

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

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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

MIDAMERICAN ENERGY COMPANY and  
ITC MIDWEST LLC.

Intervenors.

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Case No. CVCV060840

**INTERVENOR MIDAMERICAN  
ENERGY COMPANY’S RESISTANCE  
TO MOTION FOR LEAVE TO AMEND  
THE PETITION AND JOINDER IN  
RESISTANCES TO MOTION TO  
RECONSIDER**

COMES NOW Intervenor MidAmerican Energy Company (“MidAmerican”) who states as follows:

**BACKGROUND**

On March 25, 2021 the court granted Defendants’ motion to dismiss because Plaintiffs LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively “LSP”) lacked standing to challenge H.F. 2643. Plaintiffs lacked standing because they did not sustain injury in fact when there was no specific project for which bids had been solicited and because plaintiffs had not been denied the opportunity to bid on any such project. The case was dismissed, and costs were assessed to plaintiffs.

Plaintiffs seek to amend the petition based on “new evidence” despite the fact that the case has been dismissed. The motion should be denied.

## ARGUMENT

### I. THE COURT SHOULD DENY THE MOTION FOR LEAVE TO AMEND

A district court has considerable discretion in allowing amendments to pleadings and a district court will be reversed only when there is a clear abuse of discretion. *Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996); *Potter v. Good Eavespouting*, 505 N.W.2d 178, 180 (Iowa 1993); *Chao v. Waterloo*, 346 N.W.2d 822, 825 (Iowa 1984) *M-Z Enterprise v. Hawkeye-Security Ins. Co.*, 318 N.W.2d 408, 411 (Iowa 1982).

Typically, plaintiffs facing a motion to dismiss will seek to amend the petition to “cure” any shortcomings *before* the court rules on that motion. When plaintiffs do not follow that practice, courts properly deny motions to amend *after* the court has granted a dispositive motion in favor of the defendant. See *Kelsey v. State of Minnesota*, 565 F.2d 503, 507 (8th Cir. 1977) (court properly denied motion to amend a complaint where the amended complaint was filed *after* the court granted defendant’s motion for summary judgment); *Shipner v. Eastern Airlines, Inc.* 868 F.2d 401, 407 (11th Cir. 1989) (court did not abuse its discretion in denying plaintiff’s motion to amend complaint after it had granted summary judgment, but before it entered final judgment); See *Tucker v. Heaverlo*, 249 Iowa 197, 206, 86 N.W.2d 353, 360 (1957) (court properly denied plaintiff’s motion to amend the petition after plaintiff had appealed).

Similarly, LSP filed the motion to amend the petition *after* the motion to dismiss had been granted and costs were assessed against it. The motion is untimely and, accordingly, should be denied.

A further basis exists to deny the motion to amend. LSP has failed to adequately demonstrate that the two pages of exhibits submitted meet the requirements as “newly discovered” evidence.

Seeking relief based upon a claim of newly discovered evidence is not favored and the proffered evidence in support of such a motion should be closely scrutinized. See *Christy v. Heil*, 255 Iowa 602, 123 N.W.2d 408 (1963); *Mays v. C. Mac Chambers Co., Inc.*, 490 N.W.2d 800 (Iowa 1992). To prevail, LSP must show the evidence is newly discovered, could not in the exercise of due diligence have been discovered prior to the ruling that granted defendant’s motion to dismiss, the evidence must be material, not merely cumulative or impeaching, and there must be a showing that the evidence would probably change the result. See *In re Marriage of Grandinetti*, 342 N.W.2d 876 (Iowa Ct. App. 1983); *Miller v. AMF Harley-Davidson Motor Co., Inc.*, 328 N.W.2d 348 (Iowa Ct. App. 1982).

LSP does not adequately explain why this information is new evidence and why in the exercise of due diligence this information could not have been discovered before the ruling. For example, LSP’s Exhibit B is a timeline that was presented at a MISO/SPP meeting on April 9, 2021 meeting, but was previously posted for a *December 11, 2020* MISO/SPP meeting (See Intervenors’ Resistance Ex. 1; Hammer Aff. ¶4). Thus, the timeline was available well before the injunction hearing and ruling on the motion to dismiss.

As part of the temporary injunction hearing, LSP also submitted a portion of a December 7, 2020 presentation by MISO of its Long Range Transmission Plan (“MISO Plan”) where MISO indicated the potential need for transmission investments in Iowa. (See Ex. 27, pp. 11-12; Hammer Aff. ¶5).

LSP’s Exhibit B which consists of the MISO/SPP study timeline from December 11,

2020 is clearly not new evidence. The SPP/MISO timeline from December 11, 2020 merely indicated that by April 2021 there was a desire for identification of constraints. (Hammer Aff. ¶6).

Nor does the map identifying “notable 345kV constraints observed along target area” constitute new evidence after considering the prior submissions made by LSP as part of its temporary injunction request. *Compare* Ex. A, Mtn to Reconsider (4/9/21) *with* Ex. 4 p. 5 (Segner Aff. ¶19); Ex. 20 p. 2-4; Pl. Br. Motion for Temp. Inj. p. 12 (11/13/20) and Ex. 27 p. 11-12 (12/10/20).

In particular, LSP claims in the proposed amended petition that a MISO/SPP Queue Study was updated in April 2021 which identified four Iowa transmission constraints, including Council Bluffs. (See Amd. Pet. ¶34, Ex. A). The “update” is of no avail to LSP on its lack of standing.

On September 25, 2020, a MISO/SPP presentation identified a potential upgrade of an Iowa constraint--the same Council Bluffs constraint that LSP claims is new evidence. (See Ex. 20 p. 4). In fact, a portion of that slide was even submitted by LSP as part of filings on November 13, 2020. (See Hammer Aff. ¶8; Intervenor’s Resistance Ex. 2; Ex. 20, p.4; Ex. 27 pp.11-12;).

More importantly, the information on LSP’s Exhibit A along with LSP’s reference to the MISO Plan in the proposed amended petition and other references to the MISO Plan (e.g. Ex. 27, p. 20) merely identify *potential* constraints and potential solutions. (Hammer Aff. ¶9). New facilities identified in any presentation by MISO and/or SPP are little more than “lines on a map” to be studied against an initial set of constraints identified by MISO or SPP. (Hammer Aff. ¶10).

A justified need and determination of the benefits of new lines, and who will pay for

them, must be studied and approved before there is a specific project. (Hammer Aff. ¶11). It could very well turn out that none of those “lines on a map” will ever become a project that is bid upon. (Hammer Aff. ¶12). Thus, the “update” submitted by LSP is not new evidence and is cumulative with the information already presented to the court as part of the temporary injunction request.

The belated attempt to amend the petition fails for a further reason. None of the information provided by LSP meets the “probable change” standard for new evidence because it does not reflect actual projects to bid upon. For these reasons, the court’s decision on standing and lack of injury to LSP should not change.

## **II. COURT SHOULD DENY THE MOTION TO RECONSIDER**

LSP has also filed a motion to reconsider the March 25, 2021 ruling granting Defendants’ motion to dismiss.

MidAmerican joins any resistance filed by the Defendants and/.or ITC Midwest to the motion to reconsider and adopts, as if set forth fully herein, the arguments made therein.

## **CONCLUSION**

Intervenors MidAmerican and ITC Midwest request that the court deny Plaintiffs’ request for leave to amend the petition and joins any resistance to the motion for reconsideration.

Filed this 20th day of April, 2021.

/s/Stanley J. Thompson  
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