 819 F. 3d 329, 335 (7th Cir. 2016) (ROFR can provide a quick resolution of reliability problems). The only entity that a non-incumbent would be responsive to is the Federal Energy Regulatory Commission, which has sole jurisdiction over transmission rates. Even local electric distribution utilities have limited ability to force an independent transmission provider to be responsive to local retail customer concerns. (Ex. I).

In contrast, MidAmerican is vertically integrated. MidAmerican owns and operates generation and distribution assets for the benefit of retail customers, subject to IUB's

jurisdiction. MidAmerican must therefore be responsive to Iowa retail electric customers, who also have an interest in affordable transmission rates. (Ex. I).

Finally, LSP seeks too much mileage from a brief filed by the Office of the Consumer Advocate. LSP seems to suggest that position is binding on the Attorney General and State in this proceeding. That is simply not so.

The Office of the Consumer Advocate is statutorily obligated to advocate only for consumers and does not take into account quality and service issues which are within the jurisdiction of the IUB. See Iowa Code §475A.2. Accordingly, the interest of the State, as determined between the IUB and OCA, may vary. For example, , OCA has actually sued IUB over a dispute. See, e.g. *OCA v. Iowa Utilities Board*, 656 N.W.2d 101 (2003).

VI. LSP IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS SINGLE-SUBJECT CONSTITUTIONAL CHALLENGE

It is well-established that the Iowa Constitution should be liberally construed so one act may embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto. See *Lee Enterprises*, 162 N.W.2d at 734 (Iowa 1968).

A single-subject violation requires that the challenged legislation embrace "two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other." *Id. (*citing *Long v. Board of Supervisors*, 258 Iowa 1278, 1283, 142 N.W.2d 378, 381 (1966)). This does not mean that any two subjects in a multifaceted piece of legislation must, in isolation, demonstrably relate to each other for the bill to pass constitutional muster. *Id.* It is only necessary to show that all subjects relate to a single purpose. *Id.*

This proposition is clear from the language of the constitutional clause itself which provides that "[e]very act shall embrace but one subject, *and matters properly connected*

therewith." *Id. (citing* Iowa Const. art. III, § 29 (emphasis added)). In interpreting the italicized language, the Iowa Supreme Court recognized early on that the subject of a statute lies in its ultimate objective and not in the detail or steps leading to that objective. See *State ex. rel. Weir v. County Judge of Davis County*, 2 Iowa 280, 283 (1855).

Significantly, a bill with a considerably longer title and multiple matters has withstood a single-subject constitutional challenge. See *Miller v. Bair,* 444 N.W.2d 487 (Iowa 1989) (title to Senate File 395 extended for twenty-seven lines in the printed session laws and contained approximately 300 words and addressed topics from job tax credits to private wine sales).

The Iowa Supreme Court has rejected the view that the existence of two seemingly dissimilar subjects in a bill, each of which is sufficiently significant in its own right to stand independently from the other, is a *per se* violation of the single-subject rule. *Id.* In fact, "[i]t is unimportant that matters within the single subject might more logically be classified as separate subjects if they are nevertheless germane to a single subject." *Id.*

The proper analysis is to search for (or to eliminate the presence of) a single purpose toward which the several dissimilar parts of the bill relate. *Id*. In *Miller* the court was able to identify that common purpose as being a multifaceted effort to promote economic development through two basic categories: economic development incentives and revenue adjustments. Significantly, the Court did not find any absolute prohibition against the legislature exercising both the police and taxing powers in a single act.

Here the legislation involved legal and regulatory responsibilities which included appropriations. Thus, LSP is not likely to succeed on its single-subject constitutional challenge.

VII. FAILURE TO SHOW IMMINENT INJURY

The final element LSP must show to obtain a temporary injunction is that irreparable injury

is “imminent.” No projects are pending through MISO in Iowa in the near future. LSP has failed to meet its burden to show imminent injury which is required to justify entry of a temporary injunction.

CONCLUSION

For these reasons, the court should deny LSP’s request for temporary injunctive relief based on the reasons set forth.

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