

BEFORE THE SUPREME COURT OF IOWA

No. 21-0696

LSP MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,
Plaintiffs-Appellants

vs.

THE STATE OF IOWA, IOWA, UTILITIES BOARD, GERI D. HUSER, GLEN
DICKENSON and LESLIE HICKEY, Defendants-Appellees

and

MID-AMERICAN ENERGY COMPANY and ITC MIDWEST, LLC, Intervenors.

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

HON. CELENE GOGERTY

INTERVENORS-APPELLEES' PROOF BRIEF

Stanley J. Thompson AT0007811
DENTONS DAVIS BROWN PC
4201 Westown Parkway, Suite 300
West Des Moines, Iowa 50266
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: stan.thompson@dentons.com

ATTORNEY FOR INTERVENOR-
APPELLEE MIDAMERICAN ENERGY
COMPANY

TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES 4

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 6

ROUTING STATEMENT..... 7

STATEMENT OF THE CASE..... 7

STATEMENT OF THE FACTS 8

 A. LSP Inaccurately Portrays the Iowa Electric Industry 8

 B. The Passage of HF 2643 16

 C. Legislature Provided Public Notice and Opportunity for Comment 19

 D. Iowa Projects Are Not Necessarily Imminent..... 20

ARGUMENT 21

 Error Preservation..... 21

 Standard of Review..... 21

I. THE DISTRICT COURT CORRECTLY GRANTED THE MOTION TO
DISMISS 21

II. THE DISTRICT COURT CORRECTLY DETERMINED LSP FAILED TO
MAKE THE REQUIRED SHOWING TO MEET THE PUBLIC IMPORTANCE
EXCEPTION 21

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT AN INJUNCTION SHOULD NOT BE ISSUED 21

 A. Iowa Code Section 478. 16 Is Constitutional 21

 1. H.F. 2643 Meets The Single-Subject Requirement in the Iowa Constitution.....22

 2. HF 2643’s Title Provided Fair Notice..... 24

 3. Iowa Code Section 478.16 Does Not Violate the Privileges and Immunities Clause of the Iowa Constitution 26

 B. The District Court Properly Found That LSP Failed to Show Imminent Injury 26

CONCLUSION..... 26

REQUEST FOR ORAL ARGUMENT 26

CERTIFICATE OF COMPLIANCE..... 28

CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Case Law:

<i>AFSCME Iowa Council v. State</i> , 928 N.W.2d 21 (Iowa 2019)	23
<i>Burlington & Summit Apts. v. Manolato</i> , 233 Iowa 15, 19, 7 N.W. 2d 26, 28 (Iowa 1942)).....	25
<i>Comes v. Microsoft Corp.</i> , 646 N.W.2d 440 (Iowa 2002)	14
<i>Edwards v. Aguillard</i> , 482 U.S. 578, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987)...	24
<i>Exxon Corp. v. Governor of Md.</i> , 437 U.S. 117, 98 s.Ct.2207, 57 L.Ed.2d 91 (1978)	11
<i>Indep. Sch. Dist. of Cedar Rapids v. Iowa Emp. Sec. Comm.</i> , 237 Iowa 1301, 1313, 25 N.W.2d 491,498 (Iowa 1946)	24
<i>Iowa Savings & Loan Ass’n v. Selby</i> , 111 Iowa 402, 82 N.W.2d 968, 969 (1900)	
<i>Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission</i> , 335 N.W.2d 179 (Iowa 193)	14
<i>Lee Enterprises v. Iowa State Tax Commission</i> , 162 N.W.2d 730 (Iowa 1968)	22, 24
<i>Long v. Board of Supervisors</i> , 258 Iowa 1278, 142 N.W.2d 378 (1966)	22
<i>LSP Transmission Holdings, LLC v. Sieben</i> , 954 F.3d 1018 (8th Cir. 2020) cert. denied (No. 20-641 March 1, 2021)	10
<i>Miller v. Bair</i> , 444 N.W.2d 487 (Iowa 1989)	22, 24
<i>MISO Transmission Owners v. FERC</i> , 819 F. 3d 329 (7th Cir. 2016)	13
<i>Motor Club of Iowa v. Dep’t of Trans.</i> , 265 N.W.2d 151, 153 (Iowa 1978).....	25
<i>NextEra Energy Resources LLC v. Iowa Utilities Board</i> , 815 N.W.2d 30 (Iowa 2012)	13

<i>Rhoades v. State</i> , 880 N.W.2d 431 (Iowa 2016)	23
<i>Rush v. Reynolds</i> , 946 N.W.2d 543, 2020 WL 825953 *13 n. 21 (Iowa 2020)...	25
<i>S.C. Educ. Ass’n v. Campbell</i> , 883 F.2d 1251 (4th Cir. 1989)	24
<i>State v. Gibson</i> , 189 Iowa 1212, 1213, 174 N.W. 34, 37 (1919)	24
<i>State ex. rel. Weir v. County Judge of Davis County</i> , 2 Iowa 280 (1855).....	22
<i>SZ Enterprises, LLC v. Iowa Utilities Board</i> , 850 N.W. 2d 441 (Iowa 2014)	14
<i>Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.</i> , 136 FERC 61051, 3 ¶ 7 (2011)	8
<i>Utilicorp United, Inc. v. Iowa Util. Bd.</i> , 570 N.W.2d 451, 454 (Iowa 1997).....	25

Statute and Rules:

199 I.A.C §20.10(1)	12
Iowa Const. Art. III, § 29.....	22, 24
Iowa Code §§474.9, 476.8 (2)	12
Iowa Code §478.16	8, 9, 10, 13, 14, 16, 18, 21, 23
Iowa Code §478.4	12
Iowa Code §53.5	15
Iowa R. App. P. 6.903(2)(g)(1).....	20
Iowa R. App. P. 6.903(2)(g)(2).....	20
Iowa R. App. P. 6.907.....	20
Iowa R. App. P. 6.1101(3)(a).....	7

Other Authorities

FERC Order No. 1000	8, 9, 10, 11, 12
FERC Order No. 1000-A	8
House File 2643	16, 17, 18, 19, 21, 23
House Study Bill 540	18
Op. No. 85-5-1, 1985 W.L. 68969 at 1 (Iowa Att’y Gen. May 1, 1985)	25
Senate File 395.....	22

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT CORRECTLY GRANTED THE MOTION TO DISMISS

Iowa R. App. P. 6.903(2)(g)(1)

Iowa R. App. P. 6.903(2)(g)(2)

Iowa R. App. P. 6.907

II. THE DISTRICT COURT CORRECTLY DETERMINED LSP FAILED TO MAKE THE REQUIRED SHOWING TO MEET THE PUBLIC IMPORTANCE EXCEPTION

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT AN INJUNCTION SHOULD NOT BE ISSUED

A. Iowa Code Section 478.16 Is Constitutional

1. H.F. 2643 Meets The Single-Subject Requirement in the Iowa Constitution

AFSCME Iowa Council v. State, 928 N.W.2d 21 (Iowa 2019)

Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573, 96 L.Ed.2d 510 (1987)

Lee Enterprises, 162 N.W.2d at 734 (Iowa 1968)

Long v. Board of Supervisors, 258 Iowa 1278, 142 N.W.2d 378 (1966)

Miller v. Bair, 444 N.W.2d 487 (Iowa 1989)

Rhoades v. State, 880 N.W.2d 43 (Iowa 2016)

S.C. Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989)

State ex. rel. Weir v. County Judge of Davis County, 2 Iowa 280 (1855)

Senate File 395

2. HF 2643's Title Provided Fair Notice.

Burlington & Summit Apts. v. Manolato, 233 Iowa 15, 19, 7 N.W. 2d 26, 28 (Iowa 1942)

Indep. Sch. Dist. of Cedar Rapids v. Iowa Emp. Sec. Comm., 237 Iowa 1301, 1313, 25 N.W.2d 491, 498 (Iowa 1946)

Iowa Savings & Loan Ass'n v. Selby, 111 Iowa 402, 82 N.W.2d 968, 969 (1900)

Motor Club of Iowa v. Dep't of Trans., 265 N.W.2d 151, 153 (Iowa 1978)

Rush v. Reynolds, 946 N.W.2d 543, 2020 WL 825953 *13 n. 21 (Iowa 2020)
State v. Gibson, 189 Iowa 1212, 1213, 174 N.W. 34, 37 (1919)
Utilicorp United, Inc. v. Iowa Util. Bd., 570 N.W.2d 451, 454 (Iowa 1997)
Article III section 29
Op. No. 85-5-1, 1985 W.L. 68969 at 1 (Iowa Att’y Gen. May 1, 1985)

3. Iowa Code Section 478.16 Does Not Violate the Privileges and Immunities Clause of the Iowa Constitution.

B. The District Court Properly Found That LSP Failed To Show Imminent Injury

ROUTING STATEMENT

This appeal should be routed to the Court of Appeals because it involves issues of existing legal principles. I.R.A.P. 6.1101(3)(a).

STATEMENT OF THE CASE

LSP Midcontinent, LLC and Southwest Transmission, LLC (collectively “LSP”) filed the petition on October 14, 2020 and sought, among other things, a temporary injunction to enjoin the effectiveness of Iowa Code §478.16.

On November 17, 2020, MidAmerican Energy Company (“MidAmerican”) filed an application to intervene. After hearing on the resisted applications for intervention, the court granted MidAmerican’s application on January 11, 2021.

After hearing the motion to dismiss filed by the Iowa Utilities Board (“IUB”) and other defendants and the motion for temporary injunctive relief, the court granted the motion to dismiss on March 25, 2021. Plaintiffs’ resisted requests for

reconsideration were denied on April 23, 2021. The notice of appeal was filed on May 5, 2021.

STATEMENT OF FACTS

A. LSP Inaccurately Portrays the Iowa Electric Industry

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

Incumbent electric transmission owners had a long-standing federal right of first refusal (“ROFR”) 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 Order No. 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 using a ROFR for transmission line projects within their boundaries.

In fact, FERC carefully and continually referred to “federal” ROFR which purposefully left wide open the possibility of state ROFRs. Multiple footnotes in Orders No. 1000 and 1000-A demonstrate this fact.¹

¹ In particular, footnotes in Order No. 1000 provide:

227. [N]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.

LSP has challenged the constitutionality of Iowa Code §478.16 which, in effect, grants an incumbent electric transmission owner a ROFR to construct, own, and maintain its own electric transmission lines. LSP and others overlook the historical role states play in siting, permitting and construction of transmission lines within a state which is at the heart of Iowa Code §478.16.

MidAmerican is a heavily regulated utility who provides an essential service to Iowa customers. The IUB regulates every aspect of MidAmerican's business, including how responsive it is to end-user reliability issues. Additionally, that regulatory scheme specifically includes rates which must be reasonable and cost based. A non-incumbent, like LSP, is not subject to the same regulatory compact to provide services. The need to provide Iowa electric consumers with a reliable, quality service outweighs speculative claims of price savings from an out-of-state company who does not have to be responsive to local issues and concerns.

253. [T]he Commission purposely refers to “federal rights of first refusal” in this Final Rule because the Commission’s action on this issue in this Final Rule addresses only rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements. Nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.

287. The Commission acknowledges that there may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions.

Order No. 1000-A states:

187. [W]e recognize, as we did in Order No. 1000, that the states have a significant jurisdictional role in the siting, permitting, and construction of transmission facilities . . .

188. We recognize that such decisions are normally made at the state level.

The Iowa Legislature determined that a ROFR to construct a company's own transmission lines made sense. In doing so, Iowa joined other midwestern states (Minnesota, North Dakota, South Dakota, Nebraska and Oklahoma) who previously enacted identical statutes.

Prior to Iowa's enactment of Iowa Code §478.16, Minnesota enacted an identical statutory provision with a ROFR in favor of Minnesota incumbent electric transmission owners. Not surprisingly, LSP challenged the constitutionality of that statute on Commerce Clause grounds. LSP lost at the federal district court, lost at the 8th Circuit and even sought a writ of certiorari, which the U.S. Supreme Court denied earlier this year. See *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) *cert. denied* (No. 20-641 March 1, 2021).

The *LSP* court recognized that even though Order 1000 changed electric transmission planning and cost allocation requirements for public utility transmission providers, states maintained the right to regulate electric transmission lines consistent with longstanding state regulatory authority over certain matters that are relevant to transmission planning and expansion, such as siting, permitting, and construction, and nothing in Order 1000 involved an exercise of siting, permitting, and construction authority. *Id.* at 1023-24, 1028 (internal citations omitted).

The building of transmission lines inheres in the processes of siting, permitting, and constructing, which are integral to transmission planning and expansion. *Id.* at 1028-29 (“As the Supreme Court aptly stated, “We cannot ... accept appellants’ underlying notion that the Commerce Clause protects the particular structure or methods of operation in a ... market.” *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978)). FERC left such control to the states and continues to recognize the important role states play in regulating the siting, permitting, and constructing of transmission lines as transmission needs are planned and expanded. *Id.* at 1029-1030.

In 2020, Iowa followed the trend set by other midwestern states by enacting an identical ROFR statute.

Enactment of a ROFR statute “preserve[s] the historically-proven status quo for the construction and maintenance of electric transmission lines.” *Id.* That goal was within the purview of a state’s legitimate interest in regulating the intrastate transmission of electric energy. *Id.* Put differently, “unlike the regulation of natural gas, a field in which FERC has jurisdiction both over pricing and over the siting of interstate lines, the states retain authority over the location and construction of electrical transmission lines.” *Id.*

The 8th Circuit’s recent *LSP* decision addressed other important issues:

- Because many of the entities that own existing transmission facilities in Minnesota were regulated public utilities, who served captive markets and have monopolies with respect to the sale of electricity to consumers and because LSP, was an unregulated transmission company, they were *not* similarly situated to the existing transmission line owners with a ROFR and, accordingly the Minnesota ROFR law did not discriminate against LSP.
- It was a reasonable purpose in regulating electricity to provide consumers with adequate and reliable services at reasonable rates.
- State police power includes regulating utilities and such state regulation inherently involved siting, permitting, and constructing transmission lines.
- Incumbents are not obligated to exercise their ROFRs, and some incumbents may not be obligated by their states' public utilities or service commissions to build federally-approved transmission lines. Moreover, FERC's Order 1000 did not eliminate the federal ROFR for incumbents not selected in regional transmission plans for purposes of cost allocation.

Id.

LSP further suggests that a ROFR will result in price gouging of electric consumers. Not true. A key difference exists between LSP and MidAmerican. MidAmerican's rates are regulated and set by the IUB. See Iowa Code §§474.9, 476.8 (2); 199 I.A.C §20.10(1) (Ex. I Rowley Aff. ¶2). LSP 's rates are not regulated by the IUB. Moreover, the costs for construction of transmission lines by MidAmerican are regulated and reviewed by the 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 regulations, 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, several other reasons demonstrate that “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 prudence review by the IUB, return on equity is subject to FERC approval, and MidAmerican selects its suppliers, vendors and contractors for such projects through competitive bidding processes. These are the same mechanisms used effectively by the IUB and MidAmerican to ensure reliable and affordable service for retail customers. (Ex. I, Rowley Aff.).

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). A non-incumbent is only

responsive to the FERC, which has sole jurisdiction over transmission rates. Even local electric distribution utilities have limited ability to force a non-incumbent to be responsive to local retail customer concerns. (Ex. I, Rowley Aff.).

In contrast, MidAmerican is vertically integrated, meaning that MidAmerican owns and operates generation, transmission and distribution assets for the benefit of retail customers, subject to the IUB's jurisdiction. MidAmerican must, therefore, be responsive to Iowa retail electric customers, who also have an interest in affordable transmission rates. (Ex. I, Rowley Aff.).

Iowa courts have recognized the importance of having a reliable, essential service provided by a utility with an exclusive franchise because safeguards are implemented through heavy regulation, including rates. See *Iowa Citizen/Labor Energy Coalition, Inc. v. Iowa State Commerce Commission*, 335 N.W.2d 179, 182 (Iowa 1993) (recognized that utilities are generally extensively regulated, had monopoly status and provide an essential service); *SZ Enterprises, LLC v. Iowa Utilities Board*, 850 N.W. 2d 441, 462 (Iowa 2014) (IUB advocated that regulated monopolies need to have the ability to recover their reasonable costs in order to provide service to the public).

Concerns over market power are not well-taken given the Legislature's prerogative in enacting Iowa Code §478.16. See *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002) (Supreme Court's goal in interpreting the Iowa

Competition Law, including Iowa Code §53.5 addressing monopolies, is to give effect to purpose and intent of the Legislature).

LSP comments on “on-going maintenance” which is part of the Midcontinent Independent system Operator, Inc’s (“MISO”) requirements. (LSP Br. p. 87 fn 10). Those requirements appear to be designed to assure the entity that owns and is responsible for maintaining the line will still be operating when a line needs to be replaced. Concern exists within the industry that non-incumbent transmission developers may set up special purpose entities that are not adequately structured or capitalized, or otherwise lack the assets it may take to operate, maintain, repair and timely replace the line (if, for example, a natural disaster were to happen). Conversely, Incumbent Electric Transmission Owners have the financial and operational wherewithal to quickly react to disasters. The derecho storm that damaged many parts of Iowa in August of 2020 exemplified the need that arises for quick action when certain natural disasters occur. Replacing multiple miles of line on the ground requires spare inventories of structures, conductor and other materials as well as on-site engineering teams to figure out what happened and quickly design the replacement. This must take place in hours or days, not in the months and years that non-incumbents typically perform in.

The MISO Selected Developer Agreement requires the developer to “construct, implement, own, operate, maintain, repair, and *restore* all Competitive

Transmission Facilities associated with the Project pursuant to the [MISO Open Access Transmission, Energy and Operating Reserve Markets Tariff] (“Tariff”) and this Agreement.” (MISO Tariff, Attachment FF, Appendix 1 Selected Developer Agreement, pp. 437, 440-442). However, once a developer *completes construction* of a transmission line, the Selected Developer Agreement *terminates* and the developer is no longer under an obligation to restore the Competitive Transmission Facilities following a catastrophic event. (MISO Tariff, Attachment FF, Appendix 1, Selected Developer Agreement, p. 448). The clear implication is that if a non-incumbent builds a transmission line in Iowa under the Iowa statute, they no longer have the obligation under the MISO tariff to demonstrate ongoing abilities to perform, including ongoing ability to restore.

In contrast, as a rate regulated utility, MidAmerican has an inherent obligation outside of the MISO paradigm to reliably serve customers which requires MidAmerican to remain capable and proficient in maintaining and restoring damaged transmission lines service; there is no such assurance with a non-incumbent developer that is not similarly motivated or required to serve ultimate customers.

For these reasons, the economic arguments made by LSP and in the amicus brief by the Coalition of MISO Transmission Customers (which in large part were rejected by the 8th Circuit last year in *LSP*) miss the mark.

B. The Passage of HF 2643

The 88th General Assembly of the Iowa Legislature was scheduled to convene on January 13, 2020 and adjourn on April 21, 2020. (Ex. C). The Session was abruptly suspended on March 15, 2020 due to the effects of COVID-19. (Ex. D). The Legislature reconvened on June 3, 2020 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 a ROFR provision. (Ex. 2 p.6-8).

LSP fails to mention that when a senator requested additional time to review the legislation during floor debate, that request was granted. (Ex. J p. 40-Senator Bisignano). No “dark of night” tactics there.

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

It is noteworthy that when given the opportunity to speak against the ROFR on the merits or procedurally on whether the title contained a single-subject, a representative who has now sided with LSP (Rep. Zumbach) remained silent (as did Senators Bisignano and Bolton who provided affidavits to LSP). 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 by a ten-vote margin: 51-41. (Ex. G p.8-9).

The passage of House File 2643 by the 88th General Assembly involved nothing uncommon or improper. (Smithson Aff.) In fact, a former Chief Clerk of the Iowa House has stated:

Frequently one of the final bills of each legislative session dealt with the management of state government and that often included both taxation and spending as well as economic regulatory matters. Because according to joint rules of the legislature only certain bills are eligible for consideration late in a session, such taxation and spending bills frequently contain regulatory provisions as well.²

(Smithson Aff.)

² W. Charles Smithson, a licensed Iowa attorney, is the Secretary of the Senate and held that position since the 85th General Assembly convened in 2017. Prior to serving as Secretary of the Senate, Mr. Smithson served as Chief Clerk of the House from 2011-2012. The responsibilities of the office of Secretary of the Senate include: maintaining the Senate calendar, legislative processing/indexing and the Senate Journal. The duties of the Chief Clerk of the House are similar.

Mr. Smithson disagreed with any characterization that House File 2643 was passed by the Iowa Legislature contrary to past procedures. (Smithson Aff.)

C. The Legislature Provided Public Notice and Opportunity for Comment

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 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).

LSP alleges that had there been more time for legislators to consider this bill and for public input “this measure is unlikely to have passed.” (LSP Br. p. 69). That comment is nothing more than pure speculation as part of a desperate attempt to have this court overrule Judge Gogerty’s well-reasoned decision.

The bill passed by wide margins in the Senate (30-17) and the House (51-41). These votes generally were made along party-lines. LSP's lobbyists, a virtual army of advocates, knew of the ROFR provision and registered against it before passage by both chambers.

LSP ignores the reality of a COVID-shortened legislative session in 2020 which significantly limited the number of days the Legislature met.

D. IOWA PROJECTS ARE NOT NECESSARILY IMMINENT

LSP now cites the Court to a MISO committee report on long range planning that mentions March 2022 potential projects. Assuming the Court takes judicial notice of the MISO committee report, LSP places too much emphasis on the MISO's future plans. While the MISO committee indicated that it expected to recommend a set of transmission projects to its Board of Directors in March 2022, the slide deck actually stated: "Potential solutions *may be* recommended as part of MTEP21 Appendix A *as early as* March 2022". (emphasis added). It is fair to say that MISO has not committed to a date certain when it will recommend the projects.

Further, MISO's process is a *planning* process, not a *programming* process – MISO neither implements nor compels the implementation of recommended transmission projects. Project implementation is left to developers and owners to undertake and complete, subject to the state requirements discussed herein.

ARGUMENT

Error Preservation. MidAmerican does not claim that LSP failed to preserve error as required by Iowa Rule of Appellate Procedure 6.903(2)(g)(1).

Standard Of Review. This matter involves questions of constitutionality of an Iowa statute; consequently, review is for correction of errors of law. See Iowa R.App. P. 6.903(2)(g)(2); 6.907.

I. THE DISTRICT COURT CORRECTLY GRANTED THE MOTION TO DISMISS

MidAmerican adopts the argument made by the IUB on this brief point.

II. THE DISTRICT COURT CORRECTLY DETERMINED LSP FAILED TO MAKE THE REQUIRED SHOWING TO MEET THE PUBLIC IMPORTANCE EXCEPTION

MidAmerican adopts the argument made by the IUB on this brief point.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT AN INJUNCTION SHOULD NOT BE ISSUED

The district court correctly determined that an injunction should not have been issued because LSP failed to make the required showing to be granted such extraordinary relief.

A. Iowa Code Section 478.16 Is Constitutional

House File 2643 met the requirements in the Iowa Constitution regarding single-subject and title. Nor was the privileges and immunities clause of the Iowa Constitution violated by enactment of Iowa Code §478.16.

1. H.F. 2643 Meets The Single-Subject Requirement in the Iowa Constitution

It is well-established that the Iowa Constitution's single subject requirement is liberally construed. See *Lee Enterprises*, 162 N.W.2d at 734 (Iowa 1968). A liberal construction enables one act to embrace all matters reasonably connected with the subject expressed in the title and which are not utterly incongruous. *Id.*

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 was not likely to succeed on its single-subject constitutional challenge.³

2. HF 2643's Title Provided Fair Notice.

The title clause of the Iowa Constitution “should be liberally construed.” *Indep. Sch. Dist. of Cedar Rapids v. Iowa Emp. Sec. Comm.*, 237 Iowa 1301, 1313, 25 N.W.2d 491,498 (Iowa 1946). “The title need not be an index or epitome of the act.” *Id.* Where there is doubt as to the sufficiency of the title, it should be resolved in favor of validity.” *State v. Gibson*, 189 Iowa 1212, 1213, 174 N.W. 34, 37 (1919). Indeed, the notion of liberal construction is the “foremost principle in Article III, section 29 cases.” *Motor Club of Iowa v. Dep't of Trans.*, 265 N.W.2d 151, 153 (Iowa 1978) Put simply, “[t]he legal environment established by Article III section 29 is not demanding.” Op. No. 85-5-1, 1985 W.L. 68969 at 1 (Iowa Att’y Gen. May 1, 1985).

³ While LSP did not cite to any legislator affidavits in its appellant’s brief, the appendix contained such affidavits. To the extent LSP seeks to rely on such affidavits, the Court should not give any weight to such affidavits. 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 four legislators who testified as to the inadequate consideration given to an act by the legislature) 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 36-37 (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))).

The Court must afford “deferential consideration” to bills challenged under Article III section 29, *Utilicorp United, Inc. v. Iowa Util. Bd.*, 570 N.W.2d 451, 454 (Iowa 1997). HF 2643 satisfies that standard and is also materially analogous to two appellate cases. For example, the Iowa Supreme Court has rejected a title challenge because, in addition to describing a broad subject, the bill’s title referred “to the establishment of administrative requirements.” *Burlington & Summit Apts. v. Manolato*, 233 Iowa 15, 19, 7 N.W. 2d 26, 28 (Iowa 1942). Similarly, in *Rush v. Reynolds*, the Court of Appeal commented that several seemingly disparate subjects “arguably fit under the legal and regulatory responsibilities clause” in the bill’s title and so “the title . . . would not have required amendment.” *Rush v. Reynolds*, 946 N.W.2d 543, 2020 WL 825953 *13 n. 21 (Iowa 2020).

The title here includes a phrase noting the bill establishes legal and regulatory responsibilities. That phrase is sufficient; the legislature is not required to make every bill an exhaustive index of every provision it amends and every regulatory responsibility it imposes. See *Burlington & Summit*, 233 Iowa at 19, 7 N.W.2d at 28. The legislature may use titles that are “plain and broad, and direct [] the attention to the general subject.” *Iowa Savings & Loan Ass’n v. Selby*, 111 Iowa 402, 82 N.W.2d 968, 969 (1900).

Because the title meets those standards which are exceptionally deferential, LSP was not likely to succeed on the title challenge to HF 2643.

3. Iowa Code Section 478.16 Does Not Violate the Privileges and Immunities Clause of the Iowa Constitution.

MidAmerican adopts the argument made by ITC Midwest on this brief point.

B. The District Court Properly Found That LSP Failed To Show Imminent Injury

The final element LSP was required to prove to obtain a temporary injunction was that irreparable injury was “imminent.” No projects that would be eligible for the ROFR are pending through MISO in Iowa in the near future.

Accordingly, LSP failed to meet its burden to show imminent injury which was required to justify entry of a temporary injunction.

CONCLUSION

For these reasons, this Court should affirm the decision of the district court and deny LSP’s request for temporary injunctive relief based on the reasons set forth.

REQUEST FOR ORAL ARGUMENT

Appellees request that this matter be heard orally upon submission of this case.

/s/Stanley J. Thompson
Stanley J. Thompson (AT0007811)
DENTONS DAVIS BROWN PC
4201 Westown Parkway, Suite 300
West Des Moines, Iowa 50266
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: stan.thompson@dentons.com

ATTORNEY FOR INTERVENOR-

APPELLEE MIDAMERICAN
ENERGY COMPANY

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

This brief contains 3,871 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

Date: November 8, 2021

/s/ Stanley J. Thompson
Stanley J. Thompson, AT0007811
Dentons Davis Brown P.C.
4201 Westown Parkway, Suite 300
West Des Moines, Iowa 50266
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: stan.thompson@dentons.com

ATTORNEY FOR INTERVENOR-
APPELLEE MIDAMERICAN ENERGY
COMPANY

CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

I, Stanley J. Thompson, hereby certify that on the 8th day of November, 2021, I electronically filed the foregoing Appellees’ Proof Brief with the Clerk of the Iowa Supreme Court by using the EDMS system and all persons who have filed appearances are registered EDMS users and that service will be accomplished by the EDMS system on the following:

<p>Charles F. Becker Michael R. Reck Erika L. Bauer BELIN McCORMICK. P.C. 666 Walnut Street, Suite 2000 Des Moines, IA 50309-3989 Email: cfbecker@belinmccormick.com mrreck@belinmccormick.com elbauer@belinmccormick.com ATTORNEYS FOR APPELLANTS</p>	<p>David M. Ranscht Benjamin Flickinger Assistant Attorney General 1305 E. Walnut Street, 2nd Floor Des Moines, IA 50319 Email: David.ranscht@ag.iowa.gov Ben.flickinger@ag.iowa.gov ATTORNEYS FOR APPELLEES</p>
<p>Bret A. Dublinske Lisa M. Agrimonti Frederickson & Byron, P.A. 505 E. Grand Avenue, Suite 200 Des Moines, IA 50309 Email: bdublinske@fredlaw.com lagrimonti@fredlaw.com ATTORNEYS FOR ITC MIDWEST, LLC (INTERVENOR)</p>	<p>Amy Monopoli ITC Holdings Corp. 100 E. Grand Avenue, Suite 230 Des Moines, IA 50309 Email: amonopoli@itctransco.com ATTORNEY FOR ITC MIDWEST, LLC (INTERVENOR)</p>

/s/ Stanley J. Thompson
Stanley J. Thompson, AT0007811
Dentons Davis Brown P.C.
4201 Westown Parkway, Suite 300
West Des Moines, Iowa 50266
Telephone: (515) 288-2500
Facsimile: (515) 243-0654
Email: stan.thompson@dentons.com

ATTORNEY FOR INTERVENOR-
APPELLEE MIDAMERICAN ENERGY
(INTERVENOR)