IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LS POWER 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** **ITC MIDWEST LLC'S RESISTANCE TO PLAINTIFFS' REQUEST FOR TEMPORARY INJUNCTION**

While most people are familiar with the electric distribution network – the wires that bring the electricity they use to their homes, owned by their local electric company – people are less familiar with the electric transmission network, often called "the grid." That system of larger, higher-voltage lines is interconnected across state (and even national) lines and serves an indispensable role in carrying electricity over longer distances, whether between electric generating facilities and distribution networks, from electric generating facilities to energy markets, or from one network to another.

Regulation of the transmission network is complex and multi-layered. There is a federal layer through the Federal Energy Regulatory Commission ("FERC"). There is a regional layer through regional non-governmental Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") who generally oversee transmission system planning and energy markets in their region – these include the Midcontinent Independent System Operator, Inc. ("MISO") and the Southwest Power Pool ("SPP"). Finally, there remains an important state

role; the Iowa Utilities Board ("IUB"), under Iowa Code chapter 478, regulates the siting and construction of electric transmission lines in Iowa.

The determination of which new electric transmission lines are built and where is largely a function of extensive planning processes undertaken by the regional ISOs and their stakeholders and ultimately involves the regulations and processes of all three layers. *See generally, LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1023-1024 (8th Cir. 2020) (providing extensive background). Prior to 2011, FERC allowed transmission provider tariffs to include a federal right-of-first-refusal, so that when a regional planning process approved transmission projects in a state, the incumbent owner of existing transmission in that state had the right to build the project. *Id*. at 1023.

> In 2011, "FERC issued Order 1000," which in part, "eliminated the federal ROFR." *Id*. (citing *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC 61051, 3 ¶ 7 (2011) (hereinafter "*Order 1000*")). *Order 1000* specifically "direct[s] public utility transmission providers to remove from their [Open Access Transmission Tariffs] or other Commission-jurisdictional tariffs and agreements any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." *Order 1000* at 3 ¶ 7.

Id.

FERC went on, however, to make clear that while it was removing certain federal rights-of-first-refusal,

> Eliminating a federal right of first refusal in Commission-jurisdiction tariffs and agreements does not result in the regulation of matters reserved to the states.

See Order 1000, 136 FERC ¶ 61501 at ¶ 287, 2011 WL 2956837, at *92. Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities. *See, e.g., S.C. Elec. & Gas Co.*, 147 FERC ¶ 61126, 61562-64; 2014 WL 1997987, at **34-37 (May 15,

2014). FERC has reiterated that "state-granted rights of first refusal. . . still exist under state or local law. . . and nothing in Order No. 1000 changes that law or regulation." *Id.* at ¶ 127, **36.

In the 2020 session of the Iowa General Assembly, the legislature passed HF 2643, Section XXXIII, which created a state right-of-first-refusal for incumbent electric transmission owners – those who already have assets and operations in the state and a proven track record with the State and the IUB. The right applies only to narrow categories of projects – certain large projects with regional benefits and costs that are also shared regionally – and the right only applies to an incumbent where the new project will connect to that incumbent's existing facilities. In enacting HF 2643, Section XXXIII, Iowa adopted a policy that FERC long held and that FERC expressly allowed states to continue. Iowa is not alone: multiple other states, particularly in the center of the country, have similar state rights of first refusal.[1]

Nonetheless, and despite the parent company of the plaintiffs losing a challenge to a similar statute in Minnesota[2] in the federal courts in Minnesota,[3] plaintiffs challenge the Iowa right-of-first-refusal statute. As part of that challenge, plaintiffs seek a temporary injunction. There is no dispute as to the relevant injunction test: plaintiffs must demonstrate (1) a probability of success on the merits; (2) a threat of irreparable harm if

[1] In addition to Iowa, see, e.g., N.D. Cent Code § 49-03-02.2; S.D. Codified Laws § 49-32-20; Neb. Rev. Stat. § 70-1028; 17 Okla. Stat. § 292; Minn. Stat. § 216B.246; and Sections 37.051, 37.056, 37.057, 37.151, and 37.154 of the Texas Utilities Code. (This is not intended to be an exhaustive list.)

[2] Minn. Stat. § 216B.246.

[3] *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp.3d 695, 707-08 (D. Minn. 2018), aff'd by *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1023-1024 (8th Cir. 2020).

an injunction isn't issued; (3) that the balance of harms favors an injunction; and (4) that the public interest favors an injunction.

To avoid needless overlap with the State's brief, ITC Midwest focuses on two prongs of the familiar four-prong test: probability of success on the merits and threat of irreparable harm to the plaintiff. Neither supports the granting of the request injunction.

I. THERE IS NO PROBABILITY OF SUCCESS – EQUAL PROTECTION ATTACKS ON ECONOMIC STATUTES FACE AN EXTRAORDINARILY HIGH BAR IN IOWA, AND SIMILAR CHALLENGES TO STATE ELECTRIC TRANSMISSION RIGHTS OF FIRST REFUSAL HAVE FAILED IN OTHER JURISDICTIONS.

The overwhelming majority of plaintiffs' argument on the probability of success relates to the single-subject and title clauses, which are addressed by the State and by MidAmerican Energy. It is telling that there is comparatively little discussion of plaintiffs' equal protection claims under Article I, § 6 of the Iowa Constitution – likely because that claim has little chance of success. The high bar for such claims in Iowa, coupled with the failure of similar challenges to transmission rights of first refusal in other jurisdictions show that the probability of success on the merits here is very low indeed, far too low to support a request for temporary injunction.

Constitutional challenges to economic regulation, like the statute at issue here, are reviewed under the rational basis test. *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530 (Iowa 2008). "The rational basis test is a 'very deferential standard.'" *NextEra Energy Resources LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012) (citing *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009)). To prevail on an equal protection claim under this standard, plaintiffs must show that the relevant persons are similarly situated; if they are not similarly situated, their dissimilar treatment does not violate equal protection. *Id*. at 45-46. Even if the classification results in similarly-situated persons being treated in a dissimilar way, however, "[a]

statute satisfies the requirements of equal protection so long as 'there is a plausible policy reason for the classification. . .'" *Id*. at 46 (quoting *Varnum*, 763 N.W.2d at 879). "The challenging party 'has the heavy burden of showing the statute unconstitutional and must negate every reasonable basis on which classification may be sustained.'" *Qwest Corp. v. Iowa St. Bd. of Tax Review*, 829 N.W.2d 550, 558 (Iowa 2013) (quoting *Varnum*, 763 N.W.2d at 879).[4] The state need not even present evidence -- it need only present a plausible justification for the statute. *Id*.

As an initial matter, plaintiffs and incumbent electric transmission owners like ITC Midwest are not similarly situated. Incumbent electric transmission owners like ITC Midwest have existing facilities in operation in Iowa that directly serve network customers and communities, and are responsible for their continued safe and reliable operation for the delivery of electricity. Non-incumbents like the plaintiffs do not. ITC Midwest would continue to have the responsibility for its network – even as a new-entrant less familiar with ITC Midwest's network connected new facilities. ITC Midwest's responsibilities would continue, but with less control to ensure uninterrupted service. A non-incumbent transmission developer would not have the same concern as they would have no facilities in operation on the other side of the connection. Simply put, the role of an "attacher" of new transmission lines and the role of the incumbent being *attached to* are not the same. Additionally, ITC Midwest originally entered the State of Iowa when it purchased the transmission assets of Interstate Power and Light.[5] As part of that transaction, ITC Midwest was required to obtain approval from the IUB to ensure the continued, reliable operation of the transmission system and to ensure that ITC Midwest was up

[4] Notably, all of these cases – *Coralville*, *NextEra Energy*, and *Qwest* -- arise in the context of utilities, suggesting that, as with tax law, particular deference is given to policymakers with regard to the complex area of utilities regulation.

[5] *In re Interstate Power and Light Company and ITC Midwest LLC*, Docket No. SPU-07-11, Order Terminating Docket and Recommending Delineation of Transmission and Local Distribution Facilities (IUB, Sept. 20, 2007).

to the task.[6] Without HF 2643, Section XXXIII, transmission developers – without any experience in the State – may be selected by the RTOs to build projects in the State without first going before the IUB for similar approval to operate transmission lines in the State.[7] This significant difference in level of state regulatory review also means ITC Midwest and plaintiffs are not similarly situated.

In addition, the parent company of the plaintiffs made a similar argument regarding discrimination under the Commerce Clause against the Minnesota right-of-first-refusal statute – and the argument was rejected. In that case, the reasoning was that many incumbents were regulated utilities, whereas LS Power is not. *See LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp.3d 695, 707-08 (D. Minn. 2018) ("Regulated utilities [-] the existing transmission line owners with a right of first refusal [-] are not similarly situated with unregulated entities such as LSP.")[8] The same will hold true in Iowa where companies like MidAmerican Energy are regulated utilities.[9] And because ITC Midwest acquired its transmission system, subject to the review and approval of the IUB, the plaintiffs are also not similarly situated to ITC Midwest.

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[6] Technically, the sale by Interstate Power and Light (Alliant Energy's Iowa operating subsidiary) of its transmission facilities to ITC Midwest was a "reorganization" of Interstate Power under Iowa's utilities law. The test applied by the IUB looked at, among other things, the impact of ITC Midwest's purchase of the lines on Interstate Power's remaining ability to attract capital, the impact on ratepayers, and the public interest generally. *See In re Interstate Power*, Docket SPU-07-11 at 9-10.

[7] A non-incumbent developer would still have to obtain a project-specific franchise (permit) from the IUB, but only after it has been selected by the RTO to build a project. That review, however, would pertain to the details of the specific project, not the capabilities of the developer more broadly.

[8] Affirmed on different grounds by *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018. To the extent plaintiffs argue here that the equal protection clause is being violated based on differential treatment of in-state and out-of-state entities, that remnant of the dormant commerce clause argument that was unsuccessful in Minnesota also fails here for the same reasons: incumbent electric transmission owners are both in-state and out-of-state companies, and non-incumbents may also be both in-state and out-of-state companies.

[9] It is irrelevant that not every incumbent electric transmission owner is a regulated utility; that was also true in Minnesota, and Iowa law is clear that under the rational basis test the classification need not be a perfect fit. *See Qwest*, 829 N.W.2d at 558 ("The fit between the means and he end can be far from perfect. . ."); *NextEra*, 815 N.W.2d at 46 ("[a] classification 'does not deny equal protection simply because is practice it results in some inequality; practical problems of government permit rough accommodations. . .'" (citations omitted))

Even if the Court were to find that plaintiffs and the incumbent electric transmission owners are similarly situated, however, the plaintiffs still would have no likelihood of success on the merits. Given the low hurdle presented by the rational basis test, and the need to merely present any plausible justification relevant to the classification, the fact that other courts have already found policy justifications for similar statutes should be conclusive. For example, a right-of-first-refusal in Texas was upheld against a Commerce Clause challenge "in part because it was enacted to avoid jeopardy or disruption to the service of electricity to Texas electricity consumers and to allow for the provision of a reliable supply of electricity to those consumers…" *NextEra Energy Capital Holdings, Inc. v. Walker*, Slip Copy, 2020 WL 3580149 (W.D. Tex., Feb. 26, 2020), at *6. Simply continuing an approach that has historically been successful in a state has been found to be a proper purpose for a right of first refusal statute. *LSP Transmission*, 954 F.3d at 1031 ("Its goal was 'to preserve the historically-proven status quo for the construction and maintenance of electric transmission lines' . . . This goal is within the purview of a State's legitimate interest in regulating the intrastate transmission of electric energy.") And again, in its initial review of ITC Midwest's acquisition of Interstate Power's transmission assets, the IUB placed importance on the demonstrated track record of ITC Midwest's corporate affiliates:

> Unlike the situation with TRANSLink, in this case ITC Midwest's affiliates have a track record of investing in and rebuilding transmission systems and collecting awards both for safety and worker training. The evidence in the record supports a finding that the provision of safe, reasonable, and adequate service would not be impaired by the proposed reorganization.

In re Interstate Power, Docket No. SPU-7-11, at 30.[10]

[10] Notably, where such a showing on the record had not been made, in a prior case involving TRANSLink, the IUB had rejected such a reorganization of transmission assets. *See In re Interstate Power*, Docket No. SPU-07-11 at 8-9 (discussing prior TRANSLink dockets).

Finally, it is noteworthy that while the FERC eliminated the federal right of first refusal for some types of regional projects, it continued to allow such a right for other projects. The parent company of plaintiffs challenged that decision as well, and again was unsuccessful. FERC's decision was upheld, with the court stating yet another reason why a state might want to retain a right-of-first-refusal for those projects where it is empowered to do so:

> [T]he benefit, which is surely very considerable, of a quick resolution of reliability problems. Delays will be inevitable if companies outside the service area are permitted to bid for the project, since competitive bidding takes time and may get bogged down in litigation.

MISO Transmission Owners v. FERC, 819 F.3d 329, 335 (7th Cir. 2016).

Plaintiffs have a very low probability of success on their equal protection challenge. As an economic regulation, the standard for upholding the statute is very deferential to the legislature. In this case, the relevant parties are not similarly situated. Incumbents have ongoing responsibilities for their own existing operating facilities that customers rely on; non-incumbents seeking to attach to those facilities do not. Moreover, many incumbents are regulated electric utilities; non-incumbents generally are not. But even if plaintiffs were similarly situated to incumbents like ITC Midwest and MidAmerican Energy, the statute would still be valid because there are plausible reasons for the state to make a classification that distinguishes between incumbent and non-incumbent transmission owners, and to give incumbents a right of first refusal. The 8th Circuit, the 7th Circuit, and the Western District of Texas have already held that several rationales were adequate to overcome a Commerce Clause challenge; those purposes are adequate under Iowa's relaxed rational basis test for equal protection as well.

II. THERE IS NO COGNIZABLE THREAT OF IRREPARABLE HARM AS THERE IS NO TEMPORAL IMMEDIACY TO SUPPORT PRELIMINARY RELIEF WHERE, AS HERE, THE ALLEGED HARMS ARE NON-SPECIFIC, CONTINGENT, AND NEARLY A YEAR AWAY AT THE EARLIEST.

It is fundamental that temporary injunctive relief requires that the alleged harm be imminent – something that can only be forestalled by the unusual step of an expedited, preliminary decision. *See, e.g.*, 43A C.J.S. *Injunctions* § 54 ("[A] party must show that the harm is certain and great and of ***such imminence*** that there is a clear and present need for equitable relief.")(emphasis added); *Baehne v. Independent School Dist. of Manly*, 207 N.W. 755 (Iowa 1926) ("The question before the district court was the preliminary one, whether injury to the plaintiff was so imminent as to require the court to order a temporary injunction upon a preliminary hearing."); *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (to demonstrate irreparable harm, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief," *citing Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir.1996)). Here, there are no harms that are imminent – or even non-speculative.

Plaintiffs have raised two arguments as to why harms are imminent. One is that their claim relating to the title of HF 2643 would be precluded if not made before the new issue of the code was "codified." It is ITC Midwest's understanding that this is no longer an issue – that the parties agree that an injunction would have no impact on the claim because the claim would be timely or not based entirely on when it was filed, and comparing that date to whether codification had occurred at that time, as the State argues, or not. The second is that absent an injunction now, plaintiffs claim that they may lose an opportunity to bid on a project in Iowa.[11]

[11] Plaintiffs technically seek to enjoin both the implementation of the statute and any IUB rulemakings that are part of implementing the statute. The case for enjoining a rulemaking is even weaker. That process can range from several months to over a year, and provides numerous opportunities for input and for any process required. See, for

Notably, the passage of time already undermines the claim that harm is in any way imminent. The motion for temporary injunction was filed approximately two months ago; the complaint was filed nearly three months ago – and no harms have occurred. While plaintiffs have argued and have presented the affidavit of Sharon Segner as to the growth of renewables and the need for additional electric transmission projects in Iowa, neither plaintiffs' brief nor the Segner Affidavit identifies any specific projects or specific timelines (much less any that are imminent). Plaintiffs can only speak in generalities about how the planning process works, and about the background of why more projects may be coming at some unknown point in the future because the simple fact is that there are no biddable projects currently approved for Iowa by either MISO or SPP, and there won't be for nearly a year at the very earliest. As the Affidavit of Jeffrey Eddy, filed with this brief, explains, the planning cycles that were completed for both MISO and SPP in 2020 include no Iowa projects that would be subject to competitive bidding. Eddy Affidavit (*Eddy Aff.*) at ¶ 9, 10. While the plaintiffs describe the planning process generally, Mr. Eddy describes the actual timelines. *Eddy Aff.* ¶ 9, 10. As Mr. Eddy explains, the next planning cycle will not be completed and result in approved projects until October 2021 (SPP) or December 2021 (MISO). *Eddy Aff.* ¶ 9, 10. Moreover, until those planning processes are completed, there is no assurance that any Iowa projects subject to competitive bidding will be approved. Despite the growth of renewables in Iowa, no such projects subject to competitive bidding were approved by MISO Transmission Expansion Plans ("MTEP") in Iowa since 2011 and no such projects have been approved anywhere in the MISO footprint since 2017; there were no such projects approved by MISO in MTEP 18, MTEP 19 or MTEP 20. *Eddy Aff.* ¶ 9.

example, this chart of currently and recently pending IUB rulemakings on the IUB website: https://iub.iowa.gov/sites/default/files/documents/2021/01/rmu-docket-status-report-01.08.2021.pdf. As no such rulemakings have been initiated, and they would have no effect until completed, and the specific content is unknown, any potential harm from a rulemaking is particularly speculative, remote, and non-immediate.

Similarly, while the plaintiffs' brief claims that HF 2643 "represents a drastic change in Iowa law for new construction and maintenance of electric transmission lines," (Pl. Br. at 3) that is actually backwards. Normally the point of an injunction is to preserve the status quo, but in this case that status quo is that since Order 1000 removed the federal right of first refusal in 2011 there has *never* been an electric transmission line built in Iowa based on a competitive bidding process, even prior to HF 2643's state-based right of first refusal. *See Eddy Aff.* ¶ 11. The Iowa law merely codifies what had long been the de facto case in Iowa. Where plaintiffs have not had or not taken the opportunity to bid on competitive projects in Iowa since issuance of Order 1000 – or ever – that strongly suggests that there is no immediacy to the harms they now claim to face.

Until a project of the narrow type subject to competitive bidding is actually approved by an RTO for Iowa, plaintiffs' entire action – and certainly its request for extraordinary injunctive relief – is entirely speculative and remote. Even then, until the relevant incumbent electric transmission owner chooses to build the project rather than decline that right, plaintiffs can show no actual harm; until that point, the harm is entirely theoretical. Realistically, the very earliest the issues in this case could come to fruition is the end of 2021, and likely considerably later. Should approval of a specific Iowa project that would be biddable actually occur during the course of this litigation, plaintiffs can revisit the issue of an injunction at that more appropriate time. At present, there is no immediate harm that can be shown, and no need for preliminary relief at this time.[12]

[12] While ITC Midwest thinks it is clear that no temporary injunction can issue, were the Court to disagree there would still be the issue of a bond. Under Iowa R. Civ. P. 1.1508, the posting of a bond is mandatory:

> The order directing a temporary injunction ***must*** require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability to be incurred. Such bond with sureties to be approved by the clerk shall be conditioned to pay all damages which may be adjudged against the petitioner by reason of the injunction.

Filed this 14th day of January 2021.

By: */s/ Bret A Dublinske*

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In this case, were an injunction to improperly interfere with the planning process and delay or discourage projects in Iowa or result in plaintiffs improperly obtaining a project that would otherwise have been built by ITC Midwest, the economic losses would easily run into the millions of dollars.