IN THE IOWA DISTRICT COURT IN AND 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 MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC. Intervenors.	Case No. CVCV060840 **INTERVENOR ITC MIDWEST'S COMBINED RESISTANCE TO PLAINTIFFS' MOTION TO RECONSIDER AND MOTION FOR LEAVE TO AMEND**

Intervenor ITC Midwest LLC for its Combined Resistance to Plaintiffs' Motion to Reconsider and Motion for Leave to Amend states:

Plaintiffs LS Power Midcontinent, LLC and Southwest Transmission LLC ("LS Power") brought this suit to challenge a narrow economic regulation passed by the Iowa Legislature and signed into law by the Governor. That law establishes an eminently reasonable proposition: because of the importance of the electric system, when there are certain new major projects that are eligible to be bid under the Federal Energy Regulatory Commission's "Order 1000," and those projects will attach directly to existing transmission facilities, the companies that own and operate the existing facilities to which the project will attach get the first opportunity to build the new project. This type of right-of-first-refusal has been upheld in other jurisdictions; recently and notably the United States Court of Appeals for the Eighth Circuit upheld a Minnesota provision substantially similar to that at issue in this case.

On March 25, 2021, this Court correctly dismissed LS Power's case for a more basic reason, however: LS Power lacks standing because, among other things, it cannot show a specific, personal, non-speculative harm. LS Power has filed a motion to reconsider, enlarge or modify that ruling, and simultaneously has filed a motion for leave to amend its petition. LS Power has blurred the lines between its motions, however, seeking to improperly bootstrap the existence of proposed post hoc assertions into its argument for the Court to revisit its dismissal ruling. Accordingly, ITC Midwest resists the motions in this combined manner to avoid needless repetition of the same arguments.

That said, while LS Power improperly mixes and matches its motions and ITC Midwest finds it efficient to respond in a single filing, the Court must consider the motions separately: unless and until the Court grants reconsideration, there is at this time no petition to amend. Logically, it is improper to consider the motion for leave to amend – or any of the substance in the proposed amended petition – where there is no live petition to amend. Accordingly, ITC Midwest first addresses the motion to reconsider.

I. The Court's March 25, 2021 Order Is Correct, and LS Power Provides No Sufficient Basis to Reconsider.

Much of the motion to reconsider is merely a rehashing of prior arguments that were thoroughly briefed, argued and ultimately rejected by the Court. Mere reiteration is not the proper purpose of a motion to reconsider. *See Meier v. Senecaut*, 641 N.W.2d 532, 538 (Iowa 2002) ("When a ruling is strictly limited to a question of law, a motion to reconsider amounts to nothing more than a rehash of the legal question."). Particularly as to the restated arguments on the legislative process, ITC Midwest joins in the resistance of the State of Iowa.

LS Power raises two other arguments. First, it argues that the Court should enlarge its ruling to address the exception to standing for matters of great public importance. LS Power

argues that the Court is so obligated because the issue was raised in its briefing before the ruling – but LS Power cites solely to a couple of passing lines in a single footnote, not even a discussion in the body of the brief. A review of the transcript shows the issue of the public interest exception to standing was never raised at oral argument, either. While ITC Midwest is not aware of any case in Iowa that clearly determines whether a mere footnote alone sufficiently litigates an argument to require the Court to rule, to the extent Plaintiffs assert this Court should have addressed that single footnote a colorful quote by Judge Posner seems relevant: "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as Dunkel's did. Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

Even if the Court decides to expand its ruling to address the issue, there is no basis for applying the public interest exception. The narrow, arcane matter at the substantive heart of this case involving whether incumbent electric transmission owners get the first opportunity to build additions to their existing facilities, is hardly one that has grabbed headlines and drawn public interest. In that regard it is far from the paradigm case for the narrow exception. To the extent LS Power seeks to limit the public interest to the Constitutional question it raises, notably LS Power doesn't cite a single Iowa case in which the court applied the doctrine in the manner LS Power seeks. Rather, LS Power is left looking between the lines of two cases (*Godfrey* and *Exira*) that found no standing, just as the Court correctly did here, and arguing over what the Supreme Court said "might" be sufficient in a case that was not actually before it. This is too slender a reed to hold the weight of a motion to reconsider the Court's decision which was based on extensive briefing and argument, and which correctly followed the law.[1]

[1] Notably, and in particular at p. 8 of Plaintiffs' Brief in Support of Reconsideration, LS Power discusses whether "the public" had notice, and whether "legislators" were confused or properly apprised. Unfortunately for LS Power,

The second additional argument raised by LS Power is that the Court erred in determining that LS Power had failed to state a sufficiently cognizable injury in fact to have standing. And it is here that LS Power engages in a particular sleight of hand, arguing at p. 13 that the Court should consider a meeting that occurred on April 9, 2021 – a meeting that, according to LS Power's Motion for Leave to Amend, forms the basis for the additional facts it seeks to allege. But those facts are not in the record, nor should they be, because they are not part of the Petition whose dismissal is the subject to the motion to reconsider.

Of more substantive importance, however, is that there is simply nothing new in LS Power's arguments that the Court hasn't already considered in its ruling *even if the Court were to consider LS Power's claims about the April 9 meeting*. LS Power is no closer to stating a specific, non-speculative, non-remote injury. That there are constraints identified in Exhibit A to the motion, and those have been called "high priorities" by various policy-makers, does not mean there is a specific buildable project approved to relieve those constraints, or that there will be in any foreseeable future. Moreover, LS Power continues to misrepresent ITC affiant Jeff Eddy's testimony in response to LS Power's request for a temporary injunction in this case, where he stated that the *earliest* the next round of the planning process could be completed is October 2021 – he does not speculate that biddable projects in the State of Iowa will be the result of that process. As Exhibit B to the motion makes clear, a joint MISO-SPP "final report" would not be reviewed with stakeholders until a meeting currently scheduled for December 13, 2021, and again predicting what that report will contain is completely speculative at this point, further

aligning the "the public" at large does not help their standing argument, which requires personal, specific, non-speculative harm distinct from that of the general public. Moreover, LS Power is in no position to argue that *they* had a lack of notice when their lobbyists registered against the bill. See Exh A to MidAmerican's Resistance to Temporary Injunction (list of lobbyist registrations). If legislators feel confused or procedurally disadvantaged, they presumably can bring a lawsuit of their own against the leadership. But LS Power cannot obtain *its* standing through hearsay about the feelings of legislators who are not involved in this litigation.

demonstrating why LS Power does not have standing today. (ITC Midwest discusses this further below in the context of the Motion for Leave to Amend.) In any event, given we are to April 2021 and no projects have been identified, much less approved, LS Power's use of the word "imminent" is misleading at best.

In short, LS Power simply dresses its old arguments in new clothing and hopes the Court will see them differently. There is no basis for the Court to reconsider its correct ruling.

II. LS Power's Motion for Leave to Amend Should Not be Granted.

The Court need not reach this question unless it first grants the motion to reconsider and reverses its own ruling. Absent that chain of events, there is no petition that can be amended: it was dismissed. It is not unusual for litigants to file a motion to amend between a motion to dismiss and a ruling on that motion, or to argue in the alternative that if the court is inclined to dismiss, it should allow the plaintiff to replead. Due to the litigation choices of LS Power, neither of those occurred here.

Nonetheless, leave to amend is largely in the discretion of the district court – and there is nothing presented in the motion that should cause the Court to use that discretion to allow the proposed amendment. LS Power advances a single argument in support of its request to amend: that allegedly something changed in March and April 2021 that now allows LS Power to plead a more specific injury – that these "newly discovered facts address the Court's concern regarding justiciability and demonstrate Plaintiffs have standing. . ." (Motion for Leave to Amend at ¶ 6.) There are, however, no new facts: LS Power's arguments for standing have not improved at all since the Court dismissed the case.

First and foremost, the planning processes cited by LS Power were underway in 2020. There are no new facts to support LS Power's claims. Specifically, in support of its argument

that new projects are now "imminent," LS Power with its Motion to Reconsider attached two slides from a 36-page slide deck presented at the April 9, 2021 meeting. *See* ITC Midwest **Attachment A** (the entire slide deck). Neither of those slides contained information that was new to transmission developers and owners and other stakeholders that have been participating in the MISO and SPP planning processes. Affidavit of Jeff Eddy (**Attachment B**) at ¶ 4.

Moreover, LS Power's factual allegations are inconsistent: at new ¶ 37, LS Power asserts that it is "likely electric transmission projects will be approved for construction. . . in Iowa in 2021." But ¶ 34 correctly concedes that the final report of the SPP and MISO studies isn't even expected to be discussed with stakeholders until December 2021, and it is not clear (and there are no allegations) what further steps could or would be taken after that report to result in any particular project in the State of Iowa that would fall into the category of biddable projects.[2] In addition, the RTO planning activities that LS Power cites to support its motions have significant stakeholder opposition, and a fraught cost allocation planning process.[3] It is simply entirely speculative that specific projects in the State of Iowa that would be eligible for bidding will actually be approved for construction this year – if at all. *See also* Eddy Aff. at ¶ ¶ 6-7.

Furthermore, looking at both Slides 27 and 28 together demonstrates that LS Power's Exhibit B was only one of two timelines – showing development of a final report in November 2021 – but Slide 28 showing the Stakeholder Timeline suggests that the stakeholder meeting to review the final report won't occur until December 13, 2021. And again, without seeing the yet-to-be-developed report, the Court cannot say today that any biddable projects in the State of Iowa

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[2] *See e.g.*, Exhibit A, Slide 24 (At the April 9, 2021 meeting, SPP and MISO indicated that the RTOs must first identify constraints under their existing planning processes that could be "eligible" for mitigation. Then economic teams will evaluate the proposed mitigation and some subset of projects that meet specific criteria will be recommended for a discussion on cost allocation.)

[3] *See* Affidavit of Jeff Eddy at ¶ 6 (Cost allocation issues have hindered efforts to address the identified constraints between MISO and SPP for years, and nothing has changed to make that discussion easier.)

will be recommended, and if so when those would actually come for bid. Literally nothing has changed.

LS Power wants to make bare assertions and require the Court to accept them as true to overcome a motion to dismiss. But leave for that amendment is discretionary. The Court need not blank its memory or abandon its common sense when, because of the request for a temporary injunction, LS Power has already been called on to substantiate its arguments. If it could not make the requisite showing of immediacy when allowed to go beyond its pleadings in the injunction papers, the Court should be wary of allowing it to now allege what just two months ago it could not adequately support.

Finally, to the extent that LS Power seeks to have its Amended Petition somehow relate back to defeat the effect of the dismissal of its case, it is not clear that LS Power is timely. There does not appear to be a published appellate case in Iowa allowing the relation-back of an amended petition filed post-dismissal and where no allowance was made in the dismissal order. Iowa Rule of Civil Procedure 1.444 allows a court to permit or require further pleading as part of a ruling – but that rule allows only 10 days after the order. In context, this appears to refer to an order on a substantive motion, not a separate request for leave. Surely an unsolicited amendment where permission or a requirement was not previously given should not be more favored and allowed to be filed more than 10 days after the dismissal order. In the Eighth Circuit, in rare instances an amendment post-dismissal is permitted, but it is highly disfavored – and Judge Bennett rejected such an effort with an explanation that is on point here:

> I conclude that leave to amend post-dismissal should be denied in the circumstances presented here. First, a post-dismissal motion to amend is "disfavored," independent of any other consideration. *See Hypoguard*, 559 F.3d at 823–24; *see also Morrison Enters., L.L.C.*, 638 F.3d at 610; *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d at 1208; *Hawks*, 591 F.3d at 1050. Post-dismissal amendment must be viewed even less favorably, in the

> particular circumstances of this case, because the County chose to stand on its original Complaint, even in the face of a motion to dismiss that identified the very deficiencies upon which I dismissed that Complaint, and the County has stated no valid reason for not proffering the new theory on which its Amended Complaint is based *in an amended pleading* before dismissal. *See Gomez*, 676 F.3d at 665; *Parnes*, 122 F.3d at 540–51.

Plymouth County, Iowa ex rel. Raymond v. MERSCORP, Inc., 287 F.R.D. 449, 464 (N.D. Iowa 2012), judgment entered, C 12-4022-MWB, 2013 WL 2444041 (N.D. Iowa June 5, 2013), *aff'd* (Dec. 19, 2014), *and aff'd sub nom. Plymouth County, Iowa v. Merscorp, Inc.*, 774 F.3d 1155 (8th Cir. 2014). Chief Judge Lekar in the Iowa First Judicial District put it more succinctly: "It is not procedurally adequate to overcome the dismissal simply to file an Amended Petition." *See Carrie Lynn Wright v. Ross Holdings*, "Order," Docket LACV119917 (Ia. Dist. Ct., Black Hawk Co., July 22, 2013) (attached as **Attachment C)**.

The problem with both the Motion to Reconsider and the Motion for Leave to Amend is the same: nothing has changed since the Court's correct ruling regarding standing. LS Power has not, and cannot, claim an injury that is specific, personal, non-remote, and non-speculative. That there are known transmission constraints in and around Iowa is not new, and that knowledge, even with policy makers expressing concern, is a far cry from an actual, specific, official transmission line being approved, much less in any foreseeable time frame or in that class of projects that is subject to bidding. LS Power has not presented any compelling argument in fact or in law that should result in this Court exercising its discretion to grant the pending motions.

ITC Midwest further joins in the resistance to the Motion for Leave to Amend filed by MidAmerican Energy Company.

Respectfully filed this 22nd day of April, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of April 2021, 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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